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COMPANY—*Continued.*

the list of contributories; and (2), that entries made in the books of the Registrar-General are not notice to creditors of transfer. *Ex parte* JOHN BIBBY, and in *re* ENTERPRISE GOLD AND SILVER MINING COMPANY, LIMITED - - - PT. II. 94

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2. ——*British North Ameriba Act Sec. 92, sub-sec. 14—Power of the Provincial Legislature over jurisdiction and procedure in civil matters in the Supreme Court of British Columbia—Power of Legislature to delegate to the Lieut.-Governor-in-Council the right to make rules governing such procedure.* The Provincial Legislature had by an Act passed in 1881, declared that the sittings of the Supreme Court for reviewing *nisi prius* decisions, motions for new trials, &c., should be held only once in each year, and on such day as should be fixed by Rules of Court, and that the Lieut.-Governor-in-Council should have power to make such Rules of Court. *Held*, (*per* Begbie, C.J., Crease and Gray, J.J.) 1. That the Supreme Court of British Columbia is not a Provincial Court within the meaning of British North America Act Sec. 92, sub-sec. 14 and that the Provincial Legislature had not power to make laws regulating its procedure or any power to diminish or repeal its powers, authorities, or jurisdiction, nor to allot any jurisdiction to any particular Judge thereof nor to alter or add to any of the existing

CONSTITUTIONAL LAW—*Continued.*

terms and conditions of the tenure of office by the Judges, whether as to residence or otherwise. 2. That even if it had such power it had no right to delegate its exercise to the Lieut.-Governor-in-Council. 3. That the power resided in the Dominion Parliament. SEWELL V. BRITISH COLUMBIA TOWING CO. THE "THRASHER" CASE. [PT. I. 153

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7. ——*Legislation--Discriminating against a class—Ultra vires.*] It is not competent to a Provincial Legislature, or to a municipality, to deny certain nationalities or individuals the right to take out municipal trade licenses, *e.g.*, to a Chinaman the right to a pawnbroker's license. REGINA V. CORPORATION OF VICTORIA. (*Re* MOCK FEE *et al.*) - - - - PT. II 331

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CONTRACT — *Probate — Foreign will—Marriage contract construed according to the law of the foreign country in which it was made restricting right to devise real estate away from wife of testator—Land Registry Ordinance, 1870.*] Contracts of marriage made in a foreign country, the domicile of

CONTRACT—*Continued.*

the parties, by the terms of which, in accordance with the laws of that country, the alienation by a testator (one of the parties to the contract), of his real estate away from his wife and family is forbidden, will prevent a contrary devise of the same, even though, according to the *lex loci rei sitæ*, there be no such restriction. By the comity of nations the contract travels abroad, and, as between the parties to it and their representatives, attaches to the testator's real estate in places other than the domicile. Marriage carried out in consideration of such a contract, and in accordance with the laws of the domicile, will, in its incidents touching the real estate of one of the parties, as between those parties and their representatives, be respected and sustained, as to those incidents, in a country other than the domicile, when there is no direct legislation there to the contrary. In *re* KLAUKIE'S WILL - - - PT. I. 76

2. ——*Corporate Seal—Pleading—Ambiguity—Interpretation—Admission—Solicitor—Retainer.*] Plaintiffs by their statement of claim alleged that they were solicitors in partnership and that they were duly appointed to be the "legal advisers" of the defendant corporation and were afterwards continuously and exclusively employed as the solicitors of the corporation. This allegation was not put in issue by the defendant's pleadings. In conformity with a resolution of the Mayor and Council, the Municipal clerk, by a letter under the corporate seal addressed to the plaintiffs informed them that they had been appointed to be the "legal advisers" of the corporation. *Semble.* This might be insisted on as an appointment under seal. The designation "legal advisers" being ambiguous may be interpreted to mean "solicitors" or "attorneys" by reference to the circumstances of the parties at the time of the appointment, and the acts of the parties subsequently, and was so interpreted. An appointment to be solicitor of a corporation operates as a general retainer. DRAKE & JACKSON v. CORPORATION OF VICTORIA. [PT. II. 165

3. ——*Mutuality—Vested interest—Power of Municipality to pass By-Law infringing its own contract.*] A saloon keeper paying the stipulated fee to a municipality for a stipulated period of license to sell &c., has a contract which the municipality cannot infringe upon by subsequent by-law. *In re* CLAY AND THE CORPORATION OF THE CITY OF VICTORIA. - - PT. II. 300
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5. ——*Alien — Jurisdiction of Court and remedies to enforce where made between foreigners in, and to be performed in a foreign country.*] In the absence of an agreement *ad hoc* with his obligee, a party is liable at the latter's suit on a good cause of action to all the remedies, including arrest and imprisonment, allowed by law, and it is immaterial that the parties are aliens, or that the particular remedy sought is not allowed in the foreign jurisdiction. The Court has jurisdiction by reason of the residence of the parties within the jurisdiction, though the contract and breach arose outside the jurisdiction, and the parties are aliens. BAXTER v. JACOBS, MOSS, *et al.* PT. II. 373

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CRIMINAL LAW—*Evidence—Admission—Statement by prisoner.*] The provisions of Sec. 32 of 32 and 33 Vic. (Can.) Cap. 30 are directory, and a statement in writing not prefaced with the statutory words, made by a prisoner to the committing Magistrate, was admitted in evidence, upon evidence by the committing Magistrate that he had verbally cautioned the prisoner to the effect required by the Statute, before receiving the statement in question. REGINA v. KALABEEN *et al* - [PT. I. **1**

2. ——*Practice — Jury separating—Verdict.*] After the jury had been given in charge one of the jurymen was taken with a fit and removed, in charge of the Sheriff and his physician, to his residence. The remainder of the jury subsequently adjourned to the sick man's house. Where, upon his recovery, a verdict of guilty was rendered. *Held*, that after the verdict had been recorded, it could not be disturbed. QUEEN v. PETER - - - PT. I. **2**

3. ——*Summary conviction—Amendment of—Construction of Statute—Words of contradicted by words in schedule—Effect of.*] Consolidated Statutes 32 and 33 Vic., Cap. 32, gives a competent Magistrate summary jurisdiction to try the offences there defined, with the consent of the accused; such consent to be asked and given as therein set out. Con. Stat. 37 Vic., Cap. 32, Sec. 1, declares that certain acts, "the titles of which are set forth in the annexed schedule," among them 32 and 33 Vic., Cap. 32, supra, "shall apply to British Columbia." After the mention of the last mentioned Act in the schedule are the words: "In applying this Act to British Columbia, the expression 'competent Magistrate' shall be construed as any two Justices of the Peace, sitting together, as well as any functionary having the powers of two Justices of the Peace, and the jurisdiction shall be absolute without the consent of the parties charged." *Held*, (1.) That the 32 and 33 Vic., Cap 32 was introduced in its entirety, and that the last mentioned words in the schedule were inoperative as repugnant to it. (2.) Justices may amend conviction before return to

CRIMINAL LAW—*Continued.*

certiorari in matters of form but not in matters of substance. (3.) The Court may look at the depositions for the purpose of deciding whether there is any evidence whatever to found jurisdiction to convict. (4.) To sustain a conviction for cutting, the skin must be broken. HOUGHTON'S CASE [PT. I. **89**

4. ——*Common gaming house—40 Vic. (Can.) Cap. 33, Sec. 4—Unlawful game.*] *Held*, by Sir M. B. Begbie, C.J., on case stated under 20 and 21 Vic. (Imp.) Cap. 43. (1.) That it is not necessary to a conviction under 40 Vic., Cap. 33, Sec. 4, providing "any person playing in a common gaming house is guilty of an offence," to allege or prove that the game played is an unlawful game, and it appearing in the case stated that cards and instruments of gaming were found in the house when entered on a warrant there was *prima facie* evidence, under Section 3, of the Act, that the place was a common gaming house, and that the defendant, who was found there, was playing therein. (2.) That the allegation in the information that the defendant was playing at an unlawful game was surplissage and could be rejected. 20 and 21 Vic. (Imp.) C. 43 was not repealed by the Dominion Stat. 37 Vic., Cap. 42, and therefore is still in force in British Columbia. REGINA v. AH POW - - - - - PT. I. **147**

5. ——A summary conviction describing defendant as "Mrs. Morgan" *held* bad. REGINA v. MORGAN - - PT. I. **245**

6. ——It appearing that money taken by the police from a prisoner would not be required as evidence by the Crown, the Court ordered it to be restored. REGINA v. HARRIS - - - - PT. I. **255**

7. ——*Right of prisoner to make statement to jury after his counsel's address.*] Notwithstanding the prisoner calls no evidence, if he makes such a statement, the Crown has the right of reply. REGINA v. ROGERS [PT. II. **119**

8. ——*Evidence—Admissibility of deposition of witness taken on preliminary examination—Proof of absence from Canada.*] Upon a prosecution for wounding with intent to murder, the deposition of one C., taken before the Police Magistrate on the preliminary investigation, was read upon the following proof that C. was absent from Canada: "C. is, to the best of my belief, in the United States. He was employed about 10 days ago as one of the crew on a steamer

then running between Victoria and an American port. He said when he left me he was going on board the steamer. The steamer has not been on that route since. She is now running between two American ports." *Held*, that there was sufficient proof of absence from Canada. REGINA V. PESCARO AND JIM - - - PT. II. 144

9. ——*Power of Lieut.-Governor to issue commissions of Oyer and Terminer—32 and 33 Vic. Cap. 29, Sec. 11—Assize Court Act, 1885.*] British Columbia (in 1885) not being divided into Judicial Districts for criminal purposes, any place in the Province was a good venue for the trial of a criminal case. (2) The Lieut.-Governor-in Council has authority to issue commissions of Oyer and Terminer. (3) A Judge of the Supreme Court has power to try criminal cases, apart from the authority of a commission of Oyer and Terminer, under Sec. 14 Judicature Act 1879 and the Assize Court Act 1885. REGINA V. MALOTT.

[PT. II. 207

NOTE—But this was over-ruled in MALOTT V. REGINAM post. p. 212, but *see* SPROULE V. REGINAM. - - - PT. II. 219

10. ——*Venue—Sheriff's 1873 Amendment Act 1878—Criminal law procedure Act 1869 (Can.*] British Columbia was divided into judicial districts by the above Acts. *Held*, overruling Walkem, J., in Regina v. Malott (*ante* Pt. II, p. 207.) A criminal must be tried in the county or judicial district where the crime is alleged to have been committed, in this case Kootenay district and not Kamloops where the trial took place, and prisoner discharged upon writ of error and ordered to be tried again. MALOTT V. REGINAM. - - - PT. II. 212

11. ——*Procedure—Interlocutory order imperfectly drawn up — Exhibiting order as actually made on return to writ of error—Refusing poll of jury—Jurisdiction—Right of Supreme Court Judge to try criminal cases without commission--Jurors--Summoning from limited part of shrievalty under Jurors Act 1883.*] Upon writ of error after conviction for murder, *Held*, (1) that where an order has been made orally and afterwards imperfectly drawn up, *i.e.* without specifying the terms upon which it was made, and such terms appear in the judge's note made at the time of the application, it is proper in making up the record on a writ of error prayed, that a true and perfect order should be drawn up and placed on the record. (2) that the refusal of the judge at the trial to allow the prisoner's counsel to poll the jury after verdict, was not a matter that could be dealt with on a writ of error, and therefore should not appear in the record. (3) That assuming the Lieut.-Governor's commission to be void, the Court was properly constituted without commission, under Sec. 14, Judicature Act 1879, and the Assize Court Act 1885. (4) Following McLean's case, that the commission of Oyer and Terminer and General Gaol Delivery was sufficient, and that the Lieutenant-Governor had power to issue it under Sec. 128, B.N. A. Act, 1867. (5) That the commission was not exhausted by reason of the justices therein named having held under it Courts of Oyer and Terminer in other districts of the Province. (6) That there was no objection to the summoning of jurors from a limited portion of the shrievalty, under the Juror's Act, 1883, as that Act in effect created new districts for the purposes of the administration of justice in criminal cases. (7) That the prescribing of the qualifications of jurors and the manner of preparing jury lists, by the Juror's Act, 1883, were not matters of "criminal procedure," within the meaning of Section 91, sub-sec. 27, of B. N.A. Act, 1867, but were matters belonging to the "organization of provincial courts," within the meaning of Sec. 92, sub-sec. 14, and therefore *intra vires* of the Provincial Legislature. (8) That the venue was sufficiently stated in the record, and that the marginal venue, "British Columbia to wit," was at the lowest but an imperfect venue, and therefore cured by Sec. 23, Criminal Procedure Act, 1869. *Held*, *per* Crease, J., that the statement of the imposition of conditions in an order under Sec. 11, 32-33 Vic. cap. 29 is not jurisdictional. *Held*, *per* Begbie, C.J., that any application for an order for a change of venue under Sec. 11 should be made as early as possible after the commitment. *Held*, by Gray, J., after argument before himself and brother justices, sitting as assessors on a case stated, that on a trial on a charge of felony, the prisoner is not entitled, in this Province, as of right to have the jury polled: and that where, in such a trial after a verdict given, the prisoner's counsel moved to have the jury polled, but as the Court perceived nothing to create a doubt respecting the agreement and concurrence of the whole jury, the motion was refused. *Held*, that such refusal was proper. SPROULE V. REGINAM. - - - PT. II. 219

12. ——A Grand Jury have a right to look at the depositions taken upon preliminary examination, though same might not be admissable in evidence on the trial for

CRIMINAL LAW—*Continued.*

want of proof of absence of the deposing witness from Canada. REGINA v. HOWES. [PT. II. 307

CROWN—*Laches as against.*] PECK *et al.* v. REGINAM. - - - PT. II. 11

CROWN GRANT—*Construction of.*] The Crown granted to W.C.W. *inter alia* Sections 49, 50, 63 and 64 Lake District B.C. said to contain 329 acres. Within the limits of Sec. 49 was a body of water, covering the land, known as Beaver lake. The sections of land in question, excluding the area covered by the lake, contained 329 acres. By a proviso in the grant, Her Majesty reserved such water priviliges and rights of carrying water over, through or under the lands, as might be required for mining purposes in the vicinity of the lands paying reasonable compensation therefor to the said W.C.W. *Held, per* Crease, J., that although the maxim *verba fortius accipiuntur contra proferentem*, does not apply to the Crown, yet the intention of all grants must be construed from the language used with reference to surrounding circumstances, and, as it was in evidence that it was the custom of the Crown to calculate acreage for the purpose of fixing the price exclusive of portions covered by water, and in view of the reservation of privileges in regard to the water in question, that the grant included Beaver Lake, and that an award upon expropriation for water works purposes allowing compensation to W.C.W. for the land covered by water, was correct. *Semble*, the number of acres mentioned in the early Vancouver Island Crown grants is not the measure of the extent granted but merely the measure of price. *Held*, (without deciding that the Imperial Statute 9 and 10 Wm. III., C. 15 was in force in British Columbia), that the time limited by Sec. 2 of that Act was the time within which application to this Court to set aside awards should be made. Remarks as to setting aside awards on the ground of misconduct of the arbitrators. In *re* W.C. WARD AND THE VICTORIA WATER WORKS PT. I. 114

DEBTS—Calls on Mining Stock overdue at time of testators death are debts, *secus* where accruing but not due. MANSON v. ROSS [PT. II. 49

DISTRESS FOR TAXES—*Municipal Taxes—Assessment—Concealment of Objection—Rights of action for trespass.*] Plaintiff being placed on the assessment roll and taxed in respect of certain lands, the separate property of his wife, did not raise that objection until after seizure and

DISTRESS OR TAXES—*Continued.*

sale of his chattels to levy the amount. *Held*, in an action of trespass, not to amount to leave and license, but the auction value of the goods only allowed as damages. In the discretion of the Court no costs allowed. VEDDER v. CHADSEY. - - - - - - - - [PT. II. 76

DIVISIONAL COURT—*Jurisdiction of—Practice—Order for service outside jurisdiction—Final or interlocutory.*] An order setting aside an order giving leave to issue a writ of summons for service out of the jurisdiction is a final and not an interlocutory order and no appeal from it lies to the Divisonal Court. FULLER v. YERXA. [PT. II. 330

DIVORCE—*Jurisdiction of Supreme Court of British Columbia to grant—Introduction of English Law.*] *Held, per* Crease and Gray J.J., Begbie C.J. *dissentiente*), that the Supreme Court of British Columbia has all the jurisdiction conferred on the "Court for Divorce and Matrimonal Causes" under the Matromonial Causes Act, 1857 (20 and 21 Vic. Cap. 85.) as amended by 21 and 22 Vic. Cap. 108 and has therefore jurisdiction to entertain and grant applications for divorce, *a vinculo matrimonii Per* Gray, J., that the Legislative adoption by British Columbia in March, 1867, of the English law as it existed in England on the 19th November, 1858, did not necessitate the adoption of the machinery by which the English law was carried out in England, but, coupled with the language constituting the Supreme Court in British Columbia, was a direct Legislative sanction and authority to carry out that law in the Province by local tribunals and local machinery, and clothed the Supreme Court of the Province with ample power to hear and determine divorce and matrimonial causes. M., falsely called S—— v. S—— [PT. I. 25

DOMICILE - - - - - -
See PRACTICE (2).

ECCLESIASTICAL LAW — *Colonial Bishop—Coercive jurisdiction—Church of England in British Columbia—Church Discipline Act, 3 and 4 Vic., Cap. 86.*] *Held*, by Begbie, C.J., on an application for an injunction, that, though the Letters Patent from which the Bishop of Columbia derives his authority, do not confer upon him any effective coercive jurisdiction over his clergy, he could still enforce obedience by having recourse to the civil Courts. Subsequently, at the hearing, Gray, J., made

ECCLESIASTICAL LAW—*Continued.*

the injunction perpetual. This Court will on proper application apply its coercive jurisdiction to enforce the sentence of an Ecclesiastical Tribunal of Assessors appointed in accordance with the provisions of the Church Discipline Act, 3 and 4 Vic., Cap. 86, so far as its provisions are applicable to this country when the finding of such Tribunal is not unreasonable, and the proceedings before it are conducted in a way consonant with the principles of justice as understood in a Court of Equity. Constitution and authority of the Bishop of Columbia and general status of the Church of England in British Columbia. BISHOP OF COLUMBIA v. CRIDGE - - PT. I. 5

ESTOPPEL—*Held, per* Begbie, C.J.: In a dispute between adjoining proprietors as to boundaries. An owner who adopts a corrected survey made by the Crown by fyling, in 1880, a plan indicating the boundary in dispute as therein laid down, is estopped as against his adjoining proprietor from setting up any other boundary. JOHNSTON v. CLARKE - - - PT. II. 56

On appeal to the Full Court, *held, per* Begbie, C.J., Crease, McCreight, and Walkem, J.J., that the fyling of the plan in 1880 did not estop the defendants as above, *ibid.* - - - - - PT. II. 81

See LACHES.

EVIDENCE—*Parol—Supplementing written contract.*] A bill of lading, or receipt of goods, by a common carrier, expressed that the goods were bound from Victoria to New Westminster. *Held*, parol evidence that the contract was to carry not only to New Westminster, but further to Yale, was admissible, as not contradicting but supplementing the written document. HAMILTON v. HUDSON'S BAY CO. *et al* - PT. II. 1

2. ——*Criminal Law—Admissibility of deposition of witness taken on preliminary examination—Proof of absence from Canada.* REGINA v. PESCARO AND JIM - PT. II. 144

See CRIMINAL LAW (1).

EXECUTION—*Appointment of Receiver is not an execution—Creditor's Relief Act, 1883—Preferential claims of workmen.*] M. had obtained a judgment in the action against L. The defendant, being examined as a judgment debtor swore that he had no goods nor lands upon which execution could be levied on a *fi. fa.*; but that there were some contingent payments which he expected to receive shortly. Thereupon M. procured an order appointing himself Receiver, without previously taking out a writ of *fi. fa.* Afterwards certain unpaid workmen of L. claimed under the above Act, that M. should be ordered to satisfy their claims, preferentially, out of any moneys coming to him as Receiver. *Held*, that as there was no writ of *fi. fa.*, the statute did not authorize the application. *Semble*, it is not sufficient in such a case, that the workmen should claim to be in arrear of wages: the claim should be established against both the judgment debtor and the execution creditor, or at least against the judgment debtor. *Semble*, a Receiver is not within the Act, an Act which takes away the legal right of a diligent litigant, to bestow it *gratis* on a stranger, is to be construed strictly according to its letter. MUIRHEAD v. LAWSON. [PT. II. 113

See EXEMPTION. RECEIVER.

EXEMPTION—*Constitutional Law — Distribution of legislative power—British North America Act, 1867—Public officer—Notice of Action.*] Provincial statutes providing for exemptions from execution are not *ultra vires* as dealing with insolvency. An action is not maintainable against a sheriff who has seized privileged or protected goods, in obedience to the command of a writ, but the person injured must apply to the Court for an order to restore the goods. A County Court bailiff is entitled to notice of action for anything done under process of the Court under 9 and 10 Vic. cap. 95, Sec. 138 (Imp.) introduced into this Province by the County Court Ordinance, 1867. A right of exemption from execution is a privilege exercisable at the option of the debtor and to take effect must be claimed. JOHNSON v. HARRIS. - - - - PT. I. 96

2. ——*From execution.*] Sheriff's costs of seizure and possession money are payable by the execution debtor claiming the exemption which is a privilege arising only when claimed. SEHL v. HUMPHREYS. [PT. II. 257

FIERI FACIAS - - -

See EXECUTION.

GRAND JURY—Right to look at depositions. REGINA v. HOWES. [PT. II. 307

See CRIMINAL LAW (12).

GRANT—By way of license to use water for mining purposes need not be under seal - - -

See MINERAL LAW (3). CROWN GRANT. PUBLIC RIGHT.

HACK BY-LAW - - -
See MUNICIPAL BY-LAW.

HARBOURS—Franchise and ownership of the soil in public harbours are both vested in the Dominion of Canada by Sec. 108 B.N.A. Act, and False Creek, B.C., is such a harbour. ATTORNEY-GENERAL OF CANADA v. KEEFER - - PT. II. 368

IMPERIAL ORDERS - IN - COUNCIL
See ORDERS-IN-COUNCIL.

INDEPENDENCE OF PARLIAMENT—*Member of Provincial Legislature employed as counsel for Dominion Government—Counsel fees, whether "allowance, emolument or profit"—Injunction—Interlocutory—Discretion to refuse.*] *Held, per* Begbie, C.J., and Crease, J. (Gray, J., dissenting), on motion for an injunction until the hearing: (1) The employment by the Dominion Government of a member of the British Columbia Legislative Assembly, a barrister, as counsel upon an arbitration involving 35 days' attendance in Victoria, Toronto and Ottawa, though he refused to receive counsel fees therefor, disqualified the member under Stat. B.C., 1875, Sec. 1, providing: "No person accepting or holding any office or employment, permanent or temporary, to which an annual salary, or any fee, allowance or emolument or profit of any kind or amount whatever from the Dominion of Canada is attached, shall be eligible to sit or vote in the Legislative Assembly." (2) That the discretion of the Court should be exercised in refusing an injunction on the grounds of public policy as the defendant was Attorney-General, and the granting of it before the hearing would prejudice the public interest. *Per* Gray, J.: That the employment of the defendant in question was not one to which any fee, allowance, emolument or reward attached, as the counsel fees were mere *honoraria* and did not create a contract to pay.

Per curiam: Any registered voter has *status* to bring action to enforce the Act. BARNARD v. WALKEM - - PT. I. 121

INFORMATION - - -
See PUBLIC RIGHT.

INJUNCTION—Order of Court causing delay good defence to action on bond conditioned to complete work by specified time. ATTORNEY-GENERAL OF BRITISH COLUMBIA v. C.P. R. Co. - - PT. II. 350

2. ——Where there has been no order for the payment of money, the Courts will not restrain the removal of property out of the jurisdiction by the owner. BAXTER v. JACOBS, MOSS *et al.* - - PT. II. 370
See MINERAL LAWS (2).

INSOLVENCY—*What constitutes—Fraudulent preference—Pressure—Provincial fraudulent preference Act—Constitutionality of.*] A chattel mortgage to two of his principal creditors, made by a trader when unable to pay his debts in full and knowing himself to be on the eve of insolvency, covering all his property except a leasehold interest and his book debts, *held* void, as being made with intent to defeat or delay his other creditors, and to give the mortgagees a preference over them. The mortgagees had requested the trader to secure them by chattel mortgage, he stating to them at the time that he was solvent, that his other creditors were small, and that he could arrange to pay them off and concentrate the business. *Held*, insufficient to bring into question the doctrine of pressure. Stat. B.C., 43 Vic., Cap. 10, considered constitutional. The words of the statute "unable to pay his debts in full" are satisfied by proof of a promissory note of the grantors having been protested. ANDERSON v. SHOREY - - PT. II. 325

INTEREST—The surchage of 18 per cent. and 25 per cent. interest on unpaid taxes, is *ultra vires* of the Local Legislature. MURNE v. MORRISON. [PT. II. 120

IRREGULARITY—Setting out on face of order setting aside proceedings for irregularity—Necessity for in order to found appeal from order.
See PRACTICE (4).

JUDGE—Jurisdiction of Supreme Court—Residence of—Whether subject to control by Provincial Legislature.
See CONSTITUTIONAL LAW (2).

2. ——*Of Supreme Court—Jurisdiction as such under Section 14 Judicature Act, 1879 and the Assize Court Act, 1885, to try criminal cases without a commission of Oyer and Terminer.*
See CRIMINAL LAW (11).

3. ——A judge has no jurisdiction to enter judgment for either party after the disagreement of a jury in an action ordered to be tried by a jury, but it must be re-tried before a jury. FAN v. FAN. PT. II. 172
See JURISDICTION (1) (2) (3). JURY (1).

JUDICATURE ACT—Effect of as extending right to relief by injunction

JUDICATURE ACT—*Continued.*

and receiver - - -
See RECEIVER.

JUDICIAL DISTRICTS— -
See CRIMINAL LAW (9).

JURISDICTION—Of Supreme Court—Whether subject to control by Provincial Legislature.
See CONSTITUTIONAL LAW (2). JUDGE (1).

2. ——*Of Supreme Court of B.C. to grant divorce.*
See DIVORCE.

3. ——*Venue in criminal cases—Right of Supreme Court judge to try without commission.*
See CRIMINAL LAW (9 and 10). JUDGE (2).

4. ——*Of Justices of the Peace—Jurisdiction of committing magistrate must be shewn on commitment.*
See SUMMARY CONVICTION. CRIMINAL LAW (3).

5. ——*Of Supreme Court to enforce foreign contract against non-resident alien.*
See ALIEN, AND CONTRACT (5).

JURY—*Whether order for trial by jury exhausted upon disagreement of jury at first trial—Practice—Rules of Court 1880 O. 36 r.r. 3, 26.*] An order for the trial of an issue by a jury, is not exhausted by the disagreement and discharge of the jury upon a first trial, and there is no jurisdiction in a judge to enter up judgment for either party upon the evidence, but the action can only be determined by a trial by jury as directed, unless by consent. FAN V. FAN. PT. II. **172**

2. ——It is not a good objection upon a writ of error that prisoner's counsel was refused leave to poll the jury upon their verdict.
See CRIMINAL LAW (11).

3. ——A jury drawn from a limited part of the shrievalty is a good panel, when such part is made a separate judicial district for the purpose of criminal trials.
See CRIMINAL LAW (11).

4. ——*Separating of.*
See CRIMINAL LAW (2).

LACHES—*Estoppel—Tax sale—Pre-emption—Cancellation of—Pre-emptor's right—"Land Amendment Act, 1878, Sec. 2."*] In 1876, M. pre-empted land in Westminster district, and paid one instalment of the purchase

LACHES—*Continued.*

money. The other instalment was payable on the 18th November, 1878. M. paid also the taxes for 1876, 1877 and 1878; but no further tax or instalment. The taxes for 1879 became delinquent on the 1st March, 1879. M. left the province early in 1880, his address being wholly unknown. In December, 1879, the land was sold to W. by tax sale. Subsequently W. paid all arrears of taxes and the balance of the purchase money, and in 1881 a Crown grant issued to him, and he entered, and improved and mortgaged the land ; the Crown grant and mortgages were duly registered. In 1883, M. returned to the province, and claimed the land. *Held*, that M., by his *Laches*, had disentitled himself from sustaining such claim. The Crown had not declared M's first instalment forfeited, but had allowed W. the benefit of it. *Held*, that M. might, under the prayer for general relief, recover the amount of such instalment, as money paid for the use of W. *Semble*, the grant from the Crown in 1881 operated as a cancellation of M's pre-emption claim without reference to the matters specified in Sec. 2 of the "Land Amendment Act, 1878." MORIARTY V. WADHAMS. - - PT. II. **145**
See COMPANY (1).

LAND AGENT—A land agent, not being a barrister or solicitor, has no right to conduct proceedings in the Supreme Court, for another. *In re* THE LAND REGISTRY ACT, 1870, AND E. M. JOHNSON *et al.* - PT. II. **334**

LAND AMENDMENT ACT, 1878 -
See TAX SALES.

LAND REGISTRY ACT—*B. C. Land Registry Ordinance, 1870, Sec. 47—Construction of*] Sec. 47, *supra*, provides, "The owner in fee of any land, the title of which shall have been registered for the space of seven years, may apply to the Registrar for a certificate of indefeasible title." *Held, per* Begbie, C.J., that the applicant himself must have been the registered owner for seven years, in order to obtain a certificate of indefeasible title. In *re* TRIMBLE [PT. II. **321**
But *see* in *re* SHOTBOLT PT. II. **337**
In *re* VANCOUVER IMP. CO. VOL. III.

2. ——*Transfer of indefeasible title—Transferee in of same estate as that held by his transferor under Sec. 45—Land Registry Act.*] The transferee of the holder of a certificate of indefeasible title is entitled to be registered as the owner of an indefeasible title under Sec. 45 of Stat., *supra*. In *re* SHOTBOLT - - - - PT. II. **337**

LAND REGISTRY ORDINANCE, 1870—*Costs.*] Where a doubt exists on the construction of a will, the Registrar of titles under above ordinance properly refused to register and issue certificate of title, until removal of the doubt by adjudication. In such a case, the Registrar is entitled to his costs. In *re* HENRY JEROME, (deceased) [PT. I. 87

LEAVE AND LICENSE - -
See DISTRESS FOR TAXES.

LEGAL PROFESSIONS ACT, 1884—A person, other than a barrister or a solicitor, has no right to conduct proceedings in the Supreme Court, on behalf of another. In *re* LAND REGISTRY ACT, 1870, AND E. M. JOHNSON *et al* - - PT. II. 334

LIBEL—*Pleading—Striking out defence as embarrassing—Offering to publish apology.*] In an action for libel an allegation that the defendants were willing to publish an apology in such terms as the plaintiff could reasonably require, was struck out. Allegations which are merely matters of opinion or hearsay, and derogatory to the plaintiff will be struck out. HOSTE v. VICTORIA TIMES PUBLISHING CO. - PT. II. 365

2. ——The epithet "blackleg" is libellous. HUGO v. TODD - PT. II. 369

LIEN—*Mechanic's—Mechanic's Lien Act, 1879.*] Lien attaches by virtue of doing the work or furnishing materials, and takes priority of subsequent orders on money due by owner to the contractor, though same are prior to commencement of action to enforce the lien. The registration of a statement of claim is not a condition precedent to the attaching of the lien and a defective statement of claim does not defeat it. JOHNSTON v. BRADEN *et al.* PT. II. 265

LIEUTENANT-GOVERNOR—Power to issue commission of Oyer and Terminer - - -
See OYER AND TERMINER.

LIQUOR LICENSE— - -
See CONTRACT (3).

MANDAMUS—Does not lie to compel a Minister of the Crown (the Commissioner of Lands and Works) to issue a Crown grant: the remedy is by petition of right. CLARKE *et al.* v. THE CHIEF COMMISSIONER OF LANDS AND WORKS [PT. II. 328

2. ——Mandamus does not lie to force a teacher, against his *bona fide* judgment on reasonable grounds, to keep a pupil at his school, but the Court will, if necessary, force him to hold a proper enquiry. PHELPS v. WILLIAMS - - PT. I. 257

MARRIAGE — A clergyman in British Columbia is not bound to perform the ceremony of marriage, but, if he does, the rights and usages of his church or denomination, and the accustomed form must be followed. *Held*, also, marriage between non-Christians ought to be left to their own officiants or to the Registrar. A marriage purporting to have been solemnized by a Wesleyan minister between two Chinese was void for want of understanding on the woman's part of the nature of the ceremony and of any intention to contract. In *re* AH HIE PT. I. 261
See CONTRACT (1).

MINERAL LAWS—*Leave of absence—Work on claim—Sufficiency of.*] The Supreme Court cannot on appeal from a Gold Commissioner enquire whether he had sufficient grounds for granting a miner's leave of absence. During the period covered by a leave of absence to the locatee of a mineral claim part of it was assumed to be located by the agent of another miner. *Held*, a trespass conferring no right against the original locatee. The Gold Act Sec. 49, provides: (1) "A claim shall be deemed abandoned, &c., when unworked by the registered holder thereof for 72 hours" and by Sec. 46 "a claim must be faithfully and not colourably worked." *Held*, the construction by a miner of a cabin fit for residence while working on his claim, though not on the claim itself, satisfies Sec. 46, *supra*. (2) If a free miner quit his claim for more than 72 hours and return and resume possession, the claim not having been in the meantime taken up by any other person, he is in of his old estate. (3) The wrongful occupation of a claim by a trespasser excuses the true owner from the obligation to represent his claim by actual work thereon, provided he is not guilty of *laches* in seeking to establish his right. WOODBURY v. HUDNUT - PT. II. 39

2. ——*Gold Mining Ordinance, 1867—Right to use natural flow of water for mining—Intercepting natural flow so as to injure miner lower down stream—Injunction—Grant of water privilege—Not necessarily under seal.*] Sec. 36 of the Gold Mining Ordinance B.C. 1867 entitles a miner to use "so much of the water naturally flowing through or past

MINERAL LAWS—*Continued.*

his claim as may be necessary to work it." *Held*, (1) That this did not give the right to divert the natural flow so as to interfere with miners lower down the stream. (2) That the right to divert water could only be obtained by license under part X. of the Ordinance. (3) A grant of water for mining purposes, being a license, need not be under seal. JENNY LIND CO. v. BRADLEY NICHOLSON CO. - PT. II. 185

MINERAL ORDINANCE, 1869—*Construction of prospecting license—Cancellation of license.*] The Mineral Ordinance, 1869, provides that holders of a prospecting license for coal may select for purchase a portion of the lands included in their license. Upon compliance with the terms and conditions of the Act, the licensees are entitled to claim a Crown grant of the selected lands. The petitioners held a prospecting license for coal over 2,500 acres of land, and applied for a Crown grant. In support of their claim, they relied on a certificate of the Assistant Commissioner of Lands and Works that they had posted notices of their application, and that no objection to the issue of a grant had been substantiated. *Held*, (1) That the certificate was not in accordance with the Act. *Held*, (2) That the certificate of an Assistant Commissioner was not conclusive evidence of compliance with the statutory conditions, and the presumption arising from the certificate could be rebutted by evidence to the contrary. It was contended that the Lands and Works Department having received the certificate without objection, and not having cancelled the license under the provisions of the Mineral Ordinance Amendment Act, 1873, had waived the performance of the terms and conditions of the Act. *Held*, that the department could not waive the performance of conditions imposed by the Legislature. The petitioners' application for a Crown grant was made in 1874, but they did not prospect or work the land, or take further steps in support of their claim till 1882, and in the meantime the lands had increased in value. *Held*, that, in a proceeding to enforce specific performance by the Crown, unreasonable delay on the part of the petitioners is fatal to the application. *Quære*, whether, to entitle prospecting licensees to a Crown grant of coal lands under the Mineral Act, it is not essential that they should have found coal on the land selected by them for purchase? PECK *et al.* v. REGINAM. - - - - PT. II. 11

MISTAKE - - - - - -
See VENDOR AND PURCHASER.

MUNICIPAL BY-LAW—A City By-Law regulating hack stands discriminated in favour of persons owning stables, enabling them to stand their vehicles in more favourable positions than others, was held invalid, as being unequal and unjust and discriminating in favour of a class. REGINA v. RUSSELL. [PT. I. 256

MUNICIPAL LAW—*Qualification for municipal councillor—Construction of statute.*] By the Municipality Act, 1881, it was provided as an essential qualification for the position of Municipal Councillor that the candidates should have paid all taxes due to the Municipality. By the same Act, such taxes were provided to be paid to the "Collector" of the Municipality. C. having paid all his taxes to the Municipal *Treasurer* in due time and being in all other respects qualified. W., the returning officer, refused him nomination and a poll for non-payment of taxes to the Collector. B., the only other candidate, was declared elected by acclamation. *Held*, that the taxes were duly paid, and that C. was duly qualified. New election ordered. CAWLEY v. BRANCHFLOWER AND WEBB. - - PT. II. 35

MUNICIPAL TAXES - - -
See DISTRESS FOR TAXES.

NAVIGABLE WATERS—*Right of access to by owner of land fronting upon—Public right of user—Injunction.*] Every subject of the realm has a right to the user for legitimate purposes of public navigable waters and harbours within the realm where the tide ebbs and flows. (2) He cannot be deprived of that right except by legislative authority duly exercised. (3) If his land fronts on tidal waters, and access thereto is obtainable by the user of such waters, no mere license or permission from the Crown to another, to obstruct that user, can be sustained, and any plea to that effect is bad. (4) The right to continue such an obstruction cannot be acquired by the Statute of Limitations, because there can be no presumption of a grant. (5) Remedy for personal loss sustained by obstruction to such right, may be materially affected by a party's presumed acquiescence or silence with knowledge. (6) Such an obstruction inflicting private injury cannot be justified by the allegation that the private injury is merged in the greater public wrong. (7) In such cases, the Crown acts for the public, the individual for himself. (8) The description "having a frontage of 40 feet, more or less, on Store street," and running back to the harbour is sufficient to in-

NAVIGABLE WATERS—*Continued.*

clude all land within the parallel side lines, extending from Store Street to the harbour or bay, according to the curvature of the shore line, up to which the tide flows. (9) *Semble*, the Crown could not in British Columbia, at the time the titles herein were originated (viz. in 1858) or at any time since, by subsequent license, legalized any addition to, or the continuance of any obstruction which it had not the power to authorize in the first instance, and any leave or license to that effect would be inoperative. If the obstruction be one of a public nature, of which the whole community may complain, the steps for removal must take place at the instance of the Crown, as guardian of the public interests, and by its officers; but a man who is specially injured thereby in his person or property, retains, and has the fullest right to apply to the Courts of the country for redress for that personal injury, and it is useless for the wrongdoer to attempt to justify the private and personal wrong and injury resulting from his act by the allegation that the act was a wrong to the whole public. Gray, J. McEwen v. Anderson - - Pt. II. **308**

2. ——*Injunction—Obstruction to waters of public harbours—B. N. A. Act.*] The franchise of public harbours and the ownership of the soil within the limits of public harbours in Canada are both vested in the Dominion Government by section 108 of the B.N.A. Act, and False Creek, British Columbia, is such a harbour. Crease, J. Attorney-General of Canada v. Keefer - - - Pt. II. **368**

NEGLIGENCE—*Common Carrier—Liability—Contract to carry beyond own line—Contract "safely to carry, the dangers of fire and navigation excepted"—Whether a fire caused by negligence of the carrier within the exception.*] The plaintiff delivered to the Hudson's Bay Company, as common carriers, certain goods to be carried from Victoria to Yale for reward. The defendants I. and B. ran a steamship to Yale, and to them the Hudson's Bay Company delivered the goods to be carried to that point from New Westminster. Between New Westminster and Yale, on the steamship of I. and B., the goods were destroyed by fire, owing, as found in the evidence, to their negligence. The plaintiff's action was against both defendants jointly, severally and in the alternative. *Held*, (1) That the Hudson's Bay Company were liable to the plaintiff for breach of their contract to safely carry the goods and deliver them at Yale. (2) That the defendants I. and B. were liable in tort for negligence in burning the goods. The receipt of a bill of lading given to the plaintiff by the Hudson's Bay Company for his goods when delivered at Victoria stated that they were bound to New Westminster. *Held*, That parol evidence that the contract was to carry further to Yale was admissible. The contract to carry was represented by the following receipt: "Victoria, &c. Shipped in good order by the H.B. Co. on board the Enterprise * * bound for New Westminster the following packages * * (the dangers of fire and navigation excepted)" *Held, per* Walkem, J., affirmed by the Full Court (Begbie, C.J., McCreight and Walkem, J.J.), that the exception from liability by reason of the dangers of fire and navigation expressed in the receipt (coinciding with the exception contained in 37 Vic., Can., Cap. 25, Sec. 1) did not exempt the defendants from liability from loss by fire through negligence, and that such exceptions must be read as if followed by the words, "if not occasioned by the negligence of the defendants." Hamilton v. Hudson's Bay Co. *et al.* - [Pt. II. **1-176**

NEGOTIABLE INSTRUMENT — *Bill of Exchange—Money order showing account out of which payment to be made—Assignment.*] A money order containing expressions showing the account upon which the payment is to be made, is an equitable assignment and not a bill of exchange. Johnston *et al.* v. Braden - Pt. II. **265**

NEWSPAPER—*Libel—Apology—Offer to make not a good plea—Apology must be unconditional.*] A statement of defence alleged that the defendants were willing to publish such an apology as the plaintiffs could reasonably require. *Held, per* Sir M. B. Begbie, C.J., The defendant should admit that the charge was unfounded, that it was made without proper information, and that he regrets that it was published in his newspaper. He should not offer to make, but actually make and publish at once such an apology expressing sorrow and withdrawing the imputation Hoste v. Times Pub. Co. - - - Pt. II. **365**

2. ——*Libel.*] The epithet "blackleg" is libellous. Hugo v. Todd - - [Pt. II. **369**

NEW TRIAL—*Verdict against evidence.*] Where a jury answered one of seven questions put to them at the trial against undisputed evidence a new trial was ordered. *Per* Begbie, C.J.: In dealing

NEW TRIAL—*Continued.*

with the verdict of a jury, the Court is bound to see whether the scales of justice are held in an apparently even manner. Where several questions were left to the jury, one of which, though not absolutely decisive in the matter, was answered contrary to uncontradicted evidence, a new trial was granted. ROBSON v. SUTER PT. II. 375

NON-SUIT — *Effect of.*] Judgment of non-suit is now equivalent to a judgment for defendant on the merits, and the Court has under the Judicature Act discretion as to costs. PHELPS v. WILLIAMS - - - PT. I. 257

NOTICE OF ACTION—*Public officer.*] A County Court bailiff is entitled to notice of action for anything done under process of the Court under 9 and 10 Vic. Cap. 95, Sec. 138 (Imp.) introduced into this Province by the County Court Ordinance, 1867. JOHNSON v. HARRIS - - PT. I. 93
See EXEMPTION.

NOTICE OF WRIT—*Practice—Service outside jurisdiction—Order XI.—Conditional appearance.*] Plaintiff obtained leave to serve notice of writ on a foreigner out of the jurisdiction. *Held*, That the defendant was not bound to appear or enter a conditional appearance before he applied to set aside the order. (2) That the application to set aside the order was properly brought before a Judge in Chambers instead of before the Full Court. The defendant's affidavits having shewn that the case did not come within Order XI, the order was discharged. *Fowler* v. *Barstow*, L.R. 20 Ch. D. 240, observed upon. GARESCHE, GREEN & CO. v. HOLLADAY - - - - - - PT. II. 83

2. ——*Order for service of on a person out of jurisdiction—Order XI.—Practice.*] The allowance of service of a writ of summons upon a foreigner out of the jurisdiction of the Court is discretionary. Upon motion to the Judge who made such an order to rescind same, it appeared that the plaintiffs' cause of action was upon a promissory note made at Portland, U.S.A., by the defendant, who resided there; no place of payment was mentioned in the note. *Held*, rescinding the order, that *prima facie* the note was payable in Portland, and that the contract and breach arose in the foreign jurisdiction, and that the case was not within Order XI. (2) That the proper practice was to apply to the Judge who made the order to rescind it. and not to appeal from it. GARESCHE, GREEN & CO. v. HOLLADAY - - - PT. II. 83

NULLITY OF MARRIAGE—*Divorce—Jurisdiction of Supreme Court of British Columbia to entertain action for—Introduction of English law.*] *Held*, by Crease and Gray, J.J. (Begbie, C.J. dissenting): (1) That the Supreme Court of British Columbia has in British Columbia all the jurisdiction conferred on the "Court for Divorce and Matrimonial Causes" under the Matrimonial Causes Act, 1857, 20 & 21 Vic. Cap. 85, as amended by 21 & 22 Vic., Cap. 108. *Per* Gray, J., That the Legislative adoption by British Columbia in March, 1867, of the English law as it existed in England on the 19th November, 1858, did not necessitate the adoption of the machinery by which the English law was carried out in England, but, coupled with the language constituting the Supreme Court in British Columbia, was a direct Legislative sanction and authority to carry out that law in the Province by local tribunals and local machinery, and clothed the Supreme Court of the Province with ample authority and power to hear and determine divorce and matrimonial causes. M——falsely called S—— v. S—— - - PT. I. 25

NUISANCE - - - - - -
See NAVIGABLE WATER.

ODDFELLOWS — *Insurance—Contract—Indemnity.*] By the terms of a contract made by an association with its members, it was agreed, in consideration of certain subscriptions to be paid by them, that the association would indemnify any member against and pay him such losses up to a stipulated amount, as he might incur from disability by reason of sickness. In an action to recover upon the contract, it appeared that the plaintiff had been disabled by sickness for a considerable period, but it also appeared that he was a person of no occupation who lived upon his private means. *Held*, That the contract was one of indemnity, and that the plaintiff could recover nothing for disability from work. BONE v. COLUMBIA LODGE OF ODDFELLOWS [PT. II. 349

OFFICER—Notice of action to - -
See NOTICE OF ACTION.

OFFICER OF THE CROWN—*Chief Commissioner of Lands and Works—Mandamus to issue Crown grant—Petition of right.*] A mandamus is simply an order from the Crown to a subordinate officer to do something the law states to be his duty, and does not lie to compel the Chief Commissioner of Lands and Works to issue a Crown grant. The remedy is by petition of right. CLARKE *et al.* v. CHIEF COMMISSIONER OF LANDS AND WORKS - - - PT. II. 328

ORDER—*Abandonment of.* - -
See COMPANY.

2. ——Order improperly drawn up may be returned to a writ of error as it should have been drawn up.
See CRIMINAL LAW (11).

3. ——*Final—Interlocutory.* PT. II. 330
See FULLER v. YERXA.

ORDER-IN-COUNCIL — *Introduction of English law into colony.*] Orders-in-Council passed in England under powers in an Imperial statute, are not in force *propria vigore* in a colony, although the statute itself may be in force there. *Semble*, that the colony of Vancouver Island was established as a British colony prior to 1855. REYNOLDS v. VAUGHAN - - PT. I. 3

2. ——*Whether copy of report of Committee of Council is equivalent to.*] *See* MURNE v. MORRISON - - PT. II. at page 140

OYER AND TERMINER—Commission of—The Lieut.-Governor has power to issue under Sec. 129 B.N.A. Act.
See CRIMINAL LAW (9 and 11).

PETITION OF RIGHT—*Remuneration for services—Honorary appointment—Right to recover against Crown.*] Suppliant, a member of the Dominion Parliament, was appointed, by order of the Lieut.-Governor-in-Council of British Columbia, as special agent for the province at Ottawa. Another order of the same date provided for payment of expenses necessarily incurred. Afterwards the suppliant went, at the request of the Provincial Government, as delegate to London to support the prayer of a petition from the British Columbia Legislative Assembly to Her Majesty the Queen. All expenses of the suppliant were allowed and paid. On a petition to recover from the Crown payment for services ; *Held*, that as the positions were honorary, and as the contracts were silent as to remuneration for services, he could not recover. DECOSMOS v. REGINAM. - - - PT. II. 26
See MANDAMUS (1).

PLEADING—An offer, alleged in a statement of defence to an action of libel, to publish an apology on such terms as the plaintiff could reasonably require is no defence and embarrassing. HOSTE v. VICTORIA TIMES PUBLISHING CO. - PT. II. 365
See RECEIVER, CONTRACT (2).

PRACTICE—*Service of notice of writ—Conditional appearance—Motion before Judge to rescind his own order—Rules of Court 1880—Order 11—Order 54.*] Where plaintiff obtained leave to serve notice of a writ on a foreigner out of the jurisdiction. *Held*, that the defendant was not bound to appear or enter a conditional appearance before he applies to set aside the order. *Held*, that the application to set aside the order giving leave to serve notice of writ was properly brought before the Judge in Chambers, instead of before the Full Court. The defendant's affidavits having shewn that the case did not come within Order 11, the order was discharged. FOWLER v. BARSTOW (L.R. 20 Ch. D. 240) observed upon. GARESCHE, GREEN & CO. v. HOLLADAY. [PT. II. 83

2. ——*Foreign company—domicile.*] The defendants, a foreign company, had a place of business in Victoria, where it carried on a trading business, although its principal place of business and head office, where the meetings of the governor, chief traders and shareholders were held, were in England. The plaintiff as administrator (appointed by the Court here) to the intestate estate of McL., a deceased servant of the company, served a writ on one of the company's managers at Victoria. On an application to have the writ set aside; *Held*, that as inasmuch as by the company's rules the power to appoint, pay and dismiss was with the English office, and as by agreement the deceased's account was kept at that office, and the balance due him from time to time was payable there, the English office of the company must be regarded as the domicile of the company, and the company could not be sued here by the plaintiff as administrator of the deceased. WILSON v. HUDSON'S BAY CO. - PT. II. 102

3. ——*Irregularity — Setting out.*] It is necessary to set out the irregularity for which a proceeding is set aside in the order setting it aside in order to found an appeal from such order. TIETJEN v. REVESBECK [PT. II. 365

4. ——*Order—Final or interlocutory.* -
FULLER v. YERXA - PT II. 330

5. ——*Alteration of parties after writ issued—Effect of* - - - - -
See CA. *re* (3).

6. ——*Ex parte order—Rescinding—Appeal improper where original material to be displaced.* - - - - - -
See APPEAL.

7. ——*Time for moving to set aside award.*
See ARBITRATION.
Also *see* JURY (3). REPLEVIN.

PRESCRIPTION - - - -
See TITLE BY PRESCRIPTION.

PROBATE - - - - -
See CONTRACT (1).

PROCEDURE—*Retroactive legislation—Legislation affecting the method of levying a tax is legislation affecting procedure and has a retroactive effect* - - - - -
See Begbie, C.J., at page 127. MURNE v. MORRISON Pt. II.

2. ——*Control of, in Supreme Court by Provincial Legislature* - - - -
See CONSTITUTIONAL LAW (3).

PROVINCIAL LEGISLATURE — A Provincial Legislature has no power to delegate its legislative functions to any other body such as the Lieut.-Governor-in-Council. SEWELL v. B. C. TOWING CO. (THRASHER CASE). *Per* Begbie, C. J., at p. 175, Pt. I; Crease, J., at p. 220; Gray, J., at p. 237. -
See CONSTITUTIONAL LAW (2).

PUBLIC RIGHT—*Invasion of—Attorney-General necessary party—Crown Grant to public uses—Right to divert to other uses—Information — Injunction — Practice — Amendment.*] The Corporation of Victoria was, under Act of Parliament, seized of 120 acres, upon trust, to lay out and maintain the same as a public park or pleasure ground for the enjoyment and recreation of the inhabitants ; *Held*, that the Corporation could not convey any of such land free from that trust. *Held*, that cattle lairs, an agricultural hall for the exhibition of farming implements and products, and an emigrants' home were not within the objects of the trust. An individual inhabitant cannot sue to restrain a misuse of the park, unless specially injured thereby; but the Attorney-General must join or be joined. It is the duty of the Attorney-General, in cases of disputed rights, to remove obstacles in the way of trial of those rights, receiving an indemnity as to costs. ANDERSON v. VICTORIA *et al.* - - - PT. II. 107

RECEIVER—A creditor of a partnership is entitled under the Judicature Act, in an otherwise proper case, to an *interim* injunction and a receiver of the partnership estate in an action against surviving partners, and personal representatives of a deceased partner, and trustees under an assignment for the benefit of creditors by the surviving partners, and the rule formerly prevailing in Equity, that to obtain such relief, there must be some fiduciary relationship between plaintiff and defendant does not apply since the Judicature Act which gives the power to grant an injunction or receiver by interlocutory order in all cases in which it shall appear to the Court to be just or convenient. An applicant for a receiver or injunction must still show some claim upon the subject matter of the suit or some special relation with defendant. THE HUDSON'S BAY CO. v. GREEN *et al* - - PT. I. 247

RECEIVER—*Continued.*

2. ——*Appointment of receiver of debtors' estate under a judgment not an execution.*] A receiver may be appointed by way of equitable execution without previous issue of *fi. fa.* where the defendant on examination as a judgment debtor swears that he has no exigible property. MUIRHEAD v. LAWSON. - - PT. II. 113
See EXECUTION.

RECTIFICATION OF REGISTER
See COMPANY.

REPLEVIN—*B.C. Replevin Act, 1873—Affidavit for writ of Replevin—Sufficiency of.*] On an application to set aside a writ of Replevin under the B.C. Statute, 1873 C. 24. *Held*, (1) That the affidavit under Sec. 4 need not state that the deponent is the "servant" or "agent" of the claimant. (2) That the delivery to the sheriff of the bond is not a necessary preliminary to the issue of the writ. KEEFER v. TODD. [PT. II. 249

RESIDUARY DEVISE - -
See WILL.

RETAINER - - -
See CONTRACT (2).

SALE OF LANDS - -
See CONTRACT (4).

SEAL - - - -
See MINERAL LAWS (2).

SOLICITOR - - - -
See CONTRACT (2).

SPECIFIC PERFORMANCE -
See VENDOR AND PURCHASER.

STATUTE—20 and 21 Vic. C. 43 (*Imp.*) giving the power to a magistrate exercising summary jurisdiction under Jervis' Act, to state a case for the opinion of the Superior Court is not provided for or inconsistent with Can. Stat. 37 Vic. C. 42 and is not repealed by Sec 7 thereof. REGINA v. AH POW - - - PT. I. 147

2. ——*Construction of—Conditions prece-*

STATUTE—*Continued.*

dent—Imperative or directory—Clauses validating sales for taxes where any taxes due.]
See MURNE v. MORRISON. PT. II. **120**
See PECK v. REGINAM. PT. II. **11**

3. ——*Authorizing municipality to make by-laws — Construction of—By-law beyond terms of statute ultra vires.*] The Municipalities Act, 1881, authorized municipalities to make by-laws *inter alia* "to regulate the erection of wooden buildings notwithstanding any Act or law in force in the Province." The municipality assumed thereunder to pass a by-law that "no wooden building within the fire limits shall be altered without the written permission of the inspector and the majority of the fire wardens." *Held*, on motion to quash conviction under this by-law, the statute contained no authority for regulating alterations but only original erection of buildings. REGINA v. ON HING - PT. II. **148**

SUMMARY CONVICTION—*Quashing—Commitment not shewing jurisdiction in magistrate.*] A conviction was held bad on motion to quash for not shewing that the offence was committed within the jurisdiction of the convicting justice, and because the person entitled to receive the costs was not designated and the costs of conveyance to jail remained unascertained. REGINA v. AKERMAN - - PT. I. **255**
See CRIMINAL LAW (3 AND 5).

TAXATION—*Discriminating against a class unconstitutional.*] Section 14 of the Chinese Regulation Act, 1884 providing "no free miner's certificate shall be issued to any Chinese except on payment of fifteen dollars"—the fee for such certificate for other classes being five dollars, was unconstitutional as imposing an unequal and differential tax on a class. REGINA v. GOLD COMMISSIONER OF VICTORIA DISTRICT. [PT. II. **260**
See CONSTITUTIONAL LAW (1).

TAXES — *Sale for—Assessment roll—Surcharge of 25 per cent. and interest at 18 per cent. per annum—Appointments by Order-in-Council.*] On the construction of the "Taxes on Property Acts," 1876, 1877, 1878, 1879, 1880; *Held*, (1) Land contracted to be purchased from the Crown but only part paid for, and in respect of which no Crown grant has issued, is taxable under the Acts of 1876 and '78. (2) The surcharge of 25 per cent. and 18 per cent. interest on unpaid taxes is unconstitutional and void. (3) The affidavit required by Sec. 40 as to the correctness of the roll, extends to all lands

TAXES—*Continued.*

taxed, whether belonging to resident or to non-resident taxees. (4) Such last mentioned affidavit and also the certificate of the clerk of the Court of Revision that the roll has been finally passed, are not merely directory but precedent and obligatory provisions, and without compliance with them no such tax on the land can be levied by forced process. (5) The Act of 1876 Sec. 12, authorized "the Lieutenant-Governor-in-Council from time to time to appoint one or more person or persons to be assessors in each district for the purposes of the Act." The Provincial Secretary reported to the Executive Council, sitting as a committee without the Lieutenant-Governor, that it would be expedient to appoint H. to be assessor in New Westminster District. The committee, adopting the report, recommended it to the Lieutenant-Governor for his approval. The Lieutenant-Governor subsequently approved of the report (how or when, did not appear) but nothing further was done. *Held*, that such approval was not an "appointment" within Sec. 12, so as to bring a sale by H. within the protection of Stat. 1880, Sec. 30, as being a sale by "a person duly authorized to collect and enforce payment of taxes." The provisions of these Acts are to be construed strictly and followed strictly. The principle laid down by Mr. Justice Shaw in TORREY v. MILBURY (21 Pick. 64) approved, viz.: "All measures intended for the security of the subject, for securing equality of taxation, are conditions precedent, and if they are not observed, the subject is not legally taxed." MURNE v. MORRISON.
[PT. II. **120**

TAX SALE - - - - -
See LACHES (1).

TITLE BY PRESCRIPTION—*Trespass—Victoria City Lots—City of Victoria Official Map Act, 1880.*] The City of Victoria Official Map Act, 1880, and amending Acts have reference to streets only. *Held*, therefore, that nothing in those Acts could justify an interference by private individuals with the boundaries of a lot held by purchase and 20 years' possession. CROWTHER v. BEAVEN. - - - - PT. II. **116**

TITLE—Transferee of holder of indefeasible title is entitled to be registered as owner of such title. In *re* SHOTBOLT - - PT. II. **337**

TOWAGE—*By foreign steamer—38 Vic. Can. C. 2—"From one Canadian port to another"—"Distress."*] Goliath, an Ameri-

TOWAGE—*Continued.*

can tug, with a clearance from Port Townsend for Victoria, picked up on the high seas ship Abercorn, bound for Port Moody, and contracted to tow her to that port. Goliath towed Abercorn to mouth of Victoria harbour, and there left her while tug went into Victoria for coal and a clearance for Port Townsend. On coming out, Goliath resumed towing, and carried Abercorn to within fourteen miles of Port Townsend, and then cast off and ran into that port for a clearance for Port Moody; the Goliath then towed the Abercorn into Port Moody. In an action for penalty under statute, *Held*, that this was "a towage from one port or place in Canada to another," and defendant was liable. *Semble*, "distress" applied to the tow and not to the tug. The Collector of Customs has the right to sue in his own name for the penalty, under (Can.) Stat., 1877, Cap. 10, Sec. 101. Hamley v. Libby - - - - [Pt. II. 44

TRESPASS—*Leave and License.* -
See Distress for Taxes.

TRIAL - - - - - - -
See Criminal Law (7).

VENDOR AND PURCHASER—*Specific performance—Mistake.*] Defendants, trustees under a will containing a power of sale "to sell such portion of his real estate as they in their discretion should think necessary." Some 60 acres, more or less, of Sec. 78 were offered for sale, but two only of the three boundaries of the lot were defined in the particulars and conditions of sale. At the sale, the auctioneer produced a map shewing the property offered for sale and marked 60 acres, but stated that the exact contents of the land and the amount to be paid would have to be ascertained by a survey at the joint expense of the vendors and purchaser, but bids would be received per acre. Plaintiff was the highest bidder at $36 per acre, and the subsequent survey shewed that the lot contained 117 acres. *Held*, that the plaintiff was entitled to a conveyance of the 117 acres at that price; and *Held*, that the ignorance of the defendants as to the exact acreage of the lot was not such a mistake as entitled them to relief. Sea v. McLean and Anderson. Pt. II. 67

VENUE—Lieutenant-Governor-in-Council —Power to grant commission of Oyer and Terminer -
See Criminal Law (9 and 10).

VERDICT - - - - - -
See Criminal Law (2). New Trial.

WAGES -
See Execution.

WAIVER—The Executive of the Crown cannot waive the performance of an imperative condition precedent imposed by the Legislature. Peck v. Reginam - - Pt. II. 11

WATER - - - - - -
See Mineral Law (2).

WATER RIGHTS—*Riparian proprietors —Land Ordinances — Land commissioner— Duties of in considering applications for water rights.*] On the construction of the Land Ordinances and Acts: *Held*, that under Sec. 44, the Land Ordinance, 1865, no person is empowered to take water from any stream who is not at common law a riparian proprietor. *Held*, that the commissioner should, before granting any authority to divert water under the Land Acts see that all the requirements of the Statute have been complied with, but that the applicant is responsible for the insufficiency of his record. *Semble*, that the owner of a water privilege cannot satisfy Sec. 50 of Land Act, 1875, by using the ditch of another. *Semble*, that even prior to passing Sec. 50, no exclusive right could be acquired until such ditch was constructed. *Held*, that Sec. 44, of Land Ordinance, 1865, did not enable persons to acquire water rights as against riparian owners of land acquired prior to the passage of that Act. The duties of a commissioner in considering applications for water under Land Acts pointed out. Carson & Eholt v. Clarke & Martley. Pt. II. 189

WILL—The words "will simply appointing an executor" written immediately above and apparently as part of the will can be construed as incorporated with it, so as to shew the intention of the testator. In *re* Henry Jerome (deceased). [Pt. I. 87

2. ——*Construction — Pecuniary legacies payable out of residuary realty.*] H. R. the testator, gave £250.00 to M. and lands at N. in fee to W., and gave certain other lands and also pecuniary legacies to other persons, and all the rest and residue of my real and personal property "to D. absolutely." W. died in the testator's lifetime, so that the lands at N. fell into the residuary devise, and were the only lands comprised in such devise. *Held*, that the pecuniary legacies were well charged on the lands at N. The testator gave to M. absolutely (among other things) "all mining property in C. I may possess at the time of my decease." The

WILL—*Continued.*

testator died possessed of (*inter alia*) certain shares in a joint stock company, for working a mine in C. on which shares there were certain calls duly made and unpaid at testator's death, and sundry calls had been made since. *Held*, that D. was entitled to have the shares clear of all calls for which the testator might have been sued, but subject to all calls not completely made in

WILL—*Continued.*

testator's lifetime, and therefore he was put to his election. COLLINS v. LEWIS, L.R. 8, Eq. 708; TOMKINS v. COLTHURST, 1 Ch. D. 626; and KEELING v. BROWN, 5 Ves. Jr. 359, not followed. AUBREY v. MIDDLETON, 2 Eq. Ca. Abr. 407; BENCH v. BILES, 4 Madd. 187; FRANCIS v. CLEMOW, 23 L.J. Ch. 288, followed. MANSON v. ROSS [PT. II. 49

BRITISH COLUMBIA

LAW REPORTS.

REPORTS OF CASES DECIDED IN THE COLONIES OF VANCOUVER ISLAND AND BRITISH COLUMBIA, AND IN THE PROVINCE OF BRITISH COLUMBIA, FROM 1860 TO 1884.

[*It has been found impracticable to report these cases in their chronological order, but an endeavour will be made to do so as far as possible.*]

REGINA *v.* KALABEEN AND ANOTHER.

BEGBIE, C. J.
1867.
14th November.

Criminal Law—Practice—Evidence—Statement by Prisoners

The provisions of section 32 of 32-33 Vic., c. 30, are directory, and a statement not prefaced with the statutory words made by a prisoner to the committing Magistrate was admitted in evidence upon the Justice deposing that the caution had been given, although not in the statutory words.

The prisoners were put on their trial at the Yale Assizes, held in November, 1867, charged with murder.

During the course of the trial, the Attorney-General (*Crease*) proposed to put in evidence a statement made by one of the prisoners before the committing Justice.

H. P. Walker, for the prisoners, objected that the statement was inadmissible, as from the face of it it was apparent that the provisions of 11 and 12 Vic., c. 42, s. 18, had not been complied with.

The committing Magistrate (Clement F. Cornwall) was then called and deposed as follows:—

"I am the committing Justice. The prisoners were brought "before me on 14th May last. I duly cautioned them that it was "quite unnecessary for them to say anything, and that what they "might say might be given in evidence against them. I was very "particular, for I had made up my mind to commit them."

BEGBIE, C. J.:—

I think the statement is admissible, although not prefaced with the statutory words. The evidence of the committing magistrate is quite sufficient.

[*See* on same point *Reg.* v. *Soucie*, 1 P. & B., p. 611.]

BEGBIE, C. J.

1869.

5th November.

QUEEN *v.* PETER.

Criminal Law—Practice—Jury separating—Verdict, delivery of.

After the Jury had been given in charge one of the Jurymen was taken with a fit and removed, in charge of the Sheriff and his Physician, to his residence. The remainder of the Jury subsequently adjourned to the sick man's house, where upon his recovery a verdict of "guilty" was rendered.

Held, that after the verdict had been recorded it could not be disturbed.

At the November Assizes at New Westminster, 1869, Peter, an Indian, was indicted and tried before Sir M. B. Begbie, C. J., for murder.

After the jury had been given in charge, one of the jurymen was seized with a fit, and removed to his residence in an insensible condition. The remainder of the jury afterwards adjourned to the house of the sick man, where upon his recovery a verdict of "guilty" was rendered.

When the prisoner was brought up for sentence,

D. B. Ring urged that the verdict ought not to stand.

The Attorney-General (*Crease*), read a joint affidavit of the Deputy Sheriff and the Physician, negativing any communication on the subject of the trial, or any communication whatsoever, except with the Doctor.

The cases of *Conway* v. *Queen* (7 Ir. L.R. 149), and *Reg.* v. *Edwards* (R. & R. 224), shew that *all* communication is not forbidden. He submitted that the exercise of a judicious discretion in the present case was necessary to the due administration of justice. There was now on the record a verdict of "guilty," so that the prisoner could not be again arraigned. *Winsor* v. *Reg.* (L. R. 1 Q. B. 395.)

BEGBIE, C. J.:—

The rule cannot be that the mere separation of a juryman is sufficient. It must be separation and improper communication, or other misconduct. Here all communication or other misconduct is negatived. The application is too late; it ought to have been made before the jury gave any verdict. The verdict therefore stands.

REYNOLDS *v.* VAUGHAN.

BEGBIE, C. J.
1872.
2nd July.

Introduction of English Law into Colony—Orders in Council—Colony of Vancouver Island—"Statutes Repeal Act, 1871."

Held, that Orders in Council passed in England under powers in an Imperial Statute are not in force *proprio vigore* in a Colony, although the Statute itself may be in force.

Semble, that the Colony of Vancouver Island was established as a British Colony prior to 1855.

This was a summons calling upon the defendant to shew cause why the plaintiff should not recover the costs of this action.

The writ was issued, under the "Summary Procedure on Bills of Exchange Act, 1855," for $77.25 overdue on a promissory note. The defendant had obtained leave to defend within a given time. The time having expired without any defence put in, the plaintiff issued this summons.

Edwin Johnson for the plaintiff.

A. E. B. Davie, for the defendant, contended that the plaintiff was not justified in suing in the Supreme Court; he should, therefore, be deprived of costs, according to 19 & 20 Vic., c. 108, s. 30, by which a plaintiff suing in the Supreme Court for a sum under £20 is deprived of his costs. Plaintiff might have sued in the same summary way in the County Court, for sec. 4 of the same Act extends the provisions of the Summary Act of 1855 to the County Court Act if so directed by Order in Council; and an Order in Council to that effect was accordingly issued in 1856 in England.

[*Begbie, C. J.*— Where is the evidence of such Order in Council ever having issued? And how is it of force in this Colony?]

He further contended that the Imperial Summary Act of 1855 has now no force here. It first came into force by local enactment in 1861, but that local Ordinance was repealed by the "Statutes Repeal Act, 1871," so that these proceedings are altogether irregular.

BEGBIE, C.J.:—

My opinion is that the defendant must pay the costs of this action. I do not think that the Order in Council, 1856, applies here, either *proprio vigore* or by the help of the "English Law Ordinance, 1867," which establishes in British Columbia "the Civil and Criminal Laws "of England, as the same existed on the 19th November, 1858." I think those words mean Common and Statute Law, and not Orders in Council, although issued under the authority of an Act of Parliament.

An Englishman going to found a Colony may be supposed to know the Common Law, by common sense, and to carry the Statutes (in the form of Chitty) in his hands. But Orders in Council are something *extra*. This method of enacting a law is always regarded with

BEGBIE, C. J. 1872.

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jealousy, ever since that noted Act of Parliament, 31 Henry VIII., c. 8, which declared by anticipation that whatever the King's Highness might proclaim for law, should be law. No abuse of such a power is, of course, probable now, when the authority to make the Order in Council is given, not so much to an irresponsible Majesty as to a responsible Minister. And nothing can be more proper (if it be not impertinent to say so) than the present Order in Council. But I do not think it is introduced here. And if the Order in Council does not extend to the Colony then the plaintiff can not have so speedy a remedy in the County Court as the Act of 1855 gives him in this Court. I conceive that, although Statute Laws may be taken to be in force in a Colony *proprio vigore*, yet Orders in Council under powers in a Statute, like Orders of Court under similar powers, would require to be promulgated anew by the Legislature here, or by a General Order here.

Mr. Davie's contention that the Act of 1855 has no force here cannot, I think, be sustained. It is not quite clear when the Colony of Vancouver Island was legally established. If subsequently to 1855 (as there are some grounds for supposing) then this Statute was imported along with the whole body of Common and Statute Law. But if the Colony were established previously to 1855 (which is, perhaps, the better opinion) then this Statute was established here by the Act of 1867—a general Act which suffered no diminution of authority by the repeal in 1871 of the particular Ordinance of 1861.

BISHOP OF COLUMBIA *v.* CRIDGE.

Colonial Bishop—Coercive Jurisdiction—Church of England in British Columbia—Church Discipline Act (3 & 4 Vic., c. 86.)

Held, by Begbie, C. J., on an application for an injunction, that, though the Letters Patent from which the Bishop of Columbia derives his authority do not confer upon him any effective coercive jurisdiction over his clergy, he could still enforce obedience by having recourse to the Civil Courts.

This Court will, on proper application, supply coercive jurisdiction to enforce the sentence of an ecclesiastical tribunal of assessors, appointed in accordance with the provisions of the Church Discipline Act (3 & 4 Vic., c. 86), so far as its provisions are applicable to this country, when the finding of such tribunal is not unreasonable, and the proceedings before it are conducted in a way consonant with the principles of justice, as understood in a Court of Equity.

Subsequently, at the hearing, Gray, J., made the injunction perpetual.

Constitution and authority of the Bishop of Columbia.

General *status* of the Church of England in British Columbia.

This was an application for an injunction on a bill filed by the Lord Bishop of the Diocese of British Columbia against Rev. Edward Cridge, clerk, praying that the defendant might be restrained from preaching or officiating in the cure of Christ Church, Victoria, and from acting elsewhere in the diocese of British Columbia as a clergyman of the Established Church of England, and for a declaration that the defendant's licence had been duly revoked, and that the defendant had failed to conform to the discipline and doctrine of the Church of England, and was liable to be removed, and was no longer entitled to the benefits of the trust of the indenture of 6th May, 1864.

The bill set out the letters patent and consecration of the plaintiff to be Bishop of British Columbia; his arrival here and licence granted to the defendant to "preach and officiate;" his selection of Christ Church to be his Cathedral; his collation thereafter of the defendant to be the Dean of the said Cathedral Church.

Certain articles, eighteen in number, were then set forth in the bill, impeaching the conduct of the defendant in his ministry.

The Bill then stated that as the result of an inquiry had been held by assessors duly appointed upon the articles referred to; that the Bishop's assessors found all the charges of infraction of clerical duty to be proved, except two, numbered 9 and 10; that the Bishop thereupon, on the 17th of September, 1874, delivered judgment on each of the proved charges separately; that the investigation had been open; that there were four assessors, two clergymen and two laymen (County Court Judges), one of whom was compelled to retire on public business after the first day. From the affidavits used on the application, it appeared that the investigation continued *de die in diem* for four days, viz., on the 10th, 11th, 12th and 14th of September, the defendant having

BEGBIE, C. J. 1874.

BISHOP OF COLUMBIA v. CRIDGE.

had ample notice, and being in fact present, and with every opportunity apparently to examine or cross-examine witnesses. He seemed, however, to have remained as a spectator merely, after handing in a protest against the proceedings. The separate sentence on fourteen of the proved charges was revocation of the licence; on one, viz., that on Article 17, a formal admonition; and then, without noticing 18, the Bishop said he must still add further punishment, and decreed suspension from the Deanery, and then gave as his judgment on the whole proceedings to be revocation of the licence to preach and officiate, suspension from the office or dignity of Dean until submission, and a formal admonition. This was, the learned Judge said, "the sentence in fact, the logical results of which the plaintiff now seeks to have enforced by the decree of this Court."

McCreight, Q. C., for plaintiff.

Robertson, Q. C., for defendant.

BEGBIE, C. J.:—

In considering whether this Court will grant its auxiliary aid, the only questions to consider are those which arose in Dr. *Warren's* case, (in *Grind* Compend. 408), and in *Long* v. *The Bishop of Cape Town*, 1 Moo. P. C. (N. S.) 411. The Bishop having no coercive jurisdiction, had he, however, jurisdiction to summon the defendant to enquire into his conduct, to pass this judgment spiritually, as it may be said? Unless he had such a right, this Court will not interfere or assist him in any way. Neither will this Court assist him if it appears that the proceedings were conducted in an oppressive way, or in any manner contrary to the principles on which questions are examined and determined here. Neither will it assist him if the sentences appear to be disproportionate to the alleged offence, or contrary to public policy to be allowed. *E. g.*, if the defendant had been sentenced to do penance in a sheet with a taper, I do not think this Court would have anything to say to such a sentence as that, or if he were sentenced to deprivation or suspension for once omitting a genuflexion. The best test to apply is this: Fortunately, we are a branch of the Church of England; not "in union and full communion" only, but a branch of that very Church. If we had here established synods and canons and regulations of our own, the investigation now would be more intricate and difficult, according to the observations of the Master of the Rolls in *The Bishop of Natal* v. *Gladstone* (3 L. R. Eq. 37.) Here, all we have to enquire is whether the offences alleged would, if committed by a clerk in England, be triable before the Bishop of the diocese, and punishable as this is punished; and I apprehend that there is no doubt but that these questions must, subject to some observations about the Church Discipline Act and the different relation of the Bishop here *qua* patronage, be answered in the affirmative.

In my opinion, it is impossible to comply with the Church Discipline Act (3 and 4 Vict., c. 86) here, at least in its entirety, and therefore, at least in its entirety, is not law. In particular, it would be impossible to have a tribunal of the five assessors therein referred to. The assessors chosen here were, however, a better tribunal than I should have expected to have found here. The defendant objects, first, that none of them belonged to the section of the Church to which he says he belongs, and the argument addressed to me seemed really to have been that he was entitled to have one or two partisans among the assessors, perhaps on the principle of a jury *de medietate*, which is now abolished in civil cases, as from January 1st, 1875. But, of course, there was no shadow of reason in such an objection. The next objection was that inasmuch—it is not very easy to state it—inasmuch as these assessors might more closely have approximated to the assessors described in the Church Discipline Act—though I can scarcely see how—therefore, these proceedings were a nullity. But, first, it was not shown that better assessors could have been procured; second, it is not pretended that even in England the assessors *must* be of the character in the Act mentioned, but only that such assessors will be considered satisfactory; third, it is not pretended that the Act is applicable here, or is law here at all. To impugn a judgment (if otherwise reasonable) because the proceedings on which it is based do not tally closely enough (as alleged, but not proved) with certain proceedings mentioned, not required in England by a statute which is non-existent here, is surely rather far.

Then Mr. Robertson urged that the Bishop here, as a matter of fact, appoints and licences all the different ministers in the Diocese to their different cures; that by revoking defendant's licence, by suspending him, by, perhaps, ultimately depriving him of his cure altogether, he will acquire a right of presentation to this cure (which I observed counsel on both sides carefully abstained from calling "a living"), and that this right of presentation is an interest in the Bishop, which disqualifies him from being a judge, even in the preliminary matter of censure; for, it was urged, the neglect even of a censure may lead to further ecclesiastical proceedings, and so, up to the most hardened contumacy, and incurable obstinacy only fit to be cut off; and the presence of an interest in a judge utterly disqualifies him, and annuls his judgment. Now I am not sure that "interest" must not mean some interest which might be turned into cash. Apart from the simoniacal odour of such an idea, it is not shown to me that this right of presentation is of the smallest money value. But in the next place the argument is not pushed nearly far enough, but is ingeniously placed just far enough to embrace the defendant's case, and no other. If it be unlawful for the Bishop to censure because the neglect of that may lead to suspension, and so on, neither is it lawful for him to

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direct, because the neglect of his direction may lead to a censure, and the neglect of censure to suspension, and so on. On the other hand the Bishop here *qua* Bishop appoints not only to this cure, but to every cure in the Diocese. So that the argument fairly carried out is this: That because a man is the Bishop of the Diocese, *therefore* for that reason alone, *virtute officii*, he is debarred from either directing or suspending any of the inferior clergy whom he may once have appointed to a cure, notwithstanding any solemn vows and promises they swore to God, and to him, when he placed them there. In fact, that on the sole ground of his being a Bishop he is disabled from being a Bishop. For I wish again to impress upon the defendant the consideration which I threw out in argument, that the very first and highest trust and duty, more than a right or privilege, of a Bishop—his *ratio existendi*—the reason for calling him what he is called, is that he is to visit his clergy; "Bishop," "Visitor," "Overseer," the three words are almost identical; and the chief difference between them is that they are derived from the Greek, Latin, and Teutonic roots respectively. In at least one place in the New Testament the authorized version translates "EPISKOPOS" (Episcopos) by the word "Overseer." Mr. Robertson's argument came to this: That because the duties of an overseer are out here somewhat incompatible, therefore he could not oversee; at least that though he might lawfully perform such duties as the defendant liked, he was not to perform such duties as the defendant objected to; for it is to be observed that this is just as much an objection to the power of appointing as to the power of censuring. The two powers, it is said, are incompatible, therefore I claim, says the defendant, not that both powers are void, but that I may treat the one as valid, the other as invalid. The Bishop may lawfully appoint me, but cannot lawfully censure me. But in fact contradictory powers are often, in case of necessity, placed in one hand. In this very Colony there is almost a case in point. Nothing, surely, can be more important than to keep quite distinct the judicial and executive functions. No maxim of our criminal courts is better known than, that in the absence of counsel the Judge is to be counsel for a prisoner. Yet the Legislature has thought it expedient by repeated Acts, which have always obtained Her Majesty's sanction, to leave it to the Judge to nominate a Sheriff *pro re nata*; and in criminal trials up the country it has occasionally happened, in the absence of any counsel for the prosecution, that the Judge has been compelled to indicate to the Registrar, or to a constable, what statute appeared suitable for the occasion, and in what book the form of the indictment was shown. In fact, all these regulations are means to an end—that end is the administration of justice and the repression of disorder,—and to adhere to forms and principles in such a way as to suffer crime to go at large unpunished, and disorder to be unrestrained, would be "to neglect the oyster for the sake of the shell."

Ecclesiastical Tribunals have always been negligent of the forms which English Lay Tribunals have deemed useful, and all but essential. I say English Lay Tribunals, for in many other countries, other principles than ours are considered to be most conformable with the administration of justice. And the most prejudiced mind must admit that sentences may be just though not arrived at by the machinery of a jury. The judgments of Solomon have been considered as not without merit, though every one of them outrages the whole spirit of *Magna Charta*.

* * * * *

[His Lordship then proceeded to consider the charges and sentences of September last, and then continued.]

It is to be noticed that up to the present time there is not the least indication—there is no evidence and no argument—that the Church here is not a branch of the Church of England, to be governed and guided by all her practices and discipline by which all her members are bound, and defective only in this respect, that when such practice and discipline requires to be legally enforced by the strong arm, that strong arm must be put in motion by the judgment of this Court, following (if it thinks fit to follow) the sentence of the Bishop, and it may not be put in motion by virtue of the sentence of the ecclesiastical *forum* alone, as in England. That is all the difference. I am bound to examine to a certain extent the sentence of the Bishop. If I find it in conformity with the practice in the Established Church of England I am bound to order it to be enforced; then the force, if necessary, is applied under my order, not purely as in England on the episcopal authority; and the disobedience then becomes and is punishable as disobedience of my order and not as disobedience only of the Bishop's order.

Sitting here as a Judge I feel how immensely my responsibility is lessened, and my ability for comprehending the position increased, in comparison with the occasion when somewhat similiar questions were brought for the first time on somewhat similar disputes before the Supreme Court in South Africa. Since that time a flood of light has been poured upon the constitutional questions, and the relations of ecclesiastical and civil jurisdiction in the Colonies, by the labours of the great judges and civilians in the Privy Council elsewhere; and the whole matter has been discussed repeatedly in various Courts on various rights, by various minds of the most learned lawyers and most sincere and earnest churchmen and statesmen in England, and has been placed, if I may without presumption say so, upon a clear and satisfactory foundation. Of all that light, and of all those discussions I can now avail myself.

But if a voluntary association out here had been formed of persons holding the doctrines of the Church of England but rejecting or altering wholly or in part the discipline and government of the Church of

England—that would be a course perfectly open to any number of persons to pursue I apprehend, and the present Bishop might be among them,—but that association would not be an actual branch of the Church of England, though it might insist that it was in full union and communion with it, and held all its doctrines. If dissensions arose in such an association, its members would have recourse to the civil tribunals, and any question would have to be tried by their own rules and ordinances, which would have to be proved by evidence in the usual manner, and have to be construed by the Court just like the regulations of a new joint stock company. I need not point out the additional difficulty and responsibility which would thereby be imposed on the Judges, and the additional uncertainty and insecurity felt in any construction to be placed on such ordinances; the decisions of English Courts would not be binding and might not be apposite, not being *in pari materia*.

Fortunately no such case exists here. The jurisdiction here, episcopal, judicial and consenual, appears to be exactly the same—founded on instruments verbally identical—with the case of the See of Natal (*Bishop of Natal* v. *Gladstone*, 2 L. R. Eq. 1.) What that is may be given in the words of Lord Romilly. After stating, at very considerable length, all the circumstances and the different cases in which the unfortunate differences between Bishops, Deans and Ministers in South Africa had been discussed, he says: "The result shows that the District or Colony "of Natal is a district presided over by a Bishop of the Church of "England, which is properly termed a See or Diocese,—that the min- "isters, deacons and priests, officiating within that district, and also all the "laymen professing to be members of the Church of England, constitute "not a Church in Natal in union and full communion with the Church "of England, but a part of the Church of England itself, and that all "the ministers, priests and deacons, there officiating, and all persons "composing the several flocks, are members and brethern of the Church "of England, in the strict sense of the term. The consequence is, that "they have in all matters ecclesiastical, voluntarily submitted them- "selves to the control of the Bishop of Natal, so long as it is exercised "within the scope of his authority, according to the principles prescribed "by the Church of England. If, however, any sentence of the Bishop "of Natal should be contested, recourse must be had to the Courts "established by law, which will enforce that sentence if pronounced "within the scope of the legal authority of the Bishop; and if he has, in "arriving at the sentence, proceeded in a manner consonant with the "principles of justice, and in so doing the Court established by law "will proceed upon the laws of the Church of England, so far as they "are applicable in Natal," *i. e.*, the spirit, though not the letter, of the Church Discipline Act is to be adhered to. It is not law here, but it is to be taken as a guide. Now I apprehend every word of that quotation is not only very good law, but very good sense, and not only good sense

and law, but a most convenient law for the protection of rights. Not only for obtaining judicial decisions upon them, but for knowing beforehand, and without litigation, the limits of rights and duties of all members of the Church—laymen and clerical. It only requires that the name should be changed; for "Natal" read "British Columbia," and on this particular point it exactly states the position here.

* * * * *

The position and status of the plaintiff here seems to be much misunderstood. The fact is that the Lord Bishop of Columbia holds his jurisdiction, his powers, and his authority, so far as it can be derived from any temporal authority, from the same Royal and Supreme source of all authority in the British Dominions, by an instrument as solemn as I hold my own Commission and derived directly from the Crown under Her Majesty's Sign Manual. It is true the powers so given require to be supplemented, some of them by the authority of an Imperial or local Act of Parliament. My own Commission is sanctioned by both; and that being the method by which Her Majesty can constitutionally give coercive jurisdiction, coercive jurisdiction is placed in the hands of myself and the different Judges in the various Supreme Courts throughout the British Dominion. Now the plaintiff's Letters Patent assume to give him full jurisdiction, and they would probably have at once given him such jurisdiction if his diocese had been in a Crown Colony—though I rather doubt this,—but the terms are certainly ample to give him full jurisdiction, and would do so if the Letters were based on, or confirmed by, an Act of Parliament. Possibly, if a local Act were passed here recognizing or confirming the Letters Patent, the Bishop would have full coercive jurisdiction as from that time. I am far from saying that this is probable or even desirable. I think that such jurisdiction is much more safely and beneficially, for all parties, placed in the hands of this Court. Not that I have the smallest opinion that my judgment is superior to that of the plaintiff; on the contrary, I wish to be understood as placing very little confidence in my own judgment. But I have the greatest confidence in the Judicial Committee of the Privy Council; and so long as the plaintiff's sentences have to come to this Court to be enforced, he and all the Church here, and in fact all denominations and religions, have the advantage of the appeal to the Privy Council, which otherwise would not lie, but there would be only an appeal from the plaintiff to the Archbishop of Canterbury for the time being. Now, placing as I do great confidence in the wisdom and learning of that great Prelate, and of those who may succeed him, I must say that I nevertheless feel very much more confidence in the wisdom, in the learing, and, above all, in the coherency and consistency of the Judicial Committee, than in the decisions of a series of Archbishops of whatever See. Then, besides the secular jurisdiction thus imperfectly bestowed, the plaintiff has his spiritual authority, derived from the imposition of hands, which though vague, and I conceive left by our

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Church purposely indefinite, can never be treated by any churchman as less solemn on that account, but rather as all the more impressive. He is sent out here by all the authority of the Crown and of our Church, not to be taught, but to teach orthodoxy, not to be reviled, but to reprove error, and to receive all due obedience from the members of the Church of England here.

Having then examined these Pandora street proceedings much more minutely than perhaps I have any right to examine them (looking to Dr. *Warren's* case), I have come to the conclusion that the plaintiff is a Bishop of the Church of England, and the defendant is a clergyman of the same Church; that the proceedings in Pandora street, though not according to the precise form suggested (not required) by the Church Discipline Act in England, were yet in a reasonable analogy with it, the assessorial part being differently constructed from that in *Long* v. *the Bishop of Cape Town*, 1 Moo., P. C. (N.S) 411; that the proceedings were conducted in a way consonant with the principles of justice as understood in a Court of Equity; that the findings were true, and that the sentences and whole judgment reasonable and appropriate enough to the offence. It is therefore just that it should be carried out; and if no other ground existed, the inability of the Bishop to execute justice for himself is one of the heads of equity which will maintain a bill. I consider it a necessary inference from the cases in and from South Africa, that the local Civil Courts are bound to interfere on the application of either party, in these spiritual disputes, upon a proper case being shewn. But more than that; the Bishop has a trust to execute, and he has a right to come here as trustee to prevent a misapplication of the funds, and lands and buildings, just as I apprehend the treasurer or other proper officer of an insurance company would have a right to come here and demand the assistance of the Court to get rid of a suspended manager, who refused to give up the books or the key of the office. Moreover, the plaintiff has probably a right to come here in his character of general overseer of the Church of England to prevent his subordinates from infringing statutes. And by the 14 Charles II., no unlicensed minister may preach under the penalty of three months' imprisonment. It is true the Bishop might probably proceed by indictment under this statute, but there is no reason why he should be driven to a more tedious remedy and wait for the Assizes here, which may not be held for some time. Besides the defendant surely does not wish to be prosecuted as a criminal. I should be shocked if anybody were to attribute to him the sordid ambition of wishing to appear a martyr. And if the Bishop were to await for the Assizes, the illegal preaching would be going on in the meantime. Finally, in order to carry out the object and spirit of this same statute, the Bishop's manifest duty, which he is compelled to discharge, is to take steps for excluding him from the pulpit. Can I possibly say the Bishop has no right to interfere when it is one of the

duties of his high office which he is bound to discharge; or that he has a less right to have a wrong redressed because it is also a statutory misdemeanour? Then again, as to the question of marriages. It is impossible to decide anything just now as to the validity of a marriage by an unlicensed clergyman of the Church of England. The statute says that the clergyman in each denomination may celebrate marriages according to the rites and ceremonies of their respective churches, and all other marriages are to be void. Whether any clergyman who has been unlicensed can, consistently with the rites and ceremonies of the Church of England celebrate a marriage, or, indeed, officiate in any way as a clergyman of that Church is the question to be argued, and on which the validity of these marriages depends. It is a grave point, but it cannot be decided now If I were now to express myself, or if all the three judges were here and expressed themselves ever so decidedly in favour of the validity of the marriages, that could decide nothing. The question may be raised over and over again as touching the status of every wife and husband, as touching the legitimacy of every child, of every marriage celebrated by the defendant, and the decision in one case will not be of any binding force in any other case. Even if every one of these marriages shall be severally decided to be valid, there is in the meantime a cloud and a disgrace necessarily hanging over every wife and every child of such a marriage; the mere doubt is almost as bad as the certainty of the invalidity. It is a fresh instance of the extreme danger of listening to what we suppose to be the voice of conscience. Here is a man generally reputed to be of the utmost humanity and the utmost conscientiousness, who disobeys the clearest words of a solemn and reiterated vow, with the necessary and deliberate result of inflicting the most cruel injury upon poor women whom perhaps he never saw before, and generations, perhaps, of unborn children, and this in obedience, as he supposes, to the dictates of his conscience. It is simply an abuse of terms. There is no conscience in the matter at all, in the sense in which that word is understood by the Court, or by any person of understanding. It was long ago pointed out by Lord Coke that a good man will obey the laws, and he quotes the heathen poet (who may give many lessons to us Christians), answering the question, "*Vir bonus est quis?*" with the ready and obvious reply, "*Qui consulta patrum qui leges juraque servat.*" It is true the heathen moralist immediately goes on to insist upon the necessity of much more than a mere observance of the letter of the law before he will concede to any man the epithet of "good;" a man may, he shows, comply with the letter and yet depart from the spirit of a law. But how can he who fearlessly transgresses both, lay claim to the epithet, or plead conscientiousness?

* * * * *

The granting and revocation of a licence are very much in the Episcopal discretion (*Poole's* case, 14 Moo., P. C., 262), at least as to curates who

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enjoy only a stipend. The case may or may not be different, where the revocation deprives a clergyman of his right to a freehold benefice. All that need be said on that argument is, that it does not arise here. On the materials now before me I must take it, at all events, that there is no freehold benefice held by the licence. It was very strongly urged, however, at the bar that where a licence is so coupled with pecuniary emolument that the money cannot be pocketed unless the licence be continued, such licence cannot be arbitrarily revoked, either in an ecclesiastical or any other case. There is much force in this argument, so far as the word "arbitrarily" enters into it. Dr. *Poole's* case is an authority for that. In fact *Poole's* case, though it declares that the Bishop or Archbishop has a discretion, insists, also, that that discretion shall be discreetly exercised, *i. e.*, not wantonly nor without due consideration, nor without notice to the curate; but when so exercised this discretion will not be interfered with. There must be some authority somewhere. I have little doubt but that it exists in this Court to examine on *mandamus*, or prohibition, or bill for injunction, or in some way, into the exercise of this discretion by the Bishop, *i. e.*, as in *Poole's* case, into the manner in which the discretion has been exercised. But if the Bishop has examined duly and disapproves, Lord Ellenborough intimates that the Court will not say "approve though you do not not approve, take our conscience instead of your own." This is especially true, perhaps, if the licence is accompanied by any interest or dignity. In fact I have been examining into that discretion in this very case; I am not sure that I was authorized to do so, but it seemed to be the desire of both parties, and the defendant, at least, loudly demanded it. I do not say that my conduct in this respect is to form a precedent. In Dr. *Warren's* case the Court being once satisfied that the Wesleyan Conference was authorized to act, refused to examine into or to at all to consider the propriety of the particular line the Conference had thought fit to adopt. The fatal error in the defendant is, that he has taken no steps to rectify or annul the erroneous revocation, if it were erroneous. He has not even attempted to restrain the plaintiff's conduct. But until set aside the revocation is, of course, in existence and in force. Take an example from this very Court.

The order which I am about to make may, in the opinion of the defendant's advisers, be wrong. But, really, until it is set aside, I must warn them that they must obey it. It will not do for them to say that I have made a mistake, and, therefore, it appears to them that I have renounced my allegiance and torn up my Commission, and I am *ipso facto* not a Judge of the Supreme Court. The other two Judges will soon be here, and this order may by them be reviewed, I am happy to say, perhaps, reversed. But until it is reversed those two Judges will enforce its observance in all its strictness, and in what they, not the defendant's advisers, deem a conscientious manner, and they would, probably, be inclined to treat any such line of action as that which I

have suggested very seriously; and this, although they should both have formed the opinion that my order on re-examination could not be allowed to stand, it must stand until it is dissolved. And so with the defandant's licence, until he gets a licence from the Bishop, either compulsorily or by the order of some competent Court, or voluntarily by making a proper acknowledgment of his errors, and praying forgiveness and promising amendment, he is an unlicensed clergyman. The Act of Uniformity says he shall not be allowed to preach or officiate, not, at least, as a clergyman of the Church of England, nor in a building consecrated to the service of the Church of England. Nor has the Bishop any choice whether he will or not take these proceedings, or some proceedings, for preventing him from so doing. The Bishop, to use the words of Sir Herbert Jenner Fust, in *Burder* v. —— (3 Curt. 831 Ec. R.), "would not have properly discharged the duties of his high office," if he had permitted an unlicensed person so to preach or officiate. There is, of course, unlimited freedom of conscience here as in England. Everybody, whether he has been ordained in the Church or not, is at liberty so far as the lay Courts are concerned, to preach what he likes, and where he likes (within certain limits of public decency). Only the law says, "You shall not do this in the character of a clergymen of the Church of England, nor in any English Church, without the licence of the Bishop. You may not run with the hare and hunt with the hounds." The defendant's counsel urged that this rule does not apply to the defendant, because to apply the rule would be to deprive him of $200 *per annum*. Really I think that is a case of oppression of conscience; this is a very curious line of argument. You are oppressing a man's conscience if you refuse to allow him to continue receiving $200 per annum when he breaks every stipulation upon which it was to be paid to him. Now the law lays down the same rule for all religious denominations, and, indeed, for all voluntary associations here, religious or secular. Leave the association and you may do as you like. But you shall not be allowed to occupy the church of your denomination, or the offices of your joint stock company (I make the comparison with some apology, but, really, the principle is exactly the same), and at the same time set at defiance the rules of the voluntary association to which you say you belong. Nay, more, you shall not be allowed to act here, or hold yourself out as the agent of the association, trading or otherwise, against and in defiance of their rules. Everybody will see the monstrous injustice of allowing the secretary of an insurance company, after he has been suspended by the manager, to continue in occupation of the company's offices, or allowing him to set up next door, or anywhere within the sphere of the company's business, and hold himself out to the world as secretary to the company still. And surely the injustice to the company would not be less if the Court, by refusing to interfere, enabled this *soi disant* secretary to draw salary out of the company's funds. That, really, is the whole of the case.

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The manager may be wrong, but while the secretary is suspended he really may not stay there.

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The plaintiff in this case comes here in performance of a statutory duty, the continued neglect of which would subject him to very painful personal consequences; and it even appears to me that the churchwardens of Christ Church, or perhaps any three or more members of the congregation, might probably have successfully applied for a *mandamus* very many months ago, to compel the Bishop to interfere much more vigorously than he has done. I am very far from saying the Court could interfere without the Bishop, or in any way, except simply to supply coercive power to a lawful order. His reluctance to exert his power may, however, obviously be imputed to motives of the most Christian forbearance; it is the proverbial propensity of Bishops, which gives rise continually to complaints. It certainly does not lie in the defendant's mouth to raise any objections on the score of laches, and to do him justice, he did not raise any such objection. But if the defendant had been at once in December, 1872, excluded from the pulpit of Christ Church, until due submission, I should not now have had the most painful duty of attending to this distressing case, and probably much correspondence of a most disagreeable nature would have been avoided.

There must be an injunction, as the defendant will not make proper submission, which even now I should strongly suggest to the plaintiff's counsel to accept if offered. There is no offer, so there must be an injunction as prayed. It will be until further orders. I hope, if the defendant will submit, that this order may by consent be presently dissolved and the whole bill dismissed. I make no other order except for the injunction, which will be distinctly understood to extend most especially to celebrating marriages.

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This case came on for final hearing before Gray, J., on the 28th and 29th April, 1875, who on the 18th of May delivered judgment, making the injunction perpetual.

In consequence of some observations of the learned Chief Justice, the bill had been amended in form by alleging with more particularity the breaches of the several articles charged.

McCreight, Q. C., for the plaintiff.

The defendant was not represented.

GRAY, J.:—

The present motion on behalf of the complainant, on the bill filed as amended, is for a decree,—

"1. That the injunction issued may be made perpetual, and that the "defendant may be restrained by the injunction of this Honourable "Court from preaching or officiating in the said church of Christ "Church, and otherwise acting in the said cure of Christ Church, ac- "cording to his former licence, and acting elsewhere in the diocese as a "minister of the Church of England.

"2. That it may be declared that the licence of the defendant has "been revoked.

"3. That it may be declared that the defendant has failed to conform "to the discipline and government of the United Church of England "and Ireland, as in the said deed mentioned, was and is removable, and "has ceased to be entitled to any benefits arising from said trusts, "under the said Indenture of the 6th day of May, A. D. 1864, or to "make use of the said hereditaments before referred to as his resi- "dence.

"4. That the plaintiff may have such further or other relief as the "nature of the case may require."

The defendant, on the present occasion, neither objects or assents to the motion.

The points raised on the original application were substantially the same that are raised now, and upon the determination of which the decree must depend, save that, in addition to the result then obtained, it is now sought that the injunction should be made perpetual: that the defendant should be enjoined from further using the hereditaments referred to as his residence: and that he be ordered to pay the costs of the proceedings.

Since the issuing of the injunction the defendant has sent to the complainant, as Lord Bishop of Columbia, a letter, in which, after announcing the resignation of the church-wardens of Christ Church, he says:—

"I also beg to resign my position as a clergyman under your jurisdic- "tion as Bishop, if jurisdiction still appertains to you in that capacity," adding that he had been forced to that step by the result of the complainant's application to the Supreme Court for an injunction to restrain him from officiating as a clergyman of the Church of England, in Christ Church or elsewhere.

As disclosed by the affidavits filed in this cause in the month of March last, the defendant has, since such letter, officiated, and still continues to officiate, as a clergyman of the "so-called Reformed "Episcopal Church," the prayer book used in which Church, as appears by the exhibit referred to in the affidavit, is not the prayer book used

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in the Church of England: that he has not taken any steps to dissolve the injunction, or expressed any desire to be restored to his former position of a licensed clergyman of the Church of England: and that he still occupies, as his residence, the parsonage house and glebe reserved for the incumbent of the Cathedral of Christ Church.

The facts thus disclosed, and the remedies asked for, render it necessary to determine whether the revocation of the defendant's licence to officiate as a clergyman of the Church of England in this diocese was in accordance with the laws which govern the Church of England; and whether the facts proved against him show such a failure to conform to the discipline and government of the Church of England, as to justify his removal from the enjoyment of the rights, emoluments, and profits under the trust deed set out in the bill.

It is no question of religion, in the sense of the worship of God. It is simply a question of law, affecting the personal and temporal enjoyment of certain wordly properties, funds, rights, and privileges, and the exercise of temporal wordly power; whether the position and office of the complainant, in context with the position and office of the defendant, gave the former the right to do what he claimed, and required from the latter the obedience which he refused; whether in accordance with the laws governing the Church or society to which they both belonged, the former had a right to demand, or the latter to refuse what was demanded. It is no question of approval or disapproval of the judicious or non-judicious exercise of the complainant's discretion as Bishop, but, was it legal?

If it were purely a question of religion, or of approbation, it ought not to be in this Court. The Courts of Law do not deal with questions of belief, or faith, or doctrine, further than as they may be incidental to some matter of position, property, emolument, or profit, pecuniary or otherwise,—or subservient to the administration of justice in eliciting that form of oath, or mode of delivering testimony which, as binding on the conscience, will best secure the truth, or inflict the penalties of perjury for falsehood.

No man is compelled to belong to a Church or society of which his conscience disapproves, but *while* he belongs to it he must be governed by its laws. He cannot refuse to abide by the conditions of membership, yet claim its advantages. Stripped of misplaced covering,—in this Court, the difference between the complainant and defendant resolves itself into a naked question of money and power, unproductive of sentiment, enthusiasm, or prejudice.

The laws which govern the Church of England as an institution are to be found in the Common Law and Statutes of the Realm, in its Canons, and Prayer Book, and a long train of judicial decisions, which declare the construction to be put upon those laws.

The learned Chief Justice, in his able judgment previously referred to, and in which I fully concur, has already decided that the Church of England in this diocese is a branch of the Church of England, to be governed and guided by her practices and discipline, by which all her members are bound; that the tribunal of assessors, before which the preliminary facts charged in the several articles set out in the bill were investigated, was a legal and proper tribunal, in accordance with those practices and discipline, as far as applicable to this country; that the finding of that tribunal was not unreasonable; that the proceedings before it were conducted in a way consonant with the principles of justice, as understood in a Court of Equity; that the defendant, as a clergyman of the Church of England in this diocese, having received his licence from and taken the oaths of canonical obedience to the complainant as Bishop of Columbia, was under his jurisdiction as such Bishop, and that the revocation by the complainant, as such Bishop, of the defendant's licence to officiate as a clergyman of the Church of England therein, in consequence of the finding of that tribunal, was within the power of the complainant, as his Bishop, in conformity with the practice of the Established Church of England, and appropriate to the offence. The Law of the Church, the Canons, the Letters Patent, gave him that power, and he exercised it. (*Poole's* case, 14 Moo. P, C. 262.)

The defendant has so far acquiesced that he has for the present become a member of a different church, and the pastor of another congregation; but his letter of resignation is qualified; and the 28th paragraph of the amended bill alleges that he contends that the revocation of his licence is illegal, and that he intends to officiate as before the revocation.

As this paragraph was in the original bill, it would not, perhaps, have been necessary to give to the intention there expressed much weight, were it not for the tone and qualification in the defendant's letter, addressed to the plaintiff, after the judgment of the Court. His case had been put forward on his behalf, during the several days the argument was heard, by one of the ablest, and certainly most judicious, counsel in the Province. The highest tribunal had given it the most patient hearing, and, after full consideration and the greatest forbearance towards the defendant, had pronounced his position untenable, and that in law the authority was vested in the complainant as his Bishop; and the defendant had, by his oath of canonical obedience, so recognized it. His letter, therefore, simply amounts to nothing, and necessitates the final action of the Court.

The judgment of the Court on the former occasion being but interlocutory, it is now sought to make it, so far as it went, final, and to obtain other relief. Fully adopting the law as already declared, it is simply necessary to determine how far the further action of the Court may be invoked.

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The 21st paragraph of the amended bill is as follows:—

"By indenture bearing date the 6th day of May, 1864, between "the Governor and a Company of Adventurers of England, trading "into Hudson Bay of the first part, and His Excellency Arthur Edward "Kennedy, C. B., Governor of Vancouver Island of the second part, "and the said Kennedy, as such Governor as aforesaid, the Most "Reverend C. T., Lord Archbishop of Canterbury, and the Right "Reverend Lord Bishop of Columbia, who, with their successors "and assigns, were thereinafter called the 'trustees thereof for the "'time being,' of the third part, after reciting as therein is recited, "it was witnessed that the said Governor and Company with the "consent of the Crown, testified by the execution of the said "presents by the Governor of the said Colony, did grant to the said "trustees, and to the use of them, and their successors, all the heredi-"taments therein mentioned, being generally known as the Christ 'Church Reserve, and containing the piece or parcel of land upon "which Christ Church was and is erected, upon trust as to the said "piece of land last mentioned, among other trusts in the said deed "contained, that the edifice known as Victoria District Church, or "Christ Church (being the said church), or any other church or "cathedral thereafter to be built, instead thereof should, when "consecrated by the Bishop of the Diocese, be and remain devoted to "the service of Almighty God henceforth and forever. And upon "trust as to a certain other portion of the said hereditaments, to "permit and suffer the defendant so long as he should remain incum-"bent of Christ Church aforesaid, to use, occupy, and enjoy the same "as his residence. And so soon as he should vacate the said "incumbency as thereinafter mentioned, upon trust to permit and "suffer the incumbent for the time being of Christ Church, in manner "thereinafter mentioned, to use and enjoy the same during his "incumbency, and so on from time to time. And upon further trusts "as to nearly all the residue of the said hereditaments described in the "said indenture, and known as the Christ Church Reserve in the first "place, out of the rents, incomes, and profits thereof, to defray all the "reasonable expenses and charges incurred in the execution of the "trusts therein contained, or any of them. And in the next place, "upon trust out of the said rents, incomes and profits, to pay yearly "and every year, by equal quarterly payments as therein mentioned, "to the defendant, so long as he should continue incumbent of the "said church, and by way of a stipend an annual sum of £600 "sterling, or such part thereof as should or might in each year be "derived from the above source in manner aforesaid. And from and "after the decease of the defendant, or other sooner determination of "his incumbency, upon trust to pay the same annual stipend, or such "part thereof as aforesaid, to such other persons as shall severally "and successively thenceforth and forever be presented to the said

"incumbency of Christ Church by the Bishop of the Diocese for the "time, so long as such said several persons respectively continue to be "incumbents of the said Rectory of Christ Church—provided that the "said defendant and each of his successors in the said incumbency "should be deemed for the purposes of the said deed to continue "incumbents thereof until he should die or resign, or be removed from "the said Rectory or incumbency. Provided also that no such removal "should take place except for failure to conform to the Doctrine, "Worship, Discipline, and Government of the said United Church of "England and Ireland, and that every such removal should be subject "to such appeal and review as are herein mentioned, all which by "reference to the said deed, will fully appear. And the plaintiff "craves leave to refer more particularly to the said Indenture of 6th "May, 1864."

The 27th paragraph states that the said A. E. Kennedy was, by the terms of the deed, to be such trustee only while he remained Governor of Vancouver Island, and that in 1866 he ceased to be such Governor or to act in the said trust, and has since been absent therefrom, and that the Archbishop of Canterbury never was in the Province, never acted, and has declined to act in the trusts.

The allegations in these paragraphs have not been denied, and the fact that the defendant has ceased to be the incumbent of the said Church has been shewn by the revocation of his licence, clearly within the authority of *Poole's* case (14 Moo. P. C. 262), and his removal for failing to conform to the discipline and government of the United Church of England and Ireland, throughout these proceedings called the Church of England, which revocation and removal have not been appealed against or reviewed, but have been, by the interlocutory order, judicially declared to be legal.

Thus it appears that, on the part of the defendant, there is a direct pecuniary interest, and on the part of the complainant the management of a trust estate and fund.

In the somewhat analogous case of the *Attorney-General* v. *Pearson* (3 Mer. 353), A.D. 1817, Lord *Eldon* observes that the religious belief is irrevelant to the matter in dispute except so far as the King's Court is called upon to execute the trust, and that he has nothing to do in that Court in the way of pronouncing any opinion as to any religious doctrine whatever; that the case must be discussed exactly as if it were the case of a charity properly created, having no relation whatever to any religious purpose.

The case of *Forbes* v. *Eden* (L. R. 1 H. L. Sc. 581), decided in 1867, recognizes the principle clearly and distinctly: That while the Courts of Law will not interfere in mere questions of doctrine, yet whenever a pecuniary benefit is involved, the right to the use of a house or land, the enjoyment of property, funds, emoluments, or

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profits, the Court will enquire, for the purpose of satisfying itself, who is entitled to the fund, enjoyment or use. This principle it extends to voluntary religious associations, so that if the Church of England in a Colony be regarded simply as a voluntary association, it would be embraced within the rule.

Story on Equity, and *Eden* on Injunction, both maintain that for the purpose of discouraging a multiplicity of suits where Courts of Equity have once acquired cognizance of a suit, they will not, for the purposes of relief, send the parties back to a Court of Law to obtain it, but will give it themselves by the exercise of their own inherent powers, and it may be safely laid down as a general rule, that the power to apply the remedy is co-extensive with the jurisdiction over the subject matter. (*Waterman's Eden* notes, c. 17). In *Pearson's* case, already referred to, Lord Eldon intimates that such relief should be as prompt as possible.

To the enjoyment of the hereditaments referred to in the trust deed as the incumbent's residence, and the annual stipend from the general rents and profits of the residue after the deductions pointed out, the defendant cannot be longer entitled, but the complainant is bound, out of these rents and profits, to pay the incumbent for the time being, and to give him the part reserved for his residence. This trust he cannot carry out as long as the defendant remains, and, in coming to this Court to have the interlocutory order confirmed, he is justified in seeking to be put in a position to carry out the trust.

Daniel's Chancery Prac., 2 vol. 1518, chap. 36, lays it down that the practice of extending injunctions at the hearing so as to render them perpetual, is applied to prevent a continuation or repetition of acts for which the party has no legal authority whatever,—or when the same question is likely to be contested in a multiplicity of suits, (p. 1520)—and it is further said (1521) that the plaintiff has a right to proceed with his cause for the purpose of making his injunction perpetual, although he has obtained an interlocutory injunction which has been *acquiesced in by the defendant.* The defendant's legal right to act as a Minister of the Church of England in this Diocese having been determined by the revocation of his licence, and to the hereditaments, by his removal as incumbent, the complainant is entitled to the relief prayed for.

It is hardly necessary to consider that part of the case cited by the learned counsel for the complainant, of *Barnes* v. *Shore* (11 Jur. 887, cited in *Brodrick & Freemantle's* Ecclesiastical Judgments, p. 44), in which Sir Herbert Jenner Fust affirms that so officiating after revocation would subject the offender to ecclesiastical censure; but Lord Denman in the preliminary observations on that case relative to the writ of prohibition applied for, declares that a person ordained a priest in the Church of England cannot, at his own pleasure, divest himself of his orders, so

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as to exempt himself from correction by the Bishop for breach of ecclesiastical discipline. If the converse of this position be true, that being open to punishment he is entitled to the benefit of his orders, the complainant, as Bishop of the Diocese, is entitled to press making the injunction perpetual; otherwise, notwithstanding his subsequent acts, the defendant might, at his own convenience, re-assert his right to his former position. This may be deemed the more necessary, as the Clerical Disability Act of 1870, which meets the difficulty in England, may perhaps be held not to extend to this Province.

Seton, on Decrees, 2 vol., 1228, recognizing the power of the Court to enforce its order in such a case, gives the form of a writ of assistance, for putting the party in whose favour the order is made into possession of the hereditaments.

The power and practice of the Court to make the injunction in such a case perpetual, and to remove the defendant from the hereditaments in this is thus clearly shewn.

The grounds for asking the Court to enforce this power, are claimed to be:—

1st. The revocation of the defendant's licence, after adjudication, within the scope of authority, and after a trial in accordance with the principles of justice.

2nd. That the grounds of adjudication, the breaches of the canons by the defendant, the authority of the complainant, as his Bishop, and his oath of canonical obedience, as set out at length in the bill, have been proved, and sustain the proposition just enunciated.

3rd. That the facts proved shew such a failure of the defendant to conform to the discipline and government of the Church of England, as to justify the revocation of his licence and his removal from the enjoyment of his rights and benefits under the trust deed, created for the incumbent of Christ Church.

These propositions were substantially affirmed by the Chief Justice in his decision in October last. On the present hearing they have not been denied or disputed. After a full examination of the evidence, and a thorough consideration of the case, with the law applicable thereto, I have come to the same conclusion, and also decide them in the affirmative.

In thus briefly stating my conclusion for the purposes of the decree, I refrain from discussing the particular facts, and the application of law to each, because—1st, it is unnecessary; 2nd, it is not desirable to re-awaken polemical controversies, which generally disregard the teachings of the religion sought to be maintained, by violating the rules of charity it lays down.

It would be well if this decree could rest here, but the motion is that the prayer of the bill be granted with costs. A long succession

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of cases determines that costs follow the event as a general rule. (*Bartlett* v. *Wood*, 30 L. J. Chan. 614; *Caton* v. *Caton*, L. R., 2 H. L. 127; *re Suburban Hotel Co.*, L. R. 2 Chan. App. 737; *Daniel's* Chancery Practice, 1264.) And in *Long* v. *The Bishop of Cape Town*, where even the points of law were doubtful; where the questions raised were entirly new, and hitherto undetermined, as well as being of the greatest moment; and where also the unsuccessful party was admitted to have acted from the best of motives, and to have had reason to believe that he had authority to do as he had done, yet, nevertheless, the Court felt constrained, in obedience to the general rule, to grant the costs.

* * * * *

Let the decree be made out, granting the prayer of the plaintiff's bill with costs.

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Supreme Court of British Columbia—Divorce Jurisdiction—Nullity of Marriages—Introduction of English Law.

16th January.
14th February.

Held, by Crease and Gray, JJ. (Begbie, C. J , *dissentiente*),—

1st. That the Supreme Court of British Columbia has in British Columbia all the jurisdiction conferred on the "Court for Divorce and Matrimonial Causes" under the "Matrimonial Causes Act, 1857," (20 and 21 Vic., c. 85), as amended by 21 and 22 Vic., c. 108.

Per Gray, J.:—That the Legislative adoption by British Columbia in March, 1867, of the English Law as it existed in England on the 19th November, 1858, did not necessitate the adoption of the machinery by which the English Law was carried out in England, but, coupled with the language constituting the Supreme Court in British Columbia, was a direct Legislative sanction and authority to carry out that law in the Province by local tribunals and local machinery, and clothed the Supreme Court of the Province with ample power to hear and determine Divorce and Matrimonial Causes.

This was a suit in the Supreme Court of British Columbia, for nullity of marriage, brought by an alleged wife by reason of the alleged impotence of the husband. It came up for hearing, by petition, on 16th January, 1877, before the Hon. Sir Matthew Baillie Begbie, Knight, C. J., and the Hon. Mr. Crease, and the Hon. Mr. Gray, JJ., the then three Judges of the Court.

Before hearing the petition the Court requested *Drake*, who appeared for the petitioner, to argue the question whether or not the Court had jurisdiction to entertain the application.

No one was heard on the other side.

Cur. adv. vult.

GRAY, J.:—

This is an application for a decree of nullity of marriage under the Divorce and Matrimonial Causes Act of 1857 (20 and 21 Vict., c. 85,) as amended by 21 and 22 Vic., c. 108 (1858).

The Court directed before hearing the petition, that the question of its jurisdiction should be argued, and whether this Court has or has not jurisdiction is now to be declared.

Both of my learned brethern may claim that they are coeval with the law in this country; with its history from its inception they are familiar; in its political, social, legislative, and judicial vicissitudes they have shared; whatever those have been each, like the founder of one great empire, might with justice exclaim, "*quæque ipse vidi et quorum pars magna fui.*" For myself I have no such advantages, memory can supply no vacancy, and I can only look to the public records of the country and its legislation for those facts which will support the conclusion in law at which I have arrived.

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By the "British North America Act, 1867," 91st section, all legislation on the subject of "marriage and divorce" is reserved to the Dominion Parliament, but by the 129th section all laws in force in the separate Provinces at the Union, and "all Courts of Civil and Criminal "Jurisdiction, and all legal commissions, powers and authorities, and all "officers, judicial, administrative, and ministerial existing therein at the "Union shall continue in" the separate Provinces "respectively, as if the "Union had not been made; subject, nevertheless (except with respect "to such as are made by or exist under Acts of the Parliament of "Great Britain, or of the Parliament of the United Kingdom of Great "Britain and Ireland) to be repealed, abolished, or altered by the "Parliament of Canada, or by the Legislature of the respective Pro-"vinces, according to the authority of the Parliament, or of that Legis-"lature, under this Act."

At the time of the Union of British Columbia with Canada in 1871, what then were the Courts, powers, authorities, and jurisdiction which existed in British Columbia on this subject?

The first Supreme Court in Vancouver Island was established by Order of the Queen in Council on the 4th of April, 1856, under authority of the Imperial Act, 12 and 13 Vic., c. 28, in the following words:—

"That the said Supreme Court shall have cognizance of all pleas, "and jurisdiction in all civil cases arising within the said Colony, "with jurisdiction over Her subjects residing and being within the "said Colony, and shall have all such equitable jurisdiction, and "all such powers for enforcing and giving effect to the same as the "High Court of Chancery hath in England, and shall have power "to appoint and control guardians of infants, and of their estates, and "committees of the persons and estates of lunatics, idiots, and such as "being of unsound mind are unable to govern themselves and their "estates, and to institute all such examinations as the Court shall deem "necessary to ascertain such idiotcy, lunacy, or unsoundness of mind, "and shall have exclusive jurisdiction in all questions relating to testacy "or intestacy, and the validity of wills of personal property as fully as "any Ecclesiastical Court hath in England, and shall have power to "grant probates of wills, and letters of administration of the estates and "effects of deceased persons, being in the said Colony of Vancouver's "Island, and to take order for the due passing of the accounts of their "executors and administrators of such deceased persons, and for the "proper custody of the estate and effects of such deceased persons, and "for the delivery of the same to the person entitled thereto."

"And Her Majesty doth further give and grant to the said Supreme "Court full power, authority, and jurisdiction to apply, judge, and "determine upon, and according to the laws now or hereafter in force "within Her Majesty's said Colony."

This order, it is plain, at that time gave no power in causes matrimonial, because when speaking of the ecclesiastical jurisdiction conceded, which at that time the Courts in England had of matrimonial causes, nullity of marriage, &c., &c., it limited the grant to probate of wills, letters of administration, passing of executors' accounts, &c., &c. Again, neither the Ecclesiastical Court in England itself, or any other Court at that time, had the power of divorce *a vinculo*, and there was no law for granting the same.

The power of future expansion that might result from the words "Laws hereafter in force in the Colony" in the second division of the order, after passing the Divorce and Matrimonial Causes Act in England in 1857, and the adoption of the English law in the United Province in 1867, it is not necessary at this stage of the argument to consider.

The Supreme Court in British Columbia (the Mainland, so called, at that time being a distinct and separate Colony and Government from Vancouver Island) was established by Proclamation in June, 1859, under authority of the Imperial Act, 21 and 22 Vic., c. 99 (A. D. 1858).

By the 2nd section the Queen is authorized by an Order in Council to make, ordain, and establish, and (subject to such conditions or restrictions as to Her should seem meet) to authorize and empower the Governor of British Columbia to make provision for the administration of justice therein, and generally to make, ordain, and establish all such laws, institutions, and ordinances as may be necessary for the peace, order, and good government of Her Majesty's subjects therein; provided that all such Orders in Council, and all laws or ordinances to be made as aforesaid shall be laid before both Houses of Parliament as soon as conveniently may be after the making and enactment thereof respectively.

By section 3 the Governor of British Columbia is authorized to constitute a Legislature to make laws for British Columbia, and by section 6 to provide for the future incorporation of British Columbia and Vancouver Island.

Under the authority of this Act of Parliament the then Governor of British Columbia, Sir James Douglas, established a Supreme Court by Proclamation, in June, 1859. Its jurisdiction was declared in the following words, section 5: "The said Supreme Court of Civil Justice "of British Columbia shall have complete cognizance of all pleas "whatsoever, and shall have jurisdiction in all cases, civil as well as "criminal, arising within the said Colony of British Columbia." It will be here observed that there is no definition in detail of the jurisdiction exercisable, as in the case of the Supreme Court of Vancouver Island, previously in April, 1856.

By the authority of the Imperial Act, 29 and 30 Vic., c. 68 (August, 1866), the Colony of British Columbia and Vancouver Island were

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united under the name of British Columbia, by Proclamation dated 17th November, 1866.

The 5th section of this Act says: "After and notwithstanding the "Union, the laws in force in the separate Colonies of British Columbia "and Vancouver Island respectively, at the time of the Union taking "effect, shall, until it is otherwise provided by lawful authority, remain "in force as if this Act had not been passed or proclaimed."

Section 6.—That nothing in the Act is to "take away or restrict the "authority of the Governor of British Columbia, with the advice and "consent of the Legislative Council thereof, to make laws for the "peace, order, and good government of British Columbia, either "before or after the Union."

Immediately after the Union of the two Colonies under the name of British Columbia, in March, 1867, it was enacted by the Governor, with the advice of the Legislative Council (Ordinance No. 70, section 2), as follows:—"From and after the passing of this Ordinance, "the Civil and Criminal Laws of England, as the same existed "on the 19th November 1858, and so far as the same are not "from local circumstances inapplicable, are and shall be in force in all "parts of the Colony of British Columbia," with a proviso that all modifications of those laws passed by Legislative authority on the Mainland or the Island before the Union, as affecting either, should continue.

It is to be remembered that previous to this time, and from the first commencement of Local Government on the Mainland, proclamation to a similar effect with reference to the introduction of English Law on the Mainland had been made, which proclamation on its extension to the United Province was, by this Ordinance of 1867 repealed.

By an Ordinance made by the same authority after the Union, in March, 1869, No. 112, "To regulate the Supreme Courts of Justice of "British Columbia," provision is made for keeping up the distinction between the Supreme Court of the Mainland and the Supreme Court of the Island, that existed before the Union, and the relative rank of the Chief Justices, but section 11 declared:—

"That upon a vacancy being created by death, resignation, or other-"wise, of one of the two Chief Justices, the said Supreme Court of "the Mainland of British Columbia and Vancouver Island shall be "merged into one Supreme Court, to be called the 'Supreme Court of "British Columbia,' and the surviving or remaining Chief Justice shall "preside over the said Court, and shall be called 'the Chief Justice of "British Columbia,' and a *Puisne* Judge of the said Court shall there-"upon be appointed by Her Majesty, Her heirs, or successors, by "warrant under her or their Sign Manual and Signet, and receive the "annual salary of £1,000, and all the jurisdiction, powers, and

"authorities of *the two present existing Supreme Courts* and of the "Judges thereof, shall *be vested* in, and shall be had, exercised, and "enjoyed by the said Supreme Court of British Columbia and the "Judges thereof."

By Ordinance, No. 135 (April, 1870), the resignation of the Chief Justice of the Supreme Court of Vancouver Island is stated, and the merger of the two Courts declared complete "for all purposes what-"soever, from the 29th March, 1870, and shall be so recognized in "judicature, and thereout, in all proceedings, matters, and things, by "all persons and for all purposes whatsoever."

Ingenuity could hardly use more comprehensive language, without the most absurd tautology.

Thus the present Supreme Court becomes, as it were, the inheritor, not only of the detailed jurisdiction first given in the formation of the Vancouver Island Court, but also of the more enlarged jurisdiction given by the constitution of the Court of the Mainland when it was created in 1859, as well as of any increased power, the Supreme Court of Vancouver Island acquired, after the introduction of the English Law in 1867, from the terms in the second division of the order creating it, giving jurisdiction to adjudge and determine upon, and according to, the laws thereafter to be in force in the Colony.

The question then is—

1st. Is there anything in the statute passed by the Imperial Parliament (20 & 21 Vic., c. 85), intituled "An Act to amend the law relating to Divorce and Matrimonial Causes in England," passed on the 28th August, 1857, as amended by 21 and 22 Vic., c. 108, passed 2nd August, A.D. 1858, which, from local circumstances, would render it inapplicable to British Columbia, the Legislature of that Colony having specifically enacted that the civil and criminal law of England, as the same existed on the 19th November, 1858, where from local circumstances not inapplicable, should be in force?

2nd. Are the words constituting the Supreme Court sufficiently comprehensive to give it jurisdiction in divorce and matrimonial causes?

The two questions involve the principle and the machinery.

I am afraid it must be conceded the principle is not, from local circumstances, inapplicable; adultery is not an impossibility in British Columbia. Impotency, consanguinity within the forbidden decrees, are not impossiblities. No sane man will question that in cases of marriage these are wrongs for which there should be a remedy. In England previous to 1857 there was no Court vested with power to dissolve marriage *a vinculo*, and for that purpose, in each individual case, a special Act of Parliament had to be obtained and passed; but in England's more practical Colonies such powers were exercised and

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given by the local Legislatures to locally constituted Courts in the Provinces as far back as the early part of the reign of George III., previous to the present century—in New Brunswick in 1791, in the first instance, to the Governor in Council, subsequently to the Supreme Court, and in Nova Scotia even before. The subject was repeatedly legislated upon, the jurisdiction frequently exercised, and the rights and consequences of the Court's decision never questioned. In Old Canada—that is Ontario and Quebec—the Courts were not vested with such power from local reasons, in Quebec arising out of the old Canadian laws and religion, and in Ontario—then Upper Canada—because at the time the latter adopted the English law relative to property and civil rights in 1792, no such power was vested in the Courts in England, and the Local Legislature did not confer it. I refer to the circumstance of Nova Scotia and New Brunswick assuming and exercising the jurisdiction, to shew that there is nothing striking or unusual in considering that such a right belonged, and does now belong, to British Columbia, if the words defining the jurisdiction of the Supreme Court are sufficient to embrace it.

Marriage in British Columbia is purely a civil contract, it is regulated by a local Ordinance, No. 89, passed within one month after the introduction of the "English Law Ordinance, 1867," before mentioned, in 1867. By that Ordinance, No. 89, marriage requires no religious ceremony. It may be performed by a Minister of a Church, or by the District Registrar, as the parties desire. It may be made for money, or be made for love. All that is required is that the parties shall be capable of contracting, and that whether performed by a Minister or Registrar, certain prescribed preliminaries should be gone through, in view of any possible issue, and the rights of property that might result therefrom, or the punishment of parties entering into such contract where a pre-existing contract of the same nature was in force.

The fact that with most persons it is treated as a religious ceremony, sanctified by the solemn service of some holy place and hallowed by affection, does not alter the law, or give to it, in legal light, incidents other than those pertaining to other civil contracts.

By section 19 of this same Ordinance it is enacted "That in all "matters relating to the mode of celebrating marriages, or the validity "thereof, the qualification of parties," &c., "the law of England shall "prevail, subject to the provisions of that Ordinance." It was thrown out in the course of the argument, that "the validity thereof" must be held as limited to questions thereon incidentally arising in the trial of some other matter, or at any rate being construed as pertaining to the previous part of the sentence—the mode, &c.; but the modes, the qualifications, the consent, &c., are mere mediums by which the validity of the result is to be determined. The result is the

marriage—is it good or bad?—and the "validity thereof" means the direct question of the marriage, the only restriction being that in trying that question the law of England must prevail.

The principle of the English Divorce Act not being inapplicable, have we the machinery to carry it out, in the case of a local marriage, or is all this legislation to be nugatory because we have not? A Lord Chancellor, a Lord Chief Justice of the Court of Queen's Bench, a Lord Chief Justice of the Common Pleas, a Lord Chief Baron of the Exchequer or a Judge of the Court of Probate (constituted by chap. 77, passed by the Imperial Parliament in the same session, to be called the Judge Ordinary), being the special tribunal, of whom any three, the Judge Ordinary being one, is to constitute the Court in England under this Act. Or, in such a case, must the injured party necessarily go to England, before this specific tribunal, to get his remedy? though we have three Judges in this Province, admittedly exercising the jurisdiction to its fullest extent in all local matters that each one or the whole of those Judges exercise in England in English matters, the three constituting a Court in number (if such were necessary) and jurisdiction equivalent to the three in England. Does not the Supreme Court of this Province exercise the powers of the Chancery and the Exchequer, without a Chancellor or a Baron? In no instance has it been deemed necessary to have the English machinery; we adopt the principles and the rules of practice, but not the officers of a Court. In no other instance has it ever been contended that *in a local matter*, after having adopted an English law bearing on the subject, we must go before the specific tribunal established in England to dispose of that subject when the question thereon arises in England, or that we cannot dispose of it at all, because we have not "*eo nomine*," the particular tribunals and officers by which it is to be disposed of in England. The action of Local Legislatures, in adopting laws and creating tribunals for local purposes, when constitutionally taken, must be received as a legislative declaration that for all local purposes those tribunals are competent to carry out those laws. If this principle be sound, when the Legislature of British Columbia, after the union in 1867, adopted for the whole Province the English law as it existed on the 19th November, 1858, which permitted pleas of divorce and matrimonial causes, and at the same time merged the two pre-existing Courts into one, with the combined powers of both, with power to have "complete cognizance of all pleas whatsoever," it was a clear legislative declaration that in all local matters of that nature, that Court as then constituted, had jurisdiction and was empowered to act. It would be inconsistent to hold that we adopt an English remedial law for local purposes, but when you want to use the remedy you must go to England to get it. When adopted it becomes local law.

The important question then arises, are the words constituting the

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Supreme Court sufficiently comprehensive to clothe it with the powers requisite to work out the Divorce Act?

To apprehend the effect of those words thoroughly it is well to look historically at the constitution of the Courts in the other Provinces. There, where the populations were large, the interests varied, and the bar numerous, enabling a subdivision of labour, distinct Courts were created, with specifically defined powers, each revolving in its own orbit and exercising jurisdiction in its own sphere. Common Law, Chancery, Probate, were all distinct; and, in addition, Nova Scotia and New Brunswick assumed, without question, the divorce jurisdiction. In Vancouver Island, the Supreme Court is created, merging these separate jurisdictions in one, clothed with the powers of the Courts of Common Law and Chancery in full, and of the Ecclesiastical Court to a specified limited extent, and with future powers of expansion according to the laws thereafter to be in force; but when we come to the Mainland of British Columbia, in which the preamble to the Imperial Act says: "It is desirable to make some temporary provision for the "Civil Government of such territories, until permanent settlement shall "be thereupon established and the number of colonists increased;" and where, consequently, sending all these Courts with their officers and separate jurisdictions, or even creating one with the separate details, would sound like a waste of words; we find the Court curtly clothed with power "to have complete cognizance of all pleas whatsoever, "and jurisdiction in all cases, civil as well as criminal, arising within "the Colony of British Columbia." Moreover, this comprehensive language was at a time when it was well known that the whole policy of the English law on an important branch had been changed, increased jurisdiction and extended cognizance of pleas given, and was well known and recognized at the time that the entire English law, when from local causes not inapplicable, was by competent authority proclaimed to be the law of British Columbia.

At the time such liberal powers were given, whether wisely or not, it was probably thought of little consequence, owing to the smallness of the population and the improbability of any extraordinary exercise of them being required.

It was like the gift of a large fortune to an infant. The child cannot possibly use it, but when he comes of age, or should his rights descend to others, those rights cannot be abridged, because the grant was inconsiderate at the time it was made. The question would be its extent, not the prudence of the concession, or the requirements of the past. By virtue of these comprehensive terms, that Supreme Court of British Columbia in all local matters exercised the powers of chancery, common law, probate, and administration of the estates of intestates. It is superfluous to observe that Admiralty jurisdiction would not be included, as that is ex-territorial. No detail, no special

legislation, was deemed necessary. If not by virtue of these comprehensive words, all proceedings in equity, and all *probates*, and *letters of administration* on the Mainland after June, 1859 (the date of the proclamation of the constitution of a Supreme Court on the Mainland previous to the Union with Vancouver Island,) were without authority of law, and more particularly the latter, as by the Imperial Act, 20 & 21 Vic., c. 77, passed just three days before the Divorce and Matrimonial Causes Act, amending the law relating to probate and letters of administration, the jurisdiction of all pre-existing Courts over those subjects was abolished, and a new Court and special jurisdiction enacted therefor. But if comprehensive enough for that purpose, they must be comprehensive enough to include the cognizance of pleas touching contracts of marriage. There are no words of limitation as to the nature or object of the pleas of which cognizance is given. It is a well-known principle that in construing the grant of powers to a Superior Court the rule is to enlarge, not restrict, as tersely pointed out by Mr. Justice Willes, in *The Mayor of London* v. *Cox* (L. R. 2 H. L. 239), quoting from *Peacock* v. *Bell* (1 Wms. Saund. 101 r.): "The rule for jurisdiction is that nothing shall be intended "to be out of the jurisdiction of a Superior Court but that which "specially appears to be so; and on the contrary nothing shall be "intended to be within the jurisdiction of an Inferior Court but that "which is so expressly alleged."

The Supreme Court of British Columbia has, since the Union and the merger of the two Courts, practically decided the point. The case of *Scully* v. *Lee*, argued on demurrer before the present Chief Justice in 1870, was an action of criminal conversation. The defendant demurred to the declaration upon the ground that the action of criminal conversation had been abolished by the Divorce Act. The Court sustained the demurrer under the 59th section. The case of *Lawrence* v. *Egerton*, before the same learned Judge, was to the same effect. If the Act was, therefore, in force in the Province so as to deprive the injured party of the remedy he would have had at law if the Act was inapplicable, it must be equally in force to give the substituted remedy by the 33rd section, otherwise it would be a direct premium to the adulterer. The action of criminal conversation was a common law right (case, or trespass), by which the injured man obtained redress. It is almost a co-relative proposition, if by the same statute you take away the one you must give the other. It is not giving it telling him he must go to some other country to get it.

The substituted remedy is to be obtained on a petition for dissolution of marriage, or judicial separation, or on a petition directly limited to such object,—where? In the Courts of your own Province where the contract was made. The Act must apply in its remedial as well as in its restricting parts.

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It has been urged as a presumption against the grant of any such power, that the instructions to Colonial Governors were against assenting to any law for divorcing persons joined in marriage. Laying aside the doubt whether this is not to be construed as limited to individual and personal rather than to general legislation on the subject, the 4th and 5th sections of the 28 & 29 Vic., c. 63 (June, 1865), "An Act to remove doubts as to the validity of Colonial laws," dispose of that objection. After the assent to any such law by the Governor (even if the instructions were referred to in his Letters Patent), the objection is of no avail, and in this Province the assent was given to the Act establishing the jurisdiction of the Supreme Court. The case of *Argent* v. *Argent* (34 L. J. Prob. 133) shews distinctly that the power of divorce, as existing in the Court of the Colony where the marriage took place was recognized, and such divorce held valid in England, and a subsequent marriage after such divorce held good, and administration granted accordingly. There both the first marriage and divorce, and the subsequent marriage, all took place in the Colony prior to the passing of the Divorce and Matrimonial Causes Act of 1857. As a matter of coincidence it is to be observed that the Colonial Court exercising jurisdiction in that case, viz., in the Cape of Good Hope, did so under words of a general character almost similar to the words constituting the Court in British Columbia. (Cape of Good Hope, *Clark's* Colonial Law 467.)

The case of the *Corporation of Whitby* v. *Liscombe* seems extremely suitable to this case (23 Grant Ch. R. 1.) It determines two principles: 1st, the application to this country, under equivalent terms of adoption by the Local Legislature, of statutes passed in England to remedy well-known existing evils there; 2nd, the legality of working out such statutes in this country by the existing machinery of the Local Courts, with utter indifference to the fact that special tribunals are created by those statutes to work them out in England —a decision based on the soundest of reasons and the well-known necessities of a new country. The decision was unanimously arrived at (after an exhaustive argument on appeal) by four able Judges in the Highest Court in Ontario, led by Chief Justice Draper, who may well be termed the Nestor of the Canadian Bench, and whose historic position at the Canadian Bar looms up from half a century gone.

But assuming for the sake of argument that this special tribunal in England is the only one authorized to have cognizance of questions under the Divorce and Matrimonial Causes Act, how is the injured party here to go there, and be heard before that tribunal? What status would he hold? In Colonial matters the English Courts have no primary jurisdiction. That is more or less limited to cases where the cause of action arises actually or constructively within the Realm —England, Wales, or Berwick on Tweed—or is of a nature purely

transitory, though under the Common Law Procedure Act, they may, under particular provisions, issue process to parties beyond the Realm. But here both the cause of action and the parties are beyond the Realm. *Quoad*, this question, the petitioner from this Province would be a foreigner. It would be the same even from Scotland. If both or one of the parties were domiciled in England, it might be different; but with the cause of action arising abroad, and both parties domiciled abroad, the case could only get before an English Court on appeal—if, after the 47th section of the Dominion Act, 38 Vic., c. 11, such an appeal can be had at all. If the petitioner did attempt it, he would be sent back at once for want of jurisdiction: if he urged that in his own Province he could get no redress, because the Act was held not to be in force with reference to divorce, though with reference to the remedy he previously had it was held to be, he would immediately be told this being a foreign contract, must be governed by the foreign law.

The only way by which he could possibly get before a tribunal in England would be by changing his domicile *cum animo manendi*, and not for the purpose of obtaining the divorce. Equally impossible would it be for the august officials constituting that tribunal in England to come out here to dispose of the petitioner's case. They would be without jurisdiction here. The appointment of Judges, the grant of jurisdiction, and the creation of Courts within the Territories of the Dominion, under the constitution—"British North America Act, 1867,"—belong to the Dominion and Local Governments. So that the result would be in British Columbia, we would have adopted an English Act, adjudicated upon it, declared that it was not inapplicable, under it deprived our people of a Common Law right they previously possessed, and then found ourselves utterly helpless when we wanted to obtain its remedies. Such a position cannot be sound. If no other tribunal but the specially created one in England under that Act can have jurisdiction, then the Act is inapplicable here, and the assertion that the injured party is not without his remedy, but must go to England for it, is untenable. Not "inapplicable here," means workable here and by local machinery, as well as not unsuitable to the circumstances of the country.

In considering an abstract legal point expediency has no weight, but one cannot exclude from observation the effects of an erroneous conclusion. To upset the whole administration of the law on the Mainland for 12 years, set afloat every judgment or decree in Chancery, Probate or Intestacy, would be to create a legal malaria disastrous to the country. The learned Judge who administered the law during that period administered it correctly, and, as a necessary consequence, the jurisdiction now claimed must exist, because the jurisdiction in each and all depends upon the same creative words.

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The application or non-application of a statute, or any particular part of it, does not rest upon the view or opinion of any one person, however conscientious he may be, but upon the wants and necessities of the community; nor does it depend upon the frequency or common nature of the subject legislated upon. It is sufficient if the evil ever occurs. The moment it does, the statute applies. The mere fact that there has been no call for its application in the particular direction since the introduction of the statute is no answer. Its powers may be dormant for years; lapse of time will not destroy them. The occasion which requires the remedy, and the demand for it, at once give the needed vitality, unaffected by the previous non-user, as remarked in the well-known case of *The King* v. *the Steward and suitors of the Manor of Havering Atte Bower*, 5 B. & Ald., 691: "This being a Court established "for the public benefit, the words of permission used in the charter "are obligatory, and the right of determining suits will not be lost "by non-user." In that case and *The King* v. *The Mayor and Jurats of Hastings*, referred to therein, a lapse of 50 years was held not to affect or limit the jurisdiction. La Revue Critique, public *a Montreal*, April Nombre, 1874, 276.—la loi de marriage.

Story's Conflict of Laws lays it down distinctly that the common law of England considers marriage in no other light than a civil contract (section 108), and also that this *lex loci contractus* governs the marriage contract, with this qualification (section 114 d.), that when the law of a country forbids marriage under any particular circumstances, the prohibition follows the subjects of that country wherever they may go, the law of the domicile having really little to do with it, except so far as its temporary or permanent character may give validity to divorces obtained in one country of marriages made in another, and subsequent marriages thereafter, the domicile in such cases being *bona fide* and not a mere temporary residence. (See *Story* 7th Ed. 230 a. b. & c., also *Brook* v. *Brook*, L. R. 9 H. L. 193.)

The rules, therefore, which apply to other contracts in British Columbia must equally apply to this, and relief be obtainable in the one instance as in the other in the local Courts to which jurisdiction over the subject-matter is committed.

Since 1857 this doctrine has been accepted and acted upon in England, and it is in the interests of morality that it should be so. Under the Married Woman's Property Act (No. 29), passed by the Local Legislature in 1873, there is hardly anything the wife cannot do; she may carry on business separately from her husband, and perhaps with his rival in trade or his greatest enemy; join incorporated companies or associations, speculate, gamble in stocks, run up debts, sue and be sued, civilly and criminally, become the manager of a bank or a livery stable, spend her money in crime profligacy, and folly, and when all is gone require her husband

to support her. Each has but one monopoly—remedy by divorce—and if this Court does not possess the remedial powers given by the Divorce and Matrimonial Causes Act, that is gone too. In this respect the whole law is changed; with increased privileges come increased liabilities, and as a Court we have to look at the marriage contract, not in the light of sentiment, but in the light of modern legislation, which in British Columbia has entirely put an end to the old fiction of the legal unity of man and wife. *Story*, section 225, says: "The law of the "place where the marriage is celebrated furnishes a just rule for the "interpretation of its obligations and rights, as it does in the case of "other contracts, which are held obligatory according to the *lex loci* "*contractus*."

Purity and virtue will always command respect, and ensure to their possessor the esteem and position to which refinement, civilization, and Christianity have elevated him or her. When England passed the Act of 1857 it was intended that both men and women should thenceforth hold their matrimonial status *by law*,—not *by the favour or accident of a parliamentary majority*. British Columbia, in adopting the English law, intended the same; and I cannot see that it is justice to the inhabitants of this country to apply to them the worst part of the Act and deprive them of the best.

In my opinion, this Court has ample and full jurisdiction over this matter, and it is its duty to hear and consider the petition.

I have arrived at this conclusion after having given to this case the most careful consideration; not only on account of its own importance but of the doubt which has hitherto existed as to the right of this jurisdiction in the Province

I know of nothing that would be more ruinous to the peace of families, or tend more to social degradation, than the belief that for the offence of adultery there is in this country no remedy and no punishment; that after a commission of this crime—either man or woman—the injured party must be tied for the remainder of life, a living corpse, to the charnel-house of buried affections, of buried hopes, of buried honour. With all due respect for the opinions of others, in my opinion, no law, either human or Divine, requires anything so monstrous.*

*P. S.—Since the delivery of this judgment, the question has been removed from the area of doubt. On the argument in the case of Sewell *et al v.* The B. C. Towing Co., in this Court on the 18th January, 1882, in which the constitutional powers of the Court were under discussion, the then Attorney-General, now Mr. Justice Walkem, produced a dispatch from Lord Lytton, the Secretary of State, to Governor Douglas, dated the *14th February, 1859*, containing the following passages:—

"With reference to the doubt which Mr. Begbie suggests, he will observe that your "power of legislation is for the present unrestricted, and I have no doubt you will "co-operate in giving to his Court all such powers as it may in your and his estimation "require. You can constitute it a Court of Record, give it equitable jurisdiction and

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"ecclesiastical jurisdiction in case of wills and administration. With regard to "Admiralty jurisdiction, which is usually conferred from home, there is no longer any "question at issue, for you have been apprised by my dispatch of the 6th January last "that Her Majesty has thought proper to establish a Court in British Columbia for the "trial of offences against the laws of Vice-Admiralty. As to *the recent Divorce and* "*Matrimonial Causes Act it may be a matter of rather curious question whether the law* "*thus established extends to British Columbia*, a *Colony* constituted *after its passing*, or "not, but I should think it much better *such doubts be superceded* by enactment *estab-* "*lishing* such *provisions* as may be deemed *expedient in the infant state* of British "Columbia. My predecessor, Lord Stanley, suggested *the assimilation of the law of the* "*Colonies in general to that of England in this respect*, and there are obvious advan- "tages in a similarity of laws throughout the Empire on the marriage question, but I "do not consider it necessary to press the subject upon you, *leaving it to yourself* to "decide whether the subject may not be better dealt with by the Colonial Legislature, "which, I hope, to find soon established."

Eight years after this dispatch, and *immediately after the Union* of the two Colonies in March, 1867, the Colonial Legislature of British Columbia passed the Act "That the "Civil and Criminal Laws of England as the same existed on *the 19th November, 1858*, "and so far as the same are not from local circumstances inapplicable, are and shall be "in force in all parts of the Colony of British Columbia."

To my mind that ends the argument. J. H. G.

October, 1887.

CREASE, J.:—

The decision of this depends upon the answers to be given to the queries—

1. Does the Imperial Matrimonial Causes Act, 1857, 20 & 21 Vic. c. 85, as amended by 21 & 22 Vic., c. 108, apply to the Province of British Columbia?

2. If so, can it be carried out by the existing machinery here—*the Supreme Court of British Columbia?*

The importance of a correct decision hereon, can scarcely be over-rated. The point has been partially raised several times, but never, that I can learn, under circumstances which have compelled the Court to come to a complete authoritative decision on the whole Act; and the matter has never before been so fully argued before the three Judges of which the Court now consists. The present case is a petition for a *declaration of nullity of marriage.*

The learned counsel for the petition, Mr. *Tyrwhitt Drake*, has contended, with some force, that a question of *nullity of marriage* can be entertained by the Court at common law, without being obliged to have recourse to statutory authority for the purpose.

He has argued that, inasmuch as marriage is a civil contract, the *a priori* inability or impotence of one of the parties (well known to himself, but concealed from the other party to the contract) to fulfil the terms thereof, nullifies the contract, and upon proof thereof releases the other party from its obligations.

He cited cases in Exchequer in support of his position; but the dictum of His Lordship, the Chief Justice of this Court, at the conclusion of the

argument and after hearing the authorities—"That though the validity "of a marriage may, and frequently is, tested in many legal proceed- "ings, as in indictments for bigamy, questions of inheritance, main- "tenance of wives or children, and the like, yet marriage itself is good "until annulled by a decree"—I think sufficiently disposes of that argument; especially as the Chief Justice's view is in exact accord with the opinion of *Bramwell*, B., in *H*——, falsely called *C*——, v. *C*——. (29 L. J., Mat., p. 81), "that marriage exists at common law until annulled by decree."

This view, however, still leaves open the question, what law or Court is there in British Columbia of sufficient authority to pass a decree annulling such a marriage?

Nullity of marriage, which allows of re-marriage, is so intimately allied in that respect with divorce itself, that it is difficult, almost impossible, to consider one without the other.

Though the Ecclesiastical Courts would grant a divorce from one, where the inability to perform the marriage contract had existed before the marriage, and would declare it had been void—*ab initio*—they would not grant a divorce *a vinculo* for anything that occurred subsequently to marriage.

Indeed, it would not be too much to say, that on the decision of this question of nullity in the present case, hangs in effect the question, whether this Court has jurisdiction over all causes, suits, and matters matrimonial, such as suits for jactitation of marriage, restitution of conjugal rights, judicial separation, and divorce itself?

A wrongful assumption of jurisdiction over a suit for nullity of marriage, followed by a decree of nullity, if unauthorized by law, would not, I apprehend, have the force of a judgment: it would be as though it were *coram non judice*.

Either of the parties wrongfully separated would be liable, on a new marriage, to be indicted, aye, and punished too, for bigamy.

The issue of any such second marriage would be bastardized, and the descent of real property, through the issue of the illegal marriage, would be jeopardized.

On the other hand, consequences of a most serious nature would follow a decision that, under the English Law Ordinance, 1867, the Matrimonial Causes Act, 1857, does not apply here. For on the authority upon which the application of this Act rests, depends, according to this view of the matter, the validity of the judicial decisions of this Court in probate for nearly twenty years, and much of the jurisdiction in equity and other matters for the same time.

Under this Divorce Act itself, it has been judicially decided here *(Scully* v. *Lee)* that the action of *crim. con.*, which could only previously be enforced in the Ecclesiastical Courts (abolished by the second

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section), and which under section 6 is abolished, *nominatim*, in *England only*, has been declared to be abolished *here*.

This necessarily carries with it section 2 of the Divorce Act, abolishing all the forensic jurisdiction of the Ecclesiastical Courts, leaving them only the charge of the marriage licences.

Under the Matrimonial Causes Act, 1857, the deserted wife clauses have long been, and are still, being put in force *here*.

A petition for judicial separation has been entertained here, and ordered to be put on file, although not carried by the parties to a decision.

Indeed, almost the only important provisions of the Act not touched upon by the Court, though undoubtedly the most important, are suits for nullity of marriage and divorce.

Before entering on the history of the legislation which has taken place on this subject in the once separate, now united, Colonies which now constitute this Province, and tracking out the powers and constitution of the Court, from the commencement of the two Colonies down to the present day, to ascertain how far it is, or is not, complete and effective to carry out the English Matrimonial Causes Act in its entirety, it is important to see whether any and what force has been given by the practice of the Home Government, in its relations with the Colonies, to the objection, that there is in divorce something which is too sacred and complicated for a Colonial Court and its Judges to approach. What has been the practice of England in this respect?

We are met on the threshold of this enquiry by the fact that, by the "British North America Act, 1867," legislative authority, exclusive of England, in matters of divorce, has been given to the Parliament of the Dominion—a Colony of England—over half a continent.

I must here digress for a moment to remark, that, although the Dominion Parliament may now, or hereafter, make what law it pleases on the subject of divorce without consulting British Columbia; yet it has not touched the subject, and any legislation there on it is most unlikely at the present time: and, until otherwise enacted by the Dominion, the British Columbia law holds good under the Terms of Union with Canada.

It follows that if the Divorce Act is not in effective operation here as law *now*, no local legislation can, and in all human probability no Dominion legislation will, for some time to come, place that which a large majority of people consider to be the only remedy for the deepest of wrongs, within reach of the inhabitants of this Province.

But those who seek relief in matrimonial causes would have to go to the Canadian Parliament at Ottawa to obtain it.

Practically this would be tantamount, under existing circumstances of distance, expenses of witnesses, travelling and hotel charges, to

almost total denial of justice, however great the wrong seeking for redress. With the argument *ab inconvenienti* however, although it may not be excluded on such a subject, we have not so much to do as with what is the law?

To return, therefore. There are other precedents of Imperial concession of authority in divorce to Colonies to guide us.

It was brought out by Mr. Drake, the counsel for the petitioner, that there has existed for several years an effective Divorce Act in New Brunswick, successfully administered by a single Judge. Nova Scotia has also possessed an effective Divorce Law for a long series of years.

In an elaborate Charter of Justice to the Cape of Good Hope in 1832, the Imperial Government has followed up these precedents by conferring a divorce jurisdiction on the Supreme Court of that important Colony, and the decisions of that Divorce Court have been recognized in England in *Argent* v. *Argent* (34 L J. Prob., 135), in divorces occurring at the Cape in 1852, before the English Divorce Law itself came into operation in England.

It is noteworthy that the jurisdiction in divorce in the Charter of Justice of the Cape of Good Hope, is granted, not by specific mention of the word divorce, but in similar general words to those in the British Columbia local Statute under which the present application for a decree of nullity is made.

The words in the Cape Charter of Justice, 4th May, 1832, are as follows:—

"And we do hereby further ordain, direct, and appoint that the said "Supreme Court of the Colony of the Cape of Good Hope shall have "cognizance of all pleas, and jurisdiction in all causes, whether civil, "criminal, or mixed, * * * in as full and ample a manner and "to all intents and purposes as the Supreme Court of Justice now "existing within the said Colony hath or can lawfully exercise the same;" and this power is extended to the Circuit Courts of the Cape, as a branch of the Supreme Court.

The words thus conveying to the Cape Court this jurisdiction are almost literally identical (absolutely identical in effect) with the words of our British Columbia Supreme Court Statute of 1858, which gives to this Court "*complete cognizance of all pleas whatsoever.*" If anything the British Columbian grant is the more complete.

If it be objected that the grant of jurisdiction to the Cape Court may possibly be *restricted* by the words in the 1832 Charter—"in as full "and ample a manner" (scarcely words of restriction) "to all intents "and purposes as the Supreme Court of Justice now" (*i. e.*, under the Cape Charter of Justice of 1827) "existing within the said Colony now "hath, or can lawfully exercise the same,"—then *Argent* v. *Argent*, before quoted, gives the reply, and shews that under the Cape Charter

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of Justice of 1832, under which the parties to that case were married, divorces *were* granted at the *Cape*, and acknowledged as lawful by the English Courts years before the English Divorce Act of 1858 became law. These words, therefore, were not a restriction of this power, nor could they have been inserted with a view of preventing the Cape Court from entertaining and dealing freely under their Dutch law with applications for divorce. Had they been so meant, they must have been so pleaded in the suit *Argent* v. *Argent*, which was hotly contested, because of the property involved, at every point. The Cape Colony came to the English by conquest, not by settlement. Had it been acquired by settlement, the settlers would have borne with them as much of the common law and the statute law of England (as has been happily expressed) as they could carry. But being acquired by conquest, the Cape brought with it to the English the Roman-Dutch law of the seven united Provinces and the Batavian Republic. This law allowed of judicial divorce *ob adulterium*.

Whether on the grant by the Crown to the Cape of the Charter of Justice of 1827, divorces were already allowed there under the old Roman-Dutch law, I have not been able to discover.

It is noteworthy that the Charter of Justice of 1832, to which I have referred, creates an entirely new Court, and (although, no doubt, the old Judges were re-appointed), apparently, new Judges: and in giving them the jurisdiction under which divorces were granted, gave it in the words I have quoted, *without any specific mention of divorce*.

I refer to this Charter for the purposes of the conclusion to be drawn from the *similarity* of the *general words conferring jurisdiction* on the respective Supreme Courts of the Cape and British Columbia, as being sufficient to administer a jurisdiction in divorce without special mention of divorce in the grant.

I have assumed (*arguendo*) that divorce was already existing at the Cape in 1827, under the Roman-Dutch law, when the first Charter of Justice was granted.

If, on further enquiry, it should appear that divorce was *first* granted by the Charter of 1827—which I more than doubt—the argument in favour of the applicability of the Divorce Act to British Columbia would be all the stronger.

Again, the words "in as full and ample a manner as the existing "Supreme Court at the Cape then had or could lawfully exercise the "same," even if they refer, as I opine they do, to a previously existing Court which had been lawfully granting divorces, while they did not *restrict*, cannot be said to have *enlarged* the grant of jurisdiction conveyed by the specific words giving to the Court cognizance of all pleas and jurisdiction in all cases, whether civil, criminal or mixed, I appre-

hend they would be taken to define in some measure the chief operative words: not to enlarge words already so full as to be incapable of enlargement.

One can readily understand, without forcing the sense, the qualification to mean—in as full and ample a manner as the existing Supreme Court at the Cape could lawfully exercise the same, and *no further*, *i. e.*, to the fullest extent only (as regards divorce) as the Roman-Dutch law of divorce would sanction *divorce ob adulterium;* not divorce for a *less* or *different* cause. The British Columbia Supreme Court Proclamation of 1858 had no such restriction even as that.

Next, as to *when* and *where* the Divorce Act is said to have applied in British Columbia.

If the Divorce Act be in force here (in B. C.), it has been in force in the Mainland since 1858; in Vancouver Island since 1867, although allowed to remain dormant by the Court at that period. But the right which could have been exercised by either Chief Justice after 1867, would not be prejudiced by disuse.

That might well happen, and for very good reasons, without prejudicing its validity when subsequently called into active exercise.

The fact of a law like the Divorce Act, presumably established for the public benefit, not being put in force for thirty or even fifty years, does not affect or impair its validity, or the legal and express *obligation* that lies on the Court, when properly moved thereto, to carry it into execution. This is abundantly clear from *The King* v. *the Steward and Suitors of the Manor of Havering Atte Bower* (5 B. & Ald., 691 & 692): also, in same report, *The King* v. *The Mayor and Jurats of Hastings*, where this obligation was enforced by mandamus after thirty years disuse.

On the first day of the year 1858, for the first time in the history of England since the Reformation, the power of granting divorces, *a vinculo*, was taken from the Ecclesiastical Courts of England and the Judicial Committee of the Privy Council, and vested in the new Court for Divorces and Matrimonial Causes in England. It is true that the Supreme Court of Civil Justice of Vancouver Island never claimed, or could have claimed, jurisdiction in divorce up to 1867: and there were reasons for it. That Court, with Chief Justice Cameron as presiding Judge, was established under the Imperial Act, 12 & 13 Victoria, c. 28, 1849, "to provide for the administration of justice in Vancouver's Island," and the Order of the Queen in Council thereunder, which was issued nearly ten years later, on the 4th April, 1856. That conferred the fullest jurisdiction and cognizance of pleas in the Supreme Court of Vancouver's Island, and its Chief Justice, specifying every jurisdiction *e. g.*, in Chancery, Probate, Testacy, Intestacy, Bankruptcy, Common Law, Exchequer, and the like, with the notable exception of Divorce and Matrimonial Causes: an omission which is, of course, significant,

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but adds all the more force, however, to a subsequent enactment when the omission had ceased.

While Vancouver Island remained a separate Colony, it cannot be contended that the Supreme Court there had the jurisdiction in divorce.

Indeed it was not clear that the Island in those days had a legislature which had the usual full power over the administration of justice and *could* enact it.

For it is not known to this day with certainty when Vancouver Island became a Colony with legislative institutions. I believe I am right in saying that such as it had it assumed on no higher authority than a letter of instructions from the then Secretary of State for the Colonies.

Consequently it could not be predicated with certainty at what exact date English laws ceased to apply as such to the Island.

The point, however, has become immaterial, because of subsequent confirmatory Imperial legislation.

British Columbia on the Mainland, then separate from Vancouver Island, and having the advantage of the counsels of a well trained lawyer, was more fortunate. It had a birthday. That dependency (previously New Caledonia) commenced business and political life on its own account by the style and title of "British Columbia" under its able and sagacious Governor Mr. (now Sir) James Douglas, on the 19th November, 1858.

This took place under an Order of the Queen in Council, dated 2nd September, 1858, which, itself, was issued under the Imperial statute 21 & 22 Vict., "An Act to provide for the Government of British "Columbia," and called the "British Columbia Act," after it had been proclaimed in the presence of the present Chief Justice at Langley on the 19th November, 1858.

On the same 19th day of November, 1858, Governor Douglas, who combined under that Statute and Order in Council the Government and Legislature of British Columbia in his own person, issued a *Proclamation having the force of law*, under the Great Seal of the Colony, enacting "that the civil and criminal laws of England as the same "existed at the date of the said Proclamation of the said Act" (*i. e.*, the 19th November, 1858), and "*so far as they were not from local circum-* "*stances inapplicable* to the Colony of British Columbia, were and "should remain in full force within the said Colony till such time as "they should be altered by competent legislative authority."

At that time the Divorce Act had been in force in England for nine months, so that the state of the law in England before 1858 does not really affect the question before us one *iota*.

On the 2nd September, 1858, Her Majesty, under Her own hand and signet, issued a commission to the present Chief Justice, Sir Matthew

(then Mr. Matthew) Baillie Begbie "to be a Judge in the said Colony, "with full power and authority to hold Courts of Judicature, and admin- "ister justice according to the laws at that date in force, or which "thereafter should be in force, in the said Colony."

The Mainland (British Columbia) having then a separate legislature and autonomy, Governor Douglas was advised to pass a Proclamation under the Great Seal, having the force of law, declaring the constitution of the Court of Justice of British Columbia, and to make provision with regard thereto.

The Supreme Court of Civil Justice of British Columbia was then constituted.

Sir Matthew Baillie Begbie was declared to be "*the* Judge thereof," a section which on the union of the Colony of Vancouver Island with, and its merger in, British Columbia left him undoubtedly in law the *sole* Supreme Court Judge in the united Province of British Columbia. Section 5 went on to enact that "the said Supreme Court of Civil "Justice of British Columbia shall have *complete cognizance of all* "*pleas whatsoever*, and shall have jurisdiction in all cases, *civil* as well 'as criminal, arising within the said Colony of British Columbia."

These words "complete cognizance of *all pleas* whatsoever" must, according to the well-known established rule of construing statutes, by the reasonable and ordinary meaning of the words employed, be construed to include all matters in which pleadings are used, and consequently all pleas in matrimonial and divorce causes (except, of course, Admiralty, already provided for by Imperial statute).

The words conferring "complete jurisdiction in all cases, *civil and* "*criminal*" (the two grand divisions of the law), must also, under the usual construction, include all *divorce and matrimonial* causes as well as all others (except Admiralty).

The rule for construing a jurisdiction, when comparing one Court with another, is well laid down in the *Lord Mayor of London* v. *Cox* (L. R. 2 H. L., p. 239), which says:—"The rule for jurisdiction is that "nothing shall be intended to be out of the jurisdiction of a Superior "Court but that which specially appears to be so" (*Peacock* v. *Bell*, 1 Wms. Saund. 101 r.), shewing at least thus much, that if it be intended to restrict the general powers of a Supreme Court bestowed under very full language, such intimation to restrict must be specially expressed,—a rule which, on examination of the Charters of Justice of several Colonies, I find to be markedly adopted.

In construing a grant "*verba fortius accipiuntur contra proferentem*," such a grant of cognizance of *all pleas* should (it appears to me, according to this canon of construction) be construed liberally, the onus of shewing a specific restriction (if any) lying on any party objecting.

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"Where any Superior Courts," says *Dwarris*, "have a jurisdiction, "it can only be taken from them by express words of an Act of Par- "liament," and there is none such here.

By the Imperial Act, 29 & 30 Vict., c. 67, and Governor Seymour's Proclamation thereunder, Vancouver Island was united to and merged in the present Province of British Columbia on the eighth anniversary of its birthday, namely, on the 19th November, 1866.

The Vancouver Supreme Court was temporarily continued by special enactment, the "Supreme Courts Ordinance, 1869," (Revised Statutes, No. 112), notwithstanding its previous legal merger, with its former jurisdiction, until its final merger into the British Columbia Supreme Court on 29th March, 1870, under the "Courts Merger Ordinance, 1870," (Revised Statutes, No. 135).

By section 11 of the Revised Statute No. 112, "*all the jurisdiction*, "powers, and authorities of the" then "two existing Supreme Courts, "and of the Judges thereof," it was enacted should be "vested in, *and* "*should be had and exercised by* the said" (*i. e.* the present) "Supreme "Court of British Columbia, and the Judges thereof,"

This extension of this Court, with all its ample jurisdiction, over *all parts* of British Columbia, gives this Court to-day jurisdiction and cognizance of all pleas whatsoever, without any exception (except Admiralty, which, as I have already observed, is a separate jurisdiction always separately and exclusively provided for by Imperial Statute).

All that was now lacking to assimilate the law in Vancouver Island to that of the Mainland, was to extend the English laws existing at the 19th November, 1858 over the Island portion of the united Colony.

This was done by the "English Law Ordinance, 1867" (Rev. Stat. 70). It is upon the correct construction of this Statute that depends the question whether we have, or have not, jurisdiction in divorce and matrimonial causes in all parts of British Columbia.

But for that local Statute it might have been a question whether (supposing the jurisdiction to exist) it was not confined to the Mainland alone.

This Statute follows exactly the wording of the British Columbia enactment of 19th November, 1858, which it repeals for the avowed purpose of re-enacting and assimilating the Island law with that of the Mainland; and from the date of that Ordinance (6th March, 1867) enacted that the civil and criminal laws of England as the same existed on the 19th day of November, 1858, and, *so far as the same, from local circumstances, were not inapplicable,* were, and should be, in force in all parts of British Columbia, save so far as modified by the legislation on this subject by the respective Legislatures of the separate Colonies between 1858 and 1867, an exception which it is not necessary to give

in extenso here, as the only Acts affecting matrimonial causes passed in that interval, namely, the Vancouver Island and British Columbia Marriage Statutes of 1859 and 1865 respectively had been previously repealed.

It has been objected that local Ordinances were void as to divorce, because the Governor's Letters Patent and Royal Instructions forbad every Colonial Governor from assenting to any enactment which should directly or indirectly affect divorce.

I have seen the Governor's Commission and Instructions of the period alluded to, and find that it contained all the ordinary powers of legislation to the Governor, in combination with the Legislative Council as then (1867) by law established in the Colony.

It is true that the legislative concurrence, or assent of the Governor, was directed to be subject to such rules and regulations as should be contained in the Royal Instructions referred to in the Commission, and those instructions contained a signification of the Royal will and pleasure that "the Governor should *not* assent to any laws for the "divorce of persons joined together in holy matrimony, or to any Act "repugnant to the law of England." But these instructions were merely directory, and were not followed.

It was *because* the Home Government knew that if he, a duly constituted portion of the Legislature of British Columbia, "authorized, as "the officer administering the Government of the said Colony, with the "advice of the Legislative Council therein mentioned, to make laws for "the peace, order, and good government of Our said Colony," assented to such law in Her Majesty's name, that it *would* become law, that he was directed by the instructions *not* to assent to it.

Governor Seymour *did* assent to it, in the name and on behalf of Her Majesty: the Imperial Government allowed it; it was laid before both Houses of Parliament at Westminster, and its allowance proclaimed in the Colony, just exactly as the proclamation of English law in Governor Douglas' reign, in 1858, and the other laws of the Colony in force had been dealt with. It is difficult to suggest any further formality to complete its validity.

But assuming the objection advanced against its validity to be correct,—that it is repugnant to the law of England, which, if not by statute, at least in spirit, has always and, so far as it can, still discountenances divorce, and is therefore void,—the defect (if existing) as to repugnancy, is entirely cured by the Imperial Statute, 28 & 29 Vict., c. 63, the "Colonial Laws Validity Act," which, in section 3, enacts:—"That no Colonial law shall be or be deemed to have been "void or inoperative on the ground of repugnancy to the law of Eng-"land, unless the same shall be repugnant to the provisions of some "such Act of Parliament, order, or regulation made under authority of "such Act."

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How can a Colonial statute be repugnant which merely carries out the provisions of an English Act? As to its being void and inoperative because contrary to the Governor's instructions, I would repeat: It was never objected to at home, but was drawn out in the ordinary form for introducing English laws, by general words, up to a particular date, into a Colony; was sent out from the Colonial Office in Downing Street with the express object of extending English statute law, which would not otherwise be carried by a letter, to a newly settled Colony, and endorsed by the experience of the Colonial Office for many years in dependencies scattered all over the globe, and never, that I have been able to ascertain, successfully disputed. On the contrary, it was by a local law similarly passed, irrespective of the Governor's instructions, that New Brunswick obtained her divorce law.

But to any objection which may be raised to the introduction of the divorce law under the local Ordinance of 1867, on the score of being contrary to the Governor's instructions, and therefore that the Act is void or inoperative, the Imperial "Colonial Laws Validity Act" gives an effective quietus, in section 4, which says:—

"No Colonial law, passed with the concurrence of or assented to by "the Governor of any Colony, or to be hereafter so passed or assented "to, shall be or be deemed to have been void or inoperative by "reason only of any instructions with reference to such law or the "subject thereof which may have been given to such Governor by or "on behalf of Her Majesty by any instrument other than the letters or "instrument authorizing such Governor to concur in passing or to "assent to laws for the peace, order, and good government of such "Colony, even though such instructions may be referred to in such "letters patent or last-mentioned instrument."

The language itself in which this "English Law Ordinance, 1867," is couched throws the onus of any objection against its comprehensiveness upon the person making it, and creates the presumption in law of its applicability to be rebutted by any objector. It does not content itself merely with employing such a general expression as extending such laws as far as they are from *local circumstances applicable*, but employs the strongest language known to parliamentary conveyancers, the double negative—*e. g.*, "extending such laws as are *not* from *local circumstances inapplicable*." "*Negative words*" (says *Dwarris* on Statutes, 2nd. Ed. p. 610) "will make a statute imperative. *Affirmative words* "*may*, if they are absolute, explicit, and peremptory, and show that no "discretion is to be given, and especially so when jurisdiction is given." Any other course would have been less effective and clear.

It is always dangerous, in framing a general Act specially intended as the root of all Colonial legislation for any lengthened time, to specify too particularly the powers intended to be conferred, lest any important ones should, in the conflicts of legislation, or from other causes, be

with, those of the British Columbia "English Law Ordinance, 1867," with this important distinction, that they are introduced by affirmative words, while in the "English Law Ordinance, 1867," the enactment is in general words with the double negative I have already referred to, "so "far as *not* from local circumstances *inapplicable*," which would seem according to *Dwarris*, to invest them with an imperative character.

The English laws were introduced by general words *in Jamaica*, for instance, as appeared by the charge of Lord Chief Justice Cockburn to the grand jury in the case of *The Queen* v. *Governor Eyre*, in Jamaica, by the Colonial Act, George II., c. 1, which I have now before me, and in which all such laws and statutes of England as had theretofore been accidentally forgotten or omitted from the enumeration; in which case the construction which I have applied in treating of the powers of the old Vancouver Island Court (namely, "*expressio unius est omissio alterius*") would apply, and the decision would be against the intention to insert any powers so omitted.

Seeing the importance of the subject, I have been at the pains of searching into the constitutions of several of our Colonies to ascertain how far and in what words the English law has been introduced into them respectively, and whether specifically or in general words, and as far as I can discover from Howard's, Clarke's, and Burges' works on Colonial law, find as the general result that the English laws have been adopted either by construction of the Courts, or have been introduced as the root of legislation by general words like, though not identical acted upon in Jamaica "are made perpetual," and on examination I notice generally that the statute law of England, not being at variance with the *Acts of the Colony*, is acted upon in most cases of manifest convenience, as in execution of wills, limitation of suits, etc.

In Jamaica—The Common Law of England prevails, as far as circumstances will permit, and where it is not at variance with Colonial Acts, no English statutes after George II., c. 1, bind unless the Colony be specially named.

In St. Vincent—"The laws in force in this Island are stated to be, "besides their own *Acts of Assembly*, so much of the laws of England "adapted to the circumstances of the Colony as existed prior to the "Proclamation of 7th October, 1763."

In Dominica—So much of the Statute and Common Law of England adapted to the circumstances of the Colony as existed prior to the Proclamation, 7th October, 1763.

In Grenada—"Both the Common and Statute Law of England as "they existed in 1763, so far as in their nature applicable to the "Colony, and so far as not altered by the Colonial Acts revived by the "Act of 1784, or by those passed since, are now binding on the Colony "of Granada."

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In Antigua—The Common Law of England, so far as it stands unaltered by any written laws of these Islands, or some of them, confirmed by the King in Council, or some Act of Parliament of England extended to these Islands, are in force, in each of the Leeward Caribee Islands, and is the certain rule of right and property.

In Montserrat—"Causes are tried according to the laws and usages "of Great Britain and the laws and usages of the Island." (3, Rep., W. I. C., 33.)

In Nevis—"The Law of England, so far as it stands unaltered by "local enactment, is declared to be in force in each of these Islands, and "all Acts of Parliament of England anterior to a certain period, and "applicable to the Colony, or which name the Colonies, or are expressed "to extend to all His Majesty's Dominions, apply."

In St. Christopher's—A local Act in 1711 enacted that in that Island should be held a Court, and that the Justices shall determine causes therein, with full power and jurisdiction "according to the laws "and usages of Great Britain, and the law and usages of the said "Island."

In Barbados—The Local Legislature, on 7th March, 1666, proclaimed "That the Government of Barbados should be according to the laws of "England, and of that Island as had theretofore been used and practised."

In Tobago—"The Common Law of England operates in all cases not "affected by Colonial Statutes. All English Acts of Parliament at the "period of the cession (1814) which are applicable to the Colonies, are "in force here."

In Honduras—It is said "the law of England was always applied, "except when local circumstances prohibited its application."

In the Bahamas—The Colonial Act, 30 Geo. III., c. 2, called the "Declaratory Act," declared that "The Common Law of England, in "all cases where the same hath not been altered by any Act or Acts of "the Assembly of these Islands, was, and of right ought to be, in full "force within these Islands as the same then was in that part of Great "Britain called England."

In Canada, or rather *Upper Canada*, now *Ontario*, there is an example of a somewhat analogous case in a recent report (*Corporation of Whitby* v. *Liscombe*, 23 Grant, pp. 13 & 14) in a Chancery appeal case, heard before the Ontario Judges in appeal, upon a question as to the applicability of the Imperial Mortmain Act, 9 Geo. II., c. 36, to a charitable bequest in Upper Canada (Ontario), under a Canadian Act, 32 Geo. III., c. 1, which in general words had introduced English laws instead of the Quebec law that had previously ruled in Upper Canada.

At the time this passed, the Upper Canadian Legislature, namely, the Council, was empowered to make Ordinances for the peace, welfare, and good government of the Province, with the consent of the Governor,

with (it is not unfair to presume) the usual Royal instructions to guide and restrain the application of that power. That Legislature passed the Upper Canada Statute, 32 Geo. III., chap. 1, among other things enacting:—"That from and after the passing of that Act, in all matters "of controversy in Upper Canada relative to property and civil rights, "*resort shall be had to the laws of England* as the rule for the "decision of the same."

Under these general words it was held by the Canadian Courts, and now affirmed by all the Judges in appeal, that the English Statute of Mortmain of 9 Geo. II., c. 36, came into and remained in force in Ontario, although there was no *Registry Office* and even *no Court of Chancery* in Upper Canada in which an enrolment of a deed under the Act could possibly take place.

Chief Justice *Draper* (acknowledged to be a sound lawyer), in delivering judgment, declared the words "resort shall be had to the laws of "England," are comprehensive enough to include the Act of 9 Geo. II., c. 36; nor can it, I think, be questioned that the Legislature of Upper Canada had power to pass an Act *for the same object and intent as the English Statute*. He goes on to add (p. 14):—"The impossibility of "administering equity in Upper Canada for want of a proper tribunal, "did not prevent that portion of English laws being introduced by 32 "Geo. III., c. 1. I do not see why the want of an office or Court in "which an enrolment could be made, should create more insuperable "difficulty to the introduction of the law which prohibited gifts for "charitable purposes unless made in a certain form. * * *

"It must be conceded, *nemine contradicente*, that the Mortmain Act "does not by its own intrinsic force apply to the Colonies of Great "Britain. That the special provisions it contains establish this con-"clusion.

"It was not passed *eo intuitu*. But the question before us is, whether "*our legislature* have not made it part of our laws?" * * * "My "conclusion is that the English Statute 9 Geo. II., c. 36, *is in force in "this Province*."

This reasoning appears to me to apply with increased force to the applicability of the Divorce Act in British Columbia, of which it may be said, that it also is passed with the same object and intent as the English Statute, if the intent is to be gathered from the wording of the Act.

The Mortmain Act is confessedly a restraining Statute, and its introduction under general words not so easy, according to the ordinary and stricter canon of construction of restraining Statutes, as that of the Divorce Act, which is intended to be a *remedial* and beneficial Statute, the Ordinance introducing which would have, in that view, to be construed liberally.

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To carry out the Mortmain Act in Upper Canada neither the necessary Registry Office nor the Court of Chancery for enrolment were, in the case before us, in operation: and these were important parts of the machinery of the Act. Yet both Registry Office and Court were declared to be introduced by the Provincial law of Geo. III., and to be legally in force, though so long dormant. However, this is on the question of the machinery of the Act, which I shall treat of hereafter.

The arguments in favour of the applicability of the "Matrimonial Causes Act, 1857," to British Columbia derive additional force from the wording of the British Columbia "Marriage Ordinance, 1867" (No. 89, Revised Statutes of British Columbia), which contemplates the trial of the validity of marriages in *British Columbia* under that Act by the law of England.

The words of section 19 are—

"Provided always, that in all matters relating to the mode of cele-"brating marriages, or *the validity thereof*, and the qualification of "parties about to marry, and the consent of guardians or parents or "any person whose consent is necessary to the validity of such "marriage, *the law of England shall prevail*, subject always to the "provisions of this Ordinance."

It is not reasonable to suppose, that in framing this section the Legislature intended that all questions arising under it should be tried out of this Colony.

If it had done so, it could only at that period have contemplated employing the English Courts for the purpose many thousand miles away, and had that been the case, what earthly use could there have been in declaring that in *England* the law *of England* should prevail?

It must be remembered that this section, word for word, forms part of a local Act which had been assented to, as section 18 of the British Columbia "Marriage Ordinance, 1865," and acted upon in the Colony for two years before the local "Marriage Ordinance, 1867," passed, and all rights and remedies under it specially reserved and kept afoot.

It may be argued that the validity here spoken of is limited not to *marriages generally*, which is the sense in which I feel compelled, according to ordinary grammatical construction, to take it, but to their validity only in respect to not having the proper consent to make them valid.

But even in that sense, where they might be voidable, not void until so declared:—that result could only be obtained in a competent Court, guided to a decision of the same by the Law of England at those dates, 1865 and 1867, in such matters; which would bring us back to the original question—in what Court, by what law? *The validity of a*

marriage, even in that limited sense, although it may come up incidentally in any Court, cannot itself be decided or disposed of except by the decision of a competent Court.

If the "English Law Ordinance, 1867," and its predecessor of 1858, with the Supreme Court Acts, be not of avail to import *the "Matrimonial Causes Act, 1857,"* in its entirety into our *Provincial Statute Book*, then we have no law or Court in the Province (I don't speak of the Parliament) by which to test the validity of a marriage *under those Marriage Ordinances.*

It has been judicially held here that *section 59 of the "Matrimonial Causes Act, 1857,"* applies to *British Columbia*, and that under it the action of *crim. con.* has been abolished here, as well as in England.

This decision necessarily makes *section 2 in force* in British Columbia, as well as section 59.

Section 2 abolishes the jurisdiction of the Ecclesiastical Courts, "in "respect of divorces *à mensâ et thoro*, suits of nullity of marriage, "suits of jactitation of marriage, suits for restitution of conjugal rights, "and in all causes, suits, and matters matrimonial * * * Except "so far as relates to the granting of marriage licences."

The only substitutes provided by the Act, under which these judicial decisions have been given, are divorce and judicial separation, which, if the "Matrimonal Causes Act, 1857," does not apply here, cannot be had in British Columbia.

What would be the practical result of such a decision?

If this Act does not apply here, then even the grossest and most flagrant cases of immorality and adultery, with perhaps cruelty, coupled possibly with evils that cannot be named, would, in the case of all but rich people, go entirely unpunished.

The injured conjux would be without the remedy of divorce or even judicial separation, and social life and public decency would be liable to continual outrage.

Where would be the practical remedy to the great majority of people, to know that they could only apply in 1867, when the English Laws Ordinance was passed.

To the Ecclesiastical Courts? No: for although the Divorce Court is not introduced by 1867 Act, they at least are abolished by it, and no longer in existence in England.

To the English Parliament? No: that, although supreme, is bound by rule and precedent in divorces, and could not give relief until the Law Courts had passed upon it;

Or, Since 1870 and Confederation? If the remedy be with the Parliament of Canada, what sort of relief *could* that afford to a struggling tradesman, or professional, or other working man in British

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Columbia, suffering from such a crying wrong, and unable to endure the expense and loss entailed by a journey of so many thousand miles, much less able to bear the cost of lawyers and witnesses, and all the attendant charges.

What remedy, in the present state of parties, would the Parliament of Canada afford? Let the Journals and Sessional Papers of both Houses respond.

And then what becomes of the boast of British law "There is *no* wrong without a remedy?"

It is not, it appears to me, to be contended that the words of this 19th section of the *British Columbia Marriage Act* are directly confirmatory of the position that *the Divorce Act* must apply, but it would be overstraining the construction to interpret that section to imply other than, that the validity of marriages under that Ordinance, is to be tried in British Columbia.

If triable there, it can only be by this Court.

The construction of the law is in favour, not in restriction, of a jurisdiction once conferred by words ample for the purpose, and by an authority of ample power.

Once admitted that this Court can try the validity of any marriages under the local Marriage Act, it would require a statutory enactment to limit the jurisdiction of a Court, to which the Legislature without any restriction has granted for twenty years past "*complete cognizance* "of all pleas whatsoever."

And there is no such enactment, no such restriction.

One is driven, therefore, to the conclusion from whatever aspect the matter be regarded, by all considerations capable of application—reasoning directly, by analogy, by inference, by precedent, and general construction of law, that the English Divorce Act cannot but apply to the Province.

I have already remarked that at a time when no Court in England could give a divorce *a vinculo*, Divorce Courts have been for years established successfully in several other Colonies, two of them even Provinces of our own Dominion.

I cannot resist the conclusion that the *English Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85*, does apply to British Columbia.

Then comes the question, by what machinery is it to be administered? Is our Supreme Court sufficient? If there really is no machinery it must remain dormant, until machinery is provided to wake it into life: possibly by the Local Legislature, in whose hands resides the power of constituting Courts, even where the creation of the law to be applied by those Courts is reserved, by confederation, to the Dominion, as in this case exclusively.

Let us examine if there is none already. If there is, we need go no further for it.

By section 8 of the Matrimonial Causes Act, 1857, the Court of Divorce and Matrimonial Causes is made to consist of the Lord Chancellor, the Lord Chief Justices of Queen's Bench and Common Pleas, Lord Chief Baron of the Exchequer, the senior Puisne Judge in each of those three Courts, and the Judge of H. M. Court of Probate then (1857) about to be established, and actually established before this Act came into operation, and who is by the Act created Judge Ordinary of the new Court.

To the Probate Judge, as Judge Ordinary, is committed all the ordinary jurisdiction of the Court, except the trial of petitions *for nullity of marriage and divorce*, and applications for new trials.

The English Act further goes on to provide, section 11—"That during "the temporary absence of the Judge Ordinary, the Lord Chancellor "may by writing under his hand authorize the Master of the Rolls, the "Judge of the Admiralty Court, or either of the Lords Justices or any "Vice-Chancellor, *or any Judge of the Superior Courts of Law* at "Westminster, to act as Judge Ordinary of the said Court of Divorce "and Matrimonial Causes, and the Master of the Rolls, the Judge of "Admiralty Court, Lord Justice, Vice-Chancellor, or *Judge of the "Superior Courts* shall, when so acting, have and exercise all the "jurisdiction, power, and authority which might have been exercised "by the Judge Ordinary;" thus establishing the principle that the duties of Judge Ordinary are of no higher a class than can be performed satisfactorily by any Judge of the Superior Courts.

This constitution was given to the Divorce Court; indeed the Act itself was passed in consequence of the report of the Royal Commissioners appointed to inquire into the law of divorce; and "more "particularly into the mode of obtaining divorces *a vinculo matri-"monii* in England."

They recommended—

1. That dissolution of marriage should no longer be granted by the Legislature, but by a Court.

2. That the Court should consist of a Common Law, an Equity, and an Ecclesiastical Judge.

3. That dissolution of marriage should be allowed to a husband for his wife's adultery, but, as a general rule, not to a wife for his adultery, although she might have dissolution of marriage in cases of aggravated enormity.

4. And that to the existing grounds in suits for judicial separation, besides adultery and cruelty, desertion should be added as a further ground.

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In consequence of this report, after several unsuccessful attempts at legislation on the subject, the Matrimonial Causes Act, 1857, under consideration was introduced and became law: a carefully considered well settled measure.

Now, I am quite aware (it is no exaggeration to say, painfully conscious) that in every divorce case, small or great, the Court is entrusted with and has to exercise a high and perilous discretion; a discretion which the English Legislature up to 1857 had kept in its own hands; a discretion which looks not merely to the particular adjudication, but the social consequences.

I quite coincide with those writers and Judges, who consider that in the dissolution of the marriage tie the utmost care should be employed in all matrimonial, and especially all divorce cases.

The danger of being deceived, misled, or misinformed, the risk of not fully or sufficiently discerning where condonation, collusion, or other of the many bars to a divorce are existing, is indeed great; and this danger is evidently contemplated by the Legislature, for the framing of the Act itself shows clearly that the circumspection requisite in administering it must be, and was meant to be, extraordinary. The provision for the presence of a Probate Judge no doubt was made because questions connected with the validity of marriages are constantly coming up in probate, in applications for probate and administrations, and the like. But every necessary safeguard required by the Act can be obtained at the present time, and to the fullest extent, here, and out of this Supreme Court.

Each of the Judges of this Court has in himself all the authority necessary in the Province to discharge all the functions applicable here of the Lord Chancellor, Master of the Rolls, the Lords Chief Justices, of "*any Judge of any Superior Court in England*," or Judge in Probate as Judge Ordinary," not even excluding two Judges here (if there be thought any advantage in that), who have full jurisdiction in Admiralty.

The reason why so many Judges are named in the English Act to select from is one that is well known in England. It is that the judicial work of the Courts there is so overwhelming, and the division of judicial business so minute, that great difficulty would be experienced (without a long list to choose from) in getting any of the Judges to leave his own Court to sit in divorce. In practice, in the Colonies, a single Judge, combining the judicial experience in the duties fulfilled by the above several English functionaries, is found to be amply sufficient and satisfactory.

There is no function or authority, that I am aware of, dischargeable by any of the learned English Judges above enumerated that is not fulfilled and conferred under ample Letters Patent from Her Majesty on and by each one of the three Judges comprising this Court. To each is unhesitatingly confided the power over life and limb, and by

each has been exercised for years. To each is confided the full authority of the law over the liberty of the subject, his property, his infant children, testacy, intestacy, probate, and administration of his estate. Nor is the jurisdiction in Admiralty withheld, nor any other authority conferred on Judges by the law (except an exclusive jurisdiction of very recent creation in revenue matters), that I am aware of.

Indeed, as far as authority goes, it is questionable whether, as a matter of principle (I do not speak of amounts at stake in particular cases), until the passage of the Act creating the "Supreme Court of Judicature in England," the authority and jurisdiction of each British Columbian Judge, was not larger in his own person than that of any Judge of any single Court in England, where a minute division of judicial labour is a matter of necessity.

The only cases in which, I think, the combined learning of more than one Judge might be useful (as a matter of law it is not necessary, and, as a matter of practice, inconvenient,) are the cases of *nullity*, *divorce*, and new trials.

Here we have several Judges, each one competent to form the Court and deal with every case under it. It will scarcely be seriously pretended that Colonial Judges, merely because they are such, are not competent to deal with divorce cases; nor, because of the lack of any special training or special experience thought to be necessary in such matters.

If it be? The complete answer is, that experience has demonstrated the hollowness of the objection; for they have been found to answer in Colonies, where the Judges, as in British Columbia, have the same training as the English Judges, and are not unfrequently of the same Inns of Court.

But were there still any question of such a point, it would receive an immediate refutation by a reference to the wise provisions of the Act itself, which, in section 22, compels the Judges in all suits and proceedings, other than proceedings for dissolution of marriage, to act on the principles and rules of the Ecclesiastical Courts. These are most clearly laid down in a long series of Reports, and which we have here at hand; and in all proceedings for divorce itself—sections 27 to 31, inclusive, and other subsequent clauses—the strictest rules are laid down for the practice, procedure, and rules to be followed—from which no Judge dare diverge—with full powers of appeal and reversal of any improper decision of any one or more Judges.

It seems to me that once it is conceded that *in principle* the Imperial Act applies, but cannot be put in operation for lack of the machinery of a Court, the real main argument is conceded; and then Chief Justice *Draper's* judgment in the Whitby Corporation appeal case comes into play, to the effect, that if the Act itself is imported, it is not

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necessary that all the machinery for working it out should be imported at the same time. It is nevertheless in force, and from the date of importation. But here we have both Act and machinery, amply sufficient for all purposes.

As to the suggestion of the possibility of the Judges of the English Divorce Court coming out here to try a case of divorce, or to try a petition for sentence of nullity, and as to the argument advanced, that that is a Court in existence which can if it will come out here, to try any case of divorce or nullity, and, therefore, the British Columbia suitor is not deprived of remedy, though not obtainable in the local Courts, although it is, *arguendo*, conceded that the Imperial Act applies here, I can only say that I fancy that in such a case—after Great Britain in the "British North America Act of 1867" has denuded herself of the jurisdiction and has given the exclusive control over divorce in Canada to the Dominion; and assuming the Act in question to apply here—the first proceedings would be a demurrer (and a successful one too) to the jurisdiction of that particular Court, and the establishment of the applicability of the present Supreme Court of British Columbia for divorces and all other purposes of the Act.

Now let us take the converse of the Act. Assume still that the Divorce Act applies, and that supposition that there is no Court there as the machinery to carry it out. Suppose A and B parties to a divorce suit, *both born in British Columbia, married here*, the offence committed here, carrying a suit for redress and divorce to the Court for Divorce and Matrimonial Causes in England. What would the learned Judges there say? What *could* they say? Except we do not know you. Go back to your own country for redress. This is not your permanent domicile. You are not here "*cum animo manendi.*" This is not "*locus delicti*" where the alleged offence was committed. We repudiate the idea of a temporary domicile for the purpose of divorce, and scout the notion of a colorable domicile in fraud or evasion of the law. You have no "*locus standi*" here. If we did hear you it would be *coram non judice*. Even if we decided for you, we have no writ that would run into British Columbia. Even the *habeas corpus* writ was abolished after the Anderson case. Go, seek redress elsewhere. You have your own Courts and your own Judges. Go to them. So the parties would come back to find the Act in force, all the old remedies taken away, and recourse to the new substitutes withheld *sine die*, unless the Court here should step in and give the proper relief.

On a summary review of the whole of the arguments, statutes, and authorities, Imperial and Colonial, to which I have had access, and to which I have given long and much consideration, I am driven to the conclusion that the Imperial Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85, as amended by 21 & 22 Vict., c. 108, applies to all parts of British Columbia, and that the Supreme Court of

British Columbia is the Court, and its Judges the proper Judges, by which to carry out its provisions within British Columbia, and that all, or any one, are, and is, competent to hear and determine any case in divorce. It is necessary to deal with the larger jurisdiction in divorce, although the question immediately before the Court is a question merely of nullity of marriage, because the two are so connected in the similarity and importance of the consequences flowing from them. Re-marriage, legitimacy of second family, descent of real property, and the like, are dealt with by one Court under the Divorce Act, so that if the law applies for one, it must have a most important bearing on any application arising connected with the other. I am (as I said) driven to the conclusion of the applicability of the English Divorce Act, and that it was imported into British Columbia by the "English Law Ordinance, 1867," for among others the following reasons:—

It is not inapplicable. No Act is more necessary here for the protection of married life. It is not repugnant to British law, for it seeks only to carry out that law to its fullest extent. The English Laws Ordinance, 1867, which introduces it, is not void or inoperative, because contrary to Royal instructions. The Colonial Laws Validity Act expressly confirms its validity in spite of that. It has been included in the powers of the Supreme Court on the Mainland for nearly twenty years, since 1858. It has been included in the powers of the Supreme Court of British Columbia, after the merger in it of the Supreme Court of Vancouver Island, on and after the union of the two Colonies. The English Law Ordinance, 1867, extended it over all parts of British Columbia. It was retained by British Columbia under the Terms of Confederation in 1870, unaltered by the "British North America Act, 1867." No legislation in divorce has since taken place in the Dominion Parliament. If ever it does it will, doubtless, save existing rights, and probably provide a remedy in each Province. Until altered by competent legislative authority, the British Columbian past legislation in divorce is unaffected by Dominion law. It remains, until altered, where it was before Confederation. The argument that under the old English law prior to 1857, judicial divorce was not allowed in Colonies is met by the fact that in New Brunswick, Nova Scotia, the Cape of Good Hope, British Guiana, Ceylon, and the Mauritius, separate Divorce Courts, presided over by single Judges, have been in successful operation for a long course of years; and the validity of their decisions and divorces has been recognized in the English Courts. In 1867 England gave up the entire jurisdiction in divorce throughout North America to the Dominion. The law in *Lolly's* case, and many old cases, of the judicial indissolubility of English marriages, has for twenty years past been abandoned. The requirements of the old law, and the arguments used as to the indissolubility of the marriage contract in England, do not affect us here; for

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the Divorce Act was passed in 1857, took effect on 1st January, 1858, and has been in active operation ever since. Our English Law Ordinance was not passed until nine months later, 19th November, 1858, and whether it specificially mentioned the importation of the Divorce Act or not, must be deemed to have been passed *eo intuitu*; because its words are capable of no other legal construction. Its general extension (to relate back to the 19th November, 1858,) over all parts of British Columbia took place in 1867. There has never been such a thing as the absolute indissolubility of marriage; the dissolubility or indissolubility spoken of in the old cases, only meant judicial dissolubility or indissolubility.

Marriage (since the Reformation) has been always dissoluble *sub modo*,—*i. e.*, by Parliament; so even then indissolubility was not a principle of law. Dissolubility, or indissolubility, was not part of the marriage contract.

The *lex loci contractus* governs the contract of husband and wife, though, of course (as in *Brook* v. *Brook*, L. R. 9 H. L. 193), it cannot impart validity to a marriage expressly prohibited by the law of the domicile, *e. g.*, marriage with deceased wife's sister, in places where prohibited. *Lex loci domicilii, cum animo manendi, i. e.*, of the permanent domicile, governs the law of divorce. Divorce itself is a creature of the municipal law: it is now sanctioned by theEnglish law.

The Act, in points intimately connected with divorce, has been already put in force in British Columbia, and judicially acted on. The action for *crim. con.* abolished, which by parity of reasoning necessarily carries with it (section 2) the abolition of all the jurisdiction of the Ecclesiastical Courts (except over marriage licences). The deserted wife clauses are also in full operation here, and administered by our Courts.

The vast jurisdiction in probate—more potent, because more universal in its consequences even than divorce—and the law of lunacy, an important part of the equity jurisdiction of the country, have been assumed, under the same English Law Ordinance which imported the Divorce Act. All the criminal Acts here introduced under the same Ordinance to the 19th November, 1858, and all degrees of criminal punishment, up to and including death, have been inflicted under it.

The probate jurisdiction was introduced, although the machinery for working it was no more in the Colony than that required for the Divorce Act. Indeed, it is not nearly so much so. That for the latter is complete. It is true that, though in force in 1867, the power to divorce appears to have lain dormant, inasmuch as, for several years, there does not appear to have been any formal application or any persistent attempt to carry it out. Now, however, we have ample machinery here for all practical purposes and in principle of authority

as is employed to set the Act in operation in England, and the safeguard of several Judges, though one is ample for the purpose, under the constitution of our Supreme Court.

This question has occupied my anxious consideration now for several years, with a full conviction of the vast importance of the decision and of the extraordinary influence for good or evil which the admission of the Divorce Act must have on the social fabric of British Columbia for all time to come. Whatever I may feel personally in the matter, I do not consider myself justified any longer in withholding my definite consent to the conclusion that the Matrimonial Causes Act, 1857, is, and has been, in full force here, and that this is the Court out of which it has to be administered. And if divorce may be had here *a fortiori*, nullity of marriage can be obtained upon lawful cause shown. I adjudge accordingly.

P. S.—During the argument in the above case casual reference was made to the existence of an official document from Lord Lytton, when Secretary of State for the Colonies, which treated of the subject, but had been mislaid. It is not dwelt upon in my judgment, although, as a former Attorney-General of the Colony, I had some recollection of its existence. It was not enlarged upon, because it was not then forthcoming; and the subject under discussion was far too serious to be determined by anything but the most positive testimony.

In the discussion, however, on the constitutional powers of the Supreme Court of British Columbia, which took place on the argument in *Sewell et al* v. *The British Columbia Towing Company*, in this Supreme Court on 18th January, 1882, Mr. Attorney-General Walkem (now a Judge of the Supreme Court) brought before the Court the *Secretary of State's* (then Lord Lytton) *despatch bearing date the 14th February, 1859, to Governor Douglas*. This points very distinctly to the probable existence then of the Divorce Law of England in British Columbia, and in case of doubt suggests the local legislation to cover the whole ground, which has since taken place; for he says:—

"With reference to the doubt which Mr. Begbie" (then sole Judge of the Court, 1858,) "suggests, he will observe that *your power of legislation is for the present unrestricted*, "and I have no doubt you will co-operate in giving to his Court all such powers as it "may in your and his estimation require. You can constitute it a Court of Record, give "it equitable jurisdiction and ecclesiastical jurisdiction in case of wills and administra- "tion. With regard to Admiralty jurisdiction, which is usually conferred from home, "there is no longer any question at issue, for you have been apprised by my despatch of "the 6th January last that Her Majesty has thought proper to establish a Court in "British Columbia for the trial of offences against the laws of Vice-Admiralty. *As* "*to the recent Divorce and Matrimonial Causes Act* it may be a matter of rather curious "question whether the law thus established extends to British Columbia, *a Colony con-* "*stituted after its passing*, or not, but I should think it much better *such doubts be* "*superceded by enactment* establishing such provisions as may be deemed expedient "in the infant state of British Columbia. My predecessor, Lord Stanley, suggested "*the assimilation of the law of the Colonies in general to that of England in this respect*, "and there are obvious advantages in a similarity of laws throughout the Empire on "the marriage question, but I do not consider it necessary to press the subject upon "you, leaving it to yourself to decide whether the subject may not be better dealt with "by the Colonial Legislature, which, I hope, to find soon established."

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In accordance with and following this recommendation we find that in March, 1867, the Legislature of the United Colony of British Columbia, after the Union of the Colony of British Columbia with the previously separate Colony of Vancouver Island, passed the Act in the general terms suggested by the Colonial Office, and which I have shewn was the general form used in nearly all the Colonies, "That the civil and criminal laws "of England, as the same existed on the 19th November, 1858, and so far as the same "are not from local circumstances inapplicable, *are* and *shall be* in force in all parts of "the Colony of British Columbia."

That enactment clearly included the Divorce and Matrimonial Causes Act in question, as amended, and effectually removed any doubts which may have existed on the subject.

H. P. P. C.

17th October, 1887.

BEGBIE, C. J.:—

This is a suit for a decree of nullity of marriage. Under sec. 10 of the "Matrimonial Causes Act, 1857," (20 & 21 Vic., c. 85, Imperial). "All "petitions * * for a sentence of nullity of marriage * * shall be "heard and determined by three or more Judges of the said Court, of "whom the Judge of the Court of Probate shall be one." By section 8 "the Lord Chancellor, the Chief Justice of the Court of Queen's Bench, "the Chief Justice of the Court of Common Pleas, the Chief Baron of "the Court of Exchequer, the senior Puisne Judge for the time being "in each of the three last-mentioned Courts, and the Judge of the Court "of Probate constituted by the Act of that session (1857) shall be the "Judges of the said Court of Divorce and Matrimonial Causes." By another Act of the same session (20 & 21 Vic., c. 77), sec. 4, a new Court—the "Court of Probate"—was constituted, and by sec. 5 Her Majesty was empowered to appoint a person qualified as therein mentioned to be a Judge in the said Court of Probate. And the question before us to-day is—Can the present Supreme Court of British Columbia exercise the powers mentioned in sec. 10 of c. 85? Can we by virtue of sec. 10 hear and determine a matter which is to be heard and determined (in England) by three of the Judges enumerated in sec. 8 above cited?

All the statute law of England as it stood on the 19th November, 1858 (including the above Statute therefore), is in force in British Columbia, so far as not inapplicable, and not altered by local legislation. The phrase is not "shall be applicable or applied as nearly as may be," or "with such alterations as circumstances may require," or any modification of that sort. If an English Statute of the session of 1858, or of earlier date, is applicable, and so far as it is applicable, it is law here. If it be not applicable it is not law.

The present Supreme Court of British Columbia is created, and its jurisdiction defined by the "Supreme Courts Ordinance, 1869." After noticing the two separate Courts of the Mainland and Vancouver Island, that Statute proceeded, by section 11, to enact that on the vacancy by retirement, &c., of either Chief Justice (which event happened in 1870, on the retirement of Chief Justice Needham), the

two Courts of the Mainland and Vancouver Island should be merged in one Supreme Court, viz., the existing Court now sitting; the surviving or continuing Chief Justice was to be Chief Justice of the new resultant Court: one Puisne Judge was to be appointed therein, and the new Supreme Court and the Judges thereof were to have all the jurisdiction, powers, and authorities of the two then existing Courts, and the Judges thereof; that is, these powers and no others were to be the powers of the newly named Courts. This included, I think, all the topics of jurisdiction, if any, peculiar to either of the then existing Courts, although I think further that the two then existing Courts had at that time (1869), practically, jurisdiction over exactly the same matters, administered under local laws slightly different. Both Courts had full jurisdiction, *i. e.*, within their respective geographical limits, in bankruptcy, and in all common law actions affecting land, contracts, &c., although the bankruptcy laws, the land survey and registration Acts, the laws of execution, &c., and of judgments, &c., were different in the two Colonies. In this sense, they exercised somewhat different jurisdictions. But all the subject matters of jurisdiction upon which the two Courts could entertain applications by suitors, were, I think, precisely the same, although the procedure, and, perhaps, the rights of parties in respect of those subject matters, were defined by different instruments.

The Supreme Court of Vancouver Island, which was the new name given by the Ordinance of 1869 to the former Supreme Court of Civil Justice of Vancouver Island, was to have (until merged under section 11) the same powers as the original Court of Civil Justice of Vancouver Island, just as if the name had not been changed, and as if the "British Columbia Act, 1866," had not been passed (section 6). This was an Imperial Act (29 & 30 Vic., c. 67), which indirectly, perhaps unintentionally, abolished the old Vancouver Island Court, created in 1856. The (local) Act, "The Courts Declaratory Ordinance, 1868," however replaced the original respective geographical limits of the two Courts, and in effect, as to the Court in Vancouver Island, recalled it into existence; but it left the topics of jurisdiction of both Courts exactly where they were. By the same section 6 of the "Supreme Courts Ordinance, 1869," the jurisdiction of the Supreme Court of the Mainland of British Columbia was to be the same as that of the aboriginal Court of Civil Justice of British Columbia, just as if the name had not been changed, and as if the (Imperial) "British Columbia Act, 1866," had never been passed. From this review I think it is tolerably clear, notwithstanding what has fallen from my brother Gray, that the present Supreme Court of British Columbia cannot possess any jurisdiction, *i. e.*, topics of jurisdiction, which neither the aboriginal Court in Vancouver Island nor the aboriginal Court on the Mainland possessed previously to 1869. The question now to be

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decided therefore is, I think, whether either of the old Courts was ever entrusted with the power we are now asked to exercise, viz., the power of decreeing nullity of marriage. This power, if exerciseable at all, must be exercised in conformity with, and by virtue of, the Imperial "Matrimonial Causes Act, 1857."

It seems to me that any argument in favour of holding that the power was given to the British Columbia Court in 1859 applies with precisely the same force, and, indeed, with the very same words, to the Court in Vancouver Island after the 1st May, 1868 (the date of "Courts Declaratory Ordinance, 1868"). But I think that it was not in fact given either to the British Columbia Court in 1859, nor to the Vancouver Island Court in 1868.

First, as to the original Court in Vancouver Island. This Court was constituted by the Order in Council, 4th April, 1856. According to that Order in Council the Vancouver's Island Court was to have full cognizance of all pleas and jurisdiction in all civil cases arising within the Colony, with jurisdiction over all persons resident there; and all such equitable jurisdiction, &c., as the High Court of Chancery in England; jurisdiction, also, in cases of lunatics and infants, and exclusive jurisdiction as to wills, &c., "with full power, authority, and jurisdiction to 'apply, judge, and determine upon, and according to the laws now or "*hereafter* to be in force in the said Colony." In 1867 the whole body of English Statute Law, up to 19th November, 1858, was declared to be thenceforth law in Vancouver Island, being the same date as that adopted on the Mainland. The Statute, 20 & 21 Vict., c. 85 (the "Matrimonial Causes Act, 1857,") was, therefore, in 1867 just as much, and in the same way, law in Vancouver Island, as it had been since 1858 law on the Mainland, and if by the combined operation of the Proclamations of 19th November, 1858, and of the 8th June, 1859, the law of divorce was introduced on the Mainland and placed within the jurisdiction of the Supreme Court of the Mainland of British Columbia, then the combined operation of the "English Law Ordinance, 1867," and the "Courts Declaratory Ordinance, 1868," could not have failed (the very same identical words being in question) to introduce the jurisdiction into Vancouver Island, and vest it in the Supreme Court of Civil Justice of Vancouver Island.

The grounds on which my two learned brothers base their opinion that we have to-day authority to inquire into and to pronounce sentence of nullity, &c., have been fully stated by themselves. I do not pretend to vary that statement; but shortly compressed the arguments generally in favour of the petitioner, have seemed to me as thus: The "Matrimonial Causes Act, 1857," forms part of the English statute law which came in force on the Mainland on the 19th November, 1858, so far as it was not from local circumstances inapplicable; and the only local circumstance which seems to have made any part of the Act inapplicable

was that there was only one sole Judge on the Bench here. That sole Judge, however, could exercise (it is said) the whole of the authority which a sole Judge might exercise in England, *i. e.*, the whole of the Act, so far as marriage causes, judicial separation, &c., were concerned, applied here; and so much only can be deemed to have been excepted as authorized the dealing with petitions for divorce *a vinculo*, and for rehearing, and for a sentence of nullity of marriage. These the Act required to be heard and decided by three Judges; and these, the argument admits, were, perhaps, not cognizable here at first; but so soon as there were three Judges in the Supreme Court here, then this part of the authority which had been dormant only, but which from the first had been vested in the Court, became (it is said) immediately exerciseable; and it is so now. It was argued that there is, comparing England with British Columbia, the closest analogy of authority, nay even identity of nomenclature, as to two of the persons authorized to sit under section 8 of the "Matrimonial Causes Act, 1857," a Chief Justice and a senior Puisne Judge; and as to the third Judge, who in England is to be the Probate Judge, and an indispensable member of the Court (and by far the most important member, since he may deal with all but five or six matters by himself alone, but none of the other Judges can act at all without him), he may well be represented by analogy here by the junior Puisne Judge, who, it was observed, exercises as part of his usual powers jurisdiction in probate. And if not, it is suggested that the Chief Justice here might well assume (also by analogy) the powers of the Lord Chancellor in section 11, and appoint the Junior Puisne to act for the Probate Judge. It was argued that an opposite construction would operate most unfairly to Englishmen settled here. They would find that one of their old constitutional remedies, the right to bring an action of *crim. con.*, was taken away, although the fresh remedy which the Statute of 1857 gave in lieu of it could not be obtained, and, therefore, common justice requires that the Statute should be applied *in toto*, at least so far as to empower this Court to grant divorces *a vinculo*; and if power to do that, then also to hear and decree upon petitions for sentence of nullity of marriage.

To deal with this last argument first; it seems to me to admit of several answers. First of all, a case of hardship which there is reason to hope is of very rare occurrence, must not induce us to assume a jurisdiction *ad hoc* without legislative sanction; hard cases must not induce us to give judgments bad in law. But it really was part of the argument used in the English Parliament for abolishing the action of *crim. con.*, that the action itself was a disgrace to the English name, and the abolishing of it was therefore no hardship—it was deemed an advantage, not a loss, to every Englishman. Entirely apart from this, it is often possible that an Englishman going to an entirely new Colony may incur very serious inconvenience through the

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absence of a tribunal. Everybody is agreed that Englishmen going to an empty land do carry the body of English Statutes and Common Law along with them. Thus in Vancouver Island, after 1849 at least, and probably earlier, the laws, common and statute, of England, applied here. The title to land, rights under contract, the law of murder, was to be decided according to English law, although until 1856 there was no Court before whom an action of ejectment or of breach of contract could be brought. That did not leave a man who had been turned out of his house, or cheated at market, at liberty to slay the wrong-doer. A man was bound by the English law on the one hand, although he did not on the other hand get the same remedy as if he had continued in Yorkshire. In fact, it was this hardship that led to the tardy establishment of a Court of Justice in 1856, though Vancouver Island was then still very thinly inhabited. But besides this, the argument, if it be worth anything, proves, I think, too much. For we are all agreed, and it has been repeatedly decided, that the "Matrimonial Causes Act, 1857," applied here immediately to this extent, that the action for *crim. con.* has never been maintainable since 1859 on the Mainland, nor since 1867 in the Island. An Act of Parliament may be applicable in part, and inapplicable in other parts. It has always been held that section 59, which abolished the action of *crim. con.*, was from the first perfectly and easily applicable. The grant of divorce was clearly impossible for any Court in the Colony to entertain, either in 1859, or 1867, or 1868. Whether there was in the Colony any officer who could wield the authority of the Judge Ordinary under the English Act, may well be doubted. Thus the application of some parts of the Act was clear; of some, doubtful; of others, impossible. It was argued however, that although not exerciseable here, the jurisdiction *quâ* divorce *a vinculo* always had a potential existence; dormant; *in gremio legis*.

For myself I cannot understand how a Court can possess powers which it cannot exercise, though called upon to do so; and the mere expression comes as near to a contradiction in terms as can be conceived. It is true, a Court may possess powers which are dormant in one sense, *e. g.*, a Court of Equity cannot grant an injunction until the bill filed; but that is not because the power is not there; the power is always there; but according to the well-known practice of jurisprudence, no English Court is self-acting; it must be put in motion by a proper plaintiff asking relief in proper form. And thus the common expression is true that a Court of Equity has no jurisdiction to grant an injunction until bill filed. It has the jurisdiction, speaking generally, all the time; but not jurisdiction *ad hoc* until its aid is asked in proper form. But in the present case, no application can be listened to, the Court is utterly powerless to exert its alleged powers, until the Dominion Minister of Justice, after the lapse of

fourteen years, in a moment inspires vitality into the hitherto lifeless body. The contention is in fact that it is the act and volition of the Dominion Minister of Justice in 1872, acceding to the suggestion of the British Columbia Legislature, which practically conferred power on this Court to pronounce sentences of divorce *a vinculo* here. I feel pretty sure he never contemplated such a result, and I decline to accept it. I think a fair reading of B. C. Statute of 1872, No. 29, which sanctions the creation of a third judge, is quite inconsistent with the notion of any novel head of jurisdiction being imported thereby, nor could it possibly confer any jurisdiction in divorce, being subsequent to Confederation, and divorce being reserved to the Dominion Legislature by the B. N. A. Act, 1867.

In consequence, perhaps, of these considerations my two learned brethren, seeing that the jurisdiction to-day cannot be supported unless it was possessed by the sole Judge in the several Courts previous to 1869, and overcome by the strength of the general words of the Proclamation of 1859, have not hesitated to avow their opinion that the full divorce jurisdiction, which in England was only to be exercised by three Judges, has all along subsisted on the Mainland. We must be very careful, however, to distinguish between the argument that it must have existed then, otherwise it would not exist now, *i. e.*, it cannot exist now, unless it existed then; and the argument that it exists now, because it existed in 1859. I fully agree to the first argument; but I demur to the latter, the only one which we are interested in considering to-day. Let us then examine what are these general words to which such a singular force is attributed.

The words of the Proclamation, 8th June, 1859, are that "the "Supreme Court is to have complete cognizance of all pleas whatso-"ever, and to have jurisdiction in all cases, civil as well as criminal, "*arising within the Colony of British Columbia.*" I think that clearly points to the word "jurisdiction" being used with reference to the territorial limits of the power and authority of the Court, and nothing more; not that the Court is to have universal jurisdiction as to topics, but that whenever a case arises which it can take cognizance of, this Court shall have full cognizance of it if the matter or parties are in British Columbia, leaving the topics of jurisdiction, and the nature of the jurisdiction, and the manner and doctrine of its application, entirely undefined and at large. And this view seems to gather considerable strength when we compare the wording of the Proclamation, 8th June, 1859 (constituting the Mainland Court), with the Order in Council, 4th April, 1856, which constituted the Vancouver Island Court. There the very same words are used, but with additions. The draftsman of the Proclamation has evidently taken the Order in Council as a precedent, rejecting (from whatever motive) all the subsequent words of that Order, viz., those which expressly give to the Vancouver

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Island Court "all such equitable jurisdiction as the High Court of "Chancery in England," and "power over infants and lunatics and "their estates," and "exclusive jurisdiction in cases of testacy and "intestacy." What is the object of the Order in Council stating all these different heads of jurisdiction, if they all pass by the first general grant? There is no express grant in the Order in Council, any more than in the Proclamation of the 8th June, 1859, of any common law jurisdiction whatsoever; and I apprehend that the Court of Civil Justice of the Colony of Vancouver Island probably exercised its powers on the common law side by its inherent authority, apparent in its very name and title conferred by the Crown, rather than by virtue of the general words "cognizance of all pleas," in the Order in Council; general words can hardly be a definition of anything. The same thing may be alleged of the old Supreme Court of Civil Justice of British Columbia. A Judge is sent out here with a commission giving him the name and office of a Judge, and empowering him "to hold Courts of "Judicature and to administer justice according to the laws for the time "being in force" here; those laws being the English statute and common law at the 19th November, 1858, supplemented by subsequent local laws. That appointment gives him a very general authority, which can hardly be impugned so long as he does act according to those laws, and does not hold any Court or attempt to administer relief either in itself unauthorized by the laws, or by unauthorized methods. Of course, the true way to define the jurisdiction of a new Court, and by far the simplest and most convenient way, is to declare that within certain definite geographical limits it shall have the same jurisdiction, &c., as some pre-existing Court whose powers are already known: the same, *e. g.*, as the High Court of Chancery in England, the Court of Queen's Bench, or Common Bench, &c., &c., in England. That is the method, *e. g.*, adopted in 1873, when the High Court of Judicature was established in England. That is the plan usually adopted in Colonies, partially adopted in Vancouver Island, and, in fact, adopted in all the Colonies (not very many) whose "Charters of Justice," or similar documents, I have had an opportunity of examining, except Ceylon and Gibraltar. At the Cape of Good Hope, *e. g.*, where it was alleged the jurisdiction is defined by the same general words as in British Columbia, and where the Courts undoubtedly exercise jurisdiction in divorce, we find this all-important distinction. It is true, the very same general words are used as here, viz., "complete cognizance of all pleas, and "jurisdiction in all cases, civil, criminal, and mixed;" but then follow the important words "in the same manner and extent" as the old Court thereby abolished. And the old Court having had divorce jurisdiction under the Dutch-Roman law, the new Court had it equally, of course. The argument to be drawn from such an example is not that this Court has the divorce jurisdiction, but that it has it not. And at Gibraltar (where alone, so far as I have learned, the same words and no

others are used which are found in the Act constituting the British Columbia Supreme Court) it has been found necessary to supplement the original Charter of Justice by other charters, giving jurisdiction in bankruptcy, lunacy, &c.; which has also in effect been done in British Columbia, by successive Acts of the Local Legislatures. And it is not alleged that the Gibraltar Court has ever assumed jurisdiction in divorce. The method above mentioned has many manifest advantages, among which, it is not the least, that if, by virtue of general words, I assume (say) to exercise an equitable jurisdiction, I have to define it and frame a system for myself. But if by virtue of express words I am to exercise "such "equitable jurisdiction as is exercised by the High Court of Chancery," then neither I nor the suitors are left in doubt. Whatever an English Lord Chancellor has done, I am bound to do: whatever he has refused, I am bound to refuse. The Court and the suitors have a well-known and detailed system of principles and practice ready to hand. This plan, however, has only been partially adopted in the Order in Council with respect to the Vancouver Island Court, and not at all followed in the Mainland Proclamation, 8th June, 1859; and we are left to determine, as well as we can, what were the topics of jurisdiction conferred by those instruments, or either of them? We must examine the intention of the Legislatures in 1859, 1867, and 1868, and see whether there was or not an intention to confer this jurisdiction. Statutes, as Lord *Coke* observes, are always to be expounded according to the intent of the framers, where the words are capable of divers interpretations; and general words are always so capable. If the jurisdiction were expressly conferred, of course we could not enquire into such intention. Not being expressly conferred, it is our duty so to enquire.

The contention on behalf of the petitioner, adopted as I understand by my learned brethren, is, that the words "complete cognizance of all "pleas whatsoever, and jurisdiction in all cases, civil as well as criminal," being quite unhampered by any words whatever in British Columbia, and evidently supplemented, not weakened, by the additional words in the Order in Council in Vancouver Island, extended so as to include every topic of jurisdiction and every method of relief: that the word "pleas" is most apt and proper to express every step or proceeding, whether of attack or defence, taken before any Court of our Lady the Queen in any litigation whatever: an unopposed petition is within the natural meaning of the term "pleading:" and that the words "jurisdiction in "all cases, civil as well as criminal, within the Colony," are so broad and plain, that it is impossible to conceive any litigated measure which does not fall within it. But these propositions are, in my opinion, inexact. It is quite clear that the "universality" of the phrase does not include Admiralty jurisdiction. I shall presently refer to the Vice-Admiralty Court as very strongly analagous to the English Court for Divorce and Matrimonial Causes. It is impossible for the Judges of

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this Court, since the "Lunacy Jurisdiction Act, 1872," to hold that jurisdiction in lunacy was conferred by those words on the Court of British Columbia. Indeed this point seems to have been so held in the case of Gibraltar. Equally impossible is it for us to say that these general words conferred jurisdiction in Bankruptcy on the Court of Vancouver Island. I do not think it would be contended that either of the Courts could have determined and decided on apostacies, herecies, commutation of penance, and the rest of the twenty-seven topics which Lord *Coke* says are to be heard before the Queen's Ecclesiastical Judges. It is therefore, I think, clear that there are some exceptions to this general grant of jurisdiction. I think, however, that it is a fair proposition to lay down that this general grant does convey jurisdiction as to all matters except those where an intention may be inferred not to convey it.

Now, as regards Vancouver Island, the very date (1856) shews that there could then have been no intention to confer on the old original Court in Vancouver Island any jurisdiction in matters of divorce *a vinculo;* for until 1857 English jurisprudence denied this to be within the competency of any Court at all, and required a special Act of Parliament to effect it in each individual case.

The earliest Statutes into whose intention we can inquire are, the Proclamation of 1859 and the "Courts Declaratory Ordinance, 1868," and the "Supreme Courts Ordinance, 1869." And in neither of these is there any preamble or anything to bear upon this matter, except the fact, of which perhaps we should take judicial cognizance, even if it were not stated in the various Acts, viz., that in the several Courts there is but a single Judge.

If, then, all the various Courts and jurisdiction exerciseable by any judicial authority in England had been present to the mind of the legislating power, in 1859, in 1868, or in 1869, it would have been seen that whereas every other matter may, in one shape or another, be decided by a single Judge, one topic which had only just been for the first time brought within the cognizance of a Court of Law in England, was specially reserved for three Judges to decide; and was not in England permitted even to be heard by a single Judge. We must therefore, even in the most liberal interpretation of his words (and I agree that we ought to enlarge as far as possible the topics and territorial limits of the jurisdiction of a Supreme Court) suppose the legislator to have known that even if he had expressly imported the Imperial "Matrimonial Causes Act, 1857," yet the jurisdiction therein given to the English Divorce Court would, on this ground alone, fail to be exerciseable here in the three cases mentioned in s. 10, nullity of marriage being one: and we can suppose no such futile an intention as an attempt to confer a non-exerciseable jurisdiction. If it were not intended to be conferred in 1859 it cannot be implied from the general words used,

there being other heads of jurisdiction which amply satisfy them. I think there is here positive evidence of a negative intention not to confer it. And if not conferred on the original Court either of British Columbia or Vancouver Island, it cannot be vested in this Court now, whether composed of two Judges as in 1869, or three, or thirty Judges. How foreign any divorce jurisdiction was to the mind of the legislature in 1869 (when this Court and its jurisdiction was defined) is pretty clear from the "Civil Procedure Ordinance, 1869." By that Act all the procedure and practice of the Superior Common Law Courts and High Court of Chancery was imported here, as the Rules and Orders of the respective Courts stood at that time. But nothing is said of the Rules and General Orders of the High Court of Admiralty, nor of the very extensive and very carefully considered code issued by the Court for Divorce and Matrimonial Causes under 20 & 21 Vic., c. 85, s. 53, presumably, because the Supreme Court could not entertain these matters; nor are there, so far as I am aware, any rules professing to govern procedure in divorce cases here.

It is important to consider what is the constitution of the English Court upon whom this jurisdiction is conferred. And the method of its constitution is singular. Whenever on any other occasion (so far as I have learned) a new Court has been authorized by Act of Parliament, whether of partial or inferior jurisdiction, as Bankruptcy Courts and County Courts, or of the highest and most eminent in jurisdiction, as Courts of High Commission and Delegates in the olden time; whether creating Lords of Appeal in the House of Lords (as in the Act of last Session) or the permanent paid Judges in the Judicial Committee (1873) (the ultimate Court to which even this case, which we are now considering, may be taken), authority is always given to the Crown to select and appoint the Judges of the new Court from among a class of candidates possessed of qualifications defined in the Act itself, *e, g.*, barristers of seven or fifteen years' standing, and so on. But in the case of the new Divorce Court no such authority is given to the Crown. The Crown has no authority to appoint a Judge of the Court at all. The Judges are all, *ex officio*, personages already filling some other judicial position. They are not appointed by the Crown, but by Parliament. They all sit by virtue of holding some other office. It is true, these persons must have been already appointed to those other judicial offices by the Crown; but the prior appointments are made wholly irrespectively of this Act, and once appointed, they have these other duties imposed on them by the Act (c. 85), or else grow into them by seniority, without any possibility of previous intention on the part of the Crown. When the Queen appoints a Puisne Judge how can she know that he will ever survive to be a senior puisne of his Court? As a familiar illustration of this difference, I would refer to the case

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of the trustees of the Episcopal lands here. They are, or were, *ex officio*, the Governor, the Bishop, and the Archbishop of Canterbury. All these are selected by the Crown, but it surely would be most inaccurate to state that the Crown appointed the trustees of the Episcopal lands.

Neither under the Act itself may any of these *ex officio* Judges act alone in such a case as the present. In England there must be at least three of them, of whom the Judge of the Court of Probate, appointed under another Act (20 & 21 Vic., c. 77), must be one.

The other *ex officio* Judges are the Lord Chancellor, and the three Chiefs, and the three senior Puisne Judges of the three Superior Courts of Common Law at Westminster. These eight *personæ designatæ* are always the *ex officio* Judges of the Court, *virtute officiorum*, and of the Statute, and there are none other, nor any power in the Crown to appoint any other. It is true that in case, not of a vacancy of the office, but in the temporary absence, of the Probate Judge, the Lord Chancellor may nominate any one of certain others designated High Judges of Superior Courts to act *pro hoc vice* as Judge in ordinary, and it has even been suggested that the Chief Justice in the Supreme Court here is so strictly analagous to the Lord Chancellor that he may exercise that authority in British Columbia. In that argument I cannot coincide.

We must always recollect that judicial jurisdiction of the Supreme Court here is vested not in a single Judge, as the Lord Chancellor, or the Judge in Probate, or in Admiralty, but it is vested in the Court; whether that Court comprise one Judge, as from 1858 to 1870, or two Judges, as from 1870 to 1872, or three Judges, as at present happily constituted. Although for convenience sake and under the authority of the "Circuit Courts Act, 1872," and the "Puisne Judge Appointment Act, 1872," and under authority, sittings of this Court may in general be held before any one Judge thereof, yet he is not the Court in every sense of the word. The contrast is well known, occurring in half the provisions of the Common Law Procedure Act. But it does not at all follow that because this Court has all such equitable jurisdiction and all such powers for enforcing the same as the High Court of Chancery in England, that therefore the Chief Justice here has all the authority of the Lord Chancellor there, in matters especially which are not in any way connected with the said equitable jurisdiction. Even in matters very closely thus connected, there has been very lately, not exactly a decision, but a very strong and unanimous expression of opinion by this Court, that the Chief Justice has not even the ordinary and common form authority of the Lord Chancellor to rehear, by way of appeal, an order made by one of the two Puisne Judges. This opinion seems quite conformable with the "Puisne Judge Appointment Act, 1872," and that being conceded, it would seem most strange that the Chief Justice here should

have the power given to the Lord Chancellor in England by section 11, viz., the power of appointing a temporary Judge Ordinary. But even if the Chief Justice here had such power, it could only be exercised during the temporary absence of the Probate Judge, not during the permanent vacancy; and this phrase alone shews that the Statute here is speaking of quite a different matter. The Probate Judge here is never temporarily absent, so long as the Chief Justice or any other Judge is present. But then it is argued that this appointment by the Lord Chancellor of a temporary substitute is not necessary here; that there is full jurisdiction in Probate here, exerciseable by any of the three Judges, exercisable therefore by the junior puisne; in which view, since the Chief Justice and the senior puisne satisfy the requirements of the Statute for the other two Judges, the three may sit, even to hear petitions for divorce *a vinculo* under section 10; and it was said that the reference to the power of the Lord Chancellor in England to appoint a deputy was made, not only to shew that such a power might exist here, but that in fact a petition for divorce *a vinculo* might, in England, come on to be heard before a Chief Justice and two Puisne Judges of any of the Superior Courts of Common Law, if only the Lord Chancellor should appoint (as he undoubtedly might under section 11) a junior Puisne Judge of one of those Courts to act as Judge Ordinary; and if three Common Law Judges could so act there, why might not three Common Law Judges here? Especially as they have in fact in addition both common law and equity jurisdiction? But this argument was apparently used merely as shewing that the proposal to entertain the jurisdiction in a suit of nullity of marriage before three Judges of one Common Law Court is by no means foreign to the intention of the English Act; and not as admitting it to be essential that there should be any appointment by the Chief Justice here of the junior Puisne Judge to be a substituted Judge of Probate: since, it is said the Judge of Probate is already here at hand in the person of the junior Puisne Judge of this Court, he having full jurisdiction in probate. The short answer to that again is that the full jurisdiction in probate is not in the junior Puisne Judge of this Court, or in any single Judge, but in the Court, although (as has been already remarked) exerciseable, and commonly exercised, in every case by a single Judge thereof, on the ground of public convenience; and an order made by a single Judge is for many purposes and in most topics of jurisdiction to be deemed the Order of the Court, until modified or set aside. But that does not, in my opinion, afford any ground whatever for treating the junior puisne as the Judge Ordinary in marriage and divorce causes. Surely it is not he that is to be taken to be the Judge Ordinary rather than the Chief Justice or the senior puisne? The junior puisne of this Supreme Court has not, like the Judge of the Probate Court in England, any peculiar authority on that or any other head; nor presumably any peculiar experience with ecclesiastical law, which is

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obviously the reason for selecting the Probate Judge in England to be Judge Ordinary in the Divorce Court. The only reason for so taking him here I am afraid is pretty clear: the Chief Justice and the senior puisne are already wanted under those respective designations to form members of the Court within section 8, and so the junior puisne is to be styled "Judge Ordinary in Probate." But this is a way of dove-tailing Judges together to form a Court which I feel very unwilling to sanction, even if I thought that any of the three Judges, and not the whole Court, is in fact invested with the probate jurisdiction. I cannot find any true or justifiable principle for thus taking the junior Puisne Judge of this Court and calling him the Judge in Probate. He may act it is true, as a Probate Judge, but he is not the Judge of the Court of Probate, even here. Much more emphatically, he is not *the* Judge of *the* Court of Probate mentioned in the Act, section 10, which does not say that any Judge having power to order probate of a will may be Judge in Ordinary in the Court for Divorce and Matrimonial Causes, but only the Judge appointed under the Act of the same Session (20 & 21 Vic., c. 77).

To sum up: I am of opinion that the "Matrimonial Causes Act, 1857," is in force in this Province so far as it is not inapplicable. This indeed, is common ground; for if the Act does not apply we have no jurisdiction. But I think that parts of it are inapplicable, and never were intended to be applied. I find that according to the law in force both in Vancouver Island and the Mainland at the time when this Court came into existence, all matters relating to matrimonial causes were to be dealt with under that Matrimonial Causes Act by a Court composed, not of Judges appointed thereto by the Crown, but of *ex officio* personages selected, not by the Crown, but by the Act itself, from five other distinct Courts, and that a suit for nullity could only be heard before three of these Judges, of whom Sir Cresswell Cresswell, Sir James Wylde, or Sir J. Hannen, successively, were to be one. I am of opinion that that is a Court of entirely distinct formation from either the Court of British Columbia or of Vancouver Island, each presided over by a single Judge appointed directly by the Crown, and if the legislature had even in 1859 or 1869 expressly conferred jurisdiction in matrimonial causes under that Act upon the Courts here, that grant of jurisdiction would not have extended to confer power to hear petitions of nullity, which by the Act itself are to be heard before three Judges. A grant of a power which cannot be exercised is not a grant of any power at all. I find it impossible to conceive that the Legislature, either in 1868, or 1867, or 1859, intended to convey this authority to Chief Justice Needham or the Chief Justice of the Mainland. The Legislature even in 1869 contemplated, what in fact occurred, that the present Court would for some time to come be composed of a single Judge, and that it would ultimately and

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permanently be composed of two Judges only. There is no ground for supposing that the Legislature in 1869 had the smallest contemplation of three Judges. I think this Court now has the jurisdiction, and no more than the jurisdiction, which was conferred on it in 1869, *i. e.*, the same which the two Courts had in 1867–8; and that the subsequent incidental alteration of the number of Judges to three (the accident of an accident, as is very frankly set forth by the preamble of the Act of 1872), could not augment the heads of our jurisdiction, so as to include questions of divorce. By the "Puisne Judge Appointment Act, 1872," the third Judge is to have the "same" powers and jurisdiction, *i. e.*, all the powers and jurisdiction, but none additional, with those of the first Puisne, under "Supreme Courts Ordinance, 1869." And this is accurate. Any attempt in 1872 by the Provincial Legislature to confer jurisdiction in divorce, would undoubtedly have been unconstitutional and void under the "British North America Act, 1867," s. 91. There is therefore, since the appointment of the third Judge, no new authority to be exercised beyond what was exercisable in 1869; and, in my opinion, we have no authority to hear this petition or to make any order thereon.

GRAY, J.
1873.

25th April.

IN *re* KLAUKIE'S WILL.

Probate—Foreign Will—Foreign Marriage Contract—Real Estate—"Land Registry Ordinance, 1870."

Contracts of Marriage made in a foreign country, the domicile of parties, by the terms of which, in accordance with the laws of that country, the alienation by a testator (one of the parties to the contract) of his real estate away from his wife and family is forbidden, will prevent a contrary disposition of the same even though, according to the *lex loci rei sitæ*, there be no such restriction. By the comity of nations, the contract travels abroad, and, as between the parties to that contract and their representatives, attaches to the testator's real estate in places other than the domicile.

Marriage, carried out in consideration of such a contract and in accordance with the laws of the domicile, will, in its incidents touching the real estate of one of the parties, as between those parties and their representatives, be respected and sustained, as to those incidents in countries other than the domicile, when there is no direct local legislation to the contrary.

Remarks on the "Land Registry Ordinance, 1870."

This was an application, made on behalf of Oscar Christian Alexander Klaukie, for probate of the will of Martin F. Klaukie, of Dusseldorf, Prussia, deceased, made at Dusseldorf, on 25th August, 1870, and a codicil thereto made at the same place, on 4th January, 1871.

The petitioner was made by the codicil an executor of the will.

The petitioner and surviving devisees, under the will and codicil, are residents of Dusseldorf.

The will referred in particular terms only to two dispositions; one of real estate in Victoria, B. C., the other of shares in a Mining Company, incorporated in California.

The codicil modified the disposition of the real estate in Victoria, but not in a manner to affect the questions raised.

Drake, for the petitioner—The will and codicil are both proved to have been executed in accordance with the requirements of 1 Vic., c. 26, and in that respect are sufficient to pass the real estate.

A. E. B. Davie, on behalf of the widow of testator, opposed the granting of probate on the following grounds:—

1st. It is directly at variance with the *lex domicilii* of Dusseldorf, where to a great extent the Code Napoleon prevails. Under that Code the testator cannot will his property away from his wife and children. It must be a valid will there to entitle it to probate here. The execution and validity of the will, as required by the *lex domicilii*, must be first proved. *Jarman* on Wills, p. 20-21; *In bonis Deshais* (34 L. J., p. 58); *In bonis Stoddart* (31 L. J., p. 195), were cited, and he produced the opinion of an expert—an Advocate of Dusseldorf—shewing that the will is contrary to the laws of that place, and that neither the will nor the codicil would be held as valid there.

2nd. The will, so far as British Columbia is concerned, applies only to real estate, and it may be that by granting probate here the same may subsequently be obtained in San Francisco by which the personal estate may be affected. Probate will not be granted of a will limited to real estate *In bonis Barden* (L. R., 1 P. & D. 325). There being no personalty in British Columbia there is nothing on which probate can operate.

3rd. The will is in direct violation of the terms of a marriage contract made by the deceased with his widow, who now opposes this application.

By the 4th section of the marriage contract made at Hamburg, 22 August, 1833, between the deceased and his wife, in contemplation of marriage, it was agreed "that should there be any children of this "marriage, the future succession will be according to the regulations "and prescriptions of law here." The 5th and 6th referred to the contingency of the failure of issue, and provided for the survivorship. There were other provisions, but owing to the course of events they need not be set out.

Referring to this section the Hamburg law is—"So two persons who "have entered the state of matrimony, and produced children between "them, if one of them dies after the unalterable will of the Almighty, "all the real and personal property falls to the survivor and all their "children. If it happen that one or more of the children die, whether "sons or daughters, leaving issue, they shall be admited to inherit the "grandfather's or grandmother's estate *per stirpes* and not *per capita*." And by Art. 5, the wife has a life estate in the property, subject to provide for the maintenance of the children.

Drake, in reply—The will being of immovable property must be governed by the *lex loci rei sitæ*, *Wheaton's* Intern. Law (6 Ed., p. 116), *Storey's* Conflict of Law (7th Ed.,) s. 431, & ss. 474,-479. The execution being according to the laws of this Province, the will is entitled to probate.

As to the second point, it is provided by the "Land Registry Ordinance, 1870," ss. 50 & 56, that a will cannot be registered until probate is granted. I, therefore, contend that for such purpose the law gives jurisdiction to the Probate Court, even though there be no personalty.

As to the marriage contract, there is no evidence that the property acquired here was purchased with their joint money, and the presumption is that it was not joint. Nor is the husband prevented by the contract from making a will (*Thornton* v. *Curling*, 8 Sim. 310 *Jarman* on Wills, p. 5.)

GRAY, J.:—

This was an application made on behalf of Oscar Christian Alexander Klaukie for probate of the will of Martin F. Klaukie, of Dusseldorf, Prussia, deceased, made at Dusseldorf on the 25th August, 1870, and

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of a codicil thereto made at the same place on the 4th of January, 1871. The petitioner was with his brother, Martin F. Klaukie, since deceased, (in addition to other changes) made by the codicil the executors of the will in lieu of the executor named in the original will. The petitioner and surviving devisees under the will and codicil, with the exception of the deceased brother, are residents of Dusseldorf. The deceased brother died without issue, and unmarried, at Chicago, in the United States, where he had been engaged in business. The will refers in particular terms only to two dispositions, one of real estate in Victoria, British Columbia, the other of shares in a mining company incorporated at San Francisco, California. The codicil modifies the disposition of the real estate in Victoria, but not in a manner to affect the questions raised. The will and codicil are both proved to have been executed in accordance with the requirements of the English Statutes of Wills, 1 Vict., c. 26, and in that respect would be sufficient to pass the real estate. Though the will, so far as British Columbia is concerned, has no reference to personal estate, and would not, therefore, be entitled to probate, except under the provisions of a particular local statute, Mr. *Drake*, on behalf of the petitioner, contends that under that statute, the "Land Registry Ordinance, 1870," sections 50 and 56, it is enacted that a will cannot be registered until probate is granted, and that, therefore, for such purpose the law gives jurisdiction to the Probate Court, even though there be no personalty, and he demands it accordingly.

The granting of probate is opposed by Mr. *Davie*, on behalf of the widow and relict of the deceased, on several grounds:

1st. That it is directly at variance with the *lex domicilii* of Dusseldorf, in Prussia, where, to a great extent, the Code Napoleon prevails, and the disposition of the property is such as the testator there had no right to make. That it must be a valid will there to entitle it to probate here. Upon the first part of this point the opinion of an expert or advocate of Dusseldorf is produced, shewing conclusively that the will is contrary to such local law, and that neither the will or the codicil would be there valid in law.

2nd. That probate cannot be granted of a will confined exclusively to real estate; there being no personalty in British Columbia, there is nothing on which probate law can operate.

3rd. That the will is in direct violation of the terms of a marriage contract made by the deceased with his widow, now surviving him, and on whose behalf the application is opposed. Due proof of the marriage settlement is given. It was made between the deceased and his wife, the present contestant, in contemplation of marriage, at Hamburg, on the 22nd of August, 1833; executed with the sanction and in the presence of the parents and friends of the contracting parties, with all the formalities of German law. It may be observed

that no question arises as to the foreign evidence on any point, the same being certified by the Supreme Court of the country, and authenticated by the proper officer of the British Embassy.

By the fourth section of this marriage settlement it is agreed "that "should there be any children of this marriage, the future succession "will be according to the regulations and prescription of the laws here." The fifth and sixth sections refer to the contingency of the failure of issue, and provide for the survivorship. There are other provisions, but owing to the course of events, none that are alleged to affect the questions now raised.

By the laws referred to in the fourth section, the testator (as stated by the expert at Dusseldorf, the place of the domicile) had only a disposable power over one-fourth of his property, as certified by the Supreme Court at Hamburg, where the marriage contract was made, and which Court is referred to by the testator in his will, as authorized to decide in case of any difference as to the exorship. It is provided that "when two persons who have entered the state of matrimony and "produce children between them, if one dies, after the unalterable will "of the Almighty, *all* the real and personal property falls to the "survivor and their children." Also—"That if the husband should die, "and his wife, together with one or more children, survive, so long as "the widow remains unmarried and keeps house, she is not obliged to "divide with her children, but to furnish them with board and lodging "and marriage gift and outfit, according to the position of the estates." By the will and codicil, the testator disposed of the whole estate, and ignored his wife altogether.

Briefly summarized, the testator was domiciled in one place, Dusseldorf: married in another, the place of the wife's residence, Hamburg; returned and lived in his original domicile, Dusseldorf; had issue; came to British Columbia: acquired real estate: returned again to his old domicile, Dusseldorf: lived and died there nearly forty years after marriage: having made a will directly contrary to the marriage contract, and the law of the domicile, and by that will disposed of real estate in British Columbia, where there was no local law to prevent his so doing, and no English law other than might be drawn from the comity of nations as governing contracts made in foreign countries on good consideration. Thus it will be seen there arises in this case the questions of *lex domicilii*, the *lex loci contractûs*, the *lex loci celebrationis*, the *lex loci rei sitæ*, the formalties as to the execution of wills and contracts under English and foreign law, with the proper evidence thereof, as well as the construction and objects of a local statute in British Columbia in granting and requiring probate. For the purposes of this application such may be stated to be the facts and points in the case.

It is admitted on both sides that, with reference to real estate, if there be no other available objections, the *lex loci rei sitæ* must govern,

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"as to the capacity or incapacity of the testator, the extent of his "power to dispose of the property, and the forms and solemnities to "give the will or testament its due attestation and effect" (*Storey's* Conflict of Laws, 7th Ed., s. 474).

The position that a will, to be valid here, must be valid in the foreign country where it was made, is not tenable to the extent to which, in this instance, it is sought to be applied. It is true that, with reference to personal property, where a party is domiciled abroad, the *lex domicilii* will determine the validity and regulate the construction; of which will, therefore, an English Court will not grant probate, unless it appear to be an effectual testementary instrument, according to the law of the domicile. And by parity of reasoning (*Jarman*, 3rd Ed. 1861, p. 4), the Ecclesiastical Courts will grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicile, though invalid and incapable of operation as an English will. But the same rule does not apply to real estate. *Storey* (sec. 431) lays it down distinctly:—"So if a person is incapable from "any other circumstance of transferring his immovable property by "the law of the *situs*, his transfer will be held invalid, although by the "law of his domicile no such personal incapacity exists. On the other "hand, if he has capacity to transfer by the law of the situs, he may "make a valid title, notwithstanding an incapacity may attach to him "by the law of his domicile. This is the silent but irresistible result of "the principle adopted by the common law, which has no admitted "exception."

The two cases cited by Mr. *Davie*—"In the goods of *Deshais* and the *Comtesse de Vigny* (34 L. J. P., page 58)," and "in the goods of *Stoddart* (31 L. J. P., page 195), do not sustain his position beyond their application to personal or mixed estates, certainly not as to a will limited to real estate only. The whole question as to the grant of probate, in its bearing upon real and personal estate, is so succintly laid down in *Allnutt's* Practice of Wills and Testaments (edition of 1850) that, though unnecessary, it may be not inappropriate to quote the passage:—

"An Ecclesiastical Court has jurisdiction only in wills of personal "estate, it is not necessary when the will relates to real estate alone, "that probate of it should be obtained (*Habergham* v. *Vincent*, 2 Ves. "230). Where, however, the will relates to both real and personal "estate the whole must be proved in the Ecclesiastical Court (*Partridge's* "case, 2 Salk, 553), though the proof in that Court does not establish "the will of the real estate against the testator's heir-at-law (*Nettle* v. "*Brat*, Cro. Prac. 295). As a Court of Equity considers money directed "to be paid out in land as land, the Ecclesiastical Court has no jurisdic- "tion over a devise of property so to be converted (*Pullan* v. *Ready*, 2 "Atk. 592). In cases of doubt whether the whole of testator's estate

"was real estate, which would occur when it was not known whether "a portion of the property was freehold or leasehold, it has been con- "sidered that an Ecclesiastical Court ought to grant probate (*Thorold* "v. *Thorold*, 1 *Phillim* 8, *Durkin* v. *Johnston*, do. 1). There is no "necessity to prove the will in the Spiritual Court to entitle the legatee "to recover a legacy out of the real estate (*Tucker* v. *Phipps*, 3 Atk. "361)."

As to the 2nd position. Mr. *Drake* contends that though the will has no reference to personal property, yet he is entitled to probate under the 50th and 56th sections of the "Land Registry Ordinance, 1870." The 50th section says: "Whenever any property shall have been "devised or bequeathed by will or codicil, and the person claiming title "thereto through or under the testamentary disposition shall apply for "registration of the testamentary disposition, or of any instrument "affecting the property executed subsequent to the decease of the "testator, the application for registration shall not be deemed to have "been made until the testamentary disposition shall have been proved "in the Supreme Court of the Colony, or letters of administration with "the testamentary disposition annexed shall have been granted by the "said Court, or by some other Court of competent jurisdiction, and the "probate or letters of administration, or an official copy thereof, "respectively shall have been produced to the Registrar."

The 56th section is for enabling the Registrar, in case he deems the title doubtful, to direct an application to the Court. The present proceedings are not shewn or alleged to be at his instigation. It may be observed that the object of the Land Registry Ordinance, with reference to real estate, is not for the purpose of giving validity to the title or rendering registration necessary to its confirmation. The general object is rather for the protection of creditors, the prevention of frauds, the public convenience in the investigation of titles, and supplementing, (when statutory provision to that effect is made), the loss of original title deeds, or enabling them to be read in evidence without further proof of execution. It is true that particular provisions are made, and wisely made, in British Columbia for rendering good defective registered titles, or titles incapable of exact proof, and giving, under particular circumstances and after certain preliminary proofs, what is well-known as a parliamentary title; but there is no law which otherwise renders registration essential to a title. It is not compulsory, it is optional; only the party omitting to register takes upon himself the risk of the subsequent acts or liabilities of his transferror. The old incidents are still sufficient, and, as between the parties, a valid deed, with a good consideration, no fraud, and livery of seizin, would be adequate to pass the estate. It is not asserted here that the present is one of those cases which would require the aid of the Statute to cover a defective title. The 50th section cited is based upon the assumption that the will is a valid one, capable of

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passing the real estate, entitled to be registered, and that the devisee desires registration. If there be doubts why such will should be considered valid, the mere fact that in order to be registered, probate must first be obtained, can form no ground for granting it. On the contrary, it is just the reason why it should not be granted, until adjudicated upon under the 56th section. Probate is necessary before action in cases of personal estate, because, unless clothed with such authority, the executor or administrator (except in a few matters of absolute necessity) would be treated as *de son tort*; but probate is not necessary to clothe the devisee with power to act. He may make an entry, or maintain ejectment, on proper proof of the will on trial, without any preliminary sanction from an Ecclesiastical Court or any grant of probate. Here the will has been executed according to the *lex rei sitæ*; unless something else intervenes, the parties claiming under it can get their rights in the real estate in Victoria, without any probate. Mr. *Drake's* position, therefore, as applied to this case, is, it appears to me, not sound.

But something else does intervene. This brings us to the real question—the marriage settlement. On this point, during the argument, my mind wavered whether this was the time and place, and mode, in which the effect of such a contract could be determined; but in view that no objection of that nature was raised and of the great powers given to a Judge under the Common Law Procedure Acts and the Acts relating to the Administration of Justice in Equity, I have come to the conclusion that it is.

This point involves some important considerations. In *Storey's* Conflict of Laws, sec. 143, he says: "Passing from the consideration of "the personal capacities, disabilities, and powers of the wife, and of the "examination of the different opinions of foreign jurists respecting "them in cases where there has been no change of domicile, and in "cases where there has been such a change, let us in the next place "examine into the effect of the marriage upon the mutual property of "the husband and wife, and their respective rights in and over it. The "marriage may have taken place with an express nuptial contract or "arrangement as to the property of the parties, or it may have taken "place without any such contract or arrangement. The principal diffi- "culty is not so much to ascertain what rule ought to govern in cases "of an express nuptial contract, at least where there is no change of "domicile, as what rule ought to govern in cases where there is no "such contract, or no contract which provides for the emergency. "Where there is an express nuptial contract, that, if it speaks fully to "the very point, will generally be admitted to govern all the property "of the parties, not only in the matrimonial domicile, *but in every other* "*place*, under the same limitations and restrictions as apply to other "cases of contract."

In cases where there is no change of domicile, and no express nuptial contract, (sec. 145) "*Huberus* lays down the doctrine, in broad terms, "that not only the contract of marriage itself, properly celebrated in a "place according to its laws, is valid in all other places, but that the rights "and effect of the marriage contract, according to the laws of the place, "are to be held equally in force everywhere." And Chancellor *Kent*, referring to this doctrine (sec. 145), has laid down the rule that the "rights dependent upon nuptial contracts are to be determined by the "*lex loci contractûs*." Many writers go so far as to say that, even where there is no express nuptial contract, the law of the matrimonial domicile is adopted by a tacit contract (section 154), but that is not so held by us with reference to real estate. In the absence of any express nuptial contract that must be governed by the *lex rei sitæ*.

Storey sums up the review by saying:—"Where there is any special "nuptial contract between the parties, that will furnish a rule for the "case, and as a matter of contract ought to be carried into effect "*everywhere* under the general limitations and exceptions belonging to all other classes of contract." (Section 159.)

To apply this principle to the case in hand: The deceased is seeking by his representatives to do that which he expressly contracted he would not do. We do not controvert the law of this land with reference to real estate, nor do we govern the disposition thereof by the law of another country, but we hold it amenable to the agreement which the testator himself made. The law of his own country said he should not dispose of his property by will in the way he did. By his marriage contract he agreed that he would not. The situation of the real estate in this country, in the absence of any restraining powers, would have enabled him to do so, notwithstanding that law, but he agreed for a good consideration that he would not, and that agreement, undisputed, is produced and brought before us. It must be held binding. It would be contrary to conscience and good faith, contrary to the comity of nations, to permit his representatives to use our Courts to aid a breach of contract.

Application refused.

BEGBIE, C. J.
1876.

1st August.

Re "LAND REGISTRY ORDINANCE, 1870."

In re SIR JAMES DOUGLAS.

"Land Registry Ordinance, 1870,"—Registration of Title—Equity of Redemption, how Registered—"Absolute Fee," how Construed.

Held, per Begbie, C. J., that the purchaser of the equity of redemption in fee is entitled to be registered in the "Register of Absolute Fees," as the sole owner of the "absolute fee," under sec. 19 of the "Land Registry Ordinance, 1870."

Held, also, that the expression "absolute fee," in "L. R. O., 1870," does not necessarily mean "clear of all incumbrances."

This was an appeal from the decision of the Registrar-General of Titles.

In January, 1871, Captain Stamp, who was the registered owner of Lot 169, having a certificate of title dated 1866, mortgaged to Lord Lauderdale. Captain Stamp died on the 2nd January, 1872, and Probate was issued on 6th July, 1873. Sir James Douglas purchased Lot 169 from the Trustees in the will, and being uncertain whether he was bound to see to application of the purchase money, had the mortgage transferred to his son, James Douglas, junior, in trust for himself. Sir James then applied to the Registrar-General to be registered as owner of the absolute fee and to have the transfer of mortgage registered as a charge thereon.

The Registrar-General refused, on the grounds that it would lead to misrepresentation, and perhaps fraud, if the owner of a mere equity of redemption were to be held forth as the owner of an absolute fee (which is used as equivalent to fee simple, free from encumbrances); that the equity of redemption is an equitable interest within section 20, and therefore Sir James was merely entitled to register his purchase as a charge.

Drake for the application:—I claim to be entitled to the same position on the register as Capt. Stamp himself. He originally bought the lot and was registered as the owner of the absolute fee. Then he mortgaged, and the mortgage was registered as a charge. Then he sold the equity of redemption. We claim to have the fee registered to us. We rely also on section 29, which is clear in our favour, especially when contrasted with section 27.

Aikman, Registrar-General of Titles, in person opposed the application as being contrary to the spirit of the "Land Registry Ordinance, 1870."

BEGBIE, C. J.:—

We must take care not to give to words used in this Act a force to which they are not entitled if read strictly in the order in which they

stand, but to which they would be entitled if differently arranged. Here, the initial words of section 19 are "the legal owner in fee simple of real estate." We are not to dovetail these words together, and read "the owner of realty for a legal estate in fee simple."

So, in like manner, the words used in the interpretation clause, section 87, as to "absolute fee" are "absolute fee shall mean and comprise" (not mean exclusively, but comprise this among other meanings, viz.,) "the legal ownership of an estate in fee simple," which is a different thing from the ownership of a legal estate in fee simple. It is contrary to all sound canons of interpretation to force the words of a statute, to put on the words used a technical or narrower sense, when there is an apparent popular meaning. Still less would it be justifiable to alter the actual collocation of the words used where the alteration would have such a result. Where, as sometimes happens, the words used by the Legislature are absolutely unmeaning—or contradict some other provisions or the preamble of the Act,—the Court will sometimes, but very cautiously, strain the words, and even alter them, or alter their order, so as to make a sentence grammatical or logical. But generally speaking, a statute *loquitur ad vulgus*—it addresses itself to the popular common sense,—and although this statute deals with a highly technical subject, and is rather a code of instructions to the Registrar, who is presumed to be a scientific person, yet the general rule is to prevail. And I observe that the statute is not very strict or accurate in its use of language—or even of technical terms. There seems no doubt, *e. g.*, that "absolute fee" at the beginning of section 20 means "fee simple." And the use of the alternative "mean and comprise," "mean and include" in the interpretation clause, show that even in this, the dictionary, which ought to be the most carefully accurate clause of the Statute, the Legislature wish to observe considerable latitude. I think the word "legal," both in section 19 and in the interpretation clause *(ubi sup.)* means "lawful" or "rightful" owner. I do not think that an equity of redemption in fee simple is intended by the words "any equitable interest whatever" in section 20. Those words seem to me to be intended to include some lesser interest or estate, *e. g.*, legacies charged on land, equitable mortgages, in short, all charges on the land which cannot be recovered by ejectment or in any action at law, but for which the beneficiary must file his bill on the equity side of the Court. I think that the operation of section 20 is confined to tenants for life, or for years, and to incumbrances properly so called (other than judgment and Crown debts which come under sections 53 and 55), and that it does not include, nor was intended to include, nor properly could include, a mortgagee in fee simple. Nor do I think that a mortgagor as the owner in fee simple of the equity of redemption of land is one of the "two or more persons interested in distinct estates or interests in the same land" mentioned in section 29. Mr. Drake seemed to think that mortgagor and mortgagee were included by those words as "two persons having distinct

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In re SIR JAMES DOUGLAS.

estates," and that one of them (and I understood him to say the mortgagee) could claim under that section as the "first owner of an estate of inheritance," and he referred also to section 27, contending that at all events the mortgagor and mortgagee between them were "entitled "to the complement of the absolute fee." I am not quite sure that I understand those unscientific words very precisely, nor is it important to consider them on the present case. If it were, it seems probable that sections 27 and 29 refer to cases of joint tenancy, &c., and to cases of particular estates and estates in remainder or reversion, limited by shifting use, vested and contingent, &c. But in my view this part of the argument militates against Mr. Aikman's construction of the terms absolute fee as meaning "clear fee free from incumbrances." That this is not intended by the Legislature is evident from the words of section 36, which declares that any body registered as the owner of the absolnte fee of any land is to be deemed the owner of the land subject to any registered charges. And the mischief of possible fraud which Mr. Aikman suggests, is completely obviated by the form of the certificate which he will have to give, and which is set out in the schedule, Form B, where there is a column for the details of the charges, if any, on "the absolute fee;" which again clearly shows that absolute fee does not necessarily mean "clear of all incumbrances."

I am of opinion that every mortgagee is entitled to register a charge only, and that every original mortgagor or person entitled to the equity of redemption in fee simple is entitled to register his title in Form B under section 19 as sole owner of the absolute fee. If there be many persons entitled to the equity of redemption they can register under section 27. If the equity be limited by way of particular estate and remainder then under section 29. If there are many successive mortgagees the owner of the ultimate equity is alone owner of the absolute fee; all the mortgagees are mere incumbrancers, although each in turn may become in the course of events entitled to redeem the others, and may, by foreclosing the equity of redemption, become the "owner of the absolute fee." It would obviously press very hard on mortgagors were this otherwise, for no purchaser would accept a title which he could not register, and a man once mortgaging would forever be at the mercy of his mortgagee. It would also be very hard on intending purchasers, for no man could safely invest in a purchase of mortgaged land unless he were prepared to pay off all the incumbrances. But for the reasons above given it is quite clear from section 36, and the Form B, that the owner of the equity of redemption is entitled to register as owner of the absolute fee, subject to existing charges, and I order accordingly in the present case. No costs have been asked, and as the question seems to have been raised *bona fide*, and it is unusual to make a public officer pay for discharging his duty honestly, where there is no fund out of which he could be recouped, I give him no costs, but he will pay none.

IN THE MATTER OF "LAND REGISTRY ORDINANCE, 1870."

In re HENRY JEROME, DECEASED.

GRAY, J.
1876.

22nd & 29th February

"Land Registry Ordinance, 1870," s. 78—Costs—Form of Will.

Where a doubt exists on the construction of a will, as to whether a devise be fiduciary or absolute, the Registrar of Titles may refuse to register and issue Certificate of Title until the doubt be removed by adjudication. In such a case the Registrar is entitled to his costs.

Semble, the words "*Will, simply appointing an executor,*" written immediately above, and apparently as part of the will, can be construed as incorporated with it, so as to shew the intention of the testator.

This was an application under s. 78, "Land Registry Ordinance, 1870," to compel the Registrar-General of Titles to register the will of Henry Jerome, and to issue a certificate of title to Pawson of deceased's lands, so that he might claim the estate as devisee under the will.

The following is a copy of the will:—

"Will, simply appointing an executor."

"I appoint John Pawson my executor, and bequeath to him my "personal estate, such as all lands, tenements, and real estate which "I own, also all money that I have now got on deposit in the banks in "British Columbia."

22nd February, 1876, *Harrison*, for executor.

Probate was granted to Pawson in October, 1875. Cites *Jarman* on Wills (3rd Ed., 1861, vol. 1, p. 687), as to sufficiency of words used to carry real estate; *Terrell* v. *Page* (1 Ch. Cas. 262); *Jarman* (p. 712), as to appointing devisee executor; *Jarman* (1 Vol., 763–4), when words inconsistent, last words prevail.

The Registrar-General (*H. B. W. Aikman*) contended that the words, "Will, simply appointing an executor," must be read as part of the will; that they are not inconsistent with the words in the will by which Pawson is appointed executor, and, as Registrar, he could not take notice of any trusts; he would have to register him, if at all, as devisee in fee.

Harrison, in reply—Last words prevail (2 Geo. IV. & 1 Wm. IV. c. 40). Executors will be considered trustees (*Williams* on Exors., 4th Ed., 2 vol., 1,264; *Lewin* on Trusts, 105).

GRAY, J.

Two questions arise on the construction of the will: 1st, whether the real estate passes to the executor absolutely, under the will as devisee, or, as executor in trust, to be disposed of according to law whenever the *cestui que trust* may turn up; 2nd, whether the words

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"Will, simply appointing an executor," written immediately above, and, apparently, as part of the will, can be construed as incorporated with it, so as to show the intention of the testator.

The decision of the latter question disposes of the alternative in the first question. It is to be observed that the words are not placed or endorsed upon the will, as to appear a mere description of the contents within which the testator may or may not have observed. They are so placed that they cannot escape the eye of the person signing. The testator, as a labouring man, probably not able more than to read and write, sees in the very first line what, even to an uneducated man, must evince an intention to give only a qualified tenure. That intention is consistent with the terms used in the remaining part of the will, while the latter part, without those words, would be open to a different construction and operate as a devise, vesting the property absolutely in the executor (*Jarman* on Wills, 3rd Ed., vol. 1, p. 687; *Hogan* v. *Jackson*, 1 Cox., 362, cited at p. 688).

Must not those words then be considered the key by which the testator's intention is arrived at? I think they are; and I give my opinion on both points: 1st, that the words are sufficient to pass the real estate, so as to give a legal control over and vest a fee in the executor; but, 2nd, the fee so given is simply a qualified fee, and subject to further accountability to whoever hereafter may be proved the *cestui que trust* by inheritance or otherwise (*Williams* Exors., 4th Ed., 1,264). As, however, the question admits of some doubt, and the effect of the registration would be under the Ordinance to give the executor an indefeasible title in seven years (the Registrar taking no notice of trusts created by the instrument to be recorded), I shall refuse to make the order for registration, and recommend the executor to appeal from my decision to the Full Court, in order that the judgment of the Full Court may be obtained, and that on such appeal the Registrar be allowed his costs for opposing the same, to be paid, as well as those of the executor, out of the estate.

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BEGBIE, C. J.
1877.

12th March.

Certiorari—Amending Conviction—37 Vic. (D.), c. 42—Effect of Words in Schedule—Construction of Statutes.

Words printed on a schedule to an Act of Parliament, and which appear to contradict the body of the Act, are to be rejected as of no effect.

Semble, on the return to a *certiorari* the Justices are entitled, and may be required, to amend their conviction on matters of form. But it is not open to them, on pretence of amending a conviction, to omit any vital part of what the conviction really contained, nor to introduce any new facts which are of vital importance to support the conviction.

Semble, though the Court will not look at the depositions before the Justice to see whether they were justified in their conclusion as to any matter of fact found in the conviction, yet the Court may look at the depositions where it is alleged that they contained nothing whatever to justify the finding of the alleged fact, or the conclusion on a point of mixed law and fact, *e. g.*, as to the infliction of grievous bodily harm.

Thus, in the present case, the actual conviction was for "striking on the head with a stick and cutting" the complainant. *Semble*, it would not be permissible, under colour of amending the conviction, to omit in the return all mention of "cutting." The original conviction did not allege any consent by the accused, such consent being necessary to give the Magistrate jurisdiction. *Semble*, it would not be permissible, under colour of amending, to state as a fact in the returned conviction that the accused had given consent. And, *Semble*, the Court would examine the depositions to see whether (as alleged by the applicant) they contained no evidence whatever of any cut being inflicted, or any cutting instrument being used, or whether the injuries proved in the evidence did in law amount to grievous bodily harm.

The facts under which this case arose were as follows:—The defendant, conceiving himself insulted by a paragraph in a newspaper, had assaulted in the street the person whom he conceived to be responsible, by striking him over the head with a small cane, breaking the skin, but inflicting no permanent injury.

The information of C. McK. Smith, dated 22nd February, 1877, alleged that at "4 P. M. on the 22nd February, C. F. Houghton assaulted "me by striking me over the face and head twice with a stick, and cut "my face, as also my head; and I charge the said C. F. Houghton with "having committed an aggravated assault upon me, by unlawfully and "maliciously inflicting upon me grievous bodily harm, by striking me "with a stick and cutting me about the head and face, as aforesaid "contrary," &c.

Upon this a summons was issued, dated 23rd February, by which defendant was charged "for that he did on the 22nd February commit "an aggravated assault by unlawfully and maliciously inflicting "grievous bodily harm on C. McK. Smith, by striking him on the head "and face with a stick, contrary," &c.

The complaint came on to be heard before the Stipendiary Magistrate at Victoria on the 24th February, and defendant was convicted in the following terms:—"Be it remembered that C. F. Houghton is "this day convicted before me," &c., "for that he, C. F. Houghton, did

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"on 22nd February commit an aggravated assault upon C. McK. "Smith, by unlawfully and maliciously inflicting upon him grievous "bodily harm, by striking him with a stick and cutting him about the "head and face, contrary," &c. "And I do adjudge," &c., "$50 fine, or "imprisonment for two months, without hard labour."

Drake applied for a rule *nisi* for a *certiorari* to return all the proceedings and the evidence, with a view to quash the conviction. The Magistrate has found no fact except, perhaps, and incidentally, the striking by defendant with a stick. The other matters found by the conviction are matters of law. There was not a tittle of evidence to show either an aggravated assault, or grievous bodily harm, or cutting. In truth, the evidence distinctly disproved these three matters. There was no circumstance of aggravation. There was only a most trivial personal injury. And there is not the smallest pretence that the defendant ever used any cutting instrument. Such serious charges cannot be tried by a Magistrate except by the consent of the accused. That is expressly provided in the form given in the schedule to the Act, 32-33 Vic. (D), c. 32. The Magistrate's proceedings are all upon printed forms adapted to the ordinary Summary Convictions Act, 32-33 Vic. (D.), c. 31, which would cover the offence mentioned in 32-33 Vic. (D.), c. 20, s. 42, but not the offence in 32-33 Vic. (D.), c. 32, s. 2 (*Reg.* v. *Brickhall*, 33 L. J. M. C. 157.)

The Statute of Canada, (37 Vic. c. 42) does not make the Magistrate's jurisdiction absolute without consent. The words in the schedule which seem to point to that conclusion are insensible, gramatically; but their alleged intention contradicts the body of the Act, and they are therefore a nullity.

No consent was given, nor even asked, according to the Act (32-33 Vic. (D.), c. 32, s. 3).

Sir Matthew B. Begbie, C. J.—You may take a rule *nisi*; it may include a return of the evidence, as well as of the formal documents; for there is high authority to say that although we may not examine the evidence to see whether it will prove any facts found by the Magistrate, *i. e.*, whether we should, on the evidence, have formed the same opinion as to the facts so found; yet we may look to see whether the evidence supports conclusions of law; and even as to facts found by the Justice of the Peace, to see whether there is any evidence at all of these facts; and here, *e. g.*, it is alleged that there was no evidence at all to support the cutting, of which the defendant was convicted.

On a subsequent day *E. Johnson* showed cause before the Chief Chief Justice alone, who adjourned the matter for the consideration of the Full Court.

12th March, 1877, the case was argued before the Chief Justice, and Crease and Gray, JJ., by *Drake* for the defendant, and *Johnson* for the conviction.

The conviction was quashed on various grounds. The Chief Justice relied mainly on the want of consent (not, he said, that the other objections were not serious) but deeming the first ground sufficient, he did not much discuss them; as to the words in the schedule to the Act 37 Vic. (D.), c. 42, he made observations to the following effect:—

So far as a schedule is referred to in the body of the Act (to which it belongs), it has statutory authority; but so far as it is not referred to in the body of the Act, it has none. But it is not necessary here to go so far as that; but only to apply the well-known rule that when anything in a schedule *contradicts* the body of the Act to which it is annexed, the schedule shall give way. The words relied on in support of the conviction, as taking away the necessity of consent, may be more properly deemed to be printed on the schedule, than to be in the schedule. I question whether they ever were intended to be in the schedule at all. They appear more like a marginal note, or memorandum made by the person in charge of the bill, written by him as instructions to the draftsman on which some provision was to be inserted in the body of the Act. But even if they are part of the schedule, if they were introduced by apt words of enactment, they would, in my opinion, be of no effect, contradicting, as they do, the substantive enactment in s. 1. A schedule, not otherwise defined, is merely a list. Section 1 of 37 Vic. (D.) c. 42, declares that certain Acts, the titles of which are set forth in the annexed "Schedule," *i. e.*, list, shall apply in British Columbia. That has the same effect as if in s. 1 all the enumerated Acts were set forth at length, and declared to be law in British Columbia.

Among these is 32-33 Vic. (D.), c. 32, giving a competent Magistrate summary jurisdiction to try certain offences therein defined, with the consent of the accused; such consent to be asked and given in the form and manner therein set forth. Then comes these words in the schedule: "In applying this Act to British Columbia the expression "'competent Magistrate' shall be construed as any two Justices of the "Peace sitting together, as well as any functionary having the powers of "two Justices of the Peace, *and the jurisdiction shall be absolute with-* "*out the consent of the parties charged.*" These words, it is alleged, amount to an enactment that in British Columbia no consent shall be necessary, but that the jurisdiction of the competent Magistrate shall be absolute. That is a flat contradiction of the statute, and, in fact, a repeal of a very important provision. That cannot be effected by any words in the schedule, even if they amounted to an express enactment. But I do not consider the mere accident of these words being printed between brackets in the schedule to operate as an enactment at all. They are completely in the air. It is hard to say what their effect is; it is enough to say that they cannot be construed to repeal any part of section 1 of the statute to which that schedule is annexed, and that

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sections 2 and 3 of the Act, 32-33 Vic., c. 32, requiring the consent of the accused, are part of section 1 of the Act, 37 Vic. (D.), c. 42.

The rest of the history of this case shows what a dreadful thing it would be, or might be, to intrust this power to Justices in this Province; a much greater power than any Judge of the Supreme Court is invested with. Here was an assault, which is admitted to have been utterly unjustifiable in law, but which was little more than a vulgar scuffle, in which the assailant came off the worst. He deserved to be further punished by law for the offence against society, the breach of the peace. But the injuries on both sides were of the most trivial and temporary nature. An inch or two of diachylon plaster, a couple of leeches to the discoloured eye, would remove in a week every trace of the occurrence. Yet the Magistrate (the Stipendiary Magistrate, too, for Victoria) issues a summons for unlawfully and maliciously inflicting grievous bodily harm, and on that summons finds defendant guilty of "cutting" (without any pretence on the evidence that there was an incised wound, or any instrument used capable of cutting), and without alleging in the conviction any consent of the defendant to a summary trial asked or given. Then when these circumstances are strongly drawn to the Justice's attention, after this conviction has been drawn up and sealed, his counsel attending to watch the application for the rule *nisi*, in his return he sends in, not an amended, but a quite altered conviction: 1st. Inserting an allegation that the defendant's consent was asked, and that defendant did not in person or by his counsel object. 2nd. Omitting all reference to the "cutting," but maintaining the charge of wilfully and maliciously inflicting grevious bodily harm, and adding, 3. That the defendant pleaded guilty to "such" charge, which is not the case, though defendant did admit having assaulted the complainant.

It is impossible to justify such alterations. A Magistrate is at liberty, and is bound, to amend his conviction; but that means in formal matters. He cannot be allowed to convict a man of one offence and then on *certiorari* inform the Court that he convicted him of another. He cannot be allowed to pass sentence on a man by a conviction which does not show facts giving him jurisdiction, and then on *certiorari* inform the Court that the conviction did contain a statement of such facts; nor to thrust into an "amended" conviction allegations of facts which the evidence disproves. And for these reasons it appears very desirable that there should be retained to accused persons in British Columbia every protection which is cast round accused persons in any other part of Canada. It seems rash to assume that British Columbia Justices are more able, honest, and prudent than similar functionaries in Ontario or Quebec.

JOHNSON *v.* HARRIS.

GRAY, J.
1878.

17th June.

British Columbia "Homestead Ordinance, 1867"—British Columbia "Homestead Amendment Act, 1873"—"British North America Act, 1867," ss. 91, 92.

Held (1), that the exemption clauses of the Homestead Acts of British Columbia, to the full extent of $500, are in full force.

Held (2), that exemption from seizure under execution of property to a limited extent, dependent upon the personal option of the owner, under a Statute, is a matter of privilege to be exercised, and must be claimed under proper notification. An action is not maintainable against a Sheriff who has, in obedience to a valid writ, seized property so privileged, without prior legal notification of its exemption.

Held (3), The Sheriff in such cases is entitled to notice before action brought.

This was an action of trespass and trover brought against defendant, the Sheriff for Vancouver Island as a Bailiff of the County Court, for seizing and selling certain goods of the plaintiff alleged to be exempt under the provisions of the "Homestead Ordinance, 1867," and the "Homestead Amendment Act, 1873." *

It was admitted that the judgment and execution were regular. That the seizure was made on the 12th March. That the notice claiming exemption, and specifying certain articles, was served on the Bailiff on the 18th. That on the 25th, half an hour before the sale took place, an amended notice, specifying articles claimed to be exempted, was served.

The goods seized were alleged to be of the value of $403, and on sale realized $122.

It was agreed that the opinion of the Court should be taken severally upon the points raised, and judgment be rendered for the plaintiff or defendant, as the Court might ultimately decide.

Robertson, Q. C. (with him *Pollard*), for the defendant, raised the following objections:—

* Section 11 of the "Homestead Ordinance, 1867," is as follows:—

"11. The following personal property shall be exempt from forced seizure or sale by any process at law or in equity, or from any process in bankruptcy, that is to say: the goods and chattels of any debtor or bankrupt, at the option of such debtor or bankrupt, or if dead, of his personal representative, to the value of one hundred and fifty dollars, the same not being homestead property under the provisions of this Ordinance."

Section 1 of the "Homestead Amendment Act, 1873," repealed the above section, and enacted in lieu thereof the following:—

"1. The following personal property shall be exempt from forced seizure or sale by any process at law or in equity, or from any process in bankruptcy, that is to say, the goods and chattels of any debtor or bankrupt, at the option of such debtor or bankrupt, or, if dead, of his personal representative, to the value of five hundred dollars, the same not being homestead property under the provisions of the said "Homestead Ordinance, 1867."

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1. The action is not maintainable. No notice of action having been given, as required by the County Court Acts; the Sheriff being, by statute, the Bailiff of the County Court (ss. 2 & 13, "County Court Act, 1867;" 9 & 10 Vic., c. 95, s. 138; *Burton* v. *LeGros*, 34 L. J. Q. B. 91; *White* v. *Morris*, 21 L. J. C. P. 185; *Booth* v. *Clive*, 20 L. J. C. P. 151).

2. The claim of exemption from seizure is a matter of privilege, which the Bailiff is not bound to notice, unless effect be given to the privilege by order of Court ("Homestead Ordinance, 1867," s. 12; *Addison* on Torts, 652; *Tarlton* v. *Fisher*, 2 Dougl. 676; *Ewart* v. *Jones*, 14 M. & W. 774; *Rideal* v. *Fort*, 11 Exch., 847).

3. If the plaintiff is entitled to recover at all, his claim must be limited to the $150, under the Ordinance of 1867; the "Homestead Amendment Act, 1873," being *ultra vires* and unconstitutional (*L'. Union St. Jacques de Montreal* v. *Belisle*, L. R. 6 P. C. 31; *Dow* v. *Black*, L. R. 6. P. C. 272; *Potter's Dwarris*, 367; B. N. A. Act, 1867, s. 91).

4. The plaintiff cannot recover at all, as the exemption clause does not now exist. The Act of 1873, so far as it exempts property, is *ultra vires*, but so far as it repeals Ordinance of 1867, is good. Independently, however, of that, the Ordinance of 1867 was repealed by section 149, "Insolvent Act, 1875."

McCreight, Q. C. (with him *Theo. Davie*), for plaintiff.

As to notice—The notice is restricted to Supreme Courts (*Partridge* v. *Elkington*, L. R. 6 Q. B. 82; *Bullen & Leak*, 1059-60; *Pollock & Nicol's*, County Court Prac., 456), authorizing general issue. From this, counsel contended, notice applies only to Supreme Court, as in County Court there are no pleadings.

Again, the party is entitled to notice in matters of fact, not of law (*Griffith* v. *Taylor*, L. R. 2 C. P. D. 194; *Bullen & Leak*, 759-60). And here the Sheriff's mistake was one of law, not of facts.

As to 2nd point—Section 12 of Ordinance of 1867 applies only to the homestead property. It assumes that the Sheriff has made no sale, but the matter is to be disposed of before the property is converted.

As to constitutionality—This must be clearly made out (*Potter's Dwarris*, 65, 175, 178). The Act of 1873 is divisible; one relating to proceedings at law and equity, and the other as to bankruptcy. One part may be bad and the other good (*Hall* v. *Nixon*, L. R. 10 Q. B. 152), the good part may be accepted (*Potter's Dwarris*, 198).

GRAY, J.:—

This case has been most fully and ably argued. I shall deal with the points in the reverse order in which they were moved.

It has been urged that the "Homestead Amendment Act, 1873," was *ultra vires*, having been passed since the Union with Canada, and to the Dominion Parliament, under the "British North America Act, 1867," all legislation respecting bankruptcy was limited.

The Provincial Act of 1873 deals with two subjects,—

1st. The exemption of certain personal property, not being homestead property, from forced seizure or sale, at the option of the debtor, to the value of $500.

2nd. To the same extent, at the option of any bankrupt.

The first, being a matter of civil rights and property, where not clashing with the latter, was clearly one with which the Local Legislature had power to deal. The second was not. The Act of 1873 was simply an extension of the pre-existing exemption, under the Ordinance 1867, of personal property from $150 to $500.

Dwarris on Statutes, *Potter's* Am. ed., 1871, pp. 198 (note) & 367, in such case recognizes the legal force of one part of a Statute and not the other. At page 367 he says: "When a Statute is adjudged to be "unconstitutional, it is as if it had never been," &c., &c. "And what is "true of an Act void *in toto*, is true also of *any part* of an Act which "is found to be unconstitutional, and which is, consequently, to be "regarded as having never at any time possessed any legal force." In the notes, at p. 198, he cites two important cases in the United State's Courts illustrating these positions (*Cohens* v. *Virginia*, 6 Wheat. 414, and *Freeman* v. *Robinson*, 7 Ind. 321). It is true that between the Constitution of the United States and that of the Dominion, there is an essential difference as to the origin of power (*Gray* on Confederation, vol. 1, chap. 2*); but in the construction of Statutes out of which conflicts as to jurisdiction may arise, the same rule prevails Thus one part of a local Statute may be good, the other part bad. It becomes, therefore, important always to see what part bears upon the case in hand.

The mere fact of a man being a debtor, or having his goods taken by a forced seizure or sale, does not necessarily make him an insolvent or bankrupt; nay, his absolute inability to pay his debts does not make him legally an insolvent or bankrupt. Those may be circumstances to be considered in determining whether he is one or not. But to make the law applicable to him as such, he must have been so declared by proceedings taken under the Statutes regulating Insolvency or Bankruptcy—a *Statutory Bankruptcy*. It is quite compatible with a man being possessed of ample means, yet, for some reason of his own, permitting his goods to be taken by a forced seizure and sale, and claiming exemption as to certain articles set aside under laws giving

* See post, p. 105.

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privilege to such articles. The right of selection is given him by Statute. Though unusual, such a course would not be inconsistent or illegal.

It has been contended that the first part of section 1 of the local Act, 1873, which repealed section 11 of the Ordinance, 1867, was good, because it dealt with a subject on which the Local Legislature had a right to legislate, but bad as to its other parts (that is, the exemption and bankruptcy parts), because the first interfered with the existing system of bankruptcy then in force in the Province, and recognized at the time of the Union as in force by section 129 of the "British North America Act, 1867;" the latter part because it deals with bankruptcy *eo nomine*. Without admitting the correctness of this position as to the repealing part, it is to be observed that the Insolvent Act of 1875, of the Dominion Parliament, which is extended to British Columbia by section 149, repeals all the Acts and parts of Acts then existing in British Columbia relating to Bankruptcy or Insolvency, or which are in any way inconsistent with the provisions of that Act of 1875. While by the 16th section it expressly exempts from the operation of the assignment or writ of attachment under the said Insolvent Act of 1875, "such real and personal property as are exempt from seizure and "sale under execution, by virtue of the several Statutes in that case "made and provided in the several Provinces of the Dominion respec- "tively," thereby leaving the Homestead Acts of 1867 and 1873 (except when inconsistent in their parts relating to Bankruptcy or Insolvency with the Dominion Act of 1875) untouched. This is a legislative recognition by the Dominion Parliament of the existence of the two distinctive characteristics in local legislation, viz., Insolvency or Bankruptcy and exemption; the latter it preserves, the former it repeals.

It is, moreover, to be remembered that this Act of the Dominion Parliament of 1875, on a subject over which by the Constitution it had exclusive power to legislate, was two years after the Act of Local Legislature in 1873, in which the latter legislated on one subject within and on one without its power, and was, therefore, not only a clear legislative recognition, but an absolute legislative declaration that from and after the 1st of September, 1875, all existing local legislation in British Columbia on the subject of Insolvency or Bankruptcy (except as to pending proceedings) should stand repealed, and all on the subject of the exemption of certain real and personal property from seizure or sale under execution should, so far as Dominion legislation was concerned, continue in force.

It is sufficient, therefore, for the present case to say that with reference to all classes of persons *not* coming within the specific designation set out in section 1 of the Dominion Insolvent Act of 1875, and as to matters preceding the 1st September, 1875 (the day on which that Act

came in force in British Columbia), all persons not coming within sections 16 and 17 of the "Bankruptcy Ordinance, 1865," previously passed by the Local Legislature, I am of opinion that the exemption clauses of the Homestead Acts of British Columbia, to the full extent of $500, are in full force and applicable; and with reference to persons within those sections, the question is not so raised in the present case as to permit me to express an opinion.

I am thus guarded because I think the question whether statutory insolvents forfeit, or are not entitled to, the benefit of such exemptions (when *bonâ fide* made), as inconsistent with the provisions of the Act of 1875, should be distinctly raised and distinctly decided.

Though it was so intimated during the argument, I cannot learn of any decision to the effect that the Provincial Act of 1873, extending the exemption to $500, was unconstitutional *in toto*, but only an *obiter dictum* that that part of it which relates to bankruptcy was *ultra vires;* in which I fully concur. If, therefore, the plaintiff is entitled to recover at all he will not be limited to the $150.

On the second point, *Addison* on Torts (4 ed., p. 652) lays down the law with great distinctness: "An action is not maintainable against a "Sheriff who has seized privileged or protected goods in obedience to "the command of a writ, but the person injured must apply to the "Court for an order upon the Sheriff to restore the goods." The case of *Ewart* v. *Jones* (14 M. & W. 774), confirming *Tarlton* v. *Fisher* (2 Dougl. 676), clearly sustains this view with reference to personal arrests, while *Rideal* v. *Fort* (11 Exch. 847), confirming the position, extends it to the case of goods seized under a *Fi. Fa.* and points out the distinction which would exist, when case has been brought, showing the process of the Court had been maliciously used, and trespass for acts done under a *Fi. Fa.* or *Ca. Sa.* in the *bonâ fide* discharge of duty. In *Rideal* v. *Fort*, as reported in 11 Exch. 850, *Alderson*, B., says:—

"A writ is delivered to the Sheriff commanding him to levy on the "plaintiff's goods. The Sheriff has no means of knowing whether the "goods are in fact protected from seizure; and if he acts in obedience "to the writ, that is a sufficient defence to an action against him. It "may be that, if he wrongfully and maliciously seizes the goods, he is "liable in an action on the case. Here, however, the only question is, "whether the Sheriff has a right to do what he has done; and in my "opinion he had. I am by no means disposed to say that Mr. *Hender-*"*son's* argument on the first point is not correct. It may be that the "petitioner is entitled to a general protection for all his property up to "the time of the final order; but, if so, he will have a protection for "the excepted articles in a different form. If these goods are really "excepted from the operation of the Acts, the proper course was to "apply to the Court to order the Sheriff to withdraw and restore them, "not to bring an action against him for simply obeying the writ. If

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"this action would lie, the Courts have been in fault in not introducing "an exception into writs as to privileged persons and protected goods. "That has never been done: and in all the cases of privilege, whether "on the ground of the person being a member of the Legislature, or "having a duty to perform about the person of the Queen, or from any "other cause, it has always been considered that the Sheriff is justified "if he obeys the commands of the writ, and that the privileged party "must apply to the Court for his discharge. The same principle "applies to goods which are protected."

The reasoning on which these decisions rest is so clear that a doubt cannot exist of its soundness. Exemptions under statutes depend upon a great many requisites pointed out in those statutes, many involving very nice points, and requiring the consideration of judicial minds. How is a Sheriff—a mere ministerial officer, acting under a positive writ or order of the Court—to know whether all the requisites of the statute have been complied with? Why should the onus be upon him? While he is delaying the execution of the Queen's writ, to find out these law points before he acts, the object of his acting may be rendered nugatory. The law says, if a man wants the benefit of a certain privilege which is different from that which men ordinarily possess, let him come forward, claim his right, and prove it before the proper tribunal, and there he shall have the benefit of it. If he waits until it is too late, that is his own fault. He is not to expect all the world to know or believe in his peculiar privileges. I consider this a fatal objection to the plaintiff's right to recover in the present action.

With reference to the first point, I am bound to say my view would, if it were not for some doubting words of Mr. Justice *Blackburn* in *Partridge* v. *Elkington*, have been equally clear. The Imperial County Court Acts were introduced into this Province by the County Court Ordinance of 1867. Sec. 138, of 9 & 10 Vic., c. 95, requires, for the protection of persons acting under that Act, that all actions and prosecutions for anything done in pursuance of that Act shall be laid, tried, and commenced at particular places and times, and not otherwise; and that notice in writing of such action shall be given to the defendant one calendar month at least before the commencement of the action; the object being to enable the officer against whom the action is to be brought to tender amends, should he deem it advisable. Against this very plain provision of the statute regulating the County Courts, Mr. *McCreight* argued that its application, nevertheless, is limited to actions in the Superior Courts, citing *Partridge* v. *Elkington* (L. R. 6 Q. B. 82) in support of that position. That case does not so decide. On the contrary, Mr. Justice *Blackburn* expressly says that sec. 138, of 9 & 10 Vic., c. 95, did not apply to the case then in hand; but if it did, "then the question might arise whether the words 'actions "and prosecutions' in that section included plaints in the County

"Courts, as well as proceedings in the Superior Courts;" adding: "I "think it is likely that the framers of the Act meant to refer only to "proceedings in the Superior Courts, although it is difficult to see why "notice of action is not required before suing in the County Court, as "well as in the Superior Court." This doubt seems singular, for the very point that a Bailiff was entitled to notice of action had been expressly decided in the case of *Burling* v. *Harley* (27 L. J. Exch. 258), confirmed by *Crowshaw* v. *Chapman* (31 L. J. Exch. 277).

The later Acts—13 & 14 Vic., c. 61, 15 & 16 Vic., c. 54, and 19 & 20 Vic., c. 108—do not, to my mind, lessen the protection previously given, as contended for by Mr. *McCreight;* nor, in extending the jurisdiction of the Court, are any words to be found capable of such construction; on the contrary, the greater the risk, a greater need of protection. Nor can I see exactly the bearing upon this case of the distinction taken by him as to the office or party not being entitled to notice, when this alleged mistake is a question of law and not of facts. The case of *Griffith* v. *Taylor* (L. R. 2 C. P. D. 194) is, whether certain circumstances were sufficient to warrant the *bonâ fide* belief that a certain crime had been committed; or, as *Cockburn*, C. J., says, "according to the latest authorities on the subject of notice of action "for anything done in pursuance of a statute, the law is that in order "to entitle a party to notice of action he must have acted under the "*bonâ fide* belief in the circumstances, which, if they had really existed, "would have amounted to a justification." The statutes referred to in that case were a class of statutes authorizing parties, under particular circumstances, to exercise certain acts of authority *per se*, without first taking the preliminary step of getting an actual authority to do the act complained of—that is, to take the law into his own hands. In the present case, the Sheriff does not act *per se* of his own authority; he acts by authority of the highest command he can receive—the Queen's writ, on final judgment. He takes the goods of the party named in the writ, even if they were another man's goods. Under the authority of *Burling* v. *Harley*, he would have been entitled to notice; but in the present instance they are the actual goods of the party against whom the writ was directed, but protected, as alleged, by a latent privilege of exemption, of which the Sheriff could know nothing until he was informed.

Surely, then, having obeyed the Queen's writ under that section 138, he was entitled to know "the cause of the action" intended to be brought against him, namely, that he had seized certain goods that were exempt from seizure; and the object of giving him that notice would be to enable him to enquire, and if he found they were exempt, to tender amends. Whether he was right or wrong is not the point. If he was right, he wants no protection; if he was wrong, the statute protects him, by saying he shall have notice in order that he may find that out and tender amends.

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The mistakes in law referred to by Mr. *McCreight* arise in the application of facts, as illustrated by *Cockburn*, C. J. Certain facts warrant certain presumptions in law. A man who seeks to justify an exceptional act must take care that the facts in hand will warrant such presumptions, and bring him within the statutes which permit him to do that act. If they do not, he has made a mistake in law, and would not be entitled to notice: but that does not apply to the case of an officer who is compelled by law to discharge a particular duty—to obey the Queen's writ: the act which he is doing being not exceptional, but pertaining to his office. He is not a volunteer, as the other is, and assuming to himself a duty which is not forced upon him. The law which compels him to do the duty says, in express words, if he makes a mistake in carrying it out he shall be protected by notice of action.

Whether in this case the Sheriff, under the circumstances, in not "staying his hand," as pointed out by section 12 of Homestead Ordinance, did right or wrong in proceeding to sell, on being notified immediately before the sale of the fact of the alleged exemption, and served with a list of goods claimed to be exempted, is one of the very points which he might have to enquire into, and probably would if he received notice; and, therefore, instead of depriving him of the right to notice of action, is the very reason why he should have had it. I am, therefore, of opinion that in this case he was entitled to notice.

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"Chinese Tax Act, 1878."—Ultra vires "B. N. A. Act, 1867," ss. 91-92—"Aliens"—"Trade and Commerce"—Taxation.

Held, the "Chinese Tax Act, 1878," is *ultra vires* of the Provincial Legislature.

This was an *ex parte* application under the 79th and 82nd sections of the Common Law Procedure Act, for an injunction to restrain the defendant from selling or otherwise proceeding with the seizure of certain goods of the plaintiff, taken by him as a Collector under an Act passed by the Local Legislature of British Columbia at its session in August, 1878, intituled "An Act to provide for the better collection "of Provincial Taxes from Chinese."

The second section is as follows:—"Every Chinese person over "twelve years of age shall take out a licence every three months, for "which he shall pay the sum of ten dollars, in advance, unto and to the "use of Her Majesty, Her heirs and successors; and such licence may "be in the form A in the schedule hereto.

"FORM A.

"CHINESE TAX ACT, 1878.

"No. "District of

"Date, 18 .

"Received of , ten dollars, being three months' licence "from the day of , to the day of , "18 .

"Collector."

Other sections provide that every merchant, farmer, trader, or employer of Chinese labour is to furnish the Collector with a list of all Chinamen in his employ, or indirectly employed by him, liable to pay the tax, under a penalty in case of failing to deliver such list when required, or knowingly making any false statement therein, of $100 for every Chinese person so employed, "to be recovered by distress of "the goods and chattels of the person failing to pay the same, or in "lieu thereof shall be liable to imprisonment for a period not less than "one month and not exceeding two calendar months," the Collector (7th section) having power to levy the amount of the quarterly licence from any Chinese person not being in lawful possession of such licence, with costs, by "distress of the goods and chattels of the person who "ought to pay the same, or of any goods or chattels in his possession, "wherever the same may be found, or of any goods or chattels found "on the premises, *the property of* or in the possession of *any other* "*occupant* of the premises," the non-production of the quarterly

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receipt being sufficient authority for the Collector to levy; proof of the lawful possession of such receipt lying on the person whose goods are distrained.

By the 8th section—Any Chinese person not having in his possession a licence lawfully issued to him, and any person employing a Chinese person not having in his possession a licence lawfully issued to him, shall, on conviction, forfeit and pay $100, and in default of immediate payment, be liable to distress and sale of his goods, and, if sufficient goods are not found, to imprisonment, with or without hard labour, for a period not exceeding two months or less than one month.

The 9th section makes the allegation of the offence in the prosecution sufficient proof of the offence, unless the defendant prove the contrary; and the 10th section gives power to any Justice of the Peace, in a summary manner, to hear and determine the information in any locality where the accused shall be found.

The 11th, 12th, 13th, and 14th sections provide for the employer demanding his quarterly licence of the Chinese person employed, and enact that the Chinese person who neglects, refuses, or is unable to take out the quarterly licence, shall be liable, at the instance of the Collector, to perform labour on the public roads and works in lieu thereof, at the rate of 50 cents a day, the cost of food, 5 per cent. of the wages of the overseer, 5 per cent. on the amount of the quarterly licence for cost of wear and tear of tools, to be added to the quarterly sum of $10, and to be deemed payable by every Chinese person performing such labour, in addition to the amount of the quarterly licence; and such labour to be continuous until an amount of work equivalent to the whole sum due by him has been performed, the labour to last from 7 a.m. to 6 p.m., with one hour allowed at mid-day for food; and in case of failure, refusal, or neglect to perform the labour aforesaid, to be liable, for each day's default, to perform two days' labour instead of one; or, in default thereof, to be imprisoned with hard labour for any term not exceeding six months, on conviction in a summary way before a Justice of the Peace; and if any person shall obstruct others in the performance of their duties, or do anything calculated to obstruct the due performance of the labour, he shall, on conviction before a Justice of the Peace, be imprisoned with hard labour for a period not exceeding six months, the overseer being required to prosecute in such cases.

The 8th, 11th, 12th, 13th, and 14th sections just mentioned, were not to come into force until one month after the passage of the Act, namely, on the 2nd October, 1878, but (as the learned Judge remarked) they are necessary to be considered in determining the intent, character, and effect of the Act as a whole, in the light of the authorities and principles referred to in the judgment.

Robertson, Q.C. (with him *Drake*), for the applicants.

The following cases were mentioned by Counsel—*Lin Sing* v. *Washburn*, 20 Cal. 534; *People* v. *Naglee*, 1 Cal. 232; *Ex. Ah Pong*, p. 19, Cal. 106; *Cooley* on Taxation, p. 63; *R.* v. *Taylor*, 36 U. C. R. 183; *Vattel*, Ed. 1865, p. 70; "Dominion Immigration Act, 1872;" *Leprohon* v. *City of Ottawa*, 40 U.C.R. 478; 11 Canada Law Journal, p. ; *Steph.* Com., 1 vol., 170; B. C. Stat., 38 Vict., c. 2; *Kent's* Comm., 8th Ed., vol. 2, p. 388; *Potter's Dwarris*, 257, 405, 418; *Dow* v. *Black*, L. R. 6 P. C. 272; *L'Union St. Jacques de Montreal* v. *Belisle*, L. R. 6 P. C. 31.

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This is one of twelve applications now before the Court, on behalf of different merchants and employers of Chinese labour, whose goods have been seized, and the decision of which, until reversed, will govern the remainder, as well as the present. The question is of more than ordinary importance, as it tests the constitutionality of the power assumed by the Local Legislature to pass such an Act.

On behalf of the plaintiff it is contended that the Act is *ultra vires*—

1st—As dealing with trade and commerce;

2nd—As an interference with aliens;

3rd—As interfering with the powers and duties of the Dominion Government in performing the obligations of Canada, as a part of the British Empire, arising under treaties between Great Britain and China.

The Province of British Columbia is a part of the Dominion of Canada, possessing powers strictly defined by the "British North "America Act, 1867," the Federal compact by which the Provinces of the Dominion are united. No power of legislation whatever pertains to them, other than as embraced in that compact. If the legislation of the Local Legislature be not within and sustained by that compact, it is not, and has not the force of law. The assent of the Governor-General cannot make an Act constitutional, which does not come within the powers conceded to the Province by the "British North "America Act, 1867." It becomes, therefore, necessary to consider that Act with the greatest care, to see how far its provisions bear upon the question before us, keeping in mind that it is an Imperial Act, passed by the consent and at the request of the Provinces themselves, in order that their relative rights should not be liable to fluctuation, abrogation, or curtailment at the instance of any predominant party or conflicting interest in the Dominion. It is the solemn guarantee of the highest power in the British Empire, that the rights thereby conferred shall not be diverted. If the Local Parliament could interfere with the distribution of legislative powers, the Dominion Parliament could do the same, and thus in the end the weaker must fall before the stronger; and British Columbia, with its sparse and limited population, be powerless.

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The 91st section specifies in detail, by sub-divisions, the subjects on which the Dominion Parliament shall have exclusive legislation; the 92nd section those on which the Provincial Parliaments shall have exclusive legislation. When either party goes beyond the list so defined the Act becomes *ultra vires*, and it is the duty of that Court before which the question is raised so to declare it.

The 91st section, by sub-section 2, gives to the Dominion Parliament the regulation of trade and commerce, and by sub-section 25, that of naturalization and aliens, *extending to all matters coming within either of those classes of subjects.* It is plain, therefore, the Local Legislature can legally pass no Act interfering with the regulation of either the one or the other.

Then, does this Local Act interfere with the regulation of trade or commerce, naturalization, or aliens? By its preamble, it professes to prevent the evasion by the Chinese of the payment of the taxes on real and personal property, on income, on unoccupied land, and the separate tax for the maintenance of the school system, and declaring it advisable that all should contribute to the general revenue; enacts the provisions above set forth as a more simple method for the better collection of Provincial taxes from Chinese. A preamble is really no substantial part of an Act. It is simply the professed light by which it is alleged the Act should be read; but, in determining the objects of the Act, we must look not at the preamble, but really at its enacting clauses. They may directly conflict with the preamble, and it has been contended that the object of this Act is not so much to prevent the evasion of the payment of taxes by the Chinese, as to prevent their living or carrying on business in this country. What is the effect of these enacting clauses?

In arriving at a conclusion, I have been materially assisted by a leading decision in the Supreme Court of the State of California (*Lin Sing* v. *Washburn*, 20, California Reports, 534), in which the facts and points raised are almost identical with those in the case now before this Court, except that in the California case the Act of the Legislature boldly and openly avowed its object, viz., "to protect free white labour "against competition with Chinese coolie labour, and discourage the "immigration of the Chinese into the State of California." The suit there was an appeal from the decision of an inferior tribunal which had sustained, under an Act of the California Legislature under the above title, the enforcement of a monthly capitation tax of $2.50 "on each "person, male and female, of the Mongolian race, of the age of eighteen "years and upwards, residing in the State," except such as had taken, or should take out licences to work in the mines, or to prosecute some kind of business, which tax should be known as the Chinese Police Tax; and exempting also all Mongolians exclusively engaged in the production and manufacture of sugar, rice, coffee, and tea. The plaintiff, Lin Sing, after refusal, paid the $2.50, on the seizure of his property by the Collector, immediately redemanded the sum, and

brought suit for its recovery. The case was most elaborately and ably argued on appeal, the Attorney-General of the State appearing for the Collector to sustain the tax. The point was distinctly taken, that it was an interference with trade and commerce, which could be regulated alone by the general Government, and as distinctly met, that it was not an interference, but more a matter of Police regulation, and that even if it did interfere with trade and commerce, the State had concurrent jurisdiction, and in matters of taxation relative to its own internal affairs, of which this was one, an absolute and inherent right to legislate. The position of the Attorney-General, on behalf of his State, was strengthened by the well-known doctrine of State rights, that at the time of the Union being sovereign and independent States they had only parted with what they distinctly gave, and that, therefore, all powers not absolutely expressed as parted with remained in the State. A position which cannot be contended for on the part of the Provinces of the Dominion, the difference in this respect in their constitution being, as put forth in a work published in Toronto on this subject in 1872: "In the United States all powers not specifically conceded by the "several States to the Federal Government were still to remain with "the several States. In Canada, on the contrary, all powers not "specifically conceded by the Imperial Parliament, in the proposed "Constitution, to the separate Provinces were to remain with the "Federal Government. The source of power was exactly reversed. "At the time of the framing of their Constitution, the United States "were a congeries of independent States, which had been united for a "temporary purpose, but which recognized no paramount or sovereign "authority. The fountain of concession therefore flowed upward from "the several States to the United Government. The Provinces, on the "contrary, were not independent States; they still recognized a para-"mount and sovereign authority, without whose consent and legislative "sanction the Union could not be formed. True, without their assent, their "rights would not be taken from them; but as they could not part with "them to the other Provinces without the sovereign assent, the source "from which those rights would pass to the other Provinces, when "surrendered to the Imperial Government for the purpose of Confedera-"tion, would be through the supreme authority. Thus the fountain of "concession would flow downward, and the rights not conceded to the "separate Provinces would vest in the Federal Government, to which "they were to be transferred by the paramount or sovereign authority."—*Gray* on Confederation, vol. 1, pp. 55, 56.

In every way, therefore, in the legal aspect of the case, both as to the original inherent power, and the less distinctive and marked concession, the position of California was stronger than that of British Columbia, while the latter is relieved from all conflict on the question of concurrent jurisdiction by the express terms of the Federal compact of the Dominion.

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In that case, the Court decided (Field J. *dissentiente*) that the Federal Constitution had vested in the General Government the power to regulate commerce in all its branches, and this power extends to every species of commercial intercourse, and may be exercised upon persons as well as property.

That commerce cannot be carried on without the agency of persons, and a tax the effect of which is to diminish personal intercourse is a tax on commerce. If the power to impose such a tax is acknowledged, it being a sovereign power, no limitation can be affixed to its exercise, and it may be so used as not only to diminish but to destroy commerce.

The power asserted in the passing of the Act in question, is the right of the State to prescribe the terms upon which the Chinese shall be permitted to reside in it, and this right if carried to the extent to which it may be carried, if the power exists, may be so used as to cut off all intercourse between them and the people of the State, and defeat the commercial policy of the nation.

That the Act could not be maintained as a Police regulation, that branch of the Police power had been surrendered to the Federal Government as a part of the power to regulate commerce, and its exercise by a State was incompatible with the authority of the Government. That the Chinese might be taxed as other residents, but could not be set apart as special objects of taxation, and be compelled to contribute to the revenue of the State in the character of foreigners.

The reasoning which supports these conclusions is clear and logical, and it is stated in a note to the case, that they have been re-examined and approved (*People* v. *Raymond*, 34, California Reports, 422. Reference also is made to the *State of California* v. *Steamship Constitution*, January Term, 1872).

These California Reports are referred to as exceptionally applicable, the Chinese question on the Pacific Coast emphatically belonging to that State. There, almost every argument that legal ingenuity could suggest has been used to take from the General and vest in the Local Government the power of expulsive or prohibitory legislation as against this particular class of foreigners; and though towards them the mobs may there occasionally exhibit a somewhat rude exuberance of licence, few countries can be found where, in considering their cases, more correct views of law are laid down than in the higher Courts of that State.

Cooley on Taxation (chap. 3, page 62), referring to the power of the Federal Congress in the United States to regulate commerce with foreign nations, observes—"The Constitution, and the laws made in "pursuance thereof, being supreme over the several States, the power "of regulation cannot be interfered with, limited, or restrained by any "exercise of State authority. When, therefore, it is held that a power

"to tax is at the discretion of the authority which wields it, a power "which may be carried to the extent of an annihilation of that which "it taxes, and, therefore, may defeat and nullify any authority which "may elsewhere exist for the purpose of protection and preservation, "it follows as a corollary that the several States cannot tax the com- "merce which is regulated under the supremacy of Congress."—Citing *McCulloch* v. *Maryland*, 4, Wheat., p. 316, 425, per Marshall, C. J.

In the case of *Regina* v. *Taylor* (36 U. C. R., p. 183) the same points were much discussed, both on the argument on the demurrer in the Queen's Bench, and subsequently in the Court of Error and Appeal (36 U. C. R. 218). Though the latter Court reversed the decision of the former Court as to the application of the principles to the particular case in hand, yet it did not differ as to those principles themselves, that is, that if the Local Act was an interference with the regulation of trade and commerce, not specially allowed by the 92nd section of the "British North America Act, 1867," it would be *ultra vires*. With the greatest deference, however, for the distinguished Chief Justice who delivered the judgment of the latter Court, it is difficult to see the foundation for the conclusion at which he arrived, that the term "exclusive legislative authority" given to the Dominion Parliament on the subjects enumerated in section 91, was to be construed as exclusive of Imperial, not of Provincial, legislation.

The "British North America Act, 1867," was framed, not as altering or defining the changed or relative positions of the Provinces towards the Imperial Government, but solely as between themselves. It was the written compact by which, for the future, their mutual relations were to be governed. In consideration of the concessions of the Provinces to the General Government, and for the purpose of enabling the latter to carry out the responsibilities assumed on behalf of the former, each restricted itself as to what for the future it would do. And it is to be observed that the expressions used in the 92nd section, though not identical in words, are identical in meaning with those used in 91. In 91, the Dominion Parliament has "exclusive Legislative "authority;" in 92, the Provincial "Legislature may exclusively make "laws" touching the matters assigned to each. The exclusiveness in the latter could certainly have no reference to legislation by the Imperial Parliament, because it would be incongruous, and if in the former it was intended as restricted to Imperial legislation, then the mutuality in the compact was gone, and the Provinces were obtaining nothing for the concessions they gave. Moreover, with reference to the Imperial Parliament as the paramount or sovereign authority, it could not be restrained from future legislation, and therefore, in that light, the term would have no legal bearing. Such a construction weakens the authority of the General Government of the Dominion. The "British North America Act, 1867," was intended to make legal

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an agreement which the Provinces desired to enter into as between themselves, but which, not being Sovereign States, they had no power to make. It was not intended as a declaration that the Imperial Government renounced any part of its authority. It is submitted, with deference to that great and good Canadian, Chief Justice Draper, that the original framers of Confederation meant that Act to be the Rule of Guidance as between the Dominion and Provincial Governments. It is the charter of their relative rights; if not, the Act is a great bungle.

In the New Brunswick case of *Regina* v. *The Justices of King's County*, and in 2 *Pugsley's* Reports, 535, it was held that a Local Legislature has no power, since the "British North America Act, 1867," to pass a law directly or indirectly prohibiting the manufacture or sale, or limiting the use of spirituous liquors. And an Act passed with this object in view was *ultra vires* and void. The Court there clearly decided that the power of regulating trade and commerce given exclusively to the Dominion Parliament by the 91st section, was not limited to trade and commerce with foreign countries or even between the separate Provinces, but extended to the internal trade and traffic of each particular Province. That "trade" meant the exchange of goods for other goods or for money—the business of buying and selling,—while "commerce" might be more correctly defined as an interchange of goods, wares, productions, or property of any kind, between nations or individuals. "That the relation of trade and "commerce must involve full power over the matter to be regulated, "*and must necessarily exclude the interference of* all other bodies that "would attempt to intermeddle with the same thing."

Vattel, Bk. 2, c. 8, referring to our duties towards foreigners, observes: "Since the Lord of the Territory may, whenever he thinks proper, "forbid its being entered, he has a power to annex what conditions "he pleases to the permission to enter. This is a consequence of the "right of domain. If he annexes any particular condition to such "permission, he ought to have measures taken to make foreigners "acquainted with it, when they present themselves on the frontier. "He ought not to grant an entrance into his state for the purpose of "drawing foreigners into a snare; as soon as he admits them, he engages "to protect them as his own subjects, and to afford them perfect "security, as far as depends on him."

Kent, in his Commentaries (8th Edition, 2nd Vol., 388), observes— "Every person is entitled to be protected in the enjoyment of his "property, not only from invasions of it by individuals, but from all "unequal and undue assessments on the part of the Government. It "is not sufficient that no tax or imposition can be imposed upon the "citizens, but by their representatives in the Legislature. The citizens "are entitled to require that the Legislature itself shall cause all public

"taxation to be fair and equal in proportion to the value of property, "so that no one class of individuals and no one species of property may "be unequally or unduly assessed." Chinese are not citizens, nor are Frenchmen, Germans, Italians, Spaniards, or Americans; all alike are foreigners, unless naturalized, and as such are entitled to the same privileges. The United States, as the sovereign power to which California belongs, made treaties with China. Great Britain, as the sovereign power to which Canada belongs, has made treaties with China. Those treaties are described as for the purposes of peace and amity, trade and commerce.

Treaties are regarded as the highest and most binding of laws, beyond any merely internal regulation which one of the parties thereto may make for the Government of its own people, because, on the subjects to which they refer, they bind the people of both powers, however dissimilar in other respects may be their institutions, customs, or laws. A remarkable case illustrating this principle will be found in 3, *Dallas'* American Reports, 199 (*Ware* v. *Hylton*)—"During the "revolutionary war between Great Britain and the United States, the "State of Virginia made a law that all persons indebted to British "subjects might pay the amount into the Loan Office, which should be "a good discharge." By the Treaty of Peace it was provided that "creditors of either side should meet with no lawful impediments for "the recovery of their debts." The defendant had paid the money into the Loan Office, but it was held that in consequence of the Treaty of Peace he was liable to the plaintiff. Judge *Chase* said "in the con- "struction of contracts words are to be taken in their natural and "obvious meaning, unless some good reason be assigned to shew that "they should be understood in a different sense. The universality of "the terms is equal to an express specification in the treaty, and indeed "includes it, for it is fair and conclusive reasoning that if any descrip- "tion of debtors or class of cases were intended to be expressed it "would have been specified. The indefinite and sweeping words made "use of by the parties, exclude the idea of any class of cases having "been intended to be excepted, and explode the doctrine of constructive "discrimination."—*Phillimore* on International Law, 2nd vol., 89.

Wildman on International Law, 1 vol., 168, says:—"Treaties of "Commerce and Navigation are necessary to secure, as a matter of "right, that commercial intercourse which without treaty is merely "precarious." At 179, "They are to be taken, as to their stipulations, "most strongly against the party for whose benefit they are intro- "duced." At 184, "Provisions in favour of natural justice and "humanity, and consequently much more those that are declaratory of "the Common Law of nations, must be construed liberally." As a matter of history it is well known that these treaties were forced on China by Great Britain, and on the part of the former most reluctantly

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accepted. As stated by a late writer on the subject, in a popular magazine "the terms of the Treaty between Great Britain and China "permitted the subjects of Great Britain to trade in China and reside "there, and it gave in return full permission for the Chinese to trade "and reside in the British dominions everywhere. Many had already "gone there and their action was fully legalized by the treaty. It is "said this permission was not asked by the Chinese but was inserted by "the English Envoy to give it an appearance of fairness. The treaty "was forced upon China." An examination of the last treaty in 1858, and the subsequent convention in 1860, shews that the Emperor of China actually undertakes to withdraw the ban hitherto preventing his subjects from going abroad, and to give them permission to go and trade and reside and "take service in the British Colonies," and to enter "into engagements with British subjects" for that purpose.

By the 132nd section of the "British North America Act, 1867," it is specially enacted "that the Parliament and Government of Canada "shall have all powers necessary or proper for performing the obliga- "tions of Canada, or of any Province thereof, as part of the British "Empire, towards foreign countries arising under treaties between the "Empire and such foreign countries."

The same views with reference to the powers of the Local Legislatures, when coming in contact with the Dominion authority, are sustained in *Leprohon* v. *the City of Ottawa*, 40 U. C. R. 478; *Dow* v. *Black*, L. R. 6 P. C. 272; *L'Union St. Jacques* v. *Belisle*, L. R. 6 P. C. 35; *The Queen* v *Chandler*, *Hannay's* New Brunswick Reports, 54.

Sumptuary Laws affecting the domestic and personal habits of a people, where not necessary for the prevention of crime, the preservation of the public health, or purposes of morality, have always been considered objectionable. To enact that employment shall not be given to classes, except on hazardous and ruinous terms, is practically prohibiting intercourse with the particular class specified. If you cannot deal or trade with a man, but at the risk of a penalty far exceeding the value of the service, that dealing or trading will be put an end to.

Looking at the British Columbia Act in the light of these authorities, we find, in the first place, it goes far beyond the California Act, in *Lin Sing* v. *Washburn*, declared to be unconstitutional. It is not a licence to do business; it can barely be called a licence of residence; it is more simply a three months' permit of existence in British Columbia. Every Chinese person, the traveller for pleasure, for knowledge, or in view of future trade or business, comes within its purview. It is limited to no locality,—attaches at an age, without reference to sex, when under the laws applicable to other persons the individual is not the master of his own movements or actions; and under the 12th section, makes the *inability* to take out such licence, immaterial from what cause arising, whether from sickness, impotency, poverty, infancy,

idiocy, or old age, an offence punishable by what, from caprice, misapprehension, or bad feeling, may be made a grinding servitude almost indefinite in extent, and compared with which the ordinary punishments inflicted for very serious crimes would almost be a luxury. How is a Chinese infant, or female barely over 12 years of age, to comply with this Act? By the 7th section the liquidation of the offence is not limited to the offender's person or goods, but may be atoned for by the seizure of any other person's goods happening to be in his possession, or the goods and chattels of the accidental occupant of the same premises. The Act, exceptional in its nature as to one class of foreigners, bristles with imprisonment and hard labour, and places the frightful power of conviction and punishment in the hands of any Justice of the Peace throughout the country, at the instance of a Collector whose interest it may be to gratify the promoters of the Act.

Such will be the condition of the employed, what will be the condition of the employer? By the 8th section "Any Chinese person "who shall not have in his possession a licence lawfully issued to him, "*and any person who shall employ any Chinese* person who has not "in his possession a licence lawfully issued to him, shall, on conviction "thereof, forfeit and pay a sum not exceeding one hundred dollars, "and in *default of immediate payment* the amount of such penalty "shall be levied by distress and sale of the goods and chattels of the "persons contravening the provisions of this Act, or if sufficient distress "be not found, shall be liable to be *imprisoned, with or without hard "labour*, for any period not exceeding two months and *not less than "one month*." By the 9th section "In any prosecution for the "*infraction of any of the provisions of this Act* the averment in the "information that any person named therein had not in his possession "at the time of the alleged infraction, a licence lawfully issued to him, "shall be sufficient proof that such person had not such licence unless "the defendant shall prove the contrary." And by the 10th section jurisdiction is given to any Mayor, Warden, or any Justice of the Peace to hear and determine the information in a summary manner at *any locality* where the accused shall be found. Thus a farmer in the urgency of a pressing harvest, a merchant or trader in the emergency of business, before he can avail himself of this species of labour or assistance, must lose his time, his harvest, or his opportunity in testing the genuiness and lawful issue of the document, as well as the identity of the person holding it. Distance, inability to prove identity, pressing necessity, are of no avail. Non-employment or the risk of the penalty!!! It is a somewhat startling proposition to confound the innocent with the guilty, and hold the free citizens of a country responsible for the tricks and defaults of foreigners. Such trammels must kill all trade and intercourse with the proscribed race. Intercourse is necessary to trade. Social ostracism the Local Legislature

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has no power to enforce. The Act has over-reached itself. In contrast with the California Act cited in *Lin Sing* v. *Washburn*, the extent to which it goes is astounding.

Secondly,—From the examination of its enacting clauses, it is plain it was not intended to collect revenue, but to drive the Chinese from the country, thus interfering at once with the authority reserved to the Dominion Parliament as to the regulation of trade and commerce, the rights of aliens, and the treaties of the Empire. It interferes with the foreign as well as the internal trade of the country, and in its practical effect would operate as an absolute prohibition of intercourse with the Chinese.

"There can be no question that all parties who reside within the "taxing power and receive the protection of the Government may be "called upon to render the equivalent, and that both with reference to "persons and property the rule is applicable when within the jurisdic-"tion."—*Cooley*,* *15*.

The Chinese, like all other residents in the country, can be made to bear their proper share of taxation when enforced in a legal manner, under laws constitutionally made. The 92nd section gives to the Local Legislature the power of raising a revenue for Provincial purposes by direct taxation within the Province, and points out the *modes* and subjects by means of which it may be done; but under the semblance of such an intention the law will not permit an infringement of the Constitution.

It has been said that Queensland passed a law, putting an exceptional tax on Chinese immigrants into that country, which, after several unavailing efforts, was at length assented to by the Imperial Government. The shape in which that tax was imposed, or the reasons which induced the Imperial Government to assent to it, have not been shown, nor has this Act itself been produced.

British Columbia does not stand in the same position, she is not autonomous. As the State Legislature of California stands towards the Congress of the United States, so the Local Legislature of British Columbia stands towards the Parliament of Canada, and is restrained by the federal compact which governs the Dominion. Queensland, on the contrary, is autonomous, legislates solely and only for herself, is restrained by no federal compact, and in her relative position towards the British Empire is constitutionally on the same footing as the Dominion of Canada. The Dominion Parliament may pass such an Act as regulating the trade and commerce of Canada, subject to the confirmatory power of the sovereign authority in England as governing the whole Empire, but British Columbia cannot. Should the Dominion

* See *Reg.* v. *Wing Chong*, 2 B. C. Law Reports, 150; and *Reg.* v. *Gold Commissioner of Victoria*, *Ibid*, 260.

Parliament pass an Act like that of Queensland, the Imperial Government might see reasons to assent to it; and if the interests of British Columbia, in the future, require legislation of that exceptional nature, which is the opinion of some practical and sensible men in the country, she must seek and obtain it through the proper channel, that is by the action of the Dominion Parliament.

The present Act is entirely beyond the powers of the Local Legislature, and is, therefore, unconstitutional and void

The prayer of the petition must be complied with, and the injunction issued.

This judgment will apply to each of the cases brought before me.

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1874.

11th May.

In re W. C. WARD

AND

THE VICTORIA WATER WORKS.

Arbitration—Compensation—Land Covered with Water—Construction of Crown Grants—Setting aside Award—Time within which Application should be made—Imp. 9 & 10 Wm. III., c. 15.

The Arbitrators appointed under the "Victoria Water Works Act, 1873," in making an award of damages to be allowed to W. for lands required for the Water Works took into consideration, in their award and estimate, the value of certain land covered with water—(Beaver Lake).

Held, by the Court (*Crease and Gray, JJ.*), that the Arbitrators were right in so doing.

Semble, the number of acres mentioned in the early Vancouver Island Crown Grants is not the measure of the extent granted, but merely the measure of price.

Held (without deciding that the Imperial Statute 9 & 10 Wm. III., c. 15, was in force in British Columbia), that the time limited by Sec. 2 of that Act was the time within which applications to this Court to set aside awards should be made.

Remarks as to setting aside awards on the grounds of misconduct on the part of the Arbitrators.

Robertson, Q. C., on behalf of the Water Works Commissioner, obtained a rule *nisi* to set aside an award, dated 17th day of October, 1873, made under "The Corporation of Victoria Water Works Act, 1873."

That Act declared that it should be lawful for the Commissioner, his servants, &c., to enter and take lands, and also to divert any springs, streams, lakes, or bodies of water as they should judge suitable and proper, and to contract with the owners and occupiers of said lands, and those having an interest or right in the said water or waters for the purchase thereof; damages to be paid to owners, and in case of disagreement as to amount of compensation, the same was to be ascertained by three arbitrators: "the award of the majority of the "said arbitrators should be final." It was provided, "that any award "under this Act should be subject to be set aside on application to the "Supreme Court, in the same manner and on the same grounds as in "ordinary cases of arbitration."

26th April, 1874, *McCreight*, Q. C., and *Drake*, now showed cause.

11th May, 1874—The judgment of the Court* was delivered by *Crease*, J., who stated that as the Chief Justice, upon a supposition of a possible indirect interest in the subject of dispute, retired from the bench.

* Present—Crease and Gray, JJ.

This case has been fully and ably argued on both sides, and resolved itself into three simple propositions:—

1. Did the land covered with water, known as Beaver Lake, amounting to 24¼ acres, belong to Ward, so as to be properly included in the award or be taken into consideration in any estimate of damages to be allowed him for its appropriation, with the water privileges thereunto belonging, by the Victoria Water Works Company, under their Act?

2. Has there been anything in the conduct of the arbitrators, or in their estimate of damage, that would by law call for the setting aside of the award?

3. Has the application on behalf of the Commissioner to set aside the award been made in time?

In considering the first proposition—was Beaver Lake the property of Ward?—we have to be guided almost entirely by the construction to be placed on the wording of the Crown grant read in conjunction with the official plan or survey, by express reference to which all the land in question was sold.

By that grant, Her Majesty conveyed "unto William Curtis Ward, "his heirs and assigns, all that parcel or lot of land situate in Lake "District, in the Province of British Columbia, said to contain 329 acres, "more or less, and numbered sections 49, 50, 63, and 64 on the official "plan or survey of the said Lake District, to have and to hold the "said parcel or lot of land, and all and singular the premises hereby "granted, with their appurtenances, unto the said William Curtis Ward, "his heirs and assigns, for ever."

It was argued, on behalf of the Commissioner, that from time immemorial grants from the Crown to a subject, are not to be construed according to the rule which prevails between private parties where *verba fortius accipiuntur contra proferentem*, the construction is given against the grantor; that in Crown grants, on the contrary, the construction was most strongly in favour of the Crown, and that nothing passed except what was conveyed by express words (*Attorney-General* v. *Parsons*, 2 C. & J., p. 302); that consequently, in the present case, as 329 acres were mentioned as having been conveyed to Ward, only 329 acres had passed to him, and as the sections named in the grant amounted fully to 329 acres without Beaver Lake, and that as there were no clear and determinate words (*Stanhope's* case, Hob. 241, Bro. Abr. *Patent*, Pl. 62) passing the water or conveying Beaver Lake, therefore Beaver Lake did not pass out of the Crown, consequently was not Ward's to sell; that it nevertheless had been included in the award by express words, as part of the consideration for the sum awarded, consequently the award was bad on the face of it, and could be opened up to consider the validity of the points raised in the second proposition.

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It is true that the old and strict rule in favour of the prerogative still exists, but it does not mean that a forced construction was to be put upon the words of a Crown grant in favour of the Crown. That only obtains where the words are really doubtful, and where the interpretation in favour of the Crown might be made without violation of the apparent object of the grant (*Molyne's* case, 6 Co., 5.) The old rule has, however, in a long succession of decisions, been much modified; and a great relaxation of its sterner features in the interests of justice, has taken place. In a recent Australian case (*Mary Lord* v. *Commissioners for City of Sydney*, 12 Moo. P. C. 497), heard in appeal before the Judicial Committee of the Privy Council in 1859, *Sir John Coleridge*, in delivering the decision, said: "Their Lordships "do not intend to differ from the old authorities in respect to Crown "grants; but upon a question of the meaning of words, the same rules of "common sense and justice must apply, whether the subject-matter of "construction be a grant from the Crown or from a subject, it is always "a question of intention, to be collected from the language used with "reference to the surrounding circumstances. * * It can never be a "question to be determined by the literal meaning of the words, without "reference to the circumstances in which they are used." Applying this more liberal principle of construction, so much in accord with common sense, to the grant made to Ward, and regarding it in the light of the surrounding circumstances, it is found that all the sections are conveyed to Ward in one block as "all that parcel or lot," and not as so many several parcels or lots. It is not specifically limited to 329 acres, but "said to contain" 329 acres, "more or less," and in order that the uncertainty caused by these words may be effectually removed, a governing boundary of the most determined kind is established by a reference to the sections and numbers on the official plan or survey of Lake District, in which the land is situate.

It was stated, in the affidavits, that at the time the land was purchased, it was the practice of the Government Land Office, in estimating the price of any block of land, to regulate the purchase money by the approximate acreage of *cultivable* land, and to exclude from the estimate the rocks, water, and swamp contained within the lines of the sections,—thus making the supposed cultivable acreage the measure of price and not the measure of extent. It was proved that Beaver Lake was within the boundary of section 49.

The principle at issue was deemed of sufficient interest by the Court to call for a close inspection of the official plan or survey (referred to in the grant) of Lake District, at the Lands and Works Department. By a personal examination of this official plan, as well as the field-notes upon which it had been made, it was apparent that the lines enclosing section 49 had been actually run and marked out on the ground, the corner boundaries distinctly marked, and posts put in from place to

place, to establish by determinate metes and bounds on the land the exact limits of section 49, and Beaver Lake was within those limits.

It is a rule of law (*Burton*, Real Property), enforced by all the Courts from the earliest times, that where there is any doubt in the language of the deed as to the contents, when words indicative of boundaries are used, the actual work on the ground shall determine.

The Court, therefore, considers the land covered with water, called Beaver Lake, to have been duly conveyed to Ward by the grant of June, 1872, and that the number of acres mentioned was merely the measure of price. Had there still remained any doubt on this point, it would have been effectually removed by an important proviso contained in the grant, although not referred to by counsel on either side during the argument. By this proviso, Her Majesty reserved to herself, her heirs and successors, and all persons duly authorized through the Crown, such water privileges and rights of carrying water over, through, or under any parts of the hereditaments thereby granted as might be reasonably required for mining purposes in the vicinity of the said hereditaments, paying reasonable compensation therefor to the said William Curtis Ward.

The proviso expressly negatives the idea that the Crown, in granting section 49, did not intend to convey the water (including Beaver Lake) embraced within the boundary lines of that section.

It is difficult, also, to see how, in the face of the particular wording of this proviso, a claim for reasonable compensation for the water could be resisted.

With these views, it becomes unnecessary for the Court to consider how far Ward, as undoubted owner of all the land surrounding Beaver Lake, became entitled to the lake itself as riparian owner, *usque ad medium filum aquæ*. Sufficient that he obtained it by direct grant, and, in the words of *Sir John Coleridge* above cited, "The Crown had "the power of granting it; and no reason can be assigned why it should "have reserved what might be directly and immediately to the grantee, "and could scarcely have been contemplated as of any probable use to "the Crown, and this, too, in an infant Colony, where it was the mani-"fest and avowed policy to encourage settlement and the cultivation of "land, by grants, on the easiest and most favourable terms."

It is to be distinctly understood that the Court expresses no opinion (that question not having arisen in any way in this case) how far Ward's tenure of the lake and water may be affected by the rights of reparian owners (if any) around the lake, or the outlets flowing therefrom or thereto.

The fact of Beaver Lake being thus the property of Ward, and the award on the face of it being good, narrows the consideration of the second proposition—Was there anything in the conduct of the arbitra-

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tors or their estimate of damages that would, by law, call for the setting aside of their award?

The Company seek to set aside the award on the ground of misconduct of the arbitrators. They do not allege fraud, partiality, a secret interest in the subject referred to, or any moral turpitude, but that, upon the whole case, their action was such, as in law, would amount to legal misconduct. This assertion is confined to the position that the waters of Beaver Lake, included by express words in the award, was not the property of Ward (an allegation already disposed of); and that $2,000 was an excessive sum to pay for the land taken, as no evidence as to value beyond $5 an acre was given.

Without misconduct appearing on the award or other circumstances proved, to shew that the conduct of the arbitrators has been glaringly wrong (*In re Hopper*, L. R., 2 Q. B. 367; *Phillips* v. *Evans*, 12 M. & W.; *Fuller* v. *Fenwick*, 16 L. J., C. P. 79), the Courts have steadily declined to interfere with awards or unnecessarily to attempt to distinguish the different ingredients of which the total amount awarded may be made up (*Duke of Bedford* v. *Swansea Harbour Trust*, 29 L. J. C. P. 241; *Saunders* v. *Doomer*, Law Times Rep. 1850 p. 153; *Russell* on Awards, pp. 289 & 648, 4 ed. *et seq.*, and cases there cited). The facts of the case shew that here there was nothing "glaringly wrong."

[The learned Judge here reviewed the facts, which are unnecessary to report, and stated that in his opinion material facts had not been brought to the notice of the Court at the time of the application for the rule *nisi*, and continued as follows :—]

It is the practice on the equity side of the Court (and the analogy applies here), whenever an injunction is granted upon a statement of facts known to the applicant, which statement is afterwards disproved, or it is shewn that some material fact has been omitted from it, whether by accident or otherwise, at once to discharge the injunction with costs.

It would, therefore, not be improper for the Court to observe that the applicant here is in an analogous position, and on that ground, had there been no other, the rule would have been liable to be discharged. On the second proposition therefore the application cannot be sustained.

The third proposition—was the present application too late? involves a point of considerable importance—the time within which application to set aside an award should be made.

It was argued by the learned counsel for the Water Works Commissioner, that, although the Imperial Law, civil and criminal, up to the 19th November, 1858, had been made law here, it had been only made so, so far as applicable to the circumstances of the country—how far it was applicable it was the province of the Court to declare—that, as in 1869 the Local Legislature had thought fit to pass the "Civil

Procedure Ordinance, 1869," in express words making the "Common Law Procedure Act, 1854," and its provisions for arbitration, applicable to British Columbia, they had omitted all mention of the 9 & 10 William III., c. 15, and consequently they (he contended) by implication excluded it, so that the present reference could not have been under that Act; it was avowedly not under the "Common Law Procedure Act, 1854," nor ordered by a Court or Judge; nor (he assumed) under any English Rule of Court. It was therefore, he argued, to be regarded as an exceptional compulsory reference, under an exceptional local Statute—"The Victoria Water Works Act, 1873,"—and must be dealt with exceptionally, in the discretion which the Court had of declaring what parts of the Imperial Law were applicable here

While recognizing this power in the Court, this case has impressed the Court with the necessity of giving finality to the award of arbitrators. They are a tribunal acting as judges and jury, and selected by the parties in difference, it is presumed, with proportionate care. They are intended to effect a speedier and less expensive settlement of disputes than could be obtained through the more elaborate proceeding of a Court. To this end they have received more powers than either Judge or jury, and for this, (where no fraud is alleged) error in law and mistakes in their award are not too closely enquired into. We, therefore, in the present instance take the same rule as the line which was adopted under similar circumstances by English Judges (*Brooke* v. *Mitchell* 8 Dowl, P. C. 392; *Smith* v. *Blake* 8 Dowl, P. C. 133; *Ross* v. *Ross* 16 L. J. Q. B. 138; *North British Railway Company* and *Trowsdale* L. R. 1 C. P. 401)—and consider that the time within which the application should have been made to set aside the award should have been a reasonable one, and in this case (to use the words of the 9 & 10 William III., c. 15), "Before the last day of the next term after the award or umpirage was made and published to the parties." Consequently the present application having been made after the lapse of so long a period, and after there had been full opportunity to apply to a Court—between the 17th of October last, and the 17th of April last—is, we consider, entirely too late.

The rule is discharged with costs.

1880.

13th, 14th, and 16th, April.

BARNARD *v.* WALKEM.

"Independence of Parliament Act, 1875"—Barrister's fees—Injunction—Crown Officers.

On an application for an injunction under the "Independence of Parliament Act, 1875," to restrain a member of the Legislative Assembly and a Minister of the Crown from sitting and voting in the House.

Held, per Gray, J., that a Barrister's fee being in the nature of an *honorarium*, the acceptance of employment as Counsel in an arbitration by a Barrister was not the acceptance of such an office as to disqualify a member from sitting and voting.

Held, per Begbie, C. J., and Crease, J., that the acceptance of such employment was an infringement of the provisions of sec. 1 of that Act.

Held, per Begbie, C. J., Crease and Gray, JJ., on demurrer that any registered voter in the Province had sufficient interest to maintain an action under this Act.

Remarks on the Court controlling, by its process, Officers of the Crown.

This was an application for an injunction to restrain the defendant, Hon. George Anthony Walkem, a member representing Cariboo District in the Legislative Assembly, from sitting and voting in the Assembly during the then session, or until he might be elected thereto.

The application was based on the "Independence of Parliament Act, 1875," the important sections of which are set out in the judgment.

The bill stated that the plaintiff, F. S. Barnard, was a British subject and a duly qualified and registered voter for the Electoral District of Victoria City; that the defendant, a Barrister-at-Law, at the request and on behalf of the Dominion Government, while a member of the Assembly and Attorney-General and Chief Commissioner of Lands and Works, had acted and been employed by the Dominion Government as Counsel for the Dominion Government in an arbitration between the Dominion Government and Francis Jones Barnard; that the defendant appeared as such Counsel on thirty-five days in Victoria, Toronto, and Ottawa; that in undertaking these services the defendant had accepted a temporary commission and employment to which fees, allowances, emoluments, and profits from the Dominion Government were attached, and that thereby the defendant's seat in the House became vacant. *

* To this bill the defendant demurred, on the ground (1) that the plaintiff had not sufficient interest in the subject matter of the bill to enable him to maintain it. (2) That the alleged services were only performed by defendant as Barrister-at-Law without fee, and that the employment was only an isolated instance, and not during a session of the Legislature.

McCreight, Q. C., for the demurrer. The plaintiff ought to be at least a voter for Cariboo District. He relied on *Spencer* v. *Birmingham, &c., Railway Co.*, 8 Sim., 193; *Wynne* v. *Lord Newborough*, 1 Ves., p. 164; *Joyce* on Injunctions, p. 1052; *Saltau* v. *DeHeld*, 21 L. J. Chan, 153.

Drake, for plaintiff, contended that any tax-payer might bring an action under the Statute, citing,—*Rex.* v. *Parry*, 6 A. & E., 810. *Reg.* v. *Quayle*, 11 A. & E., 508.

McCreight replied. *R.* v. *White*, 5 A. & E., 613. *R.* v. *Smith*, 2 M. & S., 583.

The second part of the demurrer was struck out by the Court, thirty-five days not being considered "an isolated instance." The demurrer was overruled, on the ground that any voter in the Province has a sufficient interest to maintain such an action.

Affidavits were then read in support of the allegations of the bill.

Drake (with him *Pooley*), for the plaintiff, cited *Fluett* v. *Gauthier*, 5 U. C. Prac. R. 24; *R.* v. *Francis*, 21 L. J. Q. B., 304; *R.* v. *York*, 11 L. J. Q. B., 127; *McDougall* v. *Campbell*, 41 U. C. R., p. 332; *Todd* on Parl. Gov't. in England, vol. 2, pp. 260, 278; Public Works Act of Canada, 1867, s. 47, introduced into British Columbia by 35 Vic., c. 37.

McCreight, Q. C., for defendant, cited *Gordon* v. *Adams*, 43 U. C. R., 203; *Kennedy* v. *Broun*, 32 L. J. C. P., 137; *Stockdale* v. *Hansard*, 8 D. P. C., 474; *Lumley* v. *Wagner*, DeG., M. &. G., 604; *Ker* on Injunctions, p. 8; *Queen* v. *Lords of the Treasury*. L. R. 7 Q. B., 387.

Pooley, in reply, cited *Nicholson* v. *Fields*, 31 L. J. Ex., 233.

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This matter now stands for judgment on the application for an interlocutory order upon the defendant to restrain him from sitting and voting in the Legislative Assembly. The defendant has already demurred to the bill for want of interest in the plaintiff, and that demurrer has been overruled in the usual way. The plaintiff now moves on notice for an interlocutory injunction, and evidence has been taken, the most important part of which is the statement of the defendant himself, whose examination has been reduced to writing.

The jurisdiction is, so far as I am aware, entirely novel, being founded on the 9th section of the British Columbia Statutes of 1875, cap. 9:—"The Court, or a Judge, may restrain from sitting or voting "in the Legislative Assembly any person elected to or sitting or voting "in the said Assembly contrary to the provisions of this Act." Section 1 declares that "No person accepting or holding any office, commission, "or employment, permanent or temporary, to which an annual salary "or any fee, allowance, or emolument, or profit of any kind or amount "whatever from the Dominion of Canada is attached," shall be eligible to, or sit or vote in, the House of Assembly. Section 2 contains a similar declaration of incapacity as to any person undertaking any "contract" or "agreement" with respect to the public service of the Dominion, or under which Dominion money is to be paid for any service or work. Section 10 provides that "the words 'contract' and "'agreement' in this Act....shall not apply to a mere isolated and "single instance of ordinary work done, *where immediate payment "therefor respectively is intended to be made.*" It was strenuously urged at the bar that this exemption extended to the "employment, &c., permanent or temporary," mentioned in sec. 1, even though no immediate payment was made or contemplated, and was not confined to the words "contract or agreement" mentioned in sec. 2 and the other dependent sections. But as this is completely contrary to the plain meaning of common English words, and to the grammatical construction of the sections, the suggestion can only be noticed to be overruled.

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The plaintiff has made an affidavit generally substantiating the statements in the bill, and speaking positively to having seen and heard him, the defendant, acting as Counsel in the arbitration on one day—viz., 26th November; and also to having seen and heard him sitting and taking part in the proceedings in the House of Assembly here, on the 5th and 6th instant. Then there is an affidavit by Mr. Fell, the Clerk in the arbitration, who speaks to the defendant's having acted as Counsel. But the most important evidence is contained in the statement of the defendant, who has been examined and made a statement. It appears by it that he was requested by the Dominion Government (both by the Minister and Deputy Minister of Justice) to act as Counsel for the Dominion in the arbitration—whether before or after the commencement of that investigation does not appear. Nothing was said as to remuneration, *i. e.*, I suppose, at that time, for certainly communications respecting remuneration took place at one time or another, as mentioned by the defendant himself:—

"I had a communication from the Dominion Government requesting "me to act as Counsel for them in the matter of the said arbitration. "First, a private note from the Minister of Justice; next, a communi- "cation from his deputy. The request was to see that the claim was "fully investigated; nothing was said with regard to remuneration. I "don't know how many days the investigation lasted. I subsequently "went to Ottawa in January, 1880, and the investigation was con- "tinued there by Attorneys appointed by the Dominion Government, "Messrs. O'Connor and Hogg. I appeared as Counsel for the attor- "neys, having positively refused to act for the Dominion Government, "which refusal was made to the Deputy Minister, who begged of me "to attend to it, as he was going away. He called to see me, and I "told him at the time that there was a question raised about my acting "as Counsel in British Columbia, and that I would not wish to "jeopardize my seat in the House by acting as Counsel for the Govern- "ment and taking fees from them. This conversation took place "before I appeared for the attorneys, Messrs. O'Connor and Hogg. I "believe both the attorneys called on me individually at different "times, on the same or two successive days, and begged of me to act "for them as Counsel, as they were completely in the dark in the "matter, and as evidence was voluminous and I must be well "acquainted with it. They neither paid nor offered to pay me any- "thing, and I have since refused to accept what I thought was fairly "coming to me for acting for them, on the grounds again 'that I would "not like to jeopardize my seat in the House by accepting the money,' "although I stated to them in Ottawa that the Chief Justice of British "Columbia had given his opinion in Cariboo, in 1877, in the case of "the Queen at the instance of Houseman against Graham and another "for misdemeanor, that our local Act, with reference to employment "by the local Government, could not mean that a Counsel who should

"act for attorneys in a private prosecution could be considered as "acting for the Crown, although the attorneys might be acting for the "Crown and receive money from the Crown: and even further, that "the private prosecutor might pay his Counsel and be recouped by the "Government if so ordered, and that in such a case the Counsel could "not be said to act for the Crown, but for the private prosecutor; that "under such circumstances it would be monstrous and would debar "gentlemen of the bar in the Province from dealing with the Crown "business at all if they had seats in the Assembly, and therefore work "a positive injustice to public interests. Although I was a member of "the House, I therefore undertook the prosecution, which was in the "name of the Queen, and was paid by Mr Houseman, and after "applied to have the fee repaid to Mr. Houseman out of the Treasury "by order of the Court. The order was refused, because the Chief "Justice was not satisfied with the trial."

As to what is reported as having been said by myself in the case of the Queen against Graham, I retain the same opinion still. But it is to be remembered (*a*) that it was impossible for me then, or now, to give any decision on the point, for it was not then, nor it is now, in litigation or dispute. (*b*) Our local statutes, which are supposed to apply to members of the local Assembly taking paid employment from the local Government, are in very different terms from this Act of 1875, which deals with local members accepting employment from the Dominion; the latter Act is very much more stringent, and there is very strong ground for arguing that the statutes which are supposed to forbid paid employment from the local Government do not apply at all to members of the present House of Assembly. (*c*.) Lastly, what I said in *Graham's* case had and could have practical reference only to the class of cases of which *Regina* v. *Graham* was one—viz., private prosecutions. In such a case it does seem clear that the Attorney or Counsel is retained by the private prosecutor, and can only look to him for payment. The indictment, it is true, runs in the name of the Queen; but no pecuniary interest of the Crown is at stake, nor is the local Treasury in the least bound by such a use of the name of the Queen, who merely represents society—in a republic, prosecutions run in the name of the People, or the State—nor could the Attorney or Counsel in such a case ever raise the least shadow of a claim against the Treasury on the ground of their retainer. After the trial, it is true, the prosecutor may try and get an order from the Judge upon the Treasury to recoup to him (not to his Attorney) the expenses incurred by him in and about the prosecution. The prosecutor then acquires, by virtue of that order (which is not always made) a claim upon the Treasury (which is not always satisfied). By virtue of his retainer, his employment, the Attorney never has any shadow of a claim on the Treasury. The position of the parties is made clearer, perhaps, by considering the English practice and statutes, upon which

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our own practice is based. In England, at the Assizes, each Attorney's bill which the Judge may have ordered to be paid being taxed (including all payments to Counsel, witnesses, &c.) and receipted, is produced to the County Treasury, who pays the amount to the prosecutor out of the county rates. When the circuit is over, the County Treasurer in his turn presents an account of the sums paid by him on the whole Assize, duly vouched, to the Treasury in Downing Street, who recoup to him such sums, under authority of a Resolution of the House of Commons (it used to be one-half only, but now the whole), out of a fund voted by the House annually for that purpose. In British Columbia there are no divisions into counties, and the payment may, perhaps, in most cases be made direct by the local Government Agent in each Assize town to the prosecutor's Attorney, under the Judge's order. But the principle remains untouched. And I confess I do not see how holding a brief on an ordinary private prosecution at the Assizes can, by any straining of words or of facts, be deemed to be the acceptance of employment under the Government of British Columbia.

But all this is entirely aside from the present case. Employment in this arbitration was not so much of a different, as of a contrary, nature from holding a brief for a private prosecutor against a criminal. The question under the arbitration was entirely of a civil nature, in which the Dominion Treasury had a deep pecuniary interest. The fee on a brief on a private prosecution does not issue from the Treasury to the Barrister by virtue of the retainer, but is repaid to the prosecutor out of the Treasury by virtue of the Judge's order. But in this arbitration case, Counsel's fees and Attorney's costs justify a direct demand on the Treasury by virtue of the retainer alone.

Mr. Walkem continues thus:—

"I gave a further reason to the Attorneys, which was that in my "position as Attorney-General I would not for the sake of the money, "which was $460, wish to subject myself, as a public man, to the constant "attacks, though it might not be true, that I had evaded the law. "The amount was refused, unconditionally, without any prospect or "arrangement, direct or indirect, as Messrs. O'Connor and Hogg will "no doubt state, of obtaining it. I made no charge for my services "here, on account of the question that was raised on the construction "of the Act. I made no charge to any one or the Dominion Govern- "ment for what was done here. I went on with the business here as "instructed, and never looked at the Act till it was nearly over; and "I continued to transact the business here, after looking at the Act "carefully, under the belief that, as Counsel, I did not come within its "operation, as money if paid to a Counsel is paid as an *honorarium* "and not as a fee, and cannot be recovered, nor can he sue for it."

Question—"Are you not the legal adviser to the Dominion Government with reference to the Dominion lands in this Province?" Objected

to by Mr. McCreight, as being no part of the bill. Mr. Walkem declines to answer.

Question—"Were you not asked to undertake this duty subsequently to the closing of Mr. Barnard's arbitration?" Objected to by Mr. McCreight, as being no part of the bill. Mr. Walkem declines to answer.

"I have never been appointed to any position, or promised any "position, as a reward for my services in the arbitration. I voluntarily "submitted to the loss of my time in Victoria rather than run the "gauntlet of losing my seat. The Minister of Justice, after stating "that there might be a question in our local Act, although he believed "it would not reach Counsel, still thought it was better, and approved "of my proposal that it should be definitely understood that no agree-"ment for payment of services of Counsel rendered in Victoria had "been made at any time, as he would like to state in the House of "Commons, if asked the question, that nothing had been paid, or agreed "upon to be paid, and that all claims had been waived, lest I should "lose my seat in the House of Assembly. The question of payment in "the case never crossed my mind at first, because I believed that like "many other Dominion matters that I had acted in and not been paid "for, I thought it would last a short time, as I was informed that there "no was evidence for the Dominion Government, so that my position "was more to check the examinations and the amounts sworn to. After "it had gone on for some time, and I had received further instructions "for a full investigation, I certainly did anticipate that as Counsel I "would be paid, and it was in consequence of what I have stated I gave "up all idea of payment. I have acted since 1873 as Counsel for the "Dominion Government except, I think, during one period when Mr. "Richards may have acted. I never received from that Government, "either directly or indirectly, any sum except one payment of $40 "prior to the passing of the Act; and never sent in any account to the "Dominion of Canada for services rendered, to the best of my know-"ledge and belief. Lest there should be any misunderstanding about "this I have to state that the Marine and Fisheries Department shortly "before I left for Canada in December last, asked me to advise them "about the temporary lease of a ways in a shipping-yard. I gave the "advice and made no charge for it, and told Mr. Harrison that as they "wanted the agreement drawn up and I was not going to do attorney's "work, he might draw it up himself and charge for it in his own "account if he liked. This, I believe, he did, and he has received the "money on his own account as he tells me. I make this statement "lest this amount—which he tells me is $15—should appear in any "manner as having been paid to me or my department. I do not know "what work he did for the $15. Respecting the $460 which I refused "to accept from Messrs. O'Connor & Hogg, a large proportion of it was "for Counsel fees, to draw a special report on the legal points involved

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"in the Barnard arbitration case, which report I have not had time to "make, and could not, therefore, be paid for. I believe the Ottawa "attorneys must have dealt with the legal points themselves. It had "been settled that $100 would be a fair Counsel fee for a special report, "as the case was important and involved legal questions of a different "character in many of the items of the claim made."

I do not think that anything can be more explicit than the last few paragraphs of this statement. It is perfectly clear that one item in the $460 was in respect of a special report in this arbitration case, which the defendant as Counsel for the Dominion had undertaken to make, but which he has not yet had time to make, and could not, therefore, he says, be paid for. The force of the "therefore" is not apparent. Counsel's fees are always in theory, and often in practice, handed in along with the instructions, whether to report on an abstract of title, to draw conditions of sale, to advise on a case, &c. Conveyancer's fees are often, for convenience of calculation, postponed till the draft is prepared, but that is where the fee is proportioned to the length of the draft. Here the amount of the fee for the report had been "settled" beforehand at $100. It is, in my opinion, absolutely impossible to say that this is not an employment to which a fee of any kind or amount from the Dominion was attached.

The services rendered by the defendant may be classed under three heads:—1st. Those in Victoria, from July to November last, as to which he took his instructions from the Minister direct. It is difficult to see as to these how the defendant can maintain the proposition (not that I think it important, but his advocate seemed to lay great stress on it) that he acted purely as Counsel. The test usually is that a Barrister, when acting purely as such, never takes instructions directly from the litigant himself, but always through the intervention of a Solicitor. In British Columbia, by the Statute of 1877, s. 18, any Barrister then on the roll (and the defendant was then on the roll) may, if he choose, act as an attorney and charge accordingly. It is very possible, therefore, that as to his services in British Columbia, or some of them, the defendant has a right to sue the Dominion. An attorney's costs, it is true, are generally called costs and not fees, but they are clearly profits or emoluments attached to the employment, and which the employer by giving instructions binds himself to pay. 2nd. The services in Ontario, as to all of which the defendant appears to have acted purely as Counsel, properly speaking, *i. e.*, always on instructions from Messrs. Hogg & O'Connor, and never on instructions direct from the Minister's office. It is true, the phraseology is peculiar; he says—"I appeared as Counsel for the attorneys, and refused to act for the Dominion." He is not asked to explain that. The only intelligible meaning of the words must be that he refused to act for the Dominion without the intervention of Solicitors. The word "for" cannot mean "in lieu of," for that would involve a contradiction. Nor can it mean "on behalf

of," for the attorneys were not parties to the litigation. There is no doubt but that he did continue in Ontario to act in the arbitration as Counsel for the Dominion, properly instructed by Messrs. Hogg & O'Connor. But these services are divisible into two heads: the special report, the fee for which ($100) was settled beforehand; and the rest of the services, the fees on which were settled, apparently, after the services were performed, at $360.

It is to be observed that the Statute does not say that the employment, to disqualify, must be accepted from the Dominion. Any employment will disqualify, if any fee or emolument of any kind or amount from the Dominion be attached to it.

As to all these fees, therefore, the plaintiff's contention must be that they, or some of them, issue from the Dominion, and are attached to the employment, or some employment undertaken by the defendant. The defendant, not denying the employment or the services (partly on instructions from the Minister, and partly through the Solicitors), denies that any part of the fees, &c., was attached to the employment, which he undertook, within the meaning of section 1, insisting that "attached' in section 1, must mean "indissolubly attached," or "so attached as to be recoverable at law." No such qualifying words are found in the Statute, which speaks in the most general way—"any employment " . . . to which any fee," &c., "of any kind or amount whatever "from the Dominion is attached." It seems to me quite impossible consistently with the English language to say that the drawing up a special report by Counsel, under instructions from the Attorneys for the Dominion, for which a fee of $100 is settled as a fair amount, is not an employment of such Counsel to which a fee or profit of some kind is attached.

It is quite wrong here to give its technical meaning to the word "attached." The rule for construing words which have both a popular and technical sense is exactly the reverse as to Acts of Parliament from the rule as to deeds. In the latter, a word which may have a technical sense shall have that sense (unless it make arrant nonsense of the context) and not the popular sense. But an Act of Parliament *loquitur ad vulgus:* it is addressed to Englishmen of ordinary education; and no word shall have its technical sense, but its popular sense, unless this latter make the context unmeaning. Any good dictionary will tell us the popular sense. The verb "to attach" has, besides its popular sense, a technical sense, viz.: "to lay hold of person or property by virtue of some process of law." To attempt to give it that sense here would make the sentence ungrammatical and unmeaning. "Any employment . . . to which any fee . . . is laid hold of by process of law," is nonsense. Even if this passage occurred in a deed, therefore, we must take the word in its popular sense. And I take it that in ordinary English the word "attached" means no more than "annexed." The notion of "enforceable at law" is quite foreign to

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the word itself,—just as much as the notion of being un-enforceable at law. We have no right to add any qualifying words one way or the other. Then, the word "fee," in its primary use, means a voluntary gift—in Latin "*beneficium*"—often, perhaps always, intended as the reward of services performed, or to be performed; but always proceeding *mero motu* from the grantor: entirely voluntary. The word lies at the root of the nomenclature of the "feudal" system,—the fundamental notion of which is, a conqueror bestowing at his pleasure among his soldiers the lands of the vanquished. A very common meaning now given to the word fee is a "gratuity," which does not at all signify a gift gratis. The return for a gratuity is often much more important than the consideration for a legal debt of like amount. It signifies a gift or payment not compelled, nor compellable. To say that "any fee of any kind" cannot include a gratuity, or that a gratuity attached to an employment cannot include any gratuities except such as are enforceable at law, appears to me to involve a mode of argument and of expression which I cannot follow. There are, it is true, some cases in which money demands in respect of official acts are called fees, although recoverable at law. But they are confined, so far as I can recollect, to payments on legal or quasi-legal proceedings, taken generally to the use of the Crown now, formerly to the use of Judges and other officials. Centuries ago these were quite indefinite in amount, and quite voluntary. In that condition they afforded a ready means of bribery and extortion. By the Judges first, and then by Act of Parliament, these payments were regulated and fixed at definite amounts. But they formed part of the regular income of the Judges and the main or whole income of many clerks till quite recently. With these exceptions, the popular meaning of the word "fee," taken by itself, is quite apart from any notion of being enforceable at law; just as much as, perhaps even more than, the popular meaning of the word "attach" taken by itself. It is generally in fact used in speaking of payments to counsel and to physicians. And as to the suggestion that the words "attached to the employment" is to be construed as if the Statute were written "attached so as to be recoverable at law,"—there is at all times a great objection to importing words into a Statute; but the objection becomes insuperable when the words proposed to be imported would defeat the whole object of the Act; possibly defeat it in every case. Of all the contingencies struck at by the Statute of 1875, the Legislature would probably have been most anxious to guard against the case of the Provincial Attorney-General and Premier undertaking services on behalf of the Dominion Government of the most confidential character and involving very large sums, in respect of public works pointed at by the Terms of Union; services of such a nature as to afford the Premier ostensible grounds for accepting remuneration, which yet the Dominion should be under no obligation to pay, if they afterwards became dissatisfied with his conduct. Or again, take this very case in arbitration, which gave rise to the present discussion,—nobody, I suppose, would at first sight

maintain that Mr. Jones Barnard could have retained his seat in the Local Legislature after entering into that telegraph contract with the Dominion. But I believe he has been able to recover nothing at law; and therefore, according to the defendant's view, he did not forfeit his seat. It will be said, his failure at law is owing to his own misconduct in performing his work; if he had worked properly, he would have recovered. That again makes the matter worse. Our local House of Assembly could, according to that, be filled with Dominion contractors, who need not vacate their seats, but may continue to sit and vote, if they will only take care so far to misconduct themselves under their Dominion contracts as to deprive themselves of their profits or right to payments.

The whole object of this Act is to exclude Dominion influence from our local House. It is called the "Independence of Parliament Act." Evidently that influence would be much better secured by indefinite, unfulfilled promises than by cash payments for work done and ended. (It is not I, but the Legislature itself which contemplates the possibility of such unworthy acts being attributed to the Dominion Government and to our members here.) And that seems clearly enough indicated, and indeed expressed, by the words at the end of section 10 already quoted. It seems obvious that if the defendant be indeed accessible to undue influences (there is not a shadow of such an imputation in the bill, which very properly goes merely on the dry legal question of the meaning of the words of the Statute, and I allude to the hypothesis only for a moment, and because it seems necessary in dealing with this part of the arguments of defendant's counsel) then, an *honorarium* as yet unpaid, but which he may receive at any time, after the Minister is no longer exposed to be questioned in the House (the defendant actually refers, in his examination, to the possibility of such questions) is much more likely to influence him than the recollection of a fee paid six months ago, frankly, along with his retainer.

The conversation on this point as narrated in the defendant's examination is very singular. It is no doubt quite accurately reported from the defendant's point of view, and with his knowledge of facts. But a person who did not know all that he knew might perhaps take quite a different view of what was said. Coupling this conversation with the defendant's admitted anticipation of payment for his services in Victoria, and his refusal of the $460 (including the $100 "settled" as a fair fee for the special report) at Ottawa, the question arises which was put by *Lord Cairns* in a case in the House of Lords "Was this "to be said in the House because no remuneration had in fact ever "been arranged? Or was all claim for remuneration then waived by "the defendant in order that this might be said in the House?"

Such reserved fees, being more potent, are therefore more deeply within the mischief of the Act than open payments, as is clearly indicated by the concluding words of section 10 already quoted, and

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are not to be excluded by straining the meaning of particular words from their ordinary sense. And this, which is the true rule of construction in any case, is here merely in conformity with the "Interpretation Act, 1872," sec. 7, sub-sec. 38.

I consider it therefore quite unnecessary to examine whether fees for services rendered purely as Counsel are, either here or in Ontario, recoverable at law. It appears that there are conflicting opinions in Ontario (where, if at all, the $460 would probably be sued for) whether a Counsel can or cannot sue for his fees. I do not remember to have heard of any such action elsewhere; not I mean for fees, whatever may be the case under special agreements. As to the defendant's services in British Columbia it appears at least an arguable proposition that the defendant did not act purely as a Barrister, but as attorney as well, and so, perhaps could sue here on his retainer, for some at least of the services at Victoria. Whether the defendant could sue or not in respect of all or any part of the services rendered, either here or in Ontario, I am of opinion that those services, and the fees or emoluments attached to them, coming as they do direct from a Dominion officer or agent—and the Dominion, of course, can only act by means of its agents—bring him distinctly within the express words of the Statute.

It becomes therefore unnecessary to discuss *Fluett* v. *Gauthier*, *Regina* v *Francis*, *Regina* v. *York*, and the other cases which were cited to show that the disabling contract need not be binding on the employer, or the Ontario cases as to the right of a Counsel to recover his fees (as to which I own my inclination is quite in accordance with the opinion indicated by the Court in *Gordon* v. *Adams*, 43 U. C. R., 203, against the right to sue), or the authority from *Todd*, 260-278, to show that a subsequent abandonment of claim under the employment will not exonerate defendant from the consequences of accepting the contract. It is quite clear—defendant says so in his examination—that at one time he expected to be paid. It is quite clear that at least one fee—the $100—was named and acquisced in by all parties. It is quite clear that the Dominion agents intended to pay, for defendant says he refused to accept the $460. A man cannot refuse that which has never been offered to him. And it is the acceptance of the employment, not the receipt of the money, which creates the disqualification under the Act. Neither is it necessary to consider the effect of the Public Works Act 31 Vic., (D.), c. 12. I am disposed to think that Act could not have any application to the present case. Neither is it necessary to discuss the decisions as to disabilities of Town Councillors contracting with their corporations. There is no doubt a strong analogy to be drawn between those cases and the present case. But wherever there is an analogy, there is also a distinction. And no case of Town Councillors has been cited in which the disabling provisions were nearly so strong as in the present case. That would make the

decisions against Town Councillors in one sense more clearly fatal to the defendant's view. But section 1 of the present Statute is so clear and strong that it requires no support from mere analogy.

Being therefore of this opinion, that the case is, on the defendant's own admissions, within the letter and the spirit of sec. 1, we have to consider the application immediately before us, which is "to restrain the "defendant from sitting in the Legislative Assembly here during the "present Parliament, or until he shall be re-elected thereto." This is a jurisdiction in a Court of Justice, I believe, quite unprecedented. The nearest analogy appears to be that exercised over Town Councillors; but to interfere by injunction is, I believe, a novelty even as to them.

The injunction asked at the Bar was stated to be in accordance with sec. 9 of the Independence of Parliament Act. But that section simply authorizes the Court to restrain an offending defendant; it does not say how that restraint is to be exercised, whether by writ of injunction or by the simple order of the Court. The difference perhaps in ordinary cases would not be important—perhaps it is unimportant here—but I think it right to notice it, as the question of prerogative is to be considered, when a writ is asked to be addressed to a Minister of the Crown, not in his private capacity as, *e. g.*, a witness, or a family trustee, or a defendant in an ordinary action. In such cases, no doubt the writ might issue just as to any person not a Minister. But the issuing of this writ evidently might, and I think certainly would, interfere with his ministerial efficiency. It is true, many instances are well known in the parliamentary history of England in which officials —but not, I think, Cabinet Ministers—have been for some space of time without a seat in either House. And the loss of his seat would not, as was pointed out at the Bar, deprive him of his offices of Attorney-General and Chief Commissioner of Lands and Works—in fact he lost his seat when he accepted office, and had to be re-elected. The Assembly was not then sitting, and that caused but a slight public inconvenience. But I think we are bound to consider that at present the order prayed for probably would interfere, at a very critical moment, with the public business.

It was said, during the argument, that there ought to be no distinction of persons in a Court of law, and that a Minister of the Crown ought to be treated just like a private member. Courts of law ought, of course, to follow fixed rules, irrespective of any individual favour or preference. And so they do, even when they show a marked difference in their different treatment of different offenders for the same offence. Often, different sentences are passed for the same crimes—even, sometimes, from quite personal considerations. A sick man, or a child, or woman, is not always sentenced to the same rigorous sentence as a sturdy rogue. And the Court—every Court—ought to possess, and does always exercise, a large amount of that discretion which it was hinted was only a euphemism for tyranny. There is,

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however, a well known class of exceptions, which come much nearer to the present case. Members of Parliament, during the sitting of Parliament and for forty days thereafter (though their privileges have been of late much curtailed), and Judges, attorneys, and suitors in going and returning from Courts of justice, were all protected from civil process. This is a personal privilege granted to them on public grounds; not from any the slightest fear or favour towards the protected person, but on the ground that free and undisturbed access to Parliament and to the Courts of law, by representatives and litigants, is of far higher public importance than the enforcement of individual rights. Public convenience is therefore a matter which we ought to take into consideration.

Another reason which occurs to me against granting this interlocutory application is this, that such applications are not usually granted—*i. e.*, before the hearing of the suit—unless they are ancillary to some relief which will probably be obtained by the plaintiff at the hearing, or unless they are necessary for the subject-matter of the suit, until the rights of the parties are determined which are in litigation, either in the suit itself or in some action at law. But this is a bill for an injunction or rather a restraining order pure and simple, unconnected with any relief sought or obtainable by the plaintiff in this or in any other suit or action. It is true, there is a prayer for general relief, but I do not see what relief to the plaintiff can be founded on the allegations in the bill; and the general prayer will not authorize any other relief. The relief one would have expected to be sought would be the declaration of a vacancy, with a new election. But who can declare the vacancy? Certainly no power to that effect is given by the Statute to this Court. By the Controverted Elections Act this Court alone, it is true, is invested with power, on petition, to declare vacancies. But that Statute deals only with irregularities and malpractices at an election. The present Statute deals only with certain disabilities which attach to membership after due election, which may attach, as in the present case, long after the period at which the election itself could be contested, and indeed where the propriety of the original election is admitted on all sides. But under the present Statute, no Court or tribunal whatever appears to be invested with power to declare a vacancy, either under sec. 1 or sec. 2. The difference between the two Statutes is immense. When the Legislature intended to confer jurisdiction, as in the Controverted Elections Act, they knew how to do it. The inference is obvious, that they did not intend to confer it by the present Statute. At all events, they have not done so; and we have no express power, and cannot surely have an implied power, to declare a vacancy. It will be said—"The Act itself declares the vacancy." But the Act itself must by some competent tribunal be declared to apply to the case; the facts must in some way be legally ascertained; and the con-

sequent results legally declared. It cannot surely be that any person in the Province has a right and power to declare a forfeiture, and to have the seat treated as vacant, merely on his own opinion. That was one error in the lamentable transactions which led to the litigation in the *Bishop of Columbia* v. *Cridge*. There, a canon of the Anglican Church (A. D. 1603) had declared that persons acting in a particular way, or holding certain doctrines, should be *ipso facto* excommunicated. The defendant and his advisers had formed the opinion that certain persons had done the things forbidden by the canon, and that these words entitled them (and apparently anybody in the world) to say that the plaintiff had been guilty of the forbidden acts, and stood excommunicated without more ado; that he had forfeited his property, and that they themselves had become entitled to it, &c., &c. Such a contention is seen to be absurd as soon as it is stated in plain words. Perhaps the House itself could, by resolution, declare a vacancy, though this would be a very dangerous doctrine. All that is clear is that, so far as this Court is concerned, the declaration in the Statute is mere *brutum fulmen;* that this Court can make no declaration either of right or of disability; that there is no proceeding alleged to be pending before any other tribunal for declaring any rights or forfeiture of rights; and that this interlocutory application appears to me completely "in the air," whatever may be the case at the hearing, not attached to any relief or declaration respecting the status of the defendant or of the plaintiff. I should not in any case feel greatly disposed to favour such an application, even where the matter was within the ordinary jurisdiction, always elastic; much less do I feel disposed to do so when the jurisdiction is purely statutory, and quite inelastic.

Again, the injunction asked is, to restrain the defendant from sitting "until re-election." The Act does not say that the Court may restrain for any definite or indefinite time, but only "may restrain." Suppose an order made in the terms of the Act simply—*i. e.*, restraining the defendant from sitting, without any limit of time; suppose the defendant to profess perfect submission to the order of the Court, to abstain from sitting to-morrow, and to sit again on Monday. On any application for enforcing the order, might he not say that it had been complied with, and was exhausted? I give no opinion as to what the effect of that argument would be. Or, if we made an order in the terms of the notice of motion, would it not be a very reasonable ground for impeaching the order, that we had gone beyond the letter of our powers? Again, I give no opinion upon the objection; but I feel more difficulty in proceeding when the uncertainty of result is so obvious. If, in the words of the application, we were to grant an injunction "until re-election" the literal meaning of the clauses of the Act might make the injunction a perpetual injunction, and practically create a perpetual vacancy of the seat. One section may be read as for ever disqualifying the individual, although in section 4 it is contemplated that the dis-

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qualification may be removed. At any rate he cannot be re-elected, nor can any representative sit for Cariboo in his place, until a vacancy be first declared; and there does not appear to be, anywhere, any provision for declaring a vacancy. If we were allowed to set a limit on the duration of the injunction, it might seem more reasonable to follow the words of sec. 4, to which I have just referred, and restrain the defendant "until the disqualification is removed." If I am asked what these words mean and how the disqualification is to be removed, I answer that I do not know. If an injunction, therefore, were to issue, limited till the removal of disqualification, I should have, perhaps, the greatest difficulty in saying when the order had been complied with, or when broken, or when at an end; and the defendant would, perhaps, be quite unable to decide what the order meant, and yet would have to do so at his peril. This is another reason against making an order under this Act, which, indeed, appears to have been framed in a most righteous spirit of indignation against presumed malpractices of a very sordid and mischievous nature; but virtuous zeal is generally more successful in denouncing malpractices than in making provision for restraining or punishing them. The object of the Act is obvious; but, when you attempt to put it in force, incongruities and omissions beset you on all sides.

The difference between a restraining order and a writ of injunction (which latter is possibly, but not very clearly, intended in sec. 9) is, perhaps, only important in this respect—viz.: What is asked for is a writ; that is, a command from the Queen is asked to be directed to a person already, by command of the Queen, authorized and bound to perform certain functions, in the execution of which this second command (now asked for) evidently intends to embarrass him, without, however, relieving him from the exigency of the former command. I wish, with Lord Chief Justice Cockburn,* to avoid even the semblance of authorizing contradictory commands, interfering with the prerogative. And I say this, notwithstanding what was very properly said during the argument about treating an offender in high place, and presumably acquainted with the Statute, with even greater severity than an offender of low degree, and in whom ignorance might be pardonable It is not the alleged offender I look to, but those whom he serves, and those on behalf of whom he serves.

To sum up:—The jurisdiction as to interlocutory injunctions being to a great extent discretionary, and being generally exercised only where the Judge thinks that it will be useful for the probable result of the suit, or necessary for the preservation of the subject matter; and then only, as a general rule, where on the balance of convenience and inconvenience it appears that the party enjoined (or other persons) will not be thereby injured much more than the other party will be advantaged,—what do I find? That this interlocutory order will be

* *Vide* L. R. 7, Q. B. 394.

ancillary to no possible result in this suit or in any other action which can be brought; of no use therefore to anybody; of probable great inconvenience to the public (I disregard the convenience of the defendant altogether)—possibly trenching on the prerogative; of very doubtful efficacy and enforcement; and, perhaps in practice, amounting to an order for the perpetual disfranchisement of an innocent constituency. I feel, besides great doubt as to the form of order and the limits of duration (if any) which the Court has power to impose. Under these circumstances, although entertaining no doubt but that the defendant is conclusively proved, by his own admission, to be clearly within the scope of sec. 1 of the Statute, I think that no order should be made on this application.

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This is a very important matter from the peculiar nature of the Act, the position of the parties, and the public interests involved.

The Act was instituted, we are told, by defendant's counsel, under the title of the "Independence of Parliament Act, 1875," in a fit of legislative suspicion lest certain Dominion contractors, among others those who it was imagined were about to build a line of railway from Esquimalt to Nanaimo, should procure such an overwhelming influence over the members of the House of Assembly as to sully, if not destroy, the purity and independence of the House.

The same kind of Act obtains in other Provinces, but with this important difference that there, if we be rightly informed, the disqualification ceases with the cessation of the employment or contract which created it. So limited, it may be good. But here it is made fatal at once. Similar provisions carried to such an extent can only be found in Municipal Acts, and counsel have been driven to these to seek for *precedents*. There was a marked intention in the wording of the Act to make it as sweeping and comprehensive as possible.

There is a notable difference between sections 1 and 2, to which attention must be called. The latter refers especially to contracts or agreements, matters decidedly suable and in an especial contrast to the matters treated of in section 1, under which the present proceedings are brought, and which only refers to matters not so distinctly suable as in section 2 (as though to point the distinction) such as "accepting "or holding any office, commission or employment, permanent or tem- "porary, to which an annual salary, or any fee, allowance, or emolu- "ment, or profit of any kind or amount whatever from the Dominion "of Canada is attached," as though more clearly to enforce the distinction between these two classes, and include as much as possible in the legislative net. I say nothing of the suspicions which we are told prompted this kind of legislation and its alleged effect in excluding good men from the House. With these we have nothing to do. It is sufficient for the Courts that Parliament thought fit to enact it to move

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them to discharge faithfully the unwelcome duty thus thrust upon them. To do this we have to gather from the Act itself what is the true intent and meaning of such of its sections as apply to the state of facts now before us.

Much argument and many cases which I have already referred to have been brought forward by counsel on both sides in support of their views, but the exceptional nature of the Act has made their task unusually difficult.

The mischief which this law was intended to reach was the holding or accepting of any employment, however temporary, to which *any* fee, or allowance, or profit of *any kind* or amount *whatever* is attached which would give the Dominion an influence in the House which the Local Legislature, for five years past, has deemed injurious to its independence. There is a similar clause in the statute book applicable to employment under the Local Government of the Province (there called Colony), but that does not concern us now.

The mode in which the plaintiff now seeks to enforce the Act is by asking a restraint to be put upon defendant's sitting or voting in the House by an injunction, which being interlocutory, would only be at first temporarily issued until the hearing,—*i.e.*, the actual trial of the case on its merits. It is for such an injunction we are now asked.

The power to proceed for a remedy by injunction is a statutory one, so I do not share the Chief Justice's doubt, if I have rightly interpreted him, of the plaintiff's right to apply for it. Our judgments have all been prepared separately, but you have just now heard the learned Chief Justice's judgment as to the inapplicability of injunction in the present case and the failure of the provisions of the Act generally to provide the means and machinery necessary to enable any Court to carry its objects successfully into effect, as one of the reasons why the Court should not grant this injunction.

Without at all impugning or contesting that view of the inefficiency of the Act, I do not myself doubt but that the Act gives a power to commence some proceedings, however temporarily and ineffectively, by injunction, should the Court in its discretion think fit to grant one. Our present enquiry, however, is to ascertain whether the defendant has brought himself within the four corners of the Act.

Turning to the evidence, we find it is stated on oath, and not denied, that the service rendered was one of a barrister pleading the cause of the Dominion in an important arbitration between it and Mr. Barnard, the telegraph contractor. It is admitted, also, that for at least a certain portion of the time during which the services were rendered the defendant expected to receive pay of some kind. It is a service which usually carries pay. Barristers do not generally work for nothing. It is also clear that in Ontario he knowingly engaged in the same service, ostensibly, or rather as he believes, for the attorneys of the Dominion

in the matter, but in point of law actually for the Dominion itself. It is singular such a point should have escaped him.

Mr. Pooley, counsel for plaintiff, in a long lisit of authorities, which have already been quoted, endeavoured, with a certain amount of success, to prove that the fees of barristers were in Ontario recoverable by law as a debt, and that for his services there Mr. Walkem was acting under a contract for pay, and whatever might be the law here as to counsel fees, by his services in Ontario became specially liable under the Act.

That point, however, whether barristers' fees are a debt, if we may attach any weight to a casual *obiter dictum* of the Judge in the *Adams* case, is not yet finally decided, although in an elaborate judgment, as yet unreversed—*Macdougall* v. *Campbell*, 41 U.C.R. p. 332—it was distinctly settled by a majority of two out of three Judges of a Court of Appeal, that in Ontario such fees were recoverable in law. There is nothing to show that the *Macdougall* v. *Campbell* case has been appealed. I specially called counsel's attention to that fact in reading the case. Mr. Drake, however, the leading counsel for the plaintiff, went further than his junior, and contended with much force that whether fees were a legal debt or not, and the service rendered an enforceable contract or not, mattered not. That it mattered not for the purposes of this application whether a barrister's fees were *merces* or *honorarium*, they were "fees attached" to the temporary employment which had been admitted, and so brought Mr. Walkem within the purview of the Act. That such employment was within the mischief aimed at by the Act, as it brought the defendant under the influence of the Dominion Government, the very object which the Local Legislature in 1875 in its wisdom determined to prevent.

Much was said during the hearing as to the meaning to be attributed to the word "attached," and when a fee, &c., should be said to be attached to a temporary service or employment such as that which was admitted to have existed in the present instance. I cannot but think it would be a very strained construction indeed, looking to the wording and spirit of the Act and the admitted object of the Legislature in passing it, to narrow its meaning down to something that could be sued for as a debt, and only that.

That could never have been the intention, I think, of the framers of the Act. They went out of their way to make it more stringent than any other Act of the kind to which we have access. The learned counsel for the defendant, who declared himself to have been the framer of the Act, confesses that to have been the clear object of the Act, and it would be very difficult to conceive that any counsel who had employed such language throughout the Act intended to have confined its restrictive efforts to only direct infractions, where the commonest every day experience shows that in the great majority of cases they must of necessity be indirect.

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It seems also to have escaped the counsel for the defendant that where the object to be guarded against by the Act was the influence of the Dominion over the members of the House, that there would be infinitely more danger to be apprehended from that influence if it had then been openly paid for than if it were left as a sort of thankful hope of favours to come. On this head the argument of *Harrison*, Q. C.—afterwards Chief Justice Harrison—in *Fluett* v. *Gauthier*, 5 U. C. Prac. Rep., pp. 28, 29, are pregnant with meaning, on a similar point arising in a Municipality:—

"It is not necessary (he says) to show a contract binding on the Cor-"poration, or formal contract, so as to subject the corporation to a "successful suit; for if there is no binding contract it is more likely "that a party would use his position to enforce a claim which he could "not legally substantiate. The amount mentioned may be small, but "the principle involved is of high importance."

The learned Judge (*John Wilson*), in giving judgment, says:—

"I do not think it necessary that a valid contract should be shown "binding on the Corporation to disqualify the contractor from sitting "as a Councillor of such Corporation. If there is no contract binding "on the Corporation the danger is the greater of the party improperly "using his position to his own advantage and to the prejudice of the "Municipality. The policy of the law is that no man shall be a mem-"ber of a Municipality who cannot give a disinterested vote on a matter "of dispute that may arise. If his judgment is likely to be clouded "by self-interest in a matter of contract or quasi-contract, he should "not be a member of the Council."

The renunciation of defendant in this case made in Ottawa, according to *Todd*, vol. ii., 278 *et seq.*, would appear to have come too late, and does not affect this Act. The agreement during any part of the period, according to that authority (*Todd*), as I read it, under the circumstances set forth—so far as the evidence has up to this time been disclosed, and subject to any further evidence to be hereafter produced at the hearing of the case—brings the defendant within the mischief of the Act, and therefore makes him liable to its provisions.

The occasional delay of the English Parliament, spoken of by *Todd*, in carrying out the principle (that a mere agreement to accept the disqualifying appointment vacates the member's seat), by immediate exclusion from sitting and voting in the House, arises, no doubt, from uncertainty whether the appointment will after all be conferred. Here no such doubt can exist, for the agreement was carried into effect and the service confessedly performed. Moreover, the Local Act contemplates no such delay, for the injunction, if granted, must be in the terms of the Act, and would stop the peccant member's sitting and voting at once. Moreover, if the defendant be still able, when, and if he chooses, to be remunerated for the service undoubtedly rendered,

that is one of the kinds of possibility which the Act is intended to meet; and in that sense the word "attached" would bring the defendant within the mischief and spirit of the Act. It was contended by defendant's counsel with great force, and supported by authorities of weight such as *Eden* on Injunctions; *Ellis* v. *Earl Grey*, 6 Sim., 214; *Queen* v. *Lords of the Treasury*, L. R. 7 Q. B., 387, and others which I have already referred to, that in considering an application for an interlocutory injunction of this discription, which is merely a temporary provision until the hearing, the Courts were very careful and chary, not on personal or individual, but public grounds, in interfering, at all events before the hearing, and with full and complete evidence before them, with the political duty of an officer or department of a Government, which he alleged would in this case be the inevitable result of an injunction; that it would in effect be prejudging the case and productive of great public injury. The law, though it made no difference between one man or another, did require the Courts not to grant injunctions, interlocutory or temporary, against a public officer without studying the public, not the individual, inconvenience. Now, though the Act is not directed against the Minister, but against the member, and the application is against the defendant as member, still the law, which knows no distinction of *persons*, does impress upon the Judges, in the authorities quoted, the propriety in exercising their discretion in cases of injunctions against public officers, of considering the effect it will have on the public business and the public interest. The one sole object of the Act is the public benefit,—not the man, but the public interest.

Now it is impossible to shut one's eyes in the exercise of the discretion which, notwithstanding all the learned counsel has said in favour of judicial discretion in a strait-jacket, is still a discretion; and in injunctions (which are not the decision of a case) the law recognizes as a discretion which lawfully ought to regard the public interests—it is impossible, I say, to shut one's eyes to the great public injury and detriment that would ensue from granting this application at such a critical moment in our Federal relations and of impending public works as the present. The case might be different if the charge were for any criminal offence; but here the offence is a purely statutory one,—not a *malum in se*, a moral wrong or crime, but a *malum prohibitum*—the creation of a Statute.

I do not see, therefore, that any public or other injury can, but rather that much public benefit must, result by exercising that judicial discretion which the law sanctions and practice prescribes by not disregarding the public interests in considering the present application for an injunction until the hearing.

For these, and the other reasons already alleged by the Court, my decision is against the issuance of the injunction at present, and to refuse the application.

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I agree with may brother Judges that the injunction must be refused, but on grounds entirely different from those which have induced them to come to that conclusion.

Recognizing to its full extent the doctrine of public convenience as influencing the discretion of the Court in granting or refusing injunctions, it does not appear to me in any way applicable to this case.

Judicially to assume that because there is but one lawyer in the House, who is at the same time a Minister of the Crown, his removal would reduce the Legislature to a chaos, bar all useful legislation, all progress, and leave the Lieutenant-Governor without the means of communicating with the Legislature, is a reflection upon the other members of the Assembly and the constituencies which returned them, in addition to being directly contrary to the practical experience of Constitutional Government. There is no allegation in the bill, no evidence or statement in the affidavits, on which such an assumption, or indeed the assumption of any public inconvenience, could rest. The life of a State does not depend upon one individual.

This case must be governed by the strict language of the Statute. I say the strict language, because the rights of two parties are involved. 1st. Of the member himself. 2nd. Of the district which returned him. The first is entitled on his legal return to his seat. The second is entitled to be represented by him. Both parties have agreed, not only as between themselves, but with the whole Province, as to the conditions which shall work a *forfeiture* of that seat, and have embodied those conditions in a distinct Act which has become the law of the land.

What is that Act? By its title it is only to affect "persons accepting "or holding offices, contracts, or employment under the Dominion "Government."

The disqualification is defined in three sections—1st, 2nd, and 10th.

The 1st section says—"No person accepting or holding any office, "commission, or employment, permanent or temporary, to which an "annual salary, or any fee, allowance, or emolument, or profit of any "kind or amount whatever from the Dominion Government is *attached*, "shall be eligible as a member of the Legislative Assembly of this "Province, nor shall he sit or vote as such."

The 2nd. That "No person whosoever holding or enjoying, under-"taking or executing, directly or indirectly, alone or with any other, "by himself or by the interposition of any third party, in whole or in "part, any contract or agreement with Her Majesty, or with any public "officer or department, with respect to the public service of the "Dominion of Canada, or under which any public money of the "Dominion of Canada is to be paid for any service or work, shall be "eligible as a member, nor shall he sit or vote in the same."

The tenth section explains that the terms "contract" and "agreement" mean a continuing contract, not an isolated instance of ordinary work done, for which immediate payment is to be made.

The defendant's alleged offence comes, if at all, under the 1st section, and in my opinion must be governed by the legal meaning of the word "attached" as in that section used.

This section *works a forfeiture*, not only as to the individual member, but to the unoffending constituency he represents, and under the *rules of construction* applicable in such cases means—that some fee, allowance, emolument, or profit, whatever it may be, has been definitely promised and agreed upon, or accepted, or flows as a consequence or right from the office or employment, that is, *pertains to the office or employment*, and is not a mere *gratuity* dependent upon the will of the employer, both as to the gift and the amount, and which (having received the service) he may give or withhold as he pleases.

The bill of complaint states that the defendant was a Barrister and acted as Counsel for the Dominion Government, but the law is clear and distinct, and recognized by every English Court, that a Barrister has no right, and cannot recover from his client his fee, or any compensation for his services as Counsel, when no statutory provision, or other distinct legal authority, provides for or enables him so to do.

The Americans far more sensibly enable the Barrister under such circumstances to recover on a *quantum meruit*, but the Canadian Courts, from Nova Scotia to British Columbia, have adopted the English rule; and no authority has been shewn, or can be shewn, by which the defendant can recover from the Dominion Government any fee or compensation for the service rendered on the occasion referred to in the bill. No doubt he *expected* to be paid, and, as in the ordinary transactions of life between honest men, he had every reason to think he would be paid. Nay, it may even be admitted that the contemplated evil proposed to be guarded against by the Act would be as likely to arise where the compensation is purely dependent upon the will of the employer as where it is defined, certain, and capable of being enforced; but the Legislature has not said so. It has not said the *expectation* of the employé shall disqualify, and the Court must be governed by what it has said, not by what any Judge thinks it ought to have said.

It is a mistake to suppose that the local Statute is an original conception of the local Legislature. It is a mere transcript as to its 1st section (with which in this case we have to deal) of the Dominion Act, c. 19, "An Act to amend the Act further securing the independence of Parliament," simply varied to suit its local title. It may, therefore, be desirable to note the subsequent legislation by the Dominion Parliament on the subject of claims against the Crown. The Dominion Act, 38 Vic., c. 12, provides for the institution of suits against the Crown by Petition of Right for relief, comprehending claims to real and

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personal estate, or property or chattels, *or payment of money*, or damages, or otherwise; defining the procedure, Courts, &c., &c., but expressly embraces a clause that "Nothing in this Act shall be construed "to give to the subject any remedy against the Crown in any case in "which he would not have been entitled to such remedy in England "*under similar circumstances* by the laws then in force there prior to "the Imperial Statute, 23 and 24 Vic., c. 34," amending the law relative to Petitions of Right. Now, at no time could Counsel fees be recovered in England from anybody, much less from the Crown.

Thus we see that by the express words of the Dominion Statute, the Dominion Government employing and the Barrister employed both knew that not one shilling would in law be due, or could be recovered, for the service rendered. How then can fee or compensation be said to be "attached" to the office or employment? It is not equivalent to say the Government *may* give something, because equally the other party *may* refuse to accept. If *the offer of a gratuity*, though refused, could create a forfeiture or impose a penalty, no member would be safe; nor in law does it alter the case, that the Government after, or pending the service, named a specific sum and the Barrister admitted that would be a fair compensation, if nevertheless he refused it. It is not the service which is forbidden, but the taking compensation for it.

The unlimited construction contended for would place the seat of every member of the local Assembly at the mercy of the Dominion Government, or utterly prevent, even in the direst public emergency, any service being voluntarily rendered. Therefore it is that this Statute working a forfeiture and imposing a penalty must be construed strictly.

The case of *Macdougall* v. *Campbell*, 41 U. C. R., 332, has been much relied on as deciding that Counsel fees can be recovered in Ontario, but when carefully examined it does not establish the position that, apart from any statutory provision, or any special contract, or other consideration, they can be recovered. In that case, in the first place, the action was not against the client, but against the husband, who was by law bound to provide the expenses of the wife in her defence, on his application for a divorce; and being so bound in law, made a distinct promise, that in consideration that the plaintiff would forbear, during those proceedings, to put in force a power he then possessed to compel the defendant to pay, *de die in diem*, those expenses (whereby the Counsel fees could have been met by the wife), he, the defendant, would pay, &c., thus creating a new consideration and a specific contract. It is true *Wilson*, J., after much faltering, expressed himself to that effect, viz., that Counsel fees were recoverable, and was briefly concurred with by another Judge. The Court, however, divided in opinion, the learned C. J. *Harrison* expressing himself decidedly to the contrary. Moreover, *Wilson*, J., based his opinion upon the effect of certain local Statutes, providing a scale of fees in the

Courts in that Province, in which scale allowances were made for Counsel fees, and upon the combined functions of Barrister and Attorney in one person, thence deducing a presumed abolition of the distinctive character of Barrister and Attorney in this respect as hitherto considered; but the service here rendered was not in a suit or proceeding in any Court of Ontario or British Columbia, to which any such scale would be applicable, but in a proceeding to which the Dominion Government was a party, under a Statute passed by the Dominion Parliament, in which no such provision exists; for surely it will not be contended that local Statutes altering the Common Law in particular Provinces (admitting that they did) would govern Dominion proceedings under Dominion Statutes pointing out and determining its own line of action in matters to which the Crown is a party. That very decision, however, has not been accepted in Ontario, for the appeal from it is yet undecided. But even if it were law in Ontario as between private individuals, in this case, the defendant's claim being against the Crown (if there were any claim) would have to be under the Petition of Rights Act, and that pointedly adheres on such a subject to the English law.

The costs referred to in the 47th and 48th sections of the Public Works Act of Canada, 1867, chap. 12, creating the arbitration tribunal, in which the claims of Mr. Barnard were being heard, and in which the defendant was acting for the Crown, apply solely to costs between the parties to the arbitration, and not to any fee or compensation from the Dominion Government to the person it may employ.

The construction I have put upon the word "attached" is further confirmed by the authority cited, though for another purpose, by the Counsel for the complainant, from *Todd's* Parliamentary Government in England, page 260. "The disqualification *attaches* immediately upon accepting an office of profit," that is flows from, is a necessary consequence of the acceptance, not dependent upon the will of one party or the other. In reference to that part of the argument of the learned Counsel for the complainant, referring to the defendant's expectation of being paid, and his subsequent refusal, attention must be called to another passage in *Todd*, which doubtless escaped his observation. Speaking of the analogous case where a new writ has to be issued in consequence of disqualification, at 278, as to what constitutes an acceptance, he says:—"Ordinarily, and *as a matter of* "*convenience*, mere agreement to accept a disqualifying office vacates "the seat." But at 280, "While it is customary to issue a new writ so "soon as a member has agreed to accept a disqualifying office, mere "*agreement itself does not disqualify.* It is true that by agreement "to accept an office from the Crown, a member places himself under "the influence against which the Statute of Anne is directed; never- "theless, if there be a reasonable excuse to justify delay, it has been "usual for the House to *await the performance of some formal act of*

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"*acceptance* before proceeding to order the issue of a new writ. "Meanwhile, *the member is not debarred from* the exercise of any of "his legislative functions."

Todd is of the very highest authority on constitutional questions and the practice of Parliament, though I have not before heard him cited as a legal authority on the construction of Statutes. The weight of his opinion, however, is decidedly against the complainant, and does not support the point to which it is sought to be applied. Under the evidence, a disqualifying fee or emolument was not only not accepted but refused.

The cases of *Fluett* v. *Gauthier*, 5 U. C. Prac., 24, and the *Queen* v. *Francis*, 21 L. J. Q. B., 304, have been cited by the complainant's Counsel, to shew that a contract, though not valid or enforceable, may disqualify. Without admitting that there can be a *legal contract*, or indeed any *contract*, which is not mutually binding and therefore enforceable, except perhaps in the case of an infant, it will be observed on the examination of the report of the latter case—the *Queen* v. *Francis*—that money had been paid and received under the so-called contract, which it was contended failed in its *binding effect*, from not having the seal of the corporation affixed to it, the receipt of which money was regarded as evidence of employment and payment on account, thus bringing the case within the spirit of the disqualifying clause, the Court at once stopping the argument. Consequently, that authority does not establish the position assumed, nor is it analogous to the present case. With reference to the former—*Fluett* v. *Gauthier*—it certainly as reported is strongly in favour of the position assumed; but without seeing the local Statute on which it was based, and the Canadian authorities cited by the Counsel in the argument, I am not prepared to change my opinion, particularly as the only English case referred to, the *Queen* v. *Francis*, as above shewn, does not go to that extent, and the Judge himself refers to no authority, proceeding more upon the danger likely to arise, from the evils legislated against, than upon the language of the Statute.

The *Queen* v. *York*, 11 L J. Q. B., 127, also cited for the same purpose, simply decides that under the terms of a Municipal Ordinance, disqualifying contractors with the corporation from holding seats at the board, a lease from the corporation to the contractor came within the meaning of the word "contract" in the Ordinance used, and consequently disqualified.

But in seeking to apply all these cases it is overlooked that an engagement with a Barrister is regarded in law *not as a contract*, but simply on his part as *the discharge of a duty*, for which he can claim no remuneration, but may receive a reward. He is not responsible, as in a contract, for non-fulfilment or mismanagement, and cannot, therefore, enforce compensation for performance or good management. Moreover, the Statute under which the proceedings in the present

instance are taken, in the two sections makes a distinction between "office or employment" and 'contracts or agreements," itself defining what it means by the latter term.

As to the 1st section, Webster's definition of the meaning of the word "attach" is 1st. In a general sense, "to seize and hold fast." Hence, 2nd. To take by legal authority "to arrest the person, or lay hold of property by writ, to answer for a debt or demand." It is unnecessary to cite that part of the definition which refers to moral force, affection, &c., &c. If the world were governed by moral force or affection a Legislature would be useless.

It must be assumed in law that legislators know the meaning of the words they use, and also that they use the very words necessary most closely to convey the idea they mean. Their legislation affects the whole people, and their selection of terms in legislation must consequently be received, not only as *adequate*, but as *appropriate*, to accomplish the particular object they had in view. The moment the Court in construing a Statute attempts to give figurative meanings to words, or to construe them in any but their ordinary legal sense, it undertakes to legislate, and thereby departs from its line of duty.

Under this definition of the word, how can the defendant "by legal authority take" or recover from the Dominion Government his fee or compensation for services as a Barrister and Counsel, when every Court in England and in the Dominion has time out of mind adjudged that such fee or compensation is in the nature of a *gratuity* and cannot be recovered at law, even though the service has been most honourably and efficiently performed.

This Act is exceptional in the power it gives to the Court to issue an injunction against a member of Parliament, relative to his seat in Parliament, and unquestionably, if the case were brought within the Act, it ought to issue, for I cannot assent to the position advanced by the learned Counsel for the defendant, and to some degree acquiesced in by the Bench, that while it might be right to grant it in the case of a private member, yet, because the defendant is a high public functionary and an influential leader of the House, it ought not to be used against him. On the contrary, in my opinion, that is the very reason it should be used against him. The higher the man the greater the fault.

The Legislatures doubtless legislates for the best interests of the country, yet it may be questioned whether Statutes of this character should not be swept away. They may answer in large communities, where there is a great field of talent to choose from, but in the scattered and limited population of this Province they are apt to deprive the country and government of the services of some of its ablest men. They imply a distrust of every public man.

For seven years past, the unceasing demand of this Province upon the Dominion Government has been for the expenditure of large sums

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of money on public works, yet during the same period Acts are passed forbidding the leading business men of the country, who may be members of the House, from having anything to do with the expenditures. At this very day, with contracts of several millions to be expended by the Dominion Government, not a member of the House, be he merchant, trader, farmer, dealer, shipowner, lawyer, or doctor, can "hold, enjoy, undertake, or execute, directly or indirectly, "alone or with any other, by himself or by the interposition of any "trustee or third party, in whole or in part, any contract or agreement "with Her Majesty, or with any public officer or department with "respect to the public service of the Dominion of Canada, or under "which any public money of the Dominion of Canada is to be paid "for any service or work," under a penalty of $500 a day for every day he sits in the House after so doing, besides the forfeiture of his seat. (Nothing in splendid alliteration ever equalled it, save the old Anti-Popish Test Oath, fifty years ago.)

Though several of the members are merchants, others owners of vast tracts of grain producing land, or of fine herds of cattle—main staples of the country—they may not contract to supply a Dominion party on the railway works, "directly or indirectly, in whole or in part, by themselves or any third party," &c., &c., with one pound of flour or beef, or a shilling's worth of goods, nor, under the "Qualification and Registration of Voters Act Amendment Act, 1878," can any officers receiving Dominion salaries (other than employés of the post office—why this particular exception is not declared) vote or even advise relative to the election of members, under heavy penalties.

In most countries, the impression is, that the conflict of mind with mind promotes intelligence, but here, while these Acts remain, a dull suspicion reigns.

Burke has said "The country that lays the foundation of its great-"ness in the possession of extraordinary virtues, will find its super-"structure reared in folly, hypocrisy, and extravagance."

Perhaps it were well for British Columbia not to attempt to be too virtuous.

The injunction must be refused.

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BEGBIE, C. J.

1880.

19th Jan., 12th Feb.

Case stated by a Magistrate—20-21 Vic. (Imp.), c. 43—37 Vic. (Dom.), c. 42, s. 7—"Playing" and "gaming"—"Playing in a common gaming house"—40 Vic. (D), c. 33, s. 4—A "common gaming house" defined.

The defendant was charged under 40 Vic. (D.), c. 33, s. 4, with "playing at an unlawful game in a common gaming house," &c.

Upon a case stated by the Magistrate under 20-21 Vic. (Imp.), c. 43.

Held, that it was not necessary to allege that the defendant was playing "at an unlawful game," and that the introduction of these words in the information was merely surplusage.

Held, that it was not necessary for the prosecution, in order to convict under this charge, to prove that the accused was playing at an "unlawful game."

Held, that 20-21 Vic. (Imp.), c. 43, was not repealed by the Dominion Statute, 37 Vic., c. 42; and therefore is still in force in British Columbia.

This was a case stated by Hon. Augustus F. Pemberton, the Victoria City Police Magistrate, under the provisions of the Imperial Statute, 20 & 21 Victoria, chapter 43:—

Between Charles P. Bloomfield, appellant, and Ah Pow, respondent.

The appellant is Sergeant of Police for the City of Victoria, and on the 16th day of December, A. D. 1879, obtained from me a warrant under Stat. 38 Victoria, chap. 41, sec. 1, authorizing him to enter the house and premises of one Hee Wee, situate on Cormorant street, in the City of Victoria aforesaid, which house was suspected of being used as a common gaming house.

Accordingly, the said house was entered by the appellant and other officers of police on the 16th December, 1879, and there was no opposition to their doing so. Upon entering the said house the appellant found a number of Chinamen, including the respondent, engaged playing for money at a Chinese game called fan tan. There were two tables, at each of which a game was played for money; and in the course of one game four bits was staked by one of the players and won by the banker, according to the event of the game. Money was on the tables and in the banks; counters and cards of a peculiar character were used by the players, and a bank was kept at one of the tables by the respondent, exclusively of the other players, or, in the words of the witness, "One player keeps the bank all the time." The chances of the game were not alike favourable to all the players. There was a percentage of twenty-five cents on every five dollars won by any of the players in favour of the bank. Counters used in playing the game of "Pharaoh" were found on the said tables, but there was no evidence to show that the game of pharaoh had ever been played in the said house. The game was carried on openly, but there was no proof that said house was open to all comers.

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The appellant, upon entry as aforesaid, arrested the respondent, and on the fifth day of January, 1880, charged him upon an information before me with playing at an unlawful game in a common gaming house.

Upon the state of facts herein set out, I considered it necessary, in order to convict, that proof that the game played was an unlawful one should be given; but as, in my opinion, there was no proof that the game of fan tan was unlawful, nor any evidence that the house in question was a disorderly house, or a nuisance to the neighbourhood, and as it was shown that the amount played for was not excessive, and that there was no cheating practiced, I dismissed the case.

The appellant duly required me to state this case, and duly gave security to my satisfaction.

If the Court shall be of opinion that it was incumbent on the prosecutor to prove that the game of fan tan, so played by the respondent, was an unlawful game, and that the facts herein set out do not show the game to be unlawful, then the appeal is to be dismissed.

If, however, the Court shall be of opinion that it was not incumbent on the prosecutor to prove that the said game was an unlawful game, or if the Court shall be of opinion that the facts set out in this case show the game to be unlawful, then my decision is to be reversed, and the Court is either to remit the matter to me with its opinion thereon, or is to make such order in relation to the premises as it may see fit.

The Court is to make such order as to costs as it may see fit.

(Signed) A. F. PEMBERTON,
S. M.

19th January, 1880.—On the case coming up, *Robertson*, Q. C., for the respondent, objected that the Imp. Stat., 20 & 21 Vic., c. 43, under which the case was submitted, did not apply here, having been repealed in 1874 by 37 Vic. (Dom.), c. 42, s. 7.

He urged that the summary jurisdiction of the Magistrate in this case was under the Dominion Statute of 1869, and that therefore this method of appeal or revision was inapplicable.

Begbie, C. J.—The Dominion Statute of 1869 is, in fact, merely Jervis's Act, of 1848, in so many words. That Act had been in force in England for 8 or 9 years, when it was found that it had a small defect, which was amended in 1857 by the 20 & 21 Vic., c. 43, giving the right to either party before a Magistrate in a summary way to have a case stated by the Magistrate for a Superior Court. When British Columbia was founded, both these Acts, Jervis's Act and the amending Act (20 & 21 Vic., c. 43), came into force here, and have ever since continued so.

Then, in 1869, the Dominion Parliament, being struck with the excellence of Jervis's Act, adopted it *totidem verbis* for the whole of

the then extent of the Dominion, giving the power of appeal therein mentioned, which however is clearly confined only to an appeal by the defendant and is an appeal proper, and not a power to state a case for the opinion of the Court above. But the Parliament of Canada did not introduce the 20 & 21 Vic., c. 43.

Then, in 1874, that Parliament declared in fact precisely that the Canadian Statute of 1869 (*i. e.*, Jervis's Act, which had always been law here) should extend to this Province, and sec. 7 repealed all local laws making provisions for anything therein provided for, and all local laws inconsistent therewith.

But how can it be said that 20 & 21 Vic., c. 43, either provides for the same thing as Jervis's Act or is inconsistent with it? Why, it was passed precisely to supply a deficiency in that Act and in aid of it, and it obviously answers these purposes; 20 & 21 Vic., c. 43, is exactly contrary and opposite to what s. 7 says is to be repealed.

The case was then proceeded with, *Theodore Davie* appearing for the appellant.

BEGBIE, C. J.:—

12th February, 1880.—I have delayed in giving my views in order that I might be able to lay down some observations which might assist the Magistrate in this or any future inquiry in which it might become necessary to decide upon the meaing of the terms "unlawful game," "common gaming house," "gaming," and especially the meaning of the word "playing," in section 4 of 40 Vic., c. 33.

I have prepared at considerable length, and after comparison of very many cases and Statutes, some observations upon these points; but I hesitate to deliver them as they must be mere *dicta*, and possessed of no authority, not being necessary for the decision of the case before me.

I have to deal only with the points in the case; and to answer the questions there placed for my decision.

The information is laid under the 40 Vic., c. 33, s. 4, which says "any person playing in a common gaming house is guilty of an offence," &c. The Magistrate naturally inquires, "What does playing mean in this Statute? What is a common gaming house?" Further than that, since the information charges the defendant not simply with "playing" but with "playing at an unlawful game in a common gaming house," must not the complainant prove the offence as laid? Must he not prove the unlawfulness of the game at which the defendant is proved to have been playing? What is an "unlawful game?"

In another case, perhaps, all these questions may arise and require an answer. And perhaps the inquiries into which I have been led may be of some utility; but on reflection I think that they are not necessary to be decided now.

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The 3rd and 4th sections of the Statute, 40 Vic., c. 33, s. 4, is by s. 5 to be read as part of the Act which they amend, viz.: the 38 Vic., c. 41.

Whatever the words "playing" or "common gaming house" mean in sec. 4 of the amending Act, they mean exactly the same thing, precisely, as the very same words in sec. 3 of the amended Act. Now sec. 3 provides (it is word for word the same as the English Act of 1845, 8 & 9 Vic., sec. 8), that when any cards, &c., or instruments of gaming used in playing an unlawful game are found in a suspected house which has been entered under such a warrant as in the present case, "it shall be evidence until the contrary be made appear, that the place is a common gaming house and that the persons found there were playing therein."

Now the case finds as a fact that counters used in playing the game of pharaoh were found in the room where the police entered under the warrant. And pharaoh is certainly an unlawful game within the 12 Geo. 2, c. 28.

The finding of these counters therefore is alone evidence that the place was a "common gaming house" and that the defendant (who was also taken in the room) "playing" therein, *i. e.*, playing in a common gaming house, which is the offence expressly punishable under s. 4 of 40 Vic., c. 33, above quoted. It was not pointed out to the Magistrate that the onus of proof was completely shifted by the discovery of these counters: and that he must convict unless the defendant disprove the allegation.

It becomes, therefore, in my opinion, quite irrelevant for the prosecution to prove, or even to inquire: "What does playing mean in the Statute? What is a common gaming house? What is an unlawful game?" The pharaoh counters have been found, and all the questions are prima facie disposed of. Nor can it be important to introduce or omit in the information the words "at an unlawful game." They do not aggravate the offence. It is not as where there is an information for an assault on a constable in the execution of his duty. There the prosecution must prove that the assault was on a constable and also that he was when assaulted acting in his capacity of constable, because an ordinary assault is a different offence: differently triable and differently punishable. Here the words are mere surplusage in the information, and by section 3 the onus is thrown upon the defendant to show that the house was not a common gaming house, or that he was not playing therein, which does not mean not playing at pharaoh but not playing at all, at anything or with anybody: a difficulty greater than the prosecutor was in in the first instance. As to this last point, the case has already decided it against the defendant. The case states and finds as a fact that the defendant was playing in a room entered by the police, at "fan tan." The only loophole of escape apparently left by the case, open to the defendant, is for him to show that this house was

not a common gaming house; more difficult probably than for the defendant to show that it was one. But the Statute throws this onus on the defendant to prove this negative.

Neither is it of course necessary to prove what in fact the case finds was not proved, that the game of pharaoh was ever played there. The Statute says in section 3 the finding of the counters is enough, until the contrary is proved, to show that the defendant was "playing," and "playing in a common gaming house," and then the next section says "that is an offence" finable with $20, &c.

It is only proper to state that the line of argument here pointed out, and which relieves the prosecution from entering into the question of the unlawfulness of the game was not placed before the Magistrate at all. I feel very much disposed to agree with him in his opinion that fan tan is not *per se* an unlawful game.

As, however, it is still open to the defendant to contend that the house was not a common gaming house, the Statute says he may, if he can, rebut the implication arising from the pharaoh ticket.

I shall remit the case to the Magistrate to investigate and decide that point, subject to what I have already stated, and subject to the following observations, which are not to be taken as binding on the Magistrate, or on any body, but which contain the conclusions to which I have at present arrived.

A "common gaming house" is nowhere defined by Statute. So far as I am aware it is a matter of law, *i.e.*, of educated common sense, to be decided in every case by the Judge, on general principles, no doubt, since it is contrary to public utility, and therefore to common sense, that decisions should conflict or be arbitrarily dictated. But a good deal may depend on the circumstances of each case.

A "common gaming house" must in the first place be "a house, room or place." (38 Vic., c. 41, s. 1.)

2nd. Gaming must be carried on usually or habitually, or at least the house, &c., must be intended, kept or used for gaming. This may be shown by the fitting or furniture, or articles found there, and "gaming" may be defined to be "playing at any game or pretended "game of chance, or at any game of mingled chance and skill, for "stakes, either of money or other valuable thing." "Playing," as distinguished from "gaming," "means engaged in a game without stakes." It is not at all necessary that the "gaming" should be at an unlawful game.

3rd. The house, &c., must be common. That does not mean necessarily open to all the world. It is clear from the Canada Statute, 1877, s 1, (following the words of the English Act, 1854, c. 381) that a house may be a common gaming house though the admission thereto may be limited by keys, or in any other way. Of course if the house or room is open to all the world there could be no question about it;

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but it may be of limited access and yet be a common gaming house. It must, however, be common in the usual acceptation of the word, and the existence of any bolts, bars, or impediments to the police is by s. 5 (always following the English Act) to be evidence that the house, &c., is a common gaming house. A Magistrate might reasonably decide that a room, &c., was a common gaming house if it is commonly used or adopted for gaming, frequented by many people promiscuously, especially if by many various persons, by a fortuitous concourse, or without the necessity of any direct or personal invitation from the occupier or other person legally entitled to the sole enjoyment of the room or place, and if there be a general opportunity of gaming though without any fixed intention or invitation to do so. If gaming, *i. e.*, playing for stakes at a game of chance, or of mingled chance and skill, occurs in such an establishment, it is a common gaming house, quite apart from any question of the particular game at which the visitors play, whether named in any Statute as unlawful or not. For instance dominoes are undoubtedly a lawful game, *R.* v. *Ashton*, 22. L. J. M. C. 1., but equally without doubt to play at dominoes for stakes is "gaming."

Such an establishment will be a common gaming house though a large part of the general public are excluded by keys or watch-words, or in any other manner, and even if many of the visitors do not play at all, but only go to look on from mere idleness and curiosity.

It appears to me that in the case sent up every fact is found against the defendant except this, that he may, if he can, still show that the house was not a common gaming house within the principles here laid down, as to which I remit the matter to the Magistrate to inquire and decide.

As to the costs of the proceedings before me, the appellant has been wholly successful on the points as to which my opinion was asked, so that he ought not to pay any of the respondent's costs here in any event.

If the respondent however (the defendant) succeeds in convincing the Magistrate that this establishment was not a common gaming house, the appellant may set off his costs here against any costs which the Magistrate may order him to pay (if any), and if the defendant below fail to convince the Magistrate that this establishment was not a common gaming house, then as he will have been in the wrong all through, the appellant is to be at liberty to add his costs here to the costs of the conviction.

The respondent will bear his own costs of the proceedings before me in any event.

SEWELL *v.* BRITISH COLUMBIA TOWING CO.

THE "THRASHER" CASE.

1882.

5th, 13th, 16th and 17th January, 10th February.

"B. N. A. Act, 1867," sec. 92, sub-s. 14—Constitutional Law—The Supreme Court of British Columbia—Power of Provincial Legislature to legislate respecting procedure and residence of Judges—Delegation of power to Lieutenant-Governor in Council.

The Provincial Legislature had by a Local Act, passed in 1881, declared that the sittings of the Supreme Court for reviewing *nisi prius* decisions, motions for new trials, &c., should be held only once in each year, and on such day as should be fixed by Rules of Court, and that the Lieutenant-Governor in Council should have power to make such Rules of Court.

Held, per Begbie, C. J., Crease and Gray, JJ.

That the appointment of the days on which the Court should sit for such purposes is a matter of procedure, and of purely judicial cognizance, and is not within the power of the Local Legislature either to fix by positive enactment, or to hand over to be fixed by any other person or persons, but belongs to the Court itself; and that the above sections are in that respect unconstitutional and void.

The power conferred by section 92 of "The British North America Act, 1867," on Provincial Legislatures is a legislative power, enabling them to exercise legislative functions merely, and does not enable them to interfere with functions essentially belonging to the Judiciary or to the Executive.

The Judges of the Supreme Court of British Columbia are officers of Canada, and by sections 129 and 130 of "The British North America Act, 1867," their power and jurisdiction remain as before Confederation, subject only to the constitutional action of the Parliament of Canada under "The British North America Act, 1867."

The authority given by section 92, sub-section 14, to the Local Legislature to make laws in relation to civil procedure, is confined to civil procedure in the Courts described in that sub-section, and the Supreme Court of British Columbia does not come within the meaning of that sub-section. The power to make laws in relation to criminal procedure in those Courts, *i. e.*, the Provincial Courts described in that sub-section, and as to all procedure in all other Courts is, either by the general or the particular words of section 91 of "The British North America Act, 1867," reserved to the Parliament of Canada.

The Local Legislature has no power to diminish or repeal the powers, authorities, or jurisdiction of the Supreme Court, nor to allot any jurisdiction to any particular Judge of the Supreme Court, nor to alter or add to any of the existing terms and conditions of the tenure of office by the Judges, whether as to residence or otherwise.

The following statement, extracted from the judgment of *Gray*, J., sets forth the circumstances under which the judgment in the "Thrasher" case was rendered :—

In July, 1880, the American ship "Thrasher" loaded at Nanaimo with coal. On leaving port the defendants were engaged to tow her out. In so doing, owing, as the plaintiffs allege, to mismanagement on behalf of the defendants, she struck upon a rock a short distance from the entrance to the harbour, had to be abandoned, and was lost. Ship and cargo valued at $80,000. Suit was commenced on the 18th of October, 1880. Issue joined and notice of trial given on the 29th of April, 1881. Trial took place before the Chief Justice at Victoria, on the 27th, 28th, and 29th June, 1881. A special verdict was returned in favour of defendants. Several objections were taken by the plaintiffs' counsel to the charge of the Chief Justice to the jury. Leave was

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given to move for a new trial and a hearing in Banc on points reserved and for misdirection. That leave has from time to time been extended, and the right to hear the motion is now the question to be decided.

In order to understand how so simple a matter of procedure can be involved in difficulty, it is necessary to review the local legislation which created it.

In September, 1878, an Act passed by the local Legislature "to make further provision for the Administration of Justice," c. 20, 1878, authorized the Governor-General to appoint two new Judges to the Supreme Court of British Columbia, and without abolishing them transferred the business of the County Courts to the Supreme Court.

In April, 1879, "An Act to amend the Practice and Procedure of the Supreme Court of British Columbia, and for other purposes relating to the better Administration of Justice," called the "Judicature Act, 1879," was passed, introducing into the Province to a certain extent the changes then lately made in England; but the duty of making the Rules to carry those changes into effect was devolved upon the Lieutenant-Governor in Council instead of upon the Judges of the Court according to old and immemorial usage. The whole Act was not to come into force until Proclamation to that effect duly made—but that part as to making the Rules was to take place immediately.

At the same session, in April, 1879, an Act termed the "Judicial District Act, 1879," was passed, dividing the Province into districts and enacting that the Judges of the Supreme Court should severally discharge their duties and reside in the district assigned to them. This Act also was only to come into force by Proclamation.

In March, 1881, "An Act to carry out the objects of the 'Better Administration of Justice Act, 1878,' and the 'Judicial District Act, 1879,'" was passed, called the "Local Administration of Justice Act, 1881," (44 Vic., c. 1). This Act made some slight alterations in the provisions as to districting the Judges, and declared it lawful for the Governor-General, by Order in Council, to direct that the Judges of the Supreme Court should severally reside and usually discharge their duties in the defined districts, except in cases of inability or incapacity, when the nearest was to discharge the duties of the disabled Judge in addition to his own.

It then proceeded to regulate the procedure of the Court in many minute details. It declared valid the "Supreme Court Rules, 1880," made under authority of the "Judicature Act, 1879," by the Lieutenant-Governor in Council as modified by that Act (chapter 1, 1881), and gave the Lieutenant-Governor in Council power to "vary, amend, or "rescind any of the said rules or make new rules not inconsistent with "this Act for the purpose of carrying out its scope and aim, and that of "the 'Better Administration of Justice Act, 1878,'" and by a distinct section enacted that "the Judges of the Supreme Court should sit

"together in the City of Victoria as a Full Court, and such Full Court "shall be held only once in each year at such time as may be fixed by "Rules of Court." This Act was also to come into force by Proclamation.

The "Judicial District Act, 1879," was, on 9th June, 1881, proclaimed to come into force on the 27th June, 1881, and the "Local Administration of Justice Act, 1881," on the 28th June, 1881, on which day the Full Court was sitting and rose.

There was no saving clause in these Acts as to any pending proceedings, and thus so far as they were legal, being matters of procedure, their provisions applied to the plaintiffs' case on trial on that very day and the day following the 28th and 29th June, and they were thereby arbitrarily deprived, without reason or fault of their own, of the common right incident to all suitors in a British Court, of having the ruling of a single Judge at *nisi prius* in a heavy cause of this nature reviewed without unnecessary delay by the Full Court,—an injury difficult to estimate in such a case where the witnesses were principally seafaring men.

The plaintiffs' counsel being dissatisfied with the ruling of the Chief Justice, who tried the cause, obtained a stay of *postea* and immediately applied for a hearing before the Full Court. The learned Chief Justice felt himself restrained by the section 28 before mentioned but facilitated plaintiffs' application to the Supreme Court of Canada at Ottawa. There a hearing was refused on the ground that the Court of last resort in the Province had not dealt with the question.

Plaintiffs' counsel then again applied for a sitting of the Full Court, as he contended, under its common law right and immemorial usage to expedite the claims of suitors. Pending the consideration of that application the Lieutenant-Governor in Council, under the alleged power of section 32 of the "Local Administration of Justice Act, 1881," promulgated a new rule ordering a sitting of the Full Court in Victoria on the 19th of December. On that day the Judges met in deference to the order of the Lieutenant-Governor in Council, and called the attention of the counsel in the cause and the Attorney-General to the fact, that that order was inconsistent with and in direct antagonism to section 28, the Court having already sat within the year, and that where an alleged Rule of Court conflicted with the direct enactment of the Statute, for the purpose of carrying out which it was authorized, and under which it was made, the enactment must prevail.

The counsel for the plaintiffs thereupon contended that the legislation and enactments referred to were *ultra vires* and unconstitutional on various grounds, which for the sake of precision may be reduced to the following heads:—

1st. That the Supreme Court did not come under the designation of a Provincial Court within the meaning of sub-s. 14, sec. 92, B.N.A. Act,

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and that consequently the local Legislature had no right to regulate its procedure.

2nd. That if the local Legislature had power to make rules regulating the practice and procedure of the Supreme Court, it must itself make the rules, and could not delegate the power of so doing to the Lieutenant-Governor in Council or to any other parties than the Judges themselves—according to old and immemorial custom and usage.

3rd. That the Dominion Government having a legal right to utilize the Supreme Court in this Province for the enforcement of Dominion laws and rights, legislation by the local Legislature which impaired, prevented, or interfered with that right, was unconstitutional and *ultra vires*.

4th. That the legislation and enactments in question, both as to the sittings of the Court, the Rules of the Court, its procedure and practice, and the localizing the Judges, were unconstitutional and *ultra vires*.

5th. That the Court had still the power, *ex mero motu*, to sit in Banc and hear arguments on points reserved and raised at *nisi prius*, or otherwise in proceedings in the Court, at such times as would promote the rights of suitors.

6th. That the plaintiffs having acquired vested rights by the institution of their proceedings, could not be affected by *ex post facto* legislation.

On behalf of the plaintiffs, by agreement with the Attorney-Ceneral, the learned counsel was heard on these points, and the Attorney-General as *amicus curiæ* in reply. The counsel for the defendants in the interests of their clients having declined to take any part in the argument, being perfectly content with matters as they were. On the 19th December the Chief Justice handed to the Attorney-General a memorandum of certain points he thought deserving of consideration, and the argument was continued on the 5th, 13th, 16th, and 17th of January, 1882.

Theodore Davie for the plaintiffs.

Drake (with him *Pooley*) for the defendants

Walkem, Q. C., Attorney-General, was heard as *amicus curiæ*.

10th February, 1882. The Court now gave judgment.

BEGBIE, C. J.:—

The argument in this case has arisen under the following circumstances:—

The plaintiffs, the owners of the ship "Thrasher," completely wrecked on the 14th July, 1880, while being towed by two tugs from Nanaimo, have commenced an action in the Supreme Court against the owners of the two tugs, alleging that the loss was occasioned by the neglect and misconduct of the tugs, and they claim $80,000 damages. Certain

issues of fact were tried before myself and a special jury in June last, and on the 12th July I gave judgment in favour of the defendants, mainly in accordance with the findings of the jury. The plaintiffs were dissatisfied with my charge to the jury, with the findings, and generally with the judgment, and they wished to obtain a new trial, or to have judgment entered up for them, and to apply immediately to the Full Court for that purpose. But the local Act, No. 1 of 1881, had in the meantime come in force on the 28th June last, the 28th section of which enacts that a Full Court shall only sit once in each year, on a day to be named in the Rules of Court, and by section 32 such Rules were to be made by the Lieutenant-Governor in Council. A Full Court of the Supreme Court here had sat on the 27th June, and no day had been as yet appointed under the authority of the above Statute for the sitting of the Full Court, and it evidently might not be appointed for a considerable time. It was not concealed on the part of the plaintiffs that if the opinion of the Full Court here should be unfavourable to them, they intended to take the case by way of appeal to the Supreme Court at Ottawa; but that Court does not generally take an appeal direct from a *nisi prius* decision. I therefore suggested that the plaintiffs should apply to that Court for special leave to appeal direct; and authorized them to state that, in my opinion, from the magnitude of the amount at stake, the importance of the points of law involved, and, above all, the indefinite delay which very recent local legislation had imposed upon any application to the Full Court here, I thought it a case in which this unusual sort of appeal should be entertained, if consistent with the practice of that Court. An application to that effect was accordingly made to the Supreme Court of Canada, but that Court declined to entertain any appeal until the *nisi prius* decision had been submitted for review before the Full Court here. An application was then made to myself in Chambers (7th November), and ultimately to all the Judges on the 24th November, requesting that a Full Court might be held by us forthwith of our own authority; and the ground was taken that the above sections 28 and 32 were *ultra vires*, unconstitutional, and void, so far as they hindered this. A notice, however, had then been recently published in the "Gazette," intituled a "Report of a Committee of Council approved by the Lieutenant-Governor," in which it was recommended that certain alterations in the rules of practice heretofore in use should be made, and also that a Full Court should be held on the 19th of December. I therefore desired that the application should stand over until that day, when the validity of the objections to the above sections might be considered, and if overruled, that the application might then be made to us as a Full Court; and that notice of that order should be given to the law advisers of the Crown.

On the 19th of December, accordingly, the three Judges now in Victoria (Mr. Justice *McCreight* being detained at Richfield), sat together, not as a Full Court, but to determine whether we were then

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lawfully sitting as a Full Court. A technical objection was immediately taken, that even assuming the validity of sections 32 and 28, no Order in Council had ever been made, but merely a report of a Committee of Council had been approved by the Lieutenant-Governor, in which a sitting on the 19th December was recommended. As this was a matter which could readily be remedied, however, and as the Attorney-General was in attendance, we asked him if he could remove the doubts which had been cast on the validity of the clauses. He stated that he felt sure he could do so, and was perfectly ready to go on, but that he felt some difficulty as to his appearing to interfere in a case in which he was not retained on either side. As a grave constitutional objection appeared to us to be involved, striking at many acts of the Local Legislature for which he is very possibly responsible, we gave him at once a *locus standi* as *amicus curiæ*. We then asked him to point out the words of the British North America Act which gave any authority to the Local Legislature to regulate the civil procedure of the Supreme Court, and he referred at once to the final words of section 92, sub-section 14. But as soon as it was suggested that those words seemed to be entirely confined to civil procedure in Courts constituted, made and organized by the Province, and that this Court was by divers sections of the Act entirely taken out of that category, and that every topic of legislation not expressly given to the Local Legislature is by section 91 expressly given to the Dominion Legislature, he said that was to him an entirely new point, and he requested time to consider his argument. We adjourned accordingly, not as a Full Court, but to consider the question whether we were then sitting as a Full Court, until the 5th January. The Attorney-General then said that he did not feel that he could properly advise us as *amicus curiæ* until he had heard Mr. *Theodore Davie's* argument of the 24th November. We requested Mr. *Theodore Davie* to repeat his argument, and adjourned the consideration of the question until Wednesday, the 11th January. On that day, however, the Attorney-General found himself unable to attend, and we further adjourned till Friday, the 13th January. On that day Mr. *Theodore Davie* repeated his argument; and the counsel for the defendants declining to say anything, the Attorney-General commenced as *amicus curiæ* his statement of the considerations which ought to guide our judgment, beginning with a review of the circumstances which led to the formation of the Colony; but not concluding, he asked to be allowed to continue on Saturday. On Saturday he asked for a postponement till Monday; and on Monday and Tuesday, the 16th and 17th, he concluded a review of the early history of the Colony and of Confederation at very considerable length, and discussed much less minutely the clauses of the British North America Act to which we had drawn his attention. We could not allow Mr. *Davie* to reply upon the observations of an *amicus curiæ*, and we adjourned to deliberate on the conclusion to which we should arrive.

The main line of argument, irrespective of the British North America Act, suggested by the Attorney-General, so far as I understood him, was as follows:—The Colony of British Columbia was originally established by settlement, not by treaty or conquest, and so had a wider and more indelible sort of legislative power. That power is continued since the union and retained by a sort of transmission or inheritance even in its altered condition of a Province. The Legislature of the Colony was completely sovereign, having even power conferred on it to alter its constitution by internal legislation, and to adopt a different form of Legislature. He alleged that prior to Confederation, the Colonial Legislature alone, and without any Imperial interference, had wholly organized, maintained, and constituted the Supreme Court and the Judges thereof, and possessed despotic power over it and them, and over the whole rules of procedure and practice of the Court, to the minutest detail. He said then, applying the British North America Act, this power is continued to the Province, the Legislative Council of which, alone and without any extraneous aid, has even power to create here a Court of Appeal from the Supreme Court. Further, he maintained that when the British North America Act came to be applied to the Colony, and to the Supreme Court, nothing therein contained altered or affected this relation. The Supreme Court is a Provincial Court, and by virtue of that epithet is within the express words of section 92, sub-section 14. He urged that section 96, which directed that the Judges are to be appointed by the Governor-General, merely stipulates which of several representatives of the Crown shall exercise that particular branch of the prerogative of the Crown—that when once the Judge is appointed he is a mere Provincial officer. So as to the maintenance of the Judges. That is merely a pecuniary arrangement between the Province and the Dominion. There is nothing in that to impair the "omnipotence" of the local Legislature. The expressions of *Lord Selborne*, in *R.* v. *Burah* (L. R. 3 App. Cas. p. 904) are decisive and express, he said, to show that a local Legislature, such as ours, is by no means the delegate of its creator, but has within its own limits powers as plenary and supreme as the Imperial Parliament itself. Then, he said, section 129 of the British North America Act is quite clear Provincial officers are thereby made expressly subject to the control of the Provincial Legislatures. From his point of view section 130 has been quite misunderstood. It does not mean that any officer *in* the Province (at the moment of Confederation) who has to deal with any matter outside of section 91 is to be an officer of Canada, but it applies to every officer *of* the statutory Province, and provides that unless his duties are wholly outside of those matters, he is not to be deemed an officer of Canada. And various passages were cited from *Doutre* and other text writers which established, as he alleged, the pre-potent, inalienable, continuing authority of local Legislatures. He said that at all events, the point before us for consideration is a question of procedure; how to get a matter reviewed by the Full Court. That is beyond dispute embraced both by

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sub-section 13 of section 92, as a matter of "civil right," and as being a step in the "administration of justice in the Province" by sub-section 14, both which classes of topics are by section 92 placed exclusively within the grasp of the local Legislature, since this possesses the plenary powers of the Imperial Legislature, and the Imperial Legislature has certainly legislated directly on procedure. Lastly, the Attorney-General suggested to us that our hands were tied by our own decisions; that all the three Judges now in Victoria had, in different cases, affirmed that the capacity of regulating procedure resided solely with the Lieutenant-Governor in Council; viz., in *Saunders* v. *Reed*, before myself, in *Harvey* v. *Corporation of New Westminster*, before Mr. Justice Crease, in *Pamphlet* v. *Irving*, before Mr. Justice Gray.

Before proceeding to examine the British North America Act, *i. e.*, before discussing the real question at issue, I shall endeavour to explain or rectify some errors in much that has been pressed upon us. The Attorney-General appeared to me to be frequently misled by the use of the term "Province," "Provincial" as applied to a Court, or officer; which has a peculiar meaning when used of any of the members of the Dominion since Confederation. But they were in fact separate Colonies, each with the usual Colonial powers over all topics of legislation, &c., which have been very much curtailed by the British North America Act, by operation of which they became statutory Provinces. Before 1867 the three original partners were equally called "Provinces," and they are so termed throughout the Act. And in reading that Act, and also, perhaps, in reading some of the judgments in the different Courts of the Dominion, it is sometimes necessary to consider whether the old or the new political entity is intended. When the new and the old "Provinces" are sharply contrasted, as in section 129 of the British North America Act, all ambiguity is avoided by using the names of the Provinces as they existed previously to, and as they were to exist after, confederation. In other parts of the Statute it is left to the context to explain the ambiguity. There is also a further ambiguity in the use of the epithet "Provincial;" which when applied to an office or department may mean that it is wholly the creature of and dependent on the Province, or merely that its field of operations is wholly confined to the Province. We may with equal propriety speak of a Provincial Lieutenant-Governor or a Provincial Deputy Adjutant-General, or on the other hand of a Provincial Minister or a Provincial Superintendent of Education. But the same epithet means two very different classes of officials. The former are allotted to, the latter derive from, the Province. In the one case are meant officers appointed and authorized by some power from without, *i. e.*, by the Dominion, to perform certain duties in the Province. In the other case, the officials draw all their authority from within the Province itself. The former owe no allegiance to the Province, nor any duty, except indirectly, having to carry out, according to their respective commissions, the laws duly established in the Province, whether common law or statute laws; and as to statute

laws, whether of Imperial, Dominion, or Provincial enactment. And see accordingly the clear expressions of Chief Justice *Ritchie*, in *Valin* v. *Langlois* (3 Can. S. C. R. 20). They are not, however, responsible to any Provincial authority, but only to the Dominion, whose creatures they are and whose mandate they bear. The latter class of officials owe allegiance to the Province, and are under its sole authority, being of its creation. And I think this distinction has been sometimes lost sight of in discussing the British North America Act, leading to apparent anomalies in that Act which do not really exist. It is scarcely possible to avoid some confusion of expression, for it might be misleading to call a Superior Court in any Province a Dominion Court simply. That epithet in strictness, perhaps, might imply a Court which has jurisdiction throughout the Dominion. The proper notion of a Superior Court in any Province seems to be that it is a Court, the Judges of which are Dominion officers, assigned by the Dominion to administer the laws in such Province.

It is also, I think, quite an error to suppose what was contended at great length before us, that any of the legislative authority existing in any Colony or dependency before confederation, can continue for one moment to survive the admission of such Colony or dependency into the Dominion under the British North America Act,—or that any dependency so admitted, and thenceforth called a Province, is capable of a continuous political existence, so as to be able to transmit to its new self any title to legislative authority, although its geographical boundaries, and even its geographical name, remain unaltered. Its political existence, so far as its legislative capacity is concerned, becomes completely extinct at the moment of its admission—(the executive, administrative, and judicial powers being specially kept on foot, in the manner and subject to the provisions mentioned in section 129)—and at the very same moment, and by the very act of admission which extinguishes the previous legislative powers, the statutory Province acquires, under the authority of the British North America Act alone, a new charter, as it were, of legislative capacity, as to topics regulated, in the main, by sections 92, 93. And every topic and power of legislation which is not, on the whole Act, exclusively vested in the Provincial Legislature, is by section 91 swept within the sole jurisdiction of the Parliament of Canada. Chief Justice *Harrison* lays this down very clearly in *Leprohon* v. *Corp. of Ottawa*, 40 U.C.R., p. 488, and points out that our constitution is in this respect the converse of the United States. And *Spragge* C. (same case on appeal, 2 Ont. App. 522) says: "The "Province having only the powers specifically conferred; the Domin- "ion has all not specifically conferred on the local Legislatures." And *Savary*, a County Court Judge in Nova Scotia, in a vigorous judgment, cited approvingly by *Doutre* (Contitut. of Canada, p. 56), says: "All "which is not expressly or by necessary implication conferred on the "local Governments and Legislatures resides in the Dominion." To which I would add, that any matter, to fall within the legislative

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capacity of the local Legislature, must be given to it not only "expressly," or "specifically," or by "necessary implication" but exclusively; and not by this section or by that, but exclusively on a comparison of the whole Act. So that if there be any conflict or concurrence of gifts, then, inasmuch as the gift (so far as it is concurrent) is not exclusively to the Province, it falls, according to section 91, exclusively to the Dominion. The stringent effect of a "gift over" is well known.

The next fundamental error I shall notice, which occupied a large part of the argument in support of the widest view of the legislative authority of the Province, was where the Attorney-General endeavoured to support it on the supposed difference between the local Legislature in a dependency originally acquired by settlement, and a dependency acquired by treaty, or by conquest. And it was said that a dependency acquired by settlement had much larger legislative powers, or more indelible powers, than a dependency acquired by either of the two latter titles; and that British Columbia fell strictly within the first category. I think myself that (if it made any difference) it is arguable that British Columbia and Vancouver Island were not acquired wholly by settlement, apart from treaty; that the treaty of 1846 had a good deal to do both with the foundation of the original Colony of Vancouver Island (1846), and of the original Colony of the Mainland (1858), afterwards united as the Colony of British Columbia (1866), which now exists as a Province of the Dominion (1871). And the absolute power of legislation placed by the Royal authority in the hands of Governor Douglas for the first five years of the existence of the Colony (which the Attorney-General much pressed on our attention) looks very much as if British Columbia were treated at that time entirely as a Colony by cession, according to *Blackstone's* view. (1 Stephen Blackstone, 99). But into this question it seems quite useless to enter; neither do I enquire whether the Attorney-General's proposition is anywhere true. It seems to be too clear for argument that whatever the nature or derivation of the local Legislatures previously and up to the 20th July, 1871, everything became, as has been said, completely extinct on the admission of British Columbia into the Dominion, and that all the Legislatures of the present statutory Provinces have precisely the same authority within their respective geographical limits, viz., that given to them by the British North America Act, and no other authority; and that, not by transmission or inheritance, but solely and entirely by virtue of the Act. But the contention seems no less singular than erroneous; and I think it would not, for instance, meet with much favour in the Province of Quebec.

It was also strenuously maintained that the Supreme Court of British Columbia (under its various successive titles) from 1858 up to the moment of Confederation was wholly organized, maintained and constituted by Colonial authority, and it was especially contended that

it was "organized" by Colonial authority alone. As to this last point it is to some extent a question of definition: What is meant by "organization?" If issuing a commission and nominating every Judge in either Vancouver Island or British Columbia up to the time of Confederation, enter at all into the notion of "organizing" the Court, then, certainly, the Supreme Court of British Columbia from 1858 to the time of Confederation was not wholly "organized" by the then Colony. I have never held as Judge a commission from any Colonial Executive. But the consideration of this question again seems to me entirely immaterial. What is material, and what cannot be denied, is, that at and up to the moment of Confederation a Supreme Court of British Columbia existed in the then Colony, completely organized, maintained and constituted; possessed of all the jurisdiction, power and authorities which had been possessed either by the previous Supreme Court on the Mainland, or by the previous Supreme Court of Civil Justice of Vancouver Island; possessed also of all the additional powers mentioned in the last constituting Ordinance previous to Confederation, (viz.) the British Columbia Ordinance, 1869, (confirmed by the Ordinance of 1870). And all this, before the "Province," in its technical sense, had at all come into existence. This I do consider extremely important. Combined with other circumstances, I think that it places this Court at once under the Dominion Parliament, and removes it from the authority of the local Legislature, by virtue of section 129 of the British North America Act.

By far the larger portion of Attorney-General's suggestions was taken up by the fallacies just pointed out, and which I need not further refer to.

The bare question before us is: whether section 28 of the Act of 1881, so far as it forbids any sitting of the Full Court oftener than once a year, and so far as it authorizes the Executive Council to fix the time of sitting, is constitutional. But in order to support this section it became pretty evident that it was necessary to include a good deal more; and the Attorney-General claimed an "omnipotent" authority over the Judges of the Supreme Court and the Court itself, and over the procedure in that Court, by virtue of this "omnipotent" authority. The Judges were to be nominated and sent into the Province by the Governor-General as officers purely of the Province, the servants, I had well nigh said the slaves, of the Legislature and Executive of the Province; to live wherever the Executive might appoint each from time to time to live, to do what the Legislature might appoint each from time to time to do. The only thing that the Local Legislature could not do to a man while he was a Judge of the Supreme Court was to pay him; that is by the British North America Act reserved wholly to the Dominion authority.

But I think that such claims are altogether too extensive, even if they do not totally fail; and that on the true construction of the B. N. A. Act,

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the Judges are responsible to the Dominion authority alone, who alone may vary or repeal the powers with which the Court was invested at the time of Confederation; and in particular (what is in fact the matter in issue) that the power of regulating whatever falls strictly within the meaning of the term "procedure" in the Supreme Court here, remains where it was before Confederation, viz., in the hands of the Supreme Court itself, subject to legislation in a constitutional way by the Parliament of Canada under section 129 of the British North America Act.

The attention of the Judges has been called to the various opinions expressed by them in August and September, 1880, with regard to the first Order in Council, 16th July, 1880, purporting to establish Rules of Court under section 17 of the "Judicature Act, 1879"; viz., the case of *Saunders* v. *Reed* before myself; *Harvey* v. *Corporation of New Westminster*, before Crease, J.; and *Pamphlet* v. *Irving* before Gray, J.; with the view of showing that we all three then affirmed the legality of the power arrogated by the Executive to make rules; and that we cannot without self-contradiction now deny that power. Now, in fact, that point never came up for decision at all in any of the three cases. I do not mean not say that it was denied; but neither was it affirmed. It was never raised by the suitors. All the Judges were much puzzled as to the effect of that first Order in Council (published in Gazette 17th July, 1880). It came first before myself, and I changed my mind about it more than once. In order to clear my views I placed them in writing. At first I inclined to think that the Order in Council was quite unmeaning, and so established no rules at all here; in which case, under section 19 of the Act of 1879, the old practice would have remained; but I finally concluded that the Order in Council had established some rules capable of being proved in evidence, but requiring such extraneous proof; and therefore they prevented me from conducting business in Chambers according to the former practice, without informing me what practice was substituted; reducing matters to a deadlock, removable only by evidence in every case brought forward. My statement or memorandum of arguments in support of my first views got into print, I do not know how. The report, of course, reads absurdly, for the arguments in it are directly at variance with the conclusion. But there never was any question raised in that case as to the validity of section 17 (1879), nor as to the authority of the Executive to make the Order in Council, 16th July; that was assumed and acquiesced in by all parties. The next Judge, whose opinion was taken, was Mr. Justice *Crease*, 6th August. He seems to have come to the same conclusion as myself; and there also, the power of the Executive seems to have been acquiesced in without ever being called in question. Lastly, *Pamphlet* v. *Irving* was brought on before my brother *Gray*. He decided according to the view I had at first inclined to, viz.: that the Order in Council, 16th July, was so utterly dark and obscure as to be

a nullity, and therefore that it did not prevent the continuance of the old practice in Chambers. But in none of these cases was the power of the Executive to make rules of procedure, which depends on the authority of the Local Legislature to invest it with such powers, called in question; nor did any of the Judges, nor could they, give any binding opinion at all whether the authority existed or not; and I do not choose to inquire into the reasons for now publishing unauthorized reports of those cases with quite inaccurate headings. It is, perhaps, more important for the Attorney-General's argument to observe, that on the ensuing 16th October another Order in Council was made, cancelling the Order of the 16th July, and declaring a whole body of rules to be in force as from the 15th November following, called the "Supreme Court Rules, 1880;" and that these rules, never having had their authority tested by any suitor, have ever since from time to time construed and suffered to be applied by all the Judges, who in this way may seem to have acquiesced in the legality of the authority or authorities under which these rules were issued. But up to this time no decision has ever been given, nor could have been given, either one way or the other, on that point. None has ever been requested. The question of their legality is now raised for the first time.

The position of a Judge is a very helpless one, especially in British Columbia. He cannot state his opinions except in judgments from the bench. These are seldom heard, except by the parties interested; once delivered, all the reasoning, everything but the dry result, is forgotten or imperfectly remembered: often misunderstood, and unintentionally misrepresented at the time, almost certain to meet that fate in the near future. And in matters not brought before a Judge for actual decision, he is more helpless still. All he can do in sight of legislation, however objectionable it may appear, is to lay a statement of his views before the Ministry. That communication may be considered strictly confidential; the receipt of it is acknowledged with or without thanks, and the document is pigeon-holed. A Judge cannot, consistently with his own self-respect, descend to whisper his doubts into the ears of litigants, or send a brief to the leader of the Opposition in the Legislature. He cannot write leading articles in newspapers, though *Lord Cairns*, *Kelly*, C. B., and *Lord Penzance* did once each, and only once, I believe, write a letter to the "Times." But with respect to the power reserved to the Executive in section 17 of the "Judicature Act, 1879," since the Attorney-General has relied upon our apparent continued acquiescence in its legality, it might be worth while to give the real history of that Act. But it may suffice to say that at every stage of the Bill in its passage through the House, we warned the Attorney-General, with all the energy at our command, of the more than doubtful constitutionality of two sections, viz.: section 14 and section 17, both of which, we urged, would be certainly challenged at some time or other. These two sections, however, the Government insisted on retaining, without condescending to offer any argument or explana-

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tion. How just the apprehensions of the Judges were may appear from this: that section 14 probably gave rise to the *McLean* case, and section 17 has given rise to the present discussion. It is rather too much for even judicial endurance that we should now be taunted with having acquiesced in the legality of the authority thus assumed by the Executive. We have on every legitimate occasion expressed the gravest doubts concerning it.

The fact is, that all through the year 1880 we conceived the intention of the Executive to be to work out the "Judicature Act, 1879," in a useful and proper way, upon the plan which we suggested to the Government, and almost exactly as we should have done ourselves, viz., following as closely and literally as possible the lines of the English rules, the "Supreme Court Rules, 1880," being little else than a transcript of the English Rules, with geographical modifications. And, possibly, if the power rightly or wrongly assumed by the Local Legislature had been exercised in a way useful, or at least not intolerable, to the suitors, no question would even now have been raised as to the legality of their assumptions. But at the very end of 1880 two other Acts, the "Better Administration of Justice Act, 1878," and the "Judicial District Act, 1879," came into operation. Against both of these Acts the Judges had made strong protests, on the ground of unconstitutionality in some of their chief provisions; but both of them had been left to their operation by the Dominion Ministry. That, of course, cannot give them any validity which they do not otherwise possess. The direct effects of these Acts was to split up the Supreme Court into four District Courts, to be conducted each before a Judge of the Supreme Court, banishable into remote districts, and removable from one district to the other at the dictation of the local Executive: exactly the contrary policy to that of the "Judicature Act, 1879." And they cast upon the Supreme Court Judges, as an obligation, all the duties of the County Court Judges—all whose judicial duties we had from time to time assumed when necessary, in our discretion, under the Ordinance of 1867 (passed before Confederation). But, indirectly, these Acts did much more. By virtue of the "Mining Act, 1873," the Supreme Court Judge in each district would have to perform all the duties of a Gold Commissioner, including the duty of collecting petty fees and payments, and accounting for the same to the Provincial Treasurer. For it seems clear that if the Local Legislature can arbitrarily impose on a Supreme Court Judge the duties of a County Court Judge, it can with equal autocracy impose, and has imposed, on a County Court Judge the duty of a Gold Commissioner; and if it can do this, I do not see why it has not equal authority to impose on a Supreme Court Judge any other duty in the Province, judicial or ministerial. By the "Mineral Act, 1878," it has equally imposed on every Supreme Court Judge in British Columbia (for gold mining is carried on in every "Judicial District") the duty of holding Mining Courts daily throughout the year (Sundays and holidays excepted).

All these Acts or results seem logically to stand or fall together. If any one be constitutional they seem to be all constitutional, and to carry with them the above conclusions. But against these conclusions, or some of them, every Judge now on the bench has protested, and flatly refused to obey. And the introduction of such laws here has compelled the Judges to look more closely than they were previously inclined to look into the authority for these usurpations.

Up to the year 1880, the constitutionality of Statutes created by derivative Legislatures had been but little considered, at least in the British Courts of Justice; nor had it much engaged the attention of British text writers. But *Leprohon's* case (40 U. C. R., p. 478; 2 Ont., App. 522), 1878; *Valin* v. *Langlois* (3 Can. S. C. R., p. 1, L. R. 5 App., Cas. 115, in 1879); *Regina* v. *Burah* (L. R. 3 App. Cas., 889) in 1878, *Todd* on Colonial Parliamentary Government, and *Doutre* (both published 1880), and *Cooley's* Constitutional Limitations (4th edition 1880, the first which was brought to our notice) could not escape our attention; and compelled us, even had there been nothing unusual in the local Statutes here, to consider their validity in the light of these quite modern discussions I should be ashamed to admit that these authorities have not enabled me to see more clearly distinctions which up to 1880 I had never been called upon to formulate and define. But I may say that ever since 1872 I have more or less closely expressed similar views, nor have I stood alone. For instance, ever since 1876 the Judges of the Supreme Court have insisted upon the two main positions on which *Valin* v. *Langlois* and *Leprohon* v. *City of Ottawa* were afterwards determined, and that in the most practical way; we rejected the demands of the Provincial tax-gatherer when he endeavoured to levy income-tax on our judicial salaries; and we took among other grounds the following: 1st. That we were Dominion officials (afterwards so implied, necessarily, in *Valin* v. *Langlois*). 2nd. That the local Legislature had no power to tax Dominion salaries (afterwards so held in *Leprohon's* case). And though the tax-gatherer twice, or thrice I think, repeated his demands, the Government never attempted to enforce them. This, however, was only a passive resistance, though very clear, and acquiesced in. Again, if I may refer to a matter entirely personal to myself, when I had occasion to apply for leave of absence in 1874, I applied to the Dominion Government, as being a Dominion officer; sending my application, of course, through the hands of the local Executive. And though that was opposed by the local Executive, who insisted that they alone had the power to grant or refuse leave, and declined to forward my application, and although, in order to save time, I complied with their wishes on that occasion, yet I felt bound to offer apologetic explanations (which were graciously accepted) to the Dominion authorities at Ottawa; and my view was upheld there, and the local Executive were informed to that effect; and now, when a Judge desires leave, he applies to the Dominion authorities alone. Of course they

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receive and consider any report which the local Executive may think proper to make as to the local convenience in granting leave; but the Dominion alone grants or refuses leave. How can they have this power if the Judge is a purely Provincial officer? So that the local Executive is not without notice of the views expressed to-day. Still, if it had been merely the Judges who were personally inconvenienced by recent legislation, matters might never have come to an issue. But what has brought this question at length into serious argument and necessitated the expression of a judicial opinion by us is the recent Act of the local Legislature, by which suitors are debarred from having any *nisi prius* decision reviewed except at intervals of a whole year. And in the examination of the question whether such a denial, or at least delay, of justice is within the competence of the local Legislature, principles must be laid down which no doubt deal with an important portion of the local legislation here within the past few years.

Mr. Justice *Cooley* in his treatise on Constitutional Limitations (page 195) says: "A Judge, conscious of the fallibility of human judgment, "will shrink from exercising this power of declaring an Act of the "Legislature void in any case in which he can, conscientiously and with "a due regard to his duty and official oath, decline the responsibility. " * * But when Courts are required to enforce the law as it stands "on two statutes, one local, the other paramount, they must enforce the "latter whenever the local law comes into conflict with it." Elsewhere he says that "the jurisdiction is only to be undertaken with reluctance, "and will be left for consideration until a case arises which cannot be "disposed of without considering it, and when consequently a decision "on the point becomes unavoidable." (Page 199.) But when it becomes necessary to decide on the unconstitutionality the Court cannot refuse to do so.

Mr. Justice *Cooley's* treatise did not reach Victoria until a year ago, but this extract describes very accurately the condition which this Court has actually pursued since April, 1879.

Having therefore noticed the greater part of the views pressed upon us by the Attorney-General, which in our opinion were not very important to be considered at all, and which we dismiss as not touching the real point at issue, we turn to examine the constitutionality of the impeached sections by the only test to which we can apply, viz.: the "British North America Act, 1867," the "paramount statute," to use Mr. Justice *Cooley's* words; and the only questions we can entertain are those stated by Lord *Selborne* in *Regina* v. *Burah*, L. R., 3 App. Cas., page 905, viz.: Is this thing which has been done legislation? Is it within the general scope of the words which affirmatively give the power? Does it violate any express condition or restriction in the creating Act (or in any other Imperial Act) by which that power is limited? I think these questions should be answered unfavourably for the constitutionality of the sections now impeached. The rule is

stated to much the same effect by Mr. Justice *Cooley* (Constitutional Limitation, page 204.)

The impeached sections are sections 28 and 32 of the local Act, 1881, chapter 1; section 28 is as follows:—

"The Judges of the Supreme Court shall have power to sit together "in the City of Victoria as a Full Court, and any three shall constitute "a quorum, and such Full Court shall be held only once in each year, "at such time as may be fixed by Rules of Court."

And section 32 runs thus, so far as is material:—

"The Supreme Court Rules, 1880, shall, as modified by this Act, be "valid * * and the Lieutenant-Governor in Council shall have "power to vary, amend, or rescind any of these Rules, or make new "Rules, provided the same are not inconsistent with this Act, for the "purpose of carrying out the scope and aim of this Act and of the "'Better Administration of Justice Act, 1878.' The said Rules need not "be uniform, but may vary as to different districts in the Province "as circumstances may require; and section 17 of the 'Judicature "'Act, 1879,' with respect to Rules of Court shall continue to be in "force, subject to such proviso."

(Section 17 of the Act of 1879 directs all Rules of Court to be made by Order in Council.)

These sections must stand or fall as they agree or disagree with the "British North America Act, 1867." I do not know whether the Act, 1881, chapter 1, has been disallowed at Ottawa, or whether it has been left to its operation. It is quite clear that if originally unconstitutional it cannot be in any degree confirmed by being left to its operation, which merely means the absence of any formal condemnation by the Governor-General's constitutional legal advisers.

I shall endeavour to show: 1st. That these sections deal with a matter, and in a manner, that is not either expressly or by reasonable implication, affirmatively placed within the power of the local Legislature. This, I think, can be established without going beyond section 92 and its sub-sections. But if we look at the rest of the British North America Act I think it will also clearly appear: 2nd. That the impeached sections infringe the plain words of other sections of the British North America Act, and are repugnant to its manifest intentions.

The only part of the British North America Act, so far as I can see, which can warrant the recent local legislation is to be found in section 92 and two of its sub-sections.

Section 92 is in these words: "In each Province the Legislature may "exclusively make laws in relation to matters coming within the classes "of subjects next hereinafter enumerated, viz.:—

"Sub-section 13. Property and civil rights in the Province.

"Sub-section 14. The administration of justice in the Province, "including the constitution, maintenance and organization of Provin-

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"cial Courts, both of Civil and Criminal jurisdiction, and including "procedure in civil matters in those Courts."

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It must throughout be borne in mind that by the immediately preceding section, 91, every topic of legislation was swept into the power —the exclusive power—of the Parliament of Canada (viz.: the Crown, the Senate and Commons of Canada) except only such matters as by this Act—not by any one section of it, but by the whole Act,—are exclusively assigned to the Local Legislatures. If, therefore, a conflict arises between any general words in section 92, and general words in any other part of the Act, or between express words in section 92, and express words in any other part of the Act, so that any matter which might otherwise have been supposed to be included in the terms of section 92 or its sub-sections, is also equally placed under Dominion control in some other part of the Act, and thus not given exclusively to the Province, then by virtue of the sweeping force of the words in section 91 the Parliament of Canada has sole cognizance of such matter. For it would be contrary to common sense to suppose that the extremely careful framers of this British North America Act intended to permit a joint authority in two entirely differently constituted bodies (the Parliament of Canada being composed of the Queen, Senate and House of Commons of the whole Dominion, and the Local Legislature, consisting merely of the Lieutenant-Governor and local House of Assembly), and that, too, at the very moment when they were taking pains to distinguish and separate them. And the express words of the second branch of section 91 shows that when any authority is conferred on the Dominion Legislature, it was intended to be an exclusive authority. We must also bear in mind that the matters enumerated in the sub-sections of section 91 are not to be looked upon as limiting the power of Parliament; and that on the other hand all the sub-sections in section 92 (so far as they are exclusive) are exceptions out of the otherwise universal grant to the Parliament of Canada in the first part of section 91.

The first thing to be observed upon section 92 is, that its object and intention as well as express phraseology is to confer a legislative power on a legislative body. The words of sub-section 13 and the first part of sub-section 14 are extremely comprehensive. If they stood alone; if "civil rights and the administration of justice" were handed over to be dealt with by any one department of the Provincial Government, the grant would cover everything that can be done by any of the three branches of civil government, the legislative, the judiciary, and the executive. But the sub-sections do not stand alone; nor do they contain any words of grant. They are entirely governed and controlled by the operative words in the body of the section; and merely enumerate the topics upon which the grant is to be exercised. And the grant is to a purely legislative body, of purely legislative functions; viz., a grant of power "to make laws" in relation to civil rights and

the administration of justice; and there is no grant here to the Local Legislature enabling them to exercise either judicial or executive powers or functions in respect of any of the enumerated topics.

In defining, asserting, ascertaining and protecting civil rights,—in administering justice, the share of the Legislature is probably the most important. But the Legislature has only a share in the work. A very important share in all this business belongs to the judiciary; a very important share to the Executive alone; and it could not have been intended to give to the Legislature power to perform both judicial and executive functions; and at all events it has not been expressly given. No part of the administration of justice probably is more important than the safe custody of alleged criminals and the punishment of persons convicted. For these purposes the Legislature have authority to legislate—to provide that prisons shall be built and constables appointed. But they cannot carry out their own commands; they cannot contract for the building of a lock-up, or appoint a constable, or determine whether an accused person is guilty, or whether a constable does his duty. These matters are clearly left to the Executive and to the Courts. The gift of power to legislate in relation to the administration of justice, therefore, does not give to a Legislature power to interfere in every particular involved in that subject; but only in those particulars which are the proper subjects of legislation. This may perhaps be made a little clearer by supposing a converse case. Suppose that the Courts of Justice in each Province were by the British North America Act charged expressly (as they are indeed most clearly charged impliedly) with the care of civil rights and the administration of justice, would it for a moment be contended that that authorized them to *legislate* in reference to civil rights or the administration of justice? And still less would such a power be implied if they were directed to render all such judgments and exercise all judicial authority as may be required for the maintenance of civil rights and in reference to the administration of justice. Nothing but judicial powers would be conferred thereby on the Courts. And so, I think, nothing but essentially legislative functions are conferred by section 92, which grants to a legislative body power "to make laws" in relation to civil rights and the administration of justice. There might be somewhat to be said against this view if it reduced section 92 to a barren grant; if there were nothing left upon which the grant could operate. But this is by no means the case. The argument leaves to the Local Legislature, fully and unimpaired, all essentially legislative functions in respect to all the matters enumerated in section 92; all matters of substantive law; all, surely, that could have been intended to be given to the Legislature of the Province. The management of public lands and works, a large part of taxation, the whole law of inheritance to real and personal property, the rights of creditors against the person and property of their debtors, of husband and wife, the law of juries and attorneys, and numberless other matters are left to the Local

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Legislature; executive and judicial functions, however, are not given, and therefore are expressly forbidden to them, even in regard to these topics.

The necessity, especially in a constitutional Government, of distinguishing between the functions of the Legislature, of the Executive, and of the Judiciary, requires no comment. It is a necessity indeed which may be said only to exist in a constitutional Government; for if these functions be allowed to be usurped by any one branch, the Government will cease to be constitutional, and will be in reality a despotism; whether vested in a Louis XIV., in a Venetian Council of Ten, or in a Long Parliament. And this may be one of the meanings of *Lord Burleigh's* apothegm, "That England can never be ruined but by a Parliament." "Public liberty," says *Blackstone* (2 Stephen Blackstone, 493) "cannot subsist long in any State unless the admin-"istration of common justice be in some degree separated both from "the Legislative and the Executive power." And Chief Justice *Harrison* in his luminous judgment in *Leprohon's* case insists on the importance of preserving the distinction (40 U. C. R., 488.)

As to the line of demarcation between the Legislature and the Executive, it has been well observed by a distinguished writer (*Doutre*, Constitution Canada, page 104), that in a constitutional Government "the Executive is merely the committee of management of the "party which has the majority in Parliament." Differences of opinion, therefore, as to whether any particular exercise of authority belongs of right purely to the Legislature, or purely to the Executive, are not very likely to arise. And if any act of either should be called in question by the minority, as an encroachment on the other, the majority in Parliament will generally sustain the action of their own committee, or be sustained by them, as the case may be. And this is especially probable in a single chamber constitution. But it is not necessary here to enquire into the boundaries between the functions of the Legislature and of the Executive. We shall endeavour, however, to distinguish to some extent the functions of the Legislature and of the Judiciary, and in the first place consider the subject of procedure, which, in the case of a Superior Court, is generally allowed to be under the control of that Court. But then, what is procedure? What is not?

It is clear that a Court of Justice ought not, under colour of regulating practice or procedure, either to make a new law, or repeal an old law, affecting a suitor's rights in anything which may be the subject matter of a suit. But the forms, and the times, and the proofs to be observed and adduced in claiming those rights are matters for the Court to determine; unless the power be taken away. These constitute, I think, what may be called the procedure of the Court. Even such a matter as the limitation of actions in point of time is part of the *modus procedendi* (*Story's* Conflict of Laws, page 577, section 99, and the authorities there quoted). So is evidence (*Taylor's* Evidence,

section 41). And as to moulding the commencement of actions, that was so completely in the hands of the Courts, that each had its own forms of writs; and it was in order to bring about uniformity of practice that the Imperial Parliament from time to time interfered in all these matters, as it had a right to do by virtue of its sovereign authority. But no Legislature not sovereign can interfere with or alter the procedure in a Superior Court unless special authority to do so be conferred on it by the Sovereign, *i.e.*, here, by the Imperial Parliament. This power of Superior Courts is, I think, undoubted. It is called a common law right (3 *Chitty's* Statutes, 3rd. Ed., p. 694, and the authorities there quoted, and *Ex. p. Story* 8 Exch. 198). When the Imperial Parliament has intervened, it has generally been cautious not to cast doubt upon the power of the Court (as in the Common Law Procedure Act, 1852, 15 and 16 Vic., c. 76, sec. 223, *sub finem*). But this leaves the question still open, whether any particular matter is matter of procedure, or of substantive right or law.

The question was very clearly raised and discussed, but not, I think, decided, in *Poyser* v. *Minors* (L. R. 7 Q. B. D at p 331). There the proper quorum of County Court Judges had established, as a rule of County Court procedure, Rule 9 of the Schedule to the Judicature Act, 1873, (giving a very stringent effect to all judgments of nonsuit). The majority of the Court of Appeal gave effect to that rule of Court, treating it as concerning a matter of procedure merely. Lord Justice *Bramwell* dissented, thinking that this was a matter of substantive law, and so, not within the competency of a quorum of County Court Judges to establish. The actual decision in *Poyser* v. *Minors* could perhaps be supported in either view. If the rule there discussed were matter of procedure, then the County Court Judges had power to establish it. If it were substantive law, then being in fact a provision of the schedule of the Imperial Judicature Act, 1873, which by section 69 is part of the Act, it became by section 91 binding on all County Courts as well as on the High Court, whether they adopted it by general order or not. The majority of the Court in *Poyser* v. *Minors*, and *Bramwell*, L. J. himself in *Pellas* v. *Neptune Insurance Company* (L. R. 5, C. P. D. 40), however, clearly expressed the opinion that the phraseology in the Judicature Acts of 1873 and 1875, amounts to a legislative declaration that all the topics treated of in those schedules are matters of pure procedure, and on that account, within the cognizance of the Judges to regulate.

"'Practice,' in its larger sense," says the lamented *Lush*, L. J., in delivering the judgment of the Court in *Poyser* v. *Minors* (page 333), "the sense in which it was obviously used in the Act of 1856, like "'procedure' which is used in the Judicature Acts, denotes the mode of "proceeding by which a legal right is enforced, as distinguished from "the law which gives or defines the right, and which, by means of the "proceeding, the Court is to administer the machinery, as distinguished

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"from its product." If it be lawful for me to put a gloss on the words of that distinguished Judge, I should be inclined to say that the "Rules of Court" with which we more immediately have to deal, do not even mean the machinery, but are merely directions for using the machinery, including announcements by the managers of the department, of the times at which the machinery may be employed. "The Orders and "Rules under the Judicature Acts 1873, 1875, are matters of procedure, "and are not intended to alter the law or the rights of parties," says *Bramwell*, L. J., delivering the judgment of the Court of Appeal in *Pellas* v. *Neptune Ins. Co.* (L. R., 5 C. P. D., see page 41). The words "legal right," used by *Lush*, L. J., and "law," and "rights of parties," used by *Bramwell*, L. J., mean clearly what *Lush*, L. J., terms a "product," something quite different from the "right" which every suitor has to the benefit of the "machinery," or of the directions for using the machinery; though, owing to the poverty of language, the same word "right" may be applied in both cases. And it seems clear that it is only the "product" mentioned by *Lush*, L. J., which comes within the meaning of section 92 of the British North America Act, and which the local Legislature has power to deal with. If we had now to decide that point we should probably follow those Judges. But it is not necessary to go quite so far. The only point actually arising for decision is as to the alleged restriction in section 28 on the sitting of a Full Court for a whole year, and the attempt to give to the local Executive authority to appoint our sittings. It is more important to observe that what the Imperial Parliament has done is no sure test of what a local Legislature may do;—and that not even the Imperial Parliament has ever meddled with the point of procedure now in question, viz.: the fixing the days or intervals of holding Full Courts, or as they are termed in the English Statutes, Divisional Courts, for the review of *nisi prius* decisions. That has always been left to the discretion of the Judges to fix from time to time according to the requirements of the suitors and the state of other business before the Courts. And accordingly it is notorious that such announcements are made from the Bench from day to day as occasion requires. No Legislature, nor any other body than the Judiciary, actually engaged in the conduct of business, can arrange such matters with tolerable propriety or convenience to the public. Whatever may be said of some topics, this, at all events, is pure procedure, and essentially of judicial cognizance. It is not a legislative function at all, any more than the adjournment of a part heard case. It consequently is not included in any general gift of legislative power. And, therefore, it is not conferred by the gift to a legislative body of "a power to make laws in "reference to civil rights and the administration of justice." And not being within the power of the Legislature to deal with it themselves, they cannot transmit any authority in that behalf to any other body, apart from the doctrine in *Regina* v. *Burah*, which I shall examine presently. If the Imperial Parliament may and does from time to

time thus interfere beyond its proper legislative functions, that is by virtue of its universal sovereignty. No derivative Legislature may do so, unless especially authorized in that behalf. Mr. Justice *Comstock* says: "Aside from the special limitations of the Constitution" (*i. e.*, in our case the British North America Act), "the Legislature cannot "exercise powers which are in their nature essentially executive or "judicial." "We are only at liberty," says *Cooley* "to liken the power "of State Legislatures to that of the Imperial Parliament when they "confine their action to the exercise of legislative powers; and such "authority as is in its nature either judicial or executive, is beyond their constitutional power" (pages 108, 110)—unless, I would add, authority to overstep ordinary legislative limits be expressly given in and by the creating Statute. *Cooley* is speaking of the States Legislatures, who have received, he says, certain powers from their Sovereign, the people; but his remarks are, I think, exactly applicable to the Provincial Legislatures created by the British North America Act, who have received certain powers from their Sovereign, the Queen in Parliament. And he says that a grant of legislative authority, though as plenary as that of the Imperial Parliament while exercised on matters essentially of legislation, does not enable the local Legislature to extend its hand into matters properly judicial, although the Imperial Parliament might do so, and might by express words have authorized them to do so, if it had seemed proper. The Imperial Parliament, in its absolute sovereignty, can neglect at will fundamental principles. Further on he says, page 211: "When only legislative power is given "to one department and only judicial power to another, it becomes "quite unimportant that the Legislature is not expressly forbidden to "try causes, or the Judiciary to make laws. The assumption of judicial "functions by the Legislature is in such case unconstitutional even "though not expressly forbidden; for it is inconsistent with the pro-"visions which have conferred on another department the powers which "the (local) Legislature is seeking to exercise." It must be admitted that section 92 confers expressly nothing other than legislative powers. The words are clear: a "power to make laws," and nothing else.

But if this view be as far wrong as it seems to me to be clearly right; if the appointment of the days for holding a Full Court be a matter of substantive law, and so requires to be determined by a legislative body, and if that body so entrusted by the British North America Act be the local Legislature, then the determination of it is an act of pure legislation, which the sections now impeached attempt to hand over to another body, viz.: to the Lieutenant-Governor in Council. And this according to the *dicta* in *Regina* v. *Burah* is clearly beyond the limits of their powers. It would be "to create a new legis-"lative power not created nor authorized by" the British North America Act.

That case was very much relied by the Attorney-General as a complete justification of his attribution of "omnipotence" to the local

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Legislature, and he repeatedly cited *Lord Selborne's* expressions at the foot of page 904 of the report, viz.: "But their Lordships are of opinion "that the doctrine of the majority of the Court (below) is erroneous, "and that it rests on a mistaken view of the powers of the Indian "Legislature, and indeed of the nature and principles of legisla- "tion. The Indian Legislature has powers expressly limited by "the Act of the Imperial Parliament which created it, and it can, of "course, do nothing beyond the limits which circumscribe these powers. "But, when acting within those limits it is not in any sense an agent or "delegate of the Imperial Parliament, but has, and was intended to "have, plenary powers of legislation, as large, and of the same nature, "as those of (the Imperial) Parliament itself." But these words, in which I perfectly agree, and which would be binding on me even if I could not concur in the reasoning, appear to me to have been completely misunderstood here. They are, in fact, completely conformable with, and lend the highest sanction to, the principles I shall lay down. But in order to understand the passage, it really must not be cut off from the immediately preceding and succeeding context at the top of the same page and at the top of the next. *Lord Selborne*, after saying (page 904) that the Court below had examined whether the clause there impeached was within the competence of the Indian Legislature on the principle "*delegatus non potest delegari*," says, in the passage just quoted, "That is not at all a principle to apply. A derivative "Legislature is not a delegate of its creator; but has, within its limits, "as plenary powers as its originator." But then he proceeds immediately to say (page 905): "We quite agree that the Indian Council "could not by any form of enactment create, in India, and arm with "general legislative authority, a new legislative power, not created nor "authorized by the Councils' Act" (the Imperial Act creating the Indian Legislature)—not on the principle *delegatus*, &c., but because that power of creating a subsidiary Legislature had not been granted by the Imperial Act, and the Indian Legislative Committee would have been going beyond their limits if they had attempted to create such a thing. Now that is precisely the case in the British North America Act; it confers on the local Legislature no power to create a new Legislature, nor contemplates legislative powers being handed over to the Lieutenant-Governor in Council. And then in page 905 *Lord Selborne* goes on to say, "Nothing of that kind has, in our opinion, been done or attempted here," and states what, in the opinion of the Privy Council, actually had been done, viz.: the legislation and all its provisions were complete; the proper authority had applied its attention to the principles and details of the measure and a law, pure and simple, was handed over to the Lieutenant-Governor to say in what territorial districts of his territory it should be applied, and at what date; as soon as these were fixed, everything else, that could be called legislation, had been fixed and prepared for him beforehand. But it is clear from the expressions in page 905, quoted above, what the opinion of the

Privy Council would have been, if the impeached law had handed it over to the Lieutenant-Governor to make laws in any district of his presidency, as well as to fix the times and districts in which the laws so to be made by him should come into effect. This was the only question raised and decided in *Regina* v. *Burah*. The effect of the other sections of the impeached statute was not called in question (page 895, page 903) nor taken into their Lordships' consideration. The Privy Council held that what had been done in this impeached part was merely conditional legislation, not an attempt to create a distinct legislative body. See also, the expressions of Chief Justice *Hagarty* in *Regina* v. *Hodge* (46 U. C. R., pp. 151, 152).

As to this first point, therefore, the argument on section 92, sub-sections 13 and 14, taken alone, stand thus: This power of fixing the sittings of the Full Court is matter of pure procedure, *i. e.*, of merely judicial cognizance; and, therefore, the local Legislature has no authority over it at all—it never was given to them. But if that view be held erroneous, and if this power be deemed a matter essentially legislative in its nature, then the local Legislature must provide for it themselves; they have no authority to empower the Executive Council to make provision for it. And this latter conclusion might, but for one thing, have been deemed to have been the conclusion of the advisers of the Legislature a year ago, when they inserted in that section 32 of the Act of 1881, c. 1, the words confirming and giving a statutory force to all the "Supreme Court Rules, 1880." These Rules had theretofore stood on the authority of the local Executive, claiming to be duly empowered thereto by section 17 of the Act of 1879. It might almost have been conjectured that it was, in 1881, suspected by the local Government that this section 17 was *ultra vires*, according to *Regina* v. *Burah*, were it not that the very same error is committed over again in the very same section; and even a grosser error; for in that very section 32 the Legislature gives power to the Executive not only to make laws (if these Rules of Court are laws), but to repeal and alter what has just been decreed to be statutory law. Exclusive authority to make laws regulating our procedure is not given by the B. N. A. Act expressly to the Provincial Legislsture. It is, therefore, given to the Dominion Legislature: these Courts being also Dominion Courts, yet the local Legislature has assumed to authorize the Provincial Executive to regulate, and these rules are the result. How can it be said that the proper mind has been applied to the subject?

The Attorney-General, however, further insisted that the Supreme Court here fell within the description in the latter part of sub-section 14, viz.: "including the constitution, maintenance, and organization of "Provincial Courts, both of civil and criminal jurisdiction, and including "procedure in civil matters in those Courts," and he claimed under those words full and express authority to deal with civil procedure in all Courts, including the Supreme Court. But it seems as clear as words can

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speak, that the procedure thus handed over to be provided for (not, I think, to be set forth in detail) by the local Legislature, is the procedure in "those" Courts, viz.: in the Courts mentioned in the immediately preceding words; the only Courts mentioned in the whole 92nd section; Provincial Courts, that is to say, in the strictest sense of the term, which the local Legislature is, by that sub-section, authorized, at any future time, to "constitute, maintain, and organize," and by sub-section 4 of section 92 is specially empowered to pay. It seems perfectly impossible that this description can mean a Court which was fully constituted not by the Province at all, but long before the Province came into existence, and having that constitution secured to it by section 129 (British North America Act), till varied by Dominion legislation; a Court, of which the Judges are appointed and maintained and removable by the Dominion authorities alone (sections 96, 99, 100, British North America Act).

The introduction of the latter part of this sub-section 14 does not seem to assist, but greatly militates against, the Attorney-General's contention, that the first words alone "power to make laws in relation "to the administration of justice" were intended to confer absolute power over all Courts in British Columbia, together with their procedure and everything therewith connected. For if such had been the intention of the first grant, nothing can be weaker than to add, "and this "grant shall include the constitution, maintenance, and organization of "Provincial Courts," and then still further to add: "and shall also "include civil procedure in those Courts,"—showing that a power "to "make laws for constituting, maintaining and organizing Courts" was not thought enough of itself to carry a "power to make laws in "reference to procedure" even in "those" Courts without special words; and that such an express grant was necessary in order to confer any power to legislate on the procedure even in those inferior Courts. This seems quite incompatible with the Attorney-General's contention, that no express words whatever were necessary to confer absolute power over every point of procedure in the Supreme Court. The section, so far as sub-sections 13 and 14 are concerned, amounts to this: The local "Legislature may make laws in reference to property and civil "rights, and also the administration of justice; and those laws may "include laws for the constitution, maintenance, and organization of "Provincial Courts, (*i. e.*, Courts of the Province after Confederation); "and may include provisions in reference to civil procedure in the "Courts so constituted, maintained, and organized." In fact it seems clear that the Courts here contemplated must be subordinate to the Supreme Court. Otherwise, if of co-equal authority, they would be at the least Superior Courts, and so by sections 96, 99, and 100 the Judges would have to be appointed and maintained, and removed when necessary, by the Dominion alone; which, according to the views of the Judges in *Valin* v. *Langlois* (3 Can., S. C. R. 1), would make them officers of Canada, and so, by the British North America Act itself,

(section 129) under the control of the Parliament of Canada as to their jurisdiction, procedure, and everything else, and not under the local Legislature; which is contrary to the hypothesis, and absurd. These Courts, therefore, contemplated in the latter part of sub-section 14, are inferior Courts, including, most probably, all such Courts as Courts of Oyer and Terminer, &c., Courts of Justices of the Peace, Coroners, Gold Commissioners, Sheriffs' Courts, etc. And it may well be supposed that when such local Courts suggested themselves to the framers of the British North America Act as possible, the question arose, "what "is to be done about procedure in these Courts? In Superior Courts "the Judges, we know, have power to make rules; but in these Courts "who shall settle their practice?" and Parliament said, "Let the local "Legislature decide that."

The case would stand thus, therefore, on the bare words of section 92, sub-sections 13 and 14, and without considering *Lord Selborne's* second test, "Is there anything in the rest of the British North America "Act incompatible with the evidence of this power in the local Legis- "true?" And the answer to this is, I think, not far to seek. It is not only extremely clear on the Act itself, but has in effect been judicially settled by the ultimate authority in Canada, approved by the Judicial Committee of the Privy Council.

The steps leading to this conclusion are these: By section 96 the Judges are to be appointed by the Governor-General. By section 99 they are removable by the same authority, on the address of the Senate and House of Commons. By section 100 they are wholly maintained by the Parliament of Canada. The Province has no voice in any of these matters. How can it be said that the Judges are exclusively Provincial officers? And if not exclusively Provincial, then they are officers of Canada. "If an officer is employed by the United States," says Chief Justice *Marshall*, "he is an officer of the United States." (*United States* v. *Maurice*, 2 Brock, 102). The Governor-General directly represents and, so to speak, personates the Queen. The Lieutenant-Governor, from whom strictly Provincial appointments emanate, only represents the Governor-General. The effect of the appointments is different accordingly. Surely the Judges of the Supreme Courts, selected, commissioned, and paid, and removable by Canada, are employed by Canada, and so, officers of Canada. On that very ground the Province has abandoned their claim to tax our incomes; and the Dominion Executive have instructed the Provincial Executive that they alone claim the right of disposing of the Judges' services, as by imposing other duties; and to temporarily dispense with their services, as by granting them leave of absence. These matters are not conclusive evidence of the meaning of the Act; but they are very cogent evidence; deliberate opinions of high Executive authority; repeatedly made by the Dominion, and submitted to by the Province; and what is most important, judicially approved (so far as the question arose) in *Valin*

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v. *Langlois*. In fact, but for the course of British Columbia legislation for the last three or four years, every authority, both of the Dominion and of the Province, would seem to have been entirely of one mind ever since 1874, that the Judges of the Supreme Court in any Province are Dominion officials. The consequences are not far off. By section 129 (upon the importance of which in this argument the Judges rely on *Valin* v. *Langlois*)—"All laws in force in Canada, Nova Scotia, or "or New Brunswick at the Union, and all Courts of Civil and "Criminal Jurisdiction, and all legal commissions, powers and author- "ities, and all officers, judicial, administrative, and ministerial existing "therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, "and New Brunswick, respectively, as if the Union had not been made; "subject nevertheless . . . to be repealed, abolished, or altered by "Parliament of Canada, or by the Legislature of the respective Prov- "ince according to the authority of the Parliament or of that Legislature "under this Act."

Now it is perfectly undoubted that the Supreme Court of British Columbia, and two of its present Judges, existed in the Colony of British Columbia at the time of the Union. They, therefore, continued to exist in the Province since the Union; and so do their commissions, their powers and authorities, as if the Union had not been made. The change of name from "Canada" to "Quebec" and "Ontario" in the above sections is suggestive. It is not that the former Provincial Courts, Judges, &c., in the old sense of "Provincial" are to become "Provincial" in the new sense. On the contrary, the former Courts and Judges with all the powers and jurisdiction over all matters, both in section 91 and section 92, in short, as they existed in the completely autonomous Provinces, are to be continued after the Union in the same geographical limits, though they are now called "Provinces" in quite a different sense. All the Judges appointed since Confederation are by their Commissions expressely to have all the powers and privileges of the other Judges. Among the powers and authorities which the Judges undoubtedly had under the B.C. "Supreme Courts Ordinance, 1869, confirmed by the British Columbia Ordinance, 1870," are all the powers and authorities (which as to rules of procedure are extremely full) of the former Courts of Vancouver Island, and of the Mainland, and of the Judges thereof ("Supreme Courts Ordinance, 1869," s. 11). And besides this, the Act of 1869 gives authority to the Chief Justice alone "from "time to time to make all such orders, rules, and regulations as he shall "think fit, for the proper Administration of Justice in the said Supreme "Court of British Columbia." And this is confirmed, as I have said, by an Ordinance of the ensuing year, immediately before Confederation. All these powers and authorities the section 129 preserves inviolate, until abolished, repealed, or altered by the Dominion Parliament or the Provincial Legislature, according as either shall have authority under the British North America Act. But the Judges are Dominion officers, over whom the Dominion Executive and Parliament have between them,

by sections 96, 99, and 100, the fullest authority, and over whom the Provincial Executive and Legislature have no authority at all discoverable by the Judges in *Valin* v. *Langlois*. The powers and authorities, therefore, by the B. C. Colonial "Supreme Courts Ordinance, 1869," remain intact at this day subject to the powers by section 129 expressly reserved to the Dominion Parliament.

I do not think it can be argued, at any rate it was not argued, that the distributive words at the end of section 129 have reference to the subjects handled by the Courts, officers, &c., and not to the Courts, officers, &c., themselves. In the first place the words of the Statute are perfectly plain, and contain no reference to any particular topics, the passive subjects, *i. e.*, enumerated in sections 91 and 92, but only to persons and their powers, active agents, owing allegiance to the one Legislature or the other. And when construed as such, it is perfectly reasonable and clear. If it be attempted to be applied to the enumerated topics in section 91 and section 92, it leads instantly to quite absurd confusion. It would provide, for instance, that the Dominion Parliament alone had power to legislate concerning the procedure in trying a question in the Supreme Court here concerning the post office, or shipping, or currency, or any of the matters in section 91, or rather, not expressly mentioned in section 92; but that in trying a question on any of the subjects enumerated in section 92, the Provincial Legislature is to have power to determine the procedure. And we should probably have the Dominion Parliament enacting (if it thought fit to legislate on such a topic) that a Full Court might consist of two Judges, and should sit whenever required by the business of the suitors, and on such notice as it should think proper; and the Provincial Legislature declaring that it must consist of three Judges or more, and must not sit oftner than once in a year, or, as was put in argument, once in five years, and at a time appointed by the Executive. Nay, we should have greater confusion still, and indeed, absolute contradiction. For as the Legislature having authority may under section 129 go so far as to abolish these former Courts, it is clear that (if we are to ascertain the respective authority by reference to the enumerated topics in sections 91 and 92) we might have the Dominion Legislature keeping this Court on foot for determining all questions of bankruptcy, currency, &c., and the local Legislature abolishing it so far as regards all questions of inheritance, of legitimacy, or of civil rights generally. And the local Legislatures are to have power to do all this, though they are to have no voice in the removal of a single Judge (section 99). It is, in my opinion, improper to force the words of a statute out of their natural meaning with the sole result of introducing confusion and contradiction. Moreover we must not forget the clear words of section 91. Whatever is not *exclusively* given to the Province falls wholly to the Dominion. And even according to the forced view of the latter part of section 129, which I have been endeavouring to indicate, it is, at all events, quite clear that power over the Supreme Court and pro-

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cedure therein would not thereby be exclusively given to the Province. Therefore, by section 91, it is exclusively given to the Dominion Legislature.

And with this view agrees also section 130, which is to be taken in connection with the concluding words of section 129, which it immediately follows; being in *pari materia*, and, I think, intended to explain them: "Until the Parliament of Canada otherwise provides, all officers "of the several Provinces" (*i. e.* before Confederation) "having duties "to discharge in relation to matters other than those coming within "the classes of subjects assigned exclusively to the Legislatures of the "Provinces" (after Confederation) "shall be officers of Canada, and "shall continue to discharge the duties of their respective offices as if "the Union had not been made."

The Attorney-General treated this clause very briefly, dismissing it as quite irrelevant, though I think even if it stood alone, it would suffice to dispose of the whole case. He said, as well as I could follow him, that it was intended to apply only to officers after Confederation whose duties were confined exclusively to matters outside of subsections 92, 93. But it is evident that this is not the natural meaning which would be put by a person of ordinary understanding on section 130. And an Act of Parliament *loquitur ad vulgus*. In fact, in order to support this meaning, some word like "merely" or "solely" must be introduced, and the tenses employed entirely disregarded. "Having duties" means properly "now having," *i. e.*, at the time of passing the Act, though it might mean "who shall at any time have." But the terminating words "shall continue as if the Union had not been made" show clearly that the section is speaking of officers existing before the Union, *i. e.*, in the "Provinces," while still autonomous, and therefore of officers who might obviously have duties over many matters both in section 91 and also in section 92. As to these officers, a difficulty, it was foreseen, might well be felt, whether they were to fall under the authority of the Dominion Parliament or of the local Legislature, under the distributive words at the close of section 129. Thereupon this section 130, following naturally on the last words of the previous section, is obviously intended to meet that difficulty and explain the position of these officers with dual duties. They shall be officers of Canada. The construction suggested by the Attorney-General, besides the objections pointed out, would lead to this consequence, that the framers of this treaty of Confederation, as it is not improperly termed, thought it worth while to provide for a case which was perfectly clear, and omitted to provide for a difficulty which must have been immediately present to their minds; indeed, forced on them by the concluding words of section 129. There could be no difficulty in the case of officers whose duties were purely of Dominion cognizance, though locally dwelling and working in a Province. In some Province they must dwell, and work, if they were to dwell and work in Canada at

all. The only difficulty that could arise was in the case of officers whose duties partly concerned Canada generally, partly the Province (the statutable Province) alone. This, however, according to the Attorney-General, escaped the notice of the negotiators; and they introduced a merely useless proviso. Useless, even for the Attorney-General's argument; for on no possible construction can it be supposed that section 130 hands over any officer at all to the local Legislature, which is the proposition he has to establish. This proviso, section 130, even as the Attorney-General reads it, certainly gives to the Province no exclusive power over any officer or thing whatever.

There is, indeed, a short sub-section in section 92 which the Attorney-General did not think it necessary to discuss, but which seems wholly irreconcilable with his position that the Supreme Court Judges are merely Provincial officers. I mean the 4th sub-section. The local Legislature shall have power to make laws in relation to "the estab-"lishment and tenure of Provincial offices, and the appointment and "payment of Provincial officers." But by the almost immediately following sections of the British North America Act, it is the Dominion authorities which have to appoint, remove and pay the Judges of the Superior Courts. If these Judges are Provincial officers, it seems to follow that, notwithstanding the words of the sub-section 4, the care (and the duty) of legislating concerning the salaries, etc., of Provincial officers is not, on the whole Act, exclusively reserved to the local Legislature. And without going so far as to say that that care and duty (including provision for the salary of the Attorney-General himself) is therefore wholly cast upon the Dominion Parliament and Government, it seems clear that we should have here, in almost consecutive sections, a very remarkable contradiction if the Act intends "provincial officers" to include Judges of Superior Courts. A similar incongruity, though not leading so directly to a *reductio ad absurdum*, arises on sub-section 8 of section 91, reserving it to the Dominion Parliament exclusively to provide for fixing and paying the salaries of all Dominion officers; surely intending by that term to include the Judges who are spoken of four or five sections further on. There certainly is no express power reserved to the Dominion Parliament to legislate for providing the salary of any Provincial officer, *eo nomine*. In fact, if the Judges of the Superior Courts are taken to be purely Provincial officers, every section of the Act referring either to Provincial or Dominion officers has to be forced, and becomes anomalous. If held to be Dominion officers, the construction immediately becomes natural and harmonious.

All these five sections, viz.: 96, 99, 100, 129, 130, are evidently founded on a fundamental principle of the British North America Act, viz.: that while local legislation, properly so-called, *i. e.*, concerning strictly local matters and rights, was to be handed over absolutely to the respective Provinces, all authority over matters of general import-

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ance to the Dominion was to be retained by the Dominion Legislature. And in order to safeguard these objects, and ensure that this division of functions should be observed, all the Superior, District and County Courts in every Province after Confederation, *i. e.*, in the whole Dominion, were to be presided over by officers of Canada, and to be subject to the control of the Legislature and Executive in Canada,—Courts inferior to these, if created by the local Legislature in any Province, being left to be dealt with by the Legislatures which called them into existence.

And with this seems also to agree section 94, which provides that after the passing by Parliament of an Act for uniformity and civil rights, &c., and procedure throughout the Dominion (confirmed and adopted by the Provinces as therein mentioned) the power of Parliament to make laws in respect of such matters shall be unrestricted. That is to say, not that Parliament shall then for the first time have power, but that the existing restrictions shall then for the first time be removed. There seems to be, as I read the British North America Act, one restriction on the interference of Parliament, and only one, viz., section 129, confining it to Courts held before officers of Canada; and section 94 seems to allude to this. I do not say that this is the only possible grammatical sense of section 94, but this interpretation supports and is supported by many other sections of the Act, whereas any other interpretation seems to raise anomalies. For the language of section 94 and of many other sections seems hardly compatible with the notion that until the passing of such an Act as therein referred to, Parliament is to have no power whatever to legislate concerning a single Court in the whole Dominion; and that by simply refusing consent to any contemplated Act, any Province could for ever condemn the Dominion Parliament to perpetual impotency. This would soon compel Parliament to exercise its undoubted power of extinguishing all the Superior Courts in the Dominion by simply leaving them to perish; and then it would fall back, probably, on the power of creating new Courts under section 101; but whether these would meet the difficulty, *quære.*

There was one suggestion made by the Attorney-General which I had almost forgotton. It appears to me to be very immaterial; but as he insisted on it at some length, I may mention some of my reasons for neglecting it. It was that the "organization and maintenance" of a Court meant something more than the appointment and payment of the Judge or Judges of the Court; that it included, among other things, the appointment and maintenance of all the officers of the Court, Registrars, &c., the providing Court-houses, chambers, &c., preparations for trials of crimes, juries, &c., all which are now provided by the Province and at Provincial expense; and thus, that the Supreme Court of British Columbia has never, since Confederation, been wholly organized or maintained by the Dominion, who have undertaken merely the nomination and the salaries and allowances of the Judges. I am

very much of the Attorney-General's opinion as to one part of his suggestion. I have always thought that the Registrars and officers were part of the Supreme Court, and ought to be designated and maintained by the Dominion authorities alone, both on the words of the British North America Act and on the policy of the thing. I have often pressed my views on the Dominion Government, ever since 1872, and I have never been satisfied that my arguments were met by any attempt at argument on the construction of the Act. I was not likely, therefore, to have omitted this consideration. But it does not seem to govern the present question. Whether the expenses of the Supreme Court of British Columbia are, in the fullest sense of the word, "Courts" wholly defrayed by the Dominion or not, it cannot be said that it is a Court "constituted, maintained, and organized" by the Province within subsection 14. The consideration that the Registrar has hitherto been paid by the Province cannot affect the position that the Judges at least are, according to the reasoning in *Valin* v. *Langlois*, officers of Canada, and subject as such to the authority of the Parliament of Canada; and therefore to that Parliament alone, for they cannot be subject to two different Legislatures at once. It cannot affect the direct and express provisions of section 129, that all the powers and authorities which the Judges (who, at all events, are "judicial officers") had before Confederation are to continue after Confederation, until altered by the Parliament of Canada; nor those of section 130, that we are to "continue to discharge our duties as if the Union had not been made."

These are the principal matters which have suggested themselves to me in considering the recent Acts of the local Legislature. Some of the points on which I have ventured to rely are, I have been told, new; not put forward in any of the text books or reported cases; indeed, rather opposed by the *dicta* in some reports; *e. g.*: (1st) The proper force now for the first time claimed for the word "those," in subsection 14 of section 92. (2nd) The force claimed for the word "exclusive" in section 91, and that the exclusive grant to the Province must appear from the whole Act, not from any particular section. (3rd) The restriction of the grant in section 92 to strictly legislative functions, so that no grant to the local Legislatures is thereby conveyed, or intended to be conveyed, of functions essentially executive or judicial. (4th) The application of *Lord Selborne's dicta* in *R.* v. *Burah* in this way, that if the clauses now impeached deal with a matter essentially judicial, they are not at all within the powers of the local Legislature; if essentially legislative, the power cannot be transferred. (5th) The application of the "exclusive grant" notion to the concluding words of section 129, so that if the Dominion Parliament have thereby any power, the local Legislature have none. (6th) The distinction I have endeavoured to draw between the different senses in which the words "Province," "Provincial," are used; and other instances, perhaps. But the question is not whether these distinctions are new, but whether they are true; and I think they are, and that

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they quite accord with the principles of the decision of the Supreme Court in *Valin* v. *Langlois* (3 Can. S. C. R., 1), and may even, I venture to hope, explain away some carpings and anomalies which have been objected against that decision.

We were reminded that we could not condemn these sections as unconstitutional, merely because we thought them inexpedient; that the question of policy was wholly for the Legislature. That is undoubtedly so; if the local Legislature have the power, they alone must judge of the policy. But I cannot refrain from pointing out that recent legislation seems to aim, not at the administration, but at the non-administration, of justice, and affords a clear proof of the wisdom of the framers of the British North America Act when they removed these matters, as I think it has removed them, from the control of the local Legislature. The effect of the whole scheme is such, that if the Judges of the Supreme Court had of their own mere motion announced the resolution to do what the recent legislation authorizes, and in some respects attempts to command; if we had taken up our residences, one in Queen Charlotte Island, another at Joseph's Prairie, a third on the Similkameen, and the other two at Kamloops and Richfield, and further announced that we would not listen to suitors seeking a review of a *nisi prius* decision, save at intervals of twelve months, it seems highly probable that the indignant and injured suitors might readily have procured addresses from the Senate and House of Commons to remove us from offices, the duties of which it might be truly said we had practically renounced. Not, however, on account of this unreasonableness, nor because it contradicts the text of Magna Charta (an Imperial Act); but for the reasons I have alleged, I think that the provision in section 28 of 1881, chapter 1, forbidding a Full Court to be held save at intervals of a year; and section 32, chapter 1, 1881, and section 17, chapter 20, 1879, so far as they assume to create rules of procedure in the Supreme Court, or to authorize any other body of men to make such rules, are unconstitutional and void.

Mr. *Theodore Davie*, for the plaintiffs, contended that the whole of additional Rules of Court, the so-called "Amendments," must be condemned on this ground: They are founded, in the main, and almost in every detail, also, on the words and spirit of section 32 of the Act, 1881, (viz.) with the paramount object as expressed in that section, of carrying out the local Statutes of 1878 and 1879 with reference to the districting of the Judges of the Supreme Court. That those Acts are all *in pari materia* with the Acts of 1881, c. 1, and therefore must be read together: (*Waterloo* v. *Dobson*, 27 L. J. Q. B. 55), that they are eminently and flagrantly unconstitutional; and that these "amendments," made avowedly in order to carry out unconstitutional Acts, an object to which the rights of the Dominion and the convenience of private suitors are alike sacrificed, must be declared to be of no effect. Mr. *Theodore Davie* further urged that an Act of the local Legislature

may be declared void, judicially, not only for direct conflict with or transgressions of the British North America Act, but for any obvious repugnancy to or hinderance of its intention; according to the observations of *Harrison*, C. J., in *Leprohon's* case (40 U. C. R. 488), and *Hawkins* v. *Gathercole* (1 DeG. M. and G. 1). And, without in the least disputing the power of the local Legislature to divide the Province into such districts as they may think fit (the term "district" since Confederation seems unimportant) and to appoint and maintain in each district such Judge or Judges as they may choose, and who may be able and willing to serve (persons under other engagements would probably require in the first place the sanction of their employers) and to confer on their new Courts such jurisdiction as they pleased (subject always to the review of the Supreme Court), it is of course obvious that there are many grounds on which divers clauses of the "Judicial Districts Acts" may be impeached. They may be said to be directly in the teeth of section 129. Can anything, it may be asked, be more clear and express than section 96 of the British North America Act,—"The "Governor-General shall appoint the Judges of the Superior, District, "and County Courts in each Province?" Can anything be a clearer infraction of that provision than section 3 of the Local Act, 1878, which says that after that Act comes into force the existing County Court Judges shall no longer preside in the County Courts, and that certain other designated persons shall perform all the duties of the County Court Judge? "An office," says *Marshall*, C. J., cited approvingly by *Harrison*, C. J., (40 U. C. R. 491), "is a public charge or employment. "He who performs the duties of the office is an officer. If employed "by the United States he is an officer of the United States." It may well be argued that if the local Legislature can, notwithstanding the above section, arbitrarily forbid any one class of the officers there mentioned to perform the duties of his office, and command such person as they may choose to perform these duties, they may equally displace and appoint substitutes for them all, including the Supreme Court Judges. If these assumptions are legal it would seem, as the Attorney-General alleged, that the local Legislature is really omnipotent; and it is difficult to see why it should not with equal authority depose the Lieutenant-Governor and appoint some other person to perform his duties. It is true, by sections 58, 59, and 60 of the British North America Act, the Lieutenant-Governor in each Province is to be appointed by the Governor-General, removable by the Governor-General, and paid by the Parliament of Canada. But these are precisely the authorities who appoint, remove and pay the Judges of the Superior, District, and County Courts in each Province (District Courts in these sections mean Courts constituted before Confederation). Indeed it might be argued that the position of the Lieutenant-Governor was weaker than that of the Judges of Supreme or County Courts, for these are protected against the efforts of the local Legislature by a special clause, section 129, whereas the Lieutenant-Governor (the office being

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previously unknown) has no such protection. Then as to the indirect unconstitutionality of these Acts, from their intention and effect, Mr. *Davie's* argument was, if possible, stronger. The suitors have a right to the attention and care of all the Judges, in the consideration of the laws. whether made by the Dominion or by the local Legislature. The isolation of two or more Judges in distant localities where they never can have any opportunities of hearing or entering upon any legal argument not only tends to depreciate their judicial power by non-user (*Lord Eldon* used to say that no man was so good a lawyer at the end of the long vacation as he was at the beginning of it), but to deprive their colleagues also of the inestimable advantage of full and confidential discussion; and so tends to disable the whole Bench. For every Judge in turn may be thus banished. It deprives the suitors of the advantage of having their cases decided by the absentees. We are even now deprived of the presence of our colleague, Mr. Justice McCreight. Indeed if there were any difference of opinion between the Judges now in Victoria, that absence would have rendered further delay necessary, as we certainly should not deliver a judgment of this importance by a bare majority, or perhaps by no real majority. The Acts enable the Executive to select which Judge shall try, or shall not try, particular criminals or disputes. For the Acts do not contemplate, apparently, the permanent residence of any one Judge in any one place, but the removal of them at the arbitrary dictation of the local Executive, whenever and wherever they may deem necessary. *Coke* says that the criminal shall not be allowed to select which of several Judges shall try them; it seems conversely that neither should the Crown enjoy that privilege. But the main reason, on grounds of policy, would seem to be that it aims the most direct and scarcely veiled blow at the independence of the Judges. No Judge can tell what new district may be created, or how soon he may be arbitrarily directed to reside at McDame's Creek or Parsley River. It is in vain to say that the selection both of the Judge and of the district is now to be made by the Dominion Executive. They know the Judges merely by name, the districts perhaps not even by name, and must act solely on the information of the local Executive, who would thus acquire complete power to pack the Bench as they pleased, and obtain what decisions might suit them. Independent minded men would not accept or retain their appointments on such terms, and subservient men alone might occupy the seat of judgment in those parts of the Province where suits were likely to occur. It may well be argued, and it was argued, without any answer being attempted, that a grant of power to the Executive (with apparently a Parliamentary direction to use it) to lay down wholly varying rules of practice in different parts of the Province with the express object of carrying out acts *prima facie* unconstitutional, for the avowed purpose of directing the conduct of non-existing Courts and with the result, palpable and obvious, of impeding and, in fact, preventing access to an existing Court, must be for those grounds alone

unconstitutional. And perhaps those grounds would be sufficient if, after agument, we should determine that they were well taken. As these arguments were raised I noticed them. I give no opinion on them, because I think the sole point before me may be quite satisfactorily decided in the answer to these questions: 1st. Are the sections 28 and 32 of the Act of 1881 (so far as they go to restrain the sitting of a Full Court and to authorize the Lieutenant-Governor in Council to appoint the time of the sitting of a Full Court) authorized by the British North America Act? And secondly, do the "Amend-"ments" (I assume them to be issued in the proper form of an Order in Council) contain rules and regulations binding on the Court or the suitors? And I am of opinion that the impeached sections and amendments are invalid on both those grounds; that there are no words in the Act which confer on the local Legislature the power it has assumed; and that there are several clauses in the Act which designate other authorities as being invested with that power. The consequence is, I think, those sections are unconstitutional and void, so far as they enact or provide for the enactment of rules of procedure in the Supreme Court, and the so-called "Amendments" must fall with them. We shall immediately consider what steps should be taken for the relief of the suitors in this difficulty.

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In forming a judgment upon a case argued at such length, and with so many authorities, upon matters which are of such grave importance—not only to one Province, but to the whole Dominion—it is necessary, as much as possible, to narrow and define the issues that have to be authoritatively determined by our decision. For that purpose, it is advisable to clear off, as far as may usefully be done, all points and subjects of a preliminary nature, that we may address ourselves to the task immediately before us, viz., that of forming a judgment, whether we can hear the appellants, and how? We have to render a decision in the case. That will be found an enquiry of engrossing interest. In considering this, however, we are not at liberty to follow the plan which the learned Attorney-General—having no connection with the "Thrasher" case, and intervening only, as *amicus curiæ*, at the suggestion of the Court, and himself unfettered—was enabled to adopt; but we have to recollect that our office, in the first instance, is to determine, if possible, the case before us; to give the relief sought, or, failing that, to point to the best means available for procuring a proper hearing for the appellants before a suitable tribunal; with an ultimate view to a final appeal to the Supreme Court of Canada, perhaps even to the Privy Council in England.

The point which first presents itself for determination is:—

Are we a Full Court under Rule 401A of the amendments to the "Supreme Court Rules, 1880," which prescribes that "Sittings of the

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"Full Court shall be held in Victoria for the year 1881 on Monday, "the 19th day of December,"—and able thereunder to dispose of the "Thrasher" case so as to enable the parties dissatisfied to appeal to a higher Court?

If we are not a Full Court under that assumed authority, are we, or can we become, able, as a Full Court of the Supreme Court, in any other way, to give the relief sought? If so, it will be our duty to give it.

The considerations and reasoning which will be absolutely necessary to enable us to reach such an end, will also of necessity oblige us to deal with the fundamental principles that underlie the whole case.

In treating of these we shall be compelled also to consider the points raised by Mr. *Theodore Davie;* for our course must of necessity be dictated by the case before us, and thus we shall have to proceed in an inverse order to the argument of the Attorney-General, and in doing so to consider, as including all Mr. *Theodore Davie's* points, several vital questions in connection with—

(1.) The authority of the Lieutenant-Governor in Council to make the "amendments" in question.

(2.) That of the local Legislature to delegate the power.

(3.) That of the local Legislature to make such rules of procedure themselves and legislate directly thereon.

And, as an integral part of the same system of Supreme Court legislation, referred to us by the plaintiffs in this case and raised in *Regina* v. *Vieux Violard*:—

(4.) The powers claimed by the local Legislature to break up the residential unity of the Judges by distributing them about to reside in distant parts of the Province.

The first matter which has to be disposed of is that advanced last by the Attorney-General, viz.: the allegation that by three judgments, one by each of the three Judges now here, viz.: *Saunders* v. *Reid Bros.*, by the Chief Justice; *Harvey* v. *The Corporation of New Westminster*, by myself; and *Pamphlet* v. *Irving*, by Mr. Justice Gray—the immediate question before us was already settled; for that each Judge had authoritatively acknowledged that the Lieutenant-Governor in Council was the only proper authority to make Rules of Procedure for the Supreme Court.

Two out of the three were shown to be inaccurate versions of what was decided and the reasons; and I regret that I have had no opportunity of comparing my own judgment with what purported to be a printed copy of it, as the original has not, that I can learn, been returned. Judges and Courts can not be bound by copies of decisions suddenly sprung on them in a very serious case, and which they have had no previous opportunity of revising. It is an invariable practice for Judges to revise their judgments previous to their being

produced as authorized reports. But if, *arguendo*, the alleged copies were all correct, none of them affects to decide the point now assumed to have been determined by them; as that question was never raised in either of the cases, but the contention was in the opposite direction; so, of course, that point could not be judicially decided.

The headings on each alleged copy, which affected to record a decision affirming the power of the Lieutenant-Governor in Council to make rules and regulate what kind of cases shall be appealed to the Supreme Court, and what not, were entirely unauthorized, and do not bind us.

All that the production of these judgments goes to show is, that each of the three Judges named was endeavouring to find a way out of a dead-lock in the administration of justice which the rule-making body had produced, and at last succeeded in doing so. The points now raised have, therefore, still to be decided.

Reluctant as all Judges are, by education and habit and the conservative nature of their daily avocation, to enter into delicate constitutional questions, or to shake the stability of either legislative or judicial institutions (the breath of whose life, the chief secret of whose power for good, is the implicit confidence and trust they inspire), they are especially so, when there may be a possibility of being themselves considered to be personally interested in the result of their investigation. When, however, unless they do so, justice is barred, duty steps in and compels them to undertake the task. The cases in the books shew that there is no escape under such circumstances from a decision, even if it be only to open the door for an appeal.

The points raised by counsel in the "Thrasher" case have been sent back to the Judges here from the Supreme Court of Canada at Ottawa, expressly for the purpose of obtaining our opinions on the question. Unless we give a decision thereon, the appellants would be debarred from obtaining justice. By our rendering a judgment in the premises, either party aggrieved thereby may appeal the same to the Supreme Court at Ottawa; if still discontented there, take the question to the Privy Council in England.

There was also another matter, though of very secondary interest or importance, and not in any way necessary in the determination of any of the points now raised before us, but alluded to by the learned Attorny-General in his argument, which deserves a passing notice. He quoted an incidental allusion in the judgment of the Supreme Court in the *McLean* case to an early Proclamation clothing the British Columbia Court with Queen's Bench powers. He stated as the result of his enquiries, that nothing could be found but the rough draft of it and one fair copy; no second or amended copy signed; no correspondence with the Colonial Office, as usual on such occasions, or any notice of publication in any Gazette that he could discover, and the presump-

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tion, therefore, was, he contended, against its existence; for a secret law, even if signed, would not be valid.

That is not the conclusion at which I have arrived; my conviction is very different. For in 1858-59, being then the first and only practising barrister in Vancouver Island and British Columbia, and then entirely independent of the Government, I was engaged against the Crown to defend the prisoner in *Regina* v. *Neil*, the first murder case in British Columbia, set for trial at Langley. I was then authoritatively informed, in answer to enquiry as to the constitution and criminal jurisdiction of Mr. Justice Begbie's Court, that it had (for how long was not stated) all the powers and jurisdiction of the Court of Queen's Bench. This also came out in Court before the learned Judge who drew it for Governor Douglas, and Mr. Solicitor-General Pearkes who prosecuted for the Crown at the trial: and the value of the special verdict rendered by the jury after a hot contest (in which an American ex-Judge took a very leading part) was tested before it on the following day as a Court of Queen's Bench, and judgment rendered thereon accordingly. Had there been any doubt at the time, it would have been my duty, as prisoner's counsel, with a verdict equivalent to wilful murder against him, to have demurred to the jurisdiction, or used any legitimate means to procure some remission of the sentence necessarily anticipated. The non-discovery of the Proclamation, and the absence of notice of Proclamation—often of the slightest kind—and when there were no newspapers in British Columbia, and the absence of the correspondence is not surprising, considering the disorganized state of the early records. The lapse of so many (over twenty) years acquiescence, and the fact that it was entirely superseded only a few months later by another Proclamation giving the Court the amplest powers—these considerations quite account for its non-appearance now. There are several Acts of Vancouver Island and Proclamations of the Mainland similarly circumstanced, yet always dealt with as Acts, and, on the ordinary legal presumptions in such cases, deemed *rite acta* too. Its only interest now is as a historical incident connected with the first trial for murder in British Columbia.

The historical account which the Attorney-General gave of, what he considered to have been, the early constitutional history of the Island and the Mainland, until they formed the present united Colony of British Columbia, was not without its interest to me, although unable myself to regard it in the same light, or draw from it the same conclusion as himself. As I regarded it, it was impossible not to feel that there was force in a remark which that learned gentleman made; that in the convictions he entertained on that subject he was either very right or very wrong. With all respect, I am not prepared to dispute that position. Another preliminary point, although somewhat out of its proper order here, must be noticed. The same learned counsel, to whom we are indebted for presenting to us one of the sides of the

argument, was anxious to impress on our minds that this Supreme Court, which is the acknowledged heir of all the powers and privileges of all the previous Supreme Courts of British Columbia, is not one of Imperial descent, but was constituted solely by and in the Colony. Now, setting aside the Royal Commission of the Chief Justice under Her Majesty's own hand and signet, and my own appointment by Warrant under the same Royal hand and seal, the present Court, and each of the Judges thereof, is direct heir of the Supreme Court of Vancouver Island and its Judges. The learned Attorney-General entirely omitted to mention, that this was a Court, created and appointed direct under an Act of the Imperial Parliament, 12 & 13 Vic., c. 48, (28th July, 1849), "An Act to provide for the Administration of Justice in Vancouver's Island," and that this occurred before it became a Colony properly so-called, and years before it had a local Legislature capable of taking advantage of section 2, authorizing it to make provision for the administration of justice, or of dealing with the constitution of its Courts, and in fact it did not do so. Indeed it is a question if it ever was in its origin a legally constituted Legislature, although it had acted as such for years. Under that Act, 12 & 13 Vic., cap. 48, and the Order of the Queen in Council of the 4th April, 1856, the Supreme Court of Civil Justice of Vancouver Island was created direct from England. Mr. David Cameron, by the Queen's Commission, was created Chief Justice, and after him Sir Joseph Needham, until the union of the two Colonies into one, when all the Courts and their several jurisdictions, authorities, and privileges were combined and handed down to the present Supreme Court of British Columbia. Sir Matthew Baillie Begbie became the sole Chief Justice; myself the Puisne Judge. Now, this Order in Council under the Act gave the said Supreme Court full authority "from time to time by any Rules or "Orders of Court to be by them (*sic*) from time to time for that "purpose made and published, to frame, constitute, and establish such "Rules, Orders, and Regulations as shall seem meet, touching and "concerning the time and place of holding the said Court, and touching "the forms and manner of proceedings to be observed in the said "Court, and the practice and pleadings upon all actions, suits, and "other matters, indictments, and information to be therein brought." Bail, witnesses, evidence, admission of barristers and attorneys, sheriffs, lunatics, probate, all costs and fees of Court and its officers, and in fact "all other matters and things necessary for the proper conduct and "dispatch of business in the said Court. And all such Rules and "forms of practice, process, and proceedings were to be framed in "reference to the corresponding Rules and forms in use in Her Majesty's "Supreme Courts of Law and Equity at Westminster," subject to the Governor's approval. The same order, under the special powers, gave also by a separate clause, generally "to the said Supreme Court full power, "authority and jurisdiction to apply, judge, and determine, upon, and "according to the laws then and thereafter in force within Her

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"Majesty's said Colony." Chief Justice Cameron's Commission and Jurisdiction were very full, and covered all matters whatsoever, civil and criminal. A reference to the Act and Order in Council will shew that the powers of the Court and the Judge thereof were as ample as could be made. And these were sent out ready made, direct from the Imperial Government, so that the Court was not constituted by the Colony, and *a fortiori* not by a subordinate Province of a Colony.

And in the consideration of that Act the construction of law is in favour of the present Court. For if there be anything more advantageous to it from the fact of the the Vancouver Island Court, to whom it is heir, being of more direct Imperial constitution under this Act than under any others, then this Court and its Judges are entitled to the benefit of that advantage under the judgment of *Jessel*, M. R., in the case of *The Ettrick* (6 L. R., Prob. D. 134), where on a question as to which of two Acts affecting the same subject matter should apply—the Thames Conservancy Act or a General Act—the learned Judge says: "The answer is that the powers given by Thames "Conservancy Act are so much more advantageous to them, that of "course they were acting under those powers, and not under the "General Act."

In all the period from 1857 up to Confederation, no change whatever could be made in the Courts or the Judges, except with the express consent of the Queen, through the Colonial Office, first had and obtained; and no attempt was ever made by the Colonial Legislature to deprive the Judges of the power of making Rules and Orders for the regulation of the procedure of the Supreme Courts. Such a thing would never have occurred to them. It was left to a Legislature of far inferior powers to attempt it.

The English Law Proclamation of 1858 introduced such of the Statute Law of England as was not inapplicable, and all the Common Law (if any) as had not been brought in, as their natural heritage, by the colonists themselves when they settled in the country; and the Supreme Court of Civil Justice of British Columbia recognized and acted on the procedure in Common Law, and in Chancery, extant in 1858, and contained in the Common Law Procedure Acts, which were then new, but whose practice had been tested and settled at home. In this and some similar respects the Supreme Courts here were, little as it is imagined in the east, far ahead of some of the chief Courts of older Canada. It is true these Procedure Acts were improved and amended by the Common Law Procedure Ordinance of the 9th March, 1869. And the local Legislature, always with the sanction of the Crown, and subject to a very active power of revision and disallowance, made various changes in the Courts. But the right of the Judges to make Rules and Orders of practice and procedure was carefully preserved throughout.

The Governor of the Colony had always an immediate and unrestricted power of disallowance and reservation in constant use, and this continued unabated up to 1871, when British Columbia joined the Confederation of the Provinces, which constituted the Dominion. What transpired up to the Union, in the interval between the first establishment of the Supreme Courts and the time when British Columbia joined the Union is, however, scarcely of any great value to the determination of the question which is set before us by the "Thrasher" counsel for solution. Neither is it of any importance to a decision as to what the high contracting parties before the Union, while the negotiations were going on, would have liked or proposed to do. To us in British Columbia—*penitus toto orbe divisos*—it is given to look with an eye that pays no regard to the inter-provincial divisions, rivalries or distemperatures existing previous to Confederation, and which that great measure was intended to cure. No judgment here will be biassed either way by such considerations. We do not ask or care what negotiations took place before Confederation, but what was the effect—where the terms of the contract itself are clear—of the contract of Union itself, on British Columbia, and especially its Courts, Judges and Procedure? and that can only be gained by a careful study of the British North America Act itself. It seems strange at this day to be entering into an explanation of such a principle, that negotiations are but the necessary preliminaries to a contract; or that there is no proposition in law more accepted than that the preliminaries to a contract, which itself is so clear and complete, are at once merged in the written contract itself; but the marked reference of the Attorney-General during the argument to speeches of the great promoters of Confederation makes it necessary. The Act itself, and the Terms of Confederation which it embodies, form the contract, the effect of which we have to study.

In this research we should naturally expect to find that the effect of this great constitutional Statute would only become gradually developed as the circumstances which called for its interpretation should arise, and various legal minds should be brought to bear upon its provisions, from different points of view in different parts of the Dominion. Truth in law as well as other matters is many-sided. And this accordingly we learn to have been the case, from careful inspection of the opinions of various learned Judges throughout the Dominion on the causes that have from time to time arisen under the Act. The more recent cases of such judgments, in *Valin* v. *Langlois, Regina* v. *Burah, Severn* v. *The Queen*, and others, whether in Canada itself, or in appeals to the Privy Council in England, seem tending generally, though gradually, to the development of the powers and authority of the Dominion as the necessary outcome of the Federal principle at the base of the Act; and of that distribution of power which, whilst religiously observing treaty rights, may one day, though in the perhaps distant future, expand into national life. It is to the "British North America Act,

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1867," then, and the Terms of Union of British Columbia, that we must go to find the solution of our present difficulty.

Here we are met by the consideration, how are we to construe it? On what principle are we to examine and interpret its details? The point to be settled is a legal one. We have to regard it from a strictly legal point of view.

It is this consideration, it is the effort to arrive at this, which has caused the Judges of this Court so much and long anxious thought and deliberation. The whole question has been before them for some time, and individual opinions have changed and varied, backward and forward, in the arguments in camerâ, in almost every direction, as the different authorities which have from time to time presented themselves have prevailed. Until this case arose their anxious aim had been to carry out the wishes of the Legislature, as embodied in the "Judicature Act, 1879." There were two clauses, however, of this Act to which they had at once felt obliged to officially call the notice of the local Executive and Legislature as fraught with danger; as being, in fact, an interference with the procedure of the Courts in matters criminal and civil—viz.: section 14—which produced the miscarriage of justice in the first trial of the *Regina* v. *McLean and Hare* murder case, and section 17, whence arose the present difficulty. This section 17 enabled the Lieutenant-Governor in Council to make Rules and Orders and govern all procedure of the Supreme Court in Court and in Chambers; all forms, witnesses, evidence, duties and rights of Counsel and Officers; descending even to costume; following the Judges almost into private life; abolishing the long vacation; providing for rehearing before a Full Court of all orders, decrees or judgments of a single Judge, and generally doing anything which, by that or any other Act, might be prescribed to be regulated or done by Rules of Court. These Rules and Orders were to be made entirely exclusively of the only men who for years had studied and had constant experience of the subject—the Judges. Against this extraordinary proceeding the Judges felt it their duty to protest; at the same time offering their services to prepare the Rules.

Their protest was contained in a combined despatch of all the then Judges of the Supreme Court—the Chief Justice, Sir M. B. Begbie, Mr. Justice Crease, and Mr. Justice Gray—to the Minister of Justice, and (it being ultimately possibly an Imperial matter) to the Secretary of State. They most respectfully protested against these sections of the "Judicature Act, 1879," the "Better Administration of Justice Act, 1878," and the Judicial Districts Act, as part of one, and that a vicious and erroneous, system. These Acts are inseparable from each other.

They protested against legislation which threatened the disintegration of the Court and the creation of the very complications and difficulties which have at length arisen, with, of course, a proportionate injury to

the prestige of the Courts and the administration of justice in the Province.

They had recommended, owing to the suddenness of this legislation, the adoption of the English Judicature Rules, so far as not inapplicable to the Province, as an interim measure, preserving the immemorial Common Law right of the Judges to regulate the procedure of their Courts by rules and orders compiled at a moment of more leisure. The Lieutenant-Governor in Council (in other words, the local Executive) refused the Judges any voice in the matter, and passed and published the "Supreme Court Rules, 1880." As these were almost a literal transcript of the English Judicature Rules, except in some few important particulars, the Judges, true to their desire to aid as much as possible the administration of justice, raised no immediate questions on the point. If then *ultra vires* of the Executive and the local Legislature, the alternative was that *prima facie* the power resided in themselves as inherent in them as a Superior Court. (*Beaven* v. *Mornington*, 30 L. J., Chan. 663.) And they loyally proceeded to the best of their ability to give them practical effect. When, however, the legislation of unification of the Judicature Act gave place to that of disintegration in the "Local Administration of Justice Act, 1881," the whole system and administration of civil justice became involved in confusion, obscurity, and doubt. When Supreme Court Judges were scattered in remote and sparsely inhabited districts of the country (by the "Judicial Districts Act, 1879,") where there was no Supreme Court work to do. Then (by section 9, "Better Administration of Justice Act, 1878,") set to do what in Ontario would be Division Court work, and with unprofessional practitioners; when required by statute (section 10, "Mineral Act, 1881,") to hold Gold Commissioner's Courts (which legally would mean daily); to collect Cold Commissioner's fees for the local Treasury; settle mining boundaries, and then sit in judgment on their own ministerial work; when called on to preside in Mining Courts and discharge Magisterial duties, at second hand, in appeals on the merits from unprofessional Justices of the Peace, leaving the higher, for the lower, class of judicial work, and any Dominion work entirely in abeyance—a practical *reductio ad absurdum* had been reached which placed them in a state of cruel perplexity. During all this trying period, extending now over some five years, their most urgent representations to both Governments have failed to elicit one single legal reason in answer to their respectful protests.

But still they went on doing their duty to the best of their ability, making the best of the means at their disposal; even using an old voluntary clause in a British Columbia Ordinance of 1869, to avoid a deadlock in County Court business throughout the country.

In any other of the Provinces of Canada, except British Columbia, legislation which produced such results would not have been possible; or, if attempted, would at once have disappeared before the universal

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opposition and disapprobation it would have elicited; but the distance of British Columbia from Canada, the difficulty and delay of communication between places thousands of miles apart, the disinclination of Judges to make complaints, and the still greater disinclination of the recipients to listen to them, the utter disconnection of the Judges from the smallest political influence to attract a hearing at headquarters; misrepresentations, whether unintentional or otherwise, not only of their motives but their most ordinary acts, made their situation and position a very helpless, it might almost have been said a hopeless, one.

At length the present case arose. The plaintiffs, American merchants of influence, were turned over in a case heard before a single Judge of this Court in which, nevertheless, they conceived the right remained with them.

They were sent direct from this Court, under section 9 (although even that, I see, is not free from doubt) of the Supreme and Exchequer Courts Amendment Act, to the Supreme Court at Ottawa. That Court after argument, refusing even to receive the application, sent it back to British Columbia to obtain the decisions of Judges in the highest Court here, before they could be heard in appeal, and with a view to a possible ultimate resort to the Privy Council of England. There is no help for it but that the Judges here should address themselves decisively to the solution of the issue placed before them. In this "Thrasher" case therefore, called upon in due form of law, it is their imperative duty to render a decision.

Then for the first time commenced the serious enquiry among the Judges, what were the relative authorities and powers of the local Legislature, the Lieutenant-Governor in Council, and the Supreme Court and its Judges, in respect of the matters before them? Their first duty—the very first duty of every Judge on a legal question being presented for decision—was to satisfy themselves they had jurisdiction to proceed to hear and decide the matters at issue. That depends in this case on the validity of Rule 401A; that, again, on the power of the Lieutenant-Governor in Council to make the rules; that, on the power of the local Legislature to delegate it to them; that, in its turn, on the power of the local Legislature to pass laws regulating the Supreme Court procedure; that, in its turn also, on the construction to be given to the distribution of powers under the British North America Act among the Provinces and the Dominion. It is therefore to that Act and the Terms of Union, no matter from what point of view we commence our investigation, that we are continually brought back to find thereout valid reasons for our decision.

But how then are we to construe it? on what principle are we to proceed to examine and interpret its details from an exclusively legal point of view? The learned Attorney-General argues, quoting the address of counsel (Mr. *Mowat*, Q. C.) when an advocate in the case of *Severn* v. *The Queen* (2, Can. S. C. R., p. 80), "that if there was one

"point which all parties at Confederation agreed upon" (and British Columbia, he said, subject to the terms of Union, is in the same position as if it had been one of the original Provinces included in the Act) "it was that all local powers should be left to the Provinces, and that "all powers previously possessed by the local Legislatures should be "continued, unless expressly repealed by the British North America "Act," adding himself in effect, as his own opinion, that the Colony having before Confederation, under Governors, legislated freely on the administration of justice, procedure, Judges, Courts, and civil rights, must be assumed to have retained under the Act the same powers as to the administration of justice as before Confederation. He also contended that in each Province the Legislature was omnipotent still over Court, Judges, and procedure of all kinds.

It really is not necessary to comment on this argument, as the judgment itself in that very case authoritatively disposes of his position as untenable.

It is very noteworthy, and I confess to my unqualified surprise, that throughout the whole argument Mr. Attorney-General Walkem laid no stress whatever, hardly mentioned, section 91, which I look upon, and have from the first examination into the Act regarded, as the legal keystone of Confederation; without which the whole fabric, built up with such exceeding care, would infallibly, in my humble opinion, crumble to pieces from absolute lack of a power of cohesion. The learned Attorney-General took great exception to a casual *dictum* in my judgment in the murder case *Regina* v. *McLeans and Hare*, where, speaking of the distribution of legislative powers under the Act, and the prerogative power of issuing Commissions of Oyer and Terminer, the following words occur: "I use the word reserved because the very "groundwork and pith of the Constitution Act is that the Dominion is "*Dominus*. Everything the Colony could give up, consistently with "its Imperial allegiance, was vested absolutely in Canada and re-distri-"buted or reserved to Dominion or Province respectively by the "provisions of the British North America Act; and this is a principle "of construction, the development of which may lead to great issues "hereafter, but need not now be further considered." He objected to the use of the words "Dominus" and "redistributed," as inconsistent with the legislative "omnipotence" he claimed for the Province, even while it clashed with Dominion legislation, which he considered it could in Provincial matters override. But though those words were written long ago, before the decisions to which we now have access had reached us, I see no reason for altering that opinion. The only words I would vary would be, perhaps, to substitute the word "merged" for "vested absolutely" in Canada. The phrase "re-distributed," however, exactly represents the legal operation which actually took place. The Province had parted with all her rights in order to take some of them again in a different and (except where otherwise specifically prescribed) in a

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subordinate shape. The right of the Governor-General in Council to veto any local Act, even when *infra vires* of the local Legislature, sufficiently proves that. Of course the word "*Dominus*" will not be understood to mean that a Province has no exclusive rights of its own, except with the consent of the Dominion first had and obtained; for there are, specified in section 92, exclusive powers given to the local Legislature which include local matters within the Province of great importance, some concurrently with the Dominion; but it has to exercise those rights so that they shall not interfere with the general legislation in similar or on the same matters, under the exclusive powers expressed or necessarily implied as belonging to the Dominion under section 91—the Dominion under the Act. Therefore, in that sense, I said long ago, and after examination of all the subsequent authorities, in the same sense, I say again, Dominion is *Dominus*.

Courts enter into these constitutional questions with great reluctance; and although owing, as I have said, to recent local legislation, the Judges here are getting a very severe training in constitutional law incessantly forced upon them, still the study is in its infancy, and many and various renderings must from time to time be given on all main constitutional questions, and even by text writers of such authority as Mr. *Alpheus Todd*, who has been so much quoted in this case; until by a long course of decisions the practice shall have settled into a clear and definite system. I can readily imagine the difficulty which even the wisest lawyers would experience in England when questions like the present are for the first time brought before them for final determination; yet on this very point of supremacy of the Dominion, where Federal and Provincial laws conflict, and even sometimes where they may concur, in my humble opinion depends the stability and ultimate success of this great Confederation.

It is this very section 91 which appears to me to contain the legal germ of development of the Union in the future, clearly shadowed forth in the early speeches of Sir John Macdonald, referred to and partially quoted out of *Doutre's* work, page 25 and elsewhere, by the Attorney-General. This section I propose, therefore, to consider, and see if it bears the construction sought to be put upon it.

In *Denton* v. *Daley*, tried at Digby, Nova Scotia, *Savary*, County Court Judge, in a clear judgment, which *Doutre* has made his own, says:—

"On the dissolution of the former Provincial Constitutions a new "Charter was given to the United Provinces, in which one representa-"tive of the Crown alone, under Her Majesty, rules; new and "subordinate Governments being accorded to the different Provinces "composing the Confederation."

In another portion of the judgment the same learned Judge says:—

"Let us now consider the effects of the 'British North America Act, "1867,' and in view of its provisions and policy, there are two proposi- "tions which I may lay down with equal certainty.

"The first is, that the Parliament and Government of the Dominion "constitute the supreme legislative and executive authority, subject "only to the Imperial Parliament and Sovereign of the Empire; that "the former Provincial Legislatures and Governments were merged in "those of the Dominion; while the newly established local ones are, as "it were, carved out of the latter, and are strictly limited in their "powers to such as are conferred on them by the British North "America Act.

"The second is, that unlike the theory of the American Constitution "by which the Parliaments of the various sovereign States, or rather "the sovereign people of each State, through their representatives, "conferred certain limited and defined powers upon the Federal Gov- "ernment and Congress, so that every power not expressly thus "conferred is supposed still to render in the different States—that unlike "this theory, every authority not expressly or by necessary implica- "tion conferred upon the local Governments and Legislatures by the "British North America Act resides in those of the Dominion."

In another part of the same judgment we find the observation:—

"But we *do* find, as a striking indication of where it was intended "that the sovereign legislative and executive power of Canada should "reside; that the criminal law is a subject of exclusive legislation by "the Dominion Parliament."

The words of section 91 are very sweeping:—

"It shall be lawful for the Queen, by and with the advice and con- "sent of the Senate and House of Commons, to make laws for the "peace, order, and good government of Canada, in relation to all mat- "ters not coming within the class of subjects by this Act assigned ex- "clusively to the Legislatures of the Provinces; and for greater cer- "tainty, but *not so as to restrict the generality of the foregoing terms "of this section*, it is hereby declared that (*notwithstanding anything "in this Act*) the exclusive legislative authority of the Parliament of "Canada extends to all matters coming within the classes of subjects "next hereinafter enumerated" (enumerating them, Nos. 1 to 26).

"27. The criminal law, except the constitution of Courts of Criminal "Jurisdiction, but including the procedure in criminal matters."

28. ....

"29. Such classes of subjects as are expressly excepted in the enume- "ration of the classes of subjects by this Act assigned exclusively to "Legislatures of the Provinces."

And the Act adds a rider which emphasizes the superior authority of the Dominion Legislature by the last paragraph:—"And any matter "coming within any of the classes of subjects enu merated in this "section shall not be deemed to come within the class of matters of a

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"local or private nature comprised in the enumeration of the classes "of subjects by this Act assigned exclusively to the Legislatures of "the Provinces."

Lord Carnarvon in introducing the Bill into the House of Lords does not ignore the 91st section, but says: "In this is, I think, comprised "the main theory and constitution of Federal Government; on this "depends the practical working of the new system. . . The real object "which we have in view is to give to the Central Government those "high functions and almost sovereign power, by which general principles "and uniformity of legislation may be secured in those questions of "common import to all the Provinces; and at the same time to retain "for each Province so ample a measure of municipal liberty and self-"government as will allow, and indeed compel, them to exercise those "local powers which they can exercise with great advantage to the "community."

Surely, the Administration of Justice is a matter in which the Dominion may be expected to have a very strong interest.

After commenting on the distribution of powers, *Lord Carnarvon* adds: "In closing my observations on the distribution of powers, I ought "to point out that just as the authority of the Central Parliament will "prevail wherever it may come into conflict with the local Legislatures, "so the residue of legislation, if any, uprovided for in the specific "classification which I have explained, will belong to the Central "body."

It will be seen under the 91st clause that the classification is not to restrict the generality of the powers previously given to the Central Parliament; and that these powers extend to all laws made "for the "peace, order, and good government of the Confederation, terms which, "according to all precedents, will, I understand, carry with them an "ample measure of legislative authority." He adds to that, in effect, that while Dominion Acts are confirmed, disallowed, or reserved for Her Majesty's pleasure by the Governor-General, Acts of the local Legislature are transmitted only to the Governor-General, and are subject to disallowance within the space of twelve months by him.

Gwynne, J. (*re Niagara* Election case, 29 U. C. C. P. 274) distinguishes between the distribution of powers in the Constitution of the United States and Dominion Government, as follows:—

"The powers of the General Government in the United States, are "made up of concessions of the several States. Whatever is not "expressly given to the former the latter expressly reserve. With us "the very opposite of this is the case.

"The Dominion Government and the several Provincial Governments "emanate from the one sovereign power—the Imperial Parliament. "The Provincial Legislature have no jurisdiction whatever, but what "is expressly conferred upon them by the Statute which calls them

"into existence." (This is very different from the Attorney-General's contention.) "Whereas by the same Statute, upon the Dominion "Parliament is conferred the power of making laws not merely in "respect of the particular subjects enumerated, but in relation to all "matters not coming within the classes of subjects assigned exclusively "to the Legislatures of the Province."

In the case above quoted, *Denton* v. *Daley*, legislation which it was quite competent for the local Legislature to make, *e. g.*, regulations as to the retail sale of spirituous drinks, must give way when the Dominion Parliament intervenes in its paramount authority on any subject specially conferred upon it by the British North America Act.

In *Leprohon* v. *City of Ottawa* (2 Ont. App. 522) it was held by an unanimous Court,—Spragge, C., Hagarty, C. J., Burton and Patterson, J. J. A.—that a Provincial Legislature has no power under sub-sections 2, 13, and 16 of section 91 of the British North America Act, to impose a tax upon the official income of an officer of the Dominion Government. That case further determines that all Government officers, as public servants of the Dominion, are an essential part of the means and instruments by which the Government of Canada is carried on, and as such are not objects of taxation by the local Government. The *dicta* and reasons which led to that conclusion are very instructive in considering the position of the Supreme Court Judges in British Columbia and the efforts to compel them to do many kinds of Provincial duties beyond those of a Supreme Court Judge, and apply even with greater force to occupying their time to the exclusion or limitation of their power to serve the Dominion.

Spragge, C., in that case laid down the *dictum* that the powers of the Dominion Parliament and of the Provincial Legislature are distributed in classes assigned to each. The Provincial Legislature having only the powers specifically conferred; the Dominion Parliament having, besides those specifically conferred, all powers not specifically conferred upon the local Legislature.

L'Union St. Jacques de Montreal v. *Belisle*, 1874, (L. R., 6 P. C. 31) was quoted to show that a Provincial Legislature could interefere and legislate on subjects exclusively given by section 91 to the Dominion, namely, Insolvency; but there the decision turned on the point that the local Act complained of, as dealing with insolvency, was merely dealing with a local and private association, in such a manner as to prevent it from becoming insolvent; and, therefore, as *Lord Selborne* decided, "to "keep the Act out of the category of the 91st section, and not to bring "it into it."

This, therefore, if an authority at all, would be against the Attorney-General; and even the powers of the Dominion Legislature, though so potent under section 91, do not exceed those of the former Colony, and were limited, *e. g.*, as regards the Imperial Parliament; for in *Smiles* v *Bedford* (1 Ont. App. 436,) 1877, it was held by an unanimous Court

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that under the British North America Act (section 91, sub-section 23) no greater powers were conferred on the Parliament of the Dominion to deal with the subject than had been previously enjoyed by the local Legislatures.

In *Fredericton City* v. *The Queen* (3 Can. S. C., 505), it was decided that the Canada Temperance Act, 1878, could not be enacted by the local Legislature, there being no express power given to that effect—that power necessarily falls under the control of the Dominion Parliament (by virtue of the sweeping force of section 91). Also, that inasmuch as the right to prohibit any trade has been excluded from, by not being assigned to, the Provincial Legislature, it must necessarily be taken under section 91 to have been delegated to the Federal Government.

The powerful judgment of Mr. Justice *Ritchie* in this case will repay perusal, as also in the case of *Regina* v. *Justices of Kings County* (2 Pugs., 535), where it was held the local Government had not the power (in the presence of section 91) to prohibit. I have been thus particular in referring to the powers granted and implied in favour of the Dominion Parliament under section 91, because the learned Attorney-General almost ignored it altogether and based the strength of his position on behalf of the local Legislature on the "omnipotent" powers of section 92, and argued throughout that the Provinces went with powers unchanged into Confederation, save as to such specified subjects as they gave up to the Dominion, and that whatever of such previous Provincial powers was not so specified in section 91, in favour of the Dominion, was retained by the Province. And from that he argued, on the case more immediately before us, that the local Legislature having for a series of years nearly absolute power (subject to the Governer and Imperial authority) over Courts, Judges, Residence, Rules, and Orders of Procedure, and everything relating to the Administration of Justice within the Province, had exactly the same powers still after Confederation—except mere criminal Procedure—even to antagonism with the Dominion Parliament itself.

In order to construct such a theory it became necessary to ignore section 91, and the Imperial Vancouver Island Act of 1849, and that the learned Attorney-General effectually did. But then what is the value of a legal argument on the British North America Act, which entirely ignores section 91?

We have seen the sweeping character of section 91, let us now see what section 92 contains as bearing on the present case.

It says:—"In and for each Province the Legislature may exclusively "make laws in relation to matters coming within the classes of subjects "next hereinafter enumerated."

Then follows the enumeration, sub-sections 1 to 13, which need not be mentioned here. Suffice it to say that they refer entirely to matters within the Province.

Sub-section 13, "Property and civil rights in the Province." Now at first sight this would seem a very sweeping power to give exclusively to the local Legislature, yet read by the light of the whole Act, and the various decisions upon it, bears a very different aspect from that sought to be given to it by the Attorney-General.

Tried by the rule which has been adopted in all similar cases, its exclusiveness and comprehensiveness both nearly disappear. It is the rule adopted in *Fredericton City* v. *The Queen* as an unerring guide in determining whether any given subject is within the jurisdiction of the Provincial Legislature or of the Parliament, namely, "all subjects of "whatever nature not exclusively assigned to the local Legislatures are "placed under the supreme control of the Dominion Parliament; and "no matter is exclusively assigned to the local Legislatures unless it be "within one of the subjects expressly enumerated in section 92, and "AT THE SAME TIME . . . does not involve any interference with "any of the subjects enumerated in section 91." (*Per Gwynne*, J., at p. 568.)

The great distinction between sections 91 and 92 is, that while in the former the subjects enumerated are only designed as *examples* of exclusive legislative powers, in the latter the exclusive legislative powers appear to be all enumerated. *L'Union St. Jacques de Montreal* v. *Belisle*, L. R. 6 P. C. 31, and *Dow* v. *Black*, L. R. 6 P. C. 272.

In *Cowan* v. *Wright* (23 Grant Ch. 616, 623), *Blake*, V. C., said that the true principle is set forth *in re Goodhue*,* "that to the Provincial "Legislatures are committed the powers to legislate upon a range of "subjects which is indeed limited, but that within the limits prescribed "the right of legislative is absolute." (This sounds very like the *Queen* v. *Burah*.) The real question is, what are those limits, and that is a chief question in this "Thrasher" case. That sub-section 13, of section 92, gives the local Legislature exclusive power to legislate on property and civil rights within the Province, without reference to the exclusive powers of the Dominion Parliament, will, I expect, be scarcely maintained; and yet the words taken without qualification run so. *Harrison*, C. J., in *Ulrich* v. *National Insurance Co.*, 42 U. C. R. 155, approved in *Parsons* v. *Citizens' Insurance Company*, 43 U. C. R. 261 (affirmed by 4 Ont. App. 96), says:

"For the powers of the Dominion and Provincial Legislatures we "must refer to the fundamental law on the subject, the British North "America Act. The only exclusive powers expressly conferred by that "Act on the Provincial Legislatures are those enumerated as in section "92 of that Act." One of these is "the incorporation of companies with "Provincial objects" (sub-sec 11), another is "property and civil rights "in the Province" (sub-section 13). The last is "all matters of a "merely local or private nature in the Province" (sub-section 16). Subject to these and the other powers enumerated in section 92, it is in the power of the Legislature of the Dominion to "make laws for the

* 19 Grant, 366.

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"peace, order, and good government of Canada." No words in reference to legislation could be more comprehensive than these words. Examples, however, are given of the exclusive legislative powers as to different classes of subjects intended to be vested in the Dominion Parliament by section 91. These, it is expressly declared, are not to restrict the generality of the foregoing terms of the section (91).

And no matter coming within any of the classes of subjects enumerated in section 91, is to be "deemed to come within the class of matters "of a local or a private nature comprised in the enumeration of the "classes of subjects by this Act assigned exclusively to the Legislatures "of the Provinces."

The learned Judge adds: "It is not possible for each of the legis-"lative bodies as between themselves *exclusively* to exercise the *same* "powers. If the power be shown to belong to one of the bodies, this "under such a section, excludes the other from the exercise of the "power."

I have taken pains to collect such of the various decisions as have reference to the construction of these sections of the Act, to aid in applying the Act to the case and the points raised before us.

Treating of the rights of local legislatures, after a clear reference to the powers of the Dominion Parliament, *Ritchie*, C. J., in *Valin* v. *Langlois* (3 Can. S. C. R.), at page 15, says:—

"But while the legislative rights of the local Legislatures are in this "sense subordinate to the right of the Dominion Parliament, I think "such latter right must be exercised, so far as may be, consistently with "the right of the local Legislatures; and, therefore, the Dominion would "only have the right to interfere with property or civil rights so far as "such interference may be necessary for the purpose of legislating "generally and effectually in relation to matters confided to the Par-"liament of Canada."

We now come to sub-section 14 of section 92—

"The administration of justice in the Provinces, including the con-"stitution, maintenance and organization of Provincial Courts, both of "civil and criminal jurisdiction, and including procedure in civil mat-"ters in THOSE Courts."

This sub-section taken by itself would at first sight appear to include all those omnipotent powers the learned Attorney-General contends for.

But following the ordinary rule for the construction of Statutes, and read by the light of the Act itself and its various provisions, and comparing these with the various decisions thereon, it will be seen that the exceeding generality of the words must be applied with very considerable modifications, indeed; and in that respect accords exactly with the principles of construction already laid down. *Valin* v. *Langlois* clearly established that the Dominion Parliament has the right to interfere with civil rights, when necessary, for the purpose of

legislating generally and effectually in relation to matters confided to the Parliament of Canada. It also established that the Dominion Parliament has a perfect right to give to the Supreme Courts of the respective Provinces, and the Judges thereof, the power and duty of trying controverted elections of members of the House of Commons, and did not, in utilizing existing judicial officers and established Courts to discharge those duties, in any particular, invade the rights of the local Legislature; and that its power over procedure in civil matters means procedure in civil matters within the powers of the Provincial Legislatures.

The Chief Justice here very truly said, and we are here to bear witness to it this day, that that question involving the respective legislative rights of the Dominion Parliament and the local Legislatures, was one of the most important questions that could come before that Court, and that its logical conclusion and effect must extend far beyond the question then at issue. In page 14, that learned Judge draws attention to the causes which have diverted somewhat from their real aim, *i. e.*, correct conclusions, certain previous judicial decisions on the subject, which attributed too much importance to section 101, and to sub-sections 13 and 14 of section 92, which vest in the Provincial Legislatures the exclusive power as to property and civil rights in the Provinces, and the administration of justice and procedure in civil matters.

Neither this, nor the right to organize Provincial Courts by the Provincial Legislatures was intended in any way to interfere with, or give to such Provincial Legislatures, any right to restrict or limit the powers in other parts of the Statute conferred on the Dominion Parliament, or to direct the mode of procedure to be adopted in cases over which it has jurisdiction, and where it was exclusively authorized and empowered to deal with the subject matter, or take from the existing Courts the duty of administering the laws of the land.

And that the powers of the local Legislatures were to be subject to the general special legislative powers of the Dominion Parliament. The Attorney-General relied very much upon *The Queen* v. *Burah* (L. R., 3, App. Cas. 889) in connection with section 129 of the British North America Act, as confirming the position he took up of the omnipotence of the local Legislature over the Supreme Court and Judges, their residence and procedure. But with all deference and respect I must say a close examination of the authority itself supports the conclusion that it is a very strong one against his contention.

In quoting *Lord Selborne's* judgment, while comparing the power of the Indian Legislature with those of Canadian Legislatures, he quoted that portion which says: "The Indian Legislature has powers expressly "limited by the Act of the Imperial Parliament which created it, and "it can, of course, do nothing beyond the limits which circumscribe "these powers. But when acting within those limits it is not in any

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"sense an agent or delegate of the Imperial Parliament, but has and "was intended to have plenary powers of legislation as large and of "the same nature as those of Parliament itself." There Mr. Attorney stops. Had he continued to read on, the following sentences would have naturally had their influence as bearing on the sub-section (14) before us:

"The established Courts of justice, when a question arises whether "the prescribed limits have been exceeded, must of necessity determine "that question; and the only way in which they can properly do so, is "by looking to the terms of the instrument by which, affirmatively, the "legislative powers were created, and by which, negatively, they are "restricted."

Lord Selborne does not say with the Attorney-General, you must enquire into all the previous negotiations which led up to its enactment, or that we must look to a previous compact and give our legal interpretation to the Act by the light of that; but he lays down this broad rule for our guidance: "If," says *Lord Selborne*, "what has "been done is legislation, within the general scope of the affirmative "words which give the power, and if it violates no express condition "or restriction by which that power is limited, (in which category would "be included any Act of the Imperial Parliament at variance with it), "it is not for any Court of justice to enquire further, or to enlarge "constructively those conditions or restrictions;" and that is the real test by which to try this case.

The case of *Valin* v. *Langlois* established conclusively that which has never been doubted in this Court—that the Dominion Parliament has a perfect right to utilize established Courts in the Province, and the Judges thereof,—who, as the learned Chief Justice most aptly observed, are appointed by the Dominion, paid out of the Treasury of the Dominion, and removable only by address of the House of Commons and Senate of the Parliament of the Dominion,—to enforce their legislation.

That is a doctrine which has always been accepted and acted upon by this Court, *e. g.*, (in Insolvency, Customs, and the like) which is established not only to carry out local laws but those of the Dominion. In the Dominion there is scarcely an Act that must not in some part be held *ultra vires* if any other doctrine were well founded. Indeed, I always understood that the Supreme Court Judges, going into Confederation, were entirely Dominion officers of a Dominion Court in the Province—to carry out the laws of the Province and the Dominion. In the great majority of Dominion Acts there are provisions not only vesting jurisdiction in the Courts in the Province, but also regulating in many instances and particulars the procedure in such matters in those Courts, *e. g.*, Customs, Inland Revenue, Public Works, Banks and Buildings, Trade Marks, Fisheries, Public Lands, Inspection of Staples, Aliens and Naturalization, Patents, Insolvency, and a host of others.

Without the use of these Courts for the above purpose, or new ones established for the purpose, Dominion affairs would soon be at a deadlock.

In *Valin* v. *Langlois*, therefore, (p. 35) the Court saw no reason why they should not delegate to the Judges of the several Provinces individually, collectively, or both, whom they appoint and pay, and can by address remove, and establish Courts by *engrafting on* (or establishing independent of) those Courts throughout their respective Provinces tribunals eminently qualified to discharge the important duties assigned to them. "They have not thereby invaded the rights of the local Legis-"latures or brought the new jurisdiction, or the procedure under it, in "any way in conflict with the jurisdiction or procedure of any of the "Courts of the Provinces." And each of those Dominion Acts has reference to the procedure necessary to enforce it, and that in each case dealing with civil rights, many of them civil rights in the Province; and yet over which the local Legislature has not any control or say.

The fact is, the Constitution Act of Canada only lays down broad, but distinct, well guarded principles and lines of demarcation between the different legislative powers of separate legislative bodies, sometimes over the same subject, leaving these principles to be applied from time to time according to the ever varying growth and changes in the subjects of legislation incident to a new and progressive country. Now to apply the aforegoing general principles of construction to the case before us.

This provision, as to the administration of justice, gives the Province authority to provide for the administration of justice: that is, to see that it is administered in all Courts sitting in the Province, and to declare the powers and the subjects of jurisdiction (within the limits of their own statutory authority) of such Courts as they may think proper themselves to "constitute, organize and maintain" in the Province, and to provide for civil procedure in "those" Courts (still within the statutory limitations) in the Province. Now Courts answering to this description have been established by the Province, such as Gold Commissioners' Courts, Mining Courts and the like, to which these powers over procedure can apply.

No other Courts are expressly referred to, and we have seen that section 91 reserves to the Dominion everything that is not assigned exclusively to the Provincial Legislature, consequently if there be any Court in the Province not "constituted and maintained and organized" by the Province the Province cannot interfere with its procedure.

Now it is sufficiently clear that justice can only be administered in the Province through the ordinary channels, the established Courts, *e. g.*, in B. C. especially, the Supreme Court.

Then arises the question: Can the local Legislature under this and the previous sub-section provide directly for the procedure of the

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Supreme Court? That depends on whether the Supreme Court is a Provincial Court "constituted, organized and maintained" by the Province. The Chief Justice informs me that he has entered into that point at great length and with much particularity; so that it will not be necessary, concurring as I do generally in his views on that subject, to enter at similar length upon the question. Still it is one of such importance to the point at issue, whether we are or can sit as a Full Court or not, that I am constrained to enter somewhat into the consideration of it, even at the risk of repetition; especially as I have not seen or heard what the Chief Justice has actually written respecting it.

I have already shewn that the Supreme Court of British Columbia and its Judges are the heirs of the jurisdiction, status and authority of the Supreme Court of Civil Justice of Vancouver Island and its Judges. That was an Imperially constituted Court. Its Chief Justice was empowered under the Act and Order of the Queen in Council to make rules and orders for the practice and procedure of the Court. This power was never disturbed by any local legislation prior to Confederation. Without any declaratory Statute to that effect (for it was unnecessary), that Court administered all the Common Law and Statute Law of England applicable to a settled Colony. The Court appointed under this Statute had the supreme revising and controlling power over all other Courts in the Colony All others were inferior Courts.

The present Supreme Court too and its Judges are also the acknowledged heirs of the Court of British Columbia, the Supreme Court of Civil Justice of British Columbia, the Supreme Court of the Mainland of British Columbia (*see* Consolidated Statutes, 1877, chapters 51, 52, 53, 54, 55, 56, 57, 58), with all the jurisdiction, powers and authorities in all matters civil and criminal, up to Confederation in 1871, that a Supreme Court could receive. The present Chief Justice was the original Judge of the British Columbia Court, sent out direct under the British Columbia Act by the Imperial Government with a Commission under Her Majesty's own hand and seal, under which he still acts. The Senior Puisne Judge of that Court was appointed by an authority also under Her Majesty's own sign manual and signet, before its Confederation with Canada, with exactly the same jurisdiction, power and authority as the Chief Justice. The second Puisne Judge was appointed in 1872 under a Royal Commission, giving him exactly the same status and jurisdiction also over all British Columbia, and all pleas civil and criminal whatsoever.

At the Union of British Columbia with the Dominion, this Supreme Court had the supreme supervising power over all other Courts in the then Colony in all matters whatsoever—civil and criminal; and the British North America Act has continued it in that same position as the chief superintending and revising Court, civil and criminal, in the the Province, under section 129 and other sections. It had ample

jurisdiction over every kind of plea, except Admiralty; indeed the Puisne Judge too, in the absence of the Chief Judge, in Admiralty had that. The Judges by a long succession of Statutes, indeed nearly every one which touched on the question of Rules and Orders from 1857 and 1858 down to and including the last which was passed in 1869—the Supreme Court Ordinance, 1869,—the Judge or Judges have been the only authorities previous to Confederation to make the Rules of Procedure for the Supreme Court.

The Supreme Court's Ord., 1869, and the Courts Declaratory Ord., 1868, were specially sanctioned and sent out from Downing street, and not altered by the Courts Merger Ordinance, 1870. These gave, or rather confirmed, that inherent power in the Judges which existed in them previously at common law, and still exist in them as their inherent rights (3 Chit. Stat., 3rd Ed. p. 718, n. quoting *Morris* v. *Hancock*, 1 *Dowl*, N. S. 323, *Bartholomew* v. *Carter*, 3 *Scott*, N. R. 529, 3 M. & G. 125, *Beaven* v. *Morington*, 30 L. J., Chan., 663). That power has only been disturbed or sought to be taken away from them by section 17 of the British Columbia Judicature Act, 1879, and placed in the hands of the local Government. It is this assumption which is challenged by Mr. *Theodore Davie*, as counsel for the "Thrasher," as being unconstitutional and *ultra vires*, and therefore void.

As the validity of this contention must depend upon the British North America Act and the Terms of Union, and we have already partially considered sections 91 and 92, we must continue our investigation into the effect of sections 129, 96, 99, 100, and 130, as read by the light of the whole Act, and the various judicial decisions that have taken place, upon the legal relations between the Supreme Court and its Judges and the local and Dominion Legislatures, and then proceed to apply the principles and law deducible therefrom, to the points and the case before us.

In this research we have already seen that we must not expect to find that an Organic Act of this kind will attempt to specify particularly even all the general heads of the subjects on which either Dominion or local Legislatures can be expected to legislate. It would require omniscience to foresee what in the course of time may arise to call for legislative interference. All that the framers of it could be expected to do would be what they have done in sections 91 and 92, lay down clear principles of distinction between the classes of subjects which were to be dealt with by the several Legislatures, enunciate clear principles to guide them in their respective legislations, and compile the other sections of the Act with special, though inferential, reference to the guiding principles so laid down, and especially guarding against clashing of authority. Now, interpreted by the principles I have been endeavouring, by the aid of the more recent decisions, to explain, all the parts of the Act work well enough together. Tested by any other principle they will be found to be jarring and incongruous. Keeping what

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I have said in mind, let us see what section 129 and these other sections say, remembering in construing them that article 10 of the Terms of Union treated British Columbia as if it had been an original member of the Confederation, as, for instance, Nova Scotia. Section 129 of the British North America says:—

"Except as otherwise provided by this Act, all laws in force" [in British Columbia] "at the Union" [20th July, 1871,] "and all Courts "of Civil and Criminal Jurisdiction, and all legal commissions, powers, "and authorities, and all officers, judicial, administrative, and minis- "terial, existing therein at the Union shall continue in" [British Columbia] "as if the Union had not been made. Subject nevertheless "(except with respect to such as are enacted by or exist under Acts of "the Parliament of Great Britain) to be repealed, abolished, or altered "by the Parliament of Canada, or by the Legislatures of the respective "Provinces, according to the authority of the Parliament or of that "Legislature under this Act."

This section, Mr. Attorney contends, is the strongest in his favour; for according to his theory (the same which was started and overruled in *Regina* v. *Taylor*, 36 U. C. R. 218, and *Severn* v. *The Queen*, 2 Can. S. C. R. 70), the Province and its Legislature, under section 92 and this section, entered into Confederation with all its old jurisdiction and authority over the Supreme Court and its Judges, their residence and its procedure, as it had when a Crown Colony before Confederation, except what *the Province* gave up to the Dominion in section 91, and that what is not enumerated in section 91 belongs to the Province. This is exactly the reverse of the principle of construction for these sections, so clearly pointed out by Chief Justice *Harrison*, Chief Justice *Ritchie*, Chief Justice *Hagarty*, and other eminent Judges of this our Dominion of Canada. Their principle of construction is, however, now too well settled to be shaken. Under that, the words of section 129 are to be taken in their plain and ordinary sense, and those words do expressly continue to this Court and its Judges their full jurisdiction, commissions, privileges, powers, and authorities quite as fully as they enjoyed them before Confederation; not, however, as accidentally escaped Mr. Attorney, to render Courts and Judges, who are sworn to obey the law, independent of the law, but that they should be subject to such legislation only as is provided by competent authority under the British North America Act. What that is will hereafter appear.

The local Legislature have no such clause in their favour as section 129, handing down or returning THEIR ante-Confederation powers unbroken. There is no such section beyond the restricted, though exclusive, powers of section 92.

Whence then do they derive legal authority to authorize, to declare, "it shall be lawful for," His Excellency the Governor-General in Council to prescribe the residences of the Supreme Court Judges, *a fortiori* the elder ones, say in Cassiar on the Arctic Slope; at Kootenay

in the Rocky Mountains, or at Cariboo? or to destroy the residental unity of the Supreme Court and its Judges; so valuable in a young country for uniformity of practice and decision, and the fostering of a healthy legal atmosphere, and of a learned and experienced Bar?

Whence comes the authority to break through the treaty obligations of the Terms guaranteeing their status and privileges that passed with laboured care through three separate independent Legislatures, and received the grave sanction of both Houses of the Imperial Parliament, and the solemn imprimatur of Her Majesty's assent? If they have not the power under section 92 they have it not at all; and if they have it not, how can they bestow it on His Excellency, who since Confederation would appear to have no legislative power of himself? If he have, then the Governor-General in Council could nullify the British North America Act, which, in such case, would have been passed in vain, and all the studied care of the illustrious statesmen who framed it to secure the independence of the Judges as indispensible to the administration of justice would have been thrown away.

But to return:—

This Court is, no doubt, so far a "Provincial" Court that it is in the Province, and its jurisdiction is confined to the Province. Owing to the poverty of our language the same word is often made to do duty in many and various senses, *e. g.*, government, sovereign, quasi sovereign, and many others. Here the words "Province" and "Provincial." But the Province now, is the Province of the British North America Act; and has not "constituted" this Supreme Court. That was done by the Imperial Government, confirmed by the Colony before Confederation; and section 97 of the British North America Act and the Terms of Union placed that, since the Union, in the hands of the Governor-General as regards Superior, District, and County Courts. Neither has the Province "maintained" the Supreme Court, for although it pays the expenses of the Court House, buildings, Registrar, witnesses and the like, under the charge for "administration of justice," still it has not "maintained" the Judges, although they compose the Court, in salaries, allowances or circuit expenses. Indeed, section 130, I think, shows this. That says:—

"Until the Parliament of Canada otherwise provides, all officers of "the several Provinces having duties to discharge in relation to matters "other than those coming within the classes of subjects by this Act "assigned exclusively to the Legislatures of the Provinces, shall be "officers of Canada, and shall continue to discharge the duties of their "respective offices under the same liabilities, responsibilities and penal-"ties as if the union had not been made."

That indicates, as I consider, incontestibly that even such payments would not have constituted the Supreme Court Judges Provincial officers, (or, as Mr. Attorney contended, Provincial officers for occasionally Dominion purposes, a sort of loan to the Dominion). That section

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in effect says that notwithstanding certain officers did at Confederation occupy a position which made them Provincial, as well as Dominion officers, (such as the old Stipendiary Magistrates, who were also County Court Judges, local Government Agents, &c.), they should now be only Dominion officers. The other alternative construction that it only meant to say officers discharging Dominion duties should be Dominion officers bears a *reductio ad absurdum* on the face of it. The *ratio decidendi* in *Leprohon* v. *the City of Ottawa*, 40 U.C.R. 478, proves not only that the Judges are Dominion officers, and their Court a Dominion Court in the Province for carrying out Dominion and Provincial laws, but that in no respect whatever has the Province any more control over them, to send them here, to "district" them there, (for that point was also specifically raised for solution by Mr. *Drake* and Mr. *Theodore Davie* in this and in the *Vieux Violard* case) than they have to send the Collector of Customs, the Collector of Inland Revenue, the Postmaster or Dominion Auditor to "usually reside and discharge their "duties" at Deas Lake, Cariboo, or Francois Lake.

The question in *Leprohon's* case was merely as to the right to tax a Dominion officer. But the *dicta* in it are of great value in applying the principles on which it was decided to the cases of all other officers of the Dominion.

At page 505 we find the following:

"The exemption (of Dominion officials) from taxation rests in both "cases (*i. e.*, in State and Federal Governments) upon necessary im- "plication, and is upheld by the great law of self-preservation; as any "Government, whose means are employed in conducting its operations, "if subject to the control of another and distinct Government, can only "exist at the mercy of that Government. Of what avail are these means "if another power may tax them at discretion?" The *ratio decidendi* here applies to the present case. Of what use will Dominion Judges be if the local Legislatures have the right to fill up all their time with duties which they were not appointed to fulfil, to the exclusion of judicial Dominion duties? or to banish them to remote districts where they shall be useless for Dominion purposes. Our greatest Canadian Judges have in their judgments quoted largely from analogous cases occurring between the States and Federal Governments, and their officers, as being *a fortiori* cases when applied to cases between the Province and Dominion, and for this reason: that Province and Dominion derive their respective legislative authorities from the Queen, Lords and Commons in the Imperial Parliament, which is an absolute and complete sovereign power, while the States and Federal Legislatures derive theirs from compact endorsed by their sovereign, the people. In both cases the powers granted to the central power (except peace and war) are similar to those granted by the English Parliament to the Dominion; among others the power of appointing and, by necessary implication therefrom, preserving control over its own officers.

There is the additional check given to the Dominion, of disallowance, in cases where a Provincial Act is supposed to affect the whole Dominion, or to exceed the jurisdiction conferred on local Legislatures, or even where the jurisdiction is concurrent, but clashes with the legislation of the general Parliament. This power of disallowance has been sometimes, but not invariably, exerted; but, whether allowed or not, to the extent that the Provincial Acts transcend the competence of the Provincial Legislature, they are void.

Then, speaking of the power claimed of taxing salaries, and diminishing incomes fixed by the Dominion, and within their competence, the same learned Judge uses language which, though employed with regard to taxation of income, is immediately applicable to the case of a local Legislature imposing all kinds of judicial duties—not appertaining to the Supreme Court—on Supreme Court Judges and sending them off to reside in exile, far from civilization and that Supreme Court work which they contracted and were engaged to perform:—

"If the power exists at all it can be exercised to any extent, and in "the event of any Province being dissatisfied with the Dominion "Government it would hold in its hands a weapon to which it might "resort to harrass the Government and enforce its demands."

Has British Columbia no demands to enforce? The same power, if it existed, would enable the local Legislature to impose new and foreign duties on a Supreme Court Judge belonging to the Dominion. The learned Attorney-General talked very much of trusting to the great "discretion" of local Legislatures, that no injury should ensue from the respective powers or laws of Province and Dominion overlapping or conflicting with each other. Now, with the utmost deference and respect, I would say on this point—hear what that eminent jurist Chief Justice *Marshall* says on this point: "But all inconsistencies are to be "reconciled by the magic of the word 'CONFIDENCE.' * * There is no "security that, in the exercise of a power which is capable of being "exercised to the detriment and embarrassment of the Central Govern-"ment, the Provincial Legislature will always be guided by a judicious "regard for the harmonious working of all the departments of the con-"stitution. What motive may be found sufficiently powerful to lead to "antagonistic legislation, or whether any such motive may arise, or "whether, from caprice, or from crude theories of political economy, or "from any cause whatever, the power now in dispute may be exercised "in a vexatious manner, must be a matter of speculation" (Per *Patterson*, J. A., in 2 Ont. App., p. 563.)

The learned Judge spoke of Ontario; is it applicable to British Columbia? Let any one familiar with the local legislation of the last five years affecting the Supreme Court and its Judges make reply. Chief Justice *Marshall*, in *McCulloch* v. *Maryland*, 4 Whea., 316, at

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page 428, comparing the respective rights of taxation of Federal and State Governments, and the check the people of the State are on the abuse of State taxation, adds:—

"Now the means, *i. e.*, the officers employed by the Government of "the Union, have no such security, nor is the right to tax them sustained "by the same theory. These means are not given by the people of a 'particular State, not given by the constituents of the Legislature "which claim the right to tax them, but by the people of all the States.

"They are given by all, for the benefit of all; and upon theory should "be subjected to that Government only which belongs to all."

Apply this to the Supreme Court and its Judges, and substitute Province for States, and Dominion for Government of the Union, and the analogy is more than complete, it is *a fortiori* applicable.

In cases like this, where we have no, or scarcely any, English decisions to guide us, for such federations do not exist there, the authorities of the United States, where very similar political legislative bodies exist, though not binding on us, are entitled to the greatest attention and respect, as the production of some of the greatest jurists the world has seen, men who have given this class of questions long and profound study, while still in the prime of life, and yet of great judicial experience. All these authorities and our Canadian decisions concur in describing the United States officers (in our case it would be the Dominion officers) "the means and instruments by which the affairs "of the Dominion are administered." And this applies to the Supreme Court Judges.

It follows, therefore, that appointed by the Dominion, paid by the Dominion, removed by the Dominion, by address through the Dominion Houses of Parliament, they are entirely officers of Canada; and to endeavour to force them by local legislation so to fill up their time by petty local work, as to impede, delay or prevent Dominion work (for if they can do it for a day, they can do it for ever), is in effect, by legislation, to limit the right which, on general principles, and sections 96, 99, 100, 129, 130, 131 of the British North America Act, the Dominion has to their judicial services. Suppose for a moment the scheme for a general uniformity of laws (under sections 97 and 101) throughout the Dominion (except, of course, Quebec) actually carried out, as it surely one day will be; and the Supreme Court Judges employed to execute them in British Columbia; could the local Legislature for one moment legislate their time away in local matters to the hindrance of their Dominion duties? yet legally they are in the same position now. They are Dominion officers for the discharge of Dominion duties, and local judicial duties in the Province so long as they do not conflict with the Dominion, and though they put in force all Provincial and Dominion laws they are in no respect officers of the Province. The *ratio decidendi* of *Valin* v. *Langlois* effectually establishes that position.

In the same manner it may be shown that the Province has not "organized" the Supreme Court; so that in neither of these three senses is it a Provincial Court. And unless it were all three combined, "constituted," "maintained" *and* "organized" by the Province, it could not be one of "those" Courts within the purview of sub-section 14.

Again, it is a rule of construction of Statutes, that, if it be possible, a Statute should be so read that the whole of it should speak and be sensible; so that it becomes necessary to enquire, if there are any Courts in the Province which answer to the description in sub-section 14, to whom it can apply. Now there are (as we have said) such here. There are Courts constituted, organized and maintained by the Province, viz.: the Gold Commissioner's Court, the Mining Court, Courts of Revision, and other Courts to which this description does apply. They, therefore, and not the Supreme Courts, are the Provincial Courts within sub-section 14; and over the procedure of all "those" Courts the Provincial Legislature has complete authority

It is singular that this point, as to the actual and literal meaning of this sub-section 14—in fact, that all this constitutional question should not before have formed the subject of a single decision in the Courts of the Dominion. It was stated by Governor Musgrave to the Judges, as an inducement to them before entering into Confederation, that they were to be Dominion officers and Courts. It was incidentally brought up when the now repealed Circuits Act was being rushed through the House before the ink was dry; and was clearly enough stated and raised when Mr. Richard Woods, a Registrar of the Supreme Court and an officer in Bankruptcy, and therefore an officer of the Dominion, was removed by the Province; an act protested against in more than one communication from the Judges, through the Chief Justice, to the Local and Dominion Governments, but never formulated as it has been now in the "Thrasher" case. I suppose the reason was, the time was not ripe for a decision, the injury resulting to the public service from allowing it had not yet been practically exhibited. People go on in the old groove, notwithstanding all kinds of radical changes, so long as these do not actually affect the little world of which each individual is the centre; and so it remains until, as in this case, some marked event in practice compels a close examination into cause and title.

But to return to Provincial Courts:—

By the operation of section 129 of the British North America Act the status, jurisdiction and authorities of the Supreme Court and its Judges, as they existed at Confederation, was, by that positive enactment, handed down to us unimpaired in any respect; including the common law powers of the Judges to make rules of practice and procedure, confirmed by the local Statutes passed before Confederation, particularly "The Supreme Court Ordinance, 1869." The Attorney-General contends to the effect that this power ceased altogether on the 19th July, the day before Confederation, when British Columbia first

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became a complete representative Government. But that consideration would not affect the case one whit, inasmuch as if they had the power they did not exert it while they had it, for on the 20th July they went into Confederation with the Court and Judges in full vigour and power, as I have described them, and section 129 continued and confirmed Courts and Judges in their prior estate and importance without the loss of a single particle of their power, status, jurisdiction or rights.

That is applying the positive test commanded by *Regina* v. *Burah*. But where is there any section of the Act which gave in any similar manner back to the Province the control over this Court and its Judges and procedure that is now claimed for it? There is nothing but section 92, sub-section 14, and that is always under the correction of the controlling force of section 91, which so many Canadian Judges of eminence have insisted on.

It is not my province on the present occasion to define, with even approximate exactness, the full meaning of the words "administration of justice" and "procedure;" but sufficient will be gathered from the authorities cited to-day to make it clear that, under section 91 and the various sections of the British North America Act, the Dominion has several large directly statutory (as well as constructive) powers over the administration of justice, and can engraft its powers on its own Judicial Officers and Courts throughout the Dominion, such as this Supreme Court, and makes the criminal law and criminal procedure entirely its own. The phrase "Administration of justice" in sub-section 14, when applied to the Province, must have but a very limited application. "Procedure" may be defined to include all the means and modes by which causes "proceed" to such a final decision as will procure the determination of the issues raised, and the rendering of complete justice in the case. The enactment of substantial law is, within statutory limits, within the competence of the local Legislature: as what shall constitute a contract; what additional local Courts are wanted, when and where; and a host of other necessary provisions in aid of the meting or ministering of justice within the Province to all who claim the aid of the law. But all such local Courts must, from the principles and decisions I have set forth, necessarily be inferior to, and under the revising supremacy of, this Supreme Court. It would, of course, include a power to see that justice is properly administered, and when it is not, that a proper constitutional remedy should be applied; but the process and means by which justice is to be administered, in a Court not within the meaning of sub-section 14, must be left to the Judges of the Supreme Courts themselves.

And here I note that the moment a Judge gets a commission he steps at once into the possession of all the Common Law and other rights, powers and status which attach to the position, like an officer of one of the services stepping into a command.

As to what is procedure, *Poyser* v. *Minors* (7 L. R., Q. B. D., 333, 334) is a conclusive authority. Lord Justice *Lush*, in delivering the judgment of the Court, says:—

"Practice in its larger sense,—the sense in which it is used in [the "English Judicature Acts, like 'procedure' as there used] denotes the "mode of proceeding by which a legal right is enforced, as distinguished "from the law which gives or defines the right, and which, by means of "the proceeding, the Court is to administer the machinery as distin-"guished from its product."

Then, quoting section 74 of the English Judicature Act of 1873, the Lord Justice goes on to say:—

"In these sections the rules in the Schedule are regarded as Rules of "Court for regulating its practice and procedure, and apart from statu-"tory restriction such rules are within the competence of any Court "to make for itself."

Now the rules of procedure here spoken of cover all the same ground and matters and proceedings as the "Supreme Court Rules, 1880," and *à fortiori* the "Amendments" to the Supreme Court Rules of 1880, and among these Rule 401A, under which we are now supposed to be sitting as a Full Court. Consequently, I consider that the local Legislature were legislating on a matter not within their competence when legislating on the matter of the procedure of the Supreme Court of British Columbia, and which *Poyser* v. *Minors* declares to be within the competence of any Court (meaning, of course, the Courts he was speaking about—the Superior Courts, the High Courts, and Courts of Appeal, which answer to our Supreme Court), apart from statutory restrictions, to make for themselves. The Common Law right of the English Judges to make the Rules of Procedure in their own Courts has not been taken away by the Judicature Acts, though the Imperial Parliament is really sovereign in the highest degree, which even the Dominion Parliament is certainly not. It declared and defined also whose presence should be necessary to make rules, and provided for their presentation to the House, but the general power of the Judges was carefully preserved throughout.

It was contended in argument in this case, that local Colonial Statutes could alter the Common Law, and the Colonial Laws Validity Act was quoted in support. But assuming such to have been the case, here there was no exercise of the right thus claimed, but the very reverse; for the local Act—"Supreme Courts Ordinance, 1869," section 13 (saved by the subsequent Supreme Court Act of 1870)—expressly confirms that inherent right in the Supreme Court and its Judges which previous Acts had already declared; and in that state Confederation found the Court, and in that condition handed it down to us now, subject only to the rights of the Dominion, and such Courts and procedure as it should create, and the legal obligations of the British North America Act.

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It follows, therefore, as a logical consequence, from *Poyser* v. *Minors* as applied to the facts of this case, and the judicial construction of the British North America Act, that the local Legislature were *ultra vires* in legislating on the procedure of the Supreme Court, and as a necessary consequence could not delegate a power which was itself beyond their own competence.

But assuming, *arguendo*, they had the power of legislating on this procedure direct, then by section 32 of the Administration of Justice Act of 1881, they would have made the Supreme Court Rules of 1880 into Statute Law, and have given the Lieutenant-Governor in Council power to repeal or alter that law. That, I think, was *ultra vires*. *Cooley* on Constitutional Limitations, page 141, tells us that one of the settled maxims of constitutional law is, that the power conferred upon the Legislature to make laws cannot be delegated by that Legislature to any other body or authority.

Where the sovereign power of the state has located the authority there it must remain; and by the constitutional authority alone the laws must be made, until the constitution itself is changed.

The power to whose judgment, wisdom, and patriotism the high prerogative has been entrusted, cannot relieve itself of the responsibility by choosing other agencies upon whom the power shall be devolved; nor can it substitute the judgment, wisdom, or patriotism of any other body for those alone to whom the sovereign power has seen fit to confide it.

The exception which proves the rule is, that where there is an immemorial custom, as the delegation of limited powers of taxation to municipal corporations, that is not considered as trenching upon the maxim I have just declared, *delegatus non protest delegare*. They are rather in the light of auxiliaries of the Government in the important business of municipal rule in respect of which the parties immediately interested may fairly be supposed more competent to judge of their need than any central authority. By parity of reasoning, the Judges of a Superior Court who from immemorial custom have been in the habit of making rules for their own Courts, and as the parties more immediately interested, may be supposed more competent to judge of their own needs than any central authority.

The local Legislature could not, as a delegated, or even if considered a derivative power, and if possessed of power over procedure, subject as they were to the construction which the Canadian and English Judges have put on the British North America Act, have delegated that authority to a new body of men, as the Lieutenant-Governor in Council in this case certainly are. The clear and vigorous judgment of Chief Justice *Hagarty*, in *Regina* v. *Hodge*, is a conclusive authority against such a position; although if they had had the power, they could have relegated it to the Supreme Court Judges, as the immemorial common law channel and depository of the power of making such rules and orders.

The "Amendments" are not only defective in this principle, but also in form, not being carried out in the only form in which they could have had (under the construction of section 32 of the Local Administration of Justice Act, and section 17 of the "British Columbia Judicature Act, 1879,") a chance of being effective, namely, by being issued in the shape of an Order in Council instead of a Report of a Committee of Council —though that could have been instantly remedied had there been no other objection to it, by returning it to the Lieutenant-Governor in Council respectfully soliciting the insertion of proper operative words "it is ordered," and so forth.

But there are other defects in it, not only of form but of substance, *e. g.*, 284A: application for a new trial to a "Judge of a Judicial District;" there being no such official in existence here.

285A. Rule of partial and local application on a general subject.

Order XL. "Court of the District wherein the action has been commenced;" there being none such.

Order LVIII., 399A. Altering the words of a statutory enactment by a mere rule.

400A. Limiting the statutory power of appeal; enacting substantive law by rule and order, instead of Act.

Now, leaving the lower ground of legal inference and probability, legal comparison and conclusions thereon, and deduction, section by section, let us try the proposition laid before us: that the Lieutenant-Governor in Council, *i. e.*, the local Government, or even the local Legislature, are the only proper persons to make Supreme Court Rules, Practice, and Procedure—by a higher standard.

Regarded in the higher light, we shall be struck with the grave objections on the ground of principle, amounting absolutely to disqualification, in both these bodies, to the adoption of such a course.

It is a general principle of universal acceptance among jurists that the Legislative, Executive, and Judicial departments of Government should be kept entirely distinct from each other; and the reason for this separation of functions is obvious. They are a constant constitutional and conservative check on each other. If the Legislature goes beyond its power in the enactment of substantive law, there is the Judicial department, an independent body, presumably well trained and experienced for the purpose, at hand to indicate the extent to which their powers lawfully go. If the Judiciary overstep the proper limits of their constitutional functions, there are, first, the Executive, where the law is clear, to call attention to the excess, and suggest, and, if need be, enforce, a return to the correct path. If the substantive law at issue be not clear, there is the Legislature at hand to remedy the defect, and clear the way for the smooth and harmonious working of Constitutional Government.

It is for the Legislature to make the law, the Judiciary to interpret it, and the Executive to execute it; and it is the acknowledged experi-

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ence now of centuries in every civilized community on the globe, that those who have to interpret the law, whose daily study and avocation it is to ascertain and follow out all the best modes of carrying it out, should be charged with and responsible for the more immediate duty of declaring and defining the procedure by which justice is in all cases to be obtained, through the medium of the Court. If the Legislature and the local Government, for such we must consider the Lieutenant-Governor in Council to be, concur in the enactment and carrying out of a measure which is in excess of their constitutional power—and that may readily happen with the most honest and patriotic intention, —then, so long as the Judiciary are distinct and free from improper control, the error can be set right, and the mischief remedied or prevented. The Local Executive are generally chosen out of the Legislature, for their influence in that Legislature. They are therefore very likely, nay almost certain, to agree not only in the complete propriety of any given law they may enact, but in the execution of it. The importance therefore of keeping the third body, the Judiciary, sufficiently independent of local control to be able to exercise its proper functions, distinct from either of the other two bodies, becomes a matter of paramount importance to every one who may possibly become a suitor in the Courts; in other words, every inhabitant of the land. It is, therefore, the right of the suitor that these functions should be kept distinct from each other, and not be allowed to clash with, overlay, or destroy one another. The very case before us is a case in point. While an important trial involving a heavy amount of money is proceeding, rules of procedure are suddenly made by one of the Departments of the State above alluded to, whereby the previously existing right of rehearing (though with the ostensible intention of granting one) is suddenly cut off.

And this is the principle which is to guide us in the construction of the British North America Act, for Chief Justice *Harrison*, in *Leprohon* v. *The City of Ottawa* (40 U. C. R., p. 478), comparing the constitution of the United States with our own under the British North America Act, says: "In each Constitution, (that of the United States and ours,) "we see traced in strong characters the separate functions of the "Executive, Legislative, and Judicial departments of Government; and "provision is made in our constitution for the independent exercise of "the Executive and Legislative functions, not only by the central "authority, but by the authorities of each Province."

Cooley on Constitutional Limitations, page 57, note, citing *Webster*, vol. III.: "There is no department on which it is more necessary to "impose restraints than upon the Legislature. The tendency of things "is almost always to augment the power of that department of govern-"ment in its relation to the Judiciary." After explaining the reasons of this, the power of the purse, political influence and so forth, and the mode in which this overshadowing influence insensibly grows, he con-

cludes, "It would seem to be plain enough, that without constitutional "provisions which should be fixed and certain, such a department, in "the case of excitement, would be able to encroach on the Judiciary."

In another place (page 115) the same American author, in speaking of the powers of a Legislature, and quoting *Thompson*, J., in *Dush* v. *Van Kleck*, (Johns, 498), says: "To declare what the law is or has "been, is a judicial power; to declare what the law shall be, is legislative."

"One of the fundamental principles of all our United States Govern- "ments is (and the same applies to Canadian Provincial Governments) "that the legislative power shall be separate from the judicial." *Pomeroy*, also a great authority, in his Constitutional Law, page 71, says: "It is a fundamental principle of the United States constitution "[and the remark applies with equal force to the British America Act] "that the Executive, Legislature and Judiciary are three distinct bodies, "not to be trenched upon or destroyed by each other." And that being the general intent and spirit of our own Act, we are, I think, bound to apply that principle of construction to its provisions, deciding the matter before us on the high ground of its relation to a well understood principle of constitutional law. On this ground, therefore, I consider that it is not legally within the competence of the local Legislature to make, or depute to the Lieutenant-Governor in Council, or for the Lieutenant-Governor in Council to make, Rules and Orders for the Supreme Court of British Columbia; and had there not been several other valid grounds for arriving at the same conclusion, I should be well content to rest my judgment entirely on the application to the circumstances of the case of the above high principle of constitutional law.

As the result of the various arguments and authorities on the question before us, and a careful consideration of the whole case, I cannot resist the conclusion that section 28 of the "Local Administration of Justice Act, 1881," restricting the sittings of the Supreme Court for reviewing *nisi prius* decisions, is unconstitutional; and that the local Legislature has no power to regulate the procedure of the Supreme Court by making rules or otherwise, or to delegate the power of so doing to the Lieutenant-Governor in Council, such power residing in the Supreme Court alone, by virtue of the common law and statutory enactment previous to going into the Union, subject alone to the provisions of the British North America Act, and sections 129 and 130 thereof. And I further consider that the local Legislature has no power to diminish or repeal the authorities or jurisdiction of the Supreme Court, nor to allot any jurisdiction to any particular Judge of the Supreme Court, nor to alter or add to any of the existing terms and conditions of the tenure of office, whether as to residence or otherwise, by the Judges thereof.

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The questions involved are of the utmost importance as affecting the administration of justice, and almost of the Dominion itself. For if the "omnipotence" claimed for the local Legislature be conceded, all Dominion legislation is futile; Dominion rights only nominal, and the Dominion itself not superior to, but simply a subordinate part of British Columbia.

As must necessarily be the case, the discussion turns mainly on the 91st and 92nd sections of the "British North America Act, 1867." This Act has hitherto been considered by all Courts, all Judges, all statesmen and public men as a new departure in the constitution of Canada as well as of the several Provinces forming the Dominion.

The authorities are so numerous that the position may be assumed as a recognized axiom of constitutional law when applied to Canada or its constituent parts. Says Chief Justice *Hagarty*, in *Leprohon* v. *The City of Ottawa*: "We must take the Confederation Act as a wholly "new point of departure. The paramount authority of the Imperial "Parliament created the now existing legislatures, defining and limit-"ing the jurisdiction of each. The Dominion Government and the "Provincial Governments alike spring from the one source."

I do not propose to discuss at any length the antecedent history of the Supreme Court of British Columbia, its powers, or incidents. Whatever they were, when British Columbia went into the Union she surrendered them for good consideration to the General Government, and received back exactly what is defined in the British North America Act—nothing more, nothing less. She went in subject to all of the provisions of the British North America Act applicable to the Province. Not only is this the necessary consequence of going into the union, but it is expressly declared so to be intended by the 48th section of the local "Constitution Act, 1871," (Consolidated Statutes, 1877, chapter 42, section 83,) passed by the local Legislature in contemplation of such union, viz.:—

"If the projected union of this Colony with the Dominion of Canada "shall be carried into effect, this Act shall be construed after this "Colony has been so united as aforesaid, anything hereinbefore "contained to the contrary notwithstanding, as being subject to all the "provisions contained in the 'British North America Act, 1867,' which "may by such union become applicable to this Colony, and to the "provisions contained in any Order of Her Majesty in Council for the "admission of this Colony into such union as aforesaid, under the "authority of that Act, and to the provisions contained in any Act of "the Parliament of the United Kingdom of Great Britain and Ireland, "made for the purpose of effecting such union as aforesaid, or to any "other provisions framed by competent authority, other than already "mentioned, for such purpose."

What, then, bearing on this question, did she receive back? Subject to the controlling power of the 91st section and the general tenor of the whole Act she received by the 92nd section, sub-section 14, the exclusive power to legislate as to "The Administration of Justice in "the Province, including the constitution, maintenance, and organiza- "tion of Provincial Courts, both of civil and criminal jurisdiction, and "including procedure in civil matters in those Courts."

Standing by itself as a distinct Province, bound by no controlling connection with any other or higher authority, the powers in this sub-section would, without question, give an absolute dominant Provincial control; but read with the whole of the British North America Act, they must be read as affected by and subject to the general objects, uses, and powers for which the union was made, and for maintaining which efficiently that Act was passed. If by the terms and conditions embraced in the Act the General Government can use for Dominion purposes Courts in the Province—but Provincial only in the sense that their sphere of duty is confined to the territorial limits of a Province, the Province cannot so legislate as to render those Courts inefficient; and admitting that the Province can use the same Courts for its local purposes, this power only gives to the instrument a conjoint character, preventing its reduction to inutility by either, and renders the preservation of its efficiency the more distinct when the expense of maintenance is shared by both parties, and the appointment of the directing hand given exclusively to the one which can use it for the general purpose. This principle was recognized in *Leprohon* v. *The City of Ottawa* (2 Ont., app. C. 522), where it was held that the power of taxation by the local Legislature did not extend to those means or instruments employed by the Dominion Government to carry into effect the powers conferred upon that body. The same reasoning would render unconstitutional the possession or exercise of a power by the local Legislature to render inefficient Courts the Dominion Government was entitled to use to carry into effect the powers conferred upon it.

Valin v. *Langlois* clearly decides that the Dominion Parliament may utilize the Superior Courts in the Provinces for the purpose of enforcing Canadian laws enacted by that Parliament within the scope of the Legislative power given to that Parliament by the "British North America Act, 1867," a view which had been recognized and acted upon by this Court previous to that decision. The true character and position of these Courts are so clearly defined by the Chief Justice in *Valin* v. *Langlois* that it almost renders argument unnecessary. "They are not," he says, "mere local Courts for the administration of the local laws "passed by the local Legislatures of the Provinces in which they are "organized. They are the Courts which were the established Courts "of the respective Provinces before Confederation, existed at Con- "federation, and were continued with all laws in force, as if the union "had not been made, by the 129th section of the British North America

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"Act, and subject therein, as especially provided, 'to be repealed, "abolished or altered by the Parliament of Canada, or by the Legis-"latures of the respective Provinces, according to the authority of "Parliament or of that Legislature under this Act.' They are the "Queen's Courts, bound to take cognizance of and execute all laws, "whether enacted by the Dominion Parliament or the local Legislatures. "Provided, always, such laws are within the scope of their respective "legislative powers."

A higher authority, or a better definition, we could not have.

The Federal Government by parliamentary authority appoints, pays and removes the Judges, as pointed out by Imperial and Dominion legislation. The local Government merely provides the subordinate officers and local machinery. Without a Judge there can be no Court, and the local Government cannot appoint one to that Court. The Supreme Court of British Columbia cannot, therefore, be exclusively a Provincial Court. By the effect of the British North America Act it becomes a Federal Court, acting within a defined territorial jurisdiction, and as incident thereto for the purpose of its existence and efficiency in carrying out both the Federal and Provincial laws, cannot be controlled in such a way by local legislation, in regard to procedure or otherwise, as to render its action ineffectual. It was so intended by the British North America Act, in order that the administration of justice, and the Judges themselves, might be uninfluenced by local, political, or personal considerations. Under the 129th section, the Canadian Parliament adopted the Court, with its power and authorities, as existing previous to Confederation, clothed it with combined duties and increased jurisdiction, to carry out as the law of the land, in civil as well as in criminal matters, statutory enactments made beyond the territorial limits of the Province, rendering their operation compulsory, not operative through comity only, and preserves the Court, subject only to be abolished, altered or affected by the Dominion Parliament or the local Legislature, as the British North America Act permits.

The 14th sub-section is divisible. 1st. It confers on the local Legislature the exclusive power of making laws relative to the administration of justice in the Province. That power, it has been decided, means limited to the matters on which the local Legislature can constitutionally legislate, that is, as defined in the 92nd section; otherwise the whole Dominion legislation, so far as it has to be carried out in the Province, might be rendered nugatory. 2nd. It confers the power of constituting, maintaining and organizing "Provincial Courts," both of civil and criminal jurisdiction. If, therefore, the Supreme Court of British Columbia be a Provincial Court in the limited meaning of being organized and maintained by the Province, the local Legislature may so restrict its powers as entirely to prevent the enforcement of Dominion legislation on the very matters over which the British North America Act gives the exclusive power to the Dominion Parliament,

and thus paralyze the action of the Federal Government in the Province. 3rd. It confers the power of legislating as to procedure in civil matters only in "those Courts," that is, the Provincial Courts, the Courts the Province constitutes, maintains and organizes; otherwise again it may render abortive the enforcement of Dominion laws, on the matters confided to the Dominion Parliament, and by that Parliament deemed necessary for the good government of Canada, *e. g.*, if it can say the Supreme Court shall sit only once a year, it may equally say it shall sit only once in five or ten years, and thus, this being a matter of procedure, every step taken to enforce a Dominion law in civil matters be completely nullified. This power, pure and simple, is claimed to its fullest extent for the local Legislature. It cannot be conceived that the constitution intended anything so inconsistent—that the Dominion Government should pay for Judges, and largely bear the maintenance of Courts over which it has no control, and which may at any moment be used to neutralize Dominion legislation.

The 96th, 99th, 100th and the 130th sections distinctly make its Judges officers of the Dominion.

The Provincial Courts—by this section intended—it is submitted, are those of which the Province bears the entire expense, and has the sole control, similar to the State Courts in the United States; though owing to the difference in the constitution of the two countries the jurisdiction of such Provincial Courts could not be co-extensive with that of the State Courts.

In such a view there is nothing that conflicts with the *strictissimis verbis* of the 14th sub-section, while it makes reconcilable the general operation of the whole British North America Act, and preserves the unity of its various parts. The British North America Act contemplated and effected the transfer from the Provinces to the Dominion of all properties, institutions, and powers that were essential to the good government of Canada. By the 107th and 108th sections the public funds and public properties were transferred. By the 129th section and the limitation of the powers of the local Legislatures in the 92nd section; and the 91st, the 96th, the 99th and 100th sections, the control of the Superior Courts passed to the Dominion to be exercised when and as the public interests required.

As repeated time after time in *Valin* v. *Langlois* (3 Canada S. C. R., p. 1), you are to look at the whole of the British North America Act for its meaning It surely cannot be successfully contended that after conferring the great powers that Act conferred upon the general Government and Parliament for the public interest, it meant to take them all away again, or to place it in the power of a subordinate Legislature to do so, and to disarrange the whole machinery of the Dominion administration of Government by the words used in the 14th sub-section of section 92.

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In view of this 129th section, it may be desirable briefly to refer to the organization of the Supreme Court of British Columbia, as it existed at the time of the Union with Canada. By the "Supreme Courts Ordinance, 1869," Rev. Stat. c. 112, provision was made for the merger of the then two existing Courts called the "Supreme Court of the Mainland of British Columbia" and the "Supreme Court of Vancouver Island" into one Court to be called the "Supreme Court of British British Columbia," and for the appointment of a Puisne Judge, and that all the jurisdiction, powers and authorities of the two then existing Supreme Courts, and of the Judges thereof, should be vested in, and should be had, exercised, and enjoyed by the said Supreme Court of British Columbia and the Judges thereof. By the 13th section of that Ordinance the Chief Justice of the new Court was authorized and empowered from time to time to make all such Orders, Rules and Regulations as he should think fit for the proper administration of justice in said Supreme Court, and, subject to such Orders, Rules and Regulations, the existing Rules of the Court of the Mainland should have full force and effect in the said Supreme Court of British Columbia. By No. 120, 9th March, 1869, "An Ordinance to amend Civil Procedure," provision was made repealing the "Vancouver Island Civil Procedure Act, 1861," and introducing certain parts of the Common Law Procedure Acts, 1852 and 1854, and of the statutory enactments regulating the practice, pleadings and procedure of the High Court of Chancery; and by the 5th section of this last-named Ordinance, the Judge of either of the said Courts was empowered from time to time, with the approval of the Governor for the time being, to make general orders modifying such procedure at law or in equity in the Court in which he presided.

By an Act passed in April, 1870, ("Courts Merger Ordinance, 1870,") the merger of the two Courts was declared to have taken place on the 29th March, 1870; and by section 4, the last-named Act transferred all the business then pending in both Courts to the new Supreme Court, and preserved the provisions of the Ordinance, chapter 113, called the "Supreme Court Ordinance, 1869," just referred to. Such were the relative positions of the Supreme Court and the local Legislature at the time of the Union on the 20th July, 1871.

The Legislature had at that time, by positive legislation, made the English practice and procedure the law of the Province to a certain extent, and left to the Judges the duty and power of making the rules or regulations necessary to carry on the business of the Court in all other respects than as declared or set out in the English practice and procedure to the extent so introduced.

By the 129th section of the British North America Act, all laws, Courts, commissions, powers and authorities were to continue until altered by competent authority. What authority? The power of the local Legislature is by the 92nd section limited to the defined subjects

over which it has exclusive power. The Dominion Parliament cannot touch the subjects over which such exclusive power exists; but the Dominion Parliament itself is not limited to the subjects defined in section 91. It has exclusive power over all subjects to which the exclusive power is not given by section 92 to the local Legislature.

Again, to quote the language of the Chief Justice in *Valin* v. *Langlois:* "This may be termed a constitutional grant of privileges and "powers which cannot be restricted or taken away except by the "authority which conferred it, and any power given to the local Legis- "lature must be subordinate thereto." It was decided in that case that the Dominion Parliament had the right to utilize the Superior Courts of the Province, and to legislate as to the procedure in those Courts in the civil matters in which it so determined to use them. If so, the local Legislature has not the exclusive right to legislate as to procedure in civil matters in those Courts.

The "procedure," therefore, in that sub-section 14 specified must have reference to Courts in the Province over which the local Legislature of the Province has exclusive control, because, *ex-ratione,* if the Dominion Parliament has a power to legislate as to procedure in civil matters in certain Courts in the Province, those must be Courts over which the local Legislature has not the exclusive power to legislate as to procedure.

It is a clear canon as to the construction of statutes, that you must give force and effect to every word, as far as it is possible. The governing words in this sub-section, and section 92 as bearing on this sub-section, are "exclusively" and "those Courts." They are thus "linked," and the character of the Court is clearly specified.

The general authority conferred by 91, being to legislate on all matters not coming exclusively within 92, thus pertaining to the Dominion Parliament, the 129th section steps in, authorizing legislation as to the existing Courts in the Province by the Parliament of Canada or the local Legislature, as one or the other under the British North America Act may be entitled.

The Parliament of Canada has legislated upon the subject; has, by imposing certain duties upon the Supreme Court for Dominion purposes in matters connected with the civil administration of justice in the Province, altered the constitution of that Court, increased its jurisdiction, and expressly shewn by legislative enactment that it is not a Court over which the local Legislature has the exclusive power to legislate. The exercise of this power has by the Supreme Court of Canada, in *Valin* v. *Langlois,* been declared constitutional. In furtherance of the observations of the Chief Justice, Mr. Justice *Fournier,* referring to the extensive powers given to the Federal Government over these Courts by the 129th section, says:—"Could stronger "or fuller language be used to give jurisdiction over these Courts? I "think not. The effect of this section, to which they owe their very

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"existence, is evidently to place them under the legislative power of "the Federal Government, as well as, it is true, under that of the local "Government, and to make them, in fact, common to both these "Governments, for the administration of the laws adopted by them "within the limits of their respective powers."

Mr. Justice *Henry*:—"The whole purview of the Act, with a proper "consideration of its objects, is evidence of its policy to limit local "legislation to those civil rights in the Province not included specially "or otherwise in the powers given to the Dominion Parliament." As to sections 13 and 14:—"Guided by the purview of the whole Act, "deducting the indirect and incidental powers of legislation given by "the Act to Parliament, the local Legislatures have the exclusive right "to legislate only in regard to the remainder. The 14th sub-section "gives local authority to deal with the administration of justice in the "Province, in regard to the subjects given by the Act; and to that "extent only to provide for the construction, maintenance, and organ-"ization of Provincial Courts, in reference to those and kindred "subjects. The words 'Procedure in civil matters in those Courts' "must be considered with the context and with the objects and other "provisions of the Act" (77).

Mr. Justice *Taschereau* says:—"The administration of justice is "given to the Province, that is true; but that cannot be understood to "mean all and everything concerning the administration of justice" (81).

Mr. Justice *Gwynne* is equally decided.

As the local Legislature cannot supersede the action of the Dominion Parliament, it cannot deprive the Court of the character thus given to it by such legislation, or the Dominion Parliament of the use they may make of it. If so, it has no exclusive control, and if it has not exclusive control it cannot legislate as to that Court's procedure, because by the 91st section what it cannot exclusively legislate upon the Dominion Parliament alone has the exclusive power to legislate on. If these terms, so used in the 91st and 92nd sections, are to have any legal meaning they negative a joint authority. It is the logical sequence that if the local Legislature alone has power to legislate on matters coming within 92, and the Dominion Parliament has legislated on the duties and procedure of the Superior Courts in the Province, and that legislation has been declared constitutional, then those Superior Courts cannot come within the class embraced in sub-section 14, section 92, because with reference to that class the local Legislature, having the exclusive power, the Dominion Parliament cannot legislate. The action, therefore, of the Dominion Parliament and the judgment of the Supreme Court of Canada amount to a legislative and judicial declaration to that effect.

The term "exclusively," in 92, it must be borne in mind, has reference to and is legally a part of every sub-section, and every sub-division of

a sub-section, and therefore applies to each of the sub-divisions into which the sub-section can be divided.

It cannot be contended that in the same Court on the same subject,—the rights of suitors in civil matters,—there can be two different Rules of Civil Procedure; that you can say to one—Your case shall be heard immediately, and as often as your business requires, because the redress you are seeking springs out of Dominion legislation; but to the other—You cannot be heard for one, five, or ten years, because the debt you seek to recover pertains, so far as procedure goes, to the control of the local Legislature; yet such must be the case, if one or the other has not the exclusive power—the Dominion Parliament or the local Legislature.

If a Provincial Legislature positively enacts, that on a particular subject, and in a Provincial Court, within its legislative jurisdiction, and under its exclusive control, a particular course shall be adopted,—the suitor may or may not avail himself of that Court. But to adjudge that in the only Court to which he can resort,—a Court used for Dominion as well as Provincial purposes, and in which the Dominion Parliament has constitutionally exercised the right of regulating procedure,—he may be so used, is introducing an element entirely at variance with an impartial administration of justice, and one never contemplated under the British North America Act. The procedure in such last-named Court must be either under Dominion or Provincial control, and the former has legally assumed it. Nor is this assumption limited merely to matters of Dominion legislation. The Supreme and Exchequer Courts Act, 38 Victoria, c. 11, is especially created and clothed with power for hearing and granting appeals, not only in matters over which the Dominion Parliament has power to legislate, and arising out of laws and proceedings with which the Dominion Parliament and Government alone are connected, but also for hearing and granting appeals in matters falling strictly within the purview of the administration of justice in civil matters assigned to the local Legislature under section 92.

The 11th section of that Act restricts the appeal to an appeal from the Court of Last Resort in the Province where the judgment was rendered in such case, and by the 17th section enacts that "subject to "the limitations and provisions hereinafter made, an appeal shall lie to "the Supreme Court from all final judgments of the highest Court of "Final Resort, whether such Court be a Court of Appeal or of original "jurisdiction now or hereafter established in any Province of Canada, "in cases in which the Court of original jurisdiction is a Superior "Court."

Here is a clear statutory right given to suitors (defined as to the mode of procedure by which it is to be obtained from its inception in the Court of Last Resort in the Province to its hearing in the Supreme

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Court of Canada) to an appeal from the Superior Court of the Province in all final judgments, not judgments limited to matters springing from Dominion, but equally from local, legislation.

By the first Act of the Dominion Parliament passed in that same session, 38 Vic., c. 1., 2nd section, it is enacted as an amendment to the 18th sub-section of section 7 of the "Interpretation Act" that the term "Superior Court" shall in the Province of British Columbia denote "The Supreme Court of British Columbia."

Thus in the Supreme Court of British Columbia we have in force a Dominion Statute regulating procedure, even to staying an execution in the Sheriff's hands in matters arising, or that may arise, out of local legislation. How, then, can it be said that this Court comes within the class of Provincial Courts over which the exclusive power is given to the local Legislature to legislate as to procedure when, if so, that Legislature may take away from the suitor,—as by its action in the present case, if legal, it has done,—the very highest right conferred upon him by the Dominion Parliament ?

The inference is irresistible, that this Superior Court, with jurisdiction to deal in civil matters arising from Provincial as well as Dominion legislation, was by the Parliament considered as not coming within the class of Courts specified in the 14th sub-section, and therefore not under the control of the local Legislature as to procedure; and it was so considered by the Parliament of Canada, because it was essential to the good government of Canada, as affects the administration of justice, that it should be so.

This view, again, is in accordance with the principle laid down in the *Queen* v. *Burah*, L. R. 3, App. Cas. 889. In order that an Act passed by the local Legislature should be valid it must be within the powers expressly limited by the Act of Parliament which created it. Within those limits its powers are no doubt plenary, but it can do nothing beyond the limits which circumscribe those powers. Apply the limitation here. Such subjects as being exclusively given to the local Legislature the Dominion Parliament cannot legislate upon. Whatever, therefore, the Dominion Parliament can constitutionally legislate upon must be beyond those limits, and therefore the local Legislature cannot legislate on the same subjects.

Though this local legislation be pronounced unconstitutional, the Court itself for the purpose of the Administration of Civil Justice in the Province is not left without ample power of procedure. What it had at the time of the Union, under the 129th section, still remains, and for what may be required the existing law of that date still continues, which gave power to its Judges to make rules, besides the the inherent power in Courts of superior jurisdiction at Common Law, independent of any statutory authority to govern their own procedure in the interest of suitors—(*Morris* v. *Hancock*, 1 Dow. N. S. 323; *ex*

parte Strong, 8 Excheq. 199; *Bartholemew* v. *Carter*, 3 Scott, N. S. 529, 3 M. & G. 135), a power which it must be assumed the Dominion Parliament and the Supreme Court of Canada recognized when, under the reservations in the British North America Act, the Supreme Court of British Columbia was taken from the exclusive control of the local Legislature as to civil rights and procedure.

The local Legislature by its own act, and by the legal operation of the 129th section, gave the power it possessed over that Court to the Dominion Parliament, and the Dominion Parliament by legislating on the subject accepted it. The power still exists, but transferred to other hands, and the local Legislature has not the exclusive power of legislation as to the procedure of that Court, and if not exclusive, none.

It was intimated by very high authority in *Severn* v. *The Queen* (2 Can. S. C. R. 70), that it could not be supposed that the local Legislature would legislate save for a legitimate purpose. The same idea has also elsewhere been often expressed, and is, doubtless, theoretically correct; but in *Leprohon* v. *The City of Ottawa* (2 Ont. App.), Mr. Justice *Patterson* (p. 563) takes a view somewhat more in accordance with human experience and human nature. "There is no security," he says, "that in the exercise of a power which is capable of being used to "the detriment or embarrassment of the Central Goverment, the "Provincial Legislature will always be guided by a judicious regard "for the harmonious working of all the departments of the Constitution. "What motive may be found sufficiently powerful to lead to antagon-"istic legislation, or whether any such motive may arise; or whether "from caprice, or from crude theories of political economy, or from any "cause whatever, the power now in dispute may be exercised in a "vexatious manner, must be a matter of speculation."

That exceedingly plain common sense language finds a not inapt illustration in the case before us. The "Judicature Act, 1879," was passed for a good object, in the interests of suitors to simplify legal proceedings and expedite business. By its 4th section it abolished the terms into which the legal year was divided, and declared that, "subject "to Rules of Court," &c., "the Supreme Court and the Judges thereof "shall have power to sit and act, at any time, and at any place, for the "transaction of any part of the business of such Court, or of such "Judges, or for the discharge of any duty which by an Act of Parlia-"ment, or otherwise, is required to be discharged during or after term."

It then gave power to the Lieutenant-Governor in Council, by section 17, to make Rules of Court for "regulating the sittings of the said "Supreme Court, as a Full Court or otherwise, and of the Judges "thereof sitting in Chambers, and for regulating the vacations to be "observed by the Court and in the offices thereof."

Under this Act, Rules of Court, called "Supreme Court Rules, 1880," were made and promulgated on the 16th October, 1880, to come into

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force on the 15th November 1880, and among them several regulating the sittings of the Supreme Court, namely:—

"1. Save as by the Act or these Rules is otherwise provided, every "action, proceeding, or matter in the Supreme Court, and all business "arising out of the same, ... shall, so far as is practicable and con- "venient, be heard, determined, and disposed of before a single Judge "sitting in Court or in Chambers, as circumstances may require; and "in Victoria such sittings in Court or in Chambers respectively shall, so "far as is reasonably practicable, be held continuously throughout the "year or as often as the business to be disposed of may render necessary.

"2. A Full Court shall consist of not less than two Judges of the "Supreme Court sitting together, and shall, besides exercising the "jurisdiction assigned to it by the Act, hear and determine appeals, or "applications in the nature of appeals, from any judgment, ruling, or "order of a single Judge, excepting orders mentioned in section 8 of "the Act; and shall hear and determine Special Cases where all parties 'agree that the same be heard before a Full Court.

"3. Sittings of the Full Court in Victoria shall be held as often as "the business to be disposed of may render necessary.

"4. All appeals to the Full Court shall be by way of re-hearing, and "shall be brought by notice of motion in a summary way. The "appellant may by the notice of motion appeal from the whole or any "part of any judgment, ruling, or order, and the notice of motion shall "state whether the whole or part only of such judgment, ruling, or "order is complained of, and in the latter case shall specify such part."

By an Act passed on 25th March, 1881, called the "Local Administration of Justice Act, 1881," section 10, the 4th section of the "Judicature Act, 1879," (heretofore quoted) is amended by substituting, in lieu of the part therein as to the sittings, the following:— "Subject to the Rules of Court and the provisions of this Act, and of "the 'Judicature Act, 1879,' the Supreme Court, and any Judge or "Judges thereof, shall have power to sit and act at any time and at "any place for the transaction of any part of the business of such Court "or of such Judges, or for the discharge of any duty which by any "Act or otherwise would heretofore have been, or is required to be, "discharged during or after term."

By section 32, "The 'Supreme Court Rules, 1880,'" (it is enacted) "shall, as modified by this Act, be valid, and the provisions of any Act "or Ordinance inconsistent therewith are hereby repealed, and the "Lieutenant-Governor in Council shall have power to vary, amend, or "rescind any of the said Rules, or make new Rules, provided the same "are not inconsistent with this Act, for the purpose of carrying out the "scope and aim of this Act and of the 'Better Administration of Justice "Act, 1878.' The said Rules need not be uniform, but may vary as to "different districts in the Province as circumstances may require; and

"section seventeen of the 'Judicature Act, 1879,' with respect to Rules "of Court, shall continue to be in force, subject to such proviso."

Conceding, for the sake of argument, that the local Legislature has power to regulate the procedure of the Supreme Court, it is plain that under the amendment to section 4 of the "Judicature Act, 1879," and the "Supreme Court Rules, 1880," assumed and made valid by legislative enactment in this section, the Supreme Court could sit to expedite business whenever required, but contemporaneously with this section, and in the same Act, section 28 says: "The Judges of the "Supreme Court shall have power to sit together in the City of Victoria "as a Full Court, and any three of them shall constitute a quorum, and "such Full Court shall be held only once in each year, at such times as "may be fixed by Rules of Court, and such Court shall constitute a "Supreme Court." This, of course, is directly contradictory to the Rules just previously adopted and made statutory by legislative enactment.

Under the power in the 32nd section to make new Rules not inconsistent with this Act, a Rule was made to hold a Full Court on the 19th December, *i. e.*, within six months after the previous Full Court had been held. Being in direct violation of the positive enactment in the very Statute which authorized the rule to be made, even were there no other grounds of objection, it could not be made operative. *Christ Church College* v. *Martin*, L. R. 3, Q. B. D., 16.

To summarise the legislation under this Statute, if legal, it would be an order to the Supreme Court. 1st. To sit continuously. 2nd. To sit only once a year. 3rd. To sit more than once a year, if "not inconsistent" with the enactment to sit only once a year. It is difficult to bring such legislation within the assumption expressed in *Severn* v. *The Queen*. It seems more naturally to fall within the view expressed by Mr. Justice *Patterson*, in *Leprohon* v. *The City of Ottawa*. It was contended that the Act was not retrospective and therefore the Court could sit on the 19th December, but these provisions being matters of procedure, the Act in that respect was retrospective, and the Court clearly could not sit. (*Poyser* v. *Minors*, L. R. 7, Q. B. D., 339.)

This power of suspending the sittings of the Court for any period at the will of the local Legislature, or by rules made under an assumed delegated authority from the Legislature, and absolutely controlling its procedure, is no light matter. "If the power exists at all" (as says Mr. Justice *Burton* (p. 548), with reference to taxation in *Leprohon's* case) "it can be exercised to any extent, and in the event of any Province "being dissatisfied with the Dominion Government, it would hold in "its hands a weapon to which it might resort to harass the Government "and enforce its demands."

It is a question of principle, not of degree, and in this instance is in violation of the rights of suitors under Magna Charta, "*nulli "negabimus aut differemus justitiam vel rectum.*" As also of the right and duty of the Court to advance appeals, where irreparable

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damage may be caused by delay. (*Lazenby* v. *White*, L. R. 6, Ch. 89; *London & Chatham & Dover Railroad Company* v. *The Imperial Mercantile Credit Association*, L. R. 3, Ch. 201.)

Yet this power of legislation to the most unlimited extent is claimed for the local Legislature, even to that of direct antagonism to Dominion legislation, under the authority (the Attorney-General contends) of Mr. Justice *Fisher's* words in *Steadman* v. *Robertson*, (2 Pug. & D., 580), "All the powers possessed by the Legislature of New Brunswick still exist as potential as ever," but (he omits the learned Judge's qualification) "they are distributed between the Parliament and local Legislature, and are exercised in each according to the limitations of the constituting Act." This qualification so clearly refutes the pretension that it is unnecessary further to notice it.

Equally unavailing to sustain the claim is the assertion that the Judges themselves are Provincial officers, and thus shew conclusively the Provincial character of the Court. Apart from the distinct provision in section 91, sub-section 8, and the concluding paragraph of 91, and the direct words in the 96th, 99th and 130th sections, in *Leprohon's* case (2 Ont. App. 526) we find it laid down: "Provincial officers are those over whose salaries the Province has control," and at 537, "The officers of the Dominion do not exercise their functions within the bounds of any Province by the permission of the local Government. They are there by authority of a higher power. The Province has no sovereignty over them, or their salaries, as existing by its authority, or introduced by its permission." If the right here contended for could be sustained, equally could the Dominion Government interfere with the Provincial officers appointed and paid by the local Government and Legislature, a doctrine too unconstitutional to be thought of. The reason for this separate control is expressed in a few words, in *Collector* v. *Day*, 11 Wall. 113, also cited in *Leprohon's* case, at p. 543, "Any Government whose means are employed in conducting its operations, if subject to the control of another and distinct Government, can only exist at the mercy of that Government."

We are thus brought down to the broad question how far the section 28, c. 1, the "Local Administration of Justice Act, 1881," comes within the power given by sub-section 14, section 92, British North America Act, and to what extent the local Legislature has power to make rules, or to delegate to the Lieutenant-Governor in Council the power to make rules regulating the procedure of Supreme Court. This latter power (it was pressed by the Attorney-General at the close of his argument) had been recognized by the Supreme Court of the Province in three separate judgments, delivered by the three several Judges on different occasions, and had thereby become the judicially declared law of the land. With reference to these judgments, each Judge has to speak as to the one delivered by himself, because, incredible as it seems, in a Province where many of the most complicated questions have

arisen since the Union, affecting the constitution and powers of the Government, no provision whatever is made for reporting the decisions of the Court, or of the separate Judges, or of making any reference to what might be termed an official declaration of what the law is. All knowledge of the reasons for the decisions depends merely upon verbal statements, or the voluntary action of a Judge in giving a copy of his judgment to one of the newspapers, which may or may not publish it, as inclination dictates. A degree of parsimony, which, in the interests of suitors coming before the Court, and of the public at large, it is not exceptional to pronounce as inexcusable.

In the case of *Pamphlet* v. *Irving*, heard before myself in August, 1880, the question now raised did not then arise. In that case the point was: That under the "Local Administration of Justice Act, 1881," the local Legislature having, under section 17 of the "Judicature Act, 1878," directed the Lieutenant-Governor in Council to make Rules of the Supreme Court for carrying that Act into effect, he had no power to issue a Proclamation directing somebody else to make those Rules. And it was held that he had no such power, that the Legislature having selected him to discharge that duty, upon the principle of "*Delegatus non potest delegare*," he could not transfer either the power or the duty to any one else, a decision to which I still adhere; but the questions were not then raised which are now raised for the first time in the Province, namely: First. That the local Legislature itself had no power to make rules regulating the procedure of the Supreme Court: Secondly, that if it had such power, it must exercise it itself, and could not delegate it to the Governor in Council. Thirdly, if it had such power, and had exercised it by adopting certain Rules called the "Supreme Court Rules, 1880," and making them law by statutory enactment, it could not delegate to the Lieutenant-Governor in Council the power of making Rules to alter or revoke the Rules so adopted and made statutory; and fourthly, that the Rule made, under such last-named assumed power, directing the Full Court to sit on the 19th of December, was not only illegal on that ground, but also as being directly inconsistent with the positive enactment of the Statute, which authorized the Lieutenant-Governor to make such Rules as were not inconsistent with the Statute, which that manifestly was. The reasoning and authorities cited in *Pamphlet* v. *Irving*, to which I now refer and add a copy hereto, as there are no reports from which it can be quoted, thus become on the question of delegated authority, so far as bearing upon the questions now raised, in point, and are fully sustained by *Cooley* on Constitutional Limitation, 141, *et seq.*

Such legislation as the present, it may further be said, though it does not in words, yet it does in fact—indirectly, if not directly,—interfere with the trade and commerce of the country. For what shipowner, British foreign, or colonial, will send his ship and cargo into a country where, under an alleged claim of regulating procedure in civil matters in the

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Courts of the Province, the local Legislature or its Government, authorized by its Legislature, can, when legal troubles or difficulties have arisen, and the intervention of the Superior Courts in the Province has been invoked between such owners and the inhabitants, close down the doors of justice, deny the right of being heard, and tell him all adjudication upon his rights shall be refused for one year, or five years, or ten years, or, if the claim of "Provincial omnipotence" holds good, for ever. What trade or commerce can flourish under such circumstances?

Such *ex post facto* legislation is unknown to English law; is directly in violation of the Constitution, and without sanction from any of the powers conceded by the British North America Act. It is difficult, within the limits of judicial restraint, to find words sufficiently strong to condemn it.

Dangerous as are the uses to which such a power may be converted it is, nevertheless, in the absence of any judicial authority as to the constitutional construction now for the first time raised and put upon the 14th sub-section of section 92, and in the presence of the fact that in one or more of the Provinces local legislation has been occasionally passed under a different impression, it is, I say, only after long and careful consideration that I have felt compelled to come to the conclusion that the local Legislature has not the power to make Rules to govern the Procedure of the Supreme Court of the Province, or to delegate that power to any one else, and that it cannot legislate in a way to deprive suitors of the right of access to that Court in matters coming within its jurisdiction, or impair the use the Dominion Government and Parliament can make of that Court; and that it is not necessary to wait until a case arises in which Dominion interests are involved so to decide; but if the legislation be capable of being so used it must, whenever the objection is taken, be pronounced *ultra vires*.

I have said in the absence of any judicial authority, for it must be remembered that the case of *Valin* v. *Langlois*—conclusive as it is to the extent to which it goes,—does not yet cover the whole ground raised in this case, for the points now raised were not then brought up. That case established conclusively the right of the Dominion Parliament to the use of the Superior Courts of the Provinces for Dominion purposes, and to the further undoubted right of regulating procedure in those Courts, so far as was essential for those purposes, but it was not necessary then to consider, or to decide, whether the entire control of the procedure in those Courts was not withdrawn from the local Legislature by the effect of the 91st section, and the words of limitation in the 92nd section, and sub-section 14 of the 92nd section, and of the 129th section, and that though the local Legislature might have the undoubted right to legislate as to all matters relating to the administration of justice constitutionally coming within their control under the 92nd section, yet whether the mode or procedure for carrying out that legislation,

when suits were instituted in the Superior Courts, must not be left to the Courts themselves to regulate, under their Common Law powers, or statutory powers, existing at the time of the Union, or under such rules as the Dominion Parliament might prescribe or authorize to be made for their governance. Whether, in fact, such Courts could be considered as coming within the exclusive term "Provincial Courts" designated in that sub-section over which the local Legislature, it is not questioned, has the absolute control, and also the exclusive power and privilege of constituting, organizing, and maintaining.

There is yet another point to be considered. Among the objections raised is one to the constitutionality of the application of the "Judicial District Act, 1879," under which the power is claimed by the local Government of dislocating the Judges and enforcing, through the operation of the Dominion Government, their compulsory residence in certain assigned districts. Coinciding to the fullest extent in the views expressed by the Chief Justice and Mr. Justice *Crease* as to the injurious tendency of such a measure upon a uniform administration of justice throughout the Province, and in the absence of any adjudication, admitting, for the sake of argument, that the power to divide the Province into judicial districts falls within the legislative power of the local Legislature under the 14th sub-section of 92, it may, nevertheless, be questioned how far a restriction as to residence, in the absence of any Imperial or Dominion legislation on the subject, can be constitutional or legal, or morally obligatory even upon Judges appointed after that Act was passed; but clearly it cannot be retrospective in its operation as to Judges holding their appointments and commissions in and to British Columbia long antecedent (ranging from nine and ten to twenty years) to its enactment, and any action of the Imperial or Dominion Governments thereon would be governed by that pri .ciple. Their commissions were restricted to no locality in British Columbia, their tenure of office under those commissions was during "good behaviour," a statutory protection under Imperial legislation not only to themselves, but to the suitor in the Courts and to the public at large against undue Government pressure of any kind or from any quarter, a provision absolutely necessary to secure the independence of the Bench and impartial administration of justice.

It is idle to say that a power to send a Judge into comparative exile and to inflict expense and ruin on himself and his family will not produce a disastrous influence on his conduct. It must become servile obedience or forced resignation. If that be an incident of the office he holds it should be one attached by law at the time of his appointment, and a risk which he should have the opportunity of accepting or refusing—but to force it upon him in the decline of life, and after years of judicial service, is a breach of the conditions of his appointment, and in violation of constitutional law and practice.

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The British North America Act is the fundamental law, and defines with clearness the tenure of the judicial office. The Parliament of Canada has passed no law in contravention of or trenching on this definition. A local Legislature cannot confer on the Government of the Dominion power which the British North America Act or Canadian Parliament itself has not given. At page 54, *Cooley* says: "The con- "stitution of the State is higher in authority than law, direction, or "order made by any body or any officer assuming to act under it. In "any case of conflict the fundamental law must govern, and the Act in "conflict with it must be treated as of no legal validity. The Courts "have thus devolved upon them the duty to pass upon the constitutional "validity sometimes of Legislative and sometimes of Executive acts." (55)

In the notes at page 26: "It is idle to say that the authority of each "branch of the Government is defined and limited by the constitution "if there be not an independent power able and willing to enforce the "limitations. Experience proves that the constitution is thoughtlessly "but habitually violated, and the sarifice of individual rights is too "remotely connected with the objects and contests of the masses to "attract their attention. The Judges ought to regulate their decisions "by the fundamental laws rather than by those which are not funda- "mental."

"Nor is it necessary," says he at pages 210-11, "that the Courts in "every case, before they can set aside a law as invalid, should be able "to find in the constitution some specific inhibition which has been "disregarded, or some express command which has been disobeyed. "Prohibitions are only important when they are in the nature of ex- "ceptions to a general grant of power, and if the authority to do an "act has not been granted by the sovereign to its representative it "cannot be necessary to prohibit its being done."

The British North America Act is the fundamental law; it gives power to the Governor-General to appoint the Judges, and to remove them from office on address of the Senate and House of Commons, but nowhere, when once appointed—without condition or limitation as to residence, save that it be within the Province to which they may be appointed,—does it give the power to order the Judges to change their residences to particular sections of that Province, at the dictation of the local Legislature, contrary to the terms of their commission and the law under which their appointments were made. It was necessary, therefore, to inhibit the exercise of such a power, for it never was granted, *à fortiori* where such change is in no way essential to the efficient discharge of the duties attached to the appointment. The privileges conferred by the British North America Act and the Dominion Legislature are statutory inducements. The power which confers may remove, should public exigency demand, but that power has not yet spoken, and, should it do so, it will take care that the exercise of any authority it gives shall not work injustice.

In the case of *Calder* v. *Bull* (3 Dallas, 390), *Chase*, J., says: "Every "law that takes away or impairs rights vested agreeably to existing "laws is retrospective, and is generally unjust, and may be oppressive."

Cooley, at page 325, speaking of *ex post facto* laws, says: "If it shall "subject an individual to a pecuniary penalty for an act which when "done involved no responsibility, or if it deprives a party of any valu- "ble right, like the right to follow a lawful calling, for acts which were "innocent or at least not punishable when committed, the law will be "*ex post facto* in the constitutional sense, notwithstanding it does not "in terms declare the acts to which the penalty is attached criminal." Can there be any question that to drive a man from his house and home, selected, occupied, and acquired in thorough accordance with the existing law, is not depriving him of a valuable right, when no charge of a nature forfeiting that right is alleged against him? The same author, at pages 77 and 78, says: "The implications from the provisions of a "constitution are sometimes exceedingly important, and have a large "influence on its construction. One 'rule of construction' is, that when "the constitution defines the circumstances under which a right may be "exercised or a penalty imposed, the specification is an implied prohi- "bition against legislative interference to add to the condition or to "extend the penalty to other cases."

At page 138, after referring to powers specially confided by the constitution upon the Governor or any other specified officer, he adds: "Other powers or duties the Executive cannot exercise or assume, "except by Legislative authority, and the power which in its discretion "it confers, it may also in its discretion withhold or confer to other "hands." And in a note bearing on this point, he quotes from an American case the following observations:—"In deciding this question "as to the authority of the Governor, recurrence must be had to the "constitution; that furnishes the only rule by which the Court can be "governed. That is the charter of the Governor's authority. All the "powers delegated to him or in accordance with that instrument he is "entitled to exercise, and none others." See also the Chief Justice's observations in *Valin* v. *Langlois*, hereinbefore quoted, as to statutory rights. Where then in the constitution—the British North America Act—is any power of the character claimed given to the Governor-General? a power, it is contended, to be exercised at the instance of the local Legislature, whether the movement, in the language of Mr. Justice *Patterson*, may spring "from caprice or from crude theories "of political economy, or from any cause whatever, being a matter of "speculation."

So strongly is this principle of the inviolability of the status of the Judges regarded under the Federal Government of the United States, that that Government never imposes, or permits to be imposed, upon the Judges once appointed by the Federal Government any additional burdens or restrictions without special legislation by Congress to that

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effect, and should it in view of paramount public interest do so, not without providing additional compensation, thus shewing that in the American view the constitution requires the presumed compact, resulting from the appointment, to be construed in the light of the existing law at the time of the appointment; and this has been the rule from the dawn of the Republic.

Vide Act of Congress, May 26th, 1824, section 13, 4 United States Statutes at Large, page 56, relative to Federal Judge of Missouri;

Do. do. June 17th, 1844, 5 do. 676, relative to Louisiana, Arkansas, Mississippi, and Alabama;

Do. do. June 14th, 1860, section 7, 12 Statutes, do. page 35, relative to California.

It must, therefore, be considered that in law no authority is given to the Dominion Ministry to advise the Governor-General to order the Judges in British Columbia, or any one of them, holding his or their commissions and appointments antecedent to the "Judicial District Act, 1879," to reside in any specially assigned district of the Province, and, consequently, any order to that effect made under such advice would be unconstitutional.

A judgment to this effect was given in this Court in December last, in the case of *The Queen ex relatione the City of Victoria* v. *Vieux Violand,* from which the counsel engaged declined to appeal.

As to this Judicial District Act, it may be urged, the Judges are interested, for, if legal, it affects their position and tenure of office. That objection, however, where all are concerned, cannot be sustained, for if so, the suitor would be denied access to any Court of competent jurisdiction in the Province. In such a case it is held that the hearing becomes a matter of necessity and is unimpeachable, as if "An action "were brought against all the Judges of the Court of Common Pleas "in a matter over which they had exclusive jurisdiction." (Per *Lord Cranworth,* C., *Ranger* v. *Great Western Railway,* L. R., 5 H. L., 88. See also *Broom's* Legal Maxims, ed. 1874, and the cases there cited.)

I think, therefore, that the objections taken by the learned counsel, Mr. *Theodore Davie,* for the plaintiffs, must be sustained,—that the legislation restricting him from being heard is unconstitutional and void, and the Rules of Procedure alleged to have been promulgated by the Lieutenant-Governor in Council for the governance of this Court are inoperative, and that this Court is bound in duty to exercise the authority it possesses to afford him an opportunity of bringing the plaintiffs' case at as early a day as possible before the Court, in order to test the validity of the points raised by him at the trial of this cause. And I may add that the conclusions at which I have arrived have been materially confirmed by the fact that every conceivable and almost inconceivable argument has, in a lengthy, most careful, and able contention by the Attorney-General as *amicus curiæ,* been brought

forward against such conclusions, without any effect other than to strengthen them.

The following are the conclusions at which it may be briefly said the Chief Justice, Mr. Justice Crease and myself, who have heard and considered the argument, have arrived (Mr. Justice McCreight, whose assistance would have been most valuable, having since July last been absent at Cariboo, and not having had any opportunity of conferring with his brother Judges on the important legal questions constantly coming before the Court):—

1st. That the Supreme Court is not a Provincial Court within the meaning of sub-section 14 of section 92 of the "British North America Act, 1867."

2nd. That the local Legislature has no control over its procedure, and cannot legislate so as to prevent suitors having access to that Court, and having their causes heard, and carried on to final adjudication, so as to have an appeal to the Supreme Court of Canada.

3rd. That the local Legislature cannot itself make rules to govern the procedure of the Court, or delegate the power to the Lieutenant-Governor in Council to do so.

4th. That the application of the "Judicial District Act, 1879," to Judges appointed and holding their commissions prior to its enactment is unconstitutional and void.

5th. That the Judges are Dominion, not Provincial, officers.

6th. That in these respects the "Judicial District Act, 1879," the "Better Administration of Justice Act, 1878," and the "Local Administration of Justice Act, 1881," are *ultra vires*.

7th. That the plaintiff is entitled to have the relief asked for, and the Court is bound in law to hear his motion, and permit him to proceed with his cause.

NOTE.—The matter of the *status* of the Supreme Court of British Columbia, and the power of the Legislature of the Province to legislate in regard to procedure in that Court, and in regard to the residences of the Judges thereof, was referred to the Supreme Court of Canada for hearing and consideration, by His Excellency the Governor-General in Council, under the provisions of section 52 of the Supreme and Exchequer Court Act, by Order in Council bearing date the 15th day of May, 1883.

The Supreme Court of Canada having heard the arguments of Counsel and considered the question submitted to it, on 18th June, 1883, certified its opinion on the questions submitted to His Excellency the Governor-General in Council, as follows:

In answer to the first question, namely:—

"Is the Supreme Court of British Columbia a Provincial Court within the "meaning of the 14th sub-section of section 92 of the British North America "Act?"

The Court is of opinion that—

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The Supreme Court of British Columbia is a Provincial Court within the meaning of the 14th sub-section of section 92 of the British North America Act.

In answer to the second question, viz. :—

"Has the Legislature of the Province exclusive legislative authority over "the procedure in all civil matters in the Supreme Court of the Province? "If not, to what extent has it such authority?"

The Court is of opinion that—

The Legislature can make rules to govern the procedure of that Court in all matters, as limited by the preceding answer, and can delegate this power to the Lieutenant-Governor in Council.

In answer to the fourth question, viz. :—

"Is the 'Judicial District Act, 1879' (British Columbia), within the "powers of the Legislature of that Province? If so, does it apply to Judges "appointed before that Act came into force?"

The Court is of opinion that—

The "Judicial District Act, 1879," is within the powers of the Legislature of that Province, and does apply to Judges appointed before that Act came into force.

In answer to the fifth question, viz. :—

"Are the following Acts passed by the Legislature of British Columbia, "namely, the 'Better Administration of Justice Act, 1878' (42 Vic., c. 20, "1878); 42 Vic., c. 12, 1879, 'An Act to amend the practice and procedure "'of the Supreme Court of British Columbia, and for other purposes relating "'to the Administration of Justice;' 44 Vic., c. 1, 'An Act to carry out "'the objects of the Better Administration of Justice Act, 1878, and the "'Judicial District Act, 1879,' so far as they relate to procedure in the "Supreme Court of British Columbia, within the legislative authority of the "Legislature of the Province of British Columbia?"

The Court is of opinion that—

They are within the legislative authority of the Legislature of British Columbia.

REGINA *v.* MORGAN.

GRAY, J.
1881.
31st December.

Conviction.—Identity of accused.

Conviction describing defendant simply as "Mrs. M" *held* bad.

The prisoner was brought up on *habeas corpus*. The commitment was under a conviction by the Police Magistrate of Victoria for having violated the Municipal Revenue By-Law by carrying on the trade and business of selling spirituous liquors by retail without a licence, as required by such By-Law.

Theodore Davie for the prisoner.

GRAY, J.:—

The same points and objections were taken as in the case of *Vieux Violard*, in which judgment has just been delivered, and in this case the judgment would have been the same; but a difficulty exists which I do not see my way clear to get over. In the conviction no means of identification of the prisoner are set forth. She is simply called "Mrs. Morgan" throughout. "Mrs." is a term of courtesy; "Morgan" is a surname. There may be twenty "Mrs. Morgans" in Victoria. The place where the offence was committed is, for purposes of identification, sufficiently designated on Broughton Street. By which Mrs. Morgan was it committed? How did the Magistrate get at this prisoner? Neither in the information, the evidence, or in the conviction, is she otherwise designated than as "Mrs. Morgan." The conviction must on the face of it show sufficient identity of person to enable it to be pleaded to a second complaint against the same person for the same offence. In this conviction that cannot be. The prisoner is not described by any name of individuality —not as of any particular local residence or occupation—not as known by any designation. Any "Mrs. Morgan" who had not taken out a licence could fill this conviction. *Kerr*, at page 186, in pointing out how convictions are to be filled up, particularly mentions "the name, "residence and occupation of each of the defendants." The Justices Act, 32-33 Vic., c. 30, with reference to preliminary proceedings, section 17, provides that if the name is unknown the offender may be otherwise described. At page 109 he points out how this may be done. These precautions are required for the purposes of identity, in order that, in the first instance, an innocent party may not suffer; and in the second, that a guilty party, having been once punished for an offence, may not be brought up and punished a second time for the same offence. They are not mere technicalities to enable the guilty to escape. They are essential requisites that the innocent may not suffer, and every man in whose hands the administration of the law is placed is bound to see that they are carried out. The description in the commitment, "Mrs.

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Morgan, late of Broughton Street," even if it were sufficient in itself, which it is not, could not cure the defect in the conviction. The commitment must follow, and be sustained by the conviction. It cannot supplement it. In case of a second charge for the same offence the conviction is to be pleaded, not the commitment. The conviction of itself should, therefore, contain the elements of identity. *Paley* on Convictions, ed. 1879, p. 198, lays down the rule and practice with sufficient distinctness to be followed. "If there be," he says, "several "offenders, each must be named." The Court refused to entertain a "conviction in which the persons charged were described as 'Messrs. "Harrison & Co,' and treated it as a nullity, even against the party "named. For though neither the defendant Harrison, nor the other, "objected to the conviction on that ground, *Lord Kenyon* said the "Court were bound to take care that summary proceedings before the "Magistrates were regularly conducted, whether the parties objected to "them or not; and in that case the Court could not tell *upon the face of* "*the proceedings*, but that the delinquency of Harrison's partners, who "were not before the Court, might have been imputed to him." (*R.* v. *Harrison & Co.*, 8 T. R., 508.)

"A provision is, however, sometimes made by Statute when an "offender refuses to discover his name. Apart, however, from statutory "provision, no man is to escape because his name is not known, and if "he refuses to disclose it he may be described as a person whose name "is unknown to the Magistrate, and identified by some fact; for instance, "that he is personally brought before them by a certain constable. (*R.* v. ——, *R. & R.*, 489.)

"The Justices are not bound by the name contained in the infor- "mation, but may draw up the conviction with what appears to be "the proper ones" (*Whittle* v. *Frankland*, 31 L. J. M. C., p. 81), or, as pointed out by *Kerr's* Magistrates Manual, with such other description as will enable identification.

These authorities, and the law, leave me no discretion. The prisoner must be discharged.

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1881.

April.

THE HUDSON BAY COMPANY (FOR THEMSELVES AND ALL THE CREDITORS OF OPPENHEIMER BROS.), PLAINTIFFS,

v.

A. R. GREEN AND G. A. SARGISON, LINA OPPENHEIMER, THE EXECUTRIX OF GODFREY OPPENHEIMER, DECEASED, AND OPPENHEIMER BROS., DEFENDANTS.

Partnership—Assignment for benefit of creditors by surviving partners—Action by general creditor for account—Injunction and receiver against partners and assignees—What must be shewn on application for receiver—Practice as to endorsement on writ.

The firm of O. brothers comprised three partners. One of them died, leaving L. his executrix. Three months afterwards, the surviving partners executed an assignment for the benefit of their creditors. Immediately thereupon, H., a general creditor who had not signed or acquiesced in the deed, brought an action for an account, not only against the two surviving partners but also against L., as representing the estate of the deceased partner.

Held, that H. was entitled to an order for an injunction and receiver against the surviving partners and the trustees of the deed of assignment.

Semble, since the Judicature Act, the formal matters which used to be essential on an application for a receiver or injunction are no longer necessary; but the substantial matters necessary to be proved continue as before. Thus the application may be made in a case sounding in damages or the like: but the applicant must still, as heretofore, show some claim upon the subject matter of the suit, or some special relation with the defendant against whom the injunction is asked.

Semble, it is improper to endorse on the writ a claim that a particular person may be appointed receiver.

Appeal from an order for a receiver obtained by the plaintiffs from CREASE, J.

The facts and arguments are sufficiently stated in the judgment of the Chief Justice.

Drake, for the trustees (admitted to represent the other defendants), the appellants, referred to *Boughton* v. *Boughton* (1 H. L. C. 406, 9 Jarvis' Conveyancing 76), *Pidcock* v. *Leicester* (3 M. & S. 371), *Teevan* v. *Crawford* (6 Ch. D. 29), *Alton* v. *Harrison* (4 Ch. App. 622), *Minns and others* v. *Howell & Attley* (4 East 298); and as to the unconstitutionality of Statute No. 10 of 1880, *Union of St. Jacques* v. *Belleisle* (6 P. C., L. R. 31): as to the power to interfere by injunction, *Lindley on Partnership*, p. 843, and cases there cited, *Allen* v. *Kilbre* (4 Nodd 464), *Bell* v. *Bird* (6 L. R. Eq. 635), *Warren* v. *Joyce* (10 Ch. App. 222); at least security should be given by receiver, *Anderson* v. *Anderson* (5 Ch. App. 423). They also cited *Johns* v. *James* (8 Ch. D. 744 and 13 Ch. D. 370), Judicature Act, s. 3, sub-s. (7), *Ashlett* v. *Corporation of Southampton* (15 Ch. D. 143), *Thoms* v. *Williams* (14 Ch. D. 864).

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A. E. B. Davie, Q.C., and *Theo. Davie*, Q.C., for the respondents, cited *Citizens' Insurance Co.* v. *Parson* (4 Can. Sup. Ct. 215), *Burritt* v. *Robinson* (18 Q. B., U. C. 555), *Bank of Toronto* v. *Eccles* (10 C. P. 282, and 2 E. & A. 53), *Lindley on Partnership*, 1053, *Wilkinson* v. *Henderson* (1 M. & K. 582), *Kendall* v. *Hamilton* (4 App. Ca. 514), *Mackie* v. *Caven* (5 Cowen 547), *Smith* v. *Coule* (6 Q. B. D. 77), *Ellison* v. *Ellison* (White & Tudor, Eq. Ca. 199).

The arguments came on to be heard on the 31st March and 1st April, 1881, before Sir M. B. Begbie, C.J., and Crease, McCreight, and Robertson, JJ.

FRIDAY, April 8th.

SIR M. B. BEGBIE, C.J., delivered the judgment of the Court:—

In this case we are all agreed that there must be a receiver and an injunction, substantially, as asked by the plaintiff. We have not therefore thought it necessary to state separately the grounds for our opinions. And in the following observations I must be taken, so far as particular arguments are concerned, to be speaking for myself alone. In the result and the concluding suggestions we are all agreed.

This is an action commenced under the following circumstances:—There were three brothers, David, Isaac, and Godfrey Oppenheimer, partners. Godfrey died 21st December last, leaving the defendants David and Isaac him surviving; also, the defendant Lina Oppenheimer, his widow and executrix. David and Isaac continued the business; but on the 22nd March they executed a deed of assignment of all their property in trust for all their creditors who should come in and execute that deed within two months, and stipulating that as to all such creditors it should be taken as a full discharge of their demands; stipulating, also, for two sums of $500 to be retained for each of them, David and Isaac, with reference, probably, to the Homestead Law, which exempts $500 worth of a debtor's assets from execution. The defendants Green and Sargison are the trustees named in the deed. On the 24th March, the plaintiffs, suing on behalf of themselves and all the other creditors of the Messrs. Oppenheimer, commenced an action against the trustees and against David and Isaac, and on the same day Mr. Justice Crease made an order in that action for a receiver of all the partnership assets. Against this order the defendants, the trustees, appealed; and both the writ and the endorsement having been in the meantime importantly varied—in particular by adding Lina Oppenheimer as a defendant, and by adding endorsements aimed at the separate estate of Godfrey—the whole matter has been brought before us by way of rehearing; but in fact we have had to consider it as an original application for a receiver under the altered state of the pleadings.

A great deal of argument on both sides was addressed to the validity of the deed of assignment of the 22nd March. The limitation of the two months within which creditors were to accede, or be debarred (practically); the reservation of $1,000 out of the estate; the stipulation for the absolute discharge of the debtors, were relied on as unjust and in fraud of a debtor's liability, and therefore of the creditors' rights, and it was alleged that the deed was thus void under the Stat. 13 Eliz. It was alleged, moreover, to be bad under the Provincial Act No. 10 of 1880. On the other side it was contended that the Provincial Act No. 10 was *ultra vires* and void, and could not invalidate the deed, and that by Statute 13 Elizabeth not every delay, defeat, &c., could affect a deed, but only *fraudulent* delay, the mere delay, &c., being no fraud; that the reservations for the benefit of the debtors were reasonable and proper—and that there was nothing fraudulent in making provision for the satisfaction of some creditors (viz.: those who should come in under the deed) to the exclusion of others—there being now no Bankruptcy Act, and so no doctrine of fraudulent preference. The consideration of all these questions has caused us some debate and discussion; but after some time thus occupied we are all of opinion that it is at present, at all events, premature to decide on the validity of the deed, and that the present application must be decided on other grounds.

The objections to a receiver were strongly urged during argument; that the plaintiff had no specific estate, or lien or property of any description in the assets which he seeks to place in the hands of a receiver; that the trustees have a good legal title with which the Court, in the exercise of its equitable jurisdiction, will not interfere; that there was, on the original application at all events, no fiduciary relation of any description between the plaintiffs and any of the defendants. If they claimed as cestuisque trust at all they must claim under the deed; they must therefore affirm it and seek to have its trusts put in execution; instead of which they stigmatize it as fraudulent and void; so that there is no trust to be carried out, for a trading debtor is not in any sense a trustee for his creditors. And it was urged that no case could be found in which the Court had directed accounts and directed a receiver *ad interim*, unless there were some fiduciary relation between plaintiffs and defendants.

It may be admitted that before the Judicature Acts there would have been great difficulty in interfering. However, we have to consider, not the case as it stood on the 24th March on the original application, but as it stands amended now; nor under the old system of jurisprudence, but under the system initiated by the joint efforts of Lord Cairns and Lord Selbourne. Although there was never, in this Province at least, nor could be, a conflict of jurisdiction (since there has never been but one Court), there was nevertheless a conflict of methods, and a quasi incapacity to give any relief, except on pleadings

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aptly framed for procuring such relief; an incapacity, *e.g.*, to give equitable relief on pleadings in the common law forms, or in disputes "sounding in damages." All these mechanical obstructions are swept away now that there is but one initiatory form of action, and that full powers have been placed in our hands to be used in our discretion in all cases, and not limited and allotted to the particular variety of suit which the plaintiff may have commenced.

The authority, and of course in proper cases the duty of the Court to exercise this jurisdiction, is in sec. 3, sub-sec. (8):—

"(8.) A mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable."

But, we are told, this jurisdiction is still to be exercised on the old lines, and the old principles. And this expression, though it is in one sense true, contains such ambiguity that I shall say a few words in explanation. The short view of the Judicature Act is this: There are no longer heard the empty phrases about a "fusion" of law and equity, which so long had deluded law reformers; and yet a complete compromise has been effected. The two great chancellors were perfectly decided in favour of equity. They were ready to sacrifice every title and epithet peculiar to the Chancery Courts. They were resolute to maintain the substance of Chancery doctrines and practice unimpaired. Under a complete change of nomenclature, they preserved and established everywhere, complete and intact, the whole principles and procedure of those Courts; and wherever the old common law practice and principles differed from the Chancery, the latter are to prevail. That is really, in this Province, the whole change introduced by the *Judicature Acts*. There is no longer a "suit in Chancery;" there is an "action in the High Court." There is no longer a "Bill of Complaint;" there is a "Statement of Claim." There is no longer an "answer" or a "cross bill;" there is a "Statement of Defence" and a "counter-claim." The voice is the voice of the common law, but the hands are the hands of the Court of Chancery.

Now, so far back as 1833, in the case of *Wilkinson* v. *Henderson*, 1 M. & K., 582, the M. R. (Sir J. Leach) did on the general principles

of equity sustain a bill by a joint creditor against the executor of a dead partner, and the surviving partner of a trading firm, for the taking of the accounts at the time of death; and that, although the surviving partner was alleged, and not denied, to be perfectly solvent. It was admitted by defendant's counsel in that case, in argument, that the propriety of the bill could not have been challenged if the surviving partner had been insolvent. That case followed the principles laid down by Sir Wm. Grant in *Devaynes* v. *Noble*, 3 Mer., 539. It has been repeatedly cited and followed in England, as appears by the latest edition of *Lindley on Partnership*, and is quite beyond question here. It shows that a joint creditor of a firm, one of whose partners is dead, may sustain a bill against the executor of the dead partner and the surviving partner, even if solvent, to have the accounts taken. Every circumstance in the present case is stronger than it was there in favour of entertaining the jurisdiction. The surviving partners profess to be not solvent, and allege that they have executed a creditor's deed; whether valid or not, I do not stay to inquire. Non-solvent partners, and their voluntary assignees, cannot surely, as against a joint creditor, occupy a more favourable position, as regards their right to hold and dispose of the assets untrammelled by a receiver, than a solvent, continuing partner, entirely *sui juris*, conducting a still going concern. Now, *Wilkinson* v. *Henderson* shows that even in the latter case the plaintiff is entitled to an account: which means in a Court of Equity not only a statement and proof of the partnership accounts, but payment of any balance which may be due. And we think that the present plaintiffs, especially as they sue on behalf of all creditors, have the same rights here. That is, we think the old Court of Chancery would have taken cognizance of this case. But in every case in which the former Court of Chancery had jurisdiction, the granting of an injunction (and a receiver is merely a more stringent form of injunction) was always in the discretion of the Court; a discretion to be exercised, of course, according to fixed principles; and notwithstanding the strong expressions used by some Judges in the English Courts, I am inclined to think that the same principles are to be followed under the Judicature Acts, so far as they are now capable of being applied. Now what were those principles? First of all, the subject matter must have fallen within one of Lord Redesdale's celebrated ninefold divisions. Next, there must have been a bill properly framed and expressly asking for a receiver instituted in the Court of Chancery. Then, there must have been a case showing the right of the plaintiff to call for the relief prayed, and the utility (from his point of view) of this extraordinary relief, if granted; that it would probably be useful as a security to him; and beyond that, the Court would take into consideration the balance of convenience and inconvenience to all the parties. Of these principles it is clear that the first two, in respect of which the Court would in 1833 have been the

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most jealous, are now quite swept away. In the very case above cited Sir J. Leach is careful to point out that, as regards any demands against the surviving partner, they were to be pursued at law; that is to say (as he would doubtless have explained), those demands are to be sought in another Court, possessed of other jurisdiction and administering other remedies, with which *on principle* he could not interfere. That principle is now gone. Moreover, he would have said, in answer to any application for a receiver in that case, that there was no bill filed aptly framed for such a purpose, and bringing the solvent partner within Lord Redesdale's rules. That "principle" is now equally exploded. There is no longer any principle which prevents any Court from granting an injunction, either because the subject matter is not as Lord Redesdale defines, or because no proper bill, or no bill at all, has been filed. But the other principles upon which an injunction or receiver will be granted remain, I apprehend, very much where they were The principles of abstention and selection—the principles on which the topics and, as it were, the geographical limits, were fixed for the exercise of this jurisdiction—have been much changed and enlarged; but the principles on which the Court acts within the modern wider limits are the same as those on which the former Court of Chancery acted within its narrower limits.

As instances of this extension of jurisdiction, I may mention *Shaw* v. *Earl of Jersey* (4 C.P.D. 123), where an injunction was granted against a landlord distraining for rent; *The Ampthill* (5 Probate Division 226), where a receiver was appointed on behalf of one co-owner against another; *Thomas* v. *Williams* (14 Ch. Division 173), where a libel injurious to plaintiff's property was restrained by injunction; *Anglo-Italian Bank* v. *Davies*, where it was decided that an injunction would lie either before or after judgment. These are but a very few of the cases, which the former Court of Chancery would have alleged, *on principle*, to be quite beyond its province, but which are within the empire of the present High Court, acting, within its empire, on the same enlightened principles of justice and expediency which guided the former Court of Chancery within its former restricted limits.

The joint creditors of the three being also creditors of the several estate of Godfrey, have a right to insist upon the amount of that estate being ascertained, and applied in payment of their claims. But the amount of his separate share on the 21st December cannot be ascertained without taking all the partnership accounts and settling all the partnership liabilities as on that day. When that is done, Godfrey's one-third will be applicable to the purposes of the plaintiffs, and the other two-thirds of David and Isaac will be, or may be, handed over to the trustees of the deed. Then, and not till then, will it become important to see whether the deed can stand or not. All that David and Isaac could grant on the 22nd of March was their own separate shares—two-thirds of the net partnership assets at the time

of the dissolution. I do not see how the rights of Godfrey's creditors, as they stood on the 21st of December, can be permitted to be affected by the subsequent arbitrary act of the two surviving partners. It was stated that the present assets are merely a portion, less than two-thirds, of the assets as they stood on the 21st of December. In taking the accounts of the old firm it may be necessary to follow those assets. It is true that is usually done only as against a trustee. And it is true that one partner is not properly a trustee for another, since the legal estate and power over the *res* is vested in each, at least for partnership purposes. But they stand in a fiduciary relation to each other, just as much as guardian and ward, parent and child, etc. The *delectus personæ*, the *uberima fides* of the civil law is fully adopted by and is part of our own law, and constitute a fiduciary relation, enabling the representatives, or the creditors, of a deceased partner to follow the assets in the hands of a surviving partner, at least where he is insolvent. There is here on the whole case, therefore, a high probability that the plaintiffs will at the hearing obtain some relief. Lina could certainly have the accounts taken and distribution made; and so, therefore, may the plaintiffs, to avoid circuity of action.

And then, as regards the utility to the plaintiffs of granting this application, we think there is no doubt. It is ancillary merely to the relief prayed. The traders themselves, by making this assignment, have shown that in their opinion this property is more safely and conveniently, for all parties, lodged in other hands than their own. The creditors, so far as we can judge, unanimously desire it; and we think that common prudence directs the same course. Then, as to the balance of inconvenience, we should probably require a very clear case of danger and misconduct before we would interfere with the possession of a solvent partner conducting a going concern, and take the assets out of his hands, though we should not hesitate to do so in any gross case of extravagance or misconduct. There are abundant precedents for appointing a person to manage as well as to receive. But here all business is stopped. The surviving partners have themselves appointed, in fact, a receiver of their own nomination. There can be no hardship or loss inflicted on them. They, indeed, disclaim all interest in the assets, which they allege to be insufficient for the payment of creditors, and the present application is made merely because the creditors wish to have a receiver of their own appointment. We think that this is reasonable. But in order to place the matter clearly in the hands of the creditors generally, we shall slightly vary the order made by Mr. Justice Crease. We propose to continue the injunction against the defendants and every of them, from dealing in any manner with any of the assets or parting with such portion as may be in their hands, except to the Receiver to be appointed by this Court. Declare that a Receiver ought to be appointed to get in, collect, etc.—not to manage. Refer it to the Judge in Chambers to select and appoint a

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Receiver, to be elected by creditors generally, and then appointed if approved by the Judge; either of the present trustees to be at liberty to be proposed and appointed. There is really no whisper against them—they have been selected probably by the other defendants on account of their good reputation. Receiver to give security in an amount to be fixed in Chambers; bond with two approved sureties, to be settled if necessary by the Judge. Costs of all parties out of the estate. Liberty to apply.

Before drawing up the order, it may be necessary further to amend both the writ and the endorsements. The writ, by excepting from the plaintiffs such creditors (I believe two) as have executed the deed, and adding them as defendants: the endorsements, so as to bring them more in correspondence with the statutory forms. A substantial departure from those forms should not, I think, be encouraged. The very first of the statutory common endorsements appears very well suited, with some trivial additions, for the present case. It may be proper enough to claim a Receiver by the endorsement on the writ, but it is surely unusual to claim that a particular person may be appointed Receiver, which is part of the present endorsement. The claim of a Receiver may very properly be made in the statement of claim, which is analagous to the old bill in equity. And the selection of a proper person is much more conveniently made in Chambers after the general question, that there shall be a Receiver, has been decided. There may doubtless be many occasions where expedition is necessary, and this may have been such an occasion; but the consideration of a proper person can be immediately proceeded with after the general question is decided; and to apply in the first instance that a particular person be appointed would often embarass the consideration of the general question.

It would be very convenient if the order now to be made could embody an order for the administration of the estate of the deceased Godfrey, and for the ascertaining the amount of his share, which can only be after taking the partnership account at the time of the dissolution: and in taking them, it may be proper that directions should be given to follow the assets into the hands of the surviving partners; to ascertain also his creditors, etc. But this can only be done at the hearing, unless by consent this be taken as the hearing.

REGINA *v.* HARRIS.

BEGBIE, C.J.

Restoration of Money taken from Prisoner.

It appearing that money taken by the police from a prisoner on his arrest would not be required as evidence by the Crown, at the Assizes, the Court ordered it to be restored.

COMMITTAL FOR MURDER.

Taylor, for the accused, applied for an order that a sum of money taken from the prisoner on his arrest by the police might be restored to him in order that the prisoner might not be deprived of his only means of defence.

SIR M. B. BEGBIE, C. J.:—

After enquiring whether the money was required for the purpose of evidence at the trial on the charge upon which the prisoner was committed, and being informed that it was not, and the amount being small, directed that the money should be returned.

Application granted.

REGINA *v.* AKERMAN.

GRAY, J.

1883.

February.

Conviction for selling intoxicating liquors—What it should show.

Conviction held bad for not shewing that the offence was committed within the justices' jurisdiction, and because the person entitled to receive the costs was not designated, and the costs of conveyance to goal remained unascertained.

Appeal from a condition for selling intoxicating liquors to Indians.

The defendant Ackerman was brought before the Hon. Mr. Justice Gray on a writ of *habeas corpus*, February 9th, 1883. The return showed that Akerman had been convicted before the Indian agent and two Justices of the Peace, at Cowichan, upon a charge of supplying intoxicating liquor to Indians and had been sentenced to pay a fine of $200 and costs, and an unascertained amount for expenses of conveyance to gaol; and in default of payment to suffer two months' imprisonment, which he was undergoing.

Theodore Davie, for the prisoner, now moved for his discharge on several objections to the commitment, and his Lordship sustained the application and discharged the prisoner on the grounds—

1. That the commitment did not show that the alleged offence had been committed within the jurisdiction of the Justices; and

2. That the person entitled to receive the costs was not designated, and that the costs of conveyance to goal remained unascertained.

Conviction quashed.

McCREIGHT, J.

1883.

October.

REGINA *v.* RUSSELL.

Hack By-law—Conviction under—Duty of Magistrate to adjudicate on the validity of By-law.

A by-law that is not just and equal in its operation, or which is unreasonable, or permits favoritism, is void.

A Magistrate is bound to decide all questions raised before him as to the validity of statutes or by-laws.

Jonas v. *Gilbert*, 5 S. C. R., 356, *Re Nash and McCracken*, 33 U. C. R., 181, and *Regina* v. *Johnston*, 38 U. C. R., 549, referred to and followed.

Appeal from a conviction under a Hack By-law. The appeal was heard by Mr. Justice McCreight who delivered judgment on October 2nd, 1883.

Referring to the 4th section of the by-law his Lordship remarked that it discriminated in favour of those who happened to own stables, enabling them to stand their vehicles in favourable positions which privilege is denied to others. Such a discrimination was unjust and unreasonable, and unless a by-law is just and equal in its operation it is void. The exception of drays from the operation was also an unjust preference equally objectionable to the exception in favour of the owners of stables, there being no valid reason why one branch of the carrying trade should not be placed under equal restriction with others. His Lordship referred to *Jonas* v. *Gilbert*, 5 S. C. R., 356, and to *Regina* v. *Johnston*, 38 U. C. Q B., 549, as authorities in support of the principles laid down by him. Another objection to the by-law was that by the combined operation of sections 4 and 10, the council, by resolution, might add to, or alter the provisions of the by-law. This His Lordship held to encourage favouritism, and under the authority of *Re Nash and McCracken*, 33 U. C. Q. B., 181, was illegal. His Lordship considered that the provisions of the by-law could not be severed, the plain intention evinced by the entire by-law being to make a discrimination, which the law would not recognize, and the instances which admits of the severance of the good from the bad portions of by-laws are confined to cases where the parts sought to be severed relate to distinct subject matters.

Reference was then made to the action of the police magistrate in refusing to consider the question of the reasonableness and validity of the by-law, and his Lordship referring to the case of *Regina* v. *Johnston*, 38 U. C. Q. B., 549, said that it was the duty of a magistrate in all cases to consider and decide any and all questions raised before him, whether relating to the constitutionality of a law or the reasonableness of a by-law.

His Lordship concluded by quashing the conviction in the terms of the case stated, with costs against the corporation.

Conviction quashed.

BEGBIE, C.J.

1883.

November.

E. R. PHELPS AND ALICE MARY PHELPS BY E. R. PHELPS, HER FATHER AND NEXT FRIEND,

v.

WILLIAMS, (SCHOOL PRINCIPAL) AND MESSRS. FELL AND WILSON, (SCHOOL TRUSTEES).

Non-suit, effect of—costs—Mandamus to School Teacher to admit Pupil.

Judgment of nonsuit is now equivalent to a judgment for defendant on the merits and the Court has a discretion as to costs.

Mandamus does not lie to force a teacher, against his judgment formed *bona fide* and on reasonable grounds, to keep a pupil at his school, but the Court will, if necessary, compel him to hold a proper inquiry.

Action for damages for the suspension from school of the infant plaintiff, and for a *mandamus* to compel her re-admission.

T. Davie for plaintiffs.

SIR M. B. BEGBIE, C. J.:—

In this case there is no doubt as to the judgment to be given. The plaintiff before the case went to the jury elected to be nonsuited, and I at the time gave judgment accordingly, reserving only at Mr. Theodore Davie's request the question of costs. The defendants asked for judgment in their favour with costs to be paid by the plaintiffs. The plaintiffs urged that this was a fit case for exercising the discretion vested in the Court since the Judicature Acts, and for exempting the plaintiff from payment of the defendants' costs.

There can of course be no judgment against the infant plaintiff for costs: these can be given only against the male plaintiff, both as suing on his own behalf for the wrongful expulsion of his child, and as the infant's next friend. Formerly a nonsuit was no bar to renewed litigation. And the only protection which a nonsuit afforded to a defendant was that no second action could be brought except after payment of the costs of the first. It would formerly have been just therefore that judgment of nonsuit should invariably carry costs against the plaintiff. Now, however, judgment of nonsuit is equivalent to a judgment for defendant on the merits, and the Court is at liberty to deal with the question of costs similarly in both cases. I am, therefore, bound to give my opinion, and as there is no appeal from a judge's decision as to costs, the consideration of this very painful case has given me much anxiety. The general rule as to costs is clear and just. The successful party gets his costs of asserting rights which the result shows ought not to have been contested, or of resisting claims which never ought to have been advanced. And the principle is said to apply more strongly in favour of a successful

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defendant than a successful plaintiff, because a defendant is "dragged into Court," whereas a plaintiff is always, in form at least, a volunteer. Cases, however, continually arise in which this very general rule is modified or entirely abandoned. The principles have been recently laid down, for instance by Jessel, M. R., in *Cooper v. Whittingham* (15 Ch. D. 504).

In *Harnett v. Vise* (C. A. 5 Ex. D. 311) where a successful plaintiff was deprived of costs, Lord Justice James says: "It is the duty of the "judge who tried the case and the duty of the Court of Appeal also, "to consider not only the general result of the action but also the "whole circumstances of the case, everything which led to the action, "everything which led to the alleged wrong-doing, everything in the "conduct of the parties which may show whether or not the action "was properly brought in respect of the wrong-doing complained of:" and in *Maddison* v. *Alderson* (8 App. Cas. 467) which was an action against an heir at law for specific performance of an alleged contract by an ancestor of which the heir was quite ignorant, and which in fact was not proved to have ever been entered into, though it was dismissed with costs by the Court of Appeal, and the House of Lords unanimously affirmed that dismissal: yet they affirmed it without giving costs to the defendant, the innocent heir-at-law, conceiving the plaintiff to have been hardly used by the ancestor. This seems going a long way.

As this case has been withdrawn without going to jury, I have, it is said, an unlimited discretion as to costs. But I think it proper to exercise it upon the same considerations as if there had been a verdict, viz., upon good cause shown.

Is there then anything in the conduct of the parties, *i. e.* of the plaintiff and defendants, or in the circumstances "leading to the action" which make it proper to depart in this case from the ordinary rule?

The action was brought for wrongfully depriving the infant plaintiff of the benefit of public education by suspending her on the 10th March, 1882, and refusing to re-admit her.

The defendants alleged that the infant defendant had merited such expulsion, having written or introduced into the school a grossly improper document. The father, the co-plaintiff, admitted that the infant richly deserved expulsion if she were guilty; but alleged that she denied her guilt and demanded an investigation. Some correspondence took place in which, I take it, on the whole (though the affidavits now filed by the defendants are obscure or silent as to the date) that the defendants early informed the plaintiff of the charge and (at least by the 1st May, 1882) also of the evidence against the infant; but the defendants for some time refused any investigation and simply alleged their full persuasion of the truth of the charges. At last, on the 1st May, a meeting was held for the first time for the purpose of an investigation. By a common error, Miss Williams seems to have

been there as a witness only, whereas in fact she was the person to make and decide upon the inquiry. However, she was present as well as the trustees, and her witnesses, and Edward Phelps, and his legal adviser, Mr. Theo. Davie. On what grounds is not stated; but to the presence of Mr. Theo. Davie on Phelps' behalf the trustees absolutely objected; he was obliged to leave the room, and Phelps declining to assist at the investigation without his aid retired after a protest. Full credit may be given to the defendants for what they now state to have been their real motive for this exclusion, and, indeed, for their reluctance to hold an investigation at all, viz., a desire to avoid, for the plaintiff's sake, all unnecessary publicity. But a disclosure to the plaintiff's attorney, at the plaintiff's own request, was surely not publicity, and it was natural in the plaintiff entirely to mistrust those higher motives, and to persuade himself that the defendants were actuated by some other motive, either by pique at their decision being impugned, or obstinacy in adhering to an opinion once expressed, or even personal colour prejudice, or, what was the readiest supposition, by a consciousness in their own minds that the evidence on which they proposed to rely would not endure cross examination. This refusal on the defendants' part continued until after the 7th of June, just three months; then, it is true, they tendered a proper investigation, admitting at the same time that their minds were fully made up on the subject. But the plaintiff was scarcely bound then to accept the investigation before such a tribunal. A large part of the mischief had been irremediably afflicted; nor would simple re-instatement, after three months' suspension, compensate for the loss of reputation, pain of mind, or even for the loss of school attendance in the interim. A right of action, that is a right to have it tried, whether the suspension had been merited, and to get damages if it had not, had already accrued. The plaintiff may well have conceived himself challenged to bring the case before a jury, and he brought this action accordingly.

There is a passage at the end of the defendants' affidavit of the 22nd October, mere matter of argument and not of fact, and therefore not proper to be in an affidavit, though quite proper in itself. "If "Mr. Davie had attended to the inquiry he would have heard the "whole of the evidence, and if after so doing he had considered that the "same did not justify the action of the said Miss Williams, and that the "trustees had acted wrongly and maliciously in sustaining her action, "he could still have advised his clients to bring this action." The observation is most just; but it was exactly as just on the 1st May, 1882, as it is now. Putting this forward as an argument to-day, how can the defendants justify their exclusion of Mr. Davie from hearing the evidence for three whole months. On their own principles I can find no sufficient justification for the refusal by the defendants for so long a period to permit a proper investigation, and such refusal was

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evidently calculated completely to mislead the plaintiffs. Many defendants may often complain justly of having been dragged into court. These defendants, on the principle now urged, and I think justly urged, by themselves have induced the plaintiff to bring them here, and though his complaint turns out to be most unfounded, I cannot make him pay the costs of the defendants in defending themselves against a litigation which I think they would have avoided altogether by simply doing at once what they now urge as a reasonable course. I therefore leave each party to pay their own costs.

In giving judgment for the defendant I ought to have adverted to one part of the relief prayed, which appears to me altogether misconceived. The plaintiff at the close of his statement of claim asks, *inter alia*, for a *mandamus* for the re-admission of the child to the school. That is a matter I conceive wholly for the decision of the lady principal if she be of opinion (the proper investigation being held) that the child ought to be expelled. Then, whatever opinion I might myself form on that point, I will not say to her, "take my opinion in place of your own and declare that you think she is a proper pupil to be retained, though you in fact think she is not fit to stay." The Court will compel her to hold a proper enquiry; but will not direct her as to the opinion she is to form. The only authority that can restrain the expulsion is that of the trustees, though they cannot expel or suspend of themselves.

If the teacher do not give satisfaction to the trustees, they will relieve her of her duties. If the trustees do not give satisfaction to their constituents they will in their turn be removed. Speaking generally, if the teacher behave unjustifiably to a pupil or the trustees to a teacher, the remedy is, I think, in damages. The Court will not interfere by *mandamus* to compel a teacher against his real opinion to retain any particular pupil or the trustees to retain any particular teacher whom they have grounds for disapproving and do disapprove any more than it will compel examiners to pass any particular candi- with whose attainments they are really dissatisfied. To interfere as prayed would be to destroy all discipline. I therefore think that, in any event of the action, no relief could have been given on this second paragraph in the prayer. There were certain interlocutory ancillary proceedings before a judge in chambers, and on appeal, in which this plaintiff was successful. I do not know whether the costs of these have been already provided for. If not, I now direct that each party pay their own costs of those proceedings. As the plaintiff then succeeded it is not right that he should have to pay any costs they occasioned, but as the whole ground of his action has confessedly failed, it is not right that he should receive any.

Action dismissed without costs.

DIVISIONAL COURT.

1884.

March.

In re AH LIE, AN INFANT.

REGINA *v.* CHIN AH YOU, *ex parte* SHUB LOOK.

REGINA *v.* SHUB LOOK, *ex parte* CHIN AH YOU.

Marriage—What form necessary to validity of.

A clergyman is not bound to perform the ceremony of marriage, but if he does, the rites and usuages of his church or denomination, and the accustomed form, although unmeaning, must be followed.

Semble, marriage between non-christians ought to be left to their own officiants or to the Registrar.

Held, on the evidence, that a marriage purporting to have been solemnized by a Wesleyan minister between two Chinese was void, for want of understanding on the woman's part of the nature of the ceremony, and of any intention to contract.

These were two competing applications for a writ of *habeas corpus* for the custody of Ah Lie, a female infant, 20 years of age, Chin Ah You claiming as Ah Lie's husband, Shub Look as entrusted with the charge of the infant from Hongkong. Each party had obtained a rule *nisi* against the other. The question turned ultimalely upon the efficacy of a marriage ceremony performed by the Rev. Mr. Pollard according to the rites and usuages of his denomination. For this marriage Chin Ah You had procured the statutory license and made the statutory declaration, and declared that Ah Lie consented. But Ah Lie denied ever giving her consent or any knowledge of any pretence of a marriage ever being enacted.

The argument came on to be heard before Begbie, C.J., and Gray, J., sitting as a Divisional Court, on March 10th, 1884.

Wilson, for Chin Ah You; *Walls*, contra, was not called on.

SIR M. B. BEGBIE, C. J., delivered the judgment of the Court:—

The more I consider this case the more I am satisfied that there was no marriage at all. Mr. *C. Wilson's* argument amounts to this: Chin Ah You is entitled to the custody of Ah Lie, for she is his wife. She has been formally married according to the statute, and that is not impeached except by her own evidence. But she is not admissible as an evidence to disprove her own marriage. That is to say: Ah Lie is proved to have been married unless you admit her evidence, and her evidence cannot be admitted because she is proved to have been married. When exhibited in this its true shape the argument must be seen to be untenable. Everything about the alleged celebration looks most suspicious. There was no previous announcement in the family, no allegation even, much less any evidence, of any preparations, except those secretly taken by Chin Ah You himself in procuring the license and the assistance of the police; no previous appoint-

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ment with the proposed celebrant—the ceremony was performed after dark, out of town, in a private house, without the presence of a single friend or acquaintance of the alleged bride, nor any interpreter except Chin Ah You himself; for the so-called interpreter introduced by Chin Ah You exposed his ignorance even to Mr. Pollard. We know, therefore, nothing of what was in Ah Lie's mind then, except what Mr. Pollard tells us Chin Ah You chose to tell him.

The point taken at the first hearing as to the absence of the ring, contrary to the rites and usages of the Wesleyan connection, seems satisfactorily cleared up. We are now told that the usage among Wesleyans is never to use a ring, though by what may be termed a rubric in their formulary the option as to its use is given to the parties; and the giving and receiving a ring is certainly emphatically affirmed and relied on in the final pronouncement of the parties to be man and wife.

Marriages under the British Columbia Ordinance are only permitted when celebrated according to the rites and usages of each denomination (sec. 6). Where these are not followed the marriage is declared void, sec. 21 of the Ordinance, 1867. There is no obligation here, as in England, on any clergyman to marry anybody; but if any clergyman choose to celebrate, then the rites and usages of his church or denomination must be followed, and the accustomed form, even when the form is unmeaning, as is here this reference to the ring, when no ring was used. However, we are now assured that the Wesleyan rites and usages were strictly observed in this case.

It can scarcely be supposed that the Legislature in placing this discretion in the hands of all clergyman and ministers of every denomination ever contemplated that they would give the sanction of their religious functions to connections between persons habitually worshiping elsewhere, or other gods. Ministers who do so extend their discretion, and incur a tremendous responsibility. They are under no obligation to celebrate that which, if it be not a marriage, is surely a lamentable desecration; especially when the marriage is between non-Christians, for whom the marriage status can never represent the sacrosanct image it presents to Christians. The only guarantee against desecration is in the production of the license. The license issues, as of course, on the declaration of the man "that he knows" of no impediment of kindred or alliance or other lawful hindrance why he may not be married to C. D. Since this is all, the Rev. Mr. Pollard may next week find himself celebrating a marriage between brother and sister, which is no impediment in the eyes of some nations; between uncle and niece, which is rather a frequent connection among a very strict nationality, the Jews (*e. g.* the Herods seem nearly all to have married nieces without the least reproof) or marrying some man who has already got a wife or wives. That is no legal hindrance, I

believe, in the eyes of the large majority of mankind, including Chinamen. I say nothing of the deceased wife's sister question; of marriage where one party is French; of marriage between first cousins; nor of the ease with which all impediments can be swept away among many Christians, though surely not among Wesleyans or Anglicans. (There were no less than four instances of such impediments, and dispensations in the family of Ferdinand, of Aragon, and Isabella, the Catholic.) Again where the parties are utter strangers to him, the clergyman must be quite in the dark whether the female candidate for matrimony is the C. D. mentioned in the declaration and license or somebody else.

Many of these matters would probably prevent the celebration from being in accordance with the rights and usages of the officiating clergyman's church. But if not in such accordance, the marriage is void, and the clergyman only escapes the stigma of felony (s. 17) in the case of ignorance. I should have thought that no consideration whatever would be sufficient to induce a clergyman to run these risks; and so, probably, thought the Legislature in 1867. Clearly, marriage between non-Christians ought to be left to their own ministers, or to the Registrar.

It was alleged that certificates of marriage thus procured were abused, and used for vile purposes, and for evading the laws of a friendly neighbouring state. No evidence was given on this point, but the danger clearly exists.

Prima facie, no doubt, the fact of a marriage ceremony like this being celebrated between a Christian man and woman would be very strong proof of the contract having been knowingly entered into, and consent given by both parties. Not only would the onus of proof of want of consent lie on the recalcitrant party, but it would require evidence of some extraordinary accident or mistake to set the marriage aside. Among all christian peoples the ceremonies are somewhat alike and are not likely to be mistaken. But as between these two the probablities are really the other way, and slight reasons would turn the scales. Ah Lie had probably never seen anything like a Wesleyan marriage before. She says she thought she was being taken before a police court. Her story is infinitely more probable than Chin Ah You's; and there is bare oath against oath. I shall not repeat the arguments I suggested last Monday. I do not think they have been met. I shall, only by way of illustration, suppose a converse case. Suppose a young man here, a European, already rejected two or three times by a young lady heiress, but still continuing on speaking terms with her, to go without more ado to the Registrar and get a license. Suppose him then by force or misrepresentation to get the young lady some evening after dark, to be imprudent enough to go in company with him and a couple of his male friends, just out of curiosity, to see a Joss House in Cormorant Street, and an old Bonze (or whatever

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may be the designation of a Buddhist minister), to come in with his wife and family and a couple of friends, strangely dressed, and there is read over something to her, of which she understands never a word but what her rejected suitor told her. Would not the young lady's family be indignant at being told this was a marriage? That she was not to be heard to say that she had known nothing of what was going on? That she renounced, had never consented, &c.? The greatest heiress might be thus entrapped by a clerk.

As I do not think Chin Ah You is Ah Lie's husband, she may go where she pleases. Chin Ah You's rule *nisi* for a *habeas corpus* must be discharged, for I do not think Ah Lie is his wife; and even if she were, we could hardly, on these proceedings, make an order which would be equivalent to an order for the restitution of conjugal rights. The writ of *habeas corpus* lies only for the relief of a person unlawfully restrained of liberty, which I do not think Ah Lie is while residing with Shub Look. She is their of her own choice. And on the other hand Shub Look's rule must be discharged, for she has, without the order of the Court, taken ultroneously the relief which her rule asks for at the hands of the Court, and got possession of the person of Ah Lie. She has, as it were, abandoned her rule *nisi*; and in abandoning it, has abandoned her right to costs. Therefore discharge both rules, leaving each party to pay his own costs.

Rules discharged without costs.

BRITISH COLUMBIA

LAW REPORTS.

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1893.

CASES

DETERMINED BY THE

SUPREME COURT OF BRITISH COLUMBIA.

HAMILTON *v.* HUDSON'S BAY COMPANY AND IRVING AND BRIGGS.

WALKEM, J.

1884.

March 26.

Common Carriers, Liability of—Damages for non-delivery—Loss by fire.

The Hudson's Bay Co. and the other defendants, the Pioneer Line, were common carriers—the company plying the *Enterprise* between Victoria and New Westminster, and the Pioneer Line, the *Irving* between New Westminster and Yale, so as to form a continuous line of steamers between Victoria and Yale. The receipts from traffic passing over both sections of the route were divided between the defendants.

The plaintiff ordered goods from the company, which were to be forwarded by them to his agent at Yale. The company having filled the order, shipped the goods on the *Enterprise* and took the following receipt from the purser: "Shipped in good order by "H. B. Co., on board the *Enterprise*, * * bound for New Westminster, the following "packages (the dangers of fire and navigation excepted) consigned to Gavin Hamilton, "of 150-mile House, and marked" &c.:—

Held, as to this receipt, that parol evidence was admissible to show that the company had agreed to carry beyond New Westminster, viz., to Yale, as it did not contradict, but only supplemented, the language of the receipt; also that the exception of liability in cases of fire does not protect the carrier where loss from fire is due to his, or his agents', or servants' negligence.

At New Westminster, the goods were transferred from the *Enterprise* to the *Irving*. Next day, while the *Irving* was on her way to Yale, a fire broke out in some hay stowed near her boilers. The hay consisted of about 20 tons, and, besides being uncovered, so nearly filled the whole space between decks, forward from the engine-room to within 8 feet of the boilers, that it was found impossible to do any good with the fire-hose. The fire, under these circumstances, spread rapidly, and burnt the vessel and her cargo (including plaintiff's goods).

Held, that the stowage of the hay was bad stowage, due to negligence, to which the loss of plaintiff's goods was fairly attributable; and therefore

That the H. B. Co. were liable to the plaintiff for breach of their contract to carry his goods to Yale, as their liability extended beyond their own line or section of route and throughout the whole distance over which they undertook to carry; and that they were, moreover, responsible for the negligence of the Pioneer Line, as the latter were their agents for the carriage of the goods;

That the Pioneer Line having accepted the goods for carriage to Yale, thereby undertook a duty they neglected, viz., "to use due care and diligence in the safe-keeping and "punctual conveyance of the goods;" that this obligation was cast upon them by the common law as well as by the Dominion Act respecting carriers by water; and that having failed to fulfil it and been privy to the loss of the goods through their own negligence, they were liable as well as the other defendants for such loss;

That interest, at the legal rate, might be allowed as damages for delay in delivering the goods.

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v.
HUDSON'S BAY COMPANY AND IRVING AND BRIGGS.

A. E. B. Davie, Q.C., for Plaintiff.
M. W. T. Drake, Q.C., and *H. D. Helmcken*, for Defendants.

THE facts appear in the Judgment.

WALKEM, J. When the present cause of action arose, in 1881, the Hudson's Bay Company were merchants and common carriers, plying the steamer *Enterprise* between Victoria and New Westminster; and the defendants, Messrs. Irving and Briggs, under the partnership name of the Pioneer Line, were also common carriers, plying the steamer *Elizabeth J. Irving* between New Westminster and Yale, in connection with the *Enterprise*.

The defendants are sued jointly, severally, and in the alternative, under Rules of Court 3 and 6 of Order XVI., to recover $2,500 damages for the non-delivery of plaintiff's goods.

On the trial, which lately took place before me without a jury, it appeared that in September, 1881, the plaintiff, who was then a trader, residing in the interior, at the 150-mile House, sent separate orders for goods to Messrs. Fletcher, and Shears & Partridge, and the Hudson's Bay Company, in Victoria. The Hudson's Bay Company, as plaintiff's agents, were, according to his understanding, to have taken charge of all the goods after the orders were filled and carried them to Yale, and there delivered them to his agent, Mr. Harvey. The receipt by the Company of the parcels put up by Messrs. Shears & Partridge and Mr. Fletcher not having been proved, the sum of $54.44, included in the plaintiff's claim for their loss, may at once be disallowed. The goods ordered from the Company were shipped by them on board the *Enterprise* on the 26th of September, 1881, and a receipt of that date, which I shall refer to hereafter, taken for them from the purser. A duplicate of the receipt, which was in the nature of a bill of lading, was mailed the same day by the Company to plaintiff's agent at Yale. Next day the *Enterprise* left Victoria and reached New Westminster, where she discharged cargo. From this cargo, the Pioneer Line, under a standing arrangement with the Company, selected such of the goods (including the plaintiff's) as were destined for Yale and intermediate places, and put them on board the *Elizabeth J. Irving*. Receipts for these goods were dispensed with—a copy of the manifest of the *Enterprise* being taken in their stead, and the goods checked by it. Besides other cargo, the *Irving* had about 16 tons of hay on board, and after leaving New Westminster for Yale, which she did on the 27th, this quantity was increased at Katsey to about 20 tons. At 2 P.M. of the 28th, while the steamer was making a landing at Hope, a fire broke out midships, in or near the hay, and in a short time destroyed the vessel and her cargo.

Who is to bear the plaintiff's loss? is now the question.

In the first place, it is unnecessary to consider whether the *Enterprise* is subject, as a sea-going ship, to Imperial or Dominion legislation, or to both, for section 503 of the Merchant Shipping Act of 1854, referred to by Mr. Drake, does not apply in the present case, as the fire, with its consequent loss, did not occur on board of her, but occurred on the *Irving*, a steamer licensed by her certificate "to run on the waters of Fraser River." The question of the defendants' rights and liabilities is one relating to Inland Navigation—a subject placed by the British North America Act under the legislative con-

trol of the Dominion—and is consequently, to a certain extent, governed by the Canadian "Act respecting Carriers by water," 37 Vict., c. 25.

By section 1, carriers by water "shall be liable for the loss of or for damage "to goods entrusted to them for conveyance;

"Except that they shall not be liable to any extent whatever to make "good any loss or damage happening without their actual fault or privity, or "the fault or neglect of their agents, servants, or employés—

"To any goods on board any such vessel, or delivered to them for convey-"ance therein, by reason of fire or the dangers of navigation."

They are thus relieved from their common law liability as insurers against loss by fire, provided the loss has not been occasioned by their fault or with their privity.

The shipping receipt or quasi bill of lading given for the plaintiff's goods by the *Enterprise*, is as follows:—

"Victoria, V.I., 26th Sept., 1881.

"Shipped in good order by H. B. Co., on board the *Enterprise*, whereof "Gardiner is master, and bound for New Westminster, the following packa-"ges (the dangers of fire and navigation excepted) consigned to Gavin "Hamilton, of 150-mile house, and marked G.H. 150-m house.

(Signed) "G. HARDISTY."

[*Here the packages are enumerated.*]

The exception as to fire, &c., contained in this receipt, merely coincides in effect with the section I have quoted, and does not exempt the defendants from liability from loss by fire through negligence. (*Maclachlan* on Shipping, 458.) In *Czech* v. *General Steam Navigation Co.* (L.R 3, C.P. 14), Byles, J. observes that such exceptions from losses must be read as if followed by the words "if not occasioned by the negligence of the defendants."

The main issue in this action is that of negligence. The facts proved at the trial, with respect to it, show that in September, 1881, the *Irving* was a new steamer, registered here, and possessing the usual statutory certificate of fitness for river navigation, dated the 19th of that month; that she was well-built and equipped; that her boilers and machinery were of good make and material, and well designed; and that she was well fitted with appliances for controlling fire in the event of its breaking out. Notwithstanding this, she was burnt on her third trip up. As already stated, part of her cargo on this trip consisted of 20 tons, or 200 bales, of hay. These bales were stowed between decks, from the engine-room forward to within 8 feet of the breeching of the boilers, and filled the cubic space within these two places and the sides of the steamer, excepting an opening left on the starboard side for a passage way, a small space on the port side "gated off," as a witness expressed it, for a horse, and a space 18 or 24 inches deep between the whole upper surface of the hay and the deck overhead. Along-side of the boilers square timber was stowed, and between the after-part of the boiler and hay, according to the mate, there were some boxes of goods. Whether the mate meant by "the after-part of the boiler" the breeching or after-connection, was not made clear. If he did, his evidence materially differs from that given by the first engineer on behalf of the plaintiff, with respect to the same locality. The first engineer says "There "were 7 or 8 feet between the boiler connection and the hay. I swept the "place to keep it clean. I kept it clean all the time hay was aboard." This

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negatives—though not conclusively—the statement that boxes of goods stood on this space. And again, "I swept the hay away from the boilers two or three "times. The after-connection of the boiler had become hot; part of the time "red-hot in spots" or (as he explained) "places." The defendants' evidence on this point is that the first engineer had never mentioned this over-heating before the trial, though the cause of the fire had been much discussed; that the red-heat described could not have existed, owing to the construction of the boiler (which was explained), and as the solder on the exhaust-pipe would have been melted, which had not happened; that sparks from the boiler could not have caused such a heat, as they could not lodge in the breeching; that a similar breeching on the *Rithet*, by the same makers, had never been over-heated or given any trouble; that the first engineer was a discharged servant of the Pioneer Line; and that the captain, on his rounds of inspection—the last made about ten minutes before the fire—saw nothing indicating over-heating, although he examined the boilers and breeching. It was further proved that two watchmen were employed to look after the main deck and hay; that the steam used on the trip had not exceeded a maximum of 90 lbs. out of the 100 lbs. allowed by the steamer's certificate; and that throughout the trip, and up to the time of the fire, the hose had been connected and laid ready for use. The fire occurred about 2 P.M., when the steamer was about to "tie up" at Hope. The first engineer says he first saw it in the hay "midships;" and "All was ablaze," as he and other witnesses state, in less than three minutes. Within this short space of time, the first engineer, assisted by the mate, turned the water through the hose on the hay, but owing to the height of the hay and the necessary angle of elevation of the hose, the water could not be used with any effect. He then went out on the starboard guards and turned it, through a window, on the boiler to make steam; but in a few moments the fire burnt the hose. He returned to the engine-room for more hose, but was driven back and had to escape through the stern on the pitman, then in motion. The captain and others did all they possibly could, in the brief time allowed them, to stay the fire, but without any success; and the vessel with her cargo shortly afterwards drifted down stream and was burnt. These appear to be all the main facts bearing on the question of negligence. Mr. Drake, on behalf of the defendants, contends that as the origin of the fire has not been explained, negligence in respect of it cannot be inferred and imputed to his clients; and that they should not be adjudged culpable in view of the precautions they had taken against fire, which were all that human foresight could devise: *Nugent* v. *Smith* (L.R. 1, C. P. D. 443).

On the other hand, it is contended by the Attorney-General that as the fire occurred in the hay, midships, it may be fairly inferred that it arose from the over-heating of the breeching, as sworn to by the first engineer; but, that whether it did or not, the stowage of such a large body of so inflammable a material as hay near the boilers, without cover, and in such a manner as to render the hose useless and access to the fire next to impossible, was bad stowage, and nothing less than gross negligence on the part of the Pioneer Line, which resulted, as the sequel showed, in the destruction of the vessel and her cargo. My view is that the hay was badly stowed, and with such negligence and want of foresight that the stowage practically neutralized the

value of all the precautionary measures taken on board against fire, and prevented the officers and employés of the vessel from attempting, with any prospect of success, to control it after it broke out; and that to this cause the loss of the ship and cargo, including the plaintiff's goods, may be fairly attributed.

It is argued, however, by Mr. Drake, that as the Pioneer Line had no contract with the plaintiff to carry his goods, they incurred no liability towards him in respect of their loss.

English authorities are against this view. *Martin* v. *The Great Indian Peninsular R. Co.* (L. R. 3, Ex. 9) is very similar to the present case as regards the Pioneer Line, whose position I am now considering apart from that of the Hudson's Bay Company. The defendants, in the case cited, were carriers in India, and, as such, received Martin's goods (or luggage), under a contract with the Indian Government to carry the luggage (including Martin's) of certain troops to Bombay. This luggage was to remain under a military guard—"the Company accepting no responsibility." The plaintiff's goods were destroyed by fire on the journey, owing to alleged gross negligence on the part of the defendants. It was held, that the stipulation as to irresponsibility did not exempt the defendants from liability for the loss of plaintiff's goods, as it arose from their negligence; and that although the plaintiff was no party to the contract of carriage and could not sue the defendants in respect of it, he was entitled to sue them for an injury done to his property through their negligence, whilst the goods were in their custody. Bramwell, B., in his judgment, briefly puts the case thus: "The plaintiff says 'You had my goods in your possession and you delivered them wrongly, no 'matter whether wilfully or negligently: either way you did wrong.' The defendants reply 'I bargained with some one else to carry them': But how does this furnish an answer? The contract is no concern of the plaintiff's; the act was none the less a wrong to him." I may observe that Martin's goods having been burnt could not, as far as I can gather from the report, have been delivered at all. There was, therefore, either wilfully or negligently, no delivery, and in this respect the wrong was done.

This is exactly the plaintiff's case as against the Pioneer Line. Two other cases were referred to by plaintiff's counsel, the first being *Faulkes* v. *Metropolitan District R. Co.* (5, C. P. Div. 157), decided by the Court of Appeal. The defendants, the District Company, had running powers between Hammersmith, on their own line, and Richmond, on the London and S. W. Co.'s line, over the latter Company's line. The two companies divided the profits of the traffic between the two stations. Plaintiff took a ticket from the latter company at Richmond for Hammersmith and back. Upon the return journey to Richmond, he travelled in a carriage or train belonging to defendants, and driven by their servants. Owing to the carriage being unsuited to the other company's platform at Richmond, the plaintiff sustained bodily injury. At the trial, the jury found that the defendants had been guilty of negligence, and it was held that an action lay against the defendants, as they were bound, after receiving the plaintiff on their train, to provide for his safety.

Thesiger, L.J., in the course of his judgment, observes that "the true prin-"ciple in such a case—is that the company so far as concerns its own line, in "which term I include a line over which running powers are exercised, and

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"its own acts and omissions, is under the same obligations in reference to the "security of the passenger, as it would have been, if it had directly con- "tracted with him. This principle is a reasonable one, for underlying it is "the fact that more or less directly or indirectly the carrying company "derives a benefit from its carriage of the passengers, and should therefore "come under some corresponding obligation towards him; and what more "appropriate obligation can there be than the ordinary one undertaken by "railway companies towards their passengers, namely, that of taking due and "reasonable care for their safety?"

The next case is that of *Hooper* v. *London and North-Western R. Co.*, before the Common Pleas Division, in December, 1880, and reported in 43 L. T., p. 570 (but not in the Law Reports). The facts are stated as follows: "The "plaintiff took a ticket at Stourbridge, on the Great Western line, to Euston, "the terminus of the defendants' line. At Birmingham, the Great Western "connects with the defendants' line. The plaintiff's portmanteau was trans- "ferred to a van of the defendants. The plaintiff travelled to Euston by the "train with the van attached to it, but on reaching Euston the portmanteau "could not be found. Three months afterwards it was returned to the "plaintiff, but much damaged, its contents being also destroyed." The plaintiff having sued for his loss, the Court (Denman and Lindley, J J.) held that it was unnecessary to determine whether a contract of carriage had been entered into by the defendants, or not, as the defendants undertook a duty they neglected—viz., they did not take reasonable care of the portmanteau. "The same principle"—observed the Court—"which applies to passengers, "applies also to goods," and concurring in the views expressed by Thesiger, L. J., above quoted, the Court directed judgment to be entered for the plaintiff.

It may be argued that there is a distinction as to matters of duty—first, between carriers of passengers by land and carriers of goods by land; and, secondly, between carriers of goods by land and carriers of goods by water; but as to the first, *Hooper* v. *The London and North-Western R. Co.* decides that the same principles apply to passengers and to goods respectively carried by land; while, as to the second, carriers of goods by water are, in the absence of express contract, subject at common law to the same rules as carriers of goods by land.

Independently of all these authorities, which, of course, I am bound to follow, the Dominion "Act repecting carriers by water," already referred to, provides—

By section 1, that carriers by water (within the Dominion, as the preamble points out) shall, according to the terms of their notice, publicly given, "receive and convey according to such notice all persons applying for passage, "and all goods offered for conveyance, unless in either case there is reasonable "and sufficient cause for not doing so:

"They shall be responsible, not only for goods received on board their "vessels, but also for goods delivered to them for conveyance by any such "vessel, and they shall be bound to use due care and diligence in the safe- "keeping and punctual conveyance of such goods, subject to the provisions "hereinafter made:

"They shall be liable for the loss or damage to goods entrusted to them "for conveyance as aforesaid." Except that they shall not be liable, etc., "for "loss or damage happening without their fault or privity, or the fault or "neglect of their servants," etc., "by reason of fire," etc. This last part of the section I have already quoted in full and dealt with.

A legal obligation or duty was thus cast on the Pioneer Line, irrespectively of any contract, to carefully provide for the safety and ultimate delivery of the plaintiff's goods at Yale, and having negligently failed in this duty and been privy to the loss of the goods, they are, according to the statute, as well as to the authorities referred to, liable to the plaintiff for his loss.

In coming to this conclusion I have not overlooked Mr. Drake's objection to Captain Irving, who happened to be master of the vessel, being sued jointly with Mr. Briggs, the registered owner. But Captain Irving, according to the evidence, was an equitable owner. He has virtually said so. "Mr. Briggs and I "carried on business then, under the name of the 'Pioneer Line,' between Vic- "toria and Yale, for passengers and goods * *. It is probable the goods "mentioned in the receipt of the Hudson's Bay Company" (meaning plaintiff's) "went aboard my vessel." And again, "The only persons who, in September, "1881, were partners in the business of the Pioneer Line of Fraser River "steamers were myself and Thomas Lasher Briggs * *. Thomas Lasher "Briggs was the registered owner of the steamer *Elizabeth J. Irving*, and "I was interested in the profits, and no one else."

Here he speaks of the vessel as "my vessel," and admits that a partnership existed between himself and Mr. Briggs as carriers of passengers and goods, and in the business of the Fraser River steamers. If further evidence as to his ownership were necessary, it is supplied by the agreement, under seal, dated the 19th of November, 1879, which was made between him, Mr. Briggs and others of the one part, as owners of certain steamers, and the Hudson's Bay Company of the other part, for the purpose of controlling the traffic between New Westminster and Yale, for a period of three years from its date. The *Irving* was put on the route in lieu of or in addition to the steamers then on, and the above agreement was modified so as to allow her to run, if desirable, below her own route and over the Company's, between Victoria and New Westminster. This arrangement was made with the Company by Captain Irving in his own name, as appears in the correspondence on the subject, dated the 23rd and 26th of August, 1881; and it must be presumed that it was not made by him as master of the vessel, for a master, simply as such, has no such powers as he exercised in this instance. Taking all this evidence into consideration, I arrived at the conclusion that Captain Irving was an equitable owner in the *Irving*.

I have now to consider the question of the Hudson's Bay Company's liability. They occupy a different position from that of the Pioneer Line, for they were the contractors for the carriage of the plaintiff's goods from Victoria to Yale.

The shipping receipt, which is styled in their pleadings a bill of lading, has been already set out, but for convenience I shall set it out again:—

"Victoria, V.I., 26th Sept., 1881.

"Shipped in good order by H. B. Co., on board the *Enterprise*, whereof "Gardiner is master, and bound for New Westminster, the following packa-

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"ges (the dangers of fire and navigation excepted) consigned to Gavin "Hamilton, of 150-mile house, and marked G.H. 150-m house.

(Signed) "G. HARDISTY."

The usual bill of lading undertakes to deliver at some definite place, in the like good order, etc.; but this document contains no undertaking to deliver at any place, except by implication, either at the 150-mile House—a place far inland—or at the place of the steamer's destination—New Westminster. A good deal might be said in favour of either construction, and as the document is ambiguous, I admitted evidence to explain it. Besides this, admitting for the sake of argument that this receipt is a bill of lading, and though ambiguous, is *ex facie* a contract to carry to New Westminster, *Malpas* v. *London and South Western R. Co.* (L. R. 1, C. P. 338) is an authority for admitting parol or other evidence to show that the Company agreed to carry the goods on to Yale, as it does not contradict but only supplements the written contract. On this evidence, in connection with the terms of the receipt, I am clearly of opinion that the Hudson's Bay Company contracted to carry from Victoria to Yale. They acted as the plaintiff's agents in Victoria in arranging for and attending to the carriage of his goods to Yale. The freight was only due on delivery of the goods at Yale. The duplicate shipping receipt or bill of lading was sent by the Company to Mr. Harvey, at Yale, as his authority, of course, to demand and receive the goods there. No freight was payable at New Westminster; but one undivided sum for carriage from Victoria to Yale was to be paid at the latter place. The Company were not in any sense mere forwarders, entitled to a commission (which they don't pretend to claim) for attending to the shipment at Victoria and transshipment at New Westminster; but were carriers by their own steamer to New Westminster, and thence by their agents' vessel to Yale. A few extracts from the agreement of November, 1879, made between the Company and Messrs. Irving and Briggs, will best explain their true position. "All up-country freight carried by the Company "to New Westminster, whether pertaining to themselves or others, and of "which the inland carriage may be under their control or subject to their "direction, shall be forwarded up the river in Captain Irving's steamer, "whether there be other steamers then running in opposition on the river or "not, and shall be carried by him at the rates charged to his most favoured "customers; and Captain Irving, on his part, shall endeavour to secure for "Company's steamer or steamers all freight coming downwards, below New "Westminster; the same to be carried by them, in like manner, at the most "favourable rates.

"In order to discourage opposition the regular rates for freight and "passage shall be as low as may be considered advisable, and be subject to "adjustment from time to time as may be deemed necessary by both parties "acting in concert."

[Here follows a table of rates from Victoria to New Westminster, and *vice versâ*, and from New Westminster to Yale, and *vice versâ*, which was to remain in force until altered as above provided.]

"In the event of opposition on the whole line from Victoria to Yale, or on "either section of it, *i. e.*, below or above New Westminster, both parties "shall co-operate against * * such opposition * * by endeavour-

"ing to secure each to the other all freight and passengers going beyond "his own route and subject to his control or direction, and by such reduction "of rates and other proper means as may be most advisable and necessary."

"The rates actually obtained on *through freights* and passages shall pertain "to each party in the proportion of one-third from Victoria to New West- "minster, or back, and two-thirds from New Westminster to Yale, or back, "or such other proportions as may hereafter be mutually agreed on; and for "intermediate places a due proportion of such rates according to distance."

Another clause names a sum of $20,000 as liquidated damages for breach of the agreement by either party. The agreement was in force when the *Irving* was running; and the *Western Slope*, moreover, was on the route in opposition. In my opinion the above conditions gave, as it were, to each party carrying powers over the line of the other, and also made each the agent of the other in respect of passengers and traffic on the whole route, and to some extent on each section of it.

As the Company, in my opinion, agreed to carry to Yale—a place beyond their own end of the route,—it follows, from *Collins* v. *Bristol & Exeter R. Co.* (29 L. J. Ex. 41), that the special conditions of carriage as to fire, &c., extend over the whole route. These conditions I have already shown, for reasons I need not repeat, do not protect or exempt the carriers in the present case; but I have yet to decide whether the Company are liable, as the loss of the Plaintiff's goods occurred beyond their section of the route, and was occasioned by the Pioneer Line and whilst the goods were being carried by that Line.

The leading case on this point is that of *Muschamp* v. *Lancaster & Preston Junction R. Co.* (8 M. & W., 421), which establishes the principle that where a railway company contracts to carry goods over their own line and to a place on another company's line, they are responsible for their loss by negligence, although such loss occurred on the latter line; on the ground, that having contracted to carry the goods the entire distance, the second company to whom they deliver them are their agents for the purposes of completing the contract.

The judgment of Abinger, L. C. B., is so apposite to the present case that I shall quote it. "The Companies" he observes "though separate in them- "selves, are in the habit, for their own advantage, of making contracts, of "which this was one, to convey goods along the whole line" (that is, over the lines of both), "each of them being agents of the other to carry the goods "forward, and each receiving a share of the profits from the last. The fact "that * * the carriage was to be paid at the end of the journey, "rather confirms the notion that the persons who were to carry the goods "from Preston to their final destination, were under the control of the "defendants, who consequently exercised some influence and agency beyond "the immediate terminus of their own railway. The carriage money being "an undivided sum, rather supports the inference that although these carriers "only carry a certain distance with their own vehicles, they make subordinate "contracts with the other carriers, and are partners *inter se* as to the carriage "money, a fact of which the owner of the goods could know nothing, as he "only pays the entire sum at the end of the journey, which they divide as "they please."

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Again, in *Scotland* v. *S. Staffordshire R. Co.* (8 Ex. 341), which was a case for loss of goods by another company (the London and North Western R. Co.), Martin, B., in effect observes—If the defendants choose to employ the latter company to carry the goods, they make them their agents to carry. The defendants were therefore held liable for the loss of goods occasioned by the other company's negligence, as the latter were defendants' agents.

Collins v. *Bristol & Exeter R. Co.*, is a very instructive case, and though negligence was negatived by the jury in that case, the House of Lords approved of the principles laid down in *Muschamp* v. *Lancaster & Preston Junction R. Co.*

In *Smith* v. *G. T. R. Co.* (35 U. C. Q. B. 547), nearly all the English authorities are collected, and the principle seems now well settled that "the "liability of the carrier extends throughout the whole distance over which "he professes to carry, whether on or beyond his own line."

The Hudson's Bay Company are therefore responsible to the plaintiff for breach of their contract to carry his goods to Yale, and are liable for the loss he has consequently sustained. They are liable as the above authorities show, although the loss of the goods occurred on the Pioneer Line, as the latter were their agents for the carriage of plaintiff's goods.

I have now to settle the amount of the damages. The plaintiff claims the market value of the goods at their place of destination; but as his counsel was unable, as he explained at the trial, to give any evidence of such value, by reason of his client's absence, he was obliged to limit his claim to the cost price of the goods in Victoria, which was proved to be $1,140.93. The plaintiff has also made a special claim for interest, by way of damages, at 12 per cent. per annum, from the 29th December, 1881. No evidence was given to explain why this date was fixed. I imagine it was intended to represent, approximately, the period at which the plaintiff's goods would have reached him in the ordinary course of events; but I am not at liberty to take this for granted, though I know, from personal experience, that the date is, in that respect, a reasonable one.

A jury however has a discretion, and may, if they think proper, in cases like the present, involving a question of delay, award interest by way of damages for such delay, although it might be improper on the part of the Judge, to *direct* them to allow it. [*Sedwick* on Damages, 7th Ed., pp. 94, 189, 191.] The defendants were to have delivered the goods at Yale about the 28th September, 1881, and would have then delivered them, but for their negligence. Accordingly, from that period, the delay with which they are chargeable, may be said to have had its beginning. Exercising the functions of a jury, I should, therefore, feel authorized in allowing interest from the 28th September, 1881; but as the plaintiff only claims it by his pleadings from the 29th December, 1881, I cannot go behind the latter date, or, in other words, give him more than he asks. I may add that the authorities cited by the Attorney-General in favour of interest are *British Columbia Saw-mill Co.* v. *Nettleship* (L.R. 3, C.P. 501), and *Leslie* v. *Canada Central R. Co.* (35, U. C. Q. B. 21.)

I must, therefore, direct judgment to be entered against all the Defendants for $1,140.93, together with interest thereon from the 29th December, 1881, at one per cent. a month, and the costs of this action.

PECK AND OTHERS, PETITIONERS,

v.

THE QUEEN, RESPONDENT.

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March 17.

Mineral Ordinance, 1869, and amending Acts, construction of—Prospecting Licence—Cancellation of Licence—Condition Precedent—Waiver—Laches.

The Mineral Ordinance, 1869, provides that holders of a prospecting licence for coal may select for purchase a portion of the lands included in their licence.

Upon compliance with the terms and conditions of the Act, the licensees are entitled to claim a Crown grant of the selected lands.

The Petitioners held a prospecting licence for coal over 2,500 acres of land, and applied for a Crown grant. In support of their claim, they relied on a certificate of the Assistant Commissioner of Lands and Works that they had posted notices of their application, and that no objection to the issue of a grant had been substantiated.

Held, (1) that the certificate was not in accordance with the Act.

Held, (2) that the certificate of an Assistant Commissioner was not conclusive evidence of compliance with the statutory conditions, and the presumption arising from the certificate could be rebutted by evidence to the contrary.

It was contended that the Lands and Works Department having received the certificate without objection, and not having cancelled the licence under the provisions of the Mineral Ordinance Amendment Act, 1873, had waived the performance of the terms and conditions of the Act.

Held, that the Department could not waive the performance of conditions imposed by the Legislature.

The Petitioners' application for a Crown grant was made in 1874, but they did not prospect or work the land, or take further steps in support of their claim till 1882, and in the meantime the lands had increased in value.

Held, that, in a proceeding to enforce specific performance by the Crown, unreasonable delay on the part of the Petitioners is fatal to the application.

Quære, whether, that to entitle prospecting licensees to a Crown grant of coal lands under the Mineral Act, it is not essential that they should have found coal on the land selected by them for purchase?

M. W. T. Drake, Q. C., for the Petitioners.

A. E. B. Davie, Q. C., (Attorney-General), and Mr. *Harrison*, for the Crown.

Mr. *Pooley*, on behalf of parties claiming to be interested under subsequent legislation.

GRAY, J.:—

THIS is a proceeding under the "Mineral Ordinance, 1869," by which the Petitioners, in a Petition of Right, seek to obtain from the Crown a grant of 1,000 acres of land, in consideration of the due performance of the terms and conditions set forth in the said Ordinance; and, on compliance with which, the statute enacts that they shall be entitled to such a grant.

The Attorney-General, on behalf of the Crown, distinctly denies the performance of the terms and conditions set forth in the Ordinance, and the compliance by the Petitioners with the requisites which would entitle them to claim such grant, and avers an abandonment by the Petitioners of their alleged claim.

Sitting therefore as a Judge in this Court to determine what that law is, and to decide upon the facts in dispute, it will facilitate arriving at a

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correct conclusion, briefly to state the requirements of the Ordinances, the issues raised, and the evidence of the facts as proved before me.

The Mineral Ordinance of 1869, gives the right to any person or company of persons to enter and explore for minerals, including coal, in and under the mineral lands embraced in the Ordinance, and under the conditions therein set forth, and subject to any other regulations affecting the acquisition and tenure thereof subsequently prescribed by law, to obtain a grant of 1,000 acres of such land.

Application must be made to the Assistant Commissioner of Lands and Works for the district within which the mineral lands lie, before entry thereon, for a prospecting licence over such land for any term not exceeding *two years* from the date of application.

The application to the Assistant Commissioner must contain the best practicable written description of the plot of land sought—*after having located the same*—with a proper plan or diagram shewing the position of the boundary posts to be set up, and a description of any other landmarks of a noticeable character. Such application and plans shall be in duplicate, one *to be filed in the office of the Assistant Commissioner at the time of its being received by him*, and the other forthwith transmitted by him to the Chief Commissioner of Lands and Works, and retained by him for general reference.

Certain regulations as to shape and natural boundaries are then set forth, with the preliminaries required before even the application can be made to the Chief Commissioner. When these preliminaries have been complied with, a two (2) years' prospecting licence may be granted, and the applicant shall, on satisfactory proof to the Assistant Commissioner that he has bonâ fide explored and worked for coal (or other minerals, as the case may be) *during the said term of two years*, be entitled to an extension of the said term for the second period of one year, and such further time as the Governor shall think fit.

Section 11 of the Ordinance then enacts that, when the *application is for coal alone*, the application may include within the general limits therein defined 500 acres to each individual applicant, or 2,500 to any association or company of not less than ten persons; and *that out of the said quantity*, the licensees may at or before the expiration of the licence, or any prolongation thereof, *select for purchase* the portion of mineral land to be included in a Crown grant.

Section 12 defines the form of the licence and the powers of the licensee, with the distinct provision that at or before the expiration of such licence, or any prolongation thereof, *upon compliance* with the *terms* and *conditions in the Ordinance* contained, he may claim a Crown grant of such portion of the *mineral land* included in his licence as is *afterwards* in that behalf more particularly described.

By section 13, it is enacted that "the interest of every licensee under this "Ordinance shall be deemed to *have absolutely ceased and determined* on the "expiration or other sooner determination of his licence, or any prolongation "thereof, unless he shall have, prior to such expiration or determination, "made application for a Crown grant as therein provided;" and a new prospecting licence over the same location, or any part thereof, may be made to a new applicant.

Section 16 limits the quantity of mineral land for coal to any licensee applying for a Crown grant, and fulfilling the conditions afterwards in that behalf more particularly mentioned, to each association or company of ten or more persons to not more than 1,000 acres, *selected out of the premises* included in such licence.

Section 22 then states what the conditions are, to be complied with by the licensee before any Crown grant could issue:—

First—He was to leave with the Assistant Commissioner of Lands and Works, *and* post on a conspicuous part of the premises *sought for*, *and* on the Court house of the district, if any (for at least two calendar months previous to the record of his application for such Crown grant, and prior to the expiration of the term included in his licence, or any prolongation thereof), a notice of his intention to apply for such Crown grant, *with a diagram of the premises*; *and* shall for the same space publish such notice in the Government Gazette and a newspaper published nearest to the said mine and premises.

The Assistant Commissioner is to post such notice in his office for two calendar months, and (if no adverse claim is filed) to give a certificate to the licensee to that effect.

On the application of the licensee, and delivery of such certificate, the Chief Commissioner of Lands and Works (on the payment to him by the applicant of such sum as the said Chief Commissioner may estimate as the probable cost of survey) shall cause a survey and plan thereof to be made and to be endorsed with his approval, designating such land by its number on the official records, with the estimated value of the improvements and labour expended on the said land.

By section 23, upon proof *satisfactory to the Chief Commissioner* of compliance with the foregoing provisions, and payment of the amounts next provided, together with the balance (if any) remaining unpaid of the actual cost of survey, a Crown grant shall be issued by the Chief Commissioner to the licensee applying for the same.

The next section (24) designates the amounts—

"For coal lands the price shall be as follows:—

"For any quantity up to and including 1,000 acres, at the rate of $5 per "acre; provided that on proof, to the satisfaction of the Government, that "$10,000 has been beneficially expended on any land under prospecting "licences for coal, a grant of 1,000 acres of land included in such prospecting "licence shall be issued to the company holding such prospecting licence, "without payment of the upset price of such land."

The 29th section then enacts, that the issue of a Crown grant to any applicant under this Ordinance, save where obtained by fraud or wilful misrepresentation, shall confer an indefeasible title.

Section 38 provides that, in any mineral lands not included in any particular district of any Assistant Commissioner of Lands and Works, the Chief Commissioner is to act.

And by section 39, the Government, by publication in the Gazette, has power to define the districts for the purpose of the Ordinance.

The 43rd section defines the meanings of the terms "Assistant Commissioner," and the word "mine," &c., as used in the Ordinance.

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By the "Mineral Ordinance Amendment Act, 1873," (No. 3) section 4, it is enacted that, coal lands then held under any prospecting licence issued under the provisions of the "Mineral Ordinance, 1869," from and after ninety days have elapsed after the passing of that Act (viz., 21st February, 1873), shall be continuously and bonâ fide worked until the Crown grant for the said lands be issued; and if such work be not done, the Chief Commissioner of Lands and Works may cancel the prospecting licence including such lands.

Such being the provisions of the local statutes governing the case, it will become necessary, briefly, to state the issues raised as between the Petitioners and the Crown, and the facts established by the evidence.

The Petitioners say, first, that on the 26th November, 1872, a mineral licence to prospect for coal was issued to them under this Ordinance (1869), the district not named, but the boundaries set forth, not exceeding in the whole 2,500 statute acres, with all the rights and privileges granted under this Ordinance, and also the right to claim a Crown grant under the Ordinance, and subject to its provisions; the licence to continue for two years from its date—that is until 26th November, 1874.

2. That they entered on the land in the licence described, and before the 26th April, 1874, had "selected the portion of such land which they "desired to purchase under the said licence and Ordinance," having, in the meantime, incurred great expense in prospecting and working said land for coal.

3. That within the prescribed time—at least two months previous to 26th November, 1874,—they left with the Assistant Commissioner *and posted on a conspicuous part* of the aforesaid land which they *had selected*, and on the Court house of the district, previous to their application for such Crown grant, a notice of their intention to apply for such Crown grant, *with a diagram* of the premises, and did cause such notice to be published as required by the Ordinance.

4. That in November, 1873, they received from the said Assistant Commissioner a certificate "That the said Thomas Eric Peck, on behalf of himself "and ten others, had posted, for 60 days, on a conspicuous part of the pre-"empted claim, No. 7, and upon the adjacent land, and upon the Court house "of the district, a notice, for 60 days, that he intends to apply for a Crown "grant of the land comprised in such claim, and that no objection to the "issue of such grant had been substantiated."

5. That the Petitioners were ready to pay whatever sum the Chief Commissioner might lawfully claim as probable cost of survey, and on the 20th April, 1874, *caused* the said certificate to be sent to the Chief Commissioner, accompanied by the following letter:—

"20th April, 1874.

"To the Chief Commissioner of Lands and Works:

"Sir,—We have the honor to enclose you a certificate of Thomas L. Faw-"cett, made in pursuance of the 'Mineral Ordinance, 1869,' certifying that "Thos. E. Peck, on behalf of himself and ten others, has complied with the "terms of the Act, in respect of Mining Licence No. 7. On behalf of Mr. "Peck, we beg to apply for a Crown grant of 1,000 acres of land, and to "request from you a note of the amount that you will require in order to pay

"for survey. We may mention that from $8,000 to $10,000 has been expended "on this claim in proving it.

"We have, &c.,

(Signed) "DRAKE & JACKSON."

That they received a reply from Mr. Beaven, the Chief Commissioner of Lands and Works, acknowledging the receipt and informing them that the usual survey fee was $50, and that if they desired to have the claim surveyed at once, they could appoint a surveyor to do the work at the company's expense, subject to his approval and under instructions from his department; and, further, calling attention to the fact that the notice of intention to apply for a Crown grant had to be given in the Gazette for 60 days, whereas this had only been for one month.

That, in consequence, the Petitioners caused the said notice to be published in the Gazette, continuously, from 2nd May, 1874, to end of August.

7. That in 1882, the Petitioners believing that the time had arrived at which the coal mine they had discovered might be worked to advantage, applied to the Chief Commissioner for permission to employ a surveyor to survey the land of which notice of their intention to purchase had been given, and employed men in cutting out roads and doing other preliminary work to open the mine, and *had kept them so employed* to that time.

8. That to this application to survey the selected land, they received a reply that the Government could in no way recognise their claim, but would treat the same as abandoned.

9. That the Petitioners asserted that they never abandoned their claim, but have at all times been in continuous occupation of the said land except when driven therefrom by Indians, and have at all times had buildings and tools there for the use of their representatives; and that they were never notified to complete the purchase or pay the purchase money; that the purchase could not have been completed until the land was surveyed, and that they were at all times ready and willing to do whatever was necessary to complete the purchase.

The Attorney-General, on behalf of the Crown, takes direct issue as to all the material facts alleged by the Petitioners. That they did not leave with the Assistant Commissioner—nor post on a conspicuous part of the land which they desired to purchase, nor on the Court house of the district previous to their application—a notice of their intention to apply for a Crown grant, with a diagram of the lands selected, in the manner prescribed by the Ordinance. That they did not, at any time before the expiration of their licence, select the portion of the lands, in the pleadings mentioned, which they desired to purchase; nor did they incur great expenses in and about the working the said land for coal; nor were the notices of their intention to apply for a Crown grant published as required by the Ordinance; nor did they apply for a Crown grant of any selected 1,000 acres of land.

He then alleges that they did not appoint a surveyor, in accordance with the Chief Commissioner's letter of 28th April, 1874; that they neglected taking any steps in support of their claim until September, 1882, when they asked for permission to employ a surveyor, in answer to which the Government replied that they must treat the claim as abandoned by reason of laches, and he denies their assertion that they never abandoned it. He further

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describes the location of the lands on Vancouver Island, and alleges that they have recently increased greatly in value; denies, that since September, 1873, that they have continuously and bonâ fide worked the said lands; nor have they paid, or offered to pay, the purchase money for the lands.

To these allegations the Petitioners join issue, and further say—that if they have not, since 1873, continuously and bonâ fide worked the said land, their licence has never been cancelled; nor, if cancelled, did they receive any notice of the cancellation, or of any intention to cancel it.

On behalf of the Petitioners, the first witness was Thomas Eric Peck, who stated he was one of the Petitioners and Licensees; that the notice was written by Nixon, acting as secretary for the corporation, dated September 12th, 1873.

The notice was produced, and is as follows:—

"Notice.—At the expiration of two months from date, we, the undersigned, "intend to apply for a Crown grant for a certain portion of coal land in the "neighbourhood of Willow Point. T. E. Peck, A. Bunster, William May, "Charles York, James Gordon, William Clarke, Charles Thos. Dupont, Geo. "Nixon, S. D. Levi, Richard Nightingale. September 12th, 1873."

Peck continues—That he posted these notices on the Court house, had them posted on the ground, *left a diagram with the Assistant Commissioner*, Fawcett, Government Agent at Nanaimo; *no diagrams were with the notices put up.* Fawecett gave him a certificate—set out in paragraph 4 of the Petition, and dated 11th November, 1873.

In detailing the expenditure on the land, Mr. Peck says—That in November, 1872, prior to the licence, he sent William Lang and Henry Franklin, with a canoe manned by Indians, posting the notices, and paid them for 17 days. That *after* the licence he had men working on this land, three at one time, at $3 per day; another time, two, at the same—they were driven off by Indians (Euclataws). That he verbally complained to the Chief Commissioner of the trouble with the Indians—nothing official. That he supplied the men with tools and provisions; they were prospecting—cutting roads, building a house, and running drifts. That they did not take their tools from the house. That they have since, *occasionally*, had people on the land. That, in 1878, he paid Levi an order for $20, from May, for taking care of the tools. That, in November, 1882, he was last on the land; he took up two men—they wintered there.

On his cross-examination, he says—He has no account of his expenditure; examines a memorandum of sums he paid out and collected, which he thinks was done in 1873, perhaps some in 1874. The Euclataw expulsion was in the fall of 1874. The men were *next* sent up in November, 1882. *During that interval no work was done beyond looking after the tools*, for which purpose $20 was paid to Levi, $30 to Roselli, an Indian or half-breed; that he is owing something to an Indian, perhaps $40, for same purpose. That covers all the money during that interval, looking after tools. That the arrangement for taking care of the tools was made by May with the Indians. That he (Peck) prepared the diagram that was left with Fawcett *about the time he* got the certificate from Fawcett, in November, 1873. May, one of the licensees, made an arrangement with an Indian to take care of the tools.

On his re-examination, he says—May was not under pay by the company after he was driven off by the Indians. That the total amount received since

1873 or 1874 has been about $1,112; perhaps a little over $100 was on account of expenditure before 1873, the remainder during the period up to 1882.

When cross-examined on this new statement, he said—"The remaining "$1,000, or about that, was spent in November, 1882—*not before*—and the "spring of 1883. These last expenditures were because we thought we would "get our title from the Crown, and were on no other account whatever. "$500 of it was advanced by myself."

This witness here disavowed, in the strongest manner, the statement in Messrs. Drake & Jackson's letter of the 20th April, 1874, "that from $8,000 to $10,000 had been expended on this claim in proving it," affirming he never could understand how such a statement was made.

The next witness was Solomon Levi, who stated he was one of the Petitioners; that he worked on the claim from November, 1882, to sometime in January, 1883; that he was on the land in 1877 or 1878; there was an Indian there—a Euclataw—Pleast by name; cashed an order for $20 for him, *from May on Peck;* went to where they had been drifting for coal, on the Campbell River; saw two drifts, they were full of water; could not say how far they went in; the tools were there in 1882. He had paid towards the expenses, to Mr. Peck, $155.

On his cross-examination, he says—He had been trading off and on along the coast up there, from 1875 to 1882. The first time he went to the house was in 1882; fixed it up to live in; found some mining tools and cooking utensils—2 axes, 1 hatchet, 1 shovel, 2 picks, a frying-pan, 1 tin plate, 1 tin cup, and some crockery broken; the tools were covered with bark, and the Indians might have trampled on it; the house was nailed up; the chimney was a hole in the roof, and there was a place where a window ought to have been; it was open. Next went to find the old trail from the house to the drift; found it second day; re-blazed it; remained there two months. Lockhart, and three Indians with him, went down to the drift several times to try to work; looked for out croppings, shovelled away dirt. States, as one of the promoters, he paid $20 in 1872, $40 in 1873; cashed, in 1878, order for $20, and in November and December, 1882, $40—his proportion for expenses *since* 1882. He is one of the eleven. States that in December, 1883, he paid $25 towards expenses of this lawsuit; that he became a promoter of this company before he was involved, and before his discharge in bankruptcy; that in his list of assets it was put down, but no valuation attached to it—that was in 1875; that he got his discharge in 1876; that when he got the order from the Indian, in 1877 or 1878, he was living at the Indian house on Campbell River.

In answer to the Judge, he stated that the old house and roads may *not have been used for six years;* he always thought there was something good there, but was glad when not called upon for assessments; kept dark.

Thomas L. Fawcett—Was appointed Government Agent and Land Recorder at Nanaimo, 22nd March, 1873, and subsequently Assistant Commissioner of Lands and Works in July, 1874. In November, 1873, gave the certificate set out in paragraph 4. Has some slight recollection of Willow Point being posted in his office; believed the certificate to be correct; was satisfied of the fact from his routine of business; don't remember who made the proofs; I must have been satisfied; was well acquainted with the require-

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ments of the law at that time. I put into that certificate every thing I had reason to believe they did, *and if there was any thing required by the Act to to be done which is not in the certificate, then I am satisfied they did not do it.* I gave the certificate to Mr. Peck. Don't recollect sending a certificate or copy to the Lands and Works; if the Act requires it, I did it. I kept a record, and the record must be up there—that is at Nanaimo.

On behalf of the Crown, the first witness was John Dick, who went to Willow Point in April, 1883; saw a house and trail on the premises, the latter well blazed, very fresh, only a few months' old; a small log cabin, appearing to him recently built—four or five months. Had heard Levi's evidence; did not see any trail leading from there to Campbell River; saw neither a ranch or a coal mine about there, or any indication thereof. I was, myself, on account of Indian reports, looking for coal on the Djon River, a tributary of the Campbell; did not see any trace of coal within twelve miles of the course I took.

Captain William Raymond Clarke, one of the Petitioners, states in his examination that he was interested in the matter in 1872; that he paid his last payment in March, 1883; that he was one of the original licensees; heard nothing of it from 1874 to 1883.

Robert Dunsmuir—Is owner of a coal mine; knows Willow Point well. The lands have increased in value in consequence of the contemplated railway, and are within the railway belt. They are coal lands above Comox, and I was therefore induced to take up the railway contract; was aware of the application by Peck and others in 1872, and that for many years afterwards nothing was done. In consequence of information relative thereto, from the Chief Commissioner of Lands and Works and the Attorney-General, I signed the railway contract in August, 1883.

W. S. Gore, the Surveyor-General, produces map from official records, shewing that Willow Point was not within the District of Nanaimo. That there was a Government Agent at Nanaimo before 1874, but his district was not defined. Also, produced the counterpart of the prospecting licence, dated 25th November, 1872, to continue in force for two years. Attached to the entry, is a counterpart of the certificate, signed by Fawcett, set forth in the Petition; the form is from the "Land Ordinance, 1870."—there is no form attached to the "Mineral Ordinance, 1869." Has searched but not been able to find in the Land Office any duplicate or other record of this transaction. That is the proper office to search.

Mr. Harrison called attention to the action of the Legislature in dealing with these lands in 1882 and 1883, citing Chap. 15, 1882, passed 21st April, 1882, incorporating the Vancouver Land and Railway Company, commonly called the Clements Bill; by section 18, setting apart and reserving for the said company, on the carrying out of their Act of Incorporation, the very lands referred to in the Petition; and also to Chap. 14, 1883, passed 12th May, 1883,—"An Act relating to the Island Railway, the Graving Dock, and the Railway Lands of the Province,"—again ceding these lands for railway construction, the Incorporators under the Clements Bill having failed to comply with the conditions of their Act of Incorporation.

Such are the requirements of the Local Statutes under which the Petitioners claim their right against the Crown; such the allegations of facts set

forth in their Petition; such the reply of the Crown to their Petition; such are the facts which have been established by the sworn evidence of the Petitioners themselves and the witnesses they have produced. It is impossible to rise from the consideration of this evidence without the conviction that the Petitioners have failed on almost every ground on which they alleged their claim to rest. Not only so, but in their Petition they have set forth facts which they knew did not exist—facts of too serious a nature to be regarded as accidental or inadvertent. Laying aside all minor or what might be termed technical objections to Mr. Fawcett's appointment as Assistant Commissioner of Lands and Works, at the time he gave his certificate, and to the non-definition at that time of the mineral district in which he was to act under the Mineral Ordinance of 1869, and assuming that he gave the certificate in November, 1873, believing the parties were entitled to it, it does not mend the matter. Mr. Drake contends, on behalf of the Petitioners, that the agent or officer of the Government having given the certificate under the Act, it must be taken as conclusive that the conditions required by the Act were fulfilled, and that it is too late now to say that they were not. For the sake of the argument, supposing that position were correct—though clearly not admitting it—the certificate given is not the certificate which the Act requires. It is in the form prescribed by the Land Ordinance of 1870, regulating the issue of Crown grants to pre-empted lands. No such form is given under the Mineral Ordinance of 1869, and the conditions to be complied with, for obtaining a mineral licence *and a subsequent grant* under the last named Ordinance, are different from those under the Land Ordinance. The certificate Fawcett was to give, was of compliance with the Mineral Ordinance; but what says Mr. Fawcett himself as to that certificate? "That "he believed it to be correct; was satisfied of the facts from his routine of "business; don't remember who made the proofs; I put into that certificate" (says he) "every thing I had reason to believe they did, *and if there was* "*any thing required by the Act to be done which is not in the certificate, then* "*I am satisfied they did not do it.*" On this statement, the certificate shews that the requirements of section 22 of the Mineral Ordinance were not complied with, because they are not set out in the certificate, and Mr. Fawcett says—therefore were not done. Mr. Peck's evidence is conclusive on the same point. Not only does he say no diagrams were with the notices put up, but that he prepared the diagram he left with Fawcett, about the time he got the certificate from Fawcett in November, 1873. How then could the Assistant Commissioner (Fawcett), at that time, give a certificate that it had been posted for at least two calendar months in his office? It is also somewhat singular that, though Mr. Fawcett states he kept an official record in his office at Nanaimo of his acts and correspondence, and that on removal from office he left those records there, not the slightest evidence from such records has been produced, or even an allegation made of an effort to search for them. But, says Mr. Drake, it must be taken that as the Crown received this certificate without objection, it must be deemed that the Crown *waived* the performance of the conditions; and to shew that a statutory right had been thereby acquired, he cited two important cases: *The Attorney-General of Victoria* v. *Ettershank* (L. R. 6 P. C. 354, A. D. 1875), and *Bridges* v. *Longman* (24 Beav. 27, A. D. 1857), where somewhat similar questions arose, in which the

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Crown was concerned, as sustaining his views. After a careful examination of these cases, I cannot agree with Mr. Drake's conclusion. On the contrary, I think they are a direct authority against him. In Ettershank's case, the party had performed the preliminary conditions by which the right was to be acquired; had entered into possession; had been recognised by the Crown as possessor, as having acquired his right by performance of the preliminary conditions, but had omitted to do something *afterwards*, which omission would operate as a forfeiture, and make his lease voidable—not void; the knowledge of which subsequent omission had been brought to the knowledge of the Crown, by the Crown not only not acted upon, but positively condoned by the issue of a new grant. This is not a waiver of a preliminary condition, by which a right *is to be obtained*, but the waiver of a penalty, by which the right already obtained would be forfeited, and which, after the action of the Crown by the subsequent issue of another grant, it was too late to press. There was, in reality, an affirmation of the right. A forfeiture is simply a penalty, and may be waived. The very term "forfeiture" implies that a right had been acquired, but has been jeopardised by something that was done or omitted to be done *after its* acquisition. The opinion of the Master of the Rolls, in *Bridges* v. *Longman*, is to the same effect. This is the essential distinction between those two cases and the present. In the latter, the preliminary conditions had not been performed; no right had been obtained; there was no act of the Government admitting its attainment. It is a misuse of the term "waiver" to say it is operative in the present instance. A Government, in the disposal of the public domain, cannot waive the performance of conditions specifically ordered by the Legislature, unless directly authorised by the Legislature so to do. A Government may dispense with the proof of performance to some extent, but that is based on the presumption that the conditions have been complied with. It may accept the certificate of its officer as satisfactory proof (see section 23) of that presumption, but that is simply primâ facie, "*donec probetur in contrarium.*" When the contrary has been proved, the presumption fails, and the conclusion based on the presumption goes. Without the express sanction of the Legislature, a Government has no power of dispensing with conditions absolutely required by law. Inaction of a Government is not to be construed as an admission. Unless you have performed, or it is assumed you have performed, the conditions, you have acquired no right. Under section 13, the licence had actually expired; it was not therefore incumbent on the Government to proceed to cancel the licence under the fourth section of the "Mineral Ordinance Amendment Act, 1873," (as so strongly urged by Mr. Drake) because the lands held by the Petitioners had not (supposing the Petitioners had found coal lands to work) been continuously and bonâ fide worked. The expression is "may cancel the prospecting licence,"—not *must or shall;* it was clearly optional with the Government. It would be a novel principle indeed, that a party could take advantage of his own wrong, and say to the Government, because I did not do what the law said I should have done, and because you did not at once exercise your power and take advantage of my omission and ruin me, therefore you are under a great obligation to me, and must give me 1,000 acres of land; by violating the law, I have thus acquired a right which I had not before; you did me that favour, not

to punish, I have therefore a statutory claim to 1,000 acres of land—not because I did right, but because I did wrong. Such reasoning will not hold good. The Petitioners are here the moving party; the onus is on them to shew they have complied with the law. They are seeking to drive the Crown. When you take the bull by the horns, you ought to be stronger than the bull. With reference to the equitable relief prayed for by the Petitioners, if it were possible to find any equity in this case in their favour, a Court cannot grant it contrary to the clear provisions and intentions of the statute under which it is sought. [See Judgment in Ettershank's case, 371, referring to *Keating* v. *Sparrow*, 1 Ball & Beattie, Irish Ch. Rep. 367.]

But leaving section 22, and turning to sections 11, 13, 23, and 24, which also govern the present application, we find the Petitioners have not selected or defined the land for which they ask the Crown grant. This, in my opinion, was essentially necessary. The eleventh section—which regulates the prospecting licence under which they were acting—says, *that out of the 2,500 acres over which* they may prospect and search for coal, "the licensees may "at or before the expiration of the licence, or any prolongation thereof, select "for purchase the portion of mineral land to be specified in the Crown grant. The 13th section—that the interest of the licensee under the Ordinance shall be deemed to have absolutely ceased and determined on the expiration or other sooner determination of the licence, or any prolongation thereof, unless he shall have *prior to such expiration or determination* made application for a Crown grant, as herein provided. In the letter of the 20th April, 1874, addressed by the Petitioners to the Chief Commissioner of Lands and Works, applying for the Crown grant under these provisions, no selection whatever is made, nor even is the requisition confined or limited to the lands specified in the licence, nor in the Petition, or in the evidence is there one word, to indicate, that the Petitioners themselves had the slightest idea of what lands they were asking for, or of their having selected any portion of the 2,500 acres described in the prospecting licence. The case of *Thomas* v. *The Queen* (L. R. 10 Q. B. 31), cited by Mr. Drake, does not remove the objection. In that case, which was as to the pecuniary reward to be given the inventor of certain military arms, on conditions laid down and complied with, the decision was simply that a Petition of Right would lie against the Crown for a breach of contract resulting in unliquidated damages. There, all that the Petitioner was to do had been done. He had complied with all the conditions of the contract by him to be performed. The contract did not define in amount what pecuniary reward he was to receive from the Crown, but he was to receive something, and that amount was to be settled by the Crown. It therefore was not open to the Crown to say the amount was undetermined. In this case it is directly the contrary. The licensee here is to select out of a given area the particular portion he wants—the onus is on him to choose, ask, and define. The Government is simply to ascertain the correctness of the definition on payment to the Chief Commissioner of the "estimate of the "probable cost of surveying *such premises*, by a survey and plan thereof to be "made and endorsed, designating such land by its number on the official "records, *with the estimated value of the improvements and labour expended "on such land.*" How could the Chief Commissioner make a survey and plan

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of land, and estimate the value of the improvements and labour expended *thereon*, if he was not told where it was? It was surely the business of the Petitioners to tell him what they wanted.

Equally objectionable and equally fatal, in view of the 13th section and of the whole case, is the great delay—the absolute inaction amounting to a practical and legal abandonment of the object for which the licence was granted. By efflux of time it expired in November, 1874. From November, 1874, to November, 1882—for eight years—not one step is taken by the Petitioners towards the object for which the licence was granted. The case of *Mills* v. *Haywood* (L.R. 6 Ch. D. 196, A.D. 1877) shews such delay to be fatal when asking the Court to enforce a specific performance. There, says the learned Lord Justice Cotton, at page 202, "It is a well established principle, as laid down "by Lord Alvanley in *Milward* v. *The Earl of Thanet*, that a party cannot call "upon a Court for a specific performance, unless he has shewn himself ready, "desirous, prompt, and eager. This rule is specially applicable when the "contract is of a somewhat speculative and fluctuating value as the tavern— "the subject of the present suit must necessarily be; and the delay which has "occurred from May, 1868, till May, 1873, unless satisfactorily explained, "must be fatal to the plaintiff's title to a decree for specific performance." In that case, the delay was only five years—here it has been eight; and it will hardly be questioned that, during those eight years, the value of the Crown lands in British Columbia have not been of a somewhat *speculative* and *fluctuating* value.

The allegation of expulsion by the Euclataw Indians, in 1874, sounds like a passage from Fenimore Cooper's "Last of the Mohicans;" and, if the Court can judge from the evidence, may be deemed quite as imaginary. It was, according to that proof, with a Euclataw Indian the Petitioners left their frying-pan and scant tools—evidences of their alleged active mining operations and ownership—during the long period of inaction, from the expulsion in 1874 and the revival of their confidence in 1882. Even the Government was not seriously notified by the Petitioners of this hostile violation of the rights and sovereignty of the Crown, and of their ownership, so disastrous to their operations and interests, as they would have us infer from the allegations in the Petition.

Thus, on every important point in law, the contention of the Crown has been sustained. It is in vain for Mr. Drake to contend that these Petitioners are not to be regarded as licensees, but as parties having the option of purchase, based upon the terms of section 11 of the Mineral Ordinance. This is a grave mistake. It has been distinctly shewn that these parties had not complied with the conditions which would entitle them under the Ordinance to have that option. Indeed, it may be gravely questioned whether any one under the Mineral Ordinance of 1869 was entitled to that option, unless coal was found upon the land. Section 11 describes, in two subdivisions, the option as of "coal" or other mineral lands; and section 24 gives the option as to coal at the maximum quantity of 1,000 acres, and the price as for "coal lands." It was the object of the Legislature to encourage coal mining. Pre-emption lands were under the "Land Ordinance, 1870," and mineral lands under the "Mineral Ordinance, 1869," and it is under this latter Ordinance the Petitioners put forward their claim. Successful mining had been

the baptism of British Columbia. It brought the Province within the family of known countries, and gave it "a local habitation and a name." The Legislature recognised the importance of this industry, and held out to coal mining inducements which it did not extend to other lands or pursuits, as well as putting a higher value on the land to be operated upon. In this case, the evidence shews that no coal was found within the limits of their licence by the Petitioners. However, the point was not raised on the argument, and for the purposes of the judgment it is not necessary now to decide it.

I cannot leave this, the legal branch of the case, without acknowledging the very great assistance I have derived from the ability and research displayed by the Counsel for the Crown, as well as by Mr. Drake on behalf of the Petitioners. It was an excellent argument, of immense advantage, to which it was a luxury to listen.

For another purpose, I must now turn to the second branch of this case—the position of the Petitioners on the merits—it being my duty to consider the facts as well as the law, acting both as Judge and Jury. Omitting reference to those parts of the evidence bearing upon the performance of preliminary conditions necessary to obtain the right to petition, under the Mineral Ordinance, for a Crown grant of 1,000 acres, we will turn to a few salient points bearing on the conduct of the Petitioners. It will be noticed that in the fifth paragraph the Petitioners state that, on the 20th April, 1874,—that is about sixteen months after they had obtained their licence—they *caused Fawcett's* certificate *to be sent to the Chief Commissioner of Lands and Works, accompanied with a letter* from Messrs. Drake and Jackson, in which letter they apply for the Crown grant of 1,000 acres of land, and state "that from eight to ten thousand dollars had been expended on this claim in "proving it." The significance of this statement is apparent by reference to the 24th section of the "Mineral Ordinance, 1869," where it is enacted: "For coal lands the price shall be as follows: For any quantity up to and "including 1,000 acres, at the rate of $5 per acre; provided, that on proof, "to the satisfaction of the Government, hat $10,000 has been beneficially "expended on any land held under prospecting licence for coal, a grant of "1,000 acres of the land included in such prospecting licence *shall be issued* "*to the company holding such prospecting licence, without payment of the upset* "*price of such land.*" That little statement was weighted down with $5,000; yet, at the time it was made, not $200 had been expended in the whole matter, even including expenditures prior to obtaining the licence, if we are to believe the Petitioners and their evidence. On this point, hear Mr. Peck, in the first place observing that he states he has no account of his expenditures—nothing but a memorandum of sums he paid out and collected, he thinks in 1873, perhaps some in 1874; that the total amount received since 1874 was about $1,112—a little *over $100 was on account of expenditure before* 1873, the remainder during the period up to 1882. When cross-examined on this point, he says "the remaining $1,000, or about that, was "spent in *November, 1882*, and the spring of 1883, *not before.*" From his extremely loose statement, we learn that, between 1874 and 1882, $50 were paid and $40 were owing for services in looking after tools; "that covers all "the money during that interval." From his unbusinesslike statement, it is impossible to say what was actually expended in 1872, or, indeed, in 1873;

but from the account of employment, it may be safely said that not $200 had been expended up to the time that letter was written and sent to the Government in April, 1874—*certainly not shown.* Yet that letter says that at that time "from $8,000 to $10,000 had been expended in proving the claim." Mr. Peck says he never could understand how such a statement could be made. His own Petition says "the Petitioners caused it to be sent." It is not disavowed in the Petition which commenced these proceedings in October, 1883. It was not disavowed in the application to the Government for the grant in 1882. Nor is it shown to have been disavowed at any time or place, or on any occasion, until Mr. Peck was examined on oath in this cause on the 29th of January last. Messrs. Drake and Jackson never put that statement in that letter *without instructions from their clients, some or one of them,* and by adopting and using it in their Petition in this Court in 1883, without disavowal or explanation—*it being a matter peculiarly within their own knowledge*—the Petitioners must take the consequences.

Again, they allege they never abandoned their claim. The evidence shews distinctly that, between 1874 and 1882, not one day's labour was expended on it; and the estimate of value put upon it, during that intermediate period, may be judged from the statement of Mr. Levi, one of the Petitioners, when called and sworn as a witness on his own and their behalf. He says he was one of the promoters, and in 1872 and 1873 had paid in $60, and is one of the eleven Petitioners. That he afterwards became bankrupt; got his discharge in 1876. That in his list of assets his interest in the claim was put down, *but no valuation attached to it.* That he was on the land in 1877 and 1878; went to where they had been drifting for coal and saw two drifts filled with water. He went *first* to the house in November, 1882, (that is a small cabin, in the evidence elsewhere stated to have been put up by the Petitioners, and in which the tools referred to were left); found it nailed up; the chimney, a hole in the roof and a place where a window ought to have been; found some tools—2 axes, 1 hatchet, 1 shovel, 2 picks, a frying-pan, 1 tin plate, 1 tin cup, and some broken crockery covererd over with bark, on which the Indians might have trampled. He fixed it up to live in; remained there two months, working on the claim from November, 1882, to January, 1883. That the old house and roads at that time may not have been used for six years. That he always thought there was something good in it; kept dark.

Says Mr. Peck: From the fall of 1874 to November, 1882, *no work was done there beyond looking after the tools.* Mr. Levi has already described how they were looked after. Captain Clarke, one of the Petitioners, when called as a witness, stated, with manly straightforwardness, that he was interested in 1872; made his last payment 1883; that he was one of the original licensees; *heard nothing of it from 1874 to 1883.* And, being very judiciously not cross-examined by Mr. Drake for the Petitioners, stepped out of the witness box as if a mountain load had been lifted from his shoulders. And on this point, and as bearing on this evidence as a fact, one cannot omit to notice the reply in their pleadings to the statement made by the Attorney-General in relation to the abandonment, namely, "that if they had not, since 1873, "continuously and bonâ fide worked the said land, their licence had not been "cancelled, or if it had been cancelled they had not received any notice of "the cancellation, or of any intention to cancel the said licence." In olden

times, that would have been called "a confession and avoidance," and is entirely inconsistent with the affirmative assertion they had made. The question of cancellation has been disposed of. What had occurred in 1882? On the 21st April, the Vancouver Land and Railway Company Bill, commonly called the Clements Bill, had passed the Legislature; and in November, 1882, this neglected claim suddenly became of deep importance to the Petitioners. The seventh paragraph of the Petition says: That the Petitioners, in the year 1882, "believing that the time had arrived *at which* "*the coal mine they had discovered* might be worked to advantage, applied "to the Chief Commissioner . . . " Is that true? The evidence shews that, so far from a coal mine having been discovered, not one ounce of coal had been found by the Petitioners within the limits described in their licence. John Dick, a witness, called, sworn, and examined, who had heard Levi's testimony, stated that, in April, 1883, he went to Willow Point himself searching for coal, on account of the Indian reports; saw the cabin and trails described by Levi, but saw neither a ranch or coal mine about there, or any indication thereof, nor within twelve miles of it. And Mr. Peck, himself, throughout his long examination, has carefully abstained from saying that they found even a sign of coal; yet they petition for this grant, saying that "believing that the time had come *when the coal mine they had discovered* "could be worked to advantage;" and in the prayer of the bill they ask for a grant of the 1,000 acres of land "selected" by them.

The time of their licence expired in November, 1874, and they had not complied with one of the conditions which would entitle them to the statutory grant asked for.

It is useless to go further. It was not true that they had spent from $8,000 to $10,000 in proving their claim. It was not true that they had bonâ fide explored and worked that claim for coal during the term of the prospecting licence, in the spirit and meaning of the Mineral Ordinance, in consideration of which they would have been entitled to ask this grant. It is not true that they had found a coal mine on the premises which they could work to advantage; and it was not true that they had "selected" any portion of the land embraced within the limits they were entitled to prospect over, as stated in their Petition and prayer for relief.

Who comes into a Court of Equity must do equity. On every principle of law and justice, on every principle of equity and good faith, the Petitioners have entirely, utterly, and absolutely failed.

Considering the language of the Petition, the pecuniary value of the object sought to be obtained, the statement of facts by which they alleged they were entitled to obtain it, and the facts which were proved by the sworn evidence of the Petitioners themselves and their witnesses; without one harsh English expression, I may say, I know of nothing so adequately descriptive of the case as an old monkish couplet of the middle ages—

"Mel in ore, verba lactis,
"Fel in corde, fraus in factis."

Let the Petition be dismissed, with costs against the Petitioners.

NOTE.—The following statutes, authorities, and cases were cited and referred to during the argument:—

The B. C. Mineral Ordinance, 1869; the B. C. Mineral Ordinance Amend-

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ment Act, 1873; *Fisher* v. *Tulley* (L.R. 3 App. Cas. 627); *Weston* v. *Collins* (34 L. J. Ch. 354); *Austin* v. *Tawney* (L. R. 2 Ch. 147); *Brooks* v. *Garrow* (37 L. J. Ch. 326); *Ranelagh* v. *Melton* (34 L. J. Ch. 227); *Davenport* v. *Reg.* (L. R. 3 App. Cas. 128); *O'Brien* v. *Reg.* (4 Can. S. C. R. 575); *Davis* v. *Sheppard* (L. R. 1 Ch. 410); *Stuart* v. *London & N. W. R. Co.* (21 L.J. Ch. 450); *Milward* v. *Thanet* (cited 5 Ves. 720 n); *Mills* v. *Haywood* (L. R. 6 Ch. D.); B. C. Statutes (45 Vic. c. 15, and 46 Vic. c. 14); *Pendergrast* v. *Turton* (L.J. 13 Ch. 269); *Lindsay Petroleum Co.* v. *Hurd* (L. R. 3 P. C. 239); *Allen* v. *Deschamps* (13 Ves. 225); *Walker* v. *Brown* (14 Gr. 237); *Rogers* v. *Saunders* (33 American Decisns. 641); *Attorney-General* v. *Ettershank* (L. R. 6 P. C. 354); *Bridges* v. *Longman* (24 Beav. 27); *Fullwood* v. *Fullwood* (L. R. 9 Ch. D. 176); *Parkin* v. *Thorold* (16 Beav. 69); *Dann* v. *Spurrier* (7 Ves. 234); *Thomas* v. *Reg.* (L. R. 10 Q. B. 36); Fry, on Spefc. Perfce. 312.

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DECOSMOS *v.* THE QUEEN.

Petition of Right—Remuneration for services—Honorary appointment.

Suppliant—a Member of Dominion Parliament—was appointed by Order in Council (14th October, 1880) as Special Agent for the Province at Ottawa. Another Order, of same date, provided for "payment of expenses necessarily incurred."

On 30th March, 1881, Suppliant went, at request of Provincial Government, as Delegate to London, to support prayer of Petition from the B. C. Legislative Assembly to the Queen.

All expenses of Suppliant were allowed and paid.

On a Petition for payment for services:—

Held, that as the positions were honorary, and as contracts silent as to remuneration for services, he could not recover.

Edwin Johnson and *Theodore Davie*, for Suppliant.

A. E. B. Davie (Attorney-General), for Respondent.

The facts are sufficiently stated in the Judgment.

GRAY, J.:—

This is a proceeding under "The Petition of Right and Crown Procedure Act, 1873," by which the Plaintiff seeks to recover, from the Local Government of British Columbia, pecuniary compensation for services rendered by him as Special Agent for the said Government at Ottawa and in England, during a period extending from the 18th October, 1880, to the 8th May, 1882.

During that period, the Petitioner was a member representing the City of Victoria in the House of Commons in the Dominion Parliament.

His Petition states that, on the 18th October, 1880, he was appointed and employed by the Local Government as Special Agent at Ottawa, to "press "upon the Dominion Government the importance of their carrying out their "agreement to construct the Island section of the Canadian Pacific Railway, "and to report the result of his proceedings to the Local Government, from "time to time."

That he accepted and entered upon the appointment and employment, and continued in such employment, except so far as the same was interrupted by the further employment next named, until the 8th of May, 1882.

That, on the 30th March, 1881, he was further appointed and employed by the Local Government, as Special Agent and Delegate, to proceed to London, "for the purpose of supporting the Petition of the Legislative "Assembly of British Columbia to the Queen, respecting the breach by the "Dominion of its railway engagements with British Columbia." That he accepted the appointment; entered on the employment on the 13th April, 1881; went to London, and was continuously employed therein until the 8th of November, 1881, when, by the direction of the Local Government, he returned to Ottawa, and thenceforth continued in the same employment at Ottawa, until the 8th May, 1882, when his services were terminated by the Local Government in the following words:—"In relieving you of your duties "as Special Agent of the Province, the Committee desire to convey to you "their best thanks for the very able manner in which you have conducted "the business entrusted to your charge, and to assure you they fully appre-"ciate the marked ability which distinguished your negotiations with the "Imperial and Dominion Governments."

That full particulars of his employment and services were furnished to the Local Government.

That no express agreement was made as to the remuneration to be paid the Petitioner for his services, but he thinks a salary at the rate of $5,000 per annum would be fair, reasonable, and usual, and that in the present case would amount to $7,773, which sum is due and payable, and he prays that that sum may be paid him by the Local Government, and for such further relief as the nature of his case requires.

To this Petition of Right, the Local Government, by the Attorney-General, replies:—That, except as in the mode in his (the Attorney-General's) answer pointed out, the Petitioner was not employed as Special Agent at Ottawa, and that he did not continue in such alleged employment as set forth by him. The Attorney-General's answer then sets out the Orders in Council (dated 14th October, 1880) under which the appointment was made, and which were communicated to the Petitioner, "who was then in Ottawa," namely:—

"1. The Committee of Council are of opinion that the interests of the "Province require that some person, resident at Ottawa, should be authorized "on behalf of this Government to press upon the Dominion Government the "importance of their carrying out their agreement to construct the Island "section of the Canadian Pacific Railway, and at the same time to point out "the commercial and economic value of the work as well as the serious injury "sustained by the Province by the withdrawal from sale and settlement, for "the past seven years, at the instance of the Dominion Government, of the "extensive area of valuable lands along the East Coast of Vancouver Island, "without even the compensating advantages of Railway construction, aside "from all the larger questions of wealth and prosperity involved in its com-"pletion.

"That such authority should be given at once, so as to afford ample time "and opportunity to the Dominion Government to make their arrangements "for proceeding actively with the work, and without further delay.

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"The Committee, therefore, advise that the Honourable A. DeCosmos, who "is now, it is believed, in Ottawa, receive such authority; and that he be "requested, upon his accepting the same, to report the result of his proceed- "ings to this Government from time to time.

"It is further advised that copies hereof, if approved, be forwarded to the "Honourable the Secretary of State and to the Honourable Mr. DeCosmos."

"2. The Committee of Council advise that any expenses necessarily incur- "red by the Honourable Mr. DeCosmos, in acting under a Minute of Council "of even date herewith, be reimbursed to him, and that Mr. DeCosmos be "informed hereof by the Honourable Provincial Secretary."

The Attorney-General then denies that the Petitioner went as a Delegate to London, or that he continued in the employment of the Government until the 8th of May, as alleged, otherwise than as follows, namely:—That on the 30th March, 1881, in pursuance of a resolution of the Local Assembly, the Provincial Secretary addressed to the Petitioner, at Ottawa, the following letter:—

"Victoria, B.C., 30th March, 1881.

"Sir,—By direction of the Committee of Council, I have the honour to "acquaint you that you have been appointed Special Agent and Delegate, to "proceed to London, for the purpose of supporting the prayer of the enclosed "Petition to Her Majesty.

"I am also to state that His Honour the Lieutenant-Governor will inform "the Dominion Government of your appointment, and request the Secretary "of State for Canada to respectfully move His Excellency the Governor- "General to provide you with a suitable introduction to Her Majesty's Prin "cipal Secretary of State for the Colonies. I have, &c.,

(Signed) "T. B. HUMPHREYS,
"To Hon. A. DeCosmos." "Provincial Secretary.

That, before going to England, Mr. Beaven, the Provincial Finance Minister, placed $2,500 to the Petitioner's credit, being the amount named by Petitioner in answer to a telegram as to what funds he required before going.

The Attorney-General further admits that Petitioner supplied the Local Government with full particulars of what he did, both at Ottawa and in England.

He then states that no agreement whatever was made for remuneration, but that Petitioner was to be reimbursed the expenses necessarily incurred by him; in other respects that both appointments were purely honorary, and were so accepted by the Petitioner. That his bills for disbursements in respect of the appointments, both in Ottawa and London, amounting to $4,555.55, inclusive of the $2,500 before mentioned, were liberally allowed and paid by the Local Government; and denies that the $7,773.93, or any part of it, is due. And further states that, during the term of his alleged services, the Petitioner was a Member of the House of Commons, in the Parliament of Canada, for a British Columbia constituency, and received therefor $2,000, being his sessional allowance. That he never applied for payment for his alleged services until eight months after the termination of his agency; but on the 14th February, 1883, rendered an account, in which he allowed a deduction of his said sessional allowance of $2,000.

On this statement of facts, issue is joined; and the question is—it being admitted on both sides that no express agreement for remuneration was made—whether the law will imply that, in consideration of the performance of the contemplated services, a legal obligation for remuneration followed?

In support of his contention, the Petitioner shows that, previous to his accepting the mission to England, on first learning that it was the intention of the Government to offer him the appointment, he telegraphed W. Wilson, Esq., a Member of the Local House, to see that "ample was provided for his "time and expenses," and on the following day, 21st March, 1881, contemporaneously with the telegram from Mr. Beaven, notifying him of the appointment, he received one from Mr. Smith, from Victoria, stating that his telegram to Wilson had been attended to. Thus, whatever element of mutuality may be necessary to establish a contract, either express or implied, it is plain that, on his part, the Petitioner conceived that he was to be remunerated for his "time." What took place with reference to the Local Government, the other party to the contract, that is assuming the transaction to have merged into a contract, will have yet to be seen and considered.

Another important fact is clearly established—that the Petitioner discharged the duties of his employment, whatever they were, faithfully and well, to the entire satisfaction of the Government that employed him, as evinced by their own letter of acknowledgment. The value of a man's services under such circumstances is not always to be estimated by the immediate result. It is sometimes long before the fruit ripens or the crop fructifies. Days of labour and hours of thought, which no eye can see or hand can trace, are essential to the attainment of important ends. The ponderous wheel of public opinion turns slowly, and it was not the Petitioner's fault that Lord Kimberley's recognition of the rights of the Province, and his recommendations for its welfare, were not forthwith acted upon. The Petitioner succeeded in what he went for, and the vast accumulation of statistical and historical facts collated by him, bearing on the subject of his mission, shew that his labours were not only unceasing, but that they were judicious. They were placed before the Government, and remain a record of his services. But, admitting all this, the question is not whether morally he is entitled to compensation, but whether legally he can enforce it. The latter he can only do if it was part of the contract. The Petition of Right Act, 1873, in no way varies the law on the subject of contracts. It simply points out the mode of procedure as against the Crown. To a contract, mutuality is absolutely essential. Both parties ought not only to know what each intended, but ought so to express themselves that others can know what was intended, and the onus is on him who seeks a benefit or requires a duty not plainly expressed, to shew that it necessarily flows from the action of the parties and the circumstances under which the contract was made.

The parties to this alleged contract are the Government on one side, the Petitioner on the other. It cannot be too strongly impressed that (apart from departmental contracts or acts authorized by statute, or necessarily pertaining to the object for which a department is created) the acts or agreements of a Government can only be evidenced in one way, that is by the action of its constitutional head. The mere promise or opinion of an individual member of a Government, however influential he may be, is in no way

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legally binding on the Government. The country is entitled to the collective wisdom of all the members constituting the Government. They are simply the advisers of the Lieutenant-Governor, and he it is who, under their advice, makes the contract. Promises, therefore, made by, or understandings had with, individual members of a Government are of no *legal value* in Government contracts, unless the Government has deputed a particular member to take action in the particular instance, and has subsequently confirmed and adopted his act by its Order in Council as sanctioned by the Lieutenant-Governor. A country might be ruined if each individual member of its Government could legally bind it by pecuniary obligations. There is a great difference between political consequences and legal consequences. A Court of Law can only recognise the latter. The country at large passes judgment on the former.

The Petitioner's claim falls under two heads—his services in England and his services at Ottawa. The expectation of compensation for his time is, by the evidence, shewn clearly to have been in his mind with reference to the former. Did he in any way manifest that expectation to the Government? or is it shewn in any way to have been in their minds?

The evidence shews that Mr. Wilson, whom he deputed to bring it before the Government, did not do so, either directly on his behalf, or incidentally as an essential to the appointment, before the Petitioner would accept it. Mr. Wilson says "I received a telegram; thought it over; brought the matter "before Mr. Walkem; told him I supposed some monetary arrangements "would have to be made with DeCosmos. Walkem said Beaven would com- "municate with him. I did not detail in my conversation what the money "was for; considered that would be a matter between themselves; I did not "tell him I had a telegram from DeCosmos. It was to remind him that "monetary arrangements had to be made; it was to nudge his memory. The "Government was not aware, as far as I know, that I was communicating "with DeCosmos. I authorized Mr. Smith to communicate to DeCosmos "that his telegram to me had been attended to. I had no further communi "cation with any member of the Government on the subject."

The Petitioner, in his examination, says—"I had no communication with "the Government during my services, from beginning to end, relative to "compensation. I relied on Mr. Wilson's and Mr. Beaven's communication. "I would not communicate with the Government, because I would not ask "an appointment from any Government; secondly, I thought Mr. Wilson "was a supporter of the Government; and, thirdly, I thought no Govern- "ment would employ a man without paying him."

Thus, it is clear that, on the part of the Petitioner, no intimation was given from him to the Government that compensation would be demanded for his time.

Mr. Walkem, who was then the Premier of the Government, says distinctly—"There was no discussion in Council about remuneration; nor was "any arrangement made by me, or any member of the Government, to my "knowledge, as to remuneration; nor was there any communication from me, "or, on behalf of the Government, by me, to Mr. DeCosmos with reference "to remuneration."

Mr. Walkem assigns many and good reasons why it was not a subject of discussion at that time, and expresses his opinion at this day, when he is no longer a member of the Government, that the Petitioner ought to be compensated, and that he would, as a member of the Government, have recommended compensation had it come up for consideration in his time. This evidence (if admissible at all), as indicating what was the intention of the Government at the time of the contract, is conclusive that the subject was not taken into consideration, or even mentioned, and consequently could not have formed an ingredient of the contract on the part of the Government at the time it was made, the Orders in Council referring to expenses only.

Can then a legal obligation to compensate be implied from the nature and service of the undertaking? It is unnecessary to cite authorities to show that, with reference to many contracts of an ordinary nature, a promise is implied to make reasonable compensation for services performed. In the absence of any express understanding to the contrary, it flows from the engagement as one of mutual benefit—"The labourer is worthy of his hire." This rule, however, is not of universal application. There are exceptions, dictated by public policy and by custom. Barristers, near relations, arbitrators, trustees, acquire no implied legal title to compensation for services rendered. A contract with a Government is of no ordinary nature. It is exceptional in many of its characteristics, and the considerations which govern its construction differ materially from those of mere ordinary contracts for work and labour.—See Mellor, J., in *Churchward* v. *The Queen* (L. R. 1 Q. B. 173).

The Government, *eo nomine*, has no legal status. An execution cannot be enforced against it. It has no personality. It speaks only by its collective act. It may compensate by gratuities, but when we seek at law to compel it by contract we cannot, to the same extent, draw inferences and assume legal obligations as in the case of individuals. It is in the public interests that its contracts should contain within their own expressions all that is intended. When brought into Court under the Petition of Right Act, it may claim all the benefits, usages, and advantages an individual can claim (save perhaps the Statute of Limitations), but is bound by no admissions or statements of its individual members. It speaks only by its Orders in Council, or written instruments. I think the law is correctly laid down by myself in *Vowell* against *The Queen*, in this Court, in August, 1875:—"The "Petition of Right Act is only for the purpose of assimilating the procedure. "It does not destroy the relative position of the Crown and subject; it alters "no principles; repeals no local statute; and takes away no rights. The "proceeding has its inception by consent. Then what principle must govern "such a contract? The man who contracts with the Government and accepts "an appointment under the Government must take it (if it be necessary so "to test it) subject to the usages governing such appointments." There is no statute regulating the appointment by the Government of Special Agents or Delegates; and with reference to such appointments, in the absence of any preliminary stipulation as to compensation, the usage has been that the reward is gratuitous. Even in the case of a Royal Commission, which is the highest order of appointment for purposes of enquiry or special service, Todd, on Parliamentary Government in England (vol. 2, page 352), lays it down

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"that the services of the Commissioners are rendered gratuitously, although "compensation is occasionally allowed for time and labour; actual expenses "incurred are, of course, defrayed out of the public funds."

The usage of the Government of British Columbia has been to pay, or not to pay, as the political aspect of the Legislature may dictate. The legislative history of the Province tells us that in April, 1878, a Commission was issued by the Government of British Columbia to enquire into and report upon certain alleged corrupt practices of a high functionary of the Government, at Kootenay, in the said Province. The Commissioners discharged their duties, but the then Government repudiated all compensation. A previous Government, by direction of a previous Legislature, had issued a similar Commission relative to a Texada enquiry, and paid the Commissioners. In the Kootenay case, a subsequent Government reversed the action of the then Government and paid the Commissioners. Thus it is plain that there is no usage on the part of the Crown in British Columbia which establishes, or from which can be inferred, an implied legal liability to make compensation for services rendered under such appointments. It is a matter of gratuity—of option on the part of the Government. The question is not whether such a practice be right or wrong, beneficial or not; but does any implied legal liability to compensate attach for services rendered under such an appointment? Are there not considerations sometimes, other than those of a pecuniary character, which move ambitious men of high political standing to render great services to the country? No shadowings of forthcoming power? No lofty aspirations of triumph? No sense of enjoyment in the achievement of a great end? No desire to stand well with the people, and to command, by the exercise of ability and discretion, the acknowledgment that their confidence was not misplaced? The lives of great public men shew us that these inducements are more powerful than money, and may perhaps have tended in the administration of public affairs to introduce the system that rewards for such services should be gratuitous and honorary. Though not as particularly bearing on the case, because on the occasions referred to both the Petitioner himself and Mr. Walkem were members of the Local Legislature, yet the Petitioner states that, on previous missions to England of Mr. Walkem and himself, they were only allowed their expenses—no compensation.

Then supposing, for the sake of argument, that there was something ambiguous in the Orders in Council and letter of appointment of the Petitioner as to compensation, and that recourse may be had to the general nature of the contract, and the particular intention and circumstances of the contracting parties, to see whether there is any implied undertaking for compensation, those circumstances above mentioned, together with the evidence of the Petitioner himself, and Mr. Wilson, and Mr. Walkem, may be regarded as removing the ambiguity. In the case of *Churchward* against *The Queen* (L. R. 1 Q. B., page 195), which was as to the construction of an Admiralty contract, and an implied liability sought to be adduced therefrom as against the Crown, Lord Chief J. Cockburn lays down the rule for construction—"When a contract is silent, the Court or Jury who are called "upon to *imply an obligation on the other side, which does not appear in the* "*terms* of the contract, must take great care that they do not make the con- "tract speak when it was intentionally silent, and above all that they do not

"make it speak entirely contrary to what, as may be gathered from the whole "terms and tenor of the contract, was the intention of the parties." In the same case, Mr. Justice Lush says—"In order to raise an implied covenant, I "apprehend the intention must be manifest to the judicial mind, and there "must be also some language—some words—capable of expressing that "intention; not that any formal technical phraseology is required, but you "must find words in the instrument capable of sustaining the meaning which "you seek to imply from them."

Baron Martin, in the case of *Roberts* v. *Smith* (4 H. & N. p. 315, A.D. 1859), a case in which the subject of remuneration was distinctly referred to in the correspondence constituting the alleged contract, and under which the service had been rendered, the defendant contending that the service was gratuitous, says—"It is true that there was an expectation by "the plaintiff that he should receive some remuneration, but that was not a "matter of right, he trusted to the honour of the defendants to pay him such "sum as they thought fit. In fact, the plaintiff put himself in this condi-"tion—'I will work for you, and I leave the remuneration in your hands.' "In reason and common sense, that is a liability in honour, and not a liability "by contract. The argument that as a matter of law the plaintiff is entitled "to be paid, is incorrect; it is by no means a matter of law that a person "shall be paid for his services—it is a matter of contract. No doubt there "is a variety of labour from which there arises an irresistible inference that "the person who has done it is to be paid; but that is a sort of labour *which* "*is always done for money*, and in such a case a jury would presume a con-"tract on the ordinary terms, unless evidence was given to the contrary. "But when a man says I leave my remuneration in your hands, the contract "is not on the ordinary terms." In the American note to this case (Philadelphia edition, 1871), numerous cases are cited to establish the principle that "when services are rendered gratuitously, and without any previous agree-"ment for compensation, no action can afterwards be brought on a *quantum* "*meruit*."

The same principle had been previously laid down by Lord Ellenborough, long anterior, in 1813, in *Taylor* v. *Brewer* (1 M. & S. 290), in which he says—"This was throwing himself upon the mercy of those with whom he "contracted, and the same does not unfrequently happen in contracts with "several of the departments of the Government."

The case of *Bryant* v. *Flight* (A.D. 1839, 5 M. & W. 114) turned upon the meaning of the words "I agree to enter your service, etc., and the amount of "payment I am to receive I leave entirely for you to determine." Baron Parke considering that it constituted merely an honorary obligation on the part of the defendant, while Lord Abinger and Baron Alderson considered that it meant to pay something. This case, however, is overruled by *Roberts* v. *Smith*, and *Taylor* v. *Brewer*, sustained.

In the case of *Doutre* v. *The Queen* (6 Can. S. C. Rep. 394), Mr. Justice Strong, referring to the evidence, which he considered showed that the plaintiff agreed to trust to the honour and generosity of the Government to pay *any fees* in excess of $1,000 per month, says—"The consequence must be that "not only is such an honorary and gratuitous undertaking no foundation for "an action, but it excludes any right of action as upon an implied contract

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"to pay the reasonable value of the services rendered, assuming that the law "is as the suppliant contends, that such an action would, in the absence of "an express agreement, have been maintainable." At 397—"He must be "taken to have relied exclusively upon the honour, good faith, and liberality "of those who employed him, and not on any binding legal obligation to pay." The views of the other Judges, turning more upon the right of a barrister to recover his fees, have no immediate bearing upon the general question raised in this case. But it is to be observed, in reference to Mr. Justice Strong's opinion, that in *Doutre's* case there was a clear recognition on the part of the Crown of an allowance of remuneration to the plaintiff for his time and services, the extent of it only being a matter of enquiry dependent upon the construction of a positive agreement relative thereto. The question of remuneration in that case was pointedly discussed between the petitioner and the Minister of Marine and Fisheries, whose department had charge of the subject-matter; discussed before the petitioner entered upon his work; noted down in writing at the time by an officer of the department, whose duty it was; payment made on account thereof; the sole question being whether the remuneration went to the extent claimed by the petitioner; and further, in Mr. Justice Fournier's judgment, it was stated that, apart from other grounds, the right for compensation was also based upon stipulations in the Treaty of Washington, providing for payment of counsel, which had been subsequently incorporated in 35 Vic., c. 2, passed by the Dominion Parliament, relative to the Treaty. Thus, Mr. Justice Strong's opinion applies with greater force to the present case, where, not only is there no express agreement, but it is clearly shewn that the question of remuneration, outside of the expenses, was not even referred to or discussed between the parties to the contract "from the beginning to the end of the transaction." Nor, in all that did pass between the Government and Petitioner, have I been able to find one word from which an implied undertaking on the part of the Government to allow compensation can arise. It is clear that compensation for his time was in the Petitioner's mind. It may be that from high and generous considerations he did not press it upon the Government, or exact any stipulation to that effect; and he gives as one reason "he thought no Government would "employ a man without paying him." To repeat, then, Mr. Justice Strong's words—"*He must be taken to have relied upon the honour, good faith, and "liberality of those who employed, and not on any legal obligation to pay.*" Without proof of the latter, in a Court of Law his case cannot succeed. His expenses having all been paid, the disposal of this point disposes of the case; for if an undertaking cannot be implied for his services in England, it certainly cannot for his services in Ottawa. I regret it, for from the evidence before me the Petitioner worked faithfully and laboriously. From his abiding confidence in the Government that employed him, he neglected the precautions a prudent man otherwise would have adopted. His Petition must be dismissed; but, as the question of costs is discretionary with me, I shall dismiss it without costs.

Judgment accordingly.

Authorities cited—

Chitty, on Contracts (10 Ed. 508); Parsons, on Contracts (vol. 2, p. 64); Taylor, on Evidence (secs. 7, 576); *Regina* v. *Doutre* (6 C.S.C. 342); *Church-*

ward v. *The Queen* (L. R. 1 Q. B. 173); Russell, on Awards (4 Ed. p. 467); Chitty, on Contracts (9 Ed. p. 520); *Thorne* v. *Mayor of London* (L. R. 10, Ex. 123); *Kingston* v. *Sir Fitzroy Kelly* (18 L. J. N. S. Ex. 360); *Reid* v. *Reid* (1 F. & F. 280); *Davies* v. *Davies* (9 C. & P. 87); *Taylor* v. *Brewer* (1 M. & S. 290); *Bryant* v. *Flight* (5 M. & W. 114); *Roberts* v. *Smith* (4 H. & N. 315); Quebec Digest (vol. 1, p. 68); Stephens' Blackstone (5 Ed. 67); Addison, on Contracts (684).

CAWLEY *v.* BRANCHFLOWER AND WEBB.

MUNICIPAL ELECTION PETITION.

Municipality Act, 1881—*Qualification of Candidate for Municipal Councillor—Payment of taxes by a day certain—Condition precedent—Refusal of Returning Officer to nominate and grant a poll—Returning Officer ministerial, not judicial—Appeal to Supreme Court.*

C. having paid all his taxes to Municipal *Treasurer* in due time, and being in all other respects qualified as Candidate for Councillor of a municipal ward returning only one Councillor.

W., the Returning Officer, refused him nomination and a poll for non-payment of taxes to the Collector of the Municipality.

B., the only other Candidate, declared elected by acclamation.

Appeal by Petition to Judge of Supreme Court:—

B.'s election avoided. Interim bona fide acts of B., as Councillor, held good. New election declared and appointed. Apportionment of costs.

The sections of above Act cited or referred to:—18, 19, 21, 27, 28, 29, 30, 31, 34, 35, 36, 38, 43, 51, 52, 53, and 55.

Mr. *McColl* (of *Corbould & McColl*) appeared for the Petitioner, and (by permission) Mr. *Ashwell* for the Defendants.

CREASE, J.:—

This was a Petition of Samuel Cawley, under section 55 of the B.C. Municipality Act, 1881, against William Branchflower, Councillor elect, and Horatio Webb, Returning Officer, to make void the election of William Branchflower as the Councillor of No. 3 ward of Chilliwhack Municipality, at an election held at Chilliwhack on the 14th and 17th January, 1884, and to declare and appoint a new election, on the ground that section 34 of the said Municipal Act of 1881 had been violated, in that Horatio Webb, as Returning Officer, had refused to nominate Samuel Cawley, a candidate duly qualified, and to allow a poll duly demanded by such candidate; and had, contrary to law, declared the said William Branchflower to have been elected by acclamation; thereby depriving the said Samuel Cawley of the right of ascertaining whether a majority of electors of such ward were or were not in favour of electing him as the Councillor for that ward.

The said Petition came on for hearing, before me, at Chilliwhack Town Hall, on Saturday, 19th April, 1884.

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It was at such hearing proved, and not denied, that the sole reason why the Returning Officer (in pursuance, as he believed, of his duty under the provisions of the Municipality Act) had rejected the Petitioner as a candidate was, that although Cawley had, on the 3rd January last (one day before the last day allowed by By-law for such payments), paid his taxes for 1883, amounting to $15, direct to the Treasurer of the Municipality (Mr. Jonathan Reece, whose appointment was proved), he had not paid the same to the *Collector* of the Municipality (Mr. Charles Young). It was alleged that Young was the only person authorized to receive the municipal taxes, consequently that this was no payment of taxes such as would authorize the Returning Officer to consider Cawley legally entitled to demand a poll, or to sit as Councillor for Ward No. 3.

It was proved that, with the above exception, the Petitioner had complied with all the requirements of the Municipality Act, 1881, and the By-laws of the municipality up to the time of the nomination; that his name appeared in the voters' list as having a vote; but on a list of taxes in arrear—sent on the same day as the voters' list, namely, the 5th or 6th January, by the Clerk of the Council to the Returning Officer, for the guidance of such officer in receiving the votes at such elections—opposite to the Petitioner's name were placed the words "*paid to the Treasurer.*"

Thus, throwing on the Returning Officer (a ministerial officer) the duty, as he conceived, of determining judicially whether this payment was such a payment of taxes under the Act as would allow Cawley to be put in nomination, and go to a poll.

On behalf of the Petitioner, it was also proved that Mr. Young had been appointed Collector of the municipal taxes for 1883, by a Minute of the Municipal Council, and that he was paid by a stated salary, and not by a commission on collections.

A By-law of the Municipal Council, duly passed on the 1st January, 1884, was put in evidence, defining his duties as Collector—ordering him, in all things, to follow the provisions of the Municipality Act of 1881; also, to account to the Treasurer, at stated periods, for all moneys belonging to the municipality coming into his hands.

For the Petitioner, it was also alleged that the appointment of Collector should have been originally by By-law. That this By-law, appointing him and defining his duties, could not have been in force until the 7th January—three days too late to allow Cawley to vote—and that consequently he was compelled to pay his taxes direct to the Treasurer, instead of indirectly to him through the Collector. That he procured Mr. Reece's receipt and exhibited it to the Returning Officer in good time for the nomination, and even went so far as to get Mr. Reece (the Treasurer) to pay the $15 over to Mr. Young, and get his receipt for it on the 14th January, and that this also he exhibited to the Returning Officer in time for the nomination.

For the defence, it was strongly contended by Mr. *Ashwell* that the appointment of the Collector by a Minute of the Council was a good and valid appointment.

That in a previous timely correspondence between the Council and Cawley, in which he offered to pay his taxes and asked to whom he should pay them, he was told by the Council to pay them to Mr. Young (the Collector), but he

had declined or neglected to do so; that, had he done so, the Returning Officer would have gone to a poll, and all trouble would have been avoided.

That the Council only recognized payment of the taxes to the officer appointed for the purpose, in order to avoid complication and confusion of accounts, which would of necessity arise, if part of the taxes were paid to the man whose duty it was to know all about them, and part to another man who had no assessment list to refer to, and no knowledge of the proper amounts to receive, and could only give receipts on account.

That the Council were of opinion that the payment of taxes to the Treasurer in the first instance was not a payment to the Collector under the Act, and that consequently such a payment as Cawley's, although otherwise in good time, was not a payment under the Act, entitling him to vote or stand for nomination, or to demand a poll.

Under this state of the facts, and upon consideration of the law, I am of opinion that the taxes of Samuel Cawley, the Petitioner, were, on the 3rd of January last, duly paid. The difference of paying taxes to the Treasurer, as part of the municipal revenue, instead of the Collector, was a nominal not a substantial one.

The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with.—(Harrison's Municipal Manual, p. 62) It looks to realities, not technicalities or mere formalities, unless where forms are by law, especially criminal law, essential, or affect the subject-matter under dispute.

The practice in Municipalities, generally, is to pay the Collector if you know who he is, or if not, or there be a doubt as to who is Collector, to pay the Clerk, who is generally the more permanent officer; and this is not unfrequently the case where taxpayers reside at a distance.

I do not say the appointment of the collector may not be by minute or resolution when not otherwise required by the Municipality Act; but it is laid down in Chief Justice Harrison's Municipal Manual—that, wherever there is a doubt about how an appointment should be made or something worthy of clear specific authority done, the best way is to do it by By-law.

That is also the practice in other Municipalities in British Columbia.

Had this Council paid an annual retainer to a Standing Counsel, as many other Councils do, the present case could never have arisen. The Council would have had a constant check on frivolous or captious objections from taxpayers who will not pay taxes; they would have been assured of legal Forms and Notices, and By-laws; and they would have collected their revenue with much less trouble, delay, and expense.

I also call special attention to the "Municipal Election Regulations," established by the Order of the Judges of the Supreme Court, constituting "General Rules" *(ad interim)* for Municipal Election Petition proceedings. These seem to have been lost sight of since the Victoria City Election Petition, in 1875; but it is presumed that they are still in force. They have certainly proved simple and useful in practice.

It may be of use to municipal officers generally, at elections, if I add that, by *sec. 48* of the *Municipality Act, 1881*, if the returning officer has a doubt of the candidate's qualification, he can compel the person offering himself, "*before he shall be capable of being elected*," to make the statutory declaration

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of qualification in *sec. 53*. This was not done in the present case.

My decision, in view of all the circumstances, is in favour of the Petitioner; who, under section 55, justly claims that the election of William Branchflower should be avoided, he "not having obtained a majority of the votes "cast by the duly qualified electors;" and I declare his election null and void accordingly. All his interim acts as Councillor, in accordance with the provisions of the Municipality Act, are of course valid.

I order and appoint that a new election of Councillor for No. 3 ward shall take place at the Town Hall, Chilliwhack, on Saturday, the 26th of April instant, from 2 till 4 P.M., with Horatio Webb as the Returning Officer at such election. This decision I make without costs to W. Branchflower. But Horatio Webb acted *ultra vires*, and Samuel Cawley might have done at first what he did at last—have paid his taxes to Mr. Young. That gentleman, if not in strict law the Collector on the 3rd of January, was, at least after the letter of the Council, their agent to receive Cawley's taxes as portion of the municipal revenue. Had this been done, Mr. Cawley's franchise would have still been saved, and all cost and trouble avoided. I order, therefore, that the costs in this case be paid by Webb and Cawley, in equal shares.

WALKEM, J.
(In Chambers.)
1884.
March 12.

Re ARBITRATION BETWEEN

JOSEPH BROS. AND J. MILLER.

Arbitrators functi officio—Setting award aside for umpire's misconduct.

Mr. *Drake*, Q.C., for Joseph Bros.; Mr. *Eberts* for Mr. Miller.

The award in this matter had been set aside by the Supreme Court, on the ground of the umpire's misconduct during the arbitration. The umpire afterwards sent a letter to the Registrar of the Court resigning his position.

A summons being taken out by Mr. *Drake* to have a new umpire appointed by the Judge in Chambers; *Held*, by—

WALKEM, J.—That the powers and duties of the arbitrators having ceased when they made their award, they were *functi officio*; and consequently that the so called resignation of the umpire was meaningless, as he had no position to resign.

That, as a general proposition, on a motion to vary or set aside an award, the Court may, under section 8, C. L. P. Act, 1854, refer the matters submitted back to the arbitrators, whose original powers will thereupon be revived, but not otherwise: *McCrae* v. *McLean* (2 E. & B. 946).

The Court having however, in the present case, set aside the award and refused, in view of the umpire's misconduct, to direct a reference back, it, in effect, declared by its judgment that the powers of the arbitrators having ceased should not be revived. As a Judge in Chambers he could not therefore make the order asked for, as it would be manifestly inconsistent with and opposed to this judgment.

Summons dismissed with costs.

C. A.
1884.
March 28.

WOODBURY *v.* HUDNUT.
WOODBURY *v.* MEYERS.
BLASDEL *v.* HUNLEY.
HAMMIL *v.* SPROULE.

Leave of absence—Representation by Miner—Work on claim—Close season.

The first, third, and fourth of these cases were suits brought in the Gold Commissioner's Court for the right of possession in certain claims alleged to have been constructively abandoned by non-working. The second case was a suit by the owner of a claim for damages for trespass: the alleged trespasser relying on a supposed constructive abandonment. The Gold Commissioner found for the defendants in each case.

On the 6th October, 1882, W. located a claim; and on the same day, on the ground of sickness, obtained from the Gold Commissioner leave of absence extending over the impending close season (1st November to 1st June). On the 25th May following, M., as the agent of H., located and recorded a large portion of the same ground. *Held*, that this was an unauthorized trespass by M., and conferred no title on H.

This Court cannot on an appeal of this description inquire whether the Gold Commissioner had sufficient grounds for granting leave of absence.

The Gold Act (s. 49) provides that "A claim shall be deemed abandoned and open to "the occupation of any free miner when the same shall have remained unworked by the "registered holder thereof for the space of 72 hours, unless sickness or other reasonable "cause be shown." And by s. 46 a claim must be "faithfully and not colourably "worked."

Held, the construction by a miner of a cabin fit and convenient for a residence while working on his claim, though not standing on the claim itself, may be taken as proper and minerlike working on the claim, within the meaning of the statute, so as to preclude constructive abandonment.

Semble, the wrongful occupation of a claim by a trespasser excuses the true owner from the obligation to represent his claim by actual work thereon, provided he is not guilty of laches in seeking to establish his right.

Semble, If a free miner quit his claim for more than 72 hours, and return and resume possession, the claim not having been in the meantime taken up by any other person, he is "in of his old estate."

THESE cases came before the Full Court by way of appeal from the Gold Commissioner for Kootenay. The statements made before the Gold Commissioner were exceedingly diffuse. The substance is sufficiently stated in the Judgment. In *Woodbury* v. *Hudnut* the matter in issue was for the right to certain mining ground, claimed by the plaintiff as the "Comfort" claim, and relocated by, or rather on behalf of, Hudnut as the "Gem" claim. The decision of the Gold Commissioner, who apparently assigned no reasons in any of his judgments, was "Judgment for the defendant, with costs, who is "established in the ownership of the land in dispute." The next case was *Woodbury* v. *Meyers*, claiming damages for trespassing on the same land; Meyers having been employed by Hudnut to stake off and work the claim for him. The decision followed immediately on that of *Woodbury* v. *Hudnut* (the evidence and arguments being, by agreement, the same in both), and was in these words: "The case is decided against Woodbury who had the case now "called against Meyers for trespassing on the claim just decided in favor of "Hudnut. Judgment with costs for Meyers the defendant, who is established "in the ownership of the ground in dispute." *Blasdel* v. *Hunley* was an action

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to try the right to a claim which the plaintiff alleged had been improperly "jumped" by Hunley. The Gold Commissioner's decision was "Judgment "for defendant, with costs, who is established in the ownership of the ground "in dispute." And *Hammil* v. *Sproule* was a similar action, with judgment in the same words. The hearing before the Gold Commissioner appeared to have extended over six or seven weeks.

25th March. The appeals in the several cases now came on to be heard before the Chief Justice, and Crease and Walkem JJ., sitting as a Full Court.

The Attorney-General (*A. E. B. Davie*, Q. C.) for the Appellants (the Plaintiffs).

M. W. T. Drake, Q.C., and *C. Wilson* for the Respondents (the Defendants).

28th March. The Judgment of the Full Court was now delivered by—

SIR MATTHEW BAILLIE BEGBIE, C. J.:—

These cases seem to have excited a great deal of interest. But many matters have been mentioned which, in our opinion, are not material for the decision of the questions at issue.

It unfortunately happens that the claims now in dispute are situated at a considerable distance from the residence of any Gold Commissioner, and the miners often act upon what they honestly enough construe the gold laws to mean, without, in general, having a copy of those laws at hand to refer to, acting merely upon their general impression of what they suppose the regulations to be.

Taking first the two cases of *Woodbury* v. *Hudnut*, and *Woodbury* v. *Meyers*. It appears reasonably clear that on the 5th and 6th of October, 1882, Woodbury was in possession of a claim which he called the "Comfort." He was there on the ground. It was staked out for him by Hammil and Maxwell by his directions. On the 6th October, the Gold Commissioner happening to be on the ground, Woodbury obtained from him leave of absence by reason of sickness. This leave of absence extended over the close time. Until the expiration of that time (1st June, 1883), his claim would not be liable to be treated as an abandoned claim by reason only of his absence. It was as secure to him as if he had continued to reside on it. It was insinuated that he was not really unwell. If fraudulent simulation of sickness were alleged and proved, no doubt there would be some way of preventing a miner obtaining such an unfair indulgence. But the Gold Commissioner is in the first place to decide both on the alleged inability, and on the fraud. This Court could scarcely interfere except as an Appellate Court. And there has been no attempt to induce the Gold Commissioner to cancel the leave of absence given by him, and therefore, of course no appeal to us from his decision in that respect. But although the point is not before us for decision, we have had extraneous statements concerning Woodbury pressed on our attention, and we may say that, judging from those statements, the Gold Commissioner was perfectly justified in granting such leave of absence. Then during Woodbury's permitted absence, and during close time, on the 25th May, 1883, part of the ground of the Comfort Claim is located as the Gem Claim, in the name and on behalf of the defendant Hudnut, by Meyers his agent. This is the whole case. It is, in our opinion, a merely unauthorized

trespass on the Comfort Claim. I said, this was the whole case, but in fact Hudnut was not on the 25th May a free miner at all; his certificate is not dated until the 4th June, and he was on the 25th May incapable of acquiring or holding any right in a claim. It was indeed alleged before the Gold Commissioner that one Sproule, the defendant in another of the cases now appealed before us, had previously, on the 17th May, handed $5 to one Sharpe, who was to give it to the first man he could trust to take it to the Gold Commissioner for a free miner's certificate for Hudnut. It would be absurd to treat this as sufficient to antedate the certificate of Hudnut.

The Gold Commissioner's decision now under review is in favour of the defendant Hudnut, "who is established in the ownership of the ground in dispute," *i. e.*, the Gem Claim, about two-thirds of the area of the Comfort. We think this decision must be reversed.

The next case, in which Woodbury is plaintiff, is against Meyers "for "trespassing on the claim just decided in favour of Hudnut." In this case the Gold Commissioner also found against the plaintiff and in favour of Meyers. This decision would be a matter of course, after the previous decision in *Woodbury* v. *Hudnut*, declaring the ground to belong to Hudnut. Woodbury could claim no damages against Meyers for trespassing on Hudnut's ground. But then the judgment of the Gold Commissioner goes on to say that Meyers "is established in the ownership of the ground in dispute;" *i.e.*, we must presume, the "Gem." It is not exactly clear what is meant by establishing two different persons in the ownership of the same ground: Meyers clearly could not claim the "Gem" for himself; he had located it and recorded it, he says, in the name and for the account of Hudnut. We think he certainly, by so doing, committed a trespass on the 25th May, and continued to trespass subsequently, by refusing to leave the ground, as we are of opinion, contrary to the Gold Commissioner, that the land was Woodbury's, and not Hudnut's. We think judgment ought to have been given for the plaintiff, Woodbury, in this case of *Woodbury* v. *Myers*. But no evidence is given of the amount of any damages sustained by the plaintiff by reason of this trespass: we can give no more than he has proved; *i.e.*, we must reverse the decision of the Gold Commissioner, but we can only give nominal damages—$1.

The next case, *Blasdel* v. *Hunley*, is governed by almost exactly the same considerations. The claim called the "Kootenay Chief" was located for the plaintiff by Hammil on the 5th October. Between that day and the 20th October, work was done on Blasdel's behalf equivalent to 26 days' work; sometimes by a single man, sometimes by five men at a time. This work was for the most part applied in building a log house on or adjacent to the claim, such as four or five men could live in. It was said that the work to be done on a claim (which is to be worked continuously) must be minerlike work—that building a house is not minerlike work at all; and, moreover, that the house in question was not on the Kootenay Chief ground at all, though not far off. Now, of course, in Cornwall or Northumberland, building a house is not miner's work—it is not mining at all. In old and highly organized countries the landlord mines with hired labour, and puts up houses for his men. Yet the cost of those houses is just as much part of his mining capital invested in the mines, and the houses are just as useful for working the

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mines, as the pumps and furnaces with which the water is removed or the ore roasted. And among the hills of British Columbia the first thing a miner does (when he intends continuous working) is to secure, or to build if necessary, a cabin in a spot convenient as possible to his claim. It is not necessary that it should be actually on his ground. There may be overwhelming advantages in wood and water a quarter of a mile off. It is quite sufficient if it be in a place manifestly convenient for the workers. The building of a cabin on first settling down to the serious working of a mineral claim is therefore just as much miner's work in reference to the holding and working the claim as is, afterwards, the sinking of a shaft or the driving a tunnel, or building a pump. And without saying that fifty men working on a claim for one day are in all cases to be deemed equivalent to fifty days' continuous work by the claimholder or his representative; yet in house building, five men in one day can often do far more work than one man in five days. And the house was significantly identified during these proceedings, and there is no insinuation that it was inadequate, or merely make-believe. On the evening of the 28th October, Blasdel's work ceases, and the defendant claims the benefit of the 72 hours of non-working, which elapsed with the close of the 31st October. On the other hand it is alleged, and not denied, that the Gold Commissioner had announced that as to claims taken up in October, he should be satisfied with ten days' work done on them before the general laying over on the 1st November; and there was no Gold Commissioner reasonably near on the 28th October to whom special application might be made to lay over this claim. Obviously, no strictly mining work could be usefully done (*e. g.*, sinking a shaft) in those three days. Any such work would probably be obliterated before next spring. The weather was setting in cold. Early in November the Kootenay River—the best available line of retreat—was closed by ice. The defendant himself does not appear to have remained there for the three days after Blasdel's agents had retreated. But on the 25th May he located in his own name the whole of the grounds, substantially of the Kootenay Chief, by the title of the "Lucy Long." Now, we by no means wish to intimate that no claims can be taken up during the close season. But as far as "jumping" is concerned, the whole of the close season is as if it were expunged from the calendar, so that the 1st June becomes the same as the 1st November, for the purpose of testing the propriety of Hunley's "jump" on the plaintiff's ground; and between the 31st October and the 1st June, no act or neglect of possession or working is to affect the right to a claim one way or the other. On the 1st June, the plaintiff going on the ground, finds the defendant already in possession. In our opinion, that exonerates him from the necessity of working until the title is determined. In the first place, if the plaintiff insisted on working, that might obviously lead to a breach of the peace; in the next place, no man can be expected to expend labour and capital on ground which may be taken from him. Hunley, in our opinion, was not justified in thus locating the Lucy Long, and in this case also we think the appellant must succeed.

There are some allusions to the fact that substantially the same ground as that now known as the Kootenay Chief had been previously located by one Gay Reeder, and known as the Mogul. But it is not clearly shown that it ever was so located legally; nor that it was occupied on the 5th October, when

Blasdel's location was made, nor for months previously; nor is it even alleged that Hunley had acquired any right or interest, mediately or immediately from Reeder; which could only be conveyed by written documents. In fact, his location of the claim was just as much in derogation of Reeder's supposed rights, as against Blasdel's. Hunley cannot set up a right (Reeder's) which he at the same time claims to have destroyed. And as between Blasdel and Hunley, the latter is a mere trespasser and Blasdel's title as against Hunley is perfect and unimpeachable.

There remains the case of *Hammil* v. *Sproule*. Sproule has been endeavouring to do too much, I think, and has very nearly succeeded in doing nothing. He alleged (not on oath) to Hammil that he was in October, 1882, representing Gay Reeder in the "Mogul" Claim. But he was in fact, as he states on oath in this case, representing his own claim—the Blue Bell. Where one man pretends to represent the two claimholders, it is strong evidence that his representation in both cases is colourable, and so, worthless. A miner might as well attempt to go to sleep in two bunks. But we give him the benefit of the doubt, *i. e.*, we take it that he was representing his own claim: and on the whole we do not find enough in the evidence to justify our interference with the Gold Commissioner's decision in this case. Sproule had taken up this claim long before—it was recorded to him on the 31st July, 1882. With or without reasonable cause, he seems from time to time to have left it, sometimes for several days at a time, during August and September, always returning however, until the 25th October, when he left in his boat for the season—leaving a notice on his claim that he had left from ill health, and to get provisions. He had written for leave of absence on the 14th October, but of course could get no answer by 25th. On 26th October, Hammil, who says "he does not know" that he was watching from the opposite shore for Sproule's departure, but who certainly does not appear to have been doing anything else, and who equally certainly does appear to have made himself in some way or other very well acquainted with Sproule's movements, crossed over to the east side, to the Blue Bell Claim, saw and well understood Sproule's notices; but took upon himself to disregard them; to decide in his own favour that Sproule's former absences had operated as an abandonment of his claim; that he had never legally re-possessed it, and that his then absence was without excuse. And Hammil accordingly took up the ground for his own benefit, altering the name to the "Silver Queen." Now it is as well to point out that the 72 hours' absence mentioned in the gold laws, though it may be and generally is sufficient evidence of intention to abandon a claim in any case, yet it is by no means conclusive evidence in all cases. The miner may return, and find his claim intact, and recommence working. In such a case he would be probably held to be in "as of his old estate" without being required to re-locate and re-record. His absence may have been sanctioned by the previous permission of the Gold Commissioner; or it may be for sickness, fire, or flood, or such other necessary or reasonable cause as that the Gold Commissioner may subsequently approve of it. Nothing of all this seems to have occurred to Mr. Hammil. He decides all these matters in his own favour and jumps the claim. In our opinion this is not shown to be justifiable. Then his occupation six days before the expiry of the close season goes for nothing in his favour, unless he had already

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secured some title to which that occupation might be referred. On the contrary, for the reasons already stated, this tortious occupation excuses all irregularity, if any, in Sproule's continuous working on and after the end of the close season. The Gold Commissioner's decision in favour of Sproule will therefore in this case be adhered to.

It is impossible not to be struck with the fact prominently put forward in the printed documents before us, that the whole of this wearisome, expensive, and mischievous litigation has been caused and fostered by the unauthorized intrusion of a stranger, who seems to have succeeded, before the Gold Commissioner, in raising such a cloud of irrelevant statements and controversies, as to entirely obscure that officer's view of the few material facts in each case. This interference, it is scarcely necessary to state, is entirely illegal. The gentleman in question may have conceived himself to be impelled by the highest motives. So, undoubtedly, was that most estimable gentleman Mr. Newdegate, in assisting Clarke to prosecute his suit against Bradlaugh; but Lord Coleridge's judgment in *Bradlaugh* v. *Newdegate* (L.R. 11 Q.B.D. p. 15), clearly points out the illegality of such officious interference, and Mr. Newdegate was compelled to recoup Mr. Bradlaugh all the expenses thereby occasioned.

We must now make the orders which we think the Gold Commissioner ought to have made, *i. e.*, in three cases, judgment for the plaintiffs, the appellants, with costs, and the unsuccessful respondents must further repay to the successful appellants all such sums as they have (as we think, erroneously) received from them as and for the costs in the Court below. In Sproule's case we do not interfere. Costs of appeal to follow the result in all cases.

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1884.
February 14.

HAMLEY *v.* LIBBY.

Towage by foreign steamer—38 Vic., Dom. C. 27—"From one port or place in Canada to another"—"Distress."

Goliath—an American tug—with a clearance from Port Townsend for Victoria, picked up on the high seas ship *Abercorn*, bound for Port Moody, and contracted to tow her to that Port.

Goliath towed *Abercorn* to mouth of Victoria Harbour, and there left her while tug went into Victoria for coal and a clearance for Port Townsend. On coming out *Goliath* resumed towing, and carried *Abercorn* to within 14 miles of Port Townsend, and then cast off and ran into that Port for a clearance for Port Moody; the *Goliath* then towed the *Abercorn* into Port Moody. In an action for penalty under Statute,

Held, that this was "a towage from one port or place in Canada to another," and defendant was liable.

Semble "distress" applied to the tow and not the tug.

A. E. B. Davie, Q. C., for Informant.
Theo. Davie for Defendant.

The facts are fully stated in the Judgment.

BEGBIE, C. J.:—

This is an action brought by the Collector of Customs at Victoria against the defendant, the Master of the steam-tug *Goliath*, a United States ship, for a breach of the Dominion Statutes, 1875, c. 27, s. 1, which enacts that "the "Master of any steam-vessel not being a British ship, engaged or having been "engaged . . . in towing any vessel . . . from one port or place "in Canada to another, except in the case of distress, shall forfeit the sum "of $400." The facts are as follows:—The *Goliath* steam-tug, of which defendant was and is Master, belonging to Port Townsend, W. T., left that port about the 26th February, 1883, with a clearance for Victoria, and went outside Cape Flattery, waiting for employment from any inward-bound vessel that might desire her services. Early on the 27th February, about 12 miles W. of Cape Flattery, and on the high seas, she met the British ship *Duke of Abercorn* bound for Port Moody, in Burrard's Inlet, in Canada, and then and there contracted to tow the ship from that place of meeting to Port Moody, and at once took her in tow. The defendant could not, however, at once proceed to carry out such contract. With his clearance for Victoria, he could not legally enter any other port in Canada. He proceeded in the first place to Royal Roads, where the tow dropped her anchor a little before 10 a. m. on the 27th February, within three-quarters of a mile of the shore. The *Goliath* then, with the consent of the Captain of the tow, came into Victoria Harbour to enter and procure additional coal. The defendant duly entered at the Custom House here, and finding that he could not obtain from the plaintiff a clearance for Port Moody direct, took out a clearance for Port Townsend, not concealing his intention, which he in fact carried out, of resuming the towage of the ship to Port Moody. This he affirmed that he could do without contravening the Statute; a view which was discussed between him and the Collector here at the time. Early next morning, on the 28th February, the defendant did in fact procure 7 or 8 tons of coal, and then steamed out of Victoria Harbour to Royal Roads, made fast to the *Duke of Abercorn* and "resumed his towing engagement" (statement of defence, paragraph 6), which was, to tow her to Port Moody, to which port in fact he ultimately towed her on 1st March. The plaintiff alleges, and the defendant denies, that on that 28th February and 1st March the defendant was engaged towing the ship from one port or place in Canada to another, within the meaning of the Statute. And this is the whole question to be determined.

The towage service, after leaving Royal Roads, was not continuous. With the clearance he now held (which was for Port Townsend) the defendant could no more enter Port Moody than he could have done with the clearance for Victoria which he held when he first met the ship outside Cape Flattery.

On the other hand, with his new clearance he could not have taken his tow into Port Townsend. She was bound for Port Moody and could not legally enter any other port. What he did, therefore, was this:—He towed the ship to a point between Dungeness Light and Smith's Island, some 14 miles from Port Townsend, and there cast her adrift (on the high seas, apparently); ran into Port Townsend; entered at the Custom House there, and got a fresh

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clearance, this time for Port Moody; ran back to the ship, and recommenced towing before dark, having been absent 3 or 4 hours; and finally took her safely into Port Moody on the 1st March. The weather during the whole time was nearly calm.

There were several defences. The right of the plaintiff to sue was denied, but it is only necessary to refer to the Statute, Can., 1877, c. 10, s. 101, to refute that. It was indeed said that this enactment cannot have a retrospective effect, to authorize proceedings for a penalty enacted by a former Act. But the objection is answered by the well-known principle that provisions as to mere procedure may be and usually are retrospective in this sense; and besides that, the offence alleged occurred after the introduction of the new procedure (if it be new). Another objection, which I simply overrule, was, that the ship when anchored in Royal Roads, three-quarters of a mile from the shore, was not in "a port or place in Canada." The next ground of defence was more plausible. The defendant, it was urged, and I have no doubt truly, was throughout all these shiftings, carrying out his original lawful contract of the 27th March, viz., to tow the ship from a point 12 miles west of Cape Flattery (on the high seas, and therefore clearly not a port or place in Canada) to Port Moody—clearly a lawful contract, and not at all within any Act (if the defendant had only held a clearance for Port Moody instead of for Victoria). But the defendant is not sued for having entered into an unlawful contract on the 27th March, but for having done an unlawful act on the 28th March; whether in carrying out a lawful or any contract is quite immaterial. The Statute does not refer to any contract. It does not impose the penalty on the Master who shall engage to tow a a vessel from one place in Canada to another, but upon any Master who shall be engaged in towing any vessel from one place to another. The lawfulness of the original contract seems to have nothing to do with the question whether it can be lawfully carried out. For instance, this very contract was perhaps lawful enough in itself, but the defendant could not have carried it out directly. He could not, directly, have towed the ship to Port Moody; his clearance was for Victoria, and he would have been liable to seizure if he had attempted to enter at any other port in Canada. But the defendant says that shortly after commencing his towage service, the Engineer reported that the supply of coal was running short (*i. e.*, to go to Port Moody; he had plenty to take him to Victoria, his proper port of entry), and that he ran into Victoria merely to procure the necessary supply of coal and not at all from the exigency of his clearance. That when he made for Victoria he was, therefore, in fact in distress; that but for this deficiency of coal he could and would have fulfilled his contract without entering Victoria at all, viz., by taking the ship to a point off Port Townsend, as he afterwards actually did, and obtaining there a fresh clearance for Port Moody; returning to the Collector his former clearance for Victoria, unused; which the defendant alleged to be his frequent practice. And to support the feasibility of this suggestion, the evidence was produced of Mr. John Chapman, who describes himself as a Clerk in the Port Townsend Custom House, having the powers of a Deputy Collector as to entrances and clearances. This witness denies indeed that this is the habit of his department, but says that they do sometimes (the defendant says "often"), as a "favour," allow such facilities to Masters who

expect to "go foreign"; and if they do not "go foreign," then "it is understood" that such clearances are to be returned to the office; but he does not say that they are always so returned, or even asked for. Mr. Chapman says that they rely on the word of the Master that he has not gone foreign. He abstained, though asked repeatedly, from saying that the officials are in the habit of inspecting any such vessel to ascertain the fact whether it has "gone foreign;" he does not know whether the practice is prohibited by the United States Customs Laws; he does not know whether several such clearances for different foreign ports have not been issued at the same time to the same vessel. No doubt this shows great laxity. Canadian officials who adopted such a practice would probably be charged with affording facilities for smuggling. But the laxity does not much aid the defence. In point of fact, even if the defendant might possibly have thus carried out his original contract, he did not attempt to do so, but came into Victoria Harbour, according to his clearance, leaving his tow in the Roads outside the harbour's mouth. And the way in which he relies on Mr. Chapman's evidence is to show that it was not absolutely necessary for him to enter at Victoria in order to comply with the exigency of the clearance held by him, but that it was therefore possible that he so entered merely from distress, being short of fuel; and then he argues that distress expressly exempts him from the penalty. I apprehend that "distress" in s. (1) means distress of the ship towed—and it means distress subsisting at some point of time in the towage complained of. If a vessel in Royal Roads were in danger of driving ashore, I have no doubt but that the *Goliath* could have gone out and towed her into Esquimalt Harbour without incurring any penalty: she might probably have earned salvage. Distress and salvage seem to be in co-relation with each other. A steam-tug assisting a vessel in distress is not bound, I think, to be content with payment as for ordinary towage; but it would be extravagant in the defendant to set up any claim for salvage here. Neither have I any doubt but that a steamer may be in distress for want of coal, as much as a sailing vessel through loss of spars or other tackle. And since a tug and tow are in many respects one body, the tow may often be said to be in distress if her tug be out of coal. Perhaps, therefore, by a strain of the words, the tug and tow may be said to have been in distress on the 27th February, when they came into Royal Roads; though, I am not inclined to think so. It would seem absurd to insinuate that there was at any time any risk of loss or damage either to the tug or tow. But whether the tug, or the tow, or both, were or not in distress, by reason of the shortness of coal on the 27th February, is really quite immaterial. What took place on that day is not what is complained of; but that on the 28th February the *Goliath*, newly replenished with seven or eight tons of coal, steamed out of Victoria Harbour and took hold of the ship, then lying in perfect safety, anchored in Royal Roads, in a dead calm, and commenced towing her to Port Moody. It seems quite absurd to say that the ship was in distress then, if indeed such a term were ever applicable to her on any of the days.

But then I was told that the defendant on leaving Royal Roads was not engaged in towing the ship to Port Moody; but that, finding he could not obtain a clearance for that port at Victoria, but only for his home port, Port Townsend, he, again by agreement with the ship, was engaged in towing her

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from Royal Roads to a point in the Straits south of Smith's Island (where in effect he left her for 3 or 4 hours, while he ran into Port Townsend and procured the necessary clearance for Port Moody), and again from that point to her final destination. It is to be observed that this contention sets up a different service of towage from that which the defendant at first alleged, which was, a towage from Cape Flattery to Port Moody. The defendant now changes his ground and alleges a towage service from Victoria to a point in the middle of the Straits. I reject this suggestion as founded not so much on a fallacy of reasoning as on a mere misuse of language. His towage destination was the ship's destination; and she never had any other destination than Port Moody. Every successive point of space through which she was towed in getting there, was in one sense her destination. She had to take, at her choice, one of the numerous channels between Whidby Island and Vancouver. She had to be towed from Royal Roads to the entrance of some channel, from the entrance to the middle, from the middle to the opening into the Gulf of Georgia, from that opening to English Bay. If at any or all of these points, or at any intermediate point, the towing hawser were accidentally or intentionally to part, or to be cast off,—can that be said to make the whole more than one towage? Can it make any difference, if the hawser were replaced in five minutes, or half an hour, or an hour? If it were found necessary to delay three or four hours from heated bearings, or to moor under some shelter, or lay to for hours, till the strength of some tide rip were expended, or reversed, would that alter the matter? The towage on the 28th February and 1st March was a towage from Royal Roads to Port Moody, and nothing else.

The laxity in the Custom House of his home port may very possibly have misled the defendant. He appears to have acted without any concealment as to his plans; and probably thought he was acting lawfully enough; misled perhaps by a not infrequent though utterly unfounded notion that Courts of law delight in giving effect to quibbles. There is nothing they discountenance so much, except downright fraud or force. The Courts endeavour, as far as possible, to apply to simple matters simple common sense; though this is sometimes difficult from the conduct of parties, and, occasionally, from the language of complicated Acts of Parliament.

Judgment for plaintiff for the Statutory penalty, with costs.

MANSON *v.* ROSS.

BEGBIE, B. J.
1884.
May 25.

Will—Construction—Pecuniary Legacies payable out of residuary realty.

H. R., the testator, gave £250 to M., and lands at N. in fee to W., and gave certain other lands and also pecuniary legacies to other persons, and "all the rest and residue "of my real and personal property" to D. absolutely. W. died in the testator's lifetime, so that the lands at N. fell into the residuary devise, and were the only lands comprised in such devise.

Held, that the pecuniary legacies were well charged on the lands at N.

The testator gave to M. absolutely (among other things) "all mining property in C. I "may possess at the time of my decease." The testator died possessed of *(inter alia)* certain shares in a Joint Stock Company, for working a mine in C., on which shares there were certain calls duly made and unpaid at testator's death, and sundry calls had been made since.

Held, that W. was entitled to have the shares clear of all calls for which the testator might have been sued, but subject to all calls not completely made in testator's lifetime, and therefore he was put to his election.

Collins v. *Lewis*, *Tomkins* v. *Colthouse*, and *Keeling* v. *Brown*, not followed.

Aubrey v. *Middleton*, *Bench* v. *Biles*, *Francis* v. *Clemow*, followed.

The material allegations of the statement of claim were in effect as follows:

1. Hugh Ross, a bachelor, died 1st November, 1881, and by his will, dated 6th October, 1874, made the following disposition of his property:—

"I bequeath to my father and mother, Donald and Catherine Ross, residing "on the farm of Balkeith Tarn, Rosshire, Scotland, the sum of five hundred "pounds sterling, together with all moneys and property which at the time "of my decease may be due to me from the Hudson's Bay Company.

"I bequeath to my brother, William Ross, of the same place, the sum of "two hundred and fifty pounds sterling, and also my watch. And I also "devise to my said brother William Ross, his heirs and assigns, Sections 35 "and 36, Range I. East, Block 6 North, in the District of New Westminster, "British Columbia.

"I bequeath to my sister, Mrs. David McCulloch, of Fendown Tarn, "Rosshire, aforesaid, for her sole and separate use (and her receipt alone "shall be a discharge for the same), the sum of fifty pounds sterling; and I "bequeath to William Manson (at present) of Firebaugh's Ferry, Fresno "County, California, two hundred and fifty pounds sterling, and all mining "property in Cariboo I may possess at the time of my decease. And I also "devise to the said William Manson, his heirs and assigns, my undivided "half of Lot 9, Group two, and the whole of Section 30, Range two West, "Block 5 North, in the District of New Westminster aforesaid. And as to "all the rest and residue of my real and personal property, I devise and "bequeath the same to my said father, his heirs, executors, administrators, "and assigns.

"And I appoint Alexander Munro, of Victoria, British Columbia, of the "Hudson's Bay Company's service, executor of this my will, bequeathing "him fifty pounds sterling for his trouble."

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2. Donald Ross (testator's father) died on 15th November, 1881, intestate, leaving him surviving only one child, the defendant Helen McCulloch (referred to in the will as Mrs. David McCulloch).

3. William Ross died during the testator's lifetime, leaving him surviving his widow, the defendant Catherine Ross, and a posthumous child, the defendant Williamina Ross.

4. Testator's personal estate, though sufficient to pay his debts, was insufficient to pay the general legacies.

The plaintiff, as a legatee under the will, claimed—

1. That the real estate composed in the residuary devise, including sections 35 and 36 (devised to William Ross) or sufficient part thereof, be sold and administered for the purpose of paying his legacy out of the proceeds.

2. For an account of the personal estate (other than specific legacies) remaining in the hands of defendant Munro after payment of the testator's debts.

3. For general relief.

The defendants Williamina Ross and Helen McCulloch in their statement of defence alleged that defendant Williamina is an infant, and that Alexander McKay, of Fain, Scotland, was her duly appointed *Factor loco tutoris*, and that the said Williamina, by the law of Scotland, is heir-at-law of Donald Ross, her grandfather, and also next-of-kin jointly with the defendant Helen McCulloch, but the defendants deny that under the circumstances the plaintiff is entitled to the relief asked for; and by way of counter-claim alleged that at the time of testator's death some $2,000, then due for assessments and calls on the mining stock bequeathed to the plaintiff, was paid out of the testator's estate, and asked that the plaintiff should repay to the defendant Munro all moneys so paid, to be accounted for as part of the personal estate, and for an account of the real and personal estate, and of payments made in respect thereof, and of the debts and legacies.

To this counter-claim the plaintiff answered that the mining property bequeathed to him of mining interests in certain mining companies (naming them), and alleged "that he had elected to take the said properties only upon "the condition that the testator's estate should pay the assessments and calls "made, levied, or due before the decease of the testator," and "that in respect "of the assessments and calls made subsequently to the death of the testator "he has been ready and willing to pay the same, and has paid the same;" and the plaintiff further alleged and submitted that he was in no way liable to pay any of the moneys for which the counter-claim was brought.

The Attorney-General (*A. E. B. Davie*, Q.C.) for Plaintiff:—

The personalty being insufficient for payment of the general pecuniary legacies, they are charged upon the residuary realty, as the bequest of the legacies is followed by a gift of the residue of both realty and personalty in one mass: *Greville* v. *Brown* (7 H. L. C. 689); *In re Brooke* (L. R. 3 Ch. D. 630); *In re Bellis's* Trusts (L. R. 5 Ch. D. 504). As to the assessments on the mining property, Manson has paid those which have matured into debts since testator's death, and is not responsible for those which became debts in testator's lifetime: *Fitzwilliams* v. *Kelly* (22 L. J. Ch. 1016); *Theobald*, on Wills (2nd Ed.) p. 124, and authorities there cited.

M. W. T. Drake, Q.C., for the Defendants, contended that the residuary real estate was not liable for the pecuniary legacies, and cited in support *Dugdale* v. *Dugdale* (L. R. 14 Eq. 234); *Farquharson* v. *Floyer* (L. R. 3 Ch. D. 111); *Collins* v. *Lewis* (L. R. 8 Eq. 708); *Tomkins* v. *Colthurst* (L. R. 1 Ch. D. 628).

In support of the counter-claim it was contended that mining interests at Cariboo were in their nature leaseholds (Sec. 45 Consol. Stat. 67), and leasehold estates are taken *cum onere: Hickling* v. *Boyer* (3 Mac G. 635); *Fitzwilliams* v. *Kelly* (10 Hare, 266). There is no devise of realty for payment of debts or legacies therefore.

Pecuniary legatees are not entitled to have assets marshalled against devisees either specific or residuary: *Mirehouse* v. *Scaife* (2 My. & C. 695); *Jarman*, on Wills (vol. 2, 572); *Dugdale* v. *Dugdale* (L. R. 14 Eq. 234).

The principle with respect to charges on the mining interests appears to be that all charges incurred by the testator are to be paid out of his estate, but charges which are inherent to the article itself have to be paid by the legatee: *Bothamley* v. *Sherson* (L. R. 20, Eq. 316).

SIR MATT. B. BEGBIE, C.J.:—

In the present phase of this action I can give a decision upon two points, and I think, only on two points.

Hugh Ross, being in 1874 seised in fee of several sections of land in New Westminster district, and also of mining and other property, made his will, dated 6th October, 1874, and thereby bequeathed to his father a sum of £500 and all moneys which at the time of his decease might be due to him from the Hudson's Bay Company; to his brother William, £250, and a watch, and certain sections of land in New Westminster district, numbered 35 and 36; to his sister Helen, £50; to William Manson, £250, and all his mining property in Cariboo, and certain lots of land, numbered 9 and 30, in New Westminster district; and appointed the defendant Munro his executor, with a legacy of £50; and all the residue of his real and personal property (in a mass) he gave to his said father, absolutely. It does not appear what mining property he owned in 1874; but at his death on the 1st November, 1881, he owned certain shares in the Enterprise Mining Company (in Cariboo) upon which he had paid some calls in his lifetime, and on which there were existing calls, duly made and fully payable, but unpaid, at his death; and on which other calls have been made and become payable since his death. At the time of his decease he was still seised in fee of the said sections Nos. 35, 36, 9, and 30. The testator's brother William predeceased him, leaving an only child—the defendant Williamina. The intended gifts to William therefore, lapsed, and are swept into the residuary gift to the testator's father. The father survived the testator, but has since died, leaving his daughter, the said Helen, and his grand-daughter, the said defendant Williamina, his only next-of-kin and also his co-heirs according to the law of inheritance of lands in British Columbia. I assume the facts to be as stated in the pleadings, but as one of the parties is an infant there must be inquiries. However, I do not think the declarations I am about to make will be affected by the result of those inquiries.

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The personal estate has been sufficient to pay debts, but is not sufficient to pay the pecuniary legacies amounting to about £1,100. And in order to the taking the account and calculating proper abatements, if any, my opinion has been asked upon two points (viz.) first, whether all or any, and, if any, which of the calls or assessments on the Cariboo mining property are to be paid, ultimately, out of testator's general personal estate, or whether rather Manson is not bound to take the shares, with all their unsatisfied liabilities, in the same plight and condition as they stood at the time of the testator's death—*i.e.*, as encumbered with the calls then made and to be made? and second, whether the donees of pecuniary legatees are entitled to be satisfied in full, with recourse, if necessary, to the residuary real estate for any deficiency in the general personal estate?

Now the first question really seems to me to present no difficulty in itself, and to be completely covered by the principle laid down, and not disputed, nor, I think disputable, in *Addams* v. *Ferick* (26 Beav. 384). If the testator at the time of his death could have been successfully sued for these calls, they were then debts due by him, just as much as if they were debts due to a tradesman or on an overdue promissory note, and the executors are bound to pay them in the same way and out of the same fund as they would have to pay an ordinary tradesman's bill. If at the time of his death no action would have lain, if no judgment could have been recovered against him personally, then these calls were not "debts" at all: not *debito in præsenti;* which even though *solvenda in futuro* are yet debts, and a charge on the personalty in priority to legacies—*e. g.*, a promissory note not matured at testator's death. The only question in *Addams* v. *Ferick* was whether certain calls had been completely made, so that the testatrix could at the time of her death have been sued for them. The Master of the Rolls' conclusion was that they had not; and therefore the legatee of the shares took them *cum onere*, that is, with all the liabilities which contingently attach to the owner of shares, and so, was bound to recoup the executors for the calls thus incompletely made. In fact, until a call is definitively made, *non constat* that it ever will be enforced, or be enforceable against the shareholder. A thousand accidents, a change of directors, or of the views of the existing directors, or of the whole body of shareholders, may intervene; to say nothing of the winding up acts. That case follows *Armstrong* v. *Burnet* (20 Beav. 424) and many others, proceeding, I think, on the tolerably obvious proposition that a debt is a debt, but that a liability, which a man may never be called on to satisfy, is not a debt.

The other question is as to the right of a general pecuniary legatee to be satisfied out of lands in a residuary devise. This is more complicated, owing to the immense number and variety of decisions, but especially of dicta and opinions attributed in the reports to different judges; to the defective and imperfect reports of the earlier cases, and indeed of the modern cases also. I desire to draw a distinction nowhere, apparently, laid down expressly, but I think sufficiently intimated by Sir George Jessel, M. R., from the very cautious way in which he limits the rule in *Brooke* v. *Rooke*, July, 1876 (L. R. 3 Ch. D. 632), the most recent case to which I shall refer. And the distinction is between the case where the residuary gift comprises land only, and where it comprises both real and personal estate, blended in one mass. A

residuary gift in the latter form, the M. R. says (*Brooke* v. *Rooke*, L. R. 3 Ch. D. 632) operates as a charge of all legacies on that blended mass. He is entirely silent as to the operation of a residuary gift of pure realty. Even in such a case however, (viz.) in *Hensman* v. *Fryer* (1866, L. R. 2 Eq. 627), Vice-Chancellor Kindersley held a general pecuniary legacy to be payable in full out of a residuary devise of realty alone; and on appeal (1867, L. R. 3 Ch. App. 423) Lord Chelmsford varied that decision only to the extent of directing the land to contribute proportionally. In the subsequent cases of *Dugdale* v. *Dugdale* (1872, L. R. 14 Eq. 234) and *Farquharson* v. *Floyer* (1876, L. R. 3 Ch. D. 111), Malins, V.C., and Hall, V.C., respectively disapproved of that decision, and refused to follow it. But if there be any substance in the distinction I have taken, these adverse decisions of those Vice-Chancellors do not apply, even if they could be followed, in the teeth of a contrary judgment by a Lord Chancellor. Lord Chelmsford's judgment in *Hensman* v. *Fryer*, moreover, is mentioned (incidentally) with very high approval by both Lord Chancellor Cairns and Lord Justice James, in *Lancefield* v. *Iggulden* (1874, L. R. 10 Ch. App. 140). And at the same time, both those very learned Judges gravely disapproved the conduct of inferior tribunals who, without even troubling themselves to give reasons, deliberately set at naught the carefully considered judgments of the head of the Court. This must have pointed at Malins, V.C., in *Dugdale* v. *Dugdale*, and Stuart, V. C., in *Collins* v. *Lewis* (1869, L. R. 8 Eq. 708). And though Vice-Chancellor Malins subsequently noticing these observations (in *Tomkins* v. *Colthurst*), states that the approval was only of one part of Lord Chelmsford's judgment, viz., his holding that a residuary devise of land is specific as well since the Wills Act as before, and that he himself had followed Lord Chelmsford's ruling on that point, yet the disapproval of *Dugdale* v. *Dugdale* was evidently aimed, not at the points on which the Vice-Chancellor had followed Lord Chelmsford, but at the points where he had contradicted the Chancellor. It is not necessary further to notice these cases, which turn on residuary devises of pure realty, and which are the only cases I have found upon that gift. *Hensman* v. *Fryer* was treated as a case of the first impression both before the Vice-Chancellor and on the appeal. It is only to be observed that if Lord Chelmsford's decision is to stand, favouring the pecuniary legatee as against the donee of pure realty, *a fortiori* the pecuniary legatee occupies a favourable position as against the donee of a mixed fund; whereas the decisions of the Vice-Chancellors, exonerating pure realty, do not necessarily exonerate a mixed residue.

As regards the present case—viz., a gift of a blended mass of residuary property—it has been seen that Sir George Jessel alleges this to constitute a charge of general pecuniary legacies upon the blended fund; and he says that that has been the rule for 200 years—citing for that, *Greville* v. *Brown* (7 H. L. Ca. 689—probably 1857). (It is much to be regretted that this case, as well as several others which I should have wished to examine, are not accessible). Searching, however, such reports as we have here, these cases appear to run back for a period of upwards of 150 years, and on the whole to bear out the Master of the Rolls' assertion by a very great preponderance of authority. The earliest case I have traced (where the exact point before me is treated merely on principle and as being then quite uncovered by authority) is *Aubrey* v. *Middleton* (2 Eq. Ca. abr. 497), before Lord Chancellor Cowper.

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The year is not given, but Lord Cowper had retired from the Bench before the House of Hanover came to the throne. He held that pecuniary legatees were entitled to full satisfaction out of the residuary realty, the residuary gift being mixed. The point seems to have been at rest for nearly a century; at least the cases quoted as having been before Lord Henley, Lord Mouleslield, and Lord Hardwicke seem to have been attempts by pecuniary legatees to marshal as against specific devisees; and the next place in which I have found a contest between pecuniary legatees and the devisees of a mixed residue, is in the early volumes of Vesey, junr., where it occurs repeatedly. In *Kightley* v. *Kightley* (2 Vesey, junr., 328), Lord Alvanley, M.R., expresses himself in favour of the residuary devisee. In *Williams* v. *Chitty* (3 Vesey, junr., 551), the Lord Chancellor Loughborough (1797) favours the legatee. In *Keeling* v. *Brown* (5 Ves., junr., 361), the Master of the Rolls adheres to his preference of the claims of the residuary devisee. *Aubrey* v. *Middleton* is not referred to in any one of these three cases. These are followed in 1819 by *Bench* v. *Biles* (4 Madd., 102), where both *Aubrey* v. *Middleton* and *Keeling* v. *Brown* are quoted. Sir John Leach, V. C., rather briefly adopts Lord Cowper's view, in favour of the pecuniary legatee, dissenting from *Keeling* v. *Brown*. And *Bench* v. *Biles* was distinctly approved and followed by Vice-Chancellor Sir W. P. Wood, in *Francis* v. *Clemow* (23 L. J. Ch. 288 1854), and afterwards in a case of *Gyett* v. *Williams*, about 1862.

The balance of authority, therefore, in favour of the legatees, both before and since the Acts of William IV. and 1 Victoria, is overwhelming. Every Lord Chancellor who has spoken on the subject, Lord Cowper, Lord Loughborough, Lord Chelmsford, and Lord Cairns; Sir John Leach, Vice-Chancellor Wood, Vice-Chancellor Kindersley, and Sir George Jessel, have pronounced in their favour—besides the case in the House of Lords (*Greville* v. *Brown*), of which we have not the report. Against the claims of the legatee we have but one considered judgment, that of Lord Alvanley, M. R., in *Keeling* v. *Brown*. The decrees of Stewart, V. C., in *Collins* v. *Lewis* (a mixed fund), of Malins, V. C., in *Dugdale* v. *Dugdale*, of the same Vice-Chancellor, in *Tomkins* v. *Colthurst* (1875, L. R. 1 Ch. D. 628), a mixed fund, and of Hall, V.C., in *Farquharson* v. *Floyer* (pure realty) are simply rescripts, without any reasons alleged, and without any reference to, or reverence for the four different Chancellors alone (besides other Judges) whose unanimous recorded judgments might surely have given inferior tribunals ground for pause had they been cited. But all three Vice-Chancellors seem to think, and indeed allege, that the law is "settled" the other way. Neither *Aubrey* v. *Middleton*, nor *Chitty* v. *Williams*, nor *Bench* v. *Biles*, nor *Francis* v. *Clemow*, three of which, at least, are distinct decisions, precisely in point, appear to have been brought to the notice of any one of the three rebellious Vice-Chancellors; nor do they take any account of a difference in the case of a mixed or blended residue, though that is clearly intimated as an important circumstance by Lord Cottenham, in *Mirehouse* v. *Scaife* (2 My. & C., 708). The four adverse decisions, therefore, are entitled to but very little weight. It is urged, that none of the four have ever been appealed. But a suitor, especially a small pecuniary legatee, may abstain from appealing without being advised that the adverse decision is correct. He may have very different motives. On any reasonable doubt in administering a will, he can take the

opinion of the Vice-Chancellor, at the expense of the estate. But if he appeal against that opinion, he will generally be saddled with the costs of all parties, as well as his own, if unsuccessful.

There is in the present case one element which I do not think is found in any of the numerous cases cited, and which is further in favour of the legatee's claim. The residuary realty here consists wholly of a lapsed estate. It is true a will speaks as from the date of a testator's death (Wills Act, s. 24); but that is where no contrary intention appears in the will. A gift, if it lapse, is of course swept into the residuary estate; but that result cannot be said to have been intended by the testator, who probably does not at all contemplate, when he makes his will, that any of the objects of his bounty will predecease him. If he had contemplated their predecease, he would naturally have made provision for that event in the will itself. The sole object at once and cause of construction of wills is to discover and carry out the testator's intentions. If here the testator had made no particular gift of sections 35 and 36 to William, or anyone else, but had left them, unparticularized, to fall into his residuary gift, even then Lord Chelmsford's rule would have applied; in case of an insufficiency of pure personalty to pay debts and pecuniary legacies in full, the pecuniary legacies and the residuary realty will abate proportionally. That decision Lord Chelmsford based on the above-mentioned principle, viz., to carry out the testator's intention, who on the face of his will meant the legatee to get his money just as much as he meant the residuary devisee to get the land, and meant the devisee to have the land as much as he meant the legatee to get his money. But in the case of a lapsed devise, this is not exactly so. It is, on the face of this will, much more clear that the testator meant this legatee to have this money, than that he meant this residuary devisee to have this land. I therefore conceive that, in order to carry out Lord Chelmsford's principles of decision, which are those laid down in *Tombs* v. *Roch* (2 Coll. C. R. 490, 502), it is necessary to apply here a somewhat wider measure than mere proportionate contribution, and to decide in conformity with Lord Cowper, Sir John Leach, Vice-Chancellor Wood, Vice-Chancellor Kindersley, and Sir G. Jessel, that the general pecuniary legacies, so far as the personalty is insufficient, after payment of debts, must be paid in full out of the residuary real estate.

Since this case was argued there has been handed to me the case of *Gainsford* v. *Dunn* (L. R. 17 Eq. 405), which is quite in accordance with the views here taken.

It is somewhat remarkable that in *Brooke* v. *Rooke*, where the Master of the Rolls lays down the rule here adopted, there was no necessity for so doing. There, the very first direction in the gift of the residuary realty and personalty was an express trust to sell and convert into money. The whole residue, therefore, was to be deemed personalty, as from the testator's death, as much as if it had never existed in the form of land; and there was no room for the application of the rule that such a blended gift charged the legacies upon the land. There was in the view of a Court of Equity no blended gift—no land for the legacies to be charged upon. And it is still more remarkable that this appears to have been never noticed either in the argument or judgment.

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The decree to be made here will, therefore, be prefaced by declarations to the above effect; that William Manson takes the mining property, free from all calls which had in the testator's lifetime matured into debts, but liable to all calls and contingencies which had not then so matured. He will be put to his election either to bear this burden or take nothing under the will. Then there will be a declaration that the pecuniary legacies are by the will well charged on the residuary realty, which is liable to make them good in full. If the parties were all *sui juris*, the necessary accounts would then be directed. But as one of the co-heirs is an infant, there must be first inquiries as to the state of the family at the death of the testator, and at the death of Donald, and heirships, and then the usual accounts of debts and legacies, including an inquiry as to the calls completely made at the time of testator's death or otherwise, and also inquiries as to the residuary real estate. Some of these points, I believe, are already established; but everything must be established by evidence and not merely by admissions on the pleadings.

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Crown Grants of adjoining Lots—Surveys.—Description of Land.—Estoppel.

In an action for the declaration of title to a piece of land claimed by Plaintiff as part of Lot 376, and by Defendant as part of 202.

Defendant's title was derived through B., to whom, in 1870, a Crown Grant was issued, granting that Lot, "numbered 202 on the official plan," said to contain "150 acres, more or less."

In 1876-77 the Lands and Works Department having caused an official survey of the adjoining lots to be made, found the official plan by which the boundaries of B.'s lot were defined to be incorrect, and with a view to retain the acreage proper to each grant and to make the boundaries run true to the cardinal points, gave the defendant, without notifying him, in the new official plan or survey, a new southern boundary.

Three years after the completion of this survey, defendant filed in the Land Registry Office a plan of the greater part of Lot 202, according to a private survey made by his own directions, in which he implicitly followed, as to his southern boundary, the survey of 1876-77.

In 1881 a Crown Grant to Lot 376—the boundaries thereof being as determined by the survey of 1876-77—was issued to plaintiff.

Held, that the defendant having, by filing his map in 1880, adopted the survey of 1876-77, was precluded, as against the plaintiff, from treating that survey as a nullity.

Plaintiff, the owner in fee of the W. ½ of Lot 376, under a grant from the Crown, dated 13th January, 1881, in his statement of claim alleged in effect that the title of defendant to Lot 202, situate immediately north of Lot 376, was registered in 1874, and a map of said lot was deposited in the Land Registry Office on 22nd January, 1880.

By an Order of Court defendant, in October, 1883, deposited an amended map of Lot 202. In the amended map a portion of the west half of Lot 376 was included in Lot 202, and plaintiff claimed to have the registration amended and an injunction restraining defendant from dealing with the portion in dispute.

The defendant by his statement alleged that the map deposited on 22nd January was *only a part* of Lot 202, and sets out his title to the lot; that the Crown Grant to plaintiff of Lot 376 was improvidently issued, and improperly included a portion of Lot 202; that plaintiff's title to Lot 376 was registered subsequent to registration by defendant of his title to Lot 202; and by way of counter claim askes that it may be decreed that the portion now in dispute is the property of the defendant.

Plaintiff joins issue, and in reply to counter-claim joins issue thereon and repeats the allegations contained in his statement of claim.

30th May, 1884—The Attorney-General *(A. E. B. Davie, Q. C.)* and *Theodore Davie* for the Defendant.

The defendant purchased Lot 202, Group I., from Butler, the grantee of the Crown, the lands being described in the conveyance to the defendant as "all that piece or parcel of land situated at Port Moody, in Burrard Inlet, "in the district of New Westminster, in the Province of British Columbia, "Dominion of Canada, *known and numbered on the official map* of the "Country Lands of said district as Lot two hundred and two (202), Group "one (I.), Country Lands, New Westminster District." This conveyance was in July, 1873. The grant from the Crown to Butler was in March, 1870; the parcels in the grant being described as follows:—"all that parcel or lot "of land situate in the district of New Westminster, British Columbia, said "to contain one hundred and fifty acres, more or less, and numbered Lot two "hundred and two (202), Group one (I.), *on the official plan or survey of the "said district of New Westminster*, in the Colony of British Columbia." Annexed to the Crown Grant is a tracing of a part of the official plan. Both the tracing and the official plan show the southern boundary line of Lot 202 *to be a prolongation due westward of the undisputed southern boundary line of the eastern adjacent Lot* 201. The Lot 202 having been granted to Butler, and by Butler to the defendant, *by distinct reference to the official plan* the defendant is entitled to rely upon that plan for the ascertainment of his boundaries, in other words, the official plan is by effect of the reference made part of the Crown Grant and the conveyance. The defendant in purchasing would have no occasion to enquire, and was not put upon his enquiry as to what the lot contained or the field-notes upon which the survey was made. The lot might contain one hundred or two hundred acres. As to this there was but a guess on the part of the Crown. The very language shows there was the greatest uncertainty as to quantity "*said* to contain one hundred and fifty acres, *more or less.*" Assuming it had contained only one hundred acres, could compensation have been obtained from the Crown after the lapse of years transpired and in the absence of an express contract that compensation would be made for deficiency? The defendant could not have obtained compensation from Butler, for Butler sold the lot according to the official map without any estimation whatever, and neither the defendant or

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Butler could have obtained compensation from the Crown, because the Crown never contracted for compensation for deficiency or covenanted regarding quantity: *Jolliffe* v. *Baker* (L. R. 11, Q. B. D. 255), and *Palmer* v. *Johnson* (L. R. 12, Q. B. D. 32). The estimation of quantity was not a governing feature of the description. On this point *Whitfield* v. *Langdale* (L. R. 1, Ch. D. 61), is also in our favour. A defendant could not resist a bill for the specific performance of an agreement for the purchase of land estimated at 41 acres, when in fact the land contained only 35 and a fraction: *Winch* v. *Winchester* (1 V. & B. 375). It is hard to see why the converse of such principles should not apply, or, in other words, why the grantor should not be bound after conveyance executed; especially when the over estimation of acreage was his own, and through no fault or fraud of the grantee. In *Winch* v. *Winchester*, the Master of the Rolls, Sir William Grant, said that the effect of the words "more or less," had never been absolutely fixed by decision; and as there was in that case an additional vagueness arising from the use of the words "by estimation," he would not allow the purchaser any compensation. It is noticeable that in the Ontario Statutes provision is made for compensation from the Crown in the event of deficiency of which the grantee was ignorant at the time of the purchase, while no right is preserved to the Crown in respect of mere excess. [Revised Statutes of Ontario, page 255.] It is also to be remembered that Butler did not purchase at the rate of a dollar an acre. In point of fact the Crown has not derogated, and it is contended could not at this length of time derogate from its own grant especially as against the defendant, a subsequent *bonâ fide* purchaser for value. If the Crown conceived a mistake had been made on the official map of sufficient importance to require the rectification of its grant and the plan on which it proceeded, it might, so far as Butler was concerned, have pursued the course taken in *Harris* v. *Pepperill* (L. R. 5, Eq. 1), if adopted promptly. Such a course was never followed, and it must be taken that the Crown has, up to the present time, adopted and adhered to the official map on which the grant proceeded. The unauthorized and unwarranted alteration in 1877 of the southern boundary on the official map, after the grant to Butler and conveyance to the defendant, and before the grant of the plaintiff's Lot 376, and before its survey, cannot be regarded as the act of the Crown, and is to be reprehended. It was done without notice to the defendant; without authority; and not by any tribunal or person lawfully authorized to interfere. Judicial recognition of such a proceeding would give the Lands and Works Department the liberty of capriciously adjusting all the boundaries in the country. It is therefore to be fairly assumed that the plaintiff's grant, so far as the disputed ground is concerned, was issued improvidently and in error. The defendant having acquired the lot by a certain name (Lot 202, Group I.) and reference to the official map; and as it can be clearly shown by the official map what extent of land that lot contains, the lot as named, together with the reference, are the governing features of the description, and it will pass by the grant according to its real contents, notwithstanding any erroneous description of it, which, if literally carried out, would either narrow or extend the quantity. See remarks of Sir John Beverly Robinson in *Iler* v. *Nolan* (21, U. C. R., at page 319), cited in *Huntsman* v. *Lynd* (30, U. C. C. P., at page 106). It is submitted that the case of *Lyle* v. *Richards* (L. R. 1, H. L.) also establishes

the right of the defendant to the whole of Lot 202 with boundaries as shown in the official map.

Although we contend, consistently with this argument, that the field-notes have nothing to do with the case, yet we say they establish the boundaries as given in the official map, except in one point, which is an error on the part of the Surveyor. The field-notes of Launders, the original and Crown Surveyor, show two governing points by means of which the southern boundary (the only one in dispute) of Lot 202 can be clearly traced. They give the north-west angle and the south-east angle. The latter is fixed by the notes ascertaining the dividing line between Lots 201 and 202 *throughout its entire length*, its whole distance is shown to be *common to both lots*. The language of the notes is "survey of line between J. Murray's and Robert Butler's "Crown Grants, Port Moody;" the result being that the southern boundary line of Lot 202 must be drawn either at a right or some other angle with the dividing line at its southern point. We contend that the angle at which such southern boundary should be drawn is a right-angle and in prolongation westwardly of the southern boundary of Lot 201. This contention is borne out by the circumstance of Launders, who made the survey and who drew therefrom the original official plan, and the tracing of it attached to the Crown Grant, having protracted the southern boundary of Lot 202 in continuation due westerly of the southern boundary of Lot 201. The south-west angle of Lot 202 would therefore be not at the post distant, according to Launders' field-notes, 37 chains and fifty links southerly from the north-west angle, where Launders placed it, as we contend, inadvertently and in error, but at a point further south, namely, at a point where the line of the western boundary continued southerly would be intersected by the line of what we contend is the southern boundary. Any other contention would make our southern boundary commence on the west, at the Launders' post before referred to, and thence run in a diagonal line to our south-east angle. It is apparent from the field-notes that such was not Launders' intention, for, in the first place, the result of them, as shown by his own protraction, is to make the southern boundaries of both lots continuous, and again he projects, hypothetically, in that part of the field-notes *which shows the western boundary only*, a line due east from and at right-angles with the Launders' post. The fair inference is therefore that Launders, who never ran the southern line at all (see the field-notes), thought that the production of a line due east from the post in question would strike the southern point of the dividing line between Lots 201 and 202, and consequently we contend that the post in question was, through error, not placed at what the defendant says is the south-western angle of Lot 202.

The Ontario authorities on surveys and plans are collected in *Stevens* v. *Buck* (43, U. C. R. p. 1). In reading them reference must be had to the statute law of the Province of Ontario concerning surveying and boundaries.

Lastly, if the estimation of acreage is to be regarded as a governing feature, and it should be held that our lot ought to be reduced by the quantity in excess of 150 acres, why should the reduction be made by striking off a parallelogram from the southern portion? What right has the Crown or any person to choose any particular number of acres by reason of the alleged excess in quantity? If the area is to be reduced why not take the northern

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portion of the Lot where the C. P. R. Co. have already taken the land at railroad prices? In fact Jemmett's survey in 1877 reduced our Lot to less than 150 acres by $2\frac{1}{2}$ acres.

The plaintiff might and should have known when he acquired Lot 376 that the original official map showed the southern boundary of Lot 202 to be in production of that of 201, and that, therefore, he could not by a subsequent grant obtain that with which the Crown had already parted, viz., the disputed ground. Lastly, our title to the Lot 202 *according to the official plan* was registered as an absolute fee on the 4th day of August, 1874, long anterior to the registration of the plaintiff's title and we claim the full benefit of such registration under the Land Registry Ordinance.

The house said to be erected by the plaintiff consists of a small unfurnished and uncovered log shanty. The clearing consists merely of the slashing down of trees over some 9 acres. The ground in dispute being over 30 acres. It does not appear defendant was ever aware of the plaintiff's work, nor has the matter of estoppel been pleaded.

M. W. T. Drake, Q.C., for the plaintiff.

In the first place all grants of the Crown are construed in favour of the grantor, the usual rule being inverted, *Attorney-General* v. *Ewelme Hospital* (17 Beav. 366, Burton Real Property, 208). The Crown purported to grant the defendant 150 acres, more or less, giving only the number, 202, and group on the official map. Subsequently, the Crown granted to the plaintiff lot 376, with a plan attached and referred to in the grant, showing the line of the defendant's lot, which places him six chains further back than the line he now contends for, but leaving him 150 acres Other grants may be looked at to see what line the Crown adopted, *doe d. Carpenter* v. *Jones* (3 Kerr, 155), *Morrison* v. *McAlpine* (2 Kerr, 467). The Crown here then adopted the line the plaintiffs contend for.

The plan attached to the defendant's grant is not part of the grant and is not referred to. The original plan when examined shows a great alteration, one line marked in red, the other in black, Which then is the correct line? Apparently, by measurement, the red line is the correct one, but there is no evidence to show when or by whose authority the red line was placed on the map. There is nothing to show that the plan in the Land Office is official; in fact there was no official plan until many years afterwards.

When the plan and grant will not clearly show the land granted, you must refer to the work on the ground: *Astley* v. *Currey* (C. L. T., Vol. 6, 61), *Martin* v, *Crow* (22 U. C. R. 485), *McGregor* v. *McMichael* (41 U. C. R. 128).

If a survey has been made but inaccurately, and there is no evidence of work on the ground, the inaccurate survey must yield to a subsequent accurate one: *Thibaudeau* v. *Skead* (39 U. C. R. 387); *Forsyth* v. *Boyle* (28 U. C. C. P. 26).

The evidence of Capt. Jemmett clearly shows that the posts and lines of the original survey are all in the ground, and that the line claimed by the defendant is not marked on the ground. In addition to these arguments it is shown that the land was pre-empted by the plaintiff, a building erected, and clearing done on the disputed land, the defendant standing by and never

raising any question of title. This alone would disentitle the defendant from setting up title now: *Stevens* v. *Buck* (43 U. C. R. 1).

The following cases were also cited during the argument: *Hoover* v. *Sabourin* (21 Grant Ch. 333); *Wigle* v. *Stewart* (28 U. C. R. 427); *Davis* v. *McPherson* (33 U. C. R. 376); *Carrick* v. *Johnston* (26 U. C. R. 69); *McEachern* v. *Somerville* (37 U. C. R. 620); *O'Donell* v. *Tiernan* (35 U. C. R. 181).

BEGBIE, C. J.:—

This is a case of some interest and curiosity, not only from the singular circumstances attending the acquisition of the land in dispute, and the extraordinary increase in its value, but chiefly from the (it is to be hoped) unparalleled series of errors which has led to the difficulty.

Lot 202, Group I., of Country Land in the District of New Westminster, was originally taken up by one Butler, a Sapper in the Detachment of Royal Engineers, who came into the country, under the command of Colonel Moody, R. E., in 1859. The Detachment was to stay in British Columbia for five years; at the end of that time they were either to be taken back to England, or, at their option, to be discharged here; in the latter case, each man was to have a free grant of 150 acres (I believe) of Crown Lands (Country Lands). At the end of the five years Butler chose to remain here, and for his free grant selected a piece of land on the south shore of Port Moody, at the upper end of Burrard Inlet, afterwards known as Lot 202. Not being then surveyed land, no conveyance or grant from the Crown was issued however until 1870. By Letters Patent, dated 14th March in that year (which is the earliest conveyance in this case), for good consideration, but without any money consideration, the parcel or lot of land in the "District of New "Westminster, said to contain 150 acres, more or less, and numbered 202, "Group I., on the official plan or survey of the said District," was granted to Butler in "fee gratis." Attached by gum to the Letters Patent, but not in any manner alluded to in the body of the conveyance, is a map or plan, assumed to be a tracing (but it is not an accurate tracing) taken from the said official plan or survey.

This official plan was plotted out and constructed in 1869-70 by a Mr. Launders, employed by the Government, at the request of Butler and Murray, another ex-Sapper who had taken up a contiguous piece of land. Launders plotted it out from survey taken by himself in 1869. The plot in question is on the tracing annexed to the said Letters Patent, coloured red and numbered 202; and the two adjacent lots to the east and north, numbers 201 (Murray's lot) and 203 respectively, are also indicated and numbered. In this official plan there is an apparent attempt to correct the traverse of the coast line on the north side of these two lots by adding a red ink line, when or by whom added does not appear, but I take it to be a manifest addition to Launders' original official plan, though possibly inserted afterwards by himself. I shall mention presently an inaccuracy connected with this alteration.

On the 28th July, 1873, Butler, in consideration of $25, conveyed the said land to the present defendant Clarke in fee, by the description of "all that "certain piece or parcel of land *known as* and numbered on the official plan

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"of [&c.,] as Lot 202, Group I., in the District of New Westminster." No mention made of any acreage.

It was incidentally mentioned that Butler in 1873 had long been looking for a purchaser at $25 before he could find one, and that Lot 202 is now worth upwards of $150,000.

The above Letters Patent of the 14th March, were duly registered, under the Mainland Act, on the 6th April, 1870. The conveyance by Butler was duly registered, under the general British Columbia Act, in August, 1874, as an absolute fee in favour of Clarke. Little or nothing turns on the registration however. There is here no question of title; *i. e.*, who is entitled under these deeds; the defendant is entitled to all Butler's rights, whatever they may be, and to no more. He may possibly, however, have acquired other rights as against the Crown, and subject himself to other equities towards other parties in consequence of the subsequent acts and dealings in the Land Office, in which all parties may be contended to have acquiesced, and of which he took advantage.

In order to understand the method pursued by Launders in his survey, and the result of his work, it is necessary to commence with his work on the contiguous lot eastward, viz., lot 201, belonging to Murray, Launders' survey being occasioned in the first place by the delimitation of these two lots. Beginning then with 201 he found an old post on the coast line marked 190, Section I., which I shall call "A." This is assumed, I take it, by all parties to be the north-east corner post of Murray's land, known as Lot 201; from that post Launders started due south 33 chains, fixed a post there, which I shall call "B," and marked it 201, G. I., indicating that a back line was to be drawn from B 48 chains in length due west. This line he evidently intended for the southern boundary of Lot 201; but he did not actually run this line. He then regained the coast of Port Moody and traversed it westward till he came to the boundary between Murray's and Butler's, where he fixed a post, which I shall call "C." This he also marked 201, G. I. From C he ran a line due south, according to his field-notes, for 23.70 chains, where he put up the post, which I shall call "D," marking this again 201, G. I. I cannot doubt but that he intended to fix the four corner posts of Murray's land. From D he indicated, but did not run, a line due east for 48 chains It is quite clear that he deemed this line would coincide throughout its length with the back line indicated as to be run west from B, that B D in fact would be due east to west, and was to be the southern boundary of Lot 201. Having thus fixed D, Launders returned to C, traversed the coast for about 35 chains, where he erected a post not marked, but which I shall call "E;" it is on the frontier between Lots 202 and 203, and is not now in dispute. Thence he ran a line due west 20.70 chains, where he erected a post marked 202 and 203, Group I., being at the north-west corner of 202. I shall call it "F." About this post again there is no dispute. From F, continuing his survey of 202, he ran a line due south for a distance of 37.50 chains, according to his field-notes, and put up another post which he marked 202, G. I., I think clearly intended by him as the south-western corner of 202. I shall call this post "G." From G he indicated, but did not run, a line due east 48 chains, which was, I think, to be the southern boundary of Lot 202. This survey of Launders' in 1869 appears only to have extended to a single

row of lots along the south coast of Port Moody. From these notes Launders constructed the official plan mentioned in Butler's Letters Patent. This plan clearly shows that the intention of the Surveyor, which he supposed he had carried into effect, was that the three posts G, D, and B, were in the same right-line, and were on a due east and west parallel; whereas G, D, and B, are not in the same right-line, and neither G D nor D B is a due east and west line. These errors were not suspected till 1876-77. Up to that time Group I. (one) had only been partially surveyed. Between the single row of lots surveyed by Launders and the surveyed land bordering the Fraser River on the south, an unsurveyed lot existed, till the Government, in 1876, having determined to connect the two sets of lots, Captain Jemmett was instructed to survey the land for that purpose, beginning from the lots next from Fraser River and proceeding northwards. On approaching Port Moody the first of Launders' posts which he discovered was the post G, but when he proceeded, according to the directions in Launders' field-notes, due eastward for 48 chains for the southern base-line of 202, Captain Jemmett found that he intersected the line C D, not at D as the official plan seemed to indicate, but about six chains to the north of D, at a point which I shall call "Y." It seems to have been taken both by Captain Jemmett and at the Land Office as indisputable that G Y was at that time (March, 1877) the true southern boundary of lot 202; and, indeed, that would seem to be so according to one part of Launders' field-notes. But Launders' work is, in a great many instances, quite self-contradictory. However that is the passage in the field-notes on which the Land Office thought proper to rely. But Captain Jemmett also found other errors in Launders' survey. The base-line G Y would give to Butler (or Clarke) not 150 acres but only 141 acres as the area of Lot 202; Captain Jemmett suggested, therefore, an entirely new base-line for 202, viz., to neglect entirely the posts G D, theretofore deemed its two corner posts, as well as Y, the constructive corner post, and to give 202 a new base, *y d*, two chains further south than G D, thus adding a strip about two chains wide to Lot 202, which, on a length of 48 chains, would give very nearly the additional 10 acres of surface required to make up quantity of 150 acres mentioned in the grant to Butler. This suggestion was ultimately adopted at the Land Office. The new line *y d* was run; and it seems to have been taken for granted at the office that thereupon, without any notice given by them to Clarke (who was then the owner of Lot 202), and without any conveyance by the Crown to him of this strip, or any abandonment or re-conveyance by him to the Crown of any land which, beyond this strip, might be properly held to have been included in the Letters Patent to Butler, Lot 202, with its new boundary, and, as it appeared, not in the official plan of 1870, but in the altered plan of 1877, was vested in Clarke, in fee, and that he was confined to that new boundary. I have not been able to find any sufficient grounds for such an opinion. Clarke of course has all the rights conveyed to Butler. Butler took (14th March, 1870), under the provisions of the "Land Act, 1865," and not subject to the powers given to the Chief Commissioner of Lands and Works by sec. 10 of the "Land Act, 1870," enabling the Chief Commissioner by subsequent survey to alter, apparently, previous surveys, whatever that section may exactly mean. But the modifications suggested by Captain Jemmett did not rest here. Finding that B D,

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the southern boundary of 201, was also out of the true east and west direction he proposed to rectify this also, and to run a true west line from B to strike the prolongation of C D at a point which I shall call "Z," and so give a new south-westerly corner for 201. This also seems to have been approved by the Land Office; and it seems again to have been assumed that without any further conveyance or ceremony the triangular strip B D Z became a constitutent part of 201; at all events that Z was thenceforth the true corner post of 201. The connecting surveys from the south were then (1877) completed by Captain Jemmett, whose surveying work, both as to distance and direction, appears to me on the whole evidence to be as trustworthy as perhaps the roughness of the surface permits.

Among the lots in the connecting survey is the Lot 376 lying to the southward partly of Lot 201, partly of lot 202. This lot was, on the 20th May, 1878, pre-empted by the plaintiff, who appears to have entered and improved, and ultimately, by grant from the Crown, dated 13th January, 1881, in consideration of such improvements and of $5 in money, this piece of ground was sold to the plaintiff in fee, by the boundaries as determined and laid down in Captain Jemmett's survey, viz., as "more particularly described in the map or plan annexed thereto," which map is a tracing from Captain Jemmett's survey.

I think it was admitted that Captain Jemmett's work on the southern boundary was not officially communicated to Clarke by the Land Office; but the general result of it was mentioned to him by the plaintiff Johnston about or before the time of the latter's pre-emption, and it seems to have been fully known to and adopted by the defendant before the 22nd January, 1880, nearly twelve months before the date of the plaintiff's grant from the Crown of Lot 376; for on that day the defendant deposited at the Land Registry Office a plan showing the greater part of Lot 202 laid out in streets and town lots according to a private survey made by his directions, in which he implicitly follows Captain Jemmett's southern boundary of 202, as nearly as I can measure. This map was deposited as a map of a "part of" Lot 202, and so in fact it is; for a strip along the northern boundary of about three acres is omitted, but all the rest of Captain Jemmett's 202 is included. The defendant asserts that the description of the map as of "part of" Lot 202, gave sufficient intimation to all parties in 1880 that he reserved his right to claim also to the south of Captain Jemmett's lines. If that plan had exactly covered the whole of Captain Jemmett's lines, the word "part" might have intimated a claim by the defendant to overlap somewhere or other those lines, though in what direction would be uncertain. As it is they intimated no intention to overlap those lines at all. But, besides, the defendant had at that time (1880) full notice of the plaintiff's claim to 376. According to Captain Jemmett's survey, 376 had no other known boundaries. In January, 1881, Lot 376 was actually conveyed by the Crown to the plaintiff, and duly registered, expressly according to those boundaries, and still the defendant gives no sign for nearly three years. I may say at once that the full claim of the defendant to have the line Z X, cannot, in my opinion, be supported for a moment. He may claim according to the plan of 1870, but then he must adhere to that plan. He may claim according to Launders' field-notes, but then he must not contradict them. He may claim according to Launders'

work on the ground, but then he must not contradict it; he may of course explain it; or, lastly, he may claim according to Captain Jemmett's lines. I do not mean at all that he has the option to take which he chooses. But he may not, in the expressive phrase of Scotch law, approbate at once and reprobate any of these schemes. Neither is it, in my opinion, capable of being maintained that the fact of a common corner post for the two lots is an ineradicable element in the survey. It is by no means clear that the Land Office had in 1876-77 any right or power whatever to move a corner post of land which they had once sold. But whatever the power, the defendant's argument cuts both ways. The intention of the Land Office in 1877 that Z should thenceforth be the corner post of 201, is not a whit clearer than their intention that *d* should thenceforth be the corner post of 202. Would it be arguable that therefore 201 was thrown back to *d*? In fact it seems pretty clear that all the Land Office wished was to retain the acreage of land proper to each grant, and at the same time to make the boundaries run true to the cardinal points; and to effect that it might well be necessary to shift the corner of one lot without shifting the corner of the adjoining lots, or to shift the corners in different directions. Whether the Land Office had the power to do this without consent or acquiescence of the owners is another question. If not, that merely shows that they could not then correct the deviation from the true east and west line in lots already sold; which surely for any practical purpose was utterly unimportant.

Mr. Launders' work, which resulted in the construction of the official map of 1870, is, as to Lot 202, in this unfortunate predicament. If you take the work on the ground it is very far from being clear, unless you refer to the final official plan. With the assistance of part of that plan it is sufficiently clear. But it is erroneous, and can by no process be made to coincide with the plan as a whole. If you take the field-notes alone they are tolerably clear, but then they agree neither wholly with the work on the ground, nor at all with the official plan; nor do they carry out the instructions to include 150 acres in that lot. And if you take the official plan of Lot 202, as drawn by himself, it agrees neither with the field-notes, nor with the work on the ground, nor with the ground itself; and it includes upwards of 170 acres of land.

When we find ourselves thus obliged to reject a good deal of a Surveyor's work, we ask what it is that he might most easily miscalculate, retaining what he could scarcely have been mistaken about. Now a Surveyor may easily err in plotting out his work from a field book. In making the entries in his field book he may easily err in measuring distances and in calculating the true astronomical points of the compass.

But he can hardly fail to know what he intends to do when he drives in a corner post. And when we consider the purchaser, the same result is still more clear. He very probably learns nothing from the official plan, except the official number of his lot; and this is in fact all that Butler's Letters Patent refer to. The field-notes a purchaser has no opportunity of seeing. He is not likely, therefore, either to be led into error or to form any opinion concerning his land or its boundaries by either the official plan or the field-notes.

What he sees on his ground, if he ever takes so much interest in it as to visit it, are his corner posts. Therefore I reject both the field notes and the plan alleged to be (but it is not so by any means) correctly plotted from those

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field notes (*e. g.*, the length of the western boundary of Lot 202 is on the plan about 45 chains, but according to the post found by Captain Jemmett the distance is only 37.50). I reject them whenever they contradict the work on the ground. I admit them so far as they are consistent with it; and in one point, certainly, the plan helps us to see more clearly what the work on the ground was intended by Launders to indicate, viz., that the post D was to be common to both Lots, 201 and 202. With that knowledge going on the ground, it is manifest that 202, as Launders intended it to be on the ground, would be the sort of trapezoid inclosed between four right-lines joining C, D, G, F, and E, and the sea-coast from C to E. I should feel disposed to say, therefore, in the absence of argument on behalf of the Crown (apart from the doctrine of estoppel), that that is the piece of ground which passed to Butler under the Letters Patent of 1870; and Clarke takes by his conveyance Butler's land and nothing else. It is to be observed that the map annexed to Butler's grant is not referred to in the grant in any way as a map usually is "for further or more full description," or words to that effect. If it were so referred to, and if Butler were bound by the dimensions in that map, which professes to be drawn to scale, it would very effectually disprove Clarke's claim to the post Z; for Launders has been tolerably accurate in this respect. That the line C D on the ground corresponds very closely, both in direction and in distance, with the eastern boundary of 202 on the map, both on the official plan and that annexed to Butler's grant, and certainly does not extend nearly so far as Z.

The whole question discussed has been as to the southern boundary of 202, whether it shall be taken to be *g d* or Z X, as against the plaintiff Johnston.

In my opinion Z X claimed by the defendant is a wholly unauthorized line not to be supported by argument; he must either claim according to the plan of 1870, or, if he allege that plan to have been modified by the subsequent acts of the Land Office, he must take those modifications as a whole. Z X therefore I reject. But there are three other lines—G Y, *g d*, G D,—as to which I have considerable doubt. If matters stood now as they stood in 1873, or even in 1877, I should feel disposed to think Clarke entitled to the line G D; certainly when Clarke first took from Butler, his line must have been either G Y or G D. There was no other possible line in Launder's work, or field-notes, or map. I incline to think Clarke could have claimed G D. Since the new official map of 1877, however, and the sales under it, I think that Clarke is estopped, as against the plaintiff Johnston, from claiming any land to the southward of *g d*. Even now he takes no steps to oust Johnston from his continuous occupation, except the obvious counter-claim in this action. He has not only acquiesced in the new line *g d*, as determined by Captain Jemmett, but he has laid claim to land which only that line would give him; for he has laid out in his original plan of 22nd January, 1880, parts of several lots to the southward of any frontier he could have claimed prior to 1877, or otherwise than according to Captain Jemmett's survey; lots which I understand he has sold to purchasers. Having thus adopted this line for his own purposes, after he knew that the plaintiff had purchased under it, I think he cannot as against the plaintiff be heard to treat it as a nullity.

And without deciding anything between any other possible claimants, I think the plaintiff is entitled to the relief prayed against the defendant.

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SEA *v.* McLEAN AND ANDERSON.

Vendor and purchaser—Specific performance—Mistake.

Defendants, trustees under a will containing a power of sale "to sell such portion of "his real estate as in their discretion should think necessary." "Some 60 acres, more or "less, of section 78," were offered for sale, but two only of the three boundaries of the lot were defined in the particulars and conditions of sale. At the sale the Auctioneer produced a map showing the property offered for sale and marked 60 acres, but stated that the exact contents of the land and the amount to be paid would have to be ascertained by a survey at the joint expense of the vendors and purchaser, but bids would be received per acre.

Plaintiff was the highest bidder at $36 per acre, and the subsequent survey showed that the lot contained 117 acres.

Held, that the plaintiff was entitled to a conveyance of the 117 acres at that price; and

Held, that the ignorance of the defendants as to the exact acreage of the lot was not such a mistake as entitled them to relief.

At the trial before the Chief Justice and a Special Jury, the Jury found the amount of damages the plaintiff would be entitled to in the event of a decree for specific performance being refused, and also that the Auctioneer was authorized by the defendants to sell more than 60 acres.

10th July, 1884—*D. M. Eberts* and *Charles Wilson* for the Plaintiff, moved for judgment, and cited—

McKenzie v. *Hesketh* (L. R. 7, Ch. D. 682); *Gregory* v. *Migell* (18 Ves. 328); *Chattock* v. *Muller* (L. R. 8, Ch. D. 177); *Cottingham* v. *Cottingham* (C. L. J. 131); *Nolles* v. *Edwards* (L. R. 5, Ch. D. 379); *Weekes* v. *Gallard* (21 L. T. 655); *Durham* v. *Legard* (34 Beav. 611).

M. W. T. Drake, Q. C., *J. R. Hett*, and *J. P. Walls*, for Defendants, cited—

McDonell v. *McDonell* (U. C. 21, Chy. 342); *Beauchamp* v. *Winn* (L. R. 6 H. L. 223); Sugden V. & P. 138, 205; *Earl Durham* v. *Legard* (34 L. J. Ch. 589); *Harris* v. *Pepperell* (L. R. 5, Eq. 1); *Garrard* v. *Frankel* (30 Beav. 445); *Hill* v. *Buckley* (17 Ves. 394); *Crompton* v. *Melbourne* (5 Sim. 353); Fry Spefc. Perfce. 497, 498, 481; Snell's Equity, p. 468, 476; *Baxendale* v. *Seale* (19 Beav. 601); *Falcke* v. *Gray* (4 Drew & Sm. 651); *Talbot* v. *Ford* (13 Sim. 173); *Wedgwood* v. *Adams* (6 Beav. 600); *Tildesley* v. *Clarkson* (30 Beav. 419); *Bowen* v. *Cooper* (2 Hare 408); *Bridger* v. *Rice* (1 Jac. & W. 84); Fry Spefc. Perfce. 191, 200, 324, 355; *Hudson* v. *Bartram* (3 Madd. 440); *Honeyman* v. *Marryat* (21 Beav. 14, 24); *White* v. *Cuddon* (8 Cl. & F. 776); *Hoghton* v. *Hoghton* (15 Beav. 279).

BEGBIE, C. J.:—

This is an action for the specific performance of a contract for the sale of land by auction, and for damages by reason of the non-completion of the contract.

The testator, Robert Anderson, by his will, dated 24th April, 1883, devised and bequeathed all his real and personal property in trust to the defendants,

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whom he also appointed his executors. By a codicil, dated 5th June, 1883, he empowered his said trustees "to sell such portion of his real estate as they in "their discretion should think necessary" to raise money for payment of mortgage and other debts. The testator was in his lifetime seised of Section 78 in Victoria district, which lies next, westward from, Section 77, belonging to Mr. Rowland, and is traversed by two roads, known as the Burnside Road and Carey's Road: but he had in his lifetime sold off a portion of the section south of Burnside Road, and also a corner piece north of Carey's Road; dying seised of all that part of Section 78 which lay between the two roads, and also of part of Section 78 lying south of Burnside Road. In November, 1883, the trustees determined to exercise their power of sale for the purpose of paying off debts, and they caused accordingly an advertisement to be issued, announcing that they would offer on the 30th November certain land by the following description: "Some 60 acres, more or less, section 78, Lochend "Farm, Victoria District. The property to be sold adjoins Mr. Rowland's "land, and has a frontage on the Burnside Road and also on Carey's Road." This advertisement was first published on the 17th November, and thence from time to time till the 30th November, the day of the auction. At the sale a map was produced showing all that part of Section 78 which lay to the north of the Burnside Road (including the said corner north of Carey's Road of about three acres); the whole coloured pink uniformly and marked 60a., more or less. To this plan a copy of the above advertisement was annexed. The three acre corner piece, however, it was then stated, was not for sale. The Auctioneer at the sale stated that the vendors did not know the acreage, and that therefore a survey would have to be made at joint expense of vendor and purchaser. This survey was merely to ascertain the acreage however, not to draw any boundaries. The biddings were so much an acre. The plaintiff was declared the highest bidder, and a contract of sale signed accordingly. Twenty-five per cent. deposit was to be paid in cash; this was estimated, and paid by the plaintiff on 60 acres, at $540 (viz.), twenty-five per cent. of $36 per acre (the price bid), that being the only quantity referred to in the particulars. All parties seem to have been aware at the time of the sale that the pink tract between the two roads would probably measure more than 60 acres. The plaintiff had walked over the ground and thought it would contain at least 90 acres. The vendors felt sure that it was more than 60 acres, but how much more they estimated it at was not in evidence. Mr. McLean thought the whole residue of Section 78 retained by testator at his death was over 100 acres. A survey having been made after the sale, and the whole quantity coloured pink having been ascertained to be 117 acres, the plaintiff claimed the whole at the auction rate of $36 per acre. The defendants, alleging that the quantity sold was 60 acres more or less, and that the latter words cannot reasonably include so enormous an increase as 57 acres additional, insist that what they intended to sell, and what alone the plaintiff can claim, was and is a strip of Section 78, being the rough part of the section conterminous with Mr. Rowland's land, abutting north and south on the two roads, and extending eastwards for such a breadth, then unascertained but easily ascertainable, as to include exactly 60 acres, within a line drawn parallel to Mr. Rowland's boundary, and they in their pleadings offer a conveyance of such a strip. The plaintiff contends that this is quite inconsistent with the

description in the printed advertisement of the land to be exposed for sale, with the map displayed at the sale, and the other circumstances occurring at the auction; and even with the views and intentions of the executors in holding the sale at all, as stated in evidence before me by the acting executor. They estimated within a hundred or two of dollars the amount of debt which the personal estate was insufficient to satisfy, and to meet which they had determined to sell some of the land. They could not of course foresee exactly the price which the land would fetch per acre at auction; they expected between $35 and $40, and judged that about 60 acres at that price would realize sufficient cash for their purposes. It is quite impossible that with such views and in that state of modified uncertainty, their intention was or could have been, as now alleged in the statement of defence, to sell exactly 60 acres, neither more nor less. In fact the advertisement informs intending purchasers that the defendants did not intend to limit themselves to a precise quantity of 60 acres. Mr. Leech was the Surveyor employed to measure the land sold; and after the auction, and before he commenced to measure, he was told by Mr. McLean that if the land sold did not amount to 60 acres, the trustees would have to sell, and would sell, other portion of Section 78 lying south of the Burnside Road. The map produced at the auction would lead bidders to the same conclusion as the advertisement, and would even, *primâ facie*, have led to the supposition that the small corner piece north of Carey's Road was included in the land offered; being coloured pink, uniformly with the rest. That corner, however, was admittedly excluded by the Auctioneer; but the exclusion of this small piece, and of that alone, from the coloured part of the plan, would, of course, create all the stronger impression that all the rest of the pink portion was offered. The admitted statement by the Auctioneer, before the sale, that the exact contents (not boundaries) of the land sold would after the sale have to be ascertained by survey at the joint expense of buyer and seller, is of course quite inconsistent with the notion of any certainty as to the acreage before or at the time of the sale.

Before the Surveyor entered on the measurement, his appointment was acquiesced in on the part of the defendants, who were perfectly aware that he meant to measure, and did measure the quantity, in the whole 117 acres, and they have actually paid him on account of that work. It is not until after he had completed his work, and informed the parties that the whole quantity in the land coloured pink between the two roads amounted to 117 acres, that the notion of fixing a boundary to include a strip of exactly 60 acres is for the first time enunciated, and the defendants then for the first time employed the same Surveyor (whose calculations are not impeached) to calculate and stake off such a strip. The whole of this conduct on the part of defendants is utterly inconsistent. If they had intended to sell only the rough portion, which now turns out to be only about half of the pink portion, how could Mr. McLean have informed the Surveyor, when about to commence his work, that if there was not enough land above the Burnside Road, they would sell, in addition, the residue of Section 78, south of the Burnside Road? If they had intended the Surveyor to measure off only a strip containing 60 acres, why did they sanction his surveying the whole of the pink part, and actually pay him for that survey? Would not Mr. McLean have told him immediately that he had entirely misunderstood the work he had to do? That he was

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employed to settle a new boundary, not to measure the quantity lying within the old bounds? It would have been simple and straightforward to state in their advertisement that they intended to sell only the rough portion; and it might well be doubted whether the vendors could now take advantage of their reticence. But after all, the question now to be decided is not at all what schemes were more or less definedly passing through the minds of the vendors; but the question is, did they, on the whole transactions connected with the auction, make an offer capable of a distinct meaning, and did the defendant accept it in that meaning? And I think they did. The offer was of the Lochend Farm, abutting on three well-defined boundaries, which the vendors, apparently, estimate to contain some 60 acres, more or less. The purchaser thought it larger, but whatever it might measure, he bid for it, and bought it.

Where a promisee actually understands a promise in any particular sense, the promiser must perform it in that sense if the words of the promise and the surrounding circumstances, so far as known to the promisee, justify the promisee's belief. If the words of the promise are susceptible of two interpretations, the promisee, not the promiser, has the right to choose whichever he likes best. There are qualifications to this general rule which do not arise here.

In fact there does not seem any ambiguity in the words of the advertisement. They seem really capable only of one meaning, though they might express it more clearly. For instance by transposing the lines, using the very same words in each line, it might have stood as an offer of "Lochend "Farm, Section 78, Victoria District, some 60 acres, more or less, adjoining "Mr. Rowland's land, and fronting on the Burnside Road and Carey's Road." And I believe this is the real meaning of the advertisement; and was, prior to and on the 30th November, the real intention of the vendors. They intended to sell all that piece of land lying within well defined boundaries but of uncertain extent,—they judged, some 60 acres. Possibly, if they had known its real extent, they would have formed some other intention, and then they might have offered something else; but in their state of ignorance I think they intended to make, and did make, this offer. The defence is founded on alleged mistake; but this is not so much a mistake as ignorance of facts on the part of the defendants resulting from their own carelessness in not making use of the means of information within their own power (*Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 231), and a misrepresentation made by them in that state of ignorance, by which, they allege, the plaintiff was misled. The plaintiff says he was not in fact so far misled as defendants suppose; but however that may be, the plaintiff contends that the defendants cannot take advantage of their own misrepresentation to deprive him against his will of the benefit of his contract. The plaintiff felt sure that there was far more than 60 acres, viz., more than 90. There was not, strictly speaking, a common mistake or ignorance. Each party indeed was ignorant, but not equally ignorant of the acreage. On the 17th November, indeed when the advertisement first appeared, both parties were equally ignorant. Before the 30th November, the day of the sale, the plaintiff had informed himself to some extent. Is there anything against conscience in his contracting, having so informed himself? I cannot see it. He may well have supposed that the

defendants had equally by that time discovered the misdescription, but were ready to let the sale go on, as he himself was. As to the intention which the defendants now say they had (viz.), to offer merely a strip of Lochend Farm, containing exactly 60 acres of the roughest portion only (viz.), a strip of the land coloured pink, extending from road to road, conterminous with Mr. Rowland's land, and bounded westward by a straight line parallel to one of Rowland's westerly boundary lines, I think that the words of the advertisement, so far from expressing it with reasonable clearness, are by themselves alone quite incapable of conveying any such notion to any person reading the advertisement.

Then it was said the inadequacy of price was so great as of itself to afford ground for relief; especially on a sale by trustees. This objection might, perhaps, be urged with more force by the parties beneficially interested. But if the trustees be admitted to represent the beneficiaries, or if the vendors were not trustees, it is to be observed that mere inadequacy of price is no ground for relief, unless it be connected by evidence with the conduct of the purchaser, so as to make it unconscientious in him to hold the vendor to his contract. Otherwise no man could safely make an advantageous bargain. There is nothing of that kind hinted at here, much less proved. And beyond that, I am not at all of opinion on the evidence that there was any inadequacy of price at all. The reserved price was fixed, presumably after consultation with experts, at $35 per acre. And for the reasons already given, I am quite convinced that this was meant to extend to all the land then contemplated by the trustees as about to be offered, *i. e.*, to all coloured pink on the map. The highest offer was the plaintiff's—$36 per acre. How is this shown to be insufficient? Lord Eldon's observation is to be recollected—"the value of a thing is what it will fetch." A witness was produced who said that some of the land coloured pink was worth $100 per acre. That opinion did not extend to the whole of the 117 acres. The witness spoke of the fertility of a small portion. What we have to consider is, what was on the 30th November the fair selling price per acre for the lot then at auction; and the witness had no experience of such sales, nor spoke of such a sale. Another witness said he would now give $45 per acre. But I observe that this witness attended the sale on the 30th November; he said he went there to buy, but he would not then go beyond $25 per acre, and stood by and saw it knocked down at $36. And the witness Pridmore, who owns the adjoining land south of the Burnside Road, which he would naturally not wish to depreciate, advised the plaintiff before the sale not to go beyond $25 per acre. The whole theory therefore of inadequacy of price, so far as the evidence now produced goes, falls completely to the ground.

As to authorities, many were cited during the argument, of cases where there had been an error as to acreage, but none appear to me to have any material bearing upon the contention of the defendants in this case, or to support the meaning which they place upon the contract, viz., that it was for a strip as above supposed. The cases cited were all of this sort. A field or an estate was sold, the boundaries of which were not in dispute; but there having been an error, shared both by vendor and purchaser, as to the acreage, the question is shall there be specific performance or not? In all such cases, the acreage can always be exactly ascertained from the boundaries.

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This is the first case, to my knowledge, in which it was ever seriously contended that the boundaries of land could be ascertained by reference solely to the quantity assumed to be contracted for, without any stipulation as to shape or apportionate dimensions. I do not say that no contract ever could be made on which the boundaries might be ascertained from the acreage. It is often perfectly possible, *e. g.*, where there is a grant of alternate blocks of 640 acres, or of 20,000 acres, in squares, north and south of a railway line. But then there must be a base to measure from, and a geometrical figure to lay down on the surface from that base; both which are absolutely wanting here. It would seem just, if a vendor sells 60 acres indefinitely out of a section containing 120, that the purchaser and not the vendor should select the particular land to be conveyed (2 Co. 36a, Hob. 174). Thus here, if the vendors had merely sold 60 acres, part of Lochend Farm, the purchaser would probably be entitled to follow the boundaries all round, or take a fertile spot where he thinks fit, as if a man sells 50 sacks of flour out of 500 in his warehouse, the customer may go and select which 50 sacks he likes, and is not obliged to put up with such as the seller chooses to allot. The defendants therefore are driven to contend that because they have made a mistake in the acreage of the pink part of the map, they are entitled to rescind the contract. But this is not the sort of mistake, nor do the vendors occupy the position, which will induce a Court of Equity to interfere and annul the contract. For such an interference the mistake must be common to both parties; and I do not think this was. Or, if the error be the vendors' error only, it must be such as the vendors could not by reasonable diligence have ascertained. The vendors have not taken the very commonest preliminary precaution. There must in general be some circumstance in the relationship of the parties or otherwise showing that it would enable the plaintiffs to acquire an undue advantage. Nothing of the sort can be insinuated here. A man cannot take advantage of his own wilful ignorance; for it is that, rather than mistake. He cannot offer anything, no matter what, at auction, and if after sale examining it for the first time, he repents his bargain, cry off, because he did not choose to examine before sale. *Vigilantibus subvenit lex.* To call this wilful ignorance *mistake*, and annul contracts on such grounds, would be merely to encourage negligence. [See Story Eq. Jur., Chap. V. ss. 146-151.]

The only reported case which in its circumstances seems to govern this, is *Price* v. *North* (reported 2 Y. & Coll. 620, Exch. Cases).* But those reports are not accessible. It is, however, mentioned more than once by Lord St. Leonards, who gives it a modified approval. And in one place he states it pretty fully. Seven fields had been sold, "said to contain 14 acres more or less. Errors "of description were not to vitiate the sale, but to be the subject of com- "pensation." The 14 acres were customary acres, equal to 27 statutory acres. A bill by the vendor to enforce specific performance with compensation for the double acreage was dismissed. Lord St. Leonards seems disposed to acquiesce in that decision, remarking that it would be hard to compel a purchaser to provide and pay double the cash, or to take double the land, which he had been led to contemplate; but he adds—"A purchaser "could doubtless enforce such a contract on payment of the additional price." This dictum of a text writer is the only authority I have found on the subject;

* Contemp. Rep. in 7 L. J., Ex. Eq. 9.

but it seems directly in point, for here, the bidding having been per acre, exact compensation can be ascertained; and the text writer is Lord St. Leonards. It is even a stronger case than the present; for the plaintiff does not ask completion of the contract with a compensation, which would be a variation of the contract, but a specific performance of the contract, exactly as it stands (Sugd. V. & P., Chap. VII., sec. 1, 13).

The Earl of Durham v. *Legard* (34 Beav. 612) seems, however, to be against this dictum of Lord St. Leonards. This was a suit by a purchaser for specific performance of an agreement, with compensation in proportion to the deficiency of acreage. The contract was for sale of the K. estate described as containing 21,750 acres; the rental being accurately stated. The actual contents were only 11,800 acres; chiefly moorland, only enjoyable for shooting and fishing. The contract price was £66,000. The purchaser sought to enforce a purchase at £36,000, calculating the compensation, not on the loss as an investment, but on the acreage. Lord Romilly thought the evidence showed a clear mistake—that neither party knew in fact what the "K. estate" meant; that the compensation sought, £30,000 deduction from £66,000 was manifestly improper, the rental having been accurately stated; that proper compensation could not be ascertained, and that the purchaser must either accept the contract as it stood, or rescind it. It seems to me that compensation was asked on a wrong principle. The rental having been truly stated, the purchaser was, as an investor, entitled to no compensation at all. It does not seem to me impossible to estimate the difference in value as a shooting ground between 22,000 acres and 12,000. There appears to have been no stipulation in the contract for compensation for errors of description. The nature of the contract and of the suit was evidently very different from the present in each particular, differing in favour of the purchaser. Here, the contract price was expressly calculated by the acreage, and the purchaser does not ask, as in the *Earl of Durham* v. *Legard*, for any variation in the contract, but for its completion as it stands.

In the *Earl of Durham* v. *Legard*, the plaintiff's case was—"you say you "have made a mistake, and find you cannot give me the 22,000 acres you "promised me, but only 12,000. Well, I shall force you to give me those "12,000 acres for half the money." The Master of the Rolls refused to compel the vendor to complete on those terms. In the present case the plaintiff says to the vendors—"you say you have made a mistake, but you "can complete your contract exactly as it was made, and I will force you to "complete it. Your own conditions of sale provide a stipulated compensation "for your blunders or omissions in ascertaining the acreage."

Hill v. *Buckley* (17 Ves. 394) lays down the general rule that where there has been a misdescription as to quantity (and it was considerable in that case), completion will be directed, with compensation, according to the acreage; but in an equitable way, and with provisions that seem to have been overlooked in *Earl of Durham* v. *Legard*, where indeed only the general rule laid down in *Hill* v. *Buckley* is recited, without any regard to the principle of compensation which was actually adopted in that case. In *Baxendale* v. *Seale* (19 Beav. 601), a clear case of mistake, or rather of ignorance, common to both parties, was established; the vague terms of the contract did in reality extend to include a considerable property, which neither the defendant at the

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time of the auction intended to sell, nor the plaintiff at the auction contemplated that he was buying; and though the plaintiff was now anxious to buy, with an additional price for the additional property, Sir John Romilly refused to compel the defendant to sell property which had in fact never been contracted for. This case also, it will be seen, is very different from the present, where both parties, in my view of the evidence, knew exactly the piece of land which was bought and sold, and which was described accurately enough, except as to the acreage, of which both parties were ignorant. And the plaintiff here asks no variation from his contract, but simply to have it carried out as it stands.

Here a piece of land is put up for sale which the purchaser may fairly take as being held out in the advertisement and map to be Lochend Farm, in Section 78, Victoria District, abutting on certain definite, clearly visible lines, and containing 60 acres, more or less. The acreage is announced to be quite uncertain, and the biddings are made at so much per acre. It turns out that the whole of the land described in the map and advertisement, taken together, amount to 117 acres. The only question is whether there is such a mistake as that the vendor is entitled to cancel the contract. I do not consider that there was, properly speaking, a mistake at all; *i. e.* that either vendor or purchaser was under any error, or even uncertainty, as to the thing sold. They neither of them knew the acreage; but they were both of them aware of their ignorance on that point. The plaintiff put it at more than 90 acres. I do not know what the defendants guessed the acreage to be, but assuming that they put it at about 60 acres, that would only be a bad guess, rather worse than the plaintiff's. Fewer acres or more, nobody could mistake what land it was that was exposed for sale, and it was sold at so much an acre accordingly. I do not think it can be contended that the vendor's offer in his statement of defence comes at all within the terms of the description of what he offered for sale, and therefore the purchaser is not bound to accept that offer.

I feel compelled to say that I do not think the vendor can recede from his contract, or take advantage of the state of ignorance in which he has chosen to repose. I observe that the defendants (who are executors, with a power of sale) do not allege that the specific performance of this contract would be a breach of trust, and it is clearly within the power in the Codicil.

The question of the construction of the contract is for the Judge alone, and not for the jury. But it is satisfactory to find that the conclusion at which I have arrived is fully borne out by the answer of the jury to the question which, at the defendants' request, I left to them, viz., that the defendants did authorize the auctioneer to sell more than 60 acres. In fact it is difficult to see how anybody could form any other conclusion, looking to the advertisement, to the intentions and views of the defendants before the sale, as stated by them in the witness box, to the proved matters which occurred at the sale, and the instructions given to the surveyor by both parties after the sale.

I think, therefore, that the plaintiff is entitled to a conveyance of the whole 117 acres claimed by him, at $36 per acre. The title, I believe, is accepted. There will, if necessary, be a reference to settle the form of conveyance; but it is to be hoped the parties can agree as to that. The $540

will be in part payment, so the plaintiff will get no interest on that. Interest on the balance of the purchase money will be payable by the plaintiff as from the day on which the defendants notify him that he may take possession. The claim of the plaintiff for damages in respect of profit on the crops which he thinks it possible he might have raised this year if he had been let into possession when he tendered the purchase money, is far too vague and hypothetical to be entertained. He is a shipwright; he says that if he had had possession he intended to turn farmer; but I was not informed what crops he intended to put in, or what certainty of profit could be relied on. The cases of *McKenzie* v. *Corporation of Victoria*, before myself, and *Thomson* v. *Baker* (not cited), also before myself, were of a quite different character. In each of those cases the plaintiff was a farmer; the fields had been for years under cultivation; they were actually cultivated for a particular crop; and by the tortious act of the defendant, in each case, the crop failed. There was no other way of arriving at the damage, the loss to the plaintiff, except by estimating the probable quantity of crop, proving the market price, and deducting the proved expenses. The jury had to arrive at a conclusion as well as they could, but they had a good deal of evidence to rely upon. The quantity and quality no doubt were speculative. But here, there is no evidence at all; crop, cost, quantity, value of crop, are all mere speculation; and after all, the plaintiff might not have gone into farming at once,—he might have changed his mind. The plaintiff is not now entitled to the $47.50 found by the jury; he gets the land and that is his share of the cost of survey. He will, however, have the $12.50 there mentioned, without interest. The plaintiff is of course not bound to pay any portion of the expense of surveying the imaginary strip of land. The whole of the litigation has been caused by the negligence of the defendants in not properly maturing their intention, before the sale, and in not seeing that the maps and advertisement properly expressed their matured intention.

In *Whitfield* v. *Langdale* (L. R. 1, Ch. D. 72) there was a gift of the Farm containing 80 acres, "more or less." There were 175 acres, but it all passed. That was the case of a will however. But it shows that "more or less" are very elastic terms.

The plaintiff will therefore get his costs up to the hearing, *i. e.* up to today.

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February 29.

VEDDER *v.* CHADSEY.

Taxes, distress for—Concealment of material objection to the levy—Volenti non fit injuria—Costs.

Defendant, a Municipal Assessor, distrained for taxes assessed on three lots, standing in Assessment Roll in Plaintiff's name. One of these lots was the separate property of Plaintiff's wife. This objection was not pointed out to the Assessor, although the Plaintiff in protesting against the legality of the levy as to all lots, raised a number of technical objections, and as to this particular lot, claimed that the assessment was too high. The Assessor, at Plaintiff's request, seized certain cattle in preference to other articles.

Held, in an action for trespass, that this did not amount to leave and licence, and that the Plaintiff was entitled to damages.

But, inasmuch as the Plaintiff could have prevented the trespass, but did not, but rather encouraged it, with a view to an action for damages, *Held*, that he was entitled to no damages beyond the auction value of the goods seized and sold; and the Court having a discretion as to costs, each party was left to bear his own.

Murne v. *Morrison* distinguished.

W. Pollard for Plaintiff; *M. W. T. Drake*, Q. C., for Defendant.

The facts of the case are fully set out in the Judgment.

SIR M. B. BEGBIE, C. J.:—

This case has stood over in order that I might be furnished with the original authorities, of which only the results were relied on in argument, but it has been found impossible to procure the reports. However, these would probably only have affected the one-half of this case; it is very improbable that any precedent could be found for the whole of it; and as one point, decisive of the whole legality of the seizure, seems sufficiently clear, I shall not delay longer giving my opinion.

The plaintiff asks $500 damages for an alleged trespass on 16th February, 1883, in wrongfully seizing and selling certain animals, part of his stock, for $74.34, taxes claimed by the municipality of Chilliwhack. The plaintiff is a farmer in Chilliwhack. The defendant seized as collector for the municipality.

The plaintiff was assessed in respect of three parcels of land. He had raised several technical objections to his assessments. Before the actual time came for payment, he urged that one of the three parcels of land, known as Lot 267, was rated too high; and the assessment on it was reduced accordingly. This lot in fact was none of his; it belonged to and was registered at the Land Office in the sole name of his wife, Althœa, who held it in fee in her own right before and after her marriage with the plaintiff; but this fact was not stated by the plaintiff as an objection to his assessment. Other pieces of land were, at his request, entered by the collector in the assessment roll in the joint names of himself and his father, Volkerts Vedder. According to the certificates produced to me from the Land Office, these pieces belong solely to Adam Vedder (the plaintiff). However, they were assessed by the defendant

to Adam and Volkerts jointly. As to this, the plaintiff objected that as the tax was assessed against two, payment ought not to be demanded from him alone: much less levied on his sole property. The plaintiff also objected to the validity of the defendant's appointment as collector; that the assessment roll had not been prepared in due time; that due notice had not been given of the sittings of the Court of Revision, and that in fact no proper revision had ever taken place; that the collector's powers had been unduly extended beyond his normal time; that his powers of levying had not been extended at all; that due notice had not been given of the times of seizure and of sale. On these grounds, though the defendant pointed out that he would be compelled to enter and distrain (he and his bondsmen being personally liable), and even offered to forego his costs of seizure, the plaintiff finally and absolutely refused to pay; alleging that he was advised to let the seizure proceed. But he never told the collector that Lot 267 was not his at all, and so that he could not be liable for any taxes in relation to that lot: a clear, irresistible fact, from which the collector could at once have seen the irregularity of his levy. On the contrary, the plaintiff seems to have exhibited a placidity of temper which must have surprised the collector. He pointed out the stock (4 horses and a mule) on which, rather than on any other chattels, he would prefer the levy to be made, and saw four of the animals bought in by his own father at the sale, at an alleged undervalue, without attempting to borrow the money from the same relative on the same security: which would have saved all the expense and inconvenience of the levy. The whole amount of the tax claimed was $74.34. One of the animals he estimated at $200: the whole damage he lays at $500. He admits in his evidence that he acted thus in the hopes of completely avoiding payment, either by himself or his wife, of the year's taxes; and that his claim for damages was augmented in consequence of the defendant seizing all the animals which the plaintiff himself had pointed out, instead of seizing one or two only.

In one of his objects, namely the evasion of paying taxes for 1882, the plaintiff has probably succeeded. Even if all the objections taken by him before the levy should be overruled: if he had been in due time placed on the list as liable for the taxes on Lot 267; if that list should have been duly passed by a sufficient Court of Revision, held in due time, and with all proper notices; if the defendant's time had been properly extended as collector for the purposes of seizure and not for the purpose of returning his roll merely; if the defendant gave due notice of his intention to seize, of the actual seizure, and of the intended sale—(and every one of these points is, on grounds more or less plausible, disputed by the plaintiff)—the main insurmountable objection lies behind. These taxes, so far as they affected Lot 267, affected another person's land and not the plaintiff's. No laches on the part of the plaintiff, no innocent ignorance in the defendant, can justify entirely the distraining of one person's goods to pay another person's debt. The Ordinance goes a great way in affirming the definite incontestability and binding force of the assessment roll, if all the ceremonies as to notices, revision, etc., be observed. But it does not go so far as to say that the roll even where revised, is to bind a non-proprietor so as to make his goods liable to pay the tax which might and ought to have been assessed on the actual proprietor of land, being a different person. The statutes relied upon in *Murne* v. *Morrison*, which aim

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at preventing any impeachment of a sale of goods distrained on, refer to Government taxes, and not to taxes due to a municipality. It is unnecessary to inquire whether they would cover such a case as this. It becomes therefore quite superfluous to inquire into the validity of the technical objections, although these present perhaps the points upon which the municipality would more especially desire the opinion of the Court.

Part of the tax being in my opinion not due from the plaintiff, the whole levy is bad. The plaintiff is suing in trespass. And a trespass cannot be divided (except in such cases—*e. g.*, as where a bailiff having seized several casks drinks some beer out of one cask, and was held to be a trespasser *ab initio* as to that cask). It was urged therefore that this levy was altogether bad; and that the plaintiff must recover his whole loss. On the other hand, the defendant suggests (not by his pleadings, but in argument) that here no case of trespass is established: that the plaintiff acquiesced in the seizure, and indeed pointed out the animals which he wished defendant to seize; and *volenti non fit injuria*. That the plaintiff took only technical objections to the assessment roll, and never mentioned the glaring error of which he himself must have been perfectly cognizant, viz., that one of the pieces of land taxed did not belong, never had belonged, to him at all, but to his wife, as her separate estate; on the contrary, the plaintiff actively misled the defendant by objecting merely to the value placed on the land, thus treating it as his own; and that the plaintiff admittedly allowed the defendant to continue under his misapprehension, with the hope of altogether avoiding entirely the payment of any tax for the year 1882, either by himself or his wife. The defendant therefore, it was argued, had been guilty of no trespass; had done nothing that was not sanctioned, and even invited, by the plaintiff himself; and therefore, the defendant having paid the money over to the common fund of the municipality, that there ought now to be judgment for him on the trespass, and that plaintiff ought to be left to recover this $74.34 from the municipality, as being plaintiff's money erroneously received by them. The facts of the case would perhaps justify a jury in finding for the defendant, and I have the same power of drawing inferences that a jury would have had.

It is impossible to approve of the plaintiff's conduct. There is perhaps no moral duty to pay full taxes, though the daily advertisements of the receipt of conscience money in England show that, at least in that country, there is a wide-spread sense that there is such a duty. But the plaintiff has done somewhat more than merely take advantage of the collector's omissions: he has knowingly permitted him to remain in error, with the view, as he admitted in cross-examination, of evading payment of the taxes which might have been otherwise justly recovered from him or his wife. More than that; I think that the plaintiff has encouraged the defendant to commit this very trespass, with the view of afterwards instituting this litigation; as to the result of which the plaintiff says he had consulted with his counsel beforehand. The plaintiff could in all probability have stopped the levy with a word; but then, perhaps, he was not sure that the roll might not thereupon be amended, and his wife made liable; and at all events, he would lose the opportunity of bringing a successful action against the collector. But the word which would have stopped the levy was not spoken. It was not spoken when the action was first commenced, and when it might have been stopped at small expense;

it was not mentioned until the action was actually being tried before me; then, and not till then, on the 5th December last, the plaintiff says that Lot 267 was not and never had been his property, but his wife's. Again, he admitted on cross-examination that one of his horses would have been ample distress, but that he suggested the taking of four or five, and that this would have the effect of increasing his claim for damages. This, coupled with the purchase at an undervalue of all the animals by his father, Volkerts, with whom he is evidently on the best terms; to such a degree that he procured, apparently, some irregularity on the assessment roll in order to procure his father a vote,—all the evidence left me under the impression, not indeed a persuasion, but a strong impression, that the purchase by the father was by arrangement with the son, the plaintiff; and that the father's alleged disposition of unrelenting sternness was of the same description as that of Mr. Weller, senior, towards his son, in somewhat similar circumstances.

There was one line of evidence which was not pressed, but which seemed to throw a disagreeable light over all this business. The plaintiff had at one time been a councillor, and even the reeve, of this unhappy little municipality; and he is so no longer. There was a lurking insinuation that petty local bickerings had caused all the difficulty. I hope this is not so. The business of construing and picking a way through the perhaps necessarily complicated Ordinances which regulate municipalities has been thrust on men who have had no special education—who lack the aid of highly trained and experienced solicitors such as wealthy corporations in England can retain as permanent advisers—who are laden with the private cares and anxieties of pressing, laborious industry, with many wants, with scanty means, with deficient communications, and with clamorous constituents in all parts of their scattered population. With good sense, mutual forbearance and candour, these civic institutions will be a real blessing, and an admirable school for higher education. Without these attributes, without the frank and willing co-operation of all parties, they will be a curse instead of a blessing.

On the grounds above stated, there would be some colour for giving judgment, as already hinted, for the defendant in this case, as having had leave or license for his alleged trespass; leaving the plaintiff to recover from the municipality the $74.34, and from the defendant the costs of levy, received by them respectively without legal right. But I think the better opinion is to hold that the plaintiff did not actually give leave and license, though he came very near it; for in fact he always denied his liability, though he did so on formal and technical grounds, which the defendant would naturally dispute, and he did not disclose the clear reason, which would have satisfied the defendant in half an hour by telegraph. The plaintiff said "If you must seize, "seize these horses; but I deny that you have a right to seize at all." The defendant therefore was legally, in my opinion, a wrong-doer, and he must replace the money which he wrongfully took. But the plaintiff has quite failed to satisfy me that he has suffered any other or further loss. As for any damage for injured feelings or such like, of course there can be none. And the plaintiff must pay his own costs of recovering back this money, which in my opinion would not have been thus taken from him but for his own misleading the defendant, both actively and passively. This litigation has been caused, not so much by the defendant's wrong-doing, as by the plaintiff's own wilful-

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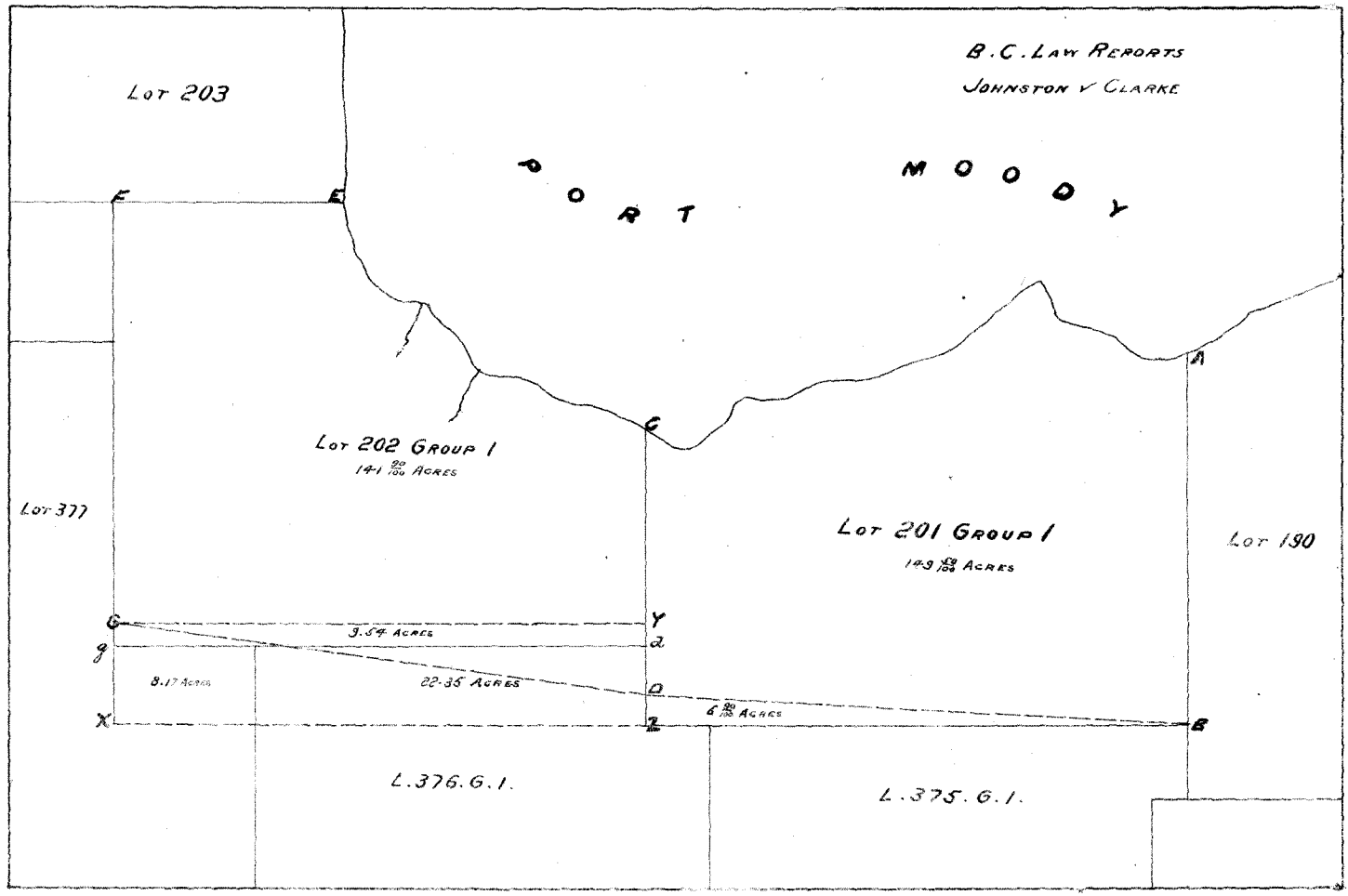
ness. A suitor is not of course bound before litigation to reveal all the grounds on which he intends to rely. But an assessment is not litigation. The defendant was not making a demand on his own account, but in his official character; and he cannot be suspected, as in the case of a tradesman suing for an account which has already been paid and for which the customer holds a receipt, of endeavouring to put any money into his own pocket. Even his costs the defendant offered, before making the levy, to forego.

There will be judgment for the plaintiff for $115, minus the amount returned to him at the time of the sale; and each party will pay his own costs. The defendant of course gets no costs, because he is in the wrong. The plaintiff gets no costs, because I think he sought and caused this litigation. He could have had, without suit, all that he now gets by suing.


B.C. Law Reports
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Lot 203
PORT MOODY
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Lot 202 Group 1
141 20/100 Acres
Lot 377
Lot 201 Group 1
149 19/100 Acres
Lot 190
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L.375.G.1.

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C. A.
1884.
August 28.

Crown Grants of adjoining Lots—Boundaries—Surveys.—Description of Land—Estoppel.

In an action for the declaration of title to a piece of land claimed by Plaintiff as part of Lot 376, and by Defendant as part of 202.

Defendant's title was derived through B., to whom, in 1870, a Crown Grant was issued, granting that Lot, "numbered 202 on the official plan, said to contain 150 acres, more or less."

In 1876-77 the Lands and Works Department having caused an official survey of the adjoining lots to be made, found the official plan by which the boundaries of B.'s lot were defined to be incorrect, and with a view to retain the acreage proper to each grant and to make the boundaries run true to the cardinal points moved his S.E. corner post four chains North, and his S.W. corner post two chains South, and without notifying the Defendant gave him, in the new official plan or survey, a new southern boundary.

This adjustment of B.'s southern boundary gave to Lot 376 the gore of land now in question.

Three years after the completion of this survey, Defendant filed in the Land Registry Office a plan of the greater part of Lot 202, according to a private survey made by his own directions, in which he implicitly followed, as to his southern boundary, the survey of 1876-77.

In 1881 a Crown Grant to Lot 376—the boundaries thereof being as determined by the survey of 1876-77—was issued to Plaintiff.

On an appeal to the Full Court from the Judgment of Begbie, C.J. (ante p. 56)—

Held (in this affirming the decision of Begbie, C.J.), that in questions relating to boundaries and descriptions of land the rule is that the work on the ground governs, and that the gore had been originally included in the grant to B., as part of 202.

Held (in this reversing the decision of Begbie, C.J.), that the filing of the map in 1880 did not under the circumstances (if at all) estop the Defendant from claiming land not included therein, and that the Defendant was entitled to the gore of land originally granted as part of Lot 202.

THIS was an appeal to the Full Court* from the Judgment of BEGBIE, C.J., reported ante p. 56.

In addition to the cases then cited, *Dixon* v. *McLaughlin* (1 E. & A. R. p. 370) was referred to. The arguments of Counsel were practically the same as in the Court below.

Davie, Q. C., for the appellant Clarke, further contending that the map deposited by Clarke was not matter of estoppel, and that it did not appear respondent had ever seen the map or acted upon it.

Drake, Q.C., contra.

28th August, 1884.—The Judgment of the majority of the Court was delivered by MCCREIGHT, J.:—

The Chief Justice intimates in his written Judgment that he should have considered that Clarke was entitled to a sort of trapezoid enclosed between four right lines, joining points C, D, G, F, E, and the sea-coast from C to E., but for the doctrine of estoppel which he seems to consider binds Clarke, in

* Present—Sir M. B. Begbie, C.J., Crease, McCreight, and Walkem, JJ.

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consequence chiefly of the deposit by him, in January, A.D. 1880, of the map in the Land Registry Office. We think, however, that he is entitled as above-mentioned, and that no such estoppel exists. The map on the face of it does not purport to be a map of the whole of Lot 202, but only of "part" of that lot, and we think it immaterial whether the map "exactly covered the whole of Jemmett's lines" or not, or, so far as the estoppel is concerned, what was the exact area which it covered.

It is laid down in *Doe* v. *Bucknell*, 2 B. & Ad. 278 (see quotation in 2 Smith's Leading Cases, p. 847) that there must not be a want of that certainty of allegation which is requisite to make an estoppel—an estoppel "not being favored by the law ought to be certain to every intent"—Co. Litt. 352 b, 303 a. "If a thing be not directly and precisely alleged, it shall be no estoppel"—Co. Litt. 352 b. These two last quotations are to be found in 2 Smith's L. C., p. 783.

Here there is more than an uncertainty as to the extent of the map, it only purports to be a plan of part of the lot, and we see nothing in the facts of the case to warrant the application of the doctrine of estoppel.

Even if the map had purported to be a plan of the whole Lot 202, we do not wish it to be understood that we should have considered that there was necessarily an estoppel, having regard to the Judgment of the Exchequer in *Freeman* v. *Cooke* (see especially the concluding part), 18 L. J. Ex. & 2 Ex. Reports, often referred to with approbation, especially in the recent case of *Miles* v. *McIlwraith* (L. R. 8 App. Ca. 120).

We think, therefore, that Clarke is entitled as the Chief Justice would apparently have decided but for the supposed estoppel, and that the plaintiff is only entitled to so much of Lot 376 as is not covered by the figures enclosed by the lines before mentioned. The Injunction should be continued, but varied by confining it to the land contained outside the quasi trapezoid.

As the appellant has only partially succeeded in his contention, we think there should be no costs of the appeal.

Our brother CREASE concurs in this conclusion, but is not responsible for the reasons which we have given.

BEGBIE, C.J.:—

In this case there is no difference of opinion between the members of the Court as to the tract of land which, apart from the doctrine of estoppel, or rather of election, belongs to Clarke. In the inextricable confusion between (1) Launders' field notes; (2) the map drawn by Launders, and called "official," ostensibly based on those notes, but not at all agreeing with them; and (3) the posts which the same surveyor fixed in the ground, we are all of opinion that reason and convenience require preference to be shown to the work on the ground, which is the rule sanctioned apparently by statute in Ontario. Those posts show the boundaries of what Butler acquired from the Crown in 1867, and Clarke acquired from Butler in 1874. But the other members of the Court think that that is what Clarke is still entitled to. I have the misfortune to disagree. In 1879 Clarke was aware of Jemmett's resurvey, and that Johnston had purchased the contiguous lot (376) according to Jemmett's lines, and that these overlapped Launders' lines, whether as ascertained by Launders' posts or by his "official" map. In 1880 Clarke

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filed, as of record, a map laid out in town lots (it is referred to in the records of this Court, placed there by himself), in which he evidently claimed land which he could not claim either under Launders' posts, or field notes, or map; nor in any way other than according to Jemmett's lines and posts. In 1882 Clarke knows that Johnston has sold one-half of Lot 376, according to Jemmett's lines, and knew that Ross had purchased according to the same lines. In 1883 Clarke files a new map, in which he re-affirms, as of record, and extends the map previously recorded by him in 1880. By that new map, Clarke again ignores Launders' survey, and claims under Jemmett's survey; but he, by the second map, for the first time clearly claims some land which he cannot hold without ignoring another part of Jemmett's lines, and clearly encroaching upon what Johnston bought in 1879 from the Crown. I quite agree that the Crown was ill-advised in 1879 in conveying to Johnston any portion of what had been previously conveyed to Clarke; and that Clarke would, probably, in 1879, have had good grounds for disputing that survey of Jemmett's, and the Crown Grant to Johnston. But I think that by reason of Clarke's conduct since 1879, it would be unconscientious, as against Johnston, to allow him now to ignore Jemmett's survey. It is the equitable doctrine of election, the Scotch doctrine that he is not to be allowed to "approbate" one part of Jemmett's survey and "reprobate" another part, after he has looked on and seen these sales, that I rely on, rather than the analagous but more rigid and technical doctrine of estoppel at common law. But even at common law, I think the concluding words of Smith's Leading Cases would apply.

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WALKEM, J.
(In Chambers.)
1884.
January 29.

Practice—Service of Notice of Writ—Conditional Appearance—Appeal from Judge in Chambers—Rules of Court, 1880—Order XI—Order LIV.

Where Plaintiff obtained leave to serve notice of a writ on a foreigner out of the jurisdiction—

Held, that Defendant was not bound to appear or enter a conditional appearance before he applies to set aside the order.

Held, that the application to set aside the order giving leave to serve notice of writ was properly brought before the Judge in Chambers, instead of before the Full Court.

The Defendant's affidavits having shewn that the case did not come within Order XI., the order was discharged.

Fowler v. *Barstow* (L. R. 20 Ch. D. 240) observed upon.

IN this action, an order was made by Walkem, J., on the 20th December last, for service of a notice of writ on the defendant—a foreigner—residing at Portland, Oregon.

Pooley, for Defendant, now applies to set aside the order and all proceedings upon it.

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Jackson, for the Plaintiffs, raised two preliminary objections to the application:—

First, that the defendant not having appeared, or entered a conditional appearance, as was done in *Fowler* v. *Barstow* (L. R. 20 Ch. D. 240), cannot be heard.

Second, the application should be to the Full Court, by way of appeal, and not to the Judge in Chambers.

WALKEM., J:—

As to the first objection taken by Mr. *Jackson*—that the defendant not having appeared, or entered a conditional appearance, cannot be heard—the old Common law practice on this point has long been so well understood, that I would have overruled the objection off-hand, were it not for the observations of the late Master of the Rolls, in *Fowler* v. *Barstow*, while sitting in Appeal, with respect to conditional appearances. On p. 243 of the report, he says: "It appears that under the *Common Law Procedure Act*, which was rather "stricter than is the rule under the *Judicature Act* as to service out of the "jurisdiction, it was the practice to allow the defendant to put in a con- "ditional appearance and to file affidavits that there was no cause of action "within the jurisdiction, ... and if the Court were satisfied that there "was no cause of action within the jurisdiction, they discharged the order "for service out of the jurisdiction. If the Court doubted, ... they "put the plaintiff under an undertaking that if it appeared at the trial that "there was no cause of action within the jurisdiction, then, ... he "was to have his action dismissed."

I can find no authority for any portion of this statement. Under the Act, no leave was necessary to enable a plaintiff to issue a writ or notice of writ against either a British subject or foreigner out of the jurisdiction. The plaintiff took it out and had it served at his own risk, without leave. Hence there could have been no such order as that referred to by the Master of the Rolls, for the Court to discharge, and as a matter of consequence the Court could not have been placed in doubt as to an order that did not exist, and thereupon bind the plaintiff by the undertaking mentioned. I have examined the different text books on the Common law practice, viz., *Day's*, *Chitty's* and *Lush's*, as well as the notes in *Wilson's* and *Charley's* works with respect to appearances, and I find that no allusion whatever is made to the existence of conditional appearances or of such a practice as that mentioned by the Master of the Rolls.

After service of a foreign writ, under sec. 18 or 19 of the *Common Law Procedure Act*, the plaintiff required leave to proceed, but only in cases of non-appearance. This is a wholly different matter from leave to issue the writ.

Conditional appearances, however, were required by the Court of Chancery before a defendant could move to set aside a bill served out of the jurisdiction; and it would appear that this is still the practice of the Chancery Division: but even this circumstance is immaterial, for the present action would, had it been instituted in England, have been assigned to one of the Common Law Divisions, and been therefore governed by its system of practice.

It is to be observed that though the M. R. made the observations mentioned, the point of a conditional appearance being necessary or not in any or all of the Divisional Courts was not before him. The only question he had

to decide (and which he affirmatively decided) was whether affidavits contesting the question of forum, by showing, on the part of the defendant, that no cause of action had arisen within the jurisdiction, were admissible or not. This would apparently account for what I would respectfully observe seems to have been a mistaken view, on the part of this very eminent Judge, of the practice with regard to appearances in Common law Courts.

Under the *Common Law Procedure Act* the only form of appearance allowed, was the one familiar to all practitioners; and to this form a somewhat rigid adherence was exacted. If a defendant entered this appearance or even gave an undertaking to appear, he was considered to have thereby submitted himself to the jurisdiction of the Court, as well as to have waived all irregularities in the writ, service and copy: See *Chitty's* Prac. (Ed. 1862, pp. 208, 216, 1460); *Day's* C. L. P. Acts, p. 16; *Forbes* v. *Smith* (10 Ex. 717)—a very clear authority; and *Lush's* Prac. (Ed. 1865) title "Appearance."

Such is the rule now, although the old form of appearance has been abandoned, and a memorandum of appearance substituted for it: See *Arch.* (13 Ed. pp. 236, 244, 1194, 1197). In *Preston* v. *Lamont* (L. R. 1 Ex. D. 361), the Judge in Chambers held, on an application analagous to Mr. *Pooley's*, that as an appearance had been filed, the application was too late. This decision was affirmed on appeal, by the Exchequer Division.

I therefore consider that Mr. *Pooley's* application is, as to time, in accordance with English precedents and practice.

Mr. *Jackson's* next objection is that the order complained of cannot be reviewed in Chambers, but should have been appealed from to the Full Court under Order LIV.

In England the Court of Appeal has, with respect to appeals from Orders in Chambers made by Judges of the Chancery Division, until lately followed the old practice of the Court of Chancery by requiring a certificate from the Judge who made the order that he did not require further argument on its subject-matter, before the appeal would be entertained; but *In re Butler's Whf. Co.* (L. R. 21 Ch. D. 131), before Hall, V.C., in 1882, the Vice-Chancellor declared that he had never adopted such a practice and would not do so, as it was needlessly expensive; and he decided that when an order has been made on a summons and not adjourned into Court, and an appeal is desired, the proper course is not to move in the Appeal Court to discharge the order, or for the Judge's certificate that he does not desire the summons to be re-heard, but to make the application to discharge the order in Chambers.

The practice in the Common Law Divisions is in accord with this. *Archbold* (13 Ed. p. 243) states that the question of foreign service of a writ is finally determined when leave to serve it is given under Order XI.,—but "subject to any application" (not motion it will be observed) "by the "defendant to rescind the leave and to right of appeal."

According to this the defendant may apply in Chambers to rescind the order, and if dissatisfied with the result, appeal.

On p. 954 of *Lush's* practice (Ed. 1865), it is stated that if an order in Chambers is made *ex parte* the application to rescind it should be made to the Judge of first instance.

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This course was followed since the *Judicature Act* in *Preston* v. *Lamont* (L. R. 1 Ex. D. 361).

Such a practice is to my mind, the most convenient one here, and is well adapted to the constitution of our Court. I have therefore to hold that Mr. *Pooley's* application has been properly brought in Chambers.

I come now to the merits of the matter. The action is founded on a promissory note, in the following words:—

"Portland, Oregon, July 14, 1883.

"$15,000.

"One day after date without grace, I promise to pay to the order of James "M. Livingston fifteen thousand dollars in gold coin of the U. S. of America, "with interest thereon at 10% per annum, from date until paid, for value "received; and in case suit or action is instituted to collect this note or any "portion thereof, I promise to pay such additional sum as the Court may "adjudge reasonable as Attorney's fees in said suit or action.

(Signed) "Benj. Holladay,
"per Chas. Ohle, Atty. in fact."

Endorsed—"Pay to the order of Garesche, Green & Co. for collection.

(Signed) "James M. Livingston."

The evidence upon which I made the order for service out of the jurisdiction consists, first of the affidavit of Mr. A. A. Green, one of the plaintiffs, stating,—

That he is a Banker, residing in Victoria; that defendant resides at Portland, Oregon; and that plaintiffs are holders of the note, and are desirous of commencing an action thereon in this Court; and—

Secondly, of an affidavit of Mr. Livingston, the payee, alleging that he is a resident of and carries on business in San Francisco; that the note was signed by defendant's attorney in fact, and delivered to him in consideration of full value, and was then endorsed by him to plaintiffs; that defendant has refused to pay the note or any part thereof, and that the amount thereof is now wholly due and owing to the plaintiffs; and lastly, that defendant is an American citizen residing at Portland, without the jurisdiction; and has property within the jurisdiction.

I may here remark that I was mainly influenced in granting the order, by the unqualified statement made by Mr. Livingston, that the amount of the note was wholly due and owing to the plaintiffs. There was nothing to show that the plaintiffs were not *bonâ fide* holders for value, or that they had not acquired the note before its dishonour. I was therefore bound to presume, irrespectively of my own doubts, that they were holders for value before dishonour. I asked for the note before I made the order, but Mr. *Jackson's* clerk said he had not got it.

I find now that the note was specially endorsed "for collection"—a term well understood amongst the mercantile community. The affidavit of Wm. C. Duxbury, sworn here, and put in by the defendant, also alleges that the note, as he has been informed and believes, was merely endorsed by Livingston to the plaintiffs to enable them to collect it by action in this Court; and he further swears that defendant informed him that Livingston applied to him (defendant) in Portland, in September or October last, and again in November last, for payment of the note. The natural inference from this is

that Livingston was, up to that time at least, the holder of the note. As the note was payable on the 15th of July previous, and had not been paid, it was necessarily dishonoured in Livingston's hands and before it got into plaintiffs' possession. Though the evidence on this point is merely secondary evidence, still it has been allowed by the plaintiffs to pass uncontradicted, although they have had ample time and opportunity of showing the contrary, or at all events of proving that they became holders of the note before it was due, if such were the fact.

Mr. Duxbury also swears that the defendant has not been within the jurisdiction since 1869. None of the facts connected with the making of the note, as to time or place, are disputed.

As a matter of law, the note having been made at Portland, and no place of payment being mentioned, it was presumably payable in Portland or at the defendant's residence or place of business there (if he had any). "It is "generally true," says *Parsons* on Bills, "that if a contract is made in a par-"ticular place and performable generally, that is, if no particular place of "performance is mentioned, it is to be presumed that it is to be there per-"formed. This seems to be just and to be obviously the intention of the "parties."—See vol. 2, p. 320. I believe our law is the same in this respect; but I cite this authority, as it would, as the *lex loci contractus*, be applied here in the construction of the contract, if the present action were maintainable. The agreement with which the note concludes is also to a certain extent evidence that the parties intended that if legal proceedings on the note were necessary, they should be instituted in their local Courts, which do not, as Mr. *Jackson* informs me, award costs of suit except there is a special agreement to that effect between the parties, as in the present case. If no costs were awarded in similar actions here, it is almost needless to say that the agreement could not confer any jurisdiction to give costs; for this Court would regard such an agreement as an interference with its right to apply its own remedies to the case, if brought before it.

I do not however intend to rely in any way upon this feature of the contract, in coming to a conclusion upon the application before me.

It is quite true, as was contended by Mr. *Jackson*, that in questions of service out of the jurisdiction I have a discretion to allow service or not; but this discretion is not an absolute or arbitrary one, but a judicial discretion only to be exercised according to law. Were it absolute, it could not be reviewed; but the reports present many instances of orders granting or refusing leave for foreign service, being reconsidered by the Judge of first instance in Chambers, or reviewed by the Court of Appeal, or by the Judge of first instance sitting in Court (in appeal) under section 50 of the Imperial *Judicature Act* of 1873. The largest measure of discretion is, for instance, allowed to a Judge with respect to costs, but the costs must be dealt with on settled principles: *Cooper* v. *Whittingham* (L. R. 15 Ch. D. 501).

In the present case my discretion must be exercised according to Order XI. of our Rules, which lays down the cases in which service out of the jurisdiction may be allowed by a Judge.

These cases are—

1. When the contract, in question, was made within the jurisdiction;

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2. When the contract has been broken within the jurisdiction, no matter where made;
3. When the act or thing *in lite* is to be done or is situate within the jurisdiction.

The present contract does not certainly fall within the third class; and as it has neither been made nor broken within the jurisdiction it does not come within either of the first two classes. I am not therefore warranted in upholding the order I made, though I might have had jurisdiction to make it at the time in view of the facts then before me.

The case is closely analagous to *Davis* v. *Park* (L. R. 8 Ch. 862), where the contract was American and made between American citizens, and its breach occurred in the United States. An order for service out of the jurisdiction on Baxter, one of the defendants in this last case, was allowed in the first instance by Wickens, V. C., but was subsequently discharged by him with costs; and on appeal the L. J. J. held that he had exercised a proper discretion in discharging his own order, and made the plaintiff pay the costs of appeal.

I must therefore direct the order I made on the 20th December last, for service of the notice of writ on the defendant out of the jurisdiction, to be set aside (together with any proceedings taken thereon), with costs. Leave to appeal as to costs should, I think, be allowed. The plaintiff has, of course, his right of appeal from my decision in other respects.

I omitted to refer to an affidavit of Mr. Green, filed to-day, alleging that he is advised and believes that plaintiffs have a good cause of action. It is defective, and useless in not showing that the cause of action "arose within the jurisdiction," and in not stating what the cause of action is: see *Archibald's* forms, p. 68.

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January 29.

HARTNEY *v.* ONDERDONK.

Capias ad respondendum—1 & 2 Vic. (Imp.), c. 110, s. 3—Intention to quit the Province—Temporary absence—Cancelling bail.

A. O.—a government contractor—arrested on a capias, deposited a sum of money in lieu of bail and for costs, which was paid into Court. On an application to have the money delivered up to him, he shewed that his intended absence was for a two months' visit to Ottawa and New York on business, in connection with his contract with the Dominion Government; that he intended to return to this Province; that the exact amount of the debt could not be ascertained; that he had signed a cheque for a large part of the debt, and the balance, as soon as ascertained, would be paid.

Held, that the security must be delivered up to the Defendant, as his absence was merely for some temporary purpose, and without any intention to delay or defraud his creditors, and he had every intention of returning to the Province.

ON 31st December last, the defendant was arrested on board the steamer, when about to leave Victoria, by an order from Mr. Justice McCreight, on an affidavit, sworn to by the plaintiff, that the defendant was indebted to the plaintiff in the sum of $5,281.34, and that he (the defendant) was about to

leave the Province. In lieu of a bail bond, security was given by defendant by depositing with the Sheriff the sum of $5,281.34 and $50 for costs, and within the proper time an additional $50 was paid into Court—equivalent to the perfecting of bail. The full amount was paid into Court by the Sheriff.

7th January, 1884.—*Drake*, Q. C., applied for an order that the security deposited in Court should be delivered up to the Defendant.

T. Davie (for Plaintiff) contra.

The grounds of the application are fully set out in the Judgment.

GRAY, J.:—

On the 7th January an application was made to me to order the return of this money to the defendant, on grounds disclosed in certain affidavits hereafter to be referred to. This application was transferred by me to Mr. Justice McCreight, as directly affecting the previous order for arrest made by himself: being unwell, he requested me to act for him—hear the argument, reconsider the case, and grant or refuse the application as required by law.

Before adverting to the facts, it will be necessary briefly to state the legislation of British Columbia on the subject of arrest and imprisonment for debt.

Anterior to the union of British Columbia (as the Mainland was then called) and Vancouver Island, the former, in April, 1865, passed an Ordinance—

1. That no person shall be arrested or imprisoned on any judgment whatsoever recovered against him as a debtor at the suit of any person.

2. That no person shall be detained, arrested, or held to bail for non-payment of money, except on a special order, based upon an affidavit establishing the same facts and circumstances as are necessary for obtaining a *capias ad satisfaciendum* under that Ordinance; and the arrest, when allowed, should be made by means of a writ of attachment corresponding as nearly as may be to a *capias ad satisfaciendum*.

3. The plaintiff must show by affidavit, to the satisfaction of the Judge, that he has recovered judgment or obtained a decree for the payment of money against defendant for £20 or upwards, exclusive of costs; and also by affidavit show such facts and circumstances as satisfy the Judge that there is good and probable cause for believing that the defendant, unless forthwith apprehended, is about to quit British Columbia, with intent to defraud his creditors generally or the plaintiff in particular, or that the defendant has parted with his property, or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution. Then the Judge may, by special order, direct a *ca. sa.* or an attachment, as the case may be, according to the practice of the Court in which proceedings in the first instance were instituted.

In August, 1866, anterior to the union, Vancouver Island passed an Act intituled "An Act to amend the law of arrest and imprisonment for debt"—

1. That after that Act, on the granting of *capias ad respondendum* or a *ne exeat regno*, the Judge ordering the writ might, at his discretion, require security to be given by the plaintiff, to the satisfaction of the Judge, to pay defendant the costs and damages consequent on arrest under such order, should the plaintiff have obtained the order without reasonable and probable cause.

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2. No *ca. sa.* or process against the person, at law or in equity, for the payment of any sum of money or costs shall issue except on proof, to the satisfaction of the Judge ordering the issue of the same, that the judgment debtor is about to leave the Colony.

On the union of British Columbia and Vancouver Island into one Province and under one government, these two statutes were severally continued as to each section. The legislation on the Mainland being in advance of that on the Island speaks for itself. That on the Island being only to amend the existing law, it becomes necessary to see what that law was, the amendment being to give the Judge a discretionary power which here he did not exercise. That law was the English Act (1 & 2 Vic., c. 110, s. 3), which, in effect, is as follows:—

If a plaintiff in any action in which defendant is now liable to arrest, whether upon the order of a Judge, or without such order, shall, by affidavit show, to the satisfaction of a Judge of one of the Superior Courts, that such plaintiff has a cause of action against defendants to the amount of £20 or upwards, or has sustained damage to that amount, and that there is a probable cause for believing that he (the defendant) is about to quit England unless apprehended, it shall be lawful for such Judge, by special order, to direct that such defendant so about to quit shall be held to bail for such sum as the Judge shall think fit, not exceeding the amount of debt or damage.

By the "English Law Ordinance, 1867," passed after the union of British Columbia and Vancouver Island, the English law, so far as not inapplicable, was introduced by its own legislature into the united Province. The first question then is, what have the English Courts adjudged to be the meaning of this word "quit" as used in this statute, the 6th section of the Act having expressly provided that a party improperly arrested may apply to a Judge for his discharge; and the decisions of the Courts showing that if the intended absence was not such as the Act contemplated, the defendant must be discharged from custody or the bail cancelled: *Archbold*, p. 781.

In *Larchin* v. *Willes* (4 M. & W. 351), on an application of the present nature, Parke, B., says: "I think the proper construction of the statute is, "that any party about to leave the kingdom, unless it be for some very tem- "porary purpose, and it appears that he is intending to return, so that the "plaintiff may be able to obtain the fruits of his judgment, is within the "meaning of this section."

Alderson, B., says:—"I entirely agree. The principle is this; that if the "party is only going to leave England for a short time, the case does not "come within the statute; but if he is going for such a purpose, or such a "length of time, as that he is not likely to be forthcoming when the plaintiff, "by the ordinary course of proceedings would be entitled to judgment, and "to have his body in execution, he has a right to prevent his departure. "This section of the statute arose out of the provisions applicable for holding "to bail before the statute, in cases when the party could not be held to bail "by the mere will of the plaintiff: and the rule made was, as I always under- "stood it, that a party was to be subject to arrest in those cases, by the dis- "cretion of the Judge, that he might be forthcoming in order to be taken in "execution if it should be ultimately decided that an execution should go "against him. The same principle ought to be followed in the administra-

"tion of this statute, in the cases in which it has not taken away the right "of arrest: it seems to be a plain principle to go upon. The discretion "given to the Judge is certainly large, and one would interpret the clause "liberally, if a man were coming back in any reasonable time."

Gurney, B., concurred.

In *Stein et al.* v. *Valkenhuysen* (27 L. J. Q. B. 236), Crompton, J., says:— "The Act contemplates the case of a debtor who is already in England and "intends to quit it, for the purpose of defeating and hindering his creditors "here from their remedy."

In *Bullock* v. *Jenkins* (20 L. J. Q. B. 90), Patteson, J., says: "It is clearly "competent for the defendant to show that he had no intention of leaving "the country." See also *Harvey* v. *O'Meara* (7 Dowl. 725); *Walker* v. *Lumb* (9 Dowl. 131).

The authorities further point out that the fact that the intended absence was not such as the Act contemplated, may be shown by affidavit, and that the application may be for the discharge of the plaintiff from custody, or the cancellation of the bail bond, or the return of the money deposited with the Sheriff or paid into Court: *Archbold*, 781 and 784.

It will be observed that in *Larchin* v. *Willan*, the Court states the object of the Act was that the body of the defendant might be had to answer the execution in case one should be awarded against him; but in a country where there is no imprisonment for debt as long as the debtor is remaining in the country, that object of the original arrest does not exist, and the provisions of both of the local statutes before cited clearly show that the judgment debtor cannot be imprisoned even for the judgment debt unless he is about to leave the Province. Such being the law, the next question is, was the defendant's intended absence of the character contemplated by the English statute (1 & 2 Vic., c. 110, s. 3).

The plaintiff's affidavit, sworn on 31st December, 1883, at Victoria, sets out that the defendant was indebted to him in the sum named; that his claim, except for $150, was for lumber supplied to defendant for building the Canadian Pacific railway; that he had rendered his accounts and requested a settlement; that he supplied such information relative thereto as was required of him; that defendant acknowledged he had fulfilled his contract, and promised to settle on a particular day; that he, plaintiff, made many efforts to obtain a settlement; that on the day named he was put off by the defendant; that on the following day defendant refused to settle, and told him that he was going to leave for New York on Monday morning by the steamer for the Sound, and that he was going on board that evening (Sunday) at 7 o'clock.

On this affidavit, Mr. Justice McCreight granted the order for the arrest. It will be observed that this affidavit does not comply with the provisions of the law in force on the Mainland, where the contract was made and to be carried out; nor taking the English Act as governing the Island, the *lex fori*, where it was sought to be enforced, are there facts or circumstances set forth which are inconsistent with the intention of other than a temporary absence.

On the hearing of this application the contract was produced, showing that it was both made and to be carried out on the Mainland; also an affidavit from the defendant, stating the circumstances of the plaintiff's meetings with him at Victoria, of the offers of settlement, of the delay for want of certain

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information, of his efforts to procure it and to determine the exact balance due to plaintiff; that on his inability to get at this exact balance, he consulted with his cashier as to what it would be safe to pay the plaintiff until his account could be checked; fixed the amount at $3,000, signed a cheque in favour of plaintiff for that amount, and an order on Mr. Cunningham, his accountant, to pay the plaintiff as quickly as he could check the account, the balance, if any, due the plaintiff; that the plaintiff did not keep his appointment, or a close approximation might have been arrived at; that before going on board the steamer that Sunday night, he left with Charles Rhodes, his cashier, the cheque and an order to make a settlement with the plaintiff as soon as it could be done; that he had left with his employés at Yale sufficient means to pay all debts and provide for carrying on his business during his absence; that he had, and had held for several years, a letter of unlimited credit at the Bank of British Columbia; that having to leave at daybreak in the morning for the east, on pressing business connected with his contracts for the construction of the Canadian Pacific railway, he had no opportunity of seeing the affidavit on which his arrest was made; that the Honourable J. W. Trutch knew the business on which he was going, and that he had arranged to return early in March for the purpose of continuing his contracts, which would last a year longer before completion, and that any affidavit that stated that he was about to leave the Province with intent to defraud or delay the plaintiff, or any other creditor, was absolutely false and without the slightest foundation. This was sworn on the 31st of December.

The affidavit of Wm. Curtis Ward, sworn on the 7th of January, 1884, is also produced, stating that he is Manager of the Bank of British Columbia at the City of Victoria, and that the said bank now holds, and has held for several years, a letter of unlimited credit in favour of the defendant, and that the bank is prepared under that letter to pay such cheques as defendant may draw, for payment of all his obligations in connection with his contracts for the construction of the Canadian Pacific railway in British Columbia.

Also, an affidavit, sworn on the 5th of January, 1884, from the Honourable J. W. Trutch, stating that he is the Resident Agent in British Columbia of the Government of the Dominion of Canada, and for weeks previous he had been informed by defendant that it was his intention to proceed to Ottawa and New York on business connected with the Canadian Pacific railway, which would necessitate his absence from British Columbia for about two months; that he had read telegrams from the general manager of the railway, requesting defendant to go to Ottawa as soon as possible on the business of the railway, and that his presence there was expected and desired by the Government of Canada in connection with that railway; that from his position as such Agent he was necessarily acquainted with the business transactions of the defendant in connection with his contract with the Railway Department of Canada, for the construction of the railway from Port Moody to Savona Ferry, and that it was absolutely necessary in connection with these contracts that defendant should return to British Columbia at an early date; and that for these reasons and from his knowledge of the object for which defendant had been requested to proceed to Ottawa, he, the said Joseph W. Trutch, said that defendant's absence was merely temporary, and for the purpose of his business.

In answer to these statements an affidavit, sworn to by the plaintiff on the 11th of January, and used for an application of a different nature in this same cause, has been put in and read—strongly setting forth the merits of his claim against the defendant, and contradicting the statements made by the defendant as to the circumstances that took place at Victoria on the Sunday evening; but it does not allege any fact or make any assertion that the defendant's intended absence was to be anything but temporary, or that it was in any way for the purpose of defrauding or delaying him or any other creditor.

I am not sitting here to decide upon the merits of this case, or in any way to adjudicate upon the points in dispute in relation to their accounts, or the amounts that may be due or not due. The exact amount of the claim itself is yet undetermined, and during the progress of the argument was hotly contested between the Counsel; at any rate, no final judgment has been given, and the Counsel differ widely as to what each will prove. The only point before me is, whether the plaintiff had any right to have the defendant arrested at the time, under the circumstances, and in the manner in which it was done—upon an unadjudicated account—on the eve of an absence intended only to be temporary, and without any intention to defraud or delay the plaintiff himself or any other creditor, and without any affidavit to that effect. Neither the expressed or adopted law in British Columbia permits it to be done. The Counsel for the plaintiff has called my attention to the judgment in the case of *Walsh* v. *Farron*, in 1875, rendered by myself, as differing from the present. There are no printed reports of the judgments of this Court, and on reference to my notes of that case, I find no reasons given for my then conclusion. I can, therefore, only presume that it must have differed in its circumstances in some material respects from the present case, and that I had good grounds at the time for the conclusions at which I arrived. To avoid any misunderstanding, I have set out my reasons for the present judgment at full length; and should the learned Counsel for the plaintiff be dissatisfied, I will facilitate an appeal to the Full Bench.

It is to be regretted that there should be on the statute book of British Columbia so marked a difference between the law to be administered on the same subject in the two divisions of the Province. A business man loses half his rights when he comes from New Westminster to the Island. On the Mainland, by express provincial enactment, he is free from arrest for debt, and may go and come as he pleases, unless it be first *primâ facie* proved on affidavits, to the satisfaction of the Judge, that he is dishonest.

On the Island, whether honest or dishonest, he cannot go or come as he pleases, except by a forced construction put upon the words of an English statute, passed nearly half a century ago. A few words from the Legislature, that no person in British Columbia shall be arrested or imprisoned for debt, on mesne or final process, would dispose of the whole matter. If money or property be obtained by false pretences, the wrong-doer can be punished criminally. No man is compelled to give credit—it is of his own motion, for some expected good to himself. Business is not carried on for sentiment.

As the conflicting statements as to facts prevent my forming any conclusive opinion upon the merits of the case, I shall leave the costs of this application to be costs in the cause dependent upon the final result

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I, therefore, acting for Mr. Justice McCreight, on the materials before me, order that the several sums of money in this cause, now deposited in Court as security on the arrest of defendant, be forthwith paid over and delivered to defendant; and I feel assured that if the learned Judge had had the same materials and authorities before him, he would not have granted the original order.

C. A.
1884.
August 26.

Ex parte JOHN BIBBY.
In re ENTERPRISE GOLD AND SILVER MINING COMPANY, LIMITED.

"Companies Ordinance, 1869"—Winding-up—Rectification of Register—Default of Company.

B., a registered holder of shares in a limited company transferred them to S., but B. being in arrear for some calls the transfer was not registered.

In August, 1881, B. obtained an order from Crease, J., that, on certain payments being made, the company should take his name off the register and substitute S.'s name. The order was served on the Secretary of the Company, and payments were made by B. under the order. The register was not rectified in pursuance of the order.

In February, 1883,—the company having suspended business for over two years—a winding-up order was made, and in March, 1884, B. appeared on a summons before the C. J. to shew cause why he should not be on the contributories' list.

The C. J. *Held* that B., not having taken steps to enforce the rectification, had abandoned the order of August, and directed his name to be placed on the list.

In an appeal to the Full Court—

Held (reversing the decision of the C.J.), that there were no laches on the part of B., and that his name must be removed from the list of contributories; and

Held, that entries made in the books of the Registrar-General are not notice to creditors of transfer.

THE material facts in this case were as follows:—

The Enterprise Company was incorporated under the British Columbia "Companies Ordinance, 1869," which brings into force in British Columbia the Imperial Statute 25 & 26 Vic. cap. 89, intituled "The Companies Act, 1862."

Bibby had been a shareholder in the company, and had sold his shares to Spencer, and executed a transfer. The transfer was not registered, whereupon Bibby applied to Mr. Justice Crease for, and obtained, an order for the rectification of the register of shareholders under section 35 of "The Companies Act, 1862."

The Order was as follows:—

"Tuesday, the 9th day of August, A.D. 1881.

"Upon hearing Mr. *Alex. E. B. Davie* of Counsel for the above-named "John Bibby, Mr. *Drake* of Counsel for the above-named company, and Mr. "*Pollard* of Counsel for the above-named S. A. Spencer, and upon reading

"the two affidavits of Henry Frederick Heisterman, and the affidavit of S. "A. Spencer, filed in this matter, I do order that the said S. A. Spencer do "pay to the said company the sum of twenty-three dollars and thirty cents, "being the sum paid to him for assessments by the said John Bibby on the "13th day of February, 1879. And that the said John Bibby do pay to the "said company the sum of twenty-three dollars and thirty cents, being the "amount of the third call, due to the company on the 30th day of January, "1879, upon the 233 shares then sold by the said John Bibby to the said "S. A. Spencer. And I do further order, that upon the payment by the "said John Bibby to the said company of the said sum of $23.30, that the "name of the said John Bibby be removed from the register of shareholders "of the said company as from the 30th day of January, 1879, and that the "name of the said S. A. Spencer be inserted as from that date in the said "register, as the holder of the said 233 shares. And I further order that "notice of the above rectification be given to the Registrar of Joint Stock "Companies. And I do further order that the said John Bibby do pay to "the company five dollars for their costs of appearance upon this application, "and that otherwise the said John Bibby and S. A. Spencer do respectively "bear his costs of this application. And, by consent, I further order that "the action for calls, pending in the County Court at Victoria, by the com- "pany against the said John Bibby, be withdrawn, and that each party "thereto bear his own costs thereof."

The order was promptly served by Bibby upon the Secretary of the Company and the Registrar of Joint Stock Companies, and payment made in pursuance of the order; but no steps whatever were taken further, by Bibby, to see whether the order was carried out.

The register of shareholders was not rectified in pursuance of the order.

In February, 1883, an order was made for winding up the company.

The Articles of Association relative to transfers were as follows:—

"8. Shares in the company shall be transferred in the following manner: "On presentation to the secretary of a certificate or certificates, properly "endorsed, he shall retain such certificate or certificates, and issue to the "holder thereof a new certificate or certificates, and make the necessary "entry of transfer in the company's books; but the transferor shall be "deemed to be the holder of the shares until the certificate or certificates so "endorsed shall have been presented to the secretary and the transfer entered "in the company's books as aforesaid, and twenty-five cents shall be paid to "the secretary for each new certificate.

"9. No transfer shall be recognized without the endorsement on the cer- "tificate of the transferor.

"10. The company may decline to register any transfer of shares made by "a member who is indebted to them."

On 27th March, 1884, Bibby having been served by the Official Liquidator with a notice calling upon him to shew cause why his name, which still remained on the register of shareholders, should not be placed upon the list of contributories, appeared before the Chief Justice and contended that he ought not to be made a contributory.

The Chief Justice ruled that Bibby not having taken steps to inquire and see that the order of the 9th of August was carried out, could not now insist

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upon it, as against the possible claimants on the company, though he might as against the company, and directed his name to be placed on the list of contributories, with an order that he was to be indemnified by the company against any calls under the winding-up.

From this ruling, Bibby appealed to the Full Court.*

28th July.—*Davie*, Q.C., for Bibby:

The ground upon which the Chief Justice refused to remove Bibby's name from the list of contributories was that Bibby not having compelled obedience to the order of Mr. Justice Crease had, theoretically speaking, allowed persons to become creditors on the footing of Bibby's being a shareholder; and that his co-shareholders might have been content to remain shareholders knowing that he remained upon the register. The Official Liquidator found Bibby's name on the register, and in performance of his duty placed Bibby's name on the list. The answer to the argument upon which the decision of the Chief Justice is based, is that the doctrine of laches has no application where the position of parties has not been changed, and here there is not and cannot be a suggestion that any persons have become creditors since the date of Mr. Justice Crease's order. In the case of the *Lindsay Petroleum Company* v. *Hurd* (L. R. 5 P. C. 239), Sir Barnes Peacock, in delivering the Judgment of the Court, said: "Now the doctrine of laches in Courts of "Equity is not an arbitrary or technical doctrine. Where it would be prac- "tically unjust to give a remedy, either because the party has by his conduct "done that which might fairly be regarded as equivalent to a waiver of it, "or where by his conduct and neglect he has, though perhaps not waiving "that remedy, yet put the other party in a situation in which it would not "be reasonable to place him if the remedy were afterwards to be asserted; "in either of these cases lapse of time and delay are most material. But in "every case if an argument against relief, which otherwise would be just, is "founded on mere delay, that delay not amounting to a bar by any statute of "limitations, the validity of that defence must be tried upon principles sub- "stantially equitable. Two circumstances, always important in such cases, "are the length of the delay and the nature of the acts done during the "interval which might affect either party and cause a balance of justice or "injustice in taking the one course or the other so far as relates to the "remedy."

Secondly, co-shareholders had no complaint. The secretary and directors of the company were their servants and agents; the neglect of the latter in effecting the rectification could not be taken advantage of by their principals.

Thirdly, Bibby had done all that was necessary when he served the order upon the Company and the Registrar of Joint Stock Companies, and complied with its terms. The Article of Association relating to transfers has no application, because Mr. Justice Crease's order was not a transfer within the meaning of that article.

Drake, Q. C., for the Official Liquidator:

Bibby's name was found on the register, and the Official Liquidator could not do otherwise than place his name on the list. The date of the winding-

* Present—Sir M. B. Begbie, C. J., Crease, Gray, and Walkem, JJ.

up order ascertained who were shareholders, and Bibby was on the register when that order was made.

The Chief Justice: There may be some winding-up cases of service to Bibby arising out of the neglect of companies to register transfers.

Davie: Such authorities can only relate to transfers contemplated by the articles. With permission, I will refer to such authorities on a future occasion. There is no reported case bearing upon the consequences of a company's disobedience of a Judge's order for rectification.

August 1st.—*Davie* cited *Shepherd's* case (L. R. 2 Eq. 564, and 2 Ch. App.); *Nation's* case (L. R. 3 Eq. 77); *Fyfe's* case (L. R. 4 Ch. App. 768); *Hill's* case (L. R. 4 Ch. App. 769 n); *Walker's* case (L. R. 6 Eq. 30); *Ward & Garfit's* case (L. R. 4 Eq. 189); *In re Reese River Mining Company* (L. R. 4 H. L. 64); 2, *Lindley* on Partnership (3rd ed., 1443 and 1363).

Drake cited 2 *Lindley* (1440); *Chartres'* case (1 De G. & S. 581); ex parte *Shaw* (L. R. 2 Q. B. D. 463).

26th August, 1884.—The Judgment of the Full Court (BEGBIE, C.J., dissenting) was delivered by WALKEM, J.:—

This is an appeal from the decision of the learned Chief Justice, refusing an application of Mr. Bibby to have his name taken off, and Mr. S. A. Spencer's put on, the list of contributories and the register of the company, in accordance with an order made by Mr. Justice Crease on the 9th of August, 1881.

The facts connected with the case are as follows:—

On the 30th of January, 1879, Mr. Bibby being the registered holder of 233 shares sold them to Mr. Spencer, free from unpaid calls. The transfer was made, according to the rules of the company, by Mr. Bibby endorsing his certificate of the shares, and delivering it to Mr. Spencer; but the company declined to register it, as the second and third calls on the shares were unpaid. This gave rise to disputes between the parties; and, eventually, Mr. Bibby brought them before Mr. Justice Crease, who made the order above referred to, which is to the following effect:—

(a.) That Mr. Spencer should pay the company $23.30, which he had received from Mr. Bibby, in satisfaction of the second call;

(b.) That Mr. Bibby should pay the company $23.30 in discharge of the third call, due January 30th, 1879;

(c.) That upon payment by Mr. Bibby of that sum the company should take his name off, and put Mr. Spencer's on their register, as holder of the shares, as from the 30th January, 1879; and

(d.) That the Registrar-General of Joint Stock Companies should be notified "of the above rectification."

On the next day (the 10th) Mr. Bibby paid the company, as directed, and served them and the Registrar-General, each, with a copy of the order.

The Registrar-General, afterwards, made the following entries in red ink opposite to Mr. Bibby's name on the share lists of 1880 and 1881 respectively, which were on file in his office, "Now S. A. Spencer, see order filed, H. B. "W. A., Regr. Genl.," and "Should be S. A. Spencer, see order filed, H. B. "W. Aikman, Regr. Genl." Neither of these entries is dated; nor have we any evidence as to when they were made.

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The company received from Mr. Spencer the $23.30 payable by him under the order of August, 1881; but at what time does not appear in evidence.

On the 16th February, 1883, two petitions to wind up the company were filed—one, by a creditor, and the other by Mr. McLeese, a member. The ground of Mr. McLeese's petition, which was verified by affidavit, was that the company had suspended business for the two then preceding years.

A winding-up order was shortly afterwards made on the first, or creditors', petition.

On the 27th of March, 1884, the Court proceeded to settle the list of contributories, and finding Mr. Bibby's name on the register, placed it on the list. To this Mr. Bibby's counsel objected at the time, and the objection being overruled, he applied, by summons, on the 1st of April, to have Mr. Spencer's name put on the list instead of his own, and the register rectified, as directed by Mr. Justice Crease's order.

The application was opposed by the Official Liquidator, and was refused by the learned Chief Justice, on the ground of Mr. Bibby's laches in permitting his name to remain so long on the register.

We think it convenient at once to dispose of the question raised by Mr. Bibby's counsel with respect to the entries in red ink made by the Registrar-General on the share lists in his office, to the effect that the shares had passed from Mr. Bibby to Mr. Spencer. Counsel contended that these entries were evidence of notice to creditors of the transfer, but we cannot assent to this, as it does not appear when the entries were made. Even if their dates had been proved, the entries could not be regarded as notice, for the only notice of a transfer recognized by the statute is the record of that transfer on the members' register. Apart from this, the Registrar-General had no authority under the Act (s. 36), or under Mr. Justice Crease's order, to make these entries. What the Act required and what the order directed was that notice of the fact of the rectification of the register when made should be sent to the Registrar-General. In the present case, no rectification took place, hence there was really nothing to communicate to the Registrar-General. The entries were therefore incorrect. They are, moreover, illegal, for the share lists, on which they appear, should contain nothing which does not appear on the register and records of the company. We have called these documents share lists, but strictly speaking they consist of a list of members and late members, and of a summary of shares issued and forfeited and calls made, received and unpaid, which are made out annually by the company, and deposited with the Registrar-General conformably to section 26 of the Act of 1862.

Proceeding to the main points of the case, we have first to consider the objection that the fact of the winding-up proceedings having intervened since the date of Mr. Bibby's transfer of the shares is a bar to the present application, and that the Court has no jurisdiction under sec. 35 of the Act to entertain it. We do not understand whether the objection was intended to be pressed upon us or not, but if it was, we need only state that the authorities in favour of the jurisdiction are too numerous to admit of its being questioned. It was next contended on the authority of *Chartres'* case (1 De G. & S. 581), cited in *Lindley* on Partnership (4th ed. p. 1409), that it was Mr. Bibby's duty as transferor to see that the company registered his

transfer, and that having neglected this duty he ought to be retained as a contributory. But in *Chartres'* case the acceptance of the purchaser, by the directors, as a shareholder, was necessary before the transfer could be treated as complete, and ready for registration. In the present case, the directors had no such option to exercise, for after Mr. Bibby had complied with Mr. Justice Crease's order and served it, they were bound, without an attachment being applied for, to obey it. *Chartres'* case is an old case, and merely illustrates the general rule that a seller of shares will be held to be a contributory unless the purchaser has been accepted (when acceptance is necessary) by the company.

The result of the authorities—*Fyfe's* case (L. R. 4 Ch. 768); *Hill's* case (*ib.* 769n); *Lowe's* case (L. R. 9 Eq. 589); *Ward & Garfit's* case (L. R. 4 Eq. 189); *Nation's* case (L. R. 3 Eq. 77); *Ward's* case (L. R. 2 Eq. 226, and L. R. 2 Ch. 431)—bearing on the present case is summed up by the learned author referred to, as follows (see p. 1412):—

"When before the commencement of winding-up shares are *bonâ fide* sold, "and the transfer has been executed by both transferor and tranferee, and "has been left for registration at the company's office, and there has been no "unnecessary delay on either side in completing the transfer, and nothing "remains to be done except to register it, and the company having had an "opportunity of registering, have neglected, but not declined to do so; under "these circumstances, the Court will allow, and indeed order, the transferee's "name to be substituted for that of the transferor, unless there is some good "reason why the transfer should not be completed."

The company alone being in default, we have therefore to determine whether, in the language just quoted, "there is any good reason" for refusing Mr. Bibby's application.

In the first place, we were asked to treat Mr. Justice Crease's order as an abandoned order, as Mr. Bibby had wilfully or negligently, no matter which, treated it as such himself by not enforcing it. In our opinion, the order was not abandoned. It is unreasonable to suppose that Mr. Bibby would have drawn it up, paid money under it, and served it, as promptly as he did, if he did not intend to have it acted upon and carried out by the company. No judgment or order, it is almost needless to say, is deemed abandoned merely because it is not followed by process to enforce it.

The next reason, given by Counsel for the Official Liquidator, was, briefly stated, that Mr. Bibby's laches in allowing his name to remain, as it did, on the register raised an equity in favour of creditors to have it kept there.

Since the winding-up proceedings were commenced, Mr. Bibby has been guilty of no laches, for the list of contributories, of which he complains, was not settled until the 27th of March last, and he then protested against his name being put on, and took immediate steps to have it removed.

The only delay with which Mr. Bibby can be charged is that which occurred before the winding-up—viz., between the 10th of August, 1881, when he first became entitled to enforce Mr. Justice Crease's order, and the 16th of February, 1883,—the date of the filing of the petition to wind up.

With respect to creditors, there were no new ones between the dates mentioned, or for six months previously, for the company had suspended business

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in February, 1881, and this suspension continued until they were wound up two years afterwards.

As to creditors prior to February, 1881, they stand in a very different position from persons who, in the first instance, become creditors of a company, while it is a "going concern"; for the latter may be influenced in giving credit by the names they see on the members' register. The only suggestion that may be made on behalf of the former is that they abstained from enforcing their rights in consequence of Mr. Bibby's name being on the register. Taken in connection with the facts of the case, this suggestion amounts to an admission on their part that they were guilty of laches in not taking any steps whatever to collect their claims for a period of two years, although the company was in a state of insolvency during that period. If we were to hold that the equity claimed for them existed, we should be encouraging instead of discouraging stale demands, and running counter to the policy of the law in that respect.

Under the circumstances, we are of opinion that Mr. Bibby's application, as set out in his notice of appeal, should be granted, with costs of this appeal payable by the estate. The Official Liquidator should also have his costs out of the estate.

Mr. Justice GRAY being unable to attend, requests us to state that he concurs with us.

We think it proper to observe that this case appears to have been argued in Chambers without any authorities being cited, and that the argument on appeal would have been open to the same observation had not the learned Chief Justice suggested that the English cases should be referred to and discussed by Counsel, as was accordingly done, on a further day agreed upon for that purpose.

BEGBIE, C. J.:—

This is a case of very singular circumstances not likely to be drawn upon as a precedent, and in which the order now sought will not, probably, relieve Mr. Bibby from any pecuniary liability to which he is exposed by the order appealed against; and in this view, it is of very small importance what becomes of that order. On the other hand, the principles involved are very serious, and should be very cautiously acted on. The majority of the Court are against the view I took, and which I still retain; but I shall very shortly point out the principles I think applicable, and the dangers I apprehend The case has been twice argued before us; but I do not think the cases cited are similar in their circumstances to the present case, which ought to be left to the general rule that all persons who have consented to be on the register, and are found there when the winding-up commences, are contributories. With the greater part of the judgment just delivered I quite concur. But the facts I look at are these: Bibby was an original shareholder and properly on the register. In 1879 he sold all his shares to Spencer; but being in arrear of some payments, he could not be registered off. On the 9th August, 1881, he obtained an order from Mr. Justice Crease, however, that on certain payments being made, the company should take his name off the register, and substitute Spencer's name, as from January, 1879; and notice of the rectification of the register was to be given to the Registrar of Joint Stock Com-

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panies. The company was on the 10th August served with a copy of this conditional order, which was of course quite right, and quite diligent. But the company never acted on the order, and Mr. Bibby never inquired whether it was carried into effect—though I believe the conditions as to payment have been complied with. He served, probably about the same time, a copy of the order on the Registrar of Joint Stock Companies, who made a memorandum of the order in his roll; when, we do not know, This was, however, quite irregular, and I think useless. So matters stood for eighteen months, till the company ceased to exist in February, 1883, by virtue of a winding-up order; Bibby's name being then still on the register. He took however, no steps,—probably he was quite unaware of the state of the register—until nearly twelve months after the commencement of the winding-up. I attach no importance to this latter delay; it could have injured nobody (the company being then non-existent), as is pointed out in *Shewell's* case (L. R. 2 Ch. App. 289). But the delay from 9th or 10th August, 1881, to February, 1883, I consider serious. The company was during all that time a "going concern," at least in theory. The consequences of a man continuing to be held out as a shareholder are threefold. It may enable the company to get fresh credit. It may encourage existing creditors to abstain from or delay pressing their claims. It may encourage co-shareholders to retain their shares, who would have got rid of them if they had not thought that Bibby still retained confidence in the concern. For these reasons I thought, and still think, the proper course is, to retain Bibby as a contributory, but with a right to indemnity from the company. There is in my opinion no reported case similar in its circumstances to the present. There is no case in which the order of the Court has been entirely ignored by all parties as it has been in this case; nor in which a shareholder, coming after the winding-up, has obtained relief after 18 months' delay during the life of the company. There are cases in which the shareholder, having a right to be removed not evidenced by an order of the Court, has neglected to enforce his right, and the company were in no default; and his name was retained. That is *Shepherd's* case (L. R. 2 Ch. App. 16), where the delay was 2½ months; and *Ward & Henry's* case (L. R. 2 Ch. App. 431), 2½ years. There are cases where the shareholder has shown due diligence, but the company have been too dilatory; and the name was removed. That is *Fyfe's* case (L. R. 4 Ch. App. 769). There are cases where there was no delay on either side; and the name was removed, the shareholder having done all he could. That is *Garfit's* case (L. R. 4 Eq. 189), and the *Reese River Company* v. *Smith* (L. R. 4 E. & I. App. 69). It is to be remembered that the question is, as to the right of removal, and the notice to the company of that right, with a request to be removed; and subsequent carelessness in insisting on that right. Such a right exists in ordinary companies just in the same degree whether evidenced by an ordinary transfer, or by the order of the Court. The order of the 9th of August (*e. g.*) merely declared his right to be removed. It gave him a new remedy in respect of that right,—*e. g.*, by attaching the directors if they refused or neglected to comply with the order. But for 2½ years he never inquired whether they had struck off his name. Now a man's name on the register is notice to all the world that he is a shareholder. And unless we are to hold that an order of Court—a conditional order—is to be, without more, equivalent to notice

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to all the world that he has ceased to be a shareholder, I do not see how we can entirely relieve him now. He should, in my opinion, remain liable to creditors, but with an indemnity from the company; for their neglect is graver than his; but I do not see why their neglect is to wholly exempt him from the possible consequences of his own. It is said, there are no consequences possible, in this particular and very peculiar case. We are assured that for two or three years before the winding-up the company was completely inert—did not make a single contract, incur a single debt, or exhibit any sign of life. And *Shewell's* case is relied on to show, that where that is the case, delay in the shareholder is unimportant. But in *Shewell's* case the delay was wholly after the winding-up; after the company was dead; and that single fact establishes the impossibility of any alteration in the rights and liabilities of any individual. But so long as the company is even nominally alive, I think it very inconvenient and dangerous (not perhaps in the case of this company—but this case may govern others) that the Court is to inquire as to the nature, and extent, and result, of the operations, if any, of the company during the time that the shareholder's name has, through his own carelessness (coupled, it may be with the graver neglect of the company), been unduly kept on their books. If it turn out as alleged, that the company without him can satisfy all creditor's claims, the indemnity I suggest will be complete. If the calls on other contributories do not suffice to pay all claims, I do not see why he should not be joined as a contributory to satisfy outside creditors.

WALKEM, J.
(In Chambers.)
1884
February 14.

WILSON *v.* HUDSON'S BAY COMPANY.

Practice—Service on Foreign Company—Double Domicile.

The Defendants—a foreign company—had a place of business in Victoria, where it carried on a trading business, although its principal place of business and head office, where the meetings of the Governor, Chief Traders, and Shareholders were held, were in England.

The Plaintiff, as administrator (appointed by the Court here) to the intestate estate of McL.,—a deceased servant of the Company—served a writ on one of the Company's Managers at Victoria.

On an application to have the writ set aside—

Held, that inasmuch as by the Company's rules the power to appoint, pay, and dismiss was with the English office, and as, by agreement, the deceased's account was kept at that office, and the balance due him from time to time was payable there, the English office must be regarded as the domicile of the Company, and the Company could not be sued here by the Plaintiff as administrator of the deceased.

30th January.—Application to set aside a writ of summons in an action brought by the plaintiff as administrator of the intestate estate of the late Donald McLean, against the defendants, for an account of their dealings with the estate, and for payment to him of any balance due by them in respect of it.

The writ, which is in the ordinary form, was taken out on the 11th and served on the 15th January on Mr. Charles, one of the company's principal officers here.

Jackson (with him *Helmcken*) for defendants, cited *Scott* v. *Wax Candle Co.* (L. R. 1 Q. B. D. 404); *Creswell* v. *Parker* (L. R. 11 Ch. D. 601).

Theodore Davie, for plaintiff, cited 7 Wm. IV. & 1 Vic., c. 73, s. 26; *Newby* v. *Van Oppen* (L. R. 7 Q. B. 295); *Charley*, pp. 409, 410.

WALKEM, J.:—

The defendants have applied (1) to have the writ set aside, on the ground that as a foreign corporation they are not liable to be served here for reasons set forth in the affidavits, and if liable, that the action should have been commenced under Order XI., which relates to service out of the jurisdiction; and (2) in the event of the writ being deemed regular to have its service set aside, on the ground that Mr. Charles is not the company's head officer in British Columbia, and no leave for substituted service on him has been granted.

I may here state that the alleged purpose of the company in testing the validity of these proceedings is not to defeat any just claim against them, but to ascertain now or eventually the person legally entitled to payment, as their contention is that the accounts and moneys of the estate are under the exclusive control of the Governor and Company in London, and as a *caveat* has been entered in the Probate Court there against any grant being made of administration to the estate.

The plaintiff has no evidence, and has to rely on that put in by the defendants' which consists of affidavits and documents, to which I shall refer later on.

On the argument of the summons, Mr. *T. Davie*, Counsel for the plaintiff, contended that, independently of any evidence as to the *locus in quo* of the accounts and assets of the estate, his client was entitled as an abstract right to bring this action against the company here: first, as they have a domicile here; secondly, as the late Mr. McLean's contract of service, which forms the basis of the action, was performed here; and lastly, as personal estate, wherever situated, follows the owner's or intestate's domicile.

On the question of domicile he relied on the following passage in the judgment of the Court of Queen's Bench, in *Newby* v. *Van Oppen* (L. R. 7 Q. B. 295):—"It was argued," says Blackburn, J., "that the "American corporation was resident in America, and must be served, if "at all, as a foreigner resident out of the jurisdiction . . . This would "be so, if the foreign company had merely employed an agent here, who "made a contract for them; but we think it is different when the foreign "corporation actually has a place of business and trades in this country. "This is a point of very considerable practical importance . . . Such a "corporation does, for many purposes, reside in England and in its own "country. In the case of *The Carron Iron Co.* v. *McLaren* (5 H. L. Cas. 459), "Lord St. Leonards, taking a different view of the facts from that taken by "Lords Brougham and Cranworth, thought the Scotch corporation was "resident in England. We think there is great good sense in what "Lord St. Leonards states to be the law in his view of the facts. He says;

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"'that if the service on the agent is right, it is because, in respect of their "'house of business in England, they have a domicile in England; and, in "'respect of this manufactory in Scotland, they have a domicile there. There "'may be two domiciles and two jurisdictions; and in this case there are, as "'I conceive, two domiciles and a double sort of jurisdiction, one in Scotland "'and one in England; and for the purpose of carrying on their business one "'is just as much the domicile of the corporation as the other.' The majority "of the Lords took a different view of the facts, and thought that, though "the corporation possessed property in England, and had agents there, they "did not carry on business there; but we do not find that they differed from "Lord St. Leonards' view of the law if they had agreed as to his facts; and "in the present case the fact is clear that the American company are carrying "on trade themselves in London, and therefore, we think, must be treated "as residents here."

The Court of Queen's Bench, it will be observed, does not declare that the domicile of the American company in England was a domicile for all purposes. It simply decides that "Such a corporation does, for many purposes, "reside in both countries."

This is the legal position of the Hudson's Bay Company. So far as concerns the business public of Victoria, they have two domiciles for many purposes—one in England and one here. Without attempting to define what these purposes may be, it is sufficient to say that, in my opinion, they do not include a power to both domiciles to appoint, pay, pension, or dismiss the company's officers holding commissions from the Governor and Company as Chief Traders, or to deal in any way with their accounts. The domicile of the company for these purposes is, and has been, the London domicile exclusively, as appears from Mr. Charles' affidavit and exhibits. According to these, the late Mr. McLean was a Chief Trader in the company's service, appointed by the Governor and Company by a commission from London, similar to Mr. Charles', and had retired on a pension some time before his death, which occurred in this country in 1864. His duties, remuneration, pension and all matters connected with his position, were regulated by a printed instrument, dated 6th January, 1834, issued, to quote its words, "by the "Governor and Company of the Hudson's Bay Company, with respect to "their . . . . Chief Traders, &c., for conducting their trade in Rupert's "Land and North America, and for ascertaining the rights and prescribing "the duties of those officers."

This document is divided into 35 Articles, but only a few of them require my attention.

By Arts. 2, 18, and 20, a Chief Trader's duties were to conduct the company's trading business at any post or station assigned to him in the company's territories, and for these services he was to receive an eighty-fifth share in the company's profits, besides winter allowance in certain cases.

Other Articles provided for his retirement and pension. By Arts. 16 and 31, each Chief Trader was required to forward annually, to the London office, full information respecting his stock in hand and business of the year, and from the information thus collectively gathered from all the company's stations, the head office compiled the general accounts of the aggregate business of the year, and made out certain sets of accounts for the respective

stations, and the private account (including profits, if any,) of each of their officers. The sets of accounts and the private account were then sent out to the stations and officers respectively interested in them. It was agreed (by Act 35) that any balance due on an officer's private account should be settled by the Governor and Company in London, either by payment to his duly authorized agent there, or by payment of his draft on the company made payable in London.

So far it seems clear that the Governor and Company in London, by special agreement with their officers, of course including Mr. McLean, made out and exclusively controlled the accounts of the latter and of the stations under their charge. It may therefore be said that, for these purposes at all events, the company's house in London was, by agreement, elected as the domicile of the company, to the exclusion of any branch house here or elsewhere. The main fact of the Victoria establishment being an extensive one, does not take it out of the category of trading stations belonging to the company. It is simply a trading station on a larger scale than those less favourably situated for trade, and its officers are subject to the same rules as Mr. McLean was, with the exception of a few modifications made in them since his day.

The payment of Chief Traders and other officers during Mr. McLean's period of service was regulated by the following paragraph in the deed poll, Art. 32:—"By the same . . . . outward bound ships of the season" (*i. e.*, which carried out the sets of accounts) "each Chief Factor and Chief Trader, "and each Clerk respectively in the service, shall have his private account "transmitted to him, and the balance shall be either paid to him by bills "drawn by him *and made payable in London* on every 15th day of April, or "be paid to any person authorized by him as agent to receive the same and "to settle the accounts for the time being in respect of such balance . . . "or if the said party prefer to leave such balance in the hands of the said "Governor and Company, and notify the same to them, the Governor and "Company will either allow him interest for the same, as may be agreed upon, "or, at the option of the purchaser, the said Governor and Company will "invest the same in the purchase of parliamentary stock, and receive, and "when received credit his account with, the dividends thereof." From this agreement it is equally clear that the company and its officers elected the head office as the domicile of payment for the private accounts or balances of the latter. The balances were to be paid by the Governor and Company in London (and not elsewhere), either to the officer's order or to his duly authorized agent. If undrawn, they were to bear interest if agreed upon, or be invested by the Governor and Company in the English funds or Government securities, and the dividends thereon credited in the London office to the accounts of the officers entitled to them.

Mr. McLean's moneys, as well as his accounts, were consequently, by his own agreement, while a Chief Trader in the company's service, left exclusively to be dealt with by the Governor and Company in London, in whose hands, as Mr. Charles' affidavit shows, they now are; the amount of money being, as he believes, £2,104 8s. 7d. Mr. McLean's retirement from the service and subsequent death, it is almost needless to say, could in no way change the terms of this agreement.

Mr. Charles has also sworn that the office of the company here never has

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kept or had any control over any accounts or moneys connected with the estate.

I must therefore grant the defendant's application, by directing the writ of summons in this case to be set aside, with costs to be paid by the plaintiff. There is a point which I omitted to mention, and which has been suggested by Mr. *Davie's* proposition, that personal estate follows the domicile of the owner or intestate. Taking the present case, this is not an accurate statement of the rule. The personal estate is governed by the law of the domicile of the intestate as to succession or distribution; but a title to it by letters of administration can only be given by the Court of the country in which the property is situate—viz., the Court of Probate in England. The plaintiff's title as administrator is limited to such assets as are within this Province, and consequently does not extend to the assets in England. I mention this, merely to point out that a writ *for service out of the jurisdiction*, under Order XI., would not, under the circumstances, be granted, if applied for, as the proper and only remedy is for the plaintiff, or some other person acting for the widow or next-of-kin, to take out letters of administration in the English Probate Court.

[On the question of domicile of the H. B. Co., compare *Armour's* Manitoba Cases *temp Wood*, p. 229.—REP.]

BEGBIE, C. J.
1884.
August 30.

ANDERSON *v.* CORPORATION OF CITY OF VICTORIA & OTHERS,
AND
THE ATTORNEY-GENERAL (ON THE INFORMATION OF ANDERSON)
v.
CORPORATION OF CITY OF VICTORIA AND OTHERS.

Amendment of Writ—Pending Motion—Information—Attorney-General—"Public Parks Act, 1876"—Trustees—Pleasure Grounds—Agricultural Hall.

The Corporation of Victoria was, under an Act of Parliament, seized of 120 acres, upon trust, to lay out and maintain the same as a public park or pleasure ground for the enjoyment and recreation of the inhabitants.

Held, that the Corporation could not convey any of such land free from that trust.

Held, that cattle lairs, an Agricultural Hall for the exhibition of farming implements and products, and an Emigrants' home, were not within the objects of the trust.

An individual inhabitant cannot sue to restrain a misuse of the park, unless specially injured thereby; but the Attorney-General must join or be joined.

It is the duty of the Attorney-General, in cases of disputed rights, to remove obstacles in the way of trial of those rights—receiving an indemnity as to costs.

IN the first-named case, the plaintiff, a resident voter upon the electoral roll of the City of Victoria, had obtained an interim order restraining the Corporation and the President and Secretary of the B.C. Agricultural Society from the erecting of buildings on Beacon Hill Park, the Chief Justice expressing doubts as to the plaintiff's right to sue alone, and granting the order with leave to any defendants to move to set it aside. On the day on which the order expired, a further interim order was made till 30th August, at noon.

On that day, *Theodore Davie*, for the plaintiff, applied for an order to continue the injunction to the hearing.

Pollard, for the Corporation, objected that the plaintiff could not bring this action alone, and quoted *Winterbottom* v. *Lord Derby* (L. R. 2 Ex. 316); *Benjamin* v. *Storr* (L. R. 9 C. P. 400).

Davie asked leave to amend his writ, by turning his action into an information, without prejudice to the pending motion, and cited *Caldwell* v. *The Payham Harbour Co.* (L. R. 2 Ch. D. 221).

The Attorney-General, who was in his place, sanctioned the use of his name, but announced that he would not interfere in any way—not actively—to urge the illegality of the proposed erections, nor negatively, by forbidding the use of his name to the plaintiff on proper terms, since such negative interference would tend to impede the trial of the right.

Hett appeared for the officers of the Agricultural Society.

The Chief Justice gave leave to amend the writ, and in ordering the injunction to be continued to the hearing, made observations to the following effect.

BEGBIE, C. J.:—

In this case, the only defence which has been raised by the defendants is one of form. Neither the Counsel for the Corporation nor the Counsel for the Agricultural Association have ventured either to deny or to justify the

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acts of which the plaintiff complains. The only ground on which they resist a restraining order is that the plaintiff is not by these acts injured, more specially than any other or all of the inhabitants of the city, and that therefore he is not entitled to maintain an action in respect of them; that a private individual cannot take upon himself to represent the public, or pray any relief. I apprehend that this objection is now at an end, the action being converted into an action and information, the Attorney-General being the nominal plaintiff, at the information of the present applicant. It would, in my opinion, have been most improper in the Attorney-General to have thrown any impediment to prevent the applicant from doing this. I conceive that any opposition on his part to the use of his name would have been quite unprecedented, and so, in a sense, unconstitutional; for a Minister of the Crown has no right to exert his influence except according to the accustomed methods. Whenever any question arises in which a civil right or remedy is sought by any individual, however humble, against any other person, however exalted, even the Crown, or against any corporation or body of men, however influential, it is the plain duty of the Attorney-General, as of every person in authority—of course, receiving a proper indemnity as to costs—to act entirely without regard to any political or other influences, and to leave the doors of the established tribunals entirely open and unobstructed —nay, to remove any real or fancied impediments in the approaches to such tribunals. And though there is, of course, no precedent for such a case, it is probable that if any Minister should so far forget his duty and attempt to misuse his power, then the Court might hold that any individual inhabitant might sue on behalf of himself and all. Otherwise, by a combination on purely political or personal grounds, *e. g.* between a Minister and a Municipality (perhaps, his own constituents), the gravest and most enduring infractions of Acts of Parliament might be placed beyond redress. However, the objection of form is no longer raised. And I shall state very shortly how the question of substance appears to me to stand at present. For though the facts are not denied, yet upon an application for an interlocutory injunction the Court has to inquire, (1) whether the plaintiff has a *primâ facie* right to sue; (2) whether the plaintiff has a case which *primâ facie* will proceed at the hearing; (3) whether there is an existent grievance requiring instant interposition; and (4), as the application is always made to the discretion of the Court, there sometimes (*e. g.* in cases of partnership, infringement of patents, &c.) arises the question of the balance of convenience and inconvenience.

The wrong alleged in the present case, and which is sought to be restrained, is that a certain association called the Agricultural Association is threatening to build, and indeed has already commenced the foundations, of a permanent brick building, to be called the Agricultural Hall, for the exhibition of all sorts of articles of agricultural interest, with which is to be connected an extensive series of cattle lairs, and a house for the reception of immigrants (though this latter part of the scheme is alleged to be at present abandoned) upon a part, viz., 20 acres, of Beacon Hill Park. These 20 acres are proposed to be bestowed upon the Association by the defendants, the Corporation of Victoria, to whom the park has been conveyed in fee for the purposes of a park or pleasure ground. The Association is purely voluntary, (*i. e.*) it

has no charter or any corporate existence—it has no trustees—and is alleged to be of such an intangible and impalpable nature that it cannot be made a defendant in an action, nor can any order bind it in any way. The President and Secretary and Architect of the Association, however, are made parties, defendants to the action, out of some 20 or 25 officials (none of whom are named as trustees); and though they, or some of these defendants, declare, I have no doubt with perfect truth, that they have never been near the place or taken any part in the construction, it seems at present quite clear that it is the Association, or some persons on their behalf, who are actively engaged in the encroachment complained of, and that the Association ought to have notice of this litigation. The proper and well-known way of so doing is by naming as defendants some of those members whose names occupy the most prominent position in their published prospectus, and the President and Secretary, the head and the hand, seem the fittest for that purpose. The Architect, also, seems, at present, a proper enough party to be included in any order which may be made.

The first thing that strikes one is, that an inarticulate, unorganized body, if it be a body, of this description, can neither acquire or hold land. Yet it is alleged, and not, I think, denied, that it is proposed to give them 20 acres out of the 120 acres which still remain of Beacon Hill Park. The Corporation do not profess to be erecting these buildings themselves, or to have any control, or anything to do with the plans or projects of the Association, except that they have undertaken to hand over to it this enormous slice—large enough for the display of a couple of model farms. And the next thing that seems pretty clear, is that the Corporation have no power whatever to convey away one inch of the Park, which has been granted to them on express trusts, except upon and subject to those trusts. The matter is regulated by two successive Acts of Parliament. By the first Act (1876, c. 132, Consolidated Statutes) the Crown may select the trustees; but when selected they are to hold the lands on trust "for the establishment or purpose of a public park or "pleasure ground for the recreation and enjoyment of the public" (s. 1). They are to have power (s. 3) "to enclose any lands so to be granted or con-"veyed as aforesaid, with proper walls, rails, fences, or pallisades, and to "erect suitable gates and entrances, and to lay out and ornament such park "or pleasure ground in such manner as may be most convenient and suitable "for the enjoyment and recreation of the public, and to embellish the same "with walks, avenues, roads, and shrubs, as may seem to them fitting and "proper, and to preserve, maintain, and keep in a cleanly and orderly state "and condition, and cause to be so maintained and kept the whole of any "such park or pleasure ground, and its walls and fences, and all monuments, "buildings, erections, walks, plantations, and shrubberies therein and belong-"ing thereto;" and also (s. 4) to make rules and regulations, and to do all acts, matters, and things necessary or proper for the purposes aforesaid, and for protecting the buildings, monuments, plantations, &c., from injury. By a subsequent Act (1881, c. 18), the Crown may no longer select trustees, but "any public park or pleasure ground set apart or reserved out of any Crown "lands of the Province, for the recreation and enjoyment of the public" is to be conveyed to the Municipal Council or Corporation of any City or Town in the Province (words which would justify a conveyance of Beacon Hill

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to the Municipal Council of New Westminster or Chilliwhack, which perhaps might not be unwise), "upon trust to maintain and preserve the same for the "use, recreation, and enjoyment of the public."

Now the prominent words, repeated four times over in these five or six clauses, are, that the land is to be "a park or pleasure ground," and that it is to be held by the trustees for the "recreation and enjoyment of the "public." At the end of sec. 1 of 1881, the word "use" is introduced; but that does not at all vary the matter. The park, *alias* the pleasure ground, is to be used for recreation and enjoyment; and therefore, I think, in no other manner; not for general purposes of profit, or utility, however great the prospect of these may be. A trustee cannot go beyond his express trust; at least, cannot do anything inconsistent with it.

Nobody, I suppose, would wish to deny,—everybody would maintain,—the very great utility, in this Province, of a well-organized, well-directed Agricultural Association. As regards both the internal and external relations of the Province, and within and without the Dominion, it might, and almost necessarily would, be of great public interest and utility. I shall not waste a word on that, But so would a University be of great public interest and utility; or a Sanatorium for our fleets in the Pacific and China Seas; or barracks for a garrison of soldiers; or a proper Lunatic Asylum. So is a cemetery a useful and indeed a necessary public matter. For any or all of these, Beacon Hill would afford an admirable site. But none of these are objects of pure recreation. None of these institutions but would be out of place in a pleasure ground. All establishments addressing themselves to profit or utility are, I think, excluded by the terms of the trust, except the profit and utility to be derived (and it is great) from open air recreations, such as may be carried on in a public park or pleasure ground, and such buildings and erections as are ancillary to public recreations there. That, according to my present view, is the clear reiterated intention of the declarations of trust contained in the Acts of Parliament; and the word "buildings" used in s. 4 of the Act of 1876 must be confined to such buildings as are consistent with the main objects of the Act.

There was one case cited, viz., *The Attorney-General* v. *Corporation of Sunderland* (L. R. 2 Ch. D. 634), which deserves attention, because it decisively shows how utterly the defendants, the Corporation of Victoria, have misunderstood their powers, and their duties. They do not appear to have reflected that trustees are invested with large powers of ownership over trust property, not in order that they may deal with it as their own, but that they may fulfil their obligations; which if they omit or transgress they may be restrained and often made personally liable. And all Corporation property is trust property. The Corporation of Sunderland were, under various instruments, dating from 1844 to 1864, seized of 25½ acres of land, to be held as a "park or recreation "ground," "as a place of recreation for the people," "for public walks or "pleasure grounds for the inhabitants of Sunderland." They had power to erect buildings "connected with such walks or pleasure grounds," but no part was to be used as a cemetery, or school, or prison, or the like. In 1875, the Corporation resolved to build upon one-quarter of an acre,—just 1½ Victoria town lot,—and the plan included the erection of a free museum and library and some town buildings (not, apparently, a town hall, but for the Council of the

museum, &c.), a conservatory or winter garden, and a school of art. Here was no prodigal grant of 20 acres to strangers; in fact the Corporation do not appear to have proposed to part with an inch of ground, or with the full control over the trust premises. There was some division of opinion as to detail among the judges; but they all agreed on the principle that the Corporation should be forbidden to appropriate any portion of the park for any erection or building not needful for or incidental to the maintenance and use of the parks as public walks or pleasure grounds. As to the matters which fall within that principle, the judges differed. All the judges agreed that a free museum and a conservatory were proper. A majority of the judges also approved a free library as being ancillary to the enjoyment of a pleasure ground. All the judges expressly disapproved of the rest of the plans of the Corporation. No case can show more clearly than this, which was cited for the defendants, that every object and purpose which the defendants wish to promote is distinctly condemned, and all these buildings, cattle lairs, Agricultural Hall, Emigrants' home, are quite outside of the trusts of which the defendants are constituted conservators.

I am asked what purposes or what buildings the Corporation may lawfully encourage or erect. It is not necessary to decide this; and so I cannot give any binding opinion. But I should say all open air sports might be encouraged; as there is room enough and to spare, beyond mere ornamental pleasure grounds; and all proper erections and buildings, ancillary to such sports. For instance, a public gymnasium, either in the open air or covered in. Foot-ball, cricket, base-ball, might have their separately prepared scenes of action, where it was found convenient to separate them, with such accessories as the Corporation might sanction. In affording reasonable encouragement to all such sports and pastimes, and even in raising money by rates for that purpose, the Corporation would be acting clearly according to the express letter of their trust. So, if horse-racing be sanctioned (though in England, country meets are now sometimes endeavoured to be put down as nuisances), then, in like manner, proper stands and seats, and rails, and enclosures for the accommodation and safety of the public, and of jockeys, &c. I should say that an aquarium would be as legitimate as a conservatory, which was treated as clearly right in the Sunderland case. And for any schemes of recreation, the Corporation as trustees are expressly empowered to make provision out of their rates, by the Act of 1881. Or, what would probably be more economical and equally effective, the Corporation may sanction or licence any such works to be done by public-spirited individuals, at their own expense, on such terms as may be agreed upon. But in giving any such sanction, it is always to be remembered that the Corporation cannot convey any title to the land, except subject to the trusts. They cannot divest themselves of their obligation to observe the trust, except, perhaps, by wholly retiring from it, and conveying the land to such new trustees as the Crown or Parliament may designate. They could not, probably, select their own successors. And any such licensee under the Corporation must remain a mere tenant on sufferance; he cannot be even a tenant at will.

Whoever can, like myself, remember the ostensible and accepted dimensions of Beacon Hill Park, 25 years ago, and observes the comparatively scanty dimensions to which it is now reduced, must feel some anxiety that at least

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the poor remainder shall be preserved intact. It is to be remembered that in the whole city there is not a single square or circus, or open place of any description whatever (except the two or three acres of the old cemetery) other than Beacon Hill. Residences already exist on two-thirds of the landward sides of the park; and it may reasonably be expected, if the city maintains its present rate of progress, that the park will in a few years be completely enclosed by dwellings (except along the shore); and the neglect of a young city to provide open spaces for the supply of light and air to its maturer growth is one of the great sources of anxiety, on sanitary grounds, in many towns in England. The improvidence of the earlier citizens is severely visited on and dearly redeemed by their children and successors. In the Sunderland case, already referred to, the Corporation had, in 1844, secured, for about $3,500, fifteen acres as a breathing space, which they called a park. In less than 20 years it was found absolutely necessary to enlarge this; but they could only get an additional 10½ acres, for which they had to pay $50,000. It was the proposed misapplication of a fraction of a rood of this ground which led to the litigation.

The order now made will follow very nearly the terms of the order in the case cited, viz., it will, until the hearing, restrain the Corporation, their grantees, licensees, agents, or servants, and also the three other defendants, by themselves, their agents, contractors, or servants, from alienating any portion of Beacon Hill Park, and from appropriating any portion of the said park, for the erection of the buildings, &c., proposed by the Agricultural Association, or of any erection or building not needful for or incidental to the maintenance or use of Beacon Hill Park as a public park or pleasure ground.

If this argument be agreed to be taken as the hearing, then a decree may be made at once; otherwise there will only be a restraining order till the hearing.

If necessary, there will be a mandatory injunction to compel the restoration of the surface of the park to its former condition, the removal of materials, &c. Costs of all parties will be costs in the cause.

MUIRHEAD *v.* LAWSON.

In re "CREDITORS' RELIEF ACT, 1883."

McLEAN'S CASE.

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(In Chambers.)
1884.
October 17.

Chap. 8, *Acts 1883—Execution—Receiver—Construction.*

M. had obtained a judgment in the action against L. The Defendant being examined swore that he had no goods nor lands upon which execution could be levied on a *fi. fa.*; but that there were some contingent payments which he expected to receive shortly. Thereupon M. procured an order appointing himself Receiver, without previously taking out a useless *fi. fa.*

Afterwards, certain unpaid workmen of L. asked, under the above Act, that M. should be ordered to satisfy their claims, preferentially, out of any moneys coming to him as Receiver.

Held, that as there was no writ of *fi. fa.*, nor any execution thereon, nor any lands or goods, the statute did not authorize the application.

Semble, it is not sufficient in such a case that the workmen should claim to be in arrear of wages: the claim should be established against both the judgment debtor and the execution creditor, or at least against the judgment debtor.

Semble, a Receiver is not within the Act.

An Act which takes away the legal right of a diligent litigant to bestow it *gratis* on a stranger is to be construed strictly according to its letter.

THIS is a case where the plaintiff had supplied the defendant, who is a contractor, with lumber which the defendant worked up in different buildings, but never paid for. The plaintiff sued and obtained judgment; and the defendant, being examined, stated on oath that he had no debts due to him which could be attached, nor any property which the plaintiff could seize; and that *fieri facias* would be useless. But there were certain payments which might shortly become due to him under his contracts. The plaintiff thereupon had procured an order, dated 6th October, appointing himself Receiver, until further order, without salary, of all moneys thereafter coming due to defendant; such moneys to be dealt with as the Court should direct.

Drake, Q. C., on behalf of four or five of Lawson's unpaid workmen, asked under Chapter 8 of Acts 1883, section 2,* that the Receiver might be ordered to pay them in full, out of any moneys coming to him as Receiver, before satisfying any portion of his own judgment debt, not exceeding three months arrears of wages.

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* "In case of any writ of fieri facias or execution against goods or lands, any clerk, servant, labourer or workman, to whom the execution debtor or person against whom the process issues is indebted for salary or wages, may apply by summons in chambers to a Judge of the Court out of which the process issues, and it shall be lawful for such Judge . . . . . to order so much as shall be due to him from the execution debtor for salary or wages, not exceeding three months' arrears, to be paid to the applicant out of the proceeds, if any, of the execution, in preference to the claim of the execution creditor; and such sheriff, or other officer, having charge of the execution, shall obey such order on pain of attachment."

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Wilson, for the Receiver, was not called on.

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This provision is evidently founded on the English Bankruptcy Acts, which charitably provide that certain small amounts, to workmen or labourers four per cent., or $10 each; to clerks or servants three months' wages, not exceeding $150 each, may be ordered to be paid in full, out of a bankrupt's estate, in preference to the other creditors in bankruptcy, leaving such workmen or clerks to prove for the residue (Bankruptcy, 1849, ss. 168, 169.) Our enactment, however, goes a great deal further than this provision, and entirely neglects some limitations which the Imperial Legislature thought necessary. Moreover, there is a great difference between giving preferences among a body of creditors who are all otherwise on a level, and taking away the right which an individual has secured by his own diligence to bestow it on one who has shown no diligence at all. With that I have nothing to do, but only to apply the law as I find it.

The first thing to be observed in both enactments is, that they are permissive. The Court may order this preference, if it thinks fit, and, therefore, there ought always to be some cause shown for the interference, or at least that the applicants have not by their conduct forfeited their right to favour. Now, why should Lawson's workmen be perferred to Muirhead's? If Muirhead cannot get paid for his lumber, how is he to pay his own men? If, like an honest employer, he has already paid his workmen, he is entitled to stand in their shoes. Then, why should Muirhead's workmen, who have prepared this lumber, be postponed to Lawson's workmen, who have worked on the lumber which the labour of Muirhead's men supplied? Muirhead's men were the first to work on the lumber, and (treating Muirhead as their representative) the first to ask the assistance of the Court, and they have got it. Why should it be taken from them? There is no reason, except compassion. It is natural to feel compassion for men working all day long for their daily wage, to provide daily bread for themselves and their families, who find themselves disappointed of their just expectation, and to feel indignation against the employer, who has thus deceived them. But compassion and indignation must not be allowed to operate too hastily. Is no compassion to be shown for Muirhead's men? And have Lawson's men acted with reasonable prudence? Let us see the probable effect of their conduct. The ordinary wages of men employed in house-building are, I believe, from $3 to $5 per day. Eight or ten of Lawson's men allowing their wages to fall three months in arrear would accumulate such a preferential claim (if the Court were, as a matter of course, to allow the whole) as might enable Lawson to set all his other creditors at defiance; and he might take advantage of this, though the workmen never thought of such a result. The Court, therefore, on all applications under this Act, will probably look to the amounts claimed and other circumstances, and is by no means bound in all cases to award a preference to the extent of $300 or $400 apiece to a dozen workmen who have been thus careless in demanding their dues. When a man engages by the day, he evidently desires daily, or, at least, weekly pay. I cannot consider an employer quite honest who defers the payment of daily wages beyond very short intervals, or who engages a daily workman without a reasonable certainty of being able to pay

promptly. But as to the workman, considered rightly, if he runs in debt to his butcher and baker, while allowing his employer to withhold his daily or weekly pay, he does in fact enable his employer to retain in his hands money belonging to the butcher and baker without their knowledge or consent. Moreover, he enables his employer to maintain a false show of solvency, and to obtain, perhaps, credit which would not otherwise be granted. It is possible that some of the lumber in this very case would not have been supplied on credit, but for the laxity of some of Lawson's men. A workman on daily wages should insist upon being paid at the stipulated intervals, and these should be brief, if he desire to come within this Act. Except in a direct case of false pretences, he who gives undue credit is morally as blameable as he who takes it, and more generally mischievous. Here, it is true, the lumber merchant has given credit to Lawson, as well as the labourers; but it is in the usual course of trade that the lumber should be sold on credit; it is not, I am happy to believe, in the usual course of trade that labour should be supplied on credit. An employer who cannot pay his week's wages is like a banker who cannot meet his own notes. He is, in fact, insolvent. And if he cannot induce his banker to advance sufficient to meet pay day, he must be in very bad credit. When an employer has neither money nor credit, the sooner he is stopped the better for all parties, including himself. In the absence of a bankruptcy law, there appears to be no more effective proceeding than that every unpaid workman should enter a plaint in the County Court on the very morrow of the day in which default is made. That would probably prevent the insolvent employer from getting undue credit elsewhere, and it is, in my opinion, an open, honest course for the workmen to pursue. And every honest contractor would be glad to see this done.

I have felt much interest in this case, as it is the first application made to me under this Act, and I have therefore made these observations which may perhaps assist at the discussion of some future case. But they are quite extra-judicial, and do not bind myself, nor anybody; for I am of opinion that the present application does not come within the Act, which, of course, is to be construed strictly and literally,—(in this instance, I think, the true meaning of the term "liberal" in the Interpretation of Statutes Act, 1872). The Act of 1883 gives to the Court no power to interfere unless where there has been taken out "a writ of *fieri facias* or execution against goods or lands." And the claimant is only to get his preferential allowance "out of the proceeds of the execution," *i. e.*, out of the proceeds of the "goods or lands" seized. Now there has been no writ of *fieri facias* taken out, nor any execution in the present case. There has been a Receiver appointed; but the appointment was made without the previous issue of any *fieri facias* (an unusual course), expressly on the ground that a *fieri facias* would be useless, since by the sworn statement of the judgment debtor he had neither goods nor lands to be seized. It was indeed argued by Mr. Drake that the appointment of a Receiver had for its object to enable the judgment creditor to get satisfaction out of some contingent and equitable rights of Lawson, and that such appointment is even sometimes called an "equitable execution." That is perfectly true; there is doubtless sufficient analogy to justify the application of the designation as an explanatory phrase to some cases of receiver-

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ship, *e. g.*, to the present. But where there is an analogy between two things, that very circumstance shows that they are not identical. In my opinion there is here neither a writ of *fieri facias*, nor an execution, nor goods nor lands. The Act does not authorize me to interfere at all. I cannot take away a man's rights and give them to another, by inference or analogy. I am not authorized to do that. Moreover, the applicants merely allege that they are creditors of Lawson. They have not established any demand against him. Until they do so, I am not sure that they have any *locus standi*. The Act does not say "to whom the judgment debtor is *alleged* to be indebted," but "is indebted." The applicants must establish their claims, probably, in the usual way. I do not see any more summary method provided by the Act, and I certainly could not adjudge them to be creditors of Lawson till Lawson has been heard. Perhaps it would be proper in such a case to establish their claim also as against the judgment creditor in possession of an execution. Nothing of the kind has been done. The application must therefore be refused. I do not, however, think it necessary to make the applicants pay the Receiver his costs of attending on this summons; he may add them to his costs as Receiver.

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1884.

August 27.

CROWTHER *v.* BEAVEN.

Trespass—Victoria City Lots—"City of Victoria Official Map Act, 1880."

The "City of Victoria Official Map Act, 1880," and amending Acts, have reference to streets only.

Held, therefore that nothing in those Acts could justify an interference by private individuals with the boundaries of a lot held by purchase and 20 years' possession.

Plaintiff is the owner and occupier of Victoria City Lot 398, and the Defendants are the owners and occupiers of the westerly adjoining Lot 399.

The trespass complained of was the removal by Defendants of a fence which for many years was accepted as the boundary line between the two lots and the placing of the fence four feet to the east, *i. e.* four feet on to the plaintiff's lot.

The Plaintiff based his claim upon his ownership and undisturbed possession for upwards of 20 years, during which time his lot had been fenced in by the fence now in question.

The defence set up by the pleadings, was that the fence was not on the true boundaries, but encroached four feet on Defendants' lot, and that as soon as they became aware of this they took down the fence, with a view to erecting it on the true boundary line.

At the trial, the possession to the four feet in dispute was clearly established in the Plaintiff.

The Defendants then raised *ore tenus* the following defence:—1st. That they had a certificate of indefeasible title to Lot 399 under the "Land Registry Ordinance, 1870." 2nd. That the "City of Victoria Official Map Act, 1880," established that the true easterly boundary of 399 was within the line of the Plaintiff's fence, and that therefore the Plaintiff's prescriptive right could not prevail against them.

Theodore Davie, for Plaintiff.
Pollard, for the Defendants.

GRAY, J.:—

Circumstances will prevent my giving to the argument in this case the consideration which it deserves, but important public interests require there should be no delay in delivering judgment. I shall, therefore, select the salient point on which I think the question turns, reserving to both parties the amplest opportunity of appealing to a higher Court on all the points raised, as well as the one on which I may decide.

Both parties are clearly entitled severally to the lots they claim—the plaintiff to 398 by purchase and possession for over twenty years, assuming the *locus in quo* comes within 398; the defendant to 399 by purchase and certificate of indefeasible title under the "Land Registry Ordinance, 1870," assuming that it comes within 399. The real question is, where is the locality of 398 and 399?

The evidence clearly shows that at the time of the purchase of both lots, severally, each party took possession, and has since held, as part of his lot, a plot of ground four feet to the westward of the line now claimed by the defendant to be the governing line. All of the lots on the street, extending along the front the full length of the block, 600 feet, were so located, held and built upon, commencing with the fence and building of the Jewish Synagogue at one end and terminating with the house and lot of the plaintiff on Quadra street at the other. That each of the ten lots constituting the 600 feet along the front has its full complement of sixty feet, except the plaintiff's, which is about eight inches short. That the starting points—at the Jewish Synagogue and at the plaintiff's lot—were given by parties who were represented and believed to be and recognized as the authorized servants of the Government or Corporation, the then holders in fee of the town site from the Hudson's Bay Company—though perhaps technical objections might be raised to the inception of their appointments. That the lines and starting points so given by these parties were given at the time as the legal lines and starting points of the lots in the blocks according to the then received and authorized plan of the city—Pearse, Tiedemann, or Gastineau, at the Jewish Synagogue, and F. W. Green at the plaintiff's lot—the latter in 1861, at the time of the purchase; the former in 1862 or 1863, at the time of putting up the fence and building; and have been held by the owners of the several lots until the occasion of the present dispute.

In 1880 the Legislature passed an Act to make valid and binding a new official map or survey of the City of Victoria, which, after reciting the facts of certain surveys and the making of a plan or map then lately made, and further reciting that it was expedient to declare that the said map should be deemed and taken to be the official map or plan of the City of Victoria—*so*

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far as the boundaries of streets in said city are concerned—proceeded to enact the necessary steps to accomplish that end, providing for the rectification of the streets and the *resumption* by the Corporation of any land *included within the limits of any street*, notwithstanding the same may have been in the possession of any person, or built upon or improved, compensation being paid therefor. In 1881, and again in 1883, the Act of 1880 was amended, but in all cases with *reference to streets only*. Indeed, it may be said, the Legislature and the Corporation were most careful to abstain from any interference with private rights, their object being only to protect the public interests in the use and enjoyment of the great highways.

The public were, through their governing body, the Corporation, to have the right to the enjoyment of all those portions of the grounds which the original plan or map of the city showed were intended for the public streets. And if during the past period any encroachment thereon had been made by private parties, then the portions so encroached upon were to be retaken for the public, and the party paid the appraised value thereof; and further, that if during the same period the public had by dedication or otherwise acquired the legal right to other parts or portions of the public highway, they were not to be deprived of their rights therein. The whole legislation was solely for the public streets. The Acts are wise and judicious, if not misapplied.

By the new map so legalized, if it applies to aught but the streets, the *plaintiff's lot, and the whole block of lots*, would be thrown four feet further to the eastward, and the defendant contends that he had therefore a right to step in and take four feet off the ground hitherto held and enjoyed as part of 398, because by that new plan it fell within 399, to which he had an indefeasible title, and 398 might recoup himself by taking his four feet from Quadra street, which by the new plan was alleged to be narrowed four feet. Were it not for the new plan it is not pretended that there was any sanction for such action.

I think this is a mistake; there is nothing whatever in the Act to extend the right of appropriation—which for the public interest is given to the Corporation relative to the streets—to private persons for their own purposes. There is nothing whatever to say that what had been previously held as lot 399, and which contained all the ground that the original location of the city gave to 399—though it might not be as to every foot of it on the exact spot which the new plan defines as within 399—should now be changed to suit the new plan, assuming the latter to be more correct than the old one. So far as private rights were concerned they stood and stand exactly where they did before the Act of 1880, except as to the right of appropriation on terms defined by statute for public streets. Each one held what he before legally had. Though in the construction of law we cannot look to expediency, we must to common sense, and it cannot be assumed that either the Legislature or the Corporation intended any thing so absurd as that a stampede of houses from the Jewish Synagogue to Quadra street should commence, and each take ground four feet to the eastward. The defendant has an indefeasible title to 399, but it must be the 399 he purchased and took, and held at the time the indefeasible title was given, not what he now assumes to be 399—because the measurement of the line of the street in front may be altered, or Quadra street beyond be declared to be too wide. The alterations

made by the new map, whatever they might be, were only legalized as to the public streets, subject to the provisions of the Acts named--not as to private properties between private individuals. Any other construction would lead to wholesale spoliation, and create a war of litigation that would make every man and woman in the city a plaintiff or defendant.

I have limited myself to this point because I think it the turning point of the case, but there are several others, particularly as to the Registry Acts, on which I think Mr. Pollard should be heard if he desires to appeal, and on this point also should he wish it.

The judgment must be for the plaintiff—$50 damages and costs.

Execution to be stayed until the sitting of the next Full Court.

QUEEN *v.* ROGERS.

Criminal Trial—Prisoner's Statement—Counsel—Right of Reply.

A prisoner on his trial, defended by Counsel, may, at the conclusion of his Counsel's address, himself make a statement of facts to the jury, but the prosecution will be entitled to reply.

Prisoner indicted for murder.

McColl, for prisoner, proposed not to call evidence for the defence, but asked His Lordship to permit the prisoner to make his statement of facts after his (Counsel's) address, and referred to *Reg.* v. *Shimmin* (15 Cox C. C., 123), as to the settled practice in England.

CREASE, J. :—

I think the case cited, coming after the date of the meeting of the English Judges mentioned in the *Law Times* (p. 100) for 1883, has settled the practice permitting a prisoner to make a statement of facts to the jury, if he chooses, after his Counsel has addressed them. The defect in such a statement is that it is not on oath—and is given under great temptation—and therefore not entitled to any great weight as against sworn testimony, and may be used against the prisoner. Counsel for the Crown, of course, in such a case has the right of reply.

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5th, 6th, & 15th June, and 17th July.

MURNE *v.* MORRISON.

Tax Sales—Assessment Roll—Surcharge of 25 per cent. and Interest at 18 per cent. per annum—Appointments by Order in Council.

On the construction of the "Taxes on Property Acts," 1876, 1877, 1878, 1879, 1880,—*Held*,

1. Land contracted to be purchased from the Crown but only part paid for, and in respect of which no Crown grant has issued, is taxable under the Act of 1876, s. 8.

2. The surcharge of 25 per cent. and 18 per cent. interest on unpaid taxes is unconstitutional and void.

3. The affidavit required by s. 40 as to the correctness of the roll, extends to all lands taxed, whether belonging to resident or to non-resident taxees.

4. Such last mentioned affidavit and also the certificate of the Clerk of the Court of Revision that the roll has been finally passed, are not merely directory but precedent and obligatory provisions, and without them no tax is so imposed on the land as that it can be levied by forced process.

5. The Act of 1876, s. 12, authorized "the Lieutenant-Governor in Council from time "to time to appoint one or more person or persons to be Assessors in each district for "the purposes of the Act." The Provincial Secretary reported to the Executive Council, sitting as a Committee without the Lieutenant-Governor, that it would be expedient to appoint H. to be Assessor in New Westminster District. The Committee, adopting the Report, recommended it to the Lieutenant-Governor for his approval. The Lieutenant-Governor subsequently approved of the Report (how or when, did not appear), but nothing further was done. *Held*, that such approval was not an "appointment" within s. 12, so as to bring a sale by H. within the protection of 1880, s. 30, as being a sale by "a person duly authorized to collect and enforce payment of taxes."

The provisions of these Acts are to be construed strictly and followed strictly.

The principle laid down by Mr. Justice Shaw in *Torrey* v. *Milbury* (21 Pick. 64) approved, (viz.) "All measures intended for the security of the subject, for securing "equality of taxation, are conditions precedent; and if they are not observed, the "subject is not legally taxed."

The circumstances which gave rise to this litigation are as follows:—

In 1873, Mr. E. Johnson (from whom the plaintiff afterwards purchased) contracted with the Crown for the purchase of three lots in New Westminster District, viz., Nos. 29, 30, 32, Block 1 N., Ran e 1 E., at the upset price of $1 per acre, and in 1878 obtained his Crown grant.

Under the "Assessment Act, 1876," taxes were claimed against Mr. Johnson in respect of these lots for the years 1876-78. These taxes he declined to pay, and on the 30th April, 1879, the land was sold for taxes to the defendant, who, on the 20th January, 1882, applied to have the tax sale deed registered.

In November, 1881, Johnson sold to plaintiff Murne, who duly registered his conveyance on the 25th November, 1881.

The plaintiff now asks that the tax sale of 30th April, 1879, be set aside, and for an injunction to restrain the registration of the conveyance.

A. E. B. Davie, for Plaintiff.

Drake, for Defendant.

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The "Assessment Act, 1876," (No. 152 Cons. Stat.) declares (s. 8) that "all land and personal property and income in British Columbia

"shall be liable to taxation," except (1.) All lands "vested in or held "in trust for Her Majesty, ... or held by Her Majesty, or "vested in any corporation or person in trust for Her Majesty, . . . "or for public purposes, ... or for Indians." The other exceptions are not material here. Section 9 declares "There shall be "assessed, levied, and collected from every person and paid to Her "Majesty, ... one-third of one per cent. on the assessed value "of real estate." That means, real estate vested in the taxee for private uses, not within the exemptions in section 8. Section 10 declares that "in addition, an annual tax of five cents per acre shall be "levied upon all unoccupied land in British Columbia." But this "wild land tax" is not to be levied in respect of land now vested in or held in trust for Her Majesty, nor on any property held by Her Majesty, or by any person or corporate body in trust for "Indians," and "either unoccupied or occupied by some person in an official "capacity."

The Act does not expressly state that "land," "real estate," or any such expression shall include equitable estates, or incorporeal hereditaments. It may be noted that section 8 imposes a tax on "*land*," personal property, and income; but section 9 says everybody is to be taxed in respect of his "*real estate*," personal property, or income. The word land does not occur in section 9, nor real estate in section 8; nor is there any definition of either expression in any interpretation clause, nor any express provision that these two expressions shall mean the same thing. I conceive, therefore, that these words must have their usual popular meaning, which is also, I take it, their technical meaning, at least as to corporeal hereditaments; subject to this, that in an Act imposing taxation, any real ambiguity is to be construed in favour of the subject.

Under this "Assessment Act, 1876," taxes were claimed against Mr Johnson in respect of these three lots for the three years 1876, 1877, and 1878. These taxes he refused to pay. In 1878, Mr. Johnson paid the full amount of his purchase money, (viz.) $1 per acre, and a Crown Grant issued to him, dated 8th November, 1878, which was duly registered on the 3rd April, 1879. I am not sure when the two years' taxes for 1876 and 1877 were claimed, otherwise than constructively, as herein appears. A letter from Mr. E. Johnson to Mr. J. C. Hughes, the Government Agent at New Westminster, however, dated 22nd April, 1879, was proved in evidence, which reads as follows:—"I was "not liable to be taxed in 1878 in New Westminster district. But if "any such taxes were assessed against me, or against any property "supposed to belong to me, I beg to give you notice that I am over "(and wrongfully) assessed.

"I also give you notice that if my land, sections 29, 30, and 32" (29 and 30 being the lots now in question), "or any part of it, be sold for "alleged taxes, I shall dispute the validity of the sale."

It was important for Mr. Johnson to shake off, if possible, the tax as wrongful, irrespective of its being an incumbrance on the land,

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because the tax, when imposed, becomes, according to the better opinion, a debt due from the taxpayer to the Crown, recoverable like any other debt, even apart from the express declaration in section 63 of the Act 1876; and at all events might have been levied at once by a sale of his furniture at Victoria, just as well as by a sale of his land in New Westminster. It is to be observed that no express reference is made in this letter to any tax claimed as for 1876 or 1877. These years may, however, well be included by the generality of the last sentence of the letter.

No notice appears to have been taken of this letter of the 22nd April, 1879; and eight days later, on the 30th April, the land was, by Mr. Hughes, the Government Agent, put up for sale by auction, for the three years' taxes, 1876, 1877, and 1878. The particulars of such taxes are stated as follows:—

Real property	$ 7 20	
Wild land tax	72 00	—79 20
25 per cent	19 80	
Interest, 18 per cent	9 28	
Expenses	3 45	
	$111 73	

And the land was sold for that precise sum to the defendant Morrison, being the only bidder. This is the sale now impeached. The taxes for the year 1879 are wholly omitted in this levy of 30th April; they were due at that time, but not delinquent until 30th June, that date having been substituted for 1st March by an Act of 1879, c. 36. No notice of this sale of the 30th April, or of the intention to proceed to sale on that or on any other day, appears to have been given to Mr. Johnson, other than the implied notice from the insertion of an official advertisement in the Gazette. On the 16th June, 1879, Mr. Johnson applied to know "whether there were then any taxes assessed against "him or his property in New Westminster district," and on the 28th June paid $27, which in the official receipt is expressed to be in payment of taxes on the three lots for the year ending 31st December, 1879. In the particulars of this demand the 25 per cent. and all claim of interest are wholly omitted. It is evident that this correspondence, non-correspondence, and receipt might, and probably did, utterly mislead the taxpayer. He would almost necessarily infer that all the previous three years' assessments as to which he had threatened litigation in his letter of the 22nd April, 1879, had been abandoned. On the other hand, the Government Agent was, from his point of view, strictly accurate. The taxes for the three previous years were not due, the amount having been levied by the sale of the 30th April. The taxes for 1879 were due from Mr. Johnson on the 2nd January, and, notwithstanding the sale, Mr. Johnson had still a considerable, and I think a taxable, interest in the land, which he might, under the statute, by virtue of which the sale was made, redeem within two

years, until which time the purchaser, Morrison, was not entitled to a conveyance. It is not disputed, however, that Mr. Johnson was in fact misled; and on the 21st November, 1881, he sold two of the three lots to Murne, the present plaintiff, a purchaser therefore for valuable consideration fully paid, without notice of any prior charge. The receipt of the 28th June, 1879, for the year's taxes was produced. Murne duly registered his conveyance on the 25th November, 1879.

On the 16th January, 1882, rather more than 2½ years after the sale by auction, Morrison obtained a conveyance from Mr. Hughes, and on the 20th January, 1882, applied to have that conveyance registered. The first part of the relief prayed which I have to consider, is whether this registration should be restrained. It was observed that the defendant ought to have applied to Mr. Hughes for his conveyance immediately at the end of the statutory two years, viz., immediately after the 30th April, 1881. Had he done so, and registered that conveyance, it would certainly have prevented the additional complication of Murne's position, as a bona fide purchaser. But there is enough, I think, to decide the questions before me without considering the effect of this delay.

The "Assessment Act, 1876," under which the three years' taxes thus levied were imposed, provided methods in accordance with which the tax was to be assessed, and also methods in accordance with which the assessed amount, if unpaid, was to be levied by sale of the land. These latter afforded to the taxee some small degree of protection against a premature sacrifice of his land. They are very imperfect provisions; they seem to omit all consideration of the cases of equitable estates, lands on mortgage, lands held in undivided shares, or the case of particular estates, estates for life or years, &c., and are, or would be considered elsewhere, very stringent. However, they required that a tax should be registered at the Land Registry Office for two years before a sale of the land could be made; that certain notices of sale should be given; and that ninety days' interval should be allowed between the notice and the sale. Nearly all these provisions have been swept away by subsequent legislation. In particular, by the Act of 1878 all previous years' taxes, if unpaid for sixty days after the revision of the list for that year, are declared to be "delinquent" (s. 8); and delinquent lands may be sold by the assessor (s. 11) without any further delay or notice apparently, than the posting up in his office for one month (and sending a copy of the same to the Provincial Secretary for publication in the Gazette—no time stated) a list of the alleged defaulters. But such sale probably could not take place for two months after the 1st March (s. 13 of 1878). It is too evident from what was proved in this case that an owner of land, a well-known professional man, in good practice, resident in the Province, in communication with the assessor concerning these taxes immediately before and immediately after the sale, may yet be left in utter ignorance, a week before the sale (22–30 April) that there was any intention

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to sell, and may remain for years in utter, and justifiable and scarcely avoidable, ignorance that his land has been sold. It would be almost impossible for him to be secure on these points unless he took up his residence at the assessor's office, and followed him about like his shadow all his life. (For the assessor may sell at any time, and adjourn as he thinks fit if he chooses to say there are no bidders; and perhaps a single bidder would not deprive him of this power; and apparently to such place and time as he thinks proper, of which adjournment no notice by advertisement or otherwise seems to be required.) Even if one landowner could do this, it would be physically impossible for every landowner in the district; and every landowner is in the same ignorance, and the same peril. Inasmuch as the Legislature has thought it necessary to place these powers in the hands of the assessors, it is not for anybody to impugn the wisdom and propriety of them: (see the remarks of the Deputy Minister of Justice—B. C. Sessional Papers, 1880, p 353). But it seems certain that if land in this Province, either without or within a municipality, is to retain any market value whatever,—if any man is to have any security that the farm or residence he supposes to be his own is not liable to heavy demands from the Crown, or that it has not in fact been sold away from him to somebody else for a trifle, a couple of years ago, after he has been years in possession, and perhaps for taxes alleged to have accrued in respect of land at the opposite extremity of the Province, and before he himself ever purchased any land or came into the Province at all—(see s. 6 of 1880)—these powers must be exercised in the very strictest conformity with the statute which confers them. (And see the remarks of C. J. Richards accordingly, in *Hall* v. *Hill*, 2 E. & A., p. 574.) It is to be observed that the insecurity attaches to all land in the Province, town lots as well as wild land. For, by the above section, if the vendor of a town lot in Victoria be also the owner of wild land in Okanagan, all arrears of the taxes in the latter (which at five cents per acre per annum may amount to a considerable sum) as well as all other taxes under the Assessment Acts and School Tax Acts, may, under section 6 of 1880, be levied on the town lot at any time, into whosesoever hands it may have passed, after any lapse of time, and without any charge having been registered by the Crown. And this liability extends to the unpaid taxes of every successive proprietor of such town lot, at least since 1880: all arrears of taxes from any such proprietor are a statutory charge on any land he may own anywhere in the Province—nor can a clear title be shown to any piece of land whatever until it be shown that every successive owner since that Act has paid all his previous taxes to the Treasury. Every man is, or may be,—and he can seldom or never prove that he is not,—placed in the position of an accountant to the Crown, so much deprecated by the Court in *The King* v. *Smith*, Wight. 49, cited Sug. V. P. 674 (11th edition), chap. XII., s. 1, sub-s. 64. But the relief given (to a bona fide purchaser without notice) by

the Court in that case, could hardly be given here; it seems to be expressly (and I think constitutionally) forbidden by that 6th section. The recent local Statutes operate, I think, in effect to repeal 1 & 2 Geo. IV., c. 121, passed for the relief of such accountants. And according to Sug. V. P., chap. XXI., sec. 9, sub-s. 1, p. 1009, it would seem that no title to land in the Province could be forced on an unwilling purchaser. Such provisions as these shake the security of every investment in the Province; for what investment will be regarded as stable, if the right to land just sold by Crown grant, just registered as a perfectly clear title at the Land Registry Office, be insecure? Of what use is a Land Registry Office to guard against private incumbrances, if unknown incumbrances in favour of the Crown may exist,—unregistered, unclaimed, unascertained? And thus discouraging all investments in the Province, these provisions discourage habits of economy and frugality—or if a man lays by moneys, he will surely invest them in some other country, where capitalized profits are less insecure. It was well said, therefore, by C. J. Richards that such enactments must be construed with the utmost strictness. It speaks highly for the honesty and discretion of the officers entrusted with these duties that complaints have not been louder or more frequent.

The provisions of the Act of 1878, however, which introduced this extreme stringency, chiefly refer to the mode of levying. The mode of assessing the tax for the three years 1876, 1877, and 1878 still remained under the provisions of the Act of 1876. And unless a definite tax have been legally assessed, it seems impossible that any amount whatever can be legally levied either by distress of goods or sale of land. Now the tax is to be assessed, on the whole, as follows:—1st. An assessor for each district, and also the person or persons to form the Court of Revision and Appeal are to be appointed by the Lieutenant-Governor in Council (ss. 12 & 42). 2nd. The assessment roll (s. 13) is to be prepared by a day to be appointed by the Lieutenant-Governor in Council (s. 40) and to be verified by a certificate of the assessor under oath (*ib.*) 3rd. The completed roll "with the certificate and affidavit attached" is to be open to inspection by the public for at least 20 days (s. 49, sub-ss. 1, 10), in order that objections may be taken by any person assessed in the district (s. 49, sub-s. 2), either on the ground that he himself has been assessed too high, or that some other person has been assessed too low or omitted altogether (*ib.* sub-ss. 1, 2, and *passim*). This roll, and these objections, are to be brought before the Judge of the Court of Revision, to be by him settled and disposed of (s. 49). And "the roll as finally passed by such Court, and certified by the clerk as so passed," is to be valid and bind all parties (s. 50).

The Act of 1876 (s. 78) declares that interest at the rate of eighteen per cent. per annum shall attach to unpaid taxes; and s. 75 imposes, in addition, a surcharge of ten per cent. on all taxes unpaid at the end of the year for which they are due. This sum of ten per cent. is

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increased by the Act of 1878 to twenty-five per cent.; and the amount of taxes for which the land in the present case was sold includes the twenty-five per cent. and eighteen per cent. per annum interest. These surcharges are clearly and beyond question or dispute quite void, being beyond the competency of the Local Legislature to impose. This has been judicially decided in the Province of Quebec, in *Ross* v. *Torrance* (2 Montreal L. N. 186). They were objected to at the time; the Dominion Government, while hesitating to disallow the whole Act on this account, most pointedly called the attention of the local executive to the utter futility of such provisions, and to the litigation and confusion "which will undoubtedly arise if the Act be attempted to be "enforced in its present shape." (See the Report of the Deputy Minister of Justice, approved by the Minister of Justice, 15th August, 1879, printed in the B. C. Sessional Papers, 1880, p. 353.) The attempt nevertheless has been made; and this action is one of the consequences. Under the "Supreme and Exchequer Court Act" and the British Columbia Statute (1882, c. 2) I might perhaps decline to decide on the constitutionality of these provisions, though neither party has requested me to refer it to the Supreme Court at Ottawa. But I do not think it a fit case to refer. 1st. The parties have not raised the question in their pleadings as the statute requires. 2nd. The point is really so clear that it was not substantially disputed. 3rd. It has been judicially decided. 4th. The Provincial Legislature have in effect, by their subsequent legislation, admitted the validity of the objections set forth in the report of the Deputy Minister of Justice, already referred to.

The attempt to enforce payment of this unconstitutional impost by sale of the land would invalidate the whole levy unless cured by the very strong section 16 in the Act of 1878, and section 26 in that of 1880. Although the amount of tax for any given year leviable by sale of the land must, I think, be determined by the finally revised roll for that year, and cannot be altered by subsequent Provincial legislation; not, at all events, as having been due in that year; yet the methods by which such amount is leviable may, I think, be altered by subsequent legislation; viz., by any Legislative Act in force at the time of the levy (here on the 30th April, 1879). And, I think, even legislation subsequent to that levy (if such legislation be not otherwise objectionable) must be, by this Court, deemed efficacious for confirming or protecting any such levy, or the persons engaged in it. This distinction between assessing and levying a tax is analogous to the well-established distinction in criminal cases. For instance, fraudulent bailees were in 1857 for the first time declared guilty of larceny. That would not render criminal a fraud perpetrated before the passing of the Act, for such fraud was not a crime when it occurred. On the other hand, all persons accused of larceny committed in that or any previous year are liable to be tried and sentenced according to the methods and punishments fixed by the

law as it stands at the time of trial, though enacted subsequently to the offence. So here: The validity of an assessment for any given year is to be determined according to the law of that year; but, if unpaid, the tax may be levied according to the procedure in force at the time of the levy; and the validity of the levy shall be determined by the methods of procedure in an action at the time that the question is brought into Court.

Irregularities are here alleged, both in the assessment of the tax (under the Act of 1876) and in the levy of the amount (under the subsequent Acts). Where a power is alleged to be ill-executed, by reason of neglect of the regulations annexed to its user and creation, the first thing to examine is whether the regulations are "directory" merely, or "obligatory" and "precedent." In the former case, the observance of them is not essential to the existence of the power; but if precedent, they are obligatory: the conditions must be observed before any power is vested in the agent, even if otherwise duly appointed and qualified. And of course, if the agent have no power, any sale by him is a nullity. In examining whether provisions are directory or obligatory, I do not know how to improve or vary materially the principle cited approvingly in Burroughs on Taxation, 249, from a judgment of Mr. Justice Shaw (*Torrey* v. *Milbury*, 21 Pick., 64): "One rule is plain and well settled, that all measures intended for "the security of the citizen, for securing equality of taxation . . . "are conditions precedent; and if they are not observed, the citizen is "not legally taxed. But regulations . . . . designed for the "information of assessors and officers, and intended to promote method "and uniformity of proceeding . . . . are directory, and com- "pliance or non-compliance with which does not affect the rights of "tax-paying citizens. . . . . Officers may be punished for not "observing them, but they do not affect the validity of the tax." The decisions of the United States Courts are not legally binding on me, but those Courts have had so much larger experience in dealing with this description of cases than has, fortunately, fallen to the lot of English Courts, that their discussions are even more valuable than those of our own Judges. Mr. Justice Shaw's language seems the language of deliberate common sense. And the principle is just as applicable to an inquiry into the legality of the power of levying the tax by sale, as on an inquiry into the legality of the imposition of the tax itself. Where "irregularities," says Vankoughnet, C., in *Hall* v. *Hill* (2 E. & A., 572), "are merely ministerial or executive, the Courts will go a "long way to excuse them; but we cannot throw aside every provision "of the statute, and permit men's properties to be sold after any "fashion which the officers charged with the duties of enforcing "payment of taxes may choose to devise."

There was one ground taken by the plaintiff—I rather think, the ground upon which in 1878 he chiefly relied, in denying his liability—in which I cannot agree with him. It was contended that Mr. John-

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son's interest in this land, previous to the issuing of the Crown grant on 8th November, 1878, was so vague and imperfect that it was not taxable at all: not within the meaning of the term "real estate," in s. 9 of the Act of 1876. And s. 77 was relied on, which provides that "unpatented land" (explained to mean land for which no Crown grant has issued) "which shall be hereafter sold, leased, or agreed to be sold, "to any person, or which shall be located as a free grant, shall be "liable to taxation from the date of such sale or grant." It was argued that the last word of this section must mean Crown grant; (if the phrase be ambiguous, it is to be construed in favour of the taxee); that there never was until 8th November, 1878, any sale, properly speaking, but only a contract of sale—which contract Mr. Johnson could not enforce against the Crown, if the Chief Commissioner chose arbitrarily to refuse to complete: and that so fleeting and imperfect a right could not be supposed to be an object of taxation. But to this line of argument there are several answers. First—There does not appear to be any inexplicable ambiguity in the word "grant" in s. 77. Two things having been mentioned in the previous part of the section, a sale (for a lease is a sale *pro tanto*, and an agreement for a sale is a sale in equity) and a free grant, the section provides that the taxable interest shall arise at the date of such sale or grant; *i. e.*, as the case may be: evidently referring to the free grant already mentioned. The difficulty arises from the use of the word "unpatented," explained to mean "in respect of which no Crown grant has issued." Section 77 is doubtless very ill expressed: it does seem, grammatically, nonsense to say "Land in respect of which no Crown grant has issued "shall only be taxable from the date of such grant." But the Courts, in construing the Acts of the Legislature, take notice that they may often be the Acts of unlearned men, and they give effect to a meaning which is reasonably plain, even although ungrammatically expressed. And I think the meaning is this: Lands which have been sold for a money consideration shall be immediately taxable, though no Crown grant has issued, (*i. e.*, lands taken under sections 39 or 61, &c., of the "Land Act, 1875," or similar statutes). But lands located, taken, *e. g.*, by a homestead settler under s. 36 of the "Land Act, 1875," or similar statutes (under which a Crown grant will issue gratis, upon certain conditions), shall not be taxable until the actual issue of the grant.

Then as to the uncertainty of the interest, and the impossibility of Mr. Johnson's enforcing his claim to it against the will of the Crown: if it be a just claim I cannot assume that the Crown would in any manner dispute it. And Mr. Johnson's contract for the land in 1873 would, in the popular sense, be called a purchase, and therefore that is the sense in which it is to be construed in an Act of Parliament; and that is the evident meaning in s. 61 of 1875, sanctioning payment by instalments; though the purchase (which necessarily implies a sale) is not complete until payment of the full consideration money on the one hand, and the execution of the Crown grant on the other. It

appears that Mr. Johnson had in 1876 only paid one-half of the purchase money; I do not know under what Act. The payment by instalments is first legalized by the Act of 1875, and limited to agreements under that Act (s. 61); and in 1873, when he had agreed to buy, the whole of the purchase money for these three lots ($480, at $1 per acre) was demandable at once. However, he did not pay the second moiety of the purchase money until 1878: therefore in 1876 he must have been indebted to the Crown in $240 (or $160, in respect of the two lots afterwards sold to Mr. Murne). And that was a debt enforceable against him at law (Land Act, 1875, s. 67). He admits that if he had in 1876 paid up the whole purchase money, he would have been at once taxable; but he contends that by keeping back this $240 (or $160) from the Treasury for three years, he has secured for himself an immunity from taxation for the like period. This is not an argument which commends itself to the Court. But not only is there nothing in the Act, as I think I have shown, to justify this part of the plaintiff's argument, but there are other passages, particularly s. 68 and s. 91 of the Act, which show demonstrably, in my opinion, that it was intended to tax, and to sell in case of non-payment, interests still more precarious than that of Mr. Johnson, *e. g.*, pre-emption rights, and expressly "while the fee is yet in the Crown"—which can only mean before the issuing of a Crown grant. I am therefore clearly of opinion that the interest which Mr. Johnson had in 1876 and following years in lots 30 and 32 was taxable within s. 9 of the Act of that year.

There were strong arguments urged by the plaintiff, founded upon the conduct of the Crown, or its officers, in accepting from Mr. Johnson the full consideration money, and delivering the Crown grant to him on 8th November, 1878, without any remark or reserve as to the claim for taxes then hanging over his head, and which he disputed; also, as to the effect of the receipt of the 28th June, 1879; and the position of Mr. Murne as a purchaser in November, 1881, for valuable consideration and without notice, though 2½ years after the sale of 30th April, 1879. As against private persons, no doubt, the two first of these arguments would be very strong; they no doubt seriously misled Mr. Johnson: but as against the Crown I do not think he can rely on them. The Crown can levy the tax if due, notwithstanding the representations or misrepresentations, the acts or neglects of its officers. And by s. 67 of 1876, the claim for taxes are a "special lien," requiring no registration. It might have been sued for under s. 63, or levied on the taxee's furniture, as well as on the land taxed. The third objection is more serious; for the defendant cannot set up the prerogative to protect his title. The argument is that whatever right the defendant would have had as against Mr. Johnson on the 30th April, 1881, he cannot claim any against Mr. Johnson's subsequent vendee without notice and for consideration paid; that his laches has exposed Mr. Murne to loss, and that he, not Mr. Murne, must suffer

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from his own delay. But I feel great difficulty in deciding on this ground, in view of the very strong and special wording of s 16 of 1878, if that section can be relied on by the defendant—and there are other grounds which I think are much more free from doubt. A delay of a few months, which Mr. Morrison seems really to have intended as an extension of the statutory two years for Mr. Johnson to redeem, is not laches—it is merely abstaining for a not unreasonable time from foreclosing an equity of redemption—it probably was solely due to a desire not to exercise his strict legal right with literal harshness; though it might have operated disadvantageously for Mr. Murne. To visit this as laches might open a way for a defaulting taxee to defeat the title of the purchaser from the assessor.

I now turn to the irregularities alleged to have been committed in levying and proceeding to sell, and also in making the assessment and fixing the amount of the tax. And first as to the objections to the mode of sale of the 30th April, (viz.) that the notice of the intended sale specified no hour, and that it was adjourned from time to time without any statutory authority to do so. I should be loath to set aside the sale on these grounds. No loss or damage is alleged to have accrued by reason thereof. The plaintiff's case is, in fact, rather that Mr. Johnson knew nothing at all of the intended sale, than that he was imperfectly informed as to the adjournment; the assessor must adjourn if the full amount be not bid (1878, s. 21); he may adjourn if no bidders appear (s. 19); the statute does not say that he may not adjourn before offering, or that when he has once fixed a place and time he cannot alter them except in the cases in ss. 19 and 21. Yet the omission to state the hour is very serious. This would seem to be an obligatory provision. No doubt such omissions might lead to great oppression, such as might afford ground for equitable relief; but *prima facie*, these irregularities appear to have been harmless in the present case, and to be such errors and defects as are intended to be cured by the ss. 102, 104 of 1876, and 1878, s. 16, and 1880, s. 26—if those sections be only applicable.

But this class of objection is more serious, when we find that even the slight and informal protection afforded to the taxee by the more recent Statute of 1878 has been quite disregarded. Section 13 says that in every year after 1878 (and the sale here complained of was on the 30th April, 1879), the assessor was to publish for one month a notice that unless delinquent taxes (with the 25 per cent. and interest added) were sooner paid, he would "at the expiration of two months "from the 1st March," sell the land. The section is not clearly worded; but I think it applies to all taxes then delinquent, whether for the current or previous years. This precaution has been neglected; the sale was within the two months from 1st March. If such a notice had been published, the assessor certainly could not have sold till the expiry of the two months, *i. e.*, not till 2nd May, certainly not on 30th April. And it seems impossible to maintain that by neglecting the

statutory duty, he has acquired a power not given by the Statute. By sections 17 and 18 of 1878, the assessor is to prepare a list of delinquent taxees, which list is to contain a notification that unless payment be made he will proceed to sell the land for taxes, on a day, time, and place to be named. This notice is to be posted up in his office for a month. Therefore no sale can take place for a month from such publication. It is not shown when the list was so posted up. But it is (s. 18) also to be sent for publication in the Gazette; for what period is not mentioned, but it is reasonable to suppose also for a month. Yet it is published for the first time in the Gazette on the 1st March, and announces a sale on the 26th March, only twenty-five days after the advertisement—being the sale which was ultimately adjourned to the 30th April. I might be reluctant to set aside a sale for any one of these irregularities, if I thought the tax demanded had been well assessed. But, combined, it would be difficult to overlook them, even then.

But graver objections remain behind. The sale is made to levy a sum of $111, which includes a sum of 25 per cent. and interest at the rate of 18 per cent. per annum. The assessment is as to these sums, as I have already shown, clearly bad and unwarranted by any enforceable law. The innocent part of the officer's act in attempting to enforce the whole $111, cannot be separated from the illegal part, and the whole levy and proceedings would under ordinary circumstances (viz., unless supported by some special and valid legislative declaration) fail. (Burroughs on Taxation p. 301, citing numerous authorities.) When, however, a plaintiff seeks relief on such grounds, he would obtain it, probably, only on the terms of making good so much of the levy as was legal. And the defendant relied besides on the 16th section of the Act of 1878, which says "if *any tax* "in respect of the land sold by the assessor after the passing of this "Act, in pursuance of and under the authority thereof, *shall have* "*been due*, and the same is not redeemed" . . . . the sale is to stand. And this section the defendant contends rehabilitates the sale, although some part of the taxes levied (*i. e.*, this 25 per cent. and 18 per cent. interest) were in fact not due, never having been authorized by a valid Act of Parliament. This section is founded on a similar provision in the Ontario Acts, on which it has been decided (*Yokham* v. *Hall*, 15 Gr. Chy., p. 335) that "any tax due" means a legal tax—a tax legally due and enforceable. And the plaintiff contends that no part of the $111.73 has been, in fact, legally assessed, even such part as the Local Legislature had constitutional power to impose.

In one sense, the property tax is "imposed" by s. 9 of the Taxes on Property Act, 1876; *i. e.*, that section declares this property to be liable to taxation, according to the scheme of the Act. But no tax is "due," *i. e.*, imposed so as to be leviable against either the taxee or the land, until finally ascertained, as follows:—It is designated by the assessor in the first place. He is to draw up a roll containing

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a list of all the taxed land in the district, with the names of the proprietors and with the respective amounts assessed on each parcel or proprietor, and sworn to by the assessor in an affidavit affixed to the roll (s. 40). Nor is such roll then binding, until revised and passed by a Court of Revision, as to all matters in which it may be impeached (having been previously posted up, "with the certificate and affidavit attached," for public inspection, s. 41), and certified by the clerk as having been finally passed by the Court (1876, s. 50). Then and not till then is any tax fully *imposed* on the land. When, after these preliminaries, the time of payment arrives, the tax is for the first time *due* and demandable from the owner; and after a certain lapse of time it becomes leviable by sale of the land. It is to be remembered that the Act (1876) does not impose as a tax one-third of one per cent. of the value of the land, but of the *assessed* value. Until there is a valid assessment, there is no tax imposed. I am of opinion that the affidavit of the assessor as to his truthfulness and care in compiling the roll, and the certificate of the clerk of the Court that the roll has been finally passed by the judge of revision and appeal, are conditions precedent, within the principle already quoted as laid down in *Torrey* v. *Milbury*. They are eminently and transparently intended and adapted to secure to the taxees the two objects specially indicated by Mr. Justice Shaw in that case, (viz.) the ensuring to every taxee that he, himself, has not been unduly weighted, and that none of his co-taxees are excused from their due share of the common burthen. And certainly the valuation upon which this sum of $111 is demanded does seem to require some evidence of being a reasonably careful estimate, as provided in s. 22 of the Act (1876), viz., "the actual cash value of the land as it would "be appraised in payment of a just debt from a solvent debtor." Inasmuch as the taxes for the three years (1876-77-78), at one-third of one per cent. in each year, amounted to $7.20, the land must have been estimated as having been, on the basis stated in s. 22, worth $720 in each of those three years on the average. Previous to 1878, there was no general anticipation or even hope of any great public work passing near this land within any measureable interval of time. In April, 1879, a railway was confidently looked for, and, in fact, contracts for the commencement of construction were already on foot. Yet the land could only fetch $111. At sales of this sort, of course, property does generally go at an undervalue; and in this case, the right of redemption at any time in two years would operate still further to keep down bidders; probably also Mr. Johnson's letter of 25th April, if known, would tend the same way—but the disproportion does seem very great, and an affidavit as to the reasonableness of the estimate in 1876 would seem by no means superfluous. It is true that Mr. Hughes, the Government Agent, who acted as assessor in respect of these claims, now swears, what nobody as a matter of fact doubts, that he took the greatest pains, and was and is fully persuaded

of the justice and equity of his assessment. That is not the point. The object of the provisions in the Act is not to throw distrust upon the acts or neglects of a deserving officer, but to protect the subject against assessors who may be ignorant, or prejudiced, or corrupt. It seems reasonably clear, from s. 41 of 1876, that the assessment roll "with the certificates and affidavits attached" ought to have been exposed for public inspection, in several places, before the sitting of the Court of Revision. The oath of the assessor to each particular roll is the more necessary, because the care and integrity of the assessor are not required to be vouched by any general oath of office. Until the roll had been exhibited in the state required by s. 41, there was probably no roll for the Court to revise; and the revision of a roll which is not in a proper state for consideration is not, I think, helped by s. 50, which says "The roll, as finally passed by the "Court, and certified by the clerk as so passed, shall be valid and "bind all parties concerned, notwithstanding any defect or error "committed in or with regard to such roll." That means, that where there is a roll completed by the assessor according to the statutory provisions, which is afterwards considered and passed by the Court, and certified by the clerk as having so passed, it shall be valid notwithstanding omissions or errors. It does not mean that the Court may approve of any list brought forward, and termed a "roll," whether it is a statutory roll or not, and that that list is thenceforth to bind all parties. See In *re Palmer's Trade-mark*, L. R. 21 Chy. D. 47, where the registration of an appellation which the Court held not to be strictly a trade-mark, though registered as a trade-mark, and though the statute says it shall not be impeached after five years, was after that lapse of time treated as a nullity—as not having been a registration of anything contemplated by the statute. Where the root and foundation of a record is wanting, no revision and approval by any Court is binding. There is no record to approve, or revise.

Mr. Hughes (who acted also as clerk of the Revision Court) again comes forward and swears, what everybody will credit, that this list was in fact submitted to Mr. P. O'Reilly (who acted as Judge of Revision), and was passed and approved by him, and he is ready now to certify to that fact; and it is contended that such his certificate, now given, will validate the roll. Be it so; but the roll is now for the first time certified, even according to that contention; there is now for the first time an assessment roll binding on all parties. But no tax is imposed on anything but the *assessed* value of the land (1876, s. 9)—and therefore according to the defendant's own argument there could not have been on the 30th April, 1879, when the land was sold to the defendant, any legally imposed tax to levy. But in fact, I hold all these matters to be conditions precedent; and whether any tax can be properly said to be due, *i. e.*, duly imposed and assessed, which has to rely upon such *ex post facto* evidence, seems more than doubtful. Until evidence was taken in this case, there has never been any sworn roll

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in existence, such as is required by s. 41, for a Court of Revision to consider; nor has the result of the revision been ever ascertained. The Court of Revision for 1876 is long since closed and defunct. It is not for me to say how the assessment roll of 1876, which now for the first time has the requisite certificate and affidavit attached to it, is to be revised.

But it was urged that the certificate and affidavit mentioned in s. 40, is only required to be attached to the roll of residents, not to the roll of non-residents, and that in fact such certificate and affidavit was attached to the first mentioned roll; but that Mr. Johnson was on the roll of non-residents, which required no security of this sort. And this argument was based on the opening words of s. 40, in which the word "rolls" occurs in the plural, only one of which, it was argued, was to have a certificate; and the adage *omnia rite acta præsumuntur* was relied on. Certainly all things are to be presumed regular until some irregularity is shown, but here I think very material irregularity is shown and admitted; and the adage does not mean that no evidence is to be admitted against a formal act, but that a formal act is not to be set aside without evidence. And as to the plural "rolls," at the commencement of s. 40, it has been quite misunderstood. The section commences thus:—"The assessors shall complete their rolls in every "year" (by a day to be fixed) "for the different districts respectively, "and shall attach thereto a certificate signed by them respectively, and "verified upon oath," &c., as follows:—"I do certify that I have set "down in the above assessment roll (singular) all the real property "liable to taxation in the district of——;" and then it goes on to provide that the assessor shall swear (among other things) that "the dates of the delivery of" certain notices directed to certain non-residents (not all) "are truly stated in the roll." It is too clear for argument there is to be but one roll in each district, including both residents and non-residents; and the opening words of s. 40 are applied to all the assessors in all the districts, who are to prepare their rolls, *i. e.*, each his own roll, and attest them in this way. Every roll may possibly be written on many pieces of paper or parchment. It may be divided into classes, or arranged in alphabetical portions; such things are perhaps left to the assessor, according to his notions of convenience; but all the statutory particulars are to constitute one assessment roll in each district, verified as required by s. 40; which indeed expressly notices that some of the taxees may be non-resident; as to the other non-residents the Act is silent. But the whole roll and every particular of its contents must be sworn to.

The case of *Morgan* v. *Parry* (25 L. J., C. P. 141,) was relied on by the defendant. In many of the circumstances that case was singularly like the present, only the turning point of the enactment, and the subject-matter of the list, are reversed; and in condemning this list I conceive that I am applying the same principles which induced the Court to uphold the list in that case. There the list was the list of

Parliamentary voters, which the overseers were to prepare (as here, the assessor) and the revising barrister was to revise, under 6 & 7 Vic., c. 18. By s. 13 the overseers "shall sign" the list which they have prepared. By s. 23 they were to publish the list (nothing was here said about signature, *e. g.*, requiring it to be a "signed" list, or a copy of a signed list) by posting it as therein mentioned. By s. 35 they are to deliver the list prepared by them to the revising barrister (again, no mention is made of signature). The overseers had never signed the list, which was, however, in other respects duly published and delivered. The revising barrister treated the list as a nullity. The Court reversed that decision, treating the 13th section as directory merely, saying that if the list were a nullity the whole parish would be disfranchised, and that Parliament could not have intended such a result to follow the mere formal omission of a signature. That case it will immediately be seen differs from the present in most important ways. (*a.*) The Act required a signature merely, not a certificate and affidavit. (*b.*) It did not in set and express terms require this signature to be attached to the published list, as our Statute does require the affidavit to be attached to the published roll. (*c.*) The list conferred a franchise, which the annulling of the list would take away; whereas here the list imposes a liability on the subject, from which he is enfranchised if the list be held a nullity. Not only are there enacting words found here which were wanting in *Morgan* v. *Parry;* but the principle of setting the subject as free as possible, which induced the Court in that case to uphold the list, would here lead to a contrary decision.

The defence, however, further relied on the 26th section of the Act of 1880, for a legislative ratification of all things connected with the sale of the 30th April, 1879; which section is as follows:—"All acts "heretofore done and powers exercised by, *(sic)* and proceedings bona "fide taken for the collection or enforcing payment of any taxes "*imposed* by the 'Assessment Act, 1876," &c., "*by any person duly* "*authorized and empowered to collect* and enforce payment of such "taxes, shall be deemed and taken to have been legally done and "exercised by him." The expression here is not, as in s. 16 of the Act of 1878, "taxes due," but taxes "imposed" by the Act of 1876. And here it is argued some tax was certainly legally imposed on this land, viz., the $\frac{1}{3}$ of 1 per cent., and, therefore, the act of the officer is hereby ratified and confirmed. But the plaintiff replied that this section would not apply in respect of any taxes not legally imposed, *(i. e.)* within the constitutional power of the Provincial legislature, and that in no case was anything imposed except on the assessed value of the land, *(i. e.)* assessed as required by the provisions of the several Acts. He further contended, in reply, that s. 26 ratified no acts except those of an officer duly authorized and empowered, and that neither the assessor nor the Judge of the Court of Revision were ever actually appointed to their offices at all. I think that by claiming the benefit of the above section the defendant raises the question at least of the *de facto* ap-

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pointment of the officer (the assessor). If he were *de facto* duly appointed, perhaps the defendant is not called to show his qualifications *de jure*, even supposing, what does not appear, that any such collateral qualification is necessary. No previous qualification for the office, nor subsequent security, by oath of office, guarantee, bond, or otherwise, seems required by the Statute. But the defendant by relying on this section has directly put in issue the *de facto* title of Mr. Hughes and Mr. O'Reilly to their offices.

In proof of the appointment, a copy of the B. C. Gazette (10th June, 1876,) was produced, in which there is an official notice, issued from the Provincial Secretary's Office, but not signed, announcing that "His "Excellency the Lieutenant-Governor has been pleased to make the "following appointments," viz.: *inter alia* "J. C. Hughes, Esq., to be "Assessor and Collector, under the 'Assessment Act, 1876,' for the "District of New Westminster." That, however, is not sufficient evidence that Mr. Hughes has been "*duly* authorized and empowered" to act. The only method of authorization sanctioned by the Act of 1876 is in s. 12, which provides that "the Lieutenant-Governor in Council may appoint in each district one or more assessors," &c. It appears that the only producible authorization of Mr. Hughes, and the foundation of the above announcement, consists in a "Report of Committee of Council, approved by the Lieutenant-Governor." The Committee report a memorandum from the Provincial Secretary, that Mr. Hughes be appointed assessor for New Westminster District, and advise that the recommendation be approved; and the recommendation is "approved by the Lieutenant-Governor" accordingly, but not, apparently, in Council. It is impossible to say that this is, in form, an appointment at all. Then, is it in effect an appointment? A Minister recommends that an appointment should be made—(*i. e.,*) that some future act should be done. The Committee of Council advise that the recommendation be approved. The Lieutenant-Governor, not in Council, does approve—*i. e.*, approves the recommendation. That is surely a very different thing from sitting in Council and then and there making an appointment, or even approving of an appointment already made. I apprehend that notwithstanding this "approved copy Report," it was quite open for the Lieutenant-Governor in Council to have changed his mind and appointed somebody else, and it would have been in that case surely impossible for Mr. Hughes, or any purchaser from him, to have contended that he ever had been appointed at all.

When power is given by Statute to the Lieutenant-Governor in Council to do anything, there are probably various ways in which he may declare his will, and the result determined on, besides the usual and formal method of an Order in Council. He may with the advice of his Council issue a Proclamation or execute a Commission. He may, with the like advice, approve of regulations and declare them; though this comes very near an Order in Council. Probably he may

approve of a Commission already drawn up, and direct the public seal to be affixed thereto, or otherwise authenticate it. Perhaps he may approve of a recommendation, and if an apt instrument of appointment be afterwards issued in conformity with such recommendation and approval, it might possibly be held that that was an appointment in effect by the Lieutenant-Governor in Council; but I should feel much more inclined to hold that when an officer is to be appointed with these very large and very arbitrary powers, and the Statute authorizes no other way of appointing him, except that it may be done by the Lieutenant-Governor in Council, that power of appointment, like any other power, must be strictly followed: the appointment must be a definite and determined act,—the act of the Lieutenant-Governor, by and with the advice of his Council. Here, however, there is no determinate act of appointment whatever for the Lieutenant-Governor to ratify, even if I were disposed to hold that a ratification in Council of a previous appointment would suffice. There is only a piece of advice given to the Lieutenant-Governor, which advice he approves; but even that approval is not alleged to have been given, as the Act directs, in Council. The approval may have been given anywhere, in private, for reasons unknown to the Council, on the advice even of other Counsellors. And nothing appears to have been done to carry the proposal into effect. In the absence of any judicial decision, I cannot say that this is an execution of the power as directed by the Statute. Take a common case of a power to appoint new trustees of a settlement; suppose the power given to the tenant for life in case of a vacancy, to appoint a new trustee, who must, however, be a *persona grata* to the continuing trustees. One dies; the survivors consult, agree on A as a fitting substitute; the tenant for life approves their choice, but nothing further is done. Could it be argued that A was thereby, without more, appointed a trustee? Or could his acts as a trustee be enforced against an unwilling third party? Suppose the two surviving trustees then to die, and A be left alone; could he bring ejectment, grant leases, or enforce a contract of sale upon an unwilling purchaser? Or again, could we suppose that a Judge of the Supreme Court would attempt to act when authorized by no other instrument than such as this, which indicates, at the best, a mere intention to appoint him, not that he is appointed? Surely he is not as yet even a *de facto* Judge. He must have his Commission. And the assessors have very important quasi judicial duties, as well as ministerial, to perform.

All that has been said as to the appointment of an assessor applies equally, in my opinion, to the appointment of a Judge of Revision; and as he is alleged to have only a similar authorization, there has never been any Judge of Revision appointed. It is true, as to this Judge, a defective appointment would probably suffice under section 9 of 1877; a section which does not apply to the assessor, who must be "duly authorized and empowered" to bring him within s. 26 of

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1880. But here I think there has not been "a defect in or about the appointment of the Court of Revision." There has been no appointment at all shown to have been ever made.

But then I was told (what had been said in answer to a similar objection in the Thrasher case) that the acts and determinations of a Privy Council are never, now, thrown into the shape of an Order in Council, except perhaps on the rarest occasions; that their resolutions were always announced in the shape of a copy Report of Committee of Council, which possessed all the efficacy of an order. But let the "approved Copy Report" now before me be called by whatever name the defendant may suggest, the questions of substance already indicated still remain, (viz.) "Is this the act of the Lieutenant-Governor in con-"junction with his Council, or otherwise? Supposing it to possess all "the efficacy of a regular formal Order in Council, what is its effect? "Is it an appointment of an assessor at all?" And evidently this document is neither the one nor the other: neither a definite appointment, nor either a definite act. It is a mere memorandum approving of a suggestion to do something. There is no conjoint act, nor any act, nor even a memorandum of a resolution to take immediate action, or any action at any time, in conformity with the suggestion. It is not inconsistent with this "approved Copy Report" that another should be in existence suggesting some other person to act with or without Mr. Hughes, and approving that suggestion also. It determines nothing. It is therefore not helped by the "Interpretation Act, 1872," sec. 7, sub-sec. 3, which says that the phrase "Lieutenant-Governor in Council," shall mean "the Lieutenant-Governor of British Columbia, "or other person administering the Government of British Columbia, "acting by and with the advice of the Executive Council of British "Columbia." For here, the Lieutenant-Governor has never acted; at the highest, he has only agreed to do a future act. Sub-section 3 is sometimes referred to as if it enabled the Lieutenant-Governor to do, when alone in his study, anything which he was empowered to do when sitting in the Council chamber: provided such solitary action be "by and with the advice" of his Council. But this is by no means a certain construction. The sub-section seems rather pointed at defining what shall be understood by the term "Council," which is not elsewhere defined, and its effect seems to be to provide that even in full Council the Lieutenant-Governor may not act contrary to their advice (as the Governor in a Crown Colony may), nor without their advice. But there is nothing in the sub-sec. to support the proposition that his separate approval of their advice shall be equivalent to putting it in execution. The defendant's case is not helped therefore by sec. 25 of the Act of 1880, which says—"The assessor, or other person author-"ized by the Lieutenant-Governor in Council, is hereby fully authorized "to sell," &c. The Report of a Committee here produced does not even profess to be an act of the Lieutenant-Governor in or out of Council; nor does it profess to give any authorization to sell. The

expression here is "fully." Section 26 requires the person to be *duly* authorized. No doubt many things, perhaps the largest part of the business of the Executive, may properly be authorized and passed upon otherwise than by a direct and express Order in Council. Some things, perhaps, more properly. For instance, the matter in a Copy Report, 29th May, 1876, Sess. papers, Canada, 1877, No. 13, p. 3, (sanctioning the visit to England of a Canadian Minister to confer with the Secretary of State); the matter in the Copy Report, 24th November, 1876, (Sess. Papers Canada, 1877, No. 14,) requesting the attention of the Home Government to alleged delays in carrying out the Treaty of Washington; rules and regulations prepared by local experts, to come into force when approved in Council, without being embodied in an Order, &c. But the case is very different when a Statute contemplates a purely creative act, such as the appointment of an assessor; and when it places the creative power in one hand only, viz.:—in the hand of the Lieutenant-Governor in Council. In such case there must be some definitive act—an *opus operatum;* and it must be the act of the Lieutenant-Governor in Council: *penes quem solum arbitrium et jus et potestas creandi.*

A defect of authority of this description is not unprecedented. The consequences, and the proper course to pursue in such a case are pointed out in Burroughs, p. 264 (citing *Bradley* v. *Ward,* 58 N. Y. 401).

For these reasons I am of opinion that Mr. Hughes is not shown to have had any proper authority to assess or levy these taxes at all, and therefore that the defendant cannot support his title by section 26 of the Act of 1880. And if the defendant cannot claim apart from the ratification contained in that section, then even if Mr. Hughes had been lawfully appointed I think there was at the time of the sale of 1879 no assessment roll for 1876 and other years properly sworn to, properly passed by the Court of Revision, or certified as having so passed; that these certificates and affidavit are obligatory in order to constitute a statutory roll, binding on all parties; that in the absence of such a roll, there was no "tax due" within the proper meaning of the words of s. 16 of 1878 (15 Gr. Chy., 335), and therefore the defendant could not support his title by that section. I am of opinion that the levy of $111.73, since it included an illegal 25 per cent. and 18 per cent. interest, was wholly bad, irrespective of all other errors, though no doubt the sale could be supported if the above two sections were shown to be applicable. I think that the sale of the 30th April, 1879, was premature, having regard to the two months delay mentioned in section 13 of the Act of 1878; although this also might be cured if section 16 of 1878 and section 26 of 1880 were shown to be applicable. As to the other objections, they might in other cases be formidable, if they were shown to have worked mischief; the adjournment of the sale; the non-advertisement of the hour of sale; the defendant's delay in claiming his deed; which was alleged to amount to *laches,* nullifying his defence,—though I am not at present of that opinion; but some of

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these matters might be held to be merely directory provisions, and there are more serious grounds on which I prefer to base my opinion.

I feel bound therefore to give the plaintiff the relief prayed.

As to costs; these naturally follow the result, especially in a case where the defendant, in the language of Vice-Chancellor Strong in *Wigle* v. *Setterington* (19 Gr. Chy., p. 519), knew that he was purchasing a lawsuit rather than a parcel of land. Still it is obvious that he has not been guilty of any moral fraud or attempt at fraud, but has been merely misled by the official interpretation, honestly enough placed on statutes of most baffling intricacy. And I think that the contention of Mr. Johnson, in 1876, that he had no taxable interest in the land sold, was quite erroneous; though again I do not express, for I do not feel, the indignation expressed by some Judges against a citizen who endeavours to shrink from a duty by evading his share of taxation, any more than I blame the officers for sacrificing the taxee's property in order to levy the tax. If the tax has been legally imposed and not paid, a duly appointed officer must, according to law, sell the land at whatever sacrifice. If the tax has not been duly imposed, or if the officer do not comply with the statutory provisions, the sale is bad, and the taxee is under no duty at all to submit to it.

The above considerations would point to making the order without costs: *i. e.*, leaving each party to bear his own costs. But the importance of the matters discussed in this case is very great, and so is the difficulty of comparing so many statutes; for it is not only the dozen or more of British Columbia statutes of the last ten years that have to be sifted, but the numerous Canadian statutes on which the Ontario judgments are based, the Imperial statutes on which the English cases are decided, that have to be consulted. It would even be desirable in some instances to consult, if it were possible, the Acts of United States Legislatures; the very important point as to the efficacy of resolutions in the Privy Council is scarcely touched by any authority within my reach. I am extremely anxious therefore not to do or say any thing which might in the least prevent this matter from being reconsidered in the highest Court of Appeal. And the defendant will perhaps be in a better position before the Court above if I make an order against him in the usual way, with costs.

Postscript, 1st September, 1882.—Since delivering the above judgment, some enquiry has been made into the grounds for the proposition advanced by the defendant (viz.) that a Copy Report of a Committee of Council, approved by the Lieutenant-Governor, not in Council, is equivalent to an Order in Council—in fact is an Order in Council. In the principal case, this equivalency, or identity, was held to be immaterial; for of course the instrument, whatever its designation, could not effect anything not within the scope of its terms; and even the most formal Order in Council, approving of a candidate as proper to be appointed to a judicial office, would not operate as an appoint-

ment without some further declaration, or probably some additional instrument, *e. g.*, a commission, writ, warrant, letters patent, &c. No authority has been found indicating that the opinion advanced by the defendant is universally or even generally acted on in Privy Council practice in Great Britain or her other Colonies. But it was alleged to be in accordance with the practice in the Privy Council of the Dominion. And Mr. Alpheus Todd (Parliamentary Government in the British Colonies, p. 37) was cited for a statement of the Privy Council practice there. "The practice in Canada, for a number of years, has been that "the business in Council is done in the absence of the Governor. On "very exceptional occasions, the Governor may preside; but this "would occur only at intervals of years, and would probably be for "the purpose of taking a formal decision on some extraordinary "matter, and not for deliberation thereon. The mode in which "business is done is by Report to the Governor of the recommenda- "tions of the Council sitting as a Committee, sent to the Governor for "his consideration, discussed, when necessary, between the Governor "and the Premier, and made operative by being marked 'approved' "by the Governor. This system is in accordance with constitutional "principles." These words are not given with marks of quotation by Mr. Todd, and so appear to convey only his own view; but he gives a reference to a despatch, undated, but received about the 1st July, 1876, addressed to the Earl of Carnarvon by the Hon. E. Blake (then Attorney-General for the Dominion), from which despatch this passage is taken *verbatim;* and this is undoubtedly very high authority. There is, however, some ambiguity here as to the extent to which the Copy Report is made "operative" by the signature of the Governor-General in token of his approval. The quotation may mean either that the instrument operates, without more, as a warrant for the proper officer to draw up a formal Order in Council, and to affix thereto the necessary seals and signatures ready for the sign manual to be prefixed at any time; or it may mean that it is so "operative" as to dispense with any further writing whatever. The origin and foundation of the practice is not stated. Perhaps the Privy Council, like a Court of Law, has considerable authority to mould the forms of its decrees and the methods by which it shall declare its determinations; though some public notification, it might be thought, like a General Order of a Court of Law, would have announced the introduction of so serious a change. Perhaps it would not be unworthy of the interposition of the Legislature to sanction it. It is not however by any means clear that the practice of the Privy Council of the Dominion is proper or legal in the Executive Council of a Province. There may be a close analogy without identity of authority between these two bodies. The custom at Ottawa may have become consecrated by long usage, which can scarcely be the case here; indeed it is alleged to be of very recent introduction in this Province. And even as to this long and unbroken usage in the Dominion Privy Council there appears some difficulty in the

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evidence. There is great difficulty of course in getting any evidence on such a subject; the best can only come from experienced clerks of the Privy Council, at Ottawa or in Great Britain, or else from the examination (if one could have the opportunity) of the complete record of the acts of Council. We have here, however, in British Columbia, a collection, or rather a selection, of the acts of Council at Ottawa, annually published by authority and prefixed to the official volume of Statutes; comprising Orders in Council, Proclamations, approved Rules and Regulations, and Copy Reports of Committees of Council—a selection which I consider sufficiently authentic for my present purpose, and which I have had the curiosity to inspect. It certainly does not appear to be a complete list, not, perhaps, of any of the acts of Council—certainly not of these "Copy Reports of Committees." For instance, it seems to omit the "Copy Report of a Committee, 29th May, 1876," in pursuance of which the very despatch was written from which Mr. Todd makes the above quotation (set forth, Sessional Papers, 1877, No. 13, p. 3). In the volume of Statutes for the ensuing year, 1877, there appear 56 Orders in Council, 22 Proclamations, and no notice of any Report of Committee of Council. In the volume for 1876, there appear to be no fewer than 82 Orders in Council, 22 Proclamations, 3 sets of "Regulations" (marine, &c.), approved by the Governor-General in Council, and only one Report of Committee of Council; approved, however, not simply by the Governor-General, but by the Governor-General in Council (Vol. 1876, p. cxi., dated 26th March, 1874). It is rather of a singular character. For the Governor-General in Council being empowered by the Dominion Lands Act, 1872, section 105, to make "Orders" for *carrying out* that Act in its true intent, and s. 60 authorizing a seizure of timber cut by trespassers, and a sale thereof, after a delay "of at least 30 days" (extendible to 3 months),—this "Copy Report of a Committee" approved by the Governor in Council, proposes to *repeal* s. 60 of the Act (and, if the recommendation be really "operative" when approved, does repeal it), and authorizes a sale after a delay of 15 days only: which would seem quite beyond the capacity even of a formal Order in Council under s. 105. And there does not appear in these annual selections any other instance of an "approved Copy Report of a Committee," at least under that designation, until the volume for 1880 (cxxiii, dated 10th May, 1880),—an interval of more than six years from the last recorded "Copy Report"—there being notices of 50 or 60 Orders in Council at least, and of 20 or 25 Proclamations, published in every volume; so that the formal "Orders in Council" appear to preponderate enormously over the "Approved Copy Reports," according to the selections here published. It is not the paucity of the "Copy Reports" so much as the frequency of the Orders in Council, which conflicts with Mr. Todd's statement; often issuing at intervals of a week only; and as to a considerable proportion, the presence of His Excellency in person being specially mentioned. For

instance, in the volume for 1880, there are 14 Orders in Council, set forth at length, at which His Excellency is said to have personally attended; and 79 other Orders in Council, of which merely the substance is given. Very possibly some of these 79 were "approved Copy Reports" merely. But a great many of these 79, as printed, contain the express declaraation "It is ordered," &c.; not merely "The Committee recommend." And if any of these "Copy Reports" are in this selection printed as "Orders in Council," why are not all so styled? There is, however, an Act of Parliament of Canada, 43 Vic., c. 15, in which an "approved Report" is termed an Order in Council. Singularly enough, it relates to this Province—dealing with the Esquimalt Dry Dock. The instrument is set forth at full length in the Schedule to the Act, where it is styled a "copy Report of a Committee," and also a "Minute." In the preamble, and also in the body of the Act (one short section), it is apparently referred to as an Order in Council. I say "apparently;" for the preamble alleging two Orders in Council, dated respectively the 13th November, 1879, and 12th November, 1880, and a Report by a Minister; the enacting part ratifies and confirms "*the Order* in Council and the Report mentioned in the preamble." Notwithstanding this grammatical inaccuracy, the meaning of the Act is, I think, clear enough; but the laxity of expression impairs the confidence with which we could otherwise refer to it as a guide in the ambiguity of nomenclature. Apparently, however, the three terms are here treated as synonymous.

It has not been thought necessary to search further in these volumes. But neither in the volumes for these five years, nor elsewhere, is there found any instance of what alone is produced here, viz.:—a Copy Report of a Committee, approved by the Governor, *not in* Council. The difference in legal effect of the act of a body of men sitting together, and the act of the same men when separated, is well shown in the recent case in the Court of Appeal, in England, between the Peruvian Company and the French Company; chiefly remarkable for the enormous value of the property at stake, which at market rates of the day was estimated at thirty million dollars. This of course adds nothing to the force of the judgment, except in so far as it shows the unusual responsibility under which the judgment was given. There, the Peruvian Co. being in possession in their own right of this vast property, but being apprehensive of their future on political and and financial grounds, a difference of opinion arose among the Directors. These were seven in number; five were in favour of selling, on certain terms, to the French Co.; two dissented. The Directors had power to bind the company by any contracts made at a board meeting, and a majority bound the minority. They had also power at a board meeting, by a majority of votes, to delegate this power of making contracts to any persons they chose. Without holding any such board meeting as was required by their deed of settlement, the five Directors went over to Paris, and there in a body negotiated with the French

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Co. And it was held that no contract these five could have entered into, acting together, but apart from the other two, and not at a board meeting, could bind their company. And similarly here: it might be argued, perhaps, that the approval by the individual members of Council of a suggestion never laid before the Lieutenant-Governor in Council, and never in fact carried into further effect, cannot bind the taxees, who are only to be bound by the act of the Lieutenant-Governor in Council.

CROWN CASES RESERVED. 1884. *14 May.*

REGINA *v.* PESCARO AND JIM.

Deposition of witness—Admissibility of—Proof of absence from Canada.

Upon a prosecution for wounding with intent to murder, the deposition of one C., taken before the Police Magistrate on the preliminary investigation, was read, upon the following proof that C. was absent from Canada:—C. is, to the best of my belief, in the United States. He was employed, about 10 days ago, as one of the crew, on a steamer then running between Victoria and an American port. He said, when he left me, he was going on board the steamer. The steamer has not been on that route since. She is now running between two American ports.

Held, that there was sufficient proof of absence from Canada.

Case reserved by the Chief Justice for the opinion of the Judges.

On the trial a certain deposition, made by one Robert Cluney before A. F. Pemberton, Esq., P.M., in the preliminary examination, was tendered in evidence by the counsel for the Crown, under 32 & 33 Vic. D. C., 30, s. 30, on the following evidence given by Richard Glenn:—"I "have known Cluney three or four months; have seen him about the "California saloon, Victoria; to the best of my belief he is now on the "Sound; he was then employed on the 'Geo. E. Starr,' a steamer "running between Port Townsend and Victoria; saw him last about "ten days ago; he is a fireman and one of the crew. When he left me "at the California he said he was going on board; that was the last "trip the 'Starr' made to this port. She is now on another berth, "running from one American port to another."

The prisoner was convicted, but sentence was delayed, at the request of Mr. McElmen, the prisoner's counsel, pending the taking of the opinion of the Judges as to sufficiency of proof of absence from Canada.

The Judges* were of opinion that the deposition was properly received.

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*Present: Begbie, C.J., Gray and Walkem, JJ.

MORIARTY *v.* WADHAMS.

BEGBIE, C. J.
1884.
15 December.

Tax sale—Laches—Pre-emption—Cancelling of pre-emptor's right—Land Amendment Act, 1878, sec. 2.

In 1876 M. pre-empted land in New Westminster District, and paid one instalment of the purchase money. The other instalment was payable on the 18th November, 1878. M. paid also the taxes for 1876, 1877, and 1878; but no further tax or instalment. The taxes for 1879 became delinquent on the 1st March, 1879. M. left the Province early in 1880, his address being wholly unknown. In December, 1879, the land was sold to W. by tax sale. Subsequently, W. paid all arrears of taxes, and the balance of the purchase money, and in 1881 a Crown grant issued to him, and he entered, and improved, and mortgaged the land; the Crown grant and mortgages were duly registered. In 1883 M. returned to the Province and claimed the land.

Held, that M. by his laches had disentitled himself from sustaining such claim.

The Crown had not declared M's. first instalment forfeited, but had allowed W. the benefit of it.

Held, that M. might, under the prayer for general relief, recover the amount of such instalment as money paid for the use of W.

Semble, the grant from the Crown in 1881 operated as a cancellation of M's. pre-emption claim without reference to the matters specified in s. 2 of the "Land Amendment Act, 1878."

The plaintiff pre-empted, and on the 16th November, 1876, partly paid for certain Crown lands in New Westminster District, the balance falling due on the 18th November, 1878. He paid the taxes due for 1876, 1877, and 1878; but left the district in 1878, and the Province in 1880, without appointing any agent or making any arrangement for the payment of the balance of the purchase-money then overdue, nor of the taxes for 1879 then delinquent, nor of any taxes to accrue thereafter. On his return in March, 1883, he found the lands in which he had obtained a right of pre-emption had been, in December, 1879, sold for taxes and conveyed to the defendant by the Assessor in a tax sale deed; that the defendant had paid to the Crown all the delinquent taxes and the balance of purchase money left unpaid by the plaintiff, and had thereupon obtained a Crown grant of the lands which he duly registered, and then mortgaged the land for considerable sums to two successive mortgagees, whose mortgages were likewise registered.

The plaintiff now brings this action to set aside the tax sale deeds and Crown grant to the defendant, or else to have the defendant declared to hold the lands in trust for him, on the grounds that—(1) The taxes in respect of which such sales were had were not lawfully due thereon; (2) The Assessor was not duly appointed; (3) The assessment roll for 1879 was not duly completed and certified, and (4) That the Chief Commissioner of Lands and Works acting in ignorance of these facts as to the tax sale had improvidently issued the grant.

At the trial the plaintiff relied wholly upon the point that interest was charged upon the taxes in arrear and formed part of the amount

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for which the lands were sold, and that this, under the authority of *Murne* v. *Morrison*, and cases there cited, invalidated the whole sale.

Davie, Q. C., (with him *McColl*), for the Plaintiff.

Drake, Q. C., for the Defendant, referred to *Kennedy* v. *Lawlor*, 14 Gr. Chy. 224; s. 40, of Land Registry Act, and contended that in any event plaintiff had been guilty of laches—*Lindsay Petroleum Co.* v. *Herd*, L. R. 5, P. C. 239.

BEGBIE, C. J.:—

The mortgagees are not made parties to the suit, and I could not set aside their securities without hearing them, but on considering the matter it does not seem necessary that the action should stand over to add parties, for I do not think that the plaintiff has established any case for relief as regards the land in specie, nor against the defendant.

The plaintiff's case relied almost wholly upon what fell from the Court in *Murne* v. *Morrison*, *ante*, p. 120, which turned, I was told, upon the same state of facts as the present case. But the two cases appear to me to differ greatly, both in the main facts alleged and the evidence to support other main facts. In each, indeed, the commencement of the plaintiff's title is by pre-emption, and the commencement of the defendant's title is with a tax sale. But there the resemblance between the two cases ends. In *Murne* v. *Morrison* the plaintiff, or rather Mr. Johnson the original pre-emptor from whom Murne had purchased, had paid the whole of his purchase money and had obtained a Crown grant of the legal estate in fee simple, which was duly registered. He had paid all taxes except the one disputed amount, and this he had good ground to believe had been abandoned by the Assessor on his remonstrance. He had never left the Province, but was always accessible and solvent to answer any inquiries as to claims on the land by anybody. Morrison knew that he was merely buying a lawsuit, and wilfully abstained from making any previous inquiry. Under these circumstances Murne, the innocent purchaser from Mr. Johnson, brought his action to restrain Morrison from registering the tax sale conveyance given him by the Assessor. It is scarcely possible to state a case more contrary to the present, where Moriarty, who at the utmost can set up no claim or title, except an abortive pre-emption, which, five years before commencing this action, he knew to be forfeitable at any moment, and who may well be supposed to have abandoned both his land and the Province, having been absent for several years without leaving any agent or address, seeks to overturn a whole chain of conveyances executed during his absence, including a grant from the Crown, on the strength of which several thousand dollars have been expended—the two mortgages alone amount to $16,000. It is one thing to protect a registered owner, guilty of no laches, from attack, which was the result of my decision in *Murne* v. *Morrison;* it is quite another thing to countenance an attack upon registered proprietors guilty of no laches, by a claim so uncertain and so stale as

the present. It is, perhaps, worth observing that the recent changes which enable equitable claims to be enforced in an ordinary action at law, do not at all diminish the importance of a legal estate or the solemnity of a formal grant from the Crown. And apart from the question of laches, I am by no means sure that the plaintiff's rights merely inchoate as they were in 1876, and liable to entire forfeiture as they were in 1878, have not in effect been definitively forfeited and annulled by the operation of the Crown grant to the defendant in 1881. The Crown could not have granted these lands to the defendant unless intending to extinguish the claims of the plaintiff in the same lands, which the Crown might have done by the mere expression of its will. The Crown could to-day extinguish the plaintiff's claims (if they still exist), and a private vendor in similar circumstances might be called on to do so under the usual covenant for further assurance. But it is so inconsistent with the Crown grant of 1881 to suppose that the Crown proposed still to keep the plaintiff's rights, or rather claim, on foot, that a more formal declaration seems unnecessary. And when we come to compare the evidence in this case with that delivered in *Murne* v. *Morrison*, the difference is even stronger. In each case the plaintiff alleges irregularities and illegalities in the appointment of the Assessor, in the assessment itself, in the revision and verification of the roll. But in *Murne* v. *Morrison* all these things were not only alleged but proved, as in the present case they are denied and are not attempted to be proved. And in the present case the defendant relies, not solely on the tax sale deed, which may be admitted to be of very doubtful validity in view of the claim for interest, but on the grant from the Crown in 1881. I do not think the plaintiff's case goes beyond what I have already stated, and on those facts alone I cannot think that he is entitled to a cancellation of the rights of all the parties on the register. That is the first part of the relief prayed, which at any rate I could not at all have assented to on these pleadings nor without hearing the mortgagees.

The alternative relief asked is that the defendant may be declared a trustee for the plaintiff. That would leave the position of the mortgagees intact, for such a trust if now declared would attach only on what the defendant has left in him (viz.), on the equity of redemption. But from what has been said I do not think that the plaintiff has shown any such equity to enforce a stale demand as against the defendant; on the contrary the defendant appears to have a preferable right, and I decline to hold that the plaintiff is any longer beneficially interested.

Then as to the prayer for general relief; the defendant in obtaining the Crown grant has taken advantage of the instalments of $160 and $37, and, perhaps, some fees paid to the Crown by the plaintiff in November, 1876. The Crown might have declared those early instalments forfeited, but it did not do so, but, as I understand, issued the Crown grant to the defendant on payment of the unpaid balance. If

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that be so, if the defendant has had the benefit of these part payments, I may treat those payments by the plaintiff in 1876 as money paid for the use of the defendant, who must repay the amount. There will be judgment for plaintiff for $197. That sort of claim does not carry interest.

As the plaintiff has failed in his expressed contention I cannot give him any costs. On the other hand as he has recovered a certain amount, though probably unexpectedly, I will not make him pay costs. Each party will bear his own. Although judgment goes for a sum within County Court jurisdiction, I think this is eminently a case proper to be brought in the Supreme Court. Reference, if necessary, to ascertain the amount due in which the plaintiff has paid, and which the defendant would otherwise have had to pay.

BEGBIE, C. J.

1884.

24 December.

REGINA *v.* ON HING.

Municipal Act, 1881—Fire limits—Repairing wooden building.

The City of Victoria Corporation, under the Municipal Act, 1881, passed a by-law which defined fire limits, within which limits no wooden building was to be altered without the permission of the Inspector and a majority of the Fire Wardens.

The defendant was convicted of a breach of this by-law for having altered his building (a wooden building existing in 1881) without permission.

Held, that the Corporation under the Municipal Act, 1881, c. 16, s. 104, sub-s. 78 and 58, had no power to regulate mere alterations in existing houses, and therefore the by-law was *ultra vires*.

Certiorari to bring up a conviction for that On Hing "unlawfully "altered a wooden building within the fire limits of the City of "Victoria, to-wit: on Government street, without the written permis- "sion of the Inspector of buildings, approved by a majority of the "Fire Wardens, contrary to the form of the by-law in that case made "and provided," whereby he was adjudged to pay a fine of $50 within one week, in default distress, in default of distress one month's imprisonment.

Mills for Defendant, as to the point now in question, relied on *R.* v. *Howard*, 4 Ont. Rep., p. 377.

Pollard for the Corporation.

BEGBIE, C. J.:—

Several grounds were relied on for quashing the conviction. The first objection was that against the validity of the building by-law under which the conviction was had. That by-law, No. 98 (which was produced and proved before the magistrate), by section 23

provides that "no wooden building within the fire limits shall be "altered without the written permission of the Inspector and majority "of the Fire Wardens" previously obtained. This provision was defended as being authorized by the Municipalities Act, 1881, c. 16, s. 104, sub-s. 78, which empowers the municipality to make by-laws *(inter alia)* "to regulate the erection of wooden buildings, notwith- "standing any Act or law in force in the province," and sub-s. 58, "the prevention of fires." The applicant contends that this statute does not authorize any by-law respecting alterations of existing buildings, but only by-laws respecting new erections. And upon this, the only point of general interest, we are not left without authority. Both the statute and the by-law are very similar in effect to a statute and by-law in Ontario relating to similar matters, which have been considered and decided on in the case of *R.* v. *Howard* (4 Ont. Rep., p. 377). There the statute authorized a municipality to make by-laws against fires, and "for regulating the erection of wooden buildings and "preventing the erection of wooden buildings *or additions thereto* and "wooden fences" in specified parts of the city. A by-law was made, under that supposed authority, ordering that all roofs of shingle should have the shingles laid in half an inch of mortar. The defendant, the owner of a wooden house of several years' standing, proceeded to re-shingle it without mortar; and being convicted of a breach of the by-law, the conviction was quashed, for that the statute only authorized the passing of a by-law to regulate new erections, and did not authorize a by-law to interfere with existing wooden buildings; that "the statute only applied to the erection, or creation as it were, "of new buildings or additions thereto, or the removal and placing of "a wooden building in a new locality within the fire limits." And the powers given under the statute to make by-laws "for the prevention "of fires" were held not to affect the decision.

I feel quite disposed to follow the reasoning of Hagarty, C. J., in that case; and this case is in many respects stronger; the words in italics in the Ontario Statute not being contained in the B. C. Statute. In addition to the grounds there adopted by the Court, it is to be considered that a by-law (dealing with matters of this sort) cannot go beyond the words of the statute; and the statute here gives no power whatever to regulate alterations; so that this by-law is quite unauthorized.

Conviction quashed.

CREASE, J.
1885.
14th & 15th July, 21st August.

REGINA *v.* WING CHONG.

Certiorari—"Chinese Regulation Act, 1884," s. 5—Constitutionality—B. N. A. Act, 1867, ss. 91, 92—"Aliens"—"Trade and Commerce"—Taxation.

On the return to a writ of certiorari,

Held, that the "Chinese Regulation Act, 1884," is *ultra vires* of the Provincial Legislature, on the following grounds:—

1. It is an interference with the rights of Aliens.
2. It is an interference with Trade and Commerce.
3. It is an infraction of the existing treaties between the Imperial Government and China.
4. It imposes unequal taxation.

14th & 15th July—On the return of a writ of *certiorari* directed to Edwin Johnson, Esquire, Police Magistrate for the City of Victoria, to return into this Court a certain conviction made by him under which one Wing Chong was fined $20 for not having in his possession a license issued under the "Chinese Regulation Act, 1884,"

The *Attorney-General* in support of the conviction said there were five points raised on the rule for the *certiorari* against the validity of the $10 tax.—1st. That it interfered with the Dominion powers under the B. N. A. Act, aliens, and naturalization; 2nd. Trade and commerce; 3rd. Treaty obligations; 4th. That the tax was unequal, and 5th. It was indirect taxation. As to the first point aliens were as much subject to taxation as citizens. Protection and taxation were reciprocal (*Cooley* on Taxation, p. 14). The law did not deal with the conditions under which aliens might acquire rights or become subjects of Her Majesty. Secondly—Trade and commerce were not interfered with. The object of the Act was two-fold, the police and sanitary regulation of a numerous foreign element and the raising of revenue necessary to meet that regulation (*Hodge* v. *The Queen*, L. R. 9, App. Cas. 117). If incidentally trade and commerce were touched, the provincial power of direct taxation was not impaired (*Citizens Insurance Co.* v. *Parsons*, L. R. 7 App. Cas. 108). The preamble and scope of the Act showed its objects were purely matters of the police and raising of revenue to meet the necessary expenditure, and within "Direct Taxation." Thirdly—The treaty obligations of England did not affect the question The last communication from the Secretary of State for the Colonies to the Governor-General, dated 16th May, 1884, stated, in effect, that the Colonies with responsible government could pass restrictive laws irrespective of treaties (B. C. Sessional Papers, 1885, p. 464), and instanced the legislation of the Australian Colonies and of the Dominion. Fourthly—As to unequal taxation, the power of the Province within its jurisdiction was supreme and as plenary as that of the Imperial Parliament (*R.* v *Burah*, L.R. 3 App. Cas. 904; *R.* v. *Hodge*, L. R. 9, App. Cas. 117; and *Powell* v. *Apollo Candle Co.*, L. R. 10 App.

Cas., p. 290; and *In re Goodhue*, 19 Gr. 366); *Cooley* on Taxation, pp. 3, 82, 126-128, and *Cooley's* Constitutional Limitations (5th Ed.) 626-7; *Sedgwick* on Stat. (2nd Ed.), p. 501; *Potter's Dwarris* 418, 421, 425; *Dow* v. *Black*, L. R. 6 P. C. 272, were cited as showing the power of taxation, unless abridged by the written constitution, might be exercised so as to discriminate. The Supreme Court of Canada, in the case of *Jonas* v. *Gilbert*, 5 S. C. R., 356, had practically decided the same point. Fifthly—Whether called a license or not, the imposition was a direct poll tax, and as such came within the power of the Province to raise money by direct taxation for Provincial purposes. *Cooley* on Taxation, 386; *Wharton's* Law Lexicon; *Reed* v. *Mousseau*, 8 S. C. R., 408. It was not a license to carry on business, or a method whereby indirectly money was raised from the consumer, as, for instance, customs or stamp laws.

Richards, Q. C., for Wing Chong—The object of the Act was not for police purposes or to raise revenue. Its object, though not apparent on the face of the Act, was to prevent Chinese coming into the Province and drive out those who had already come. He reviewed the legislation against Chinese since confederation, contending it was levelled against a particular race of aliens and, therefore, beyond provincial control, per *Gwynne*, J., in *Citizens Insurance Co.* v. *Parsons*, 4 S. C. R., at p. 346. The law was a direct interference with trade and commerce (*R.* v. *Severn*, 2 Can. S. C. R., 70). If its object were successful and Chinese driven from the country, the customs dues received from the Chinese would be lost, and the benefits of trade relations enjoyed by the merchants would be destroyed. Counsel cited statistics from the Chinese Commission showing the extreme importance, from a fiscal and commercial point of view, of the large number of Chinese in the Province. The Dominion under the B. N. A. Act had alone the right of performing in Canada the obligations of Canada as part of the British Empire in respect of treaties, and although Canada might pass laws prohibiting immigration, or having that tendency, the Province could not do so, nor could it pass laws in derogation of treaties. He cited the British treaty (25th August, 1842, from *Hertslet*, Vol. 6, and Lord *Elgin's* treaty, 1860), comparing it with the *Burlingame* treaty of the United States, and quoted California decisions (*Lin Sing* v. *Washburn*, 20 Cal. 334), and the decision of *Gray*, J., in *Tai Sing* v. *Maguire*, deciding that similar legislation was held void as contravening the treaty and the sovereign power to regulate trade and commerce with foreign countries.

Drake, Q. C., on the same side, argued that the imposition of the $10 tax was invalid because of inequality. Inherent in and incidental to the taxing power was the characteristic of equality. *Cooley* stated that irrespective of constitutional limitation a particular class of citizens could not be burdened for the advantage of others—*Cooley's* Constitutional Limitations, p. 635. This was a principle underlying the power to tax and governing that right even though the

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written constitution made no mention of it—*Cooley* on Taxation, p. 18, and *City of Lexington* v. *McQuillan*, 35 Am. Dec. 159. The imposition was in derogation of treaty rights with which Canada alone had the power to deal. The Australian legislation did not help the contention of the Attorney-General. The Australian Colonies were autonomous, and occupied the same position as that of Canada. The Provinces were not autonomous. He did not contend that the whole of the Act was invalid. Much of it was within the scope of the Province, notably the provisions affecting the size of dwellings, the forbidding the use of opium, and the desecration of grave-yards. He insisted that imposing excessive taxation on one class of citizens was unconstitutional. The remarks of Chief Justice Ritchie, in the case of *Jonas* v. *Gilbert* before the Supreme Court of Canada, were *obiter dicta*, as the decision was upon another point, and intimated, but did not decide the right of the Provinces to discriminate, nor in what things and to what extent discrimination in taxation was legitimate. Lastly, the Act was for indirect taxation, which was a power given only to the Dominion Parliament. It was a license fee, the power to impose which had, in *Severn* v. *The Queen*, been decided against the Provinces on the score of such legislation being against trade and commerce.

The *Attorney-General* in reply—The ten dollar impost was a tax whether designated by the name of a license or otherwise. The distinction between direct and indirect taxation was well drawn in the case of *Reed* v. *Mousseau* before the Supreme Court of Canada, in which Mr. Justice Strong mentioned the Privy Council had decided the Provincial legislatures had exclusive power to impose direct taxation, and that it did not follow they might not have power even to impose indirect taxation. The tax did not sanction the carrying on of any business out of the product of which the consumer would, indirectly, contribute towards payment of the tax. Then as to inequality, the one dictum of *Cooley* was but an expression of opinion that political wisdom required uniform taxation; for the same author cited numerous authorities, including that of the Supreme Court of the United States establishing the right to discriminate unless fettered by the express language of the Constitution. *Todd* on Parliamentary Government in the Colonies, supported the view that the Provinces within their jurisdiction were as omnipotent as the Imperial Parliament. The California cases (see *The People* v. *Naglee*, 1 Cal. 232) decided a differential tax might be imposed on foreign miners; and though a later case (*Lin Sing* v. *Washburn*, 20 Cal. 334) had decided a special tax could not be imposed on Chinese, a most celebrated Judge, Mr. Justice Field (since elevated to the Federal bench), dissented, and had pointed out that according to federal decisions the State might impose special taxation on alien residents, provided the impost was not levied against foreigners landing in the country. The tax was not to exclude the Chinese—another statute with that object had been disallowed. It was imposed to meet the extraordinary expenses incident to enforcing the police

and sanitary regulations prescribed by the Act. The question of treaties had nothing to do with the subject, for to responsible governments the Imperial Authorities conceded the right to pass laws within their jurisdiction. So the Canadian Parliament to-day was passing a restriction Act. Opponents to the Act might as well contend the exclusion of the Chinese from the franchise, and barring them from acquiring lands, was illegal. As to autonomy, neither the Australian Colonies nor the Dominion were absolutely possessed, but the Province equally with Australia and the Dominion were autonomous within the bounds of their respective jurisdictions.

21st August, 1885—CREASE, J.:—

In order to deal satisfactorily with the questions raised by this appeal, it is necessary to see what is the scope and purport of the Act. It is called "An Act to regulate the Chinese population of British Columbia." It *starts* with a recital, in itself a *petitio principii*—not apparently the result of any public enquiry—which charges them with being not law-abiding, dissimilar in habits and occupation to the whites—useless in emergencies, habitual desecrators of grave-yards, unsuited to our laws, and of habits subversive of the community. From that premises concluding that special laws are required for their government, it proceeds to enact:—

1. The title.

2. Defines Chinese to mean "any native of the Chinese empire or "its dependencies not born of British parents, and shall include any "person of the Chinese race."

Section 3—with which we are immediately concerned—says:—"From and after the passage of this Act there shall be payable and "paid by every Chinese in British Columbia, above the age of fourteen "years, unto and for the use of Her Majesty, her heirs and successors, "the sum of ten dollars, and thereafter on the 1st day of June in each "and every year there shall be likewise payable and paid by such "Chinese person a further sum of ten dollars."

Sec. 4 provides for the appointment and payment of special collectors, "to be called Chinese collectors, to collect and receive such "payments from Chinese; and such collector or collectors, immediately "upon such payment, shall issue and deliver to the person paying the "same a license in the form contained in the schedule hereto."

By Sec. 5 "Any Chinese who shall be found within the Province not "having in his possession a license issued under the provisions of this "Act, lawfully issued to him, shall, on conviction thereof, forfeit and "pay a sum not exceeding forty dollars."

By Sec. 6 "Any collector or Government servant wilfully disobeying "any of the provisions of this Act shall forfeit and pay a sum not "exceeding one hundred dollars."

By Sec. 7 "Every collector shall collect the tax from each Chinese, "and shall as soon afterwards as may be pay over the amount to the

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"officer in charge of the Treasury, or to such other person as the "Lieutenant-Governor in Council may from time to time direct."

By Sec. 8 "Every employer of Chinese shall furnish to the collector, "when requested by him so to do, from time to time, a list of all "Chinese in his employ, or indirectly employed by him; but no such "statement shall bind the collector, nor shall excuse him from making "due enquiry to ascertain its correctness."

Section 9. "In case any employer of Chinese fails to deliver to the "collector the list mentioned in the preceding section, when required "so to do, or knowingly states anything falsely therein, such "employer shall, on complaint of the collector and upon conviction "before a Justice of the Peace having jurisdiction within the "district wherein such employer carries on his business, forfeit "and pay a fine not exceeding one hundred dollars for every Chinese "in his employ, to be recovered by distress of the goods and chattels "of such employer failing to pay the same, or in lieu thereof shall be "liable to imprisonment for a period not less than one month and not "exceeding two calendar months."

Section 10 gives the collector power to "levy the amount of the "license from any Chinese not being in lawful possession of a license, "with costs, by distress of his goods and chattels, or of any goods and "chattels which may be in the possession of the delinquent, or which "may be upon or in any premises (whether the goods of the delin-"quent or not) for the time being in the possession or occupation of "such delinquent Chinese," and declares that "for the purposes of this "section premises shall be deemed to be in the possession or occupa-"tion of any Chinese when it can be shown to the satisfaction of the "tribunal having cognizance of the matter (*a*) that such Chinese "habitually frequents such premises with the assent of the owner; "(*b*) that he is the owner or one of the owners of the premises, or has "control, either alone or jointly, with another or others, of such prem-"ises or some part thereof; (*c*) that he has passed the night or slept "upon such premises at any time within a week of the levy, it shall "be sufficient authority for the collector to levy as aforesaid on the "non-production of the license. Proof of the lawful possession of "such receipt shall lie on the person whose goods are restrained."

By section 11 every license must be demanded by the employer and retained during the Chinaman's service.

By section 12 tax collectors are not to allow Chinese to pass unless a license is produced.

Section 13 imposes a penalty of $50 on any person guilty of employing any Chinese not having a license.

Sec. 14. Fee for free miner's certificate to a Chinese to be $15, instead of the white man's $5.

Sec. 15. Penalty not exceeding $30 for every Chinaman mining without a license.

Section 16 amends the License Ordinance of 1867, whereby the

pursuit of various callings is sanctioned by the ominous words, "but no license shall be issued to any Chinese."

Sections 17 and 18 prevent the exhumation of dead bodies without permission, and prohibit the use of opium except for medical purposes.

Section 19 provides for the recovery of any pecuniary penalty thereunder in a summary manner before a J. P., and in default of immediate payment sanctions a distress, and failing that, imprisonment for not exceeding three months.

Section 20 (amended by Act of 1885) declares that "convictions are not to be quashed for want of form."

Section 21. "Any Chinese who shall lend his license or free miner's "certificate to another Chinese, and any Chinese who shall utter or "pass off upon any collector or other person any license or free "miner's certificate other than his own, with intent himself to avoid "payment of the license fee payable under this Act (and the onus of "proving that such was not his intent shall rest upon the person "charged), shall forfeit and pay a penalty of not less than twenty "dollars nor more than one hundred dollars."

Section 22 enacts that the tribunal applied to may decide "on its own view and judgment" whether any person is a Chinese or 14 years old.

Sections 23, 24 and 25 contain sanitary provisions affecting buildings let to Chinese.

Section 26 provides a means whereby persons imprisoned for an infraction of the Act may be put to hard labour by an Order in Council, and the same executive authority is empowered to make rules and regulations for carrying out the Act.

Section 27 places in the hand of the local executive the construction from time to time of further rules and regulations to enforce the Act, and a fitting summary to such a premiss in section 28 reverses all the old law of England and one of the most cherished and priceless safeguards of the freedom from oppression won for us by our forefathers—that no one shall be deemed guilty until he has been proved so—throws on the defendant, white or yellow, the burden of proving that he is exempt from the operation of its arbitrary provisions—and in a tax Act which is in restraint of personal liberty, and opposed to the common law rights of the citizen—for if applicable to aliens it is *a fortiori* to the temporary inhabitants of the Province—abrogates the hitherto invariable rule in criminal matters and makes it unnecessary in any information, summons or conviction to "state or negative any "exception in or exemption under this Act, or *in contemplation of "law!"* Taught by experience of former efforts in the same direction, section 29 gives one year's notice of the coming into operation of the Act—a time which has now expired. And section 30 terms it merely "The *Chinese* Regulation Act, 1884."

The only schedule is the form of license, which runs as follows:—

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"'CHINESE REGULATION ACT, 1884.'

"No. District of

"Date 18 .

"Received of , the sum of dollars, being the yearly license, from the day of to the day of , 18 .

"Collector."

The question now raised on the construction of this Act affects not only British Columbia, but, as she occupies the only Pacific seaboard of the Dominion, indirectly more or less the very many other Provinces under the flag of confederation.

Taking for convenience the five points of objection to the conviction in the order in which they are made—

1. That it interfered with the Dominion powers under the B. N. A. Act over aliens and naturalization.
2. Trade and commerce.
3. Treaty obligations.
4. That the tax was unequal.
5. That it was indirect taxation and therefore illegal, and should be quashed.

On the first point, I would observe that it is now well settled law that British Columbia, as a part of the Dominion, possesses all, but possesses only, the powers which are strictly defined by the B. N. A. Act of 1867, which is, indeed, the constitution of Canada.

Neither she nor any other of the Provinces possess any other powers of legislation than are conferred by that Act. If British Columbia, or any other Province, in its legislation, goes beyond that Act and in excess of its provisions, that moment, and to the extent of such transgression, it ceases to be law. Therefore, in dealing with this question, our constitutional Act must be kept in view throughout, as the measure by which we must continually gauge the legality or illegality of the provisions of the local statute under consideration.

The Act of Federation was passed in order to be an irrefragable, permanent standard by which to preserve and regulate all the relative rights of the Provinces, as among themselves and as regards the Dominion.

The exclusive powers of that Act given to the Dominion over particular subjects are contained in the 91st section. The exclusive powers of the Province are particularized in section 92. It is natural that in the working out of such a constitution in a new and growing country, questions should be continually cropping up, and call upon the Courts to define gradually and with greater exactness, as time progresses and population expands, the relative powers given by the Act to the Dominion and Provinces respectively.

Sub-section 2 of section 91 gives to the Dominion Parliament exclusively the regulation of "trade and commerce," and by sub-section 25 that of "naturalization and aliens," and everything relating to those subjects as affecting the whole Dominion is within the

Dominion powers, and no local Legislature can make any statute interfering with either of those subjects. If it does, so far as such interference extends it is illegal and void, and when brought before the Court it is the duty of that tribunal so to adjudge it.

And the converse of this is true when applied to Dominion legislation as affecting the subjects exclusively given by the constitution to the Province.

Now, applying this test to the statute before us, let us see whether and how far its provisions affect, as is alleged, aliens, or trade, or commerce.

The aliens in this case being Chinese, the first enquiry must be, what is the object of the Act? On applying to the preamble, we find that it looks like a bill of indictment as against a race not suited to live among a civilized nation, and certainly does not prepare one for legislation which would encourage or tolerate their settlement in the country. Indeed, the first lines of the preamble sound an alarm at the multitude of people coming in, who are of the repulsive habits described in the last part of the preamble, and prepares one for measures which should have a tendency to abate that alarm by deterrent influences and enactments which should have the effect of materially lessening the number of such undesirable visitors. The provisions of the Act I have given somewhat *in extenso* bear out that view, and the concurrent and previous local legislation bear out the same impression, for on the same day as this Act was passed, another Act was passed, the very object of which was plainly stated to be "to *prevent the immigration* of Chinese."

That Act was disallowed. It interfered with aliens as well as trade and commerce, which cannot subsist among nations without personal intercourse, which such an Act (as far as China was concerned) would have a tendency to prohibit.

Another statute (of 1878), "An Act to provide for the better collection of taxes from Chinese," which contained several of the stringent provisions which I have described in this Act, such as a special tax specially recoverable by summary and unusual remedies from the Chinese alone, in British Columbia, and enforced by fine and imprisonment and other penal clauses, came before this Court, and in a most conscientious and exhaustive judgment of Mr. Justice Gray, of 23rd September, 1878, in the case of *Tai Sing* v. *Maguire,* was declared unconstitutional and *ultra vires* the Local Legislature, as interfering with aliens and trade and commerce—matters reserved exclusively under the 91st section of the B. N. A. Act to the Dominion. That decision was never appealed from, and was at once acted on by the government as conclusive.

The position and legislative powers of British Columbia have been in no respect altered in its relations to the legislative powers of the Dominion on the same subjects since that time, though *Russell* v. *The Queen* (7 App. Cas. 829) and *Hodge* v. *The Queen* (9 App. Cas. 117)

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have more fully defined the extent of the powers of the Provincial Legislatures than has hitherto been done; and in the latter case especially. That decision, however, was not before Mr. Gray when he rendered the judgment in *Tai Sing* v. *Maguire*. Until reversed or varied, the decision in the *Hodge* case is law here, and binding on this Court.

Their lordships say (page 132), with reference to the objection of the appellants there *(delegatus non potest delegare)*:—

"It appears to their lordships, however, that the objection thus "raised by the appellants is founded on an entire misconception of the "true character and position of the Provincial Legislatures. They are "in no sense delegates of or acting under any mandate from the "Imperial Parliament. When the British North America Act enacted "that there should be a Legislature for Ontario" (for this case, we may for "Ontario" read "British Columbia"), "and that its Legislative "Assembly should have exclusive authority to make laws for the "Province and for provincial purposes in relation to the matters "enumerated in section 92, it conferred powers not in any sense to be "exercised by delegation from or as agents of the Imperial Parliament, "but authority as plenary and as ample within the limits prescribed "by section 92 as the Imperial Parliament in the plenitude of its "power possessed and could bestow. Within these limits of subjects "and area the Local Legislature is supreme."

[So far this decision confirms the words of Lord Selborne in *R.* v. *Burah;* what follows goes beyond it.] "And has the same authority "as the Imperial Parliament or the Parliament of the Dominion would "have had under like circumstances to confide to a municipal institu-"tion or body of its own creation authority to make by-laws or "resolutions as to subjects specified in the enactment, and with the "object of carrying the enactment into operation and effect."

That decision, although in some respects an *obiter dictum*, as regards this case, makes it clear that within the limits of subjects and the area prescribed by the B. N. A. Act, by section 92, the Legislature of British Columbia is supreme. The basis, then, of our enquiry must be: Is this Chinese Regulation Act of 1884—rather the parts of it objected to—within the limit of subjects and area of section 92, or does it exceed those limits in which it is supreme, and interfere with aliens, trade and commerce in such a manner as to encroach on section 91 or any of its sub-sections? If so, so far as it does so, it is unconstitutional and *ultra vires*, and therefore void. Now it does not follow because a local Act touches on these three subjects it therefore interferes with them so as to render it unconstitutional.

Aliens may be taxed, may be subjected to the same rules and municipal and other by-laws as other inhabitants of British Columbia, and such discrimination in so doing as are allowed in local legislatures between and among different persons and occupations among the whites are quite as applicable to them. These are the only discriminations

which the law allows, and these are the permissible discriminations spoken of by Cooley in the portions cited before the Court. During the argument the case of *Liu Sing* v. *Washburn*, 20 California Reports, 534, was quoted as bearing on this case. There, an Act of the California Legislature passed an Act imposing a capitation tax "on each "person, male and female, of the Mongolian race of the age of 18 years "and upwards residing in the State," accompanying a license almost a *fac simile* of our own, and enforced in much the same way as in the case before us, that, after long and elaborate argument in which the Attorney-General appeared for the State, was determined to be unconstitutional, as it was an interference with trade and commerce, which could be regulated alone by the general government. It was in vain advanced that at least the State had concurrent jurisdiction in matters of taxation relative to its own internal affairs, of which this was one (the same proposition as was advanced by the Attorney-General in this case) in which it had a supreme and autonomous right to legislate. And the grounds of this decision were that the federal constitution had vested in the general government the power to regulate commerce in all its branches (as with us in the Dominion); and this power extends to every species of commercial intercourse, and may be exercised upon persons as well as property (Mr. Justice Field, whose arguments have been reproduced by the Attorney-General before me in this case, dissenting).

That commerce cannot be carried on without the agency of persons, and the tax, the effect of which is to diminish personal intercourse, is a tax on commerce. If the power to impose such a tax is acknowledged, it being a sovereign power, no limitation can be affixed to its exercise, and it may be so used as not only to diminish but destroy commerce.

The power asserted in the Act in question (the California Act) is the right of the State to prescribe the terms upon which the Chinese shall be permitted to reside in it, may be so used as to cut off all intercourse between them and the people of the State, and defeat the commercial policy of the nation.

That the Act could not be maintained as a police regulation; that a branch of the police power had been surrendered to the Federal Government as a part of the power to regulate commerce, and its exercise by a State was incompatible with the authority of the Government.

That the Chinese might be taxed as other residents, but could not be set apart as special objects of the taxation, and be compelled to contribute to the revenue of the State in the character of foreigners.

The reports of the higher California courts are of great authority for us on all Chinese questions, for there have been efforts for years past to restrict Chinese immigration in California, and the matter has been constantly before the superior courts there, and the judges there (if we may take the reports as correct) are more than ordinarily skilled in laying down the law correctly in constitutional points of

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that nature. Indeed, there is no other country which has such experience generally in constitutional law as applicable to a federation of states.

Of course, in all the observations I make I recognize the now well-known distinction between the relations of a State of the Union to the Federal Government, and our relation as a Province to the Dominion. Still both Federal Governments have reserved to themselves the regulation of trade and commerce and naturalization and aliens; so the analogy is so close as to become almost a direct authority.

In the *Lin Sin* judgment, p. 579, the learned judge says of the power of taxing foreigners, as in the present *qua* foreigners: "If the "power exist it may be exercised upon all foreigners residing in the "State, and may be so exercised as to bar the door of foreign com-"merce as effectually as the Government could do by issuing its "mandate and closing its ports."

And again "to determine whether there is a conflict or not," *i. e.*, of jurisdictions, "the power must be considered with reference to its "consequences, for its effect when carried out is the only criterion by "which a judgment can be formed."

In another place he says—"It would be an empty sound to say that "the several States cannot pass any law to prevent foreigners from "coming here if they may pass laws which will compel such foreigners "to depart as soon as they arrive."

And again, "A tax imposed by the law on these persons for the "mere right to reside here, is an appropriate and effective means to "discourage the immigration of the Chinese into the State."

During the argument on the case before me, the Attorney-General claimed that this was direct taxation, and a direct tax within the Province, to raise revenue for Provincial purposes, and, therefore, *intra vires;* but the question is not one of name but of fact. Does it interfere with trade or commerce? Can it be legally imposed on foreigners as foreigners, for even a legal tax in other respects becomes illegal when it goes beyond its proper limits, and interferes with powers exclusively given to the Dominion for the benefit of all?

In another California case, *In re Tiburcio Parrott*, it is laid down that if the apparent object of a statute is under a pretense of the exercise of constitutional powers to drive Chinese away, the end sought to be obtained being unlawful, the statute is void.

In *Russell* v. *Reg.* it is decided that the true nature and character of legislation must be determined in order to ascertain its legality.

In *Citizens Insurance Co.* v. *Parsons*, we have to look at the legislation for the same purpose.

If the legislation here be to drive people from the country, have the local legislature the power? Legislation as to aliens is reserved to the Dominion. And as to trade and commerce, if the Chinese be driven out an annual loss to the revenue, it appears by the tables in the Chinese Commission Report, of $110,000 will take place; and more

than $1,500,000 of property and business be lost to us, besides an injury to trade to an incalculable extent. The amount of business transacted by Chinamen in British Columbia, as revealed by the tables in that Chinese Report, is something which a casual observer could have no idea of.

The treaties between Great Britain and China, which bind us, have been quoted. The treaty of 25th August, 1842, *Hertslet*, Vol. 6, ratified 26th June, 1843, p. 221, and Lord *Elgin's* treaty of October, 1860, authenticated copies of which were produced in Court, secure to Chinese coming into British dominions the same "full security for "persons and property as subjects of Her Majesty."

Vattell, cap. 8, referring to our obligations to foreigners, observes:— "As soon as the lord of the territory admits strangers into it he engages "to protect them as his own subjects, and to afford them perfect security "as far as depends on him."

Reg. v. *Severn* and *Reg.* v. *Russell* are important authorities in guiding our enquiry as to the nature and effect of local legislation in determining whether and how far the Act under review exceeds the limits within which the local legislature is supreme. And as to the equality of taxation, besides *Cooley*, who has been quoted freely on both sides, in *Kent's* Commentaries (8th Ed.), 2nd Vol., 388, it is insisted—"That every person is entitled to be protected in the enjoyment "of his property, not only from invasions of it by individuals, but "from all unequal and undue assessments on the part of the Govern- "ment. It is not sufficient that no tax or imposition can be imposed "upon the citizens, but by their representatives in the legislature the "citizens are entitled to require that the legislature itself shall cause "all public taxation to be fair and equal in proportion to the value of "'property'" (and that is what *Cooley* means by apportionment of taxation), "so that no class of individuals, and no species of property "shall be unduly assessed." The treaties I have quoted between Great Britain and China, binding on the Dominion and on us in British Columbia, secure to the Chinese, just as the treaties between Great Britain and other foreign countries secure to other foreigners, the same rights in regard to the equality of taxation which I have described as being enjoyed by citizens of this country.

These treaties have the force of international law, and are continued most strongly against the party for whose benefit they are introduced.

In the case of the Chinese treaties, they were forced at the point of the bayonet on China, to obtain a right for us to enter China, and in return for a similar permission to us, full permission was given for the Chinese to trade and reside in British dominions everywhere.

In the treaties of 1858 and 1860, made at the solicitation of Great Britain, the Emperor of China was induced to give permission to his subjects to go and trade and reside "in British Colonies," and to enter into "engagements with British subjects for that purpose."

These obligations are binding here and in other parts of the Dominion,

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under section 132 of the British North America Act, and no Province, or the Dominion itself, can lawfully pass laws interfering with that right without a previous revision of the treaties by the high contracting parties to them for that purpose. Treaties with foreign nations are above all ordinary municipal law, for obvious international reasons, for without such a provision there can be no permanent security, which is the life of all commercial intercourse. The same provisions that apply to Chinese may be made to apply also to Americans, Frenchmen, Germans, or any other foreigners. Such treaties are the especial care of the Dominion, and where local legislation clashes with that especial province of the Dominion, the legislation of the Province must give way, as laid down in *Leprohon* v. *the City of Ottawa*, 40. Q. B., Ont., 478; *Reg.* v. *Chandler*, *Hannay's* New Brunswick Reports, 548; *Dow* v. *Black*, L. R. 6 P. C. 272; *L'Union St. Jaques* v. *Belisle*, L. R. 6 P. C. 31, and numerous other Canadian authorities, besides the British North America Act itself. Now applying the principles and tests I have described to the Act before us, what do we find? The Act is found associated with another Act now disallowed, the express object of which is to prevent the Chinese altogether from coming to this country, and the principle "*noscitur a sociis*" is kept up by the preamble of the present Act, which describes the Chinese in terms which, I venture to think, have never before in any other country found a place in an Act of Parliament.

In the definition of the persons affected by the Act no distinction is made of ambassadors, merchants, consuls, artists, professors or travellers, or sex, whether under disability or not, or at such a distance from a collector as to make it difficult or impossible to obtain a license. Every person of Chinese origin, whether naturalized in Hong Kong or America, or any other State with which we are at amity, so long as they are of Chinese origin, 14 years of age,—every one without distinction—must take out a license. For the purpose of argument I have treated the license fee as a tax; but it is in fact a license—a license to remain in British Columbia unmolested for a year. When the legislature wanted to create a tax, they knew what words to use for the purpose, for in the sister Act passed on the same day, which was disallowed, they called the impost there enacted a "tax," not a license. However difficult or impossible for any Chinese to find a district collector, if such Chinese is "found without a license he is liable to a fine of $40." At every turn he is confronted with an exceptional duty, and an exceptional penalty, and the loss of his goods and chattels, and of personal liberty.

It is impossible but that such an imposition so enforced, in addition to all the general taxes to which he is subject, should make this country too hot for him to live in; and just in proportion as he is so persecuted out of the country, in that degree does this enactment interfere with trade and commerce and that control over aliens exclusively given to the Dominion. And not only is he thus attacked, but unheard of provisions are introduced. Every employé of Chinese

labour, whether English, American, or what not, is made liable to severe and incessant liability of a penal kind, for what? Some act, a default of his own? No; an act or default of a stranger, a man whose language he knows not, and for every infraction of the Act by the Chinese under his employ. The palpable object of such a provision, or set of provisions, is to render the employment of Chinese so distasteful and annoying to the employer that he must cease to employ them. Now, to pass a law providing that employment shall not be given to a special class of men, except it be productive of so much danger, annoyance, and loss to the employer, is just another way of saying that no intercourse shall be had with that class. With penalties and prosecutions always before you, far in excess of any advantage to be derived from that intercourse or trade, what is that but equivalent to saying that such intercourse or trade or labour must cease altogether? What is that but interfering with aliens, trade, and commerce?

If a man employ a Chinaman who should happen to be delinquent in his tax, and he happens to occupy a cottage or room of his employer, with his master's goods in it, under section 10 they are liable to seizure and sale. In every prosecution under the Act the legal presumption of innocence until conviction is reversed; in every case the *onus probandi*, though in a Statute highly penal, is shifted from the informant on to the shoulders of the accused, and he a foreigner not knowing one word of the law, or even the language of the accuser. In other words, every Chinese is guilty until proved innocent—a provision which fills one conversant with subjects with alarm; for if such a law can be tolerated as against Chinese, the precedent is set, and in time of any popular outcry can easily be acted on for putting any other foreigners or even special classes among ourselves, as coloured people, or French, Italians, Americans, or Germans, under equally the same law. That certainly is interfering with aliens.

The proposition that it is a Provincial tax for revenue purposes, supposing it to be so intended under the provisions of the Act, is so manifestly calculated to defeat that object, by diminishing the numbers of the members of the persons to be affected by it, that it is difficult to regard it in that light, or in any other light than an indirect mode of getting rid of persons whom it affects out of the country. The whole Act teems with special provisions which affect not only Chinese, but their employers, with obligations and liabilities as to the conduct of the Chinese in their employ, that no reasonable man would encounter, and run the risk of the penal consequences which the Act hangs over him.

For instance, by section 19 any pecuniary penalty imposed may be summarily recovered (and applies to employers), and in default of immediate payment the same may be recovered by distress of the goods and chattels of the offender, and in default of sufficient distress by a liability to imprisonment for three calendar months, and the employers would necessarily be white men.

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In fact, the Act so bristles with these arbitrary, exceptional and penal consequences, that it is invidious to single out particular ones for comment. It is enough to add that "any person," no matter whether white or Chinese, imprisoned in respect of any infraction of the provisions of the Act, may be at the will of the executive, subjected even to hard labour.

The Act is so full of provisions that interfere directly with aliens, with trade, and with commerce, that I have no hesitation in pronouncing all such provisions, and among them those under which the appellant in this case has been convicted, to be *ultra vires* the local legislature, and consequently illegal and void.

So far, I have dealt with the Act on its own merits; but if we consider it in juxtaposition to the Dominion Act recently passed restricting the Chinese throughout all Canada, its illegality becomes transparent; for in passing that Act against the Chinese the Dominion has spoken by the highest authority which it possesses—its own Parliament. By the Constitutional Act the subject of aliens, we have seen, is specially reserved to the Dominion, and it is now an axiom, in the interpretation of that Act, that when that authority deals with a subject expressly included in its jurisdiction by the 91st section, it has possession of that subject exclusively, and the Province has to give way. It is a great assumption of power on the part of a Province to pass laws, the effect of which must be practically to expel a particular class of aliens from that Province, to say in effect that it will by its legislation impede or prevent that class from being employed in another Province—say the North-west Territory or Manitoba—where railway works may be languishing for want of that very class of labourers, British Columbia being the only sea-board of Canada on the Pacific through which (in face of the restrictive laws of the United States) that class of labourers can enter and pass through; that is, in fact, legislating on all inter-provincial immigration; in other words, such legislation is *ultra vires*, and so I pronounce it; and adjudge accordingly, and quash the conviction, with costs.

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BEGBIE, C. J.
1884.
3rd November.

Appointment of Solicitors to a Corporation Aggregate—Retainer—Corporate Seal.

Plaintiffs by their statement of claim alleged that they were solicitors in partnership, and that they were duly appointed to be the "legal advisers" to the Corporation, the defendants. This allegation was not denied or put in issue by the defendants' pleadings. Plaintiffs were afterwards continuously and exclusively employed as the solicitors of the Corporation.

Held, that the defendants were debarred from denying a due appointment, (viz.) an appointment under seal.

In conformity with a resolution of the Mayor and Council, their clerk, by a letter under the corporate seal addressed to the plaintiffs, informed them that they had been appointed to be the "legal advisers" of the Corporation.

Semble, this might be insisted on as an appointment under seal.

The designation "legal advisers" being ambiguous, may be interpreted to mean "solicitors," or "attorneys," by reference to the circumstances of the parties at the time of the appointment, and the acts of the parties subsequently: and was so interpreted in this case.

Qu.—Whether an unambiguous term (*e. g.*, standing counsel to the Corporation) would not require to be strictly construed?

An appointment to be solicitor to a Corporation operates as a general retainer.

Observations as to the effect of a retainer and as to the functions of a solicitor and counsel.

This was an action by a firm of solicitors for the amount of their bills of costs for professional work and assistance rendered to the defendants in various matters. One of the bills of costs amounts to $71.40, being for certain professional work and disbursements on various topics not directly in any suit or matter, the other four being all cases in which the Corporation occupied the position of defendants.

The defendants, in their statement of defence, relied wholly on technical defences, viz.:—1st. That there was no appointment or general retainer of the plaintiffs. 2nd. That the appointment of plaintiffs, such as it was, did not enure to retain or appoint them solicitors to the Corporation, appointing them expressly to be "legal advisers" only. 3rd. That even a general appointment or retainer of plaintiffs as solicitors to the Corporation would not suffice, but there must be for every piece of business a particular retainer under seal. 4th. That no bill of costs properly authenticated by the plaintiffs had been sent to the defendants within the statutable month.

Wilson for Plaintiffs.

Pollard for Defendants.

BEGBIE, C. J.:—

The last objection raised by the defendant was completely and immediately refuted. It would probably never have been raised if statements of defence, like the old answers in Chancery, were required to be under oath.

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Then as to the appointment of plaintiffs to be solicitors to the Corporation. It is undoubtedly true that the retainer of a solicitor by a Corporation aggregate must, like every other contract, be in general contained in an instrument under the corporate seal. And it is equally true that no instrument styling itself an appointment was produced by the plaintiffs, though a letter was produced and proved addressed to the plaintiffs, authenticated by the corporate seal and the signature of the Clerk of the Council, announcing their appointment to be the "legal advisers" of the Corporation. I am not sure that that letter would not operate as a substantive appointment. An appointment of the most formal kind might have commenced differently, perhaps "To our trusty and well beloved," or "Know all men." The present letter is addressed to the plaintiffs by their partnership style and commences "Gentlemen." But the statements are just such as would be embodied in the most formal deed poll, and it is authenticated as such a deed poll would be. The objection of the want of an appointment was taken at the bar *ore tenus*.

I am of opinion, however, upon these pleadings that the objection cannot be so taken. The statement of claim alleges that the plaintiffs are and were solicitors, carrying on business in partnership; that on the 31st January, 1881, they were duly appointed to be "legal advisers" to the Corporation, and that "such appointment" was continued until January, 1884 (covering the whole time within which the bills of costs were incurred. The power of the Council to appoint at all being limited to their year of office, the appointment would have to be renewed annually.) None of these allegations are denied, or stated not to be admitted, in any pleading of the defendants. It is, therefore, not now open to them to deny that the plaintiffs, being solicitors, were "duly" appointed in January, 1881, to be the "legal advisers" of the Corporation (whatever that may mean), nor that "such appointment," *i. e.*, a due appointment, has been continued up to January, 1884. The question of the form of the appointment, so far as the affixing of the seal is concerned, does not arise. But the defendants raise by their pleadings the further question (viz.), what is the meaning of such an appointment? What is the meaning of appointing a firm of solicitors to be the "legal advisers" of a corporation aggregate?

The term has not, so far as I know, any recognized legal signification; it is not a technical term. "Attorneys and solicitors," "standing counsel," I know, but what are the functions of a "legal adviser?" Yet the phrase can only mean one of these two. And, practically, the whole case made by the defendants rests on this phrase. They maintain that the functions of a "legal adviser" are simply to draft by-laws, &c., and to advise; to recommend in any contingency what steps should be taken, but not to take those steps unless a separate contract is entered into on each occasion, the appointment of "legal adviser" not implying a contract for the last-mentioned matter at all.

They pointed out in argument (but I think they did not prove) that these gentlemen, the plaintiffs, are in other instruments styled "City Barristers," "Barristers of the Corporation;" not anywhere styled solicitors; but that in fact under these appointments as "legal advisers" or "City Barristers," it is intended to retain the services of professional gentlemen as standing counsel and not as solicitors; and that before the plaintiffs could in any case act as solicitors they required to have an independent retainer as such, which must be under seal, that is, if the Corporation was to be made liable. This is the whole defence.

It is not alleged that this meaning of the term "legal advisers" has ever been acted on, or, indeed, ever suggested before this action.

By the Municipal Ordinances (see 1881, c. 16, s. 104, sub-s. 12) the Corporation is empowered by by-laws to define the functions of various officers and the methods which are to regulate their own mode of business, &c., in appointing officers. The code of by-laws was not referred to in argument, but by consent of both parties I have been furnished with a copy. Up to April, 1884, however (a later period than this action), I have only found one by-law which at all alludes to any legal proceedings, viz., clause 28 of by-law 6, dated in 1872: "No opinion of counsel shall be taken at the expense of the Corporation without a resolution of the Council." At that time the two branches of the profession were still quite distinct. The "opinion of counsel" could not be a solicitor's opinion at all, but the opinion of a barrister, taken on a case drawn up and laid before him by some solicitor. According to this by-law, no solicitor (general, or particular, or merely officious) is to recover against the Corporation his costs of procuring such an opinion, unless authorized to procure it by the previous resolution of the Council. That means, probably, that the solicitor would be left to look for his costs to the person who instructed him. This by-law throws very little light on the present question, which is, "What did the parties mean by the phrase 'legal advisers' in the present case?"

The difficulty has arisen, I think, from not calling things and persons by their proper names. Attorneys and solicitors (by the Act of 1879 to be thenceforth called promiscuously solicitors) belonging to what is called the inferior branch of the profession,—having duties to perform which are deemed not to be so honorable and important as the duties of counsel, it came to be held somewhat uncourteous unnecessarily to call them by that distinctive appellation. They usually called themselves in conversation, and were called by others, "lawyers"—a generic term, which applies as well to the oldest judge on the bench as fully as to the youngest attorney who practises before him in chambers. It may mean anything, and therefore has no particular meaning at all; that is, its meaning must be gathered from the context and the surrounding circumstances.

The Corporation seem to have yielded to this sentiment, for they

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do not ever appear to name a city solicitor, which is the proper designation of that officer, and is the term used, for instance, by the City of London, and therefore surely to be accepted as sufficiently dignified for Victoria.

The term "legal adviser" is so nearly equivalent to "lawyer" that I think it must mean what "lawyer" would certainly mean in common conversation in England, viz., an attorney or solicitor. And this is supported by the consideration that an attorney is an absolute necessity to a Corporation aggregate, which can neither sue nor defend in person; and therefore it is the first duty of the Council as soon as possible to appoint an attorney (which in London is always done by the Lord Mayor at his installation on the 9th November, verbally, in open Court, the appointment being then entered as of record, precluding the necessity of a seal.—Pulling, Attorneys, 88 n., t.); but it is quite unnecessary for a Corporation aggregate to appoint a standing counsel.

It is surely to be presumed that the defendants having a necessary duty to perform intended to perform it, though in untechnical phraseology, and not that they intended to neglect their duty and make an unnecessary appointment, however ornamental; *i. e.*, it is to be presumed that the Corporation intended by this phrase to appoint solicitors. The same view is further supported by the circumstance that the plaintiffs in their letter of appointment are addressed by their partnership name. Now barristers, *qua* barristers, cannot form a partnership. They have nothing to throw into a common stock as solicitors have, nor have they any profits capable of being assigned. Their fees are mere *honoraria*, incapable of being sued for (see sec. 9 of 1877, c. 136); and, therefore, a barrister cannot assign to anybody a right to unpaid fees as property, a right which he himself does not possess.

Where, as in British Columbia, the statutes enable certain barristers to practise as solicitors, they certainly may be partners and may sue for fees; but that is in their character of solicitors.

It would appear, therefore, that this is the character in which these plaintiffs are addressed and appointed in 1881 and in subsequent years. The same view is still further confirmed by the consideration of how the parties, plaintiffs and defendants, appear to have themselves construed the appointment.

The services performed on the one hand and required on the other, so far as appears by the bills of costs, seem always to have been such as are performed by a solicitor, never such as are performed by a person practising purely as a barrister. The plaintiffs do not appear to have acted on any single occasion as "standing counsel;" not, that is, to have ever advised on any case, or settled any draft, or pleaded in any Court on instructions given them through the medium of any other solicitor, and not taken direct from the Mayor or some officer, the legitimate exponent of the wishes of the Council itself. And

there was abundant evidence that they have always acted as solicitors would act, and as counsel, *qua* counsel, could not act; and this to the knowledge and with the full assent of the Mayor and Council.

It is, of course, in this Province quite regular for some barristers (viz., all those who are likewise on the roll of attorneys) to take instructions direct from their clients without the intervention of another solicitor; but when they do so they act not in their capacity of counsel, but in that of a solicitor; and if, *e. g.*, on any such occasion they express a legal opinion, I do not think this would be taking "counsel's opinion" within the by-law of 1872.

Therefore, usage, necessity, the form of communications, the practise both of the plaintiffs and defendants during the whole of their business intercourse, all combine to show that the term "legal advisers" means solicitors. Then the appointment of plaintiffs as solicitors operates, in my opinion, as a retainer, and the retainer constitutes the relation of attorney and client, involving the implied contract upon which alone the attorney can sue. Unless there be some retainer antecedent or subsequent to the services, there is no contract; and a solicitor can only sue on his contract. He cannot sue a man for a reward for his services, however useful they may have been, merely because they have been useful. And this appointment operated further, in my opinion, as a general retainer, differing from a particular retainer in this: that when a solicitor is retained for any particular matter or suit at law, the relation is at an end when the particular matter or action is finally concluded. But if he be retained generally, the client contracts that in all matters coming within the scope of a solicitor's business he will, pending the retainer, employ this solicitor and not another (see Pulling on Attorneys, chaps. iii., ix.; Brett., L. J., in L. R. 12 Ch. D., p. 360), and will pay the solicitor his proper reward for his services; and the solicitor correspondingly contracts that, pending the retainer, he will undertake the conduct of all his client's legal business, will give him advice, and exhibit average skill and diligence. And Erle, J. in *Reg.* v. *Lichfield*, 16 L. J., Q. B., 334, intimates that the solicitor under this contract may, without further instructions (3 C. & P., 214: Pulling, p. 418), bind his client in all legal forms and proceedings within reason; and is particularly bound, without further instructions, to take all defensive steps to defend his client's interests against attacks. If he neglect, his client may sue him; if he refuse, he may even be attached (Reg. Gen. H. T. 1853, s. 3; Pulling, p. 91).

I am told it is now the fashion to appoint somebody to be a "City Barrister." What the effect of that may be does not arise for consideration here, where due appointment has been made under the ambiguous style of "legal advisers" to the Corporation. Where indeterminate language is used the Court has always power, which it is bound to exercise, of construing the phrase in such a way as is most conformable to the obvious meaning of the parties and so as to give

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it the effect most consistent with equity and common sense; and if only one of its diverse meanings be consistent with these, then to give it that meaning *ut res magis valeat quam pereat.* But the case is different when a phrase is used which is not at all ambiguous, but quite determinate, and which in its own plain sense is not at all ineffective or improper; the Court might be bound to that plain meaning. And a "City Barrister" might be held not to be *ex ci ternimi,* solicitor to the Corporation. Suppose an Edinburgh physician admitted to the roll of British Columbia solicitors—not a very violent supposition,—or a qualified attorney admitted to holy orders; or suppose a notary (and I believe all notaries here are on the roll of solicitors) were appointed by the Corporation to be "City Chaplain," or "City Physician," or "City Notary," would that enure as an appointment of a City Solicitor? Then why should the appointment of a man as City Barrister so enure? Chaplains, standing counsel, physicians, notaries, common sergeants, recorders, are often usual and sometimes useful officers of a civic corporation. But if these appointments are not purely ornamental, at least none of them are absolutely necessary. The appointment of a City Solicitor is deemed of such paramount urgency that, as we have seen, the Lord Mayor of London always performs the duty of appointing one in his first moment of office, before even attending to the duties of hospitality.

It is very probable that Mr. Pollard was perfectly right in that part of his contention, if it merely amounted to this, that a person appointed to be City Barrister is not thereby authorized to act as solicitor to the Corporation, so as to bind them to his bill of costs without a particular retainer under seal obtained as a preliminary to undertaking each separate piece of business—a very inconvenient state of things which in well ordered municipalities in other parts of the world is avoided by giving a general retainer to some respectable solicitor. A City Solicitor should always be appointed by that designation and style; and although the Corporation of course may, if they choose, stipulate beforehand as to his line of conduct—may even, if they choose, define or attempt to define his duties by a by-law—yet I think they would act much more prudently if they wholly abstained from such evidence of distrust and appoint a reasonable and honest man in whom they can place confidence, imposing no restrictions. They have imposed none hitherto, and their confidence does not appear in any single instance to have been abused. If they do not appoint a solicitor to act for them generally, then on every occasion and attendance they will probably have to give a particular retainer or instructions under seal, which I was informed their present solicitor had deemed necessary in the present case for his own protection in case he were compelled to sue his clients. Properly, instructions merely indicate the objects or work upon which the client desires that the special knowledge and industry contracted for by the retainer shall be exercised. Instructions, therefore, in the case of a Corpora-

tion aggregate need not be under seal when given to a duly retained or appointed solicitor. But if the instructions are relied on, not only as intimations of a client's wishes, but also as a retainer, then in the case of a Corporation aggregate they ought to be under seal, according to the current of English decisions; the reason for this rule being, I suppose, that a Corporation can only bind itself to a contract by its seal. That seems to be the ground of *Arnold* v. *Mayor of Poole* (4 Man. & Gr., 860) and seems good law, notwithstanding the observations in the Court of Appeal in Eldridge's case (L. R. 12, Ch. D. 349). The doubt there expressed is only interlocutory, though in conformity with many modern decisions in Canada and elsewhere, relaxing the ancient strictness of the rule. The decisions in the United States would be still more favorable to the present plaintiffs, but I have not noticed them; though the circumstances of this Province, both as to methods of business and status of professional men, are more analagous to what exists there than to what exists in England, so that decisions and arguments in the U. S. Courts would be more reasonable guides to follow than our own. But, however this may be, I think that on these pleadings the fact of a due appointment, whether under seal or otherwise, must be taken as admitted; and the technical defence failing, and there being not the slightest suggestion that the plaintiff's demands are not intrinsically entirely just and proper, there must be judgment for them for the full amount claimed, with costs. The defendants have by their line of defense and the lapse of time abandoned their right of taxation, which indeed has not been asked.

On appeal * the judgment of Begbie, C.J., was affirmed without calling upon plaintiff's counsel, on the ground that the plaintiff's right was confessed by the pleadings.

* Present—Begbie, C.J., Crease, McCreight, Walkem, J.J.

C. A.
1885
20th, 24th July.

LOO CHU FAN *v.* LOO CHOCK FAN.

Right to trial by Jury—Jury discharged—Motion for judgment—Practice—Rules of Court, 1880, O. XXXVI., rr. 3, 26.

Where an issue has been ordered to be found by a jury, and the jury have disagreed, and been discharged without giving a verdict, the order for trial by jury is not exhausted, and the Judge, on motion for judgment, cannot direct judgment to be entered for either party.

This was an appeal to the Full Court* from a judgment of the Chief Justice.

During the course of the proceedings the following order for the trial of an issue by a jury was made:—"I do order that the question "as to whether the plaintiff is a partner with the defendant in the "business carried on under the firm name of Kwong Lee & Co. be "tried before a Judge and a special jury," &c. The trial was had on the 11th May, 1885, before the Chief Justice and a special jury. The jury disagreed and was discharged without a verdict.

On the 18th May a motion was made before the Chief Justice by counsel for the plaintiff, for the appointment of a receiver and manager of the business of Kwong Lee & Co., and that judgment be entered for the plaintiff as an equal partner therein; or, in the alternative, that a trial of the issue of partnership be had on the 25th May, when the judgment now under appeal was delivered. The following extract from the Chief Justice's judgment shews the grounds on which his decision was based:—

"Mr. Drake says I have no power to enter up a judgment under the "existing circumstances; that even if a Judge may direct a judgment "adverse to the findings of a jury, the jury here have been discharged "*without any finding*, and the plaintiff having given notice of his desire "to have a jury, and a jury having been ordered, he cannot now be "deprived of that right, at least by a Judge at *nisi prius*, whatever "may be the power of a Court of Appeal. That, moreover, the Judge, "by Order XXXVI., Rule 21, has this power only at or after a trial, "and that we are neither at nor after. To this the Attorney-General "replied that this is a case not within r. 21 alone, but governed by r. "22; and, moreover, that the leave given to try by a jury has been "exhausted and requires to be renewed if a new trial were to be had. "If the circumstances of this case had been known (viz.), that the "plaintiff's case was capable of entire proof from documentary "evidence, without any balancing of oath against oath, no trial by "jury would ever have been permitted, and that no such order will "now be made, and that a jury cannot be summoned without one.

* Present: Crease, Gray, McCreight, and Walkem, JJ.

"That if a Judge has power, as it seems clear from Order XXXVI., r. "21, to direct judgment according to his own views against the verdict "of a jury, he *a fortiori* may, in a proper case, direct judgment as he "thinks fit, when the jury have found no verdict at all. I think what "the orders had in view, as occurring before the Judicature Act, was "this—There is a bill filed in Chancery for a declaration of partner- "ship and to have the accounts taken and a dissolution. The Vice- "Chancellor, being told that it is a case of oath against oath between "two Chinamen, immediately concludes that a jury is the most satis- "factory tribunal and he directs an issue, say to be tried at the next "Kingston Assizes. The jury disagree. If the Vice-Chancellor then "be asked to send the issue to be tried at Croydon, he would not "necessarily comply with that request; he certainly would not if he "found that the nature of the case had been entirely misconceived, "and that it was not a proper case for a jury at all,—that the issue "depended not simply on the contradictory assertions of two sets of "Chinamen witnesses, but on the construction and inferences to be "drawn from a great number of facts evidenced by documentary "testimony of a varied and unimpeached character. I apprehend "that that would be exactly my position before the Judicature Acts, "and I conceive that the orders intend to preserve to the Judge of "the High Court the same jurisdiction and discretion as the Vice- "Chancellor would have had under similar circumstances before the "Act. Whichever way I decide there will certainly be an appeal; "perhaps it is not too much to say that there ought to be an appeal. "If I am wrong that Court will rectify the error; but I think that "any Judge looking to the evidence already given will feel competent "to decide, and will also be of opinion that no further evidence of "importance is obtainable or, perhaps, admissible.

"And I apprehend that the Court above, even if they think my "view of the practice wrong, will feel bound to make the same order "as I now make (viz.), enter up judgment for the plaintiff.

"The Common Order will then follow for a dissolution as from the "date of the writ for taking the accounts, and, in that event, not dis- "turbing any settled account; continue the receiver; liberty to apply; "reserve further consideration and costs."

20th July, 1885—*Drake*, Q. C., now asks that the judgment of the Chief Justice be reversed or discharged, and that instead thereof judgment be entered for the defendant, or for a new trial. Rule 271 does not apply. There has been no trial because no finding by the jury. As to the absolute right of either party to a trial by jury, see *In re Martin*. *Hunt* v. *Chambers* (L. R. 20, Ch. D. 365); *Clarke* v. *Skipper* (L. R. 21 Ch. D. 134); *Burgoine* v. *Moordaff* (L. R. 8 P. D. 205).

The following cases were also referred to:—*Perkins* v. *Dangerfield* (51 L. T.—C. A. 535); *Clack* v. *Wood* (L. R. 9, Q. B. D. 276); *Hamilton* v. *Johnson* (L. R. 5, Q. B. D. 263).

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Davie, Q. C., for the respondents, contended that the order for a jury was exhausted. In *O'Sullivan* v. *McSweeny* (2 Con. & L. 486), cited, *Chitty's Equity Index*, p. 2313, plaintiff was held entitled to a decree, without an issue at law, after three trials, and an admission (as he contended there was in this case) in the last of the principal fact in dispute. He relied on the remarks of Mellish, L. J., *ex p. Morgan* (L. R. 2, Ch. D., at p. 86.)

The right to a jury is not absolute in Chancery cases, such as this is. *Gardner* v. *Jay* (L. R. 29 Ch. D. 50). Neither party can demand an issue if the Court is able without one to arrive at a conclusion satisfactory to its own mind. *Robinson* v. *Anderson* (7 DeG. M. & G. 239). The Full Court, under r. 405, has power to give any judgment which ought to have been given, and now having all necessary materials before it, it should not send case back if satisfied that justice had been done. *Sewell* v. *B. C. Towing Co.* (9 S. C. R. 552); per Wilson, C.J., in *Stewart* v. *Rounds* (7 Ont. Ap. 518); *Hamilton* v. *Johnson* (L. R. 5 Q. B. D. 263).

Drake, in reply—*Gardner* v. *Jay* is a decision under the rules of 1883.

24th July, 1885.—The judgment of the Court was delivered by CREASE, J.:—

On the appeal coming before this Court for hearing on the preliminary proceedings, objection was taken to the following effect:—

Can a Judge in a case like the present, where an issue has been ordered to be found by a jury, and the jury summoned for the purpose have disagreed and been discharged, treat the order for trial by jury as exhausted, and proceed to give judgment by himself?

We are unanimously of opinion that he cannot.

In re Martin. Hunt v. *Chambers* (L. R. 20 Ch. Div. 368), *et seq*, Jessel, M. R., says:—

"The rules mean that either party giving notice of trial by jury is "entitled to have his case tried by a jury, unless there is some reason "to the contrary.

"Under the 26th rule of Order XXXVI., the Court may in any case "in which the cause could, before the passing of the Judicature Act, "without the consent of the parties, be tried without a jury, order it "to be tried without a jury.

"The words are 'if it shall appear desirable,' which, as I said before, "means that there is some reason for depriving the party requiring a "jury of his right to have it tried before a jury.

"That, I think, is the settled rule as to those questions, if tried by "jury."

In another part of the same judgment he says:—

"It is for the party who says there shall not be a trial before a jury "to shew a reason why it cannot be so tried."

And, again, Cotton, L. J., says:—

"The first question in this case is as to the true construction of "Rules 3 and 26 of Order XXXVI." [B. C. Rules 251 and 271]. "That, I think, is clear.

"Under Rule 3, the party who gives notice that he desires the case "to be tried by a jury has a right to have it so tried, subject, never- "theless, to Rule 26, which applies to an action like this, which was "properly instituted in the Chancery Division.

"What is Rule 26" [B. C. Rule 271]? "It is this: The Judge, "notwithstanding the notice, has a discretion to order the action to be "tried without a jury, if 'it shall appear to him desirable.' In my "opinion it is tolerably clear that under this rule the Judge ought, "before depriving the party who has given notice of that which is his "right, namely, to have the action tried before a jury, to be satisfied "that there are reasons why the case should not be tried before a jury, "and that the order ought not to be made merely because trial before "a jury will be a more expensive mode of trial, or because there is no "sufficient reason for trying it before a jury.

"The party has a right, without reason assigned, to have it tried "before a jury, subject only to this power given to the Judge, to make "an order depriving the party giving the notice of his right if, in his "discretion, he sees there are reasons other than mere expense for "having it tried before the Judge alone."

Lindley, L.J.:—"I am of the same opinion. . . . . The Vice- "Chancellor . . . . seems to me to have considered (in fact, his "judgment admits of no other construction) that the burden lay upon "the defendants of showing some good reason why this case should be "tried before a jury. It appears to me this is an error, and an error "which has affected the whole of his view. . . . . I confess I do "not see any reason for trying this case without a jury, or for trying "it with a jury.

"The rule has given the defendants the right to have it tried with "a jury, and unless there are sufficient reasons for depriving them of "that right, the rule must have effect, and it seems to me impossible "to deprive the defendants of the right they have under the third "rule."

The burden of proof lay on the party objecting to a jury to show some good reasons why there should not be a jury.

We do not see in the other cases cited before us anything to alter this view of the rule giving either party a right to a jury.

The case *Ex parte Morgan* (L. R. 2 Ch. D.) was, under section 72 of the Bankruptcy Act, quite a different thing from the Judicature Rules and does not apply here. In a Canadian case, *The Bank B. N. America* v. *Eddy* (5 *Can. Law Times*, p. 277), Cameron, J., on a motion to dispense with a jury on the ground that one jury had disagreed and that the cases were of such a nature that a jury would not be likely to agree, dismissed the motion, on the ground of the transfer of

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the case from the Chancery Division to a Common Law Division, for the purpose of a jury trial, and that it was "*res judicata.*"

In the present action the order has been made for trial by a jury, and the carrying out of that order has not been completed.

Our duty is to make the order which might have been made by the Chief Justice at the time, which is as follows:—

The order having been made for trial by jury should be carried out, either party being at liberty to apply to a Judge to give directions for fixing the time and place of trial, and for summoning a jury for the purpose.

The appointment of receiver and manager not having been objected to, to be continued until further order.

We think the appellant should have his costs of this appeal.

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26th, 28th August. 19th December.

HAMILTON *v.* HUDSON'S BAY COMPANY AND IRVING AND BRIGGS.

Common Carriers, Liability of—Loss of Profits—Measure of Damages for non-delivery—Loss by fire—Stowage.

The Hudson's Bay Co. and the other defendants, the Pioneer Line, were common carriers—the company plying the *Enterprise* between Victoria and New Westminster, and the Pioneer Line the *Irving* between New Westminster and Yale, so as to form a continuous line of steamers between Victoria and Yale. The receipts from traffic passing over both sections of the route were divided between the defendants.

The plaintiff ordered goods from the company, which were to be forwarded by them to his agent at Yale. The company having filled the order, shipped the goods on the *Enterprise* and took the following receipt from the purser: "Shipped in good order by "H. B. Co., on board the *Enterprise*, * * bound for New Westminster, the following "packages (the dangers of fire and navigation excepted) consigned to Gavin Hamilton, "of 150-mile House, and marked," &c.

On an appeal to the Full Court,—

Held (affirming Walkem, J.), as to this receipt, that parol evidence was admissible to show that the company had agreed to carry beyond New Westminster, viz., to Yale, as it did not contradict, but only supplemented, the language of the receipt; also that the exception of liability in cases of fire does not protect the carrier where loss from fire is due to his, or his agents', or servants' negligence.

At New Westminster, the goods were transferred from the *Enterprise* to the *Irving*. Next day, while the *Irving* was on her way to Yale, a fire broke out in some hay stowed near her boilers. The hay consisted of about 20 tons, and, besides being uncovered, so nearly filled the whole space between decks, forward from the engine-room to within 8 feet of the boilers, that it was found impossible to do any good with the fire-hose. The fire, under these circumstances, spread rapidly, and burnt the vessel and her cargo (including the plaintiff's goods).

Held (affirming Walkem, J.), that the stowage of the hay was bad stowage, due to negligence, to which the loss of plaintiff's goods was fairly attributable; and therefore

That the H. B. Co. were liable to the plaintiff for breach of their contract to carry his goods to Yale, as their liability extended beyond their own line or section of route and throughout the whole distance over which they undertook to carry; and that they were, moreover, responsible for the negligence of the Pioneer Line, as the latter were their agents for the carriage of the goods;

That the Pioneer Line having accepted the goods for carriage to Yale, thereby undertook a duty they neglected, viz., "to use due care and diligence in the safe-keeping and "punctual conveyance of the goods;" that this obligation was cast upon them by the common law as well as by the Dominion Act respecting carriers by water; and that having failed to fulfil it and been privy to the loss of the goods through their own negligence, they were liable as well as the other defendants for such loss.

Held, also, that the measure of damages by way of compensation for delay (where delay has occasioned loss) is interest at the legal rate upon the actual value until judgment.

This was an appeal to the full Court* from a decision of Mr. Justice Walkem, reported *ante* page 1.

The plaintiff's statement of claim alleged substantially as follows:—The plaintiff was a trader carrying on business at the 150-mile house, Cariboo. The defendants, Irving and Briggs, were common carriers of goods from New Westminster to Yale. The defendants, the Hudson's Bay Company, were traders at Victoria, and at the time of the accruing of the cause of action were common carriers of goods from Victoria to Yale.

2. In September, 1881, the plaintiff purchased from the defendant Company, for the price of $1,140.93 divers quantities of goods; and purchased other goods from Shears & Partridge, for the price of $14.44; and purchased other goods from T. W. Fletcher, for the price of $40. The defendant Company rendered the plaintiff a bill of parcels of the goods so purchased from them, showing the price to be $1,140.93.

3. The plaintiff delivered to the defendant Company as such carriers as aforesaid the said goods so purchased from Shears & Partridge and T. W. Fletcher, and they, the defendant Company, then had and retained the goods so purchased from them, to be by them carried at the ordinary and reasonable rate of charges for such carriage from Victoria to Yale, and there delivered to the plaintiff or his agent within a reasonable time in that behalf.

4. The defendant Company received from the plaintiff all the said goods, upon the terms and for the purposes aforesaid.

5. A reasonable time for the said carriage and delivery to the plaintiff had elapsed.

6. The Company did not carry the said goods from Victoria to Yale within a reasonable time, or at all, nor were they delivered to the plaintiff or his agent.

7. If the Company were not common carriers, or if they did not receive the said goods as common carriers, then they received them as carriers of goods for hire upon the terms that they should safely carry them as above stated.

*Present: Begbie, C.J., McCreight and Walkem, JJ.

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8. If the Company did not undertake, either as common carriers or carriers for hire, to so carry the said goods, then they either as common carriers or carriers for hire undertook to carry the said goods from Victoria to New Westminster and there deliver them to the other defendants within a reasonable time, to be by them safely carried from New Westminster to Yale, and there delivered to the plaintiff or his agent, and to obtain and preserve receipts of the delivery to the other defendants of the said goods.

9. The Company did not deliver the said goods to the other defendants within a reasonable time, or at all.

10. If the Company did deliver the said goods to the other defendants, the company did not obtain and preserve receipts of the delivery to the said other defendants of the said goods.

11. As to the other defendants, the said John Irving and Thomas Lasher Briggs, the plaintiff says in the alternative and without prejudice to what has been alleged against the Company, that the Company, as the agents of the plaintiff in September, 1881, delivered at New Westminster to the said defendants, Irving and Briggs, the said goods to be by them safely and securely carried at the ordinary and reasonable rate of charges for such carriage from New Westminster to Yale, and there delivered to the plaintiff or his agent within a reasonable time in that behalf.

12. The defendants, Irving and Briggs, then received the said goods on the terms and for the purposes aforesaid.

13. A reasonable time for the said carriage and delivery to the plaintiff or his agent at Yale of the said goods had elapsed.

14. The defendants, Irving and Briggs, have not delivered any of the said goods to the plaintiff or his agent at Yale, or at all.

15. If the defendants, Irving and Briggs, were not common carriers, or if they did not receive the said goods as common carriers, then they received them as carriers of goods for hire, upon the terms that they should safely carry them as above stated.

16. The plaintiff, by reason of the premises, had been deprived of and lost the said goods, the value of which was $1,195.37, besides freight, wharfage, and other charges in respect of the carriage of the same from Victoria to and at New Westminster; and by reason of the premises the plaintiff also lost divers profits which he would have made by the sale of the said goods at the said 150-mile house, for which place the goods were destined for sale during the winter of 1881 and 1882, and the spring and summer of the year 1882, and of all which the defendants had notice at the time of the receipt by them of the said goods.

The plaintiff claimed $2,500 and interest on the sum of $1,195.37 from the 29th day of December, 1881, at 12 per cent. per annum;

And general relief.

By their statement of defence the defendants admit that the plaintiff purchased from the company goods to the value of $1,140.93, but

they do not admit that the plaintiff purchased the other goods in the second paragraph mentioned, or that the goods were of the value therein mentioned.

2. The defendants do not admit the statements contained in paragraphs 3, 4, 5 and 6 of the statement of claim, or any of them, and they say that the plaintiff requested the company to forward the goods purchased from the company to the plaintiff's agent at Yale; and the company, as agent of the plaintiff, placed the said goods on board the steamer *Enterprise*; and if any other goods belonging to the plaintiff were shipped on board the said steamer the defendants were unacquainted with the particulars or value thereof; and the said company received a bill of lading for the goods so laden on board the said steamer *Enterprise*, in the words and figures following:—

"VICTORIA, V. I., 26th Sept., 1881.

"Shipped in good order by H. B. Co. on board the *Enterprise*, "whereof Gardiner is master, and bound for New Westminster, the "following packages (the dangers of fire and navigation excepted) "consigned to Gavin Hamilton, of 150-mile house, and marked G. H. "150-m house.

(Signed) "G. HARDISTY."

[*Here follow the items.*]

And the defendants, the Hudson's Bay Company, forwarded to William Harvey at Yale, the agent of the plaintiff, a duplicate of such bill of lading, and the said company deny that they received for the plaintiff any other goods than those mentioned in the said bill of lading, and the defendants deny that they received the said goods upon any other terms and conditions than those set forth in the said bill of lading.

3. The defendants say that the goods mentioned in the said bill of lading were forwarded to said William Harvey, to be by him received and forwarded to the plaintiff. The plaintiff has frequently purchased other goods of the defendants, the Company, and has had the same forwarded to him in the same way, and the plaintiff was well aware of the terms and conditions on which the defendants, the Company, received and forwarded goods.

4. The defendants say that the plaintiff did not pay to the defendants, or to any of them, the freight due and payable in respect of the said goods.

5. The defendants, the Company, say that the goods mentioned in the said bill of lading were duly carried on board the *Enterprise* to New Westminster, and there with the knowledge and consent of the plaintiff delivered to the other defendants, because the steamer *Enterprise* was unable to proceed further, on account of her draught, and by the said other defendants, on or about the 27th September, 1881, shipped on board the *Elizabeth J. Irving*, a vessel duly registered under the Merchant Shipping Acts; and the said goods were received

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on board the said *Elizabeth J. Irving*, subject to the terms of the said bill of lading.

6. The said *Elizabeth J. Irving* was, on or about the 28th September, 1881, totally destroyed by fire, while on the voyage from New Westminster to Yale, without any neglect or default of the said company; and all the goods included in the said bill of lading were burnt; and such loss of the said goods was one of the excepted perils in the said bill of lading mentioned.

7. And the defendants, the Company, deny the allegations contained in paragraph 10, and say that they had a list of goods shipped on board the said *Elizabeth J. Irving* by them.

8. And the defendants, Irving and Briggs, say that they did not receive the goods mentioned in the said bill of lading as common carriers, but only on the terms and subject to the conditions in the said bill of lading mentioned; and they further say that on or about the 28th of September a fire broke out on board the steamer *Elizabeth J. Irving* while on her way from New Westminster to Yale, and the said vessel with the plaintiff's goods was totally destroyed by fire, without any neglect or default of defendants, their servants or agents.

9. And by way of alternative defence the defendants, Irving and Briggs, say that if the plaintiff's goods were received and carried by them as common carriers, they were received and carried under the provisions of the Act respecting carriers by water, and the loss of the said goods happened without their fault or privity, and without the fault of their agents or servants.

10. The defendants deny that the goods were of the value as in the 16th paragraph alleged, and that the plaintiff paid any freight, wharfage, or other charges in respect thereof. Save as aforesaid, the defendants deny each and every the allegations in the statement of claim contained.

The facts as found by Walkem, J., are set out in his judgment, *ante* page 1. Judgment was entered against all the defendants for $1,140.93 with interest from 29th December, 1881.

23, 26, & 28 August—The appeals of the defendants now come on for argument.

Drake, Q. C., and *Theodore Davie* for appellants, Irving and Briggs, contended that they were not liable on contract because there was no contract between the plaintiff and themselves. The only contract proved was the shipping receipt of the Hudson's Bay Company, which on its terms implied an agreement for delivery at the 150-mile house. *(Angell, sec. 95.)*

If the Company intended to limit their liability as carriers short of the place to which the goods were directed, they were bound to indicate such intent.

Muschamp v. *Lancaster Ry. Co.* (8 M. & W. 421); *Boehm* v. *Combe* (2 M. & S. 172); *Bristol & Exeter Ry. Co.* v. *Collins* (7 H. L. Cas. 194.)

The joinder of the defendants did not help the plaintiff, because the defendants might have a good defence against the Company on other grounds than those disclosed in the pleadings.

The defendants, under any circumstances, were protected by the stipulation contained in the shipping note, not liable for fire.

With regard to the question of negligence, the onus of proof was cast upon the plaintiff.

Czech v. *Gen. Steam Nav. Co.* (3 L. R. C. P. 14); *Brass* v. *Maitland* (6 El. & Bl. 471); *Oberloff* v. *Briscall* (L. R. 1, P. C. 231); *Story on Bailment* (410, 454, 573); *Grill* v. *Iron Screw Co.* (1 L. R. C. P. 600), affirmed on appeal (3 L. R. C. P. 476); *Marsh* v. *Horne* (5 B. & C. 322); *Smith's Leading Cases* (vol. 1, 240).

On the question of negligence. The Canadian Act, 1874, requires due care and diligence and does not require the delivery in any event. Under the common law liability of common carriers it does not make them insurers. In *Blyth* v. *Birmingham Water-works Co.* (25 L. J. Ex. 212), negligence is defined to be omitting to do something a reasonable man would do, or doing something a reasonable man would not do. See also *Giblin* v. *McMullen* (L. R. 2, P. C. 317).

The deduction drawn by the learned Judge is not warranted by the evidence. The hay was laden in the usual and only way that hay could be carried. It was protected from the boiler by lumber and timber alongside the boiler, and by case goods aft, and a space of from 8 to 10 feet clear from the end of the boiler. No direct evidence was produced as to how the fire took place. The defendants had the hose laid on all along the deck and connected with the pump, and two men were solely engaged to watch and protect the cargo. The care which was taken was all that the definition above cited required; no reasonable precaution was omitted.

Nugent v. *Smith* (L. R. 1, C. P. D. 423); *Hooper* v. *London & N. W. Ry.* (43 L. T., 570); *Hall* v. *N. E. Ry. Co.* (L. R. 10, Q. B. 437).

The plaintiff failed to prove any negligence on the defendant's part, such as would render them liable for breach of duty.

Hett, for the appellants, Hudson's Bay Co.

The Company, merely acting as forwarding agents, are in a different position from the defendants, Irving & Briggs, who were common carriers. *Roberts* v. *Turner* (7 Am. Dec. 311). And in this respect observe the language of the agreement of 19th November, as to the carriage of "up-country freight." The goods were never traced beyond New Westminster, the place of delivery so far as the Company were concerned. The Company's liability ceased when goods were warehoused at that place.

The Canadian Statute, 37 Vic. cap. 25, does not apply to the steamer *Enterprise*. She is registered here as an English sea-going vessel, and her liability is limited by the Imperial Shipping Acts to loss or damage occasioned with "actual fault or privity." The Com-

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pany would not be liable for fire on her—17 and 18 Vic. (Imp.) c. 104 s. 503—and counsel contended this exception would extend to loss on the steamer *Irving*, so far as the Company were concerned.

Parol evidence to show that the Company had agreed to carry beyond New Westminster should not be allowed to supplement the shipping receipt. *Fitzgerald* v. *Grand Trunk* (28 U. C. C. P. 587; 4 Ont. Ap. 601; 5 S. C. R. 204.)

The plaintiff to recover must give proof of negligence. *Ohrloff* v. *Briscall*—the "Helene" (L. R. 1 P. C. 238); *Hilliard* v. *Thurston* (9 Ont. Ap. 514); *Thompson* on Negligence, p. 1227; *Canada Southern R. Co.* v. *Phelps* (20 *Canada Law Journal*, 259). Negligence cannot be inferred.

In actions against carriers for loss of goods by fire, American cases intimate that a less stringent rule should be applied to steamboats than to conveyances not propelled through the agency of fire. *Hunt* v. *Morris* (12 Am. Dec. 493).

Darie, Q.C., for respondent Hamilton,—

First, as to liability, in point of law, of Irving & Briggs, irrespective of contract. There are the cases referred to in the judgment in the Court below and the Dominion statute. Also *Hayn* v. *Culliford* (L.R. 4, C.P.D. 182), *Self* v. *London, Brighton, & South Coast Ry. Co.* (42 L.J. N.S. 173), and *Heaven* v. *Pender* (L.R. 11, Q.B.D. 503). The case of *Collins* v. *Bristol and Exeter Railway Co.* does not help Irving & Briggs, for there it was held, in accordance with *Muschamp* v. *Lancashire Railway Co.* (8 M. & W. 421), that the contract for the whole distance was with the first company, and the exemption from fire extended throughout, and the jury negatived negligence. There being no negligence, there could be no liability, according to *Nugent* v. *Smith* (L.R. 1, C.P.D. 423).

The evidence establishes negligence. What was the use of precautionary measures when the mode of stowage neutralized them? The hay should have been covered with canvas (Stevens on Stowage) to protect it from sparks and to keep down flame in the event of fire, and should have been so stowed as to have permitted the pumps and hose to be serviceable. They were bound to have the vessel in proper condition (*Tattersall* v. *National Steamship Co.*, L.R. 12, Q.B.D. 297).

The exemption in the English Merchant Shipping Act applies only to sea-going ships. The *Elizabeth Irving* was not a sea-going ship, and was licensed only for river navigation. A new trial should not be granted (*Hilliard* v. *Thurston*, 9 Ont. App., at page 527).

Then, as to the Hudson's Bay Co. They have only to thank themselves for having been joined. They were unable or unwilling to furnish us with evidence of the delivery of goods to Irving & Briggs (see the correspondence), and the latter, in an earlier stage of the pleadings denied the receipt. We consequently added the Hudson's Bay Co. as defendants, charging them with non-delivery to Irving, and also, alternatively, with a contract to carry to Yale. Consequent upon

the joinder, Irving & Briggs admitted receipt. If the company are not to be held liable, they should not receive costs, as their own conduct caused their joinder. But they are liable. The plaintiff was not concerned as to whom they delivered the goods for carriage from New Westminster. See the remarks of the Lord Chancellor, in *Collins* v. *Bristol and Exeter Co.* The very difficulty we experienced in shewing delivery to the other defendants establishes the propriety of holding the first carriers as contracting for the whole distance to Yale. It was only there the plaintiff had an agent. The Hudson's Bay Co. could not have simply left the goods at New Westminster (*Bourne* v. *Gatliff*, 11 Cl. & F., 45). Their liability is not merely co-extensive with liability as owners of the *Enterprise*, so that the English Merchant Shipping Act does not protect them (*Morewood* v. *Pollok*, 1 El. & Bl., 743). The agreement the company had with the Fraser River Line makes, for all purposes, a partnership between the defendants as to the third parties. The river business was carried on in the interest of the Hudson's Bay Co., under that agreement and on their behalf; hence they are liable under *Cox* v. *Hickman* (8 H. L. Cas. 268) and *Bullen* v. *Sharp* (L. R. 1, C. P. 86).

19th December, 1884—The Judgment of the Full Court was delivered by Sir MATT. B. BEGBIE, C. J.:—

In this case, the plaintiff, a trader in Cariboo, gave goods to the value of $1,140 to the defendants, the Hudson's Bay Co., at Victoria, for transmission to Yale, *en route* for the Cariboo. The Hudson's Bay Co. are common carriers from Victoria to New Westminster, in sea-going boats. The other defendants, Irving & Co., are common carriers from New Westminster to Yale, on Fraser River. The Hudson's Bay Co. carried the goods safely to New Westminster, and there delivered them to Irving & Co., for transmission to Yale. The goods were destroyed by fire at Hope, before reaching Yale. It is alleged that the fire was caused by the negligence of the defendants, Irving & Co.; and the plaintiff sues for damages, as against the Hudson's Bay Co. for breach of contract, and as against the other defendants for negligence. We agree with the judgment in the Court below, and, with very slight variation, in the reasoning of that judgment: so that it becomes unnecessary to express ourselves at any length. The arrangement between the defendants, the Hudson's Bay Co. on the one hand, and Irving & Co. on the other, as to their mutual rights and duties in transporting goods and passengers between Victoria and Yale, and intermediate points, is of a very peculiar nature; and we at first deliberated whether or not it constituted a particular partnership as to through freight, within *Cox* v. *Hickman* and the other cases collected in *Lindley* on Partnership (3rd Ed), vol. 1, p. 40 *seqq.* But it seems unnecessary to decide as to that. If there be a partnership, then of course both the defendants would be liable. And if there be no partnership, then the defendants Irving & Co. were the agents of the other defendants, the Hudson's Bay Co., selected by them to carry out their

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contract; and they having been guilty of negligence, all the defendants are involved in a common liability to the plaintiff.

As to the negligence, it might be observed for the defence (1) that the chief witness to much of the negligence relied on in the Court below was a discharged servant, who gave evidence of the evidently dangerous overheating, and of his own neglect to report the overheating of the "connections," and that his evidence was therefore to be received with distrust. But the learned Judge, who had the opportunity of seeing and observing the witness, was fully satisfied that he was the witness of truth. And as to the alleged negligence of stowage, the defendants alleged in reply that they had exhibited ordinary care to prevent the cargo catching fire, and taken special precautions for extinguishing any fire which might break out. But the defendants by "ordinary care" merely meant that they had stowed the hay in the accustomed manner, which may much more accurately be described as the ordinary want of care: (viz.) by piling it up very nearly to the carlings, directly in rear of the boilers, in bales, but unprotected by any covering, with the loose spikes of hay sticking out, and within a few feet of the "connections," the after part of which was at times red hot; and one witness swept loose hay away from the boilers two or three times. To carry hay in such a manner as that is to invite a conflagration, and to render it irremediable if once started; and, even if this were the universal practice, it must be allowed to be most careless and imprudent. Now, ordinary care does not mean the care (or recklessness) usually exhibited, but the care, (*i. e.*) the precaution, which would be exhibited by a man of ordinary prudence and experience: and a reckless carrier cannot be excused by showing that he has for years been always reckless.

No argument has been addressed to us, or to the Court below, as to the responsibilities of the defendants *inter se*. At the trial, the learned Judge referred expressly to Order XVI., Rule 6, but was informed that no question was raised on that point. And neither have we been at all asked to give any opinion as to that, but only as to the right of the plaintiff to recover against the defendants generally. We therefore confine ourselves to the question of general liability.

It is alleged in the Statement of Claim, par. 16, that the plaintiff, in consequence of the non-delivery of his goods, lost divers profits which he expected to make by re-selling them in the upper country; and he seems to claim some $1,300 in respect of damage by delay, as well as interest on the invoice price of the goods lost. But such expected profits are too remote to be included in a verdict. Where there has been indefinite loss or damage from delay, beyond the invoice or actual value of the goods lost or mislaid, the reasonable and proper measure of compensation is always held to be attained by giving interest on the actual value. And we think the discretion of the Court below has been properly exercised in this instance. For though, as was said in *Gosman's* case (L. R. 17, Chy. D. 771), "Interest is only

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payable by Statute or by contract," and there is no Statute, nor contract expressly stipulating for interest here, yet a carrier's contract is always on these terms, that he will deliver in due course; and if not, that he will make compensation for the goods, or the delay, or both, as the case may be; and the recognized measure of the loss by delay (if the delay, taken separately, has inflicted loss) is interest (*British Columbia Saw-mill Co.* v. *Nettleship*, L. R. 3, C. P. 501).

And in this way a carrier's contract often comes within the principle of *Gosman's* case; though sometimes it would not, as here, for instance if the goods lost had been merely a piano for the private recreation of plaintiff's family. There no interest would probably accrue, because no pecuniary loss could be proved beyond the value of the piano.

Judgment affirmed, with costs.

JENNY LIND CO., Appellants,

v.

BRADLEY-NICHOLSON CO., Respondents.

WALKEM, J.
1883.
13th September.

Water grants—Hill claims—Gold Mining Ordinance, 1867, sec. 36—Supreme Court Rules, 1880—Order in Council, form of.

Each company had a hill-claim, fronting on the right bank of Williams Creek, and dependent on its water for the means of mining it. The B. N. Co., whose claim was higher up-stream than the J. L. Co.'s, turned nearly all the water of the creek from its bed, at a point on the stream some distance above their claim, and conveyed it by a ditch to their ground, thereby depriving the J. L. Co. of water, and obliging them to stop work.

The B. N. Co. claimed the right to do so, by virtue of sec. 36 of the Gold Mining Ordinance, which entitles a miner to use "so much of the water naturally flowing through or past his claim" as may be necessary to work it.

Held—reversing the Gold Commissioner's decision—that the water so used by the B. N. Co. was not "water naturally flowing through or past" their claim, as its natural flow had been intercepted and turned into a ditch above the claim, and that the B. N. Co. had, therefore, no right to such water under sec. 36.

The J. L. Co., having complied with Part X. of the same Ordinance—referring to "Ditches"—obtained from the Gold Commissioner, in April, 1882, a licence to divert 150 inches of water from the creek at their ditch-head, which was higher up-stream than both their and the B. N. Co.'s claims, and use it by means of their ditch, on their ground, for mining purposes, for five years. The B. N. Co. held no similar licence, either directly or derivatively.

Held, that owners of hill-claims could only acquire water privileges such as those claimed in the present action, by complying with Part X.; and that under the circumstances stated, the J. L. Co. had an exclusive right to use 150 inches of water, according to the terms of their licence and by virtue of it; and that the B. N. Co., having no similar licence, had no right to any of the water of Williams Creek.

Held, also, that the grant of a water-privilege, under Part X., need not be by deed.

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WALKEM, J.:—

This is an appeal to Mr. Justice Walkem, sitting at Richfield, from an order made by Mr. Commissioner Bowron, giving the Bradley-Nicholson Co. the use, for mining purposes on their claim, of 150 inches of the water of Williams Creek, to the exclusion of the Jenny Lind Co., who also required the water to work their ground, and who were, consequently, compelled to stop work, when thus deprived of it.

Irving, for the Appellants.

Wilson, for the Respondents.

I have first to decide whether I have any jurisdiction in this matter, as Mr. Wilson contends that the appeal should have been made to the Full Court, and not to the Supreme Court, under the Supreme Court Rules as amended in 1881.

These amended Rules were before the Court, consisting of the three senior Judges, on the argument of the *Thrasher* case, in November, 1881, and their validity, apart from constitutional questions as to the power of the Executive Council to frame them, was then doubted by the Chief Justice, on the ground that the Order in Council purporting to introduce them seemed insufficient in form for the purpose.

The form of the Order was, as a general form, obtained from the Clerk of the Privy Council, in 1872, but I find that, since then, it has been abandoned for the clearer form in which their Orders now appear, as may be seen by reference to those annually published with the Dominion Statutes. In view of this circumstance, and bearing in mind the fact that the Rules referred to, when properly put in force, become part of the Statute under which they are promulgated, it follows that the language of the Order in Council intended to give them effect, should be clear and free from doubt. In this latter respect, I am inclined to agree with the Chief Justice that the Order in Council in question is too defective to be operative, and that the Rules embraced in it are therefore not in force. The appeal has, therefore, been properly brought before this Court under sec. 14 of the "Mineral Act, 1878."

The solution of the main question in dispute depends on a firmly established interpretation given to the mining laws bearing upon it by the Supreme Court, from 1867 onwards.

Each of the litigants has, for some years past, owned a hill-claim fronting on the right bank of Williams Creek, the claim of the Bradley-Nicholson Co. being further up-stream than that of the Jenny Lind Co.

On the 4th of September, 1877, the Jenny Lind Co. obtained a licence from Mr. Commissioner Ball, under Part X. of the "Gold Mining Ordinance, 1867," to take 75 inches of the water of the creek, into their ditch at its head, which is above the Bradley-Nicholson claim, as well as their own, and use it for mining their ground.

On the 20th of June, 1878—eight months afterwards,—the company brought an action of trespass, before the same Commissioner, against the present respondents, for depriving them of the water so granted to them; and an order was made, quoting its language, "that the "Bradley-Nicholson Co. be confined to 150 inches of water for the "working of their claim," &c. With great respect for the acknowledged ability of the Commissioner, the order is only intelligible on the assumption that he considered that as the Bradley-Nicholson Co. were owners of ground higher up the creek than the Jenny Lind ground, they were entitled to the prior use of the water, under section 36 of the Mining Ordinance, which gives a miner "the right to use so much of the water "flowing through or past his claim" as may be required to work it. This, as I shall point out hereafter, was a misconception of the effect of the section, for it does not apply to hill-claims such as those of the parties to this appeal.

On March 22nd, 1882, the Jenny Lind Co. applied again, under Part X. of the Ordinance, for a licence to use 150 inches of the water of the creek for five years. It appears that all the conditions of the mining laws in connection with this application were fully complied with. No protest against the grant of the water having been entered by the Bradley-Nicholson Co., Mr. Commissioner Bowron granted the application, on the 20th April, 1882, "subject to existing rights."

The Jenny Lind Co. used the 150 inches thereafter, and as the Bradley-Nicholson Co. ran short of water in July last, they entered a complaint against the Jenny Lind Co. for diverting the 150 inches and asked for an injunction, and that Mr. Commissioner Ball's order of June, 1878 should be enforced. Mr. Bowron, thereupon, made the following order—being the order now under appeal:—"It is ordered . . . "that the decision given on the 20th of June, 1878, by H. M. Ball, "Gold Commissioner, wherein it is stated that the Bradley-Nicholson "Co. shall be allowed 150 in. of water to work their claim is still in "force, which right shall be respected by the defendants" (the Jenny Lind Co.) "The water to be taken by the Bradley-Nicholson Co. "into either of their present ditches as they shall see fit.

"*Richfield, 12th July 1883.*"

The reason given by Mr. Bowron for making this order is that he conceived he was bound to uphold Mr. Ball's order, as it had not been appealed from. But Mr. Ball's order was not binding on him; its only effect was to settle the particular act of trespass with which he had to deal. Moreover, the relative positions of the parties were changed after the date of Mr. Ball's order, by the grant of the licence to the Jenny Lind Co. in April, 1882. It will be observed that both Commissioners seem either to have ignored the effect of the respective licences granted to the Jenny Lind Co. in September, 1877, and April, 1882, or, probably, to have considered that as they were issued "subject to existing rights," the Bradley-Nicholson Co. had "existing rights"

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under sec. 36, which were superior to those conferred by the licences. This, indeed, is the position now contended for by the respondent's counsel.

Dealing with the last licence (for the first one has either been merged in it or abandoned) it is clear that the Jenny Lind Co. took the proper legal steps to obtain it, and that they thereby acquired the right to divert and use 150 inches of the creek water for their own mining purposes for five years. By no other method could they have acquired such a right. The provisions of Part X. of the Ordinance were purposely framed to enable owners of hill-claims, which had no water running down or over their slopes, to acquire the right to use the water of adjacent creeks or lakes. It is admitted that the Bradley-Nicholson Co. have not taken advantage of these provisions. They consequently have no licence to use any Williams Creek water; nor have they, under sec. 36, any "existing right" whatever in or to that water, beyond the absolutely valueless right to use what "naturally flows past" the base of their hill-claim. It is true, that they now contend that this is the water that they claim; but such is not the case, for what they seek is the use of water which they intercept, or propose to intercept, and turn into their ditch at a point much higher up the stream than the site of their mine. The water thus intercepted and removed from its channel into the ditch cannot possibly be said to be "water naturally flowing past" the mine.

The contention of the Bradley-Nicholson Co. has therefore, in my opinion, wholly failed.

The respondent's counsel has objected to the form of the licence given to the Jenny Lind Co., which is written in the following words, at the foot of their application for water:—

"150 inches of water are hereby granted to the Jenny Lind Co., of "Williams Creek, to work their claim, for a term of five years, if so "long requisite to work the claim—subject to any existing rights.

"*Richfield, 20th April, 1882.*

(Signed) "JOHN BOWRON, G. C."

He contends that the word "grant" in the Mining Act, as applied to water-privileges, necessarily implies that they should be given or conveyed by deed. But this is confounding the grant of a privilege to use a chattel interest with the well known common law conveyance required to be under seal. Under the Mining Acts, a miner is granted the privilege of mining on waste lands of the Crown, and the grant of the privilege as required by the Acts is issued in the form of a written licence to mine, signed by the Gold Commissioner, and familiarly know as a "Free Miner's Licence." The licence may be for one, two, or three years. A licence is defined by Wharton as "a grant of permission, a "power or authority given to another to do some lawful act. It may "be either written or verbal; when written the paper containing the "authority is called a licence."

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The Mining Ordinance authorizing the "grant" of a right "to divert and use the water" of a stream or lake does not require such grant to be in writing, although grants of bed-rock flume and mining privileges must be in writing. In any event the form of licence given to the Jenny Lind Co. has been in use ever since the Mining Ordinance became law, and under the circumstances is, I think, unobjectionable.

The decision of the Gold Commissioner must therefore be reversed and the appellants be declared entitled to the water-privileges mentioned in their licence of April, 1882. The usual injunction will also issue, restraining the defendants, &c., from interfering with these water-privileges while the licence lasts; and they must pay the costs of this appeal.

CARSON & EHOLT *v.* CLARK & MARTLEY.

BEGBIE, C. J.
1885.
5th June.

Water-rights—Ditches—Riparian proprietors—Adjacent lands.

On the construction of the Land Ordinances and Acts,—

Held, that under sec. 44, the "Land Ordinance, 1865," no person is empowered to take water from any stream who is not at common law a riparian proprietor.

Held, that the Commissioner should, before granting any authority to divert water under the Land Acts, see that all the requirements of the Statute have been complied with, but that the applicant is responsible for the insufficiency of his record.

Semble, that the owner of a water privilege cannot satisfy sec. 50 of "Land Act, 1875," by using the ditch of another.

Semble, that even prior to passing sec. 50, no exclusive right could be acquired until such ditch was constructed.

Held, that sec. 44 of "Land Ordinance, 1865," did not enable persons to acquire water-rights as against riparian owners of land acquired prior to the passage of that Act.

The duties of a Commissioner in considering applications for water under Land Acts, pointed out.

This was an action for damages sustained by the plaintiffs through the interference of the defendants with the plaintiffs' water privileges, and for a declaration of water rights under the Land Acts.

In 1861 the defendant, Captain John Martley, having a wife and several children, settled with his whole family in Pavilion Valley, British Columbia. A person named Reynolds had already settled there and built himself a log-house, but he had no title whatever except mere occupancy, and he was readily induced to abandon the place, whereupon the defendant entered, and there he and his family have ever since continued, uninterruptedly, to reside and cultivate the land. The earliest record entry concerning land produced is about the time when Reynolds thus moved out and the defendant

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moved in. It is dated 15th October, 1861, of 160 acres apiece (320 acres in all), in favour of Mrs. Martley, the wife, and Miss Martley, the eldest daughter (then an infant) of the defendant.

On the 29th May, 1862, there is a record of 300 acres in favour of defendant upon Pavilion Mountain. This is expressed to be under the provisions of the Proclamation of 18th March, 1861. It is not clear where these 300 acres are situated, as the sketch referred to in the record was not produced in the certified copy put in at the hearing.

On the 3rd June, 1862, there is a record in favour of the defendant, and Arthur his son, of the pre-emptive right to 160 acres apiece (320 acres in all) on Pavilion Creek, situate immediately below the pre-emptive claims of Mrs. and Miss Martley. On the 9th November, 1863, it is entered of record at Lillooet that the said defendant and his wife and two children have made the necessary improvements on their 160 acres each. And on the 12th March, 1866, there is an entry called a record—"Alice M. Martly, Pavilion Creek, and extends to the "point where the trail ascends the mountain side overhanging the "Lake, *vide* filed sketch." But no sketch was produced at the trial. In the meantime, on the 12th February, 1864, a Crown grant had issued conveying to the defendant John Martley in fee a tract of 1,440 acres on the Pavilion Mountain itself (in the argument and hereinafter called the Military grant); the upper or table land of the mountain being tolerably level and separated from the valley by an irregular abrupt descent, almost a cliff, of several hundred feet on vertical height, inaccessible for horsemen except in one or two places in the course of 3 or 4 miles.

Part of the southern or south-western boundary of the military grant is formed by the Pavilion Creek, which then, plunging down the above-mentioned abrupt descent, enters a lake from which it almost immediately emerges and flows through all the lands recorded as above-mentioned in favour of the defendant and the various members of his family, the creek itself shortly afterwards descending precipitately into Fraser River. The owners therefore of all the above pieces of land are in a position to claim riparian rights in the water of this creek, whatever those rights may be. Previously to the arrival of the defendant, certainly in 1859, probably as early as 1858, there had been mining operations on Fraser River above the mouth of Pavilion Creek, in the conduct of which the miners had constructed a ditch high up on the mountain to bring water from Pavilion Creek on to their claim on the edge of the Fraser, some thousand feet below. The claim being worked out the ditch was abandoned. It ran for about a couple of miles through the land which was afterwards surveyed and conveyed to the defendant, Captain John Martley, as his military grant, but the ditch head was above the grant. In 1863 the defendant Martley repaired this ditch, and so brought the water from Pavilion Creek into a smaller stream (Island Creek) which runs close to his dwelling house, but which in that year had dried up. This water the

defendant did not measure, he took what he wanted across his own land, though the ditch head was beyond his own land leading out of Pavilion Creek before it reaches the military grant. The defendant Martley's title to water was based on this 20 years user, riparian rights, and an award hereinafter mentioned. Martley purchased the "Corner" 28th July, 1884. On the 1st December, 1863, the defendant, Captain John Martley, mortgaged the military grant to S. & L. Franklin (registered 18th August, 1868). On the 10th August, 1870, S. Franklin alone, under the power of sale, sold to Robert Beaven in fee (registered 18th August, 1870). On the the 27th August, 1870, Captain John Martley, the mortgagor, for a nominal consideration, confirmed the sale by the mortgagee to Beaven; and on the 8th December, 1883, Beaven contracted in writing to sell the said military grant to the defendant Clark in fee, but the whole of the purchase money not having been yet paid, no more definite conveyance has been executed. None of these documents conveyed specifically any water rights or any appurtenant rights or privileges of any sort. In the original Crown grant a right is reserved to the Crown or its grantees to take water, but that is limited to mining purposes and does not extend to irrigation. Mr. Beaven does not appear ever to have resided or cultivated. The defendant Clark however is a resident. He appears to have pre-empted in June, 1874, the Section No. 21, Group 1, Lillooet District (previously occupied by Brady), immediately adjacent to the western boundary of the military grant, and both are now held by Clark in one block as one holding, the military grant being traversed by two ditches running parallel, at a distance of a few yards, for nearly two miles, the upper one being the old mining ditch (subsequently taken as his own by the plaintiff Carson); the lower one constructed by Brady for the irrigation of his (now Clark's) section 21. Clark's house is on that section. Clark bases his claim to the waters of Pavilion Creek on a record, dated 14th Dec., 1876, for 200 inches, and his riparian proprietorship. The plaintiff Eholt occupied section 20, which he holds by purchase from Louis Eholt. It had been originally occupied by one Sampson, who moved out after a negotiation with Louis. As to water rights, Sampson seems to have procured an entry at the local office as follows:—

"May 16th, 1870, No. 106.—William Sampson, Pavilion Mountain.

"The right to 200 inches of water from a large creek supplying "Carson's ditch. The ditch is about 6 miles east of Carson's farm."

On this record, and these conveyances, the plaintiff Eholt claimed the second right to 200 inches from Pavilion Creek.

The plaintiff, Carson, who occupies section 19, to the west of Eholt, in 1868, with a view to irrigating his ranche, cleared out the old mining ditch and applied to the Stipendiary Magistrate to record in his favour the ditch or water privileges formerly used for mining purposes, and not being then, as he alleges, otherwise lawfully appropriated. The following entry is extracted from the record book of the

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Assistant Commissioner at Lillooet:—

"May 16th, 1868, No. 43, Robt. Carson, Pavil. Mountn., 200 inches.

"A ditch on Pavilion Mountain, coming from a large creek on a "mountain to about opposite the 26-mile post, said water ditch for "farming purposes on my ranch. I wish to record 200 inches of "water.

(Signed) "E. H. SANDERS, S. M."

It is by virtue of this record that Carson claimed the first right to 200 inches of water out of Pavilion Creek. (This is a copy of the record produced on the appeal, and differs from the copy produced at the trial).

In the spring of 1868 Martley, finding Carson at work repairing that part of the ditch which ran through his military grant, brought an action of trespass against Carson before Mr. Sanders, then the County Court Judge at Lillooet. This action was compromised, according to Captain Martley's evidence, by Carson paying $100 for the use of the ditch, from which Captain Martley was to have the privilege of drawing 50 inches. An agreement to this effect was drawn up, and signed by Martley, but not by Carson. It appears that this agreement was broken in 1869, for in June, 1870, an arbitration was held and the following award drawn up:—

"We have been appointed arbitrators in a cause between Captain "Martley and Robert Carson, respecting the right to water in a "certain ditch passing through Captain Martley's farm on Pavilion "Mountain, and damages that either may have sustained by the loss "of water for irrigation in the year 1869.

"We find that neither is entitled to damages. That while Captain "Martley has a sufficient supply of water in the two creeks passing "into his farm, he shall not be entitled to any water from Carson's "ditch; but in case of scarcity Captain Martley shall be entitled to "half the water in Carson's ditch, the half not to exceed in any case "50 inches, and he will be entitled to get this for use on his farm "round his house, and to take it out of the ditch where it joins the "Island Creek. Captain Martley may use these 50 inches on Pavilion "Mountain if he chooses.

"June 2, 1870.

"GEORGE A. KELLEY,
"JOSEPH L. SMITH,
"J. A. SMART."

After the arbitration Captain Martley, at various times, drew water from Carson's ditch, from a box placed at the junction of Island Creek with Carson's ditch—generally notifying Carson when he intended to exercise this right or privilege. This ditch, capable of carrying 450 inches, was used by Eholt, with Carson's permission, to carry Eholt's water from Pavilion Creek to some distributing point on section 20.

In 1884—being a dry season—the plaintiffs turned the whole body of Pavilion Creek—not then running, as they alleged, sufficient water

to satisfy their joint rights—into Carson's ditch, thus depriving Clark of all water from that source.

Clark, under these circumstances, applied to Martley for water; the latter consented to allow Clark the use of the 50 inches secured by the award. This arrangement was carried out, and Clark drew water from Carson's ditch until the plaintiffs broke the box through which the water was being abstracted. Thereupon Martley, who apparently had an ample supply for himself and other members of his family from Gillon's and Milk Ranch Creeks and the waste water flowing from Eholt's land, allowed Clark to draw water from these two creeks, while he himself tapped Carson's ditch at a point (B) about one-fourth of a mile east of the arbitration box, and permitted the water to flow into Pavilion Creek at X. Later on Clark, independently of Martley, broke Carson's ditch and turned the Pavilion Creek into his own ditch.

Drake, Q. C., (with him *Eberts*) for the Plaintiffs.

Davie, Q. C., for defendant Martley.

Wilson for defendant Clark.

BEGBIE, C. J. (after stating the facts):—

The defendant Captain Martly does not appear, up to 1868, to have attempted to acquire by record any right to the water from the Pavilion Creek; but as to two other small creeks (I suppose the creeks named Gillon's Creek, and the Island or Milk Creek, but it is quite impossible to know from the so-called "record") there is an entry (said to be in favour of the defendant, though his name is not mentioned) in the Assistant Commissioner's book,—"No. 22, October 3rd, "1866. The right to the water of the creek crossed by the trail "running from the 29-Mile House to the Grange House," probably meaning Gillon's Creek; and another entry—"No. 28, January 4th, "1867. The right to the water of a creek running from Pavilion "Mountain into Pavilion Creek Valley and running close to Captain "Martley's house." This last is probably the Island Creek.

Matters were in this position when the plaintiff Carson first appears as a claimant of any rights in the locality. On the 2nd January, 1868, he addressed a letter, recorded on the same day, No. 237, by the Assistant Commissioner, as follows:—"I beg leave to send you a claim "of 160 acres of land situate on Pavilion Mountain opposite the 26 "mile post, distant a few hundred yards, running from a large stump "on the brow of a hill to a large rock north-west, thence east to the "brow of hill." This is signed by plaintiff but not addressed to anybody. It is, however, filed as a record by the Assistant Commissioner, who appears further to have issued a certificate of improvement (I suppose) in respect of this land on the 29th May, 1869. But previously to that certificate of improvement the plaintiff Carson now contends that he acquired the first right to 200 inches of water out of

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Pavilion Creek by virtue of the second of the three following entries in the Assistant Commissioner's books at Lillooet:—

"1868, January 20th, No. 35—The right to the use of 100 inches of "water, for the purpose of irrigation, to be diverted from a creek on "the summit of a mountain known as Pavilion, at a point near the "30-mile post.

"1868, May 16, No. 43.—A ditch on Pavilion Mountain coming "from a large creek on a mountain to about opposite the 26-mile "post, said water ditch for farming purposes on my ranch. I wish to "record 200 inches of water.

(Signed) E. H. SANDERS, S.M.

"1868, May 18th, No. 44.—The right to 200 inches of for water "agricultural purposes to be diverted from a creek crossing the "waggon road near the 29-mile post on the Pavilion Mountain." Signed by the Stipendiary Magistrate.

I have quoted these in the exact words, certified by the proper to show the carelessness displayed by the plaintiff. They are all said to be the plaintiff's records. They do not even contain his name—though from the situation, they are probably easily recognized as his. When an application is made for water rights the Magistrate is probably forced to file a copy of the application as of record; he cannot at the time do anything else. Of course before granting any authority under the Statute, he would see that all the requirements of the Statute had been complied with, but the whole responsibility of so complying lies on the applicant. Subsequently to this, on the 12th August, 1871, the plaintiff Carson sent in a claim to pre-empt a further quantity of 55 acres adjoining his first pre-emption claim, and lying, apparently, between that and the waggon road. These, I believe, are all the records or claims of the plaintiff Carson, either to land or water, previous to the commencement of this suit, the writ in which was issued on the 7th July, 1884; all that were produced at the trial of the action, and one question is, whether they amount to what the Statute requires.

There is probably much to be said as to the insufficiency of every one of the original records, either of Carson, or of Eholt, or the defendants. But as to the land pre-emptions of the two plaintiffs and of the defendant Clark, and also as to the piece of land claimed or represented by Captain Martley called the "corner" (which is divided by the Pavilion Creek from the military grant and therefore carries with it riparian rights), any irregularity in the original descriptions or boundaries as given by the pre-emptors themselves, is probably cured by the authentic surveys accepted by the Lands and Works Department. Any such irregularity could only have been fatal as against the Crown, and the Crown seems to have waived it.

Whether the water-right (if any) acquired by Sampson was conveyed by him to Louis Eholt does not appear. Upon the present evidence I think it must be taken that it was not. It is a right or privilege I think appurtenant to some land, but the record does not

give any indication of what land, and the whole record is, perhaps, unmeaning. At any rate after Louis had abandoned or conveyed his pre-emption right in whatever land he held, after he ceased to have any right or interest in any land on the mountain, he could not continue to hold this water right or privilege (if he ever had any) in gross.

Louis in his evidence says—"In January, 1873, Sampson was in "possession, after some correspondence he moved out and I moved in. "There was a bill of sale." This document was not registered, but the parties seem to have taken, singularly enough, some little precaution in this matter, for there is a record of certificate of improvement being granted on the 18th January, 1873. Whether before or after the change of occupation and conveyance, or whether such certificate was issued to Sampson, or to Louis, or to Joseph (the plaintiff), does not appear.

Joseph in his evidence on cross examination says—"I bought the "land two years ago from my cousin Louis; I have a Crown grant at "home;" but when asked if it was not merely a pre-emption record, he could not say, not knowing the difference; even if parol testimony were admitted as to the nature and intent of a document in writing not lost and not produced. Under these circumstances it appears very doubtful whether the plaintiff Joseph is entitled to claim any water under Sampson's record; but I will assume, for the purpose of argument, that he is entitled to whatever remedies Sampson could have enforced. Neither Joseph, nor Louis, nor Sampson appear to have taken any water out of Pavilion Creek in any ditch of their own. What Sampson did is not clear. He seems to have taken no steps whatever to utilize his alleged claim to water, for Louis says that this old mining ditch, which would not hold water previously, he and Carson worked at, and repaired and widened the flume, and that he always took whatever water he used by means of this ditch, which he calls Carson's ditch. The plaintiff, Joseph Eholt, uses it in the same way. It is said to be ten or eleven miles long from the ditch head to the 26-mile post. The plaintiffs claim a right under the records of 16th May, 1868, and 16th May, 1870, to take 400 inches of water out of Pavilion Creek through the old mining ditch which runs for about two miles through the military grant in priority to either of the defendants. Previous to this suit the plaintiffs relied wholly on their so-called records, the defendants relied mainly on an alleged agreement by Carson to allow Martley priority to the extent of 50 inches, of which Martley was to have the absolute disposal. Captain Martley relied also on an alleged award to the same effect. The plaintiffs at that time treating both the verbal agreement of 1868 and the award of 1870 as merely inoperative. By their pleadings however both parties have changed their ground, the plaintiffs now relying, first, on their records as above set out, but in the alternative, if those should be held defective, they rely on the alleged award, and the defendants now treating the award as mutually abandoned, if it ever were operative,

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and utterely denying that the plaintiffs had in any way complied with the statutory provisions necessary for obtaining perogative rights to an agricultural ditch. And when the plaintiffs' case was terminated the Attorney-General and Mr. Wilson, for their respective clients, asked for a nonsuit, by reason of the utter inefficiency of the water records. This I declined at the time, reserving to the defendants leave to move, wishing for further time to examine the documentary evidence, chiefly the so-called "records," and indeed to be supplied with proper evidence of their contents, the alleged office copies being in a very unsatisfactory state, also to enquire into the quantity of water actually taken out by the plaintiffs, and in the meantime also to hear the defendants' case, which resulted in establishing the facts, I think, as above stated. The owner or occupier of land traversed or bounded by a natural lake or a natural stream of water has certain natural or common law rights to use the water so flowing, called riparian rights. In England by the common law the owner of such land has the right to conduct the stream through his own land whither he will, not going off his own land for that purpose nor damming it back on the lands of proprietors higher up the stream, and returning the water into its original channel, undiminished in quantity and quality for the use of owners lower down the stream. He has also a right to take and consume what he requires of this natural supply for household purposes for the use and consumption of his family, cattle, &c. But I am not aware of any authority for saying that the riparian land-owners in England may use the water for the purposes of irrigation. I should think that the point must have occasionally arisen, for though in the climate of England the irrigation of a whole farm, as understood here, is utterly unknown and undreamt of, yet probably water may often be required for gardens and other special cases in which it would be impossible to comply with the rule above laid down, viz., that after so using the water of the stream the riparian owner must return it into its channel unaltered in quantity and quality. The fact is that in early days (when the Common Law was being built up) water was in England diverted from its natural channel solely with a view to employing it as a motive power in a mill which does not visibly abstract from its quantity nor injure its quality. Since the general introduction of manufactures and of wind-mills, and especially steam mills, water is much less in request as a motive power, but in eager demand for manufacturing purposes. If the climate of England had resembled that of British Columbia, the Common Law would, no doubt, have allowed a riparian land-owner to consume some portion, at least, in assuaging the thirst of his fields as well as the thirst of his cattle But I am not aware of any decided case which entitles him to irrigate, or which, on the other hand, denies *prima facie* natural right to do so. But whatever be the extent of riparian rights here, the plaintiffs contend that the Provincial law by local Statutes enables strangers entirely to override them; and in fact as to the rights of taking water

from a stream for irrigation, put strangers entirely on a footing with the person through whose land the stream flows. That they, the plaintiffs, have taken advantage of those local Statutes and that the defendants have not, and so that the plaintiffs have acquired and the defendants have lost whatever rights a riparian owner has in British Columbia. I am of opinion, however, that the plaintiffs have greatly misconstrued the words and the plain meaning of the Statutes, and that they have in nowise complied with the conditions thereby provided, even if they came at all within the description of persons authorized to abstract water for such a purpose. The claims of both the plaintiffs must depend upon how far they are authorized by the Statute of 1865. That Statute is (ss. 44, 45, and 47) as follows:—

"44. Every person lawfully occupying and bona fide cultivating "lands may divert any unoccupied water from the natural channel of "any stream, lake, or river adjacent to or passing through such land "for agricultural and other purposes, upon obtaining the written "authority of the Stipendiary Magistrate of the district for the pur- "pose, and recording the same with him, after due notice as herein- "after mentioned, specifying the name of the applicant, the quantity "sought to be diverted, the place of diversion, the object thereof, and "all such other particulars as such Magistrate may require.

"45. Previous to such authority being given, the applicant shall "post up in a conspicious place on each person's land through which "it is proposed that the water should pass, and on the district Court "House, notices in writing stating his intentions to enter such land "and through and over the same to take and carry such water, speci- 'fying all particulars relating thereto, including direction, quantity, "purpose, and term.

"47. The right of entry on and through the lands of others for "carrying water for any lawful purpose, upon, over, or under the said "land, may be claimed and taken by any person lawfully occupying "and bona fide cultivating as aforesaid, and (previous to entry) upon "paying or securing payment of compensation as aforesaid for the "waste or damage so occasioned, to the person whose land may be "wasted or damaged by such entry or carrying of water."

It seems quite clear that this 44th section empowers no man to take water from any stream who is not already at common law in possession of riparian rights. It empowers no man to take water from a stream which does not in some part of its course flow "through" or adjacent to land in his occupation. Land "adjacent to" a stream cannot mean land several miles distant and separated from the stream by other land really adjacent to it and owned by other persons. The owner of land traversed by a stream or lake is as to the whole bed, and of land adjacent to a lake or stream is as to half the bed, the owner of the soil over which the water flows (not being a navigable river), and possibly by the common law riparian rights already in part referred to; and the Statute proceeds to give to such person (but

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to no other person) a right which he had not at common law of England (viz.), a right to go to any point he chooses higher up the same stream or on land belonging to other persons, and take thence water for agricultural purposes. Among these, irrigation rights, though not expressed, would, by necessary application, be in this Province included; the phrase would surely not be confined to taking the water as motive power for a threshing machine or a grist mill. The Statute does not state on what land the water is to be utilized, but probably on the land in respect of which the privilege is given, it is an extension of the common law riparian rights. But as it is a privilege in derogation of the rights of other riparian owners, the Statute is careful to ensure that it shall not be acquired improvidently or unfairly; nor is any exclusive right permitted unless the authorizations of the local Stipendiary first be obtained and recorded—a judicial sanction, which, therefore, cannot be given *ex parte* or without due consideration of the rights of others after hearing them, and any sanction given without hearing others, or at least without a full opportunity for objectors to come forward, would probably be a nullity, as being destitute of the first elements of a judicial act, and liable therefore to be set aside by a higher tribunal. And the Statute itself shows that this was the anxious desire of the legislature, by the minute directions concerning the notices and information to be given before the Magistrate can give any sanction at all to the proposed works; and after the applicant has obtained the sanction he may not divert any water until the sanction is recorded. Every one of these directions is denied in the pleadings to have been complied with, and there is no attempt on the part of the plaintiffs to show that any one of them was observed. The Statute expressly says that unless they are observed and the authority recorded no person shall have any exclusive right, *i. e.*, the right of excluding another man. The deficiencies and obscurity of the so-called "records" are indeed obvious and lamentable. As to that of the 16th May, 1868, it would *prima facie* appear to be an application not to, but by the Stipendiary Magistrate and for his own benefit. Carson's name does not appear in it. It is impossible that any person reading this entry could have any certainty from what creek or on what mountain the ditch was proposed to be taken, or on what land the water was to be used. It is really melancholly to reflect on the industry and the endurance, and the hopes, and the years that have been expended apparently in reliance on what must strike any person of the commonest education as being merely insensible. And yet the Statute is clear enough. It may be admitted that bewildering clauses are occasionally found in Acts of Parliament. These are the clauses which excite most comment and are occasionally held up as types of all the clauses in every Act of Parliament.

But this is very far from being the case. Our laws are addressed not to highly educated men only, but to all our people, and are couched

in plain common terms as a general rule. It would be difficult to express sections 44 and 45 in clearer words; and the subject is not abstruse. I do not think it can be contended that such a "record" as the above entry of 16th May, 1868, is even an attempt to comply with the simple, though strict, stipulations of the Statute. Yet the entry is relied on as if it were the record of a judicial authorization by the local authority. It is at the highest a very vague, unsigned letter of application to the magistrate, which he had filed in his office as he was bound to do, but upon which no further steps have been taken. Probably it was seen that no steps could be taken. It amounts to nothing. It is like a writ issued in an action by an infant without the name of any issuer and never served, but of course recorded by the Registrar in his office, and as if the plaintiff were to treat that as a judgment of the Court in his favour. The Act of 1875, which governs some of the alleged records, is a little more precise than that of 1865, but the additional precautions there provided against haste or partiality are merely such as a judicial personage would devise spontaneously without any express command by a Statute. In 1875 this prerogative right is still confined to riparian owners of land, with the additional proviso that they may only take water as yet "unrecorded" and "unappropriated;" *i. e.*, they may not take any water which is already recorded or already appropriated. And of such unappropriated water the magistrate may only sanction the diversion of so much as may be "reasonably" necessary for the purposes of the applicant; and the notices to neighbouring proprietors or to the world in general must be given at least one month before the magistrate may give his sanction to the scheme. In other respects it re-enacts the very words of the Act of 1865. The same laudable anxiety to safeguard the rights and the convenience of another class of riparian owners, viz., creek miners, is shown in the various minute provisions for their protection in the analagous case of ditches under the Gold Mining Laws (1865, No. 14, part X.). And there is manifest reason and policy, as well as natural equity, in this. It is scarcely consistent with natural equity that a man through whose land a stream flows, who has probably originally settled there because of this natural advantage, should see his land lying arid and parched, while the bounty of nature is cut off from above and carried miles away to enrich the hill slopes of another valley. It is not expedient for the public welfare, and therefore not reasonable, that a large quantity of water should be carried to a distance merely to effect the same result which a smaller quantity would effect in the home valley. The loss of water from evaporation above and leakage below in a ditch of eleven miles long is very great, and water is more economically employed in proportion as it is nearer to the source of supply. Some of the largest rivers of the world exemplify this. The Euphrates, after the first 700 or 800 miles of its source, has an enormous volume, probably quite as large as Fraser River; but in the course of the last 700 or 800 miles this is entirely

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lost, and it is supposed, except in the season of floods, to carry very little water, if any, into the Persian Gulf. The Oxus dwindles away before it reaches the Sea of Aral. Many smaller rivers now named in every telegraphic dispatch, *e. g.*, the Heri, Rud, and the Murghab, near Herat, increase for a hundred miles and then shrink and at last completely disappear. And it may well be that the plaintiffs, after taking their nominal 400 or 500 inches from Pavilion Creek, do not distribute on their farms more than the 60 or 80 inches which probably satisfy the requirements of both the defendants; and your water may thus be very wastefully employed. The Legislature may well be taken to have contemplated this result of taking water to any great distance from its natural channel, and to have intended to prevent it. At all events they have not indicated any intention to authorize such wasteful operations. The lands traversed or bounded by streams are to be served discreetly, but owners of land in stranger valleys do not seem to have any statutory right to be served at all. It is perhaps desirable that such diversion of water from one valley to another should in proper cases and with proper safeguards be allowed for agricultural purposes, as it sometimes is for mining purposes. Much is to be said on both sides for and against the expediency of permitting such a diversion even for mining purposes. Such a right is very jealously and cautiously permitted, as will be remembered by those who recollect the struggles and difficulties before the water was allowed to be taken from Jack of Clubs Creek, where it was practically idle, to Williams Creek, where it was immediately and pressingly wanted. All that need be said here is, that the power does not appear to be given either in the Act of 1865 or 1875; not, at all events, so as to enable the plaintiffs to acquire any water rights from the Pavilion Creek, as against the owners of land already taken up and occupied along that creek in 1868. As against subsequent applicants for water, the long period of enjoyment by the plaintiffs would afford a powerful protection. It would hardly be said that the water taken by plaintiffs in their ditch is unoccupied or unappropriated; and the Act only permits the recording of "unappropriated" water.

That matter, however, is not now before me, but only the rights of these four persons, as between themselves, on the 7th July, 1884. Now the plaintiffs cannot complain of a trespass on running water, of which they were in possession. There can be no such possession, no such trespass, though there may be a tortious interference with the right to take water along a water-course, or a right to use it. But the land with the two ditches was and is Clark's, and is in Clark's possession. The plaintiffs were in fact trespassing, appropriating Clark's soil, both the site of the ditch and the stones and earth, for repairing or raising its banks, and interfering with the boxes and other constructions which every man has a right to make and place on his own land, so long as he interferes with the lawful enjoyment of no other man. If the plaintiffs complain of a trespass on the soil over

which the water flowed, the weakness of their possession is seen at once. The case of the two plaintiffs against the two defendants appears, therefore, to fail. But as between the first-named plaintiff and the first-named defendant another matter is set forth in the statement of claim, viz., an alleged arbitration and award of 1870. It appears, after handing to the magistrate the letter of the 16th May, 1868, and without waiting for any further ceremony, Carson entered upon Captain Martley's military grant and took possession of the old mining ditch, which was then, of course, the absolute property of Captain Martley (subject to the mortgage), and was actually used by him from time to time when required for additional irrigation supply in dry seasons, enlarged and repaired it and treated it as entirely his own, on what grounds does not appear; he simply took it. For all that appears he might with as much show of reason have taken and occupied Captain Martley's dwelling-house. Captain Martley immediately complained of the trespass before the magistrate at Lillooet, from whom he obtained an injunction against a continuance of the work—which, by the way, shows the magistrate's own notion of the sanctity of the rights acquired by Carson by virtue of the memorandum of the 16th May, 1868. On the next day a verbal agreement between Carson and Martley is alleged, by which the latter consented to Carson's use of the ditch in consideration of $100 cash to be paid by Martley, and Martley to have the right to the first 50 inches of water taken into the ditch. The $100 was paid, but there being a difficulty as to the 50 inches of water, the matter was referred to the arbitration of some neighbours (the reference was not produced *de non apparentibus*), who confirmed the 50 inches to Martley, practically to be used on any of his land, either in the valley or on the table-land, he being then still in possession, as mortgagor, of the military grant. Martley having access to other streams (Gillon's and the Milk Ranch, as to both of which all four of the parties, as well the two plaintiffs as the two defendants, appear all to be riparian owners) seems to have been for some time satisfied with 30 inches, but a season of drought supervening, the usual wrangling ensued. The defendant Clark had in the meantime, in 1874, entered into occupation of his section, No. 21, group 1, contiguous to the military grant, and in 1883 entered into an agreement for purchase from Mr. Beaven of the fee simple of the military grant itself, so that the land in his occupation then and now reaches quite up to the middle portion of Pavilion Creek for a mile or more, and thus he has become a riparian owner on that creek. Captain Martley having, as has been said, access to the first claim on Gillon's Creek and Milk Ranch Creek, allowed Clark to take some of the 30 (or 50) inches awarded by the arbitrators; but to this the plaintiff Carson objected extremely. He seems to have claimed for himself the right to take 200 inches of water and distribute it as he pleased on the lands of Eholt or others, without consulting Martley, but to deny to Martley any similar right to permit

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the use of any portion of the 50 inches by Clark; and as if Martley's conduct worked a forfeiture of the whole quantity awarded him, he cut off all Martley's supply from Pavilion Creek. Whatever may have been the original binding force of the award originally, as to which I know nothing, I should be very loath to say or do anything that might disturb it after the many years through which the award of the neighbourly tribunal has been practically in force—ever since 2nd June, 1870. On the contrary, I should endeavour to keep it in force and to carry it into effect. But the plaintiff can scarcely be allowed now to insist on it after having violently repudiated it, and, in fact, by his repudiation caused this litigation. And its fair effect is, I think, that Martley may use that 50 inches upon any land in his occupation. I do not think it is at all binding upon Clark, although he purchased subsequently to 1870 (1874–1883), for it could not be binding on the mortgagee (mortgage dated December, 1863), through whom Clark claims. The subsequent confirmation by Martley merely acknowledged that the mortgagee's exercise of his power of sale was lawful and regular. Clark, therefore, as a riparian owner, was at the commencement of this action in possession of rights entirely irrespective of Martley, or of his agreement, or of the award. The ditch was running on his own land and was his, not Martley's at all. Carson may have had in 1868 some rights in it as against Martley, but it is hard to see what title he could set up to the ditch itself as against Clark. It remains to be considered, however, whether both the defendants are not bound by the laches of themselves or their predecessors in title by having submitted for so long a time—ever since 1868, or at least since 1870—to this servitude, *i. e.*, this right assumed by Carson (even if he is to be deemed a mere intruder) to carry water for his own use across another man's land. In the first place, however, it generally requires an uninterrupted absolute enjoyment for 20 years to establish such a servitude. In the next place this plea of laches is properly a plea, *i. e.*, a shield of defence, not a weapon of attack. In the next place the right or servitude has never been admitted unreservedly. There have been continual disputes and occasional interruptions of the alleged right. Carson, I think, for the first time alleged his full claim when he wholly cut off Captain Martley's supply last summer. Then, too, the principle on which a servitude is claimed. That will not, according to the cases, be presumed after a less period than twenty years; but it cannot be presumed at all when the evidence shows that there has been no grant and that the plaintiff refused to accept a grant. Such a grant must be in writing. There was in 1868 a negotiation with Captain Martley for a grant from him. The evidence as to this is almost wholly in the defendant Martley's *viva voce* evidence. Martley says he verbally agreed to sanction Carson's use of the ditch, in consideration of $100 cash and the prior right to the use of the first 50 inches of water, and that was to be reduced to writing and signed by both parties; Carson

accordingly paid the $100, and that he, Martley, himself drew up and signed such an agreement, but that Carson has never signed or accepted it, and has at his convenience entirely disregarded it. In fact, the defendant Martley was at one time (in 1878) ready to be satisfied with only 30 inches, but even as to this he could not get it reduced to writing He still took the water, however, but his supply was wholly cut off when he most required it. And even assuming the agreement signed by Martley under these circumstances to have been a good grant, Carson could only as a plaintiff enforce it on the terms of performing his own share of the contract, which he has most strenuously refused to do, instituting this suit rather than submit to it. And, after all, it is a grant from Martley only, not binding on the registered mortgagee (mortgage registered 18th August, 1876) or his vendee, Mr. Beaven (registered absolute fee 16th Sept., 1870), all whose rights are now vested in the defendant Clark; and the "grant" itself is not registered at all. I am, therefore, of opinion that the plaintiffs are not entitled to the relief claimed by them; that their claim of exclusive right to the ditch in question, or to take water in it out of Pavilion Creek, as against the defendants, or either of them, has been disproved, and there must therefore on the claim be judgment for the defendants.

By their respective counter-claims the defendants claim damages for the loss to their crops, &c. Captain Martley alleges his crop to be deficient from his expectations, founded on previous experience, by 11,700 pounds of wheat, worth $2\frac{1}{4}$ cents net, equal to about $250; and for loss of men's time and destruction of materials in the disputes in opening and closing the ditch, $55; in all, for annoyance and loss, $500.

Clark claims $5,000. He swears to a loss, *i. e.*, a disappointment, of 40,000 pounds of barley at 1 cent, equal to $400, and 25 tons of hay worth $25—$625 more—equal to $1,025 in all, Carson values his hay at $20 net; there may be a difference in quality. Some deficiency in defendant's crops in 1884 there doubtless was; but whether, under any conduct of the plaintiff Carson, the defendant's crops would, in the very dry season, have reached the average of former years, seems extremely improbable. Damages for annoyance or loss of time I scarcely feel disposed to give. The defendants could have easily established their rights and some interim arrangement by referring their disputes to a higher authority than the local arbitrators, who are not armed with powers for carrying out their own awards. On the other hand, the operations of the plaintiff Carson do appear to have been rather high-handed, although I have no doubt that he conceived himself to be acting within his rights, and that he even took some pains to limit himself to his rights; *e. g.*, by the box which he constructed to take away 400 inches of water at the ditch-head for himself and Eholt, I have no doubt he believed that trough an accurate mode of measurement. From experiments conducted in the presence of counsel on both sides, however, it seems quite clear what I

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had suggested during the argument, that this trough took more than 400 inches. Mr. Drake indeed pointed out that, whereas I had suggested a very large over-take, the excess was not more than 10 per cent. or 15 per cent. The experiments were not sufficiently numerous or careful to be very conclusive as to the amount of excess. I still suspect that the plaintiff's box takes considerably more than 15 per cent. beyond the amount claimed; but even at the rate admittedly indicated, the plaintiff was taking from 40 to 60 inches more than he, I think, intended to take. And this was very nearly the amount about which the whole series of squabbles and interruptions arose, at the most critical period of last year, in which a very large quantity of water ran quite uselessly to waste. Still that overtake arose from a mere unintentional miscalculation of the plaintiff Carson, for which he deserves no moral blame. But it is in evidence that whatever quantity he took it was more than his ditch could carry, and that is wilful waste. The water at the time of direct scarcity was overflowing at his flume and overflowing in different parts of the ditch, so that a large quantity was running quite uselessly over the cliff into the valley below. Another witness speaks of collecting what he could of Carson's waste water, either soaking through the ditch or overflowing, and utilizing it on his own land below. Now this is very bad. Loss from evaporation perhaps is in a 10-mile ditch inevitable. A small amount of loss from leakage is perhaps very difficult to prevent, but any large amount of leakage can and must be prevented by fluming, and to admit fluming in such a case is wilful waste. So every case of overflowing (except from storms or accident) is obviously wilful, showing improper construction or want of repair. In the course of 10 or 11 miles the grade will probably vary where the course is rapid and the ditch deep; it may be narrow where the grade is very slight; it should be flumed to prevent leakage, and the section of the flume should be increased so as to carry the water safely. Waste, perhaps, may deserve to entail no penalty if there be no person injured thereby. But here there were, to the knowledge of the plaintiff, two neighbouring farms in extreme want. The waste, as described in evidence, is positively cruel. So again as to the distribution. Carson takes this redundant supply and gives to his neighbours, allows water on the Hoey ranch, sells it to Chinamen. That may not be blameworthy perhaps if the water were his own; but why does Martley's similar conduct in yielding to Clark a share of his water gratis arouse such indignation and induce him entirely to cut off even Martley's supply of 30 or 50 inches. There seems here some motive beyond the mere desire to protect the integrity of the statutory provisions. The plaintiffs, I think, have so far made a common cause that I cannot distinguish between them. They have equally taken their 200 inches apiece in the same trough and ditch—wastefully, as I think, and in derogation of the rights of the defendants, and have equally sued in this action. Carson, perhaps, figures a little more prominently than

Eholt in the physical, non-judicial injunctions which were alternately imposed and removed on the defendants' supply, but I do not think that much affects their liabilities. The responsibility for the whole proceedings is jointly assumed by the plaintiffs in their action, and it seems just to give judgment on the counter-claims of both the defendants against the plaintiffs jointly, in favour of Martley for $200 and in favour of Clark for $500. Acting as a jury, I give no reasons for assessing these precise sums, only I feel persuaded on the evidence that the defendants have suffered pecuniarily to this extent, at least, from the acts of the plaintiffs. Had it not been for those acts, Clark could have supplied himself at least concurrently with others by means of the separate ditch (formerly Brady's) for the supply of section 21; only Carson turned the whole body of water into the upper ditch. And as between Carson and Martley, Carson is equally without any right, unless under the agreement or understanding with Martley in 1868, or the award of 1870, and under these Martley has a preferential right to 50 or 30 inches of water, of which Carson deprived him last summer. Even if at common law a riparian owner had no irrigation rights, and if the final words of section 44 deprived a riparian owner of all riparian rights to water whatever (neither of which propositions are established), if the defendants had no more rights than men who had put in a crop upon some of the waste land of the Crown, any persons who without any show of title in themselves came and wilfully injured that crop would be liable in damages. Out of any moneys coming to Martley from Carson he must allow to the latter the sum of $100, part of the consideration which he received on the abortive negotiation in 1868. This is all that concerns the question before me, and I have surely said enough. But it is probable that some application may be made under the recent Land Acts for the authorization by the district official of a prerogative right to take water for agricultural purposes, and it may be useful to point out—

1st. That it is his duty not to express an arbitrary determination, but to exercise a judicial discretion, after hearing all parties, and liable to review.

2nd. That he is not empowered to give any authorization at all unless to the persons pointed out by the Statute, nor unless the statutory preliminaries have been observed.

3rd. That in the exercise of his discretion he is only to allow a reasonable quantity to be taken.

4th. That where one applicant has riparian rights to two streams and another applicant only to one of these streams, it may often be judicious to apply a principle analagous to the equitable doctrine of marshalling assets, and confine the first applicant (if such an arrangement be otherwise equitable) to the stream or lakes to which the second applicant has not access.

5th. That a long ditch means great waste of water. Every applicant ought, therefore, to state the length of his proposed ditch. The

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smaller the quantity a farmer is authorized to take, the more careful he will be in conveying and distributing it; and every inch of water may mean a ton of flour—a matter of considerable importance from the view of public policy, which is what a magistrate has to consider, and not private interest, unless (what very often happens) the two objects coincide.

6th. From the evidence in this case, 50 or 60 inches seems a reasonable supply for an ordinary farm such as Martley's or Clark's, but it may require from 400 or 500 inches to ensure the delivery of those 50 or 60 inches on a farm 10 miles from the ditch-head. Therefore, other things being equal between two applicants, the shorter ditch should be preferred. Much depends on the construction of the ditch. It is not, however, clear that the Statute warrants a grant of more than enough for the purposes specified by the application. A man has a farm for which 100 inches is a reasonable supply. The Statute does not authorize a grant of 1,000 inches merely because the farm is 20 miles off.

7th. It seems an unreasonable or an uncandid practice to seek to record several hundred inches of water out of a creek which never carries more than 40 or 50, and occasionally runs dry; and a careful judge will always watch uncandid applications with great jealousy.

8th. It may be a very useful precaution to obtain full particulars as to the volume of a creek and the nature and extent of its valley, so that the magistrate can form an opinion as to what is proper to be left for future applicants, bearing in mind the principle that a heedless grant of water may enable the grantee to monopolize the whole land.

9th. When any ditch is proposed to be taken over the land of any other private owner, and not over the waste lands of the Crown, special care ought to be taken to ascertain that such owner has an opportunity of opposing, if he wish to oppose the scheme. Perhaps in all cases notice should be sent to the office of Lands and Works.

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1885.
October 23.

Criminal Law—Plea to jurisdiction—Venue—32-33 Vic., c. 29, s. 11—Validity of Commission of Oyer and Terminer—Power of Lieutenant-Governor to issue—"Assize Court Act, 1885."

The prisoner charged with the commission of the crime of murder in the Kootenay District, was brought for trial in a Court of Oyer and Terminer held at Kamloops, under the "Assize Court Act, 1885," by one of the Judges of the Supreme Court, who was also named in the Commission of Oyer and Terminer issued by the Lieutenant-Governor.

The prisoner pleaded to the jurisdiction, stating that the scene of the alleged homicide was in Kootenay District; that no order changing the venue had been made under Sec. 11, of 32-33 Vic., c. 29; that in the absence of such an order the prisoner could not be tried elsewhere than in Kootenay District, and by a Jury of the *visne*; and further, that the Court professing to sit and act under a Commission from the Lieutenant-Governor was improperly constituted.

Held, that as British Columbia had never at any time been divided into Districts for purposes relative to the Administration of Justice in Criminal Cases, the Province was but one venue: that, therefore, there was no necessity for an order under sec. 11 to entitle the Crown to proceed at Kamloops; that the Jury, having been summoned under the "Jurors' Act, 1860," was a proper and lawful Jury.

Held, (following the McLeans' case) that the Lieutenant-Governor is authorized, under sec. 129, B. N. A. Act, to issue Commissions of Oyer and Terminer.

And *Held*, that even if the Commission was invalid, a Court of Oyer and Terminer if presided over by a Judge of the Supreme Court, would be, under the combined effect of sec. 14, of the "Judicature Act, 1879," and the "Assize Court Act, 1885," properly constituted.

At a sitting of the Court of Oyer and Terminer and General Gaol Delivery held at Kamloops, under the "Assize Court Act, 1885," on 5th October, 1885, presided over by the Honourable Mr. Justice Walkem, one of the Justices of the Supreme Court of British Columbia, and also a Justice named in a Commission of Oyer and Terminer and General Gaol Delivery, issued by the Lieutenant-Governor of British Columbia, the Grand Jury "of good and lawful men of British 'Columbia, summoned by the Sheriff of the Clinton Judicial District, "then and there empanelled, sworn, and charged to enquire for the "said Lady the Queen and the body of the said Province," found the following true Bill:—

BRITISH COLUMBIA, } The Jurors for Our Lady the Queen, upon their
To wit: } oath, present that Albert Malott, on the ninth day of August, in the year of Our Lord one thousand eight hundred and eighty-five, at Fifteen-Mile Creek, in the Province of British Columbia, did feloniously, wilfully, and of his malice aforethought, kill and murder one Andrew Johnson.

Upon the prisoner being arraigned, Mr. *Theodore Davie* filed the following plea to the jurisdiction of the Court:—

"And afterwards the said Albert Malott in his own proper person cometh into Court here at Kamloops, having been brought hereto in custody, and having heard the said indictment read, saith that the

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Court here at Kamloops ought not to take cognizance of the felony in the said indictment above specified, because protesting that he is not guilty of the same, nevertheless the said Albert Malott saith that Fifteen-Mile Creek, in the said indictment mentioned, and where the said killing and murder is alleged to have been committed, is situated and lies wholly within the District of Kootenay, as defined in a public notice from the Lands and Works Office on the fifteenth day of December, in the year of Our Lord eighteen hundred and sixty-nine, by the desire of the Governor, and purporting to be in accordance with the provisions of the "Mineral Ordinance, 1869," and east of the town of Farwell, and is not situate, lying, or being either wholly or in part within the Yale District, or the Lytton District, or the Kamloops District, or the Clinton District, as created under the "Jurors' Act, 1883;" and the said Albert Malott further saith that no order of any Court or a Judge has been made directing the trial to be proceeded with in any District, County, or place other than where the said supposed offence is alleged to have been committed, and the said Albert Malott, protesting as aforesaid that he is not guilty, further says the indictment has not been presented or found by any Grand Jury from the *visne* or locality of the alleged supposed murder, or by any Grand Jury forthcoming and summoned from the Kamloops District, as defined in the said "Jurors' Act, 1883;" and that he, the said Albert Malott, has not a jury empanelled from the *visne* or locality or district of the alleged murder on which he can put himself upon his trial as by law he is entitled to have, and, protesting as aforesaid, the said Albert Malott now brings forward and adds profert of the Commission or Letters Patent for the holding of this Assize, and where, under or by authority of which this Assize is holden, and which said Commission or Letters Patent is or are issued by the Lieutenant-Governor of the Province of British Columbia, who has not and never had any power or authority to issue the same, or to constitute a Court, and all this he, the said Albert Malott, is ready to verify; whereof he prays judgment of this Court now holden here at Kamloops, will or ought to take cognizance of the indictment aforesaid, and that by the Court here he may be dismissed and discharged."

"And hereupon David McEwen Eberts, who prosecutes for Our Lady the Queen in this behalf, as to the said plea of the said Albert Malott by him above pleaded and set forth, saith that the said plea and the matters therein contained are not sufficient in law to preclude the Court here from their jurisdiction to hear and determine the felony mentioned and specified in the said indictment, and above charged upon him, the said Albert Malott, in and by the said indictment; wherefore, for a proper and sufficient answer in this behalf, he prayeth judgment, and that the said Albert Malott may answer in Court here to Our said Sovereign Lady the Queen, touching and concerning the premises aforesaid."

In support of the plea, Mr. *Theodore Davie* read his own affidavit of verification that the facts alleged in the plea were true "to the best "of his knowledge, information, research, and belief," and asked for judgment discharging the prisoner.

The contention on the part of the prisoner was, that he was entitled to be tried in the locality, or in the neighbourhood of the locality, in which the alleged crime was committed. That Fifteen-Mile Creek was in the Kootenay District and not in Kamloops District, as defined under the "Mineral Ordinance, 1869," or by the "Jurors' Act, 1883;" that no order had been obtained under Section 11 of the Criminal Procedure Act directing that the trial should take place at Kamloops; that the Grand and Petty Juries were not, as to prisoner's trial, legal, as they were selected by the Sheriff from the Kamloops District instead of from Kootenay; and further, that the Commission of the Lieutenant-Governor to hold the Court of Oyer and Terminer was insufficient, as that officer had no power to issue Commission or constitute a Court.

Eberts for the demurrer contended that the trial was properly brought at Kamloops; that Section 11 did not apply to British Columbia, as the Province had never been divided into districts for purposes relative to the Administration of Justice in criminal cases; that the Province is one venue, and has always been so treated and considered, the Crown having always fixed the place of trial irrespective of the locality where the offence might have been committed. Further, the "Jurors' Act, 1883," had been—except as to remuneration of Jurors—repealed by Chap. 15 of B. C. Acts, 1885, so far as the Mainland was concerned, and that the Jury was properly summoned under the "Jurors' Act, 1860."

The validity and sufficiency of the Lieutenant-Governor's Commission had been affirmed by the Full Court in the McLeans' case, and he cited Sec. 129 of B. N. A. Act.

Eberts objected that the plea to the jurisdiction filed was bad, in that it did not mention some jurisdiction in which the prisoner might be tried—1 *Chitty's* C. L. 438; *Stephen's* Digest Crim. Procd. Art. 261, p. 172; *R.* v. *Johnson*, 6 East 601, per *Lord Ellenborough*, following *Lord Hardwicke* in 2 Ves. 357.

Theodore Davie in reply—*Reg.* v. *O'Rourke* (1 Ont. Rep. 464)—shews that objection to the jurisdiction must be taken by plea. Although the plea filed is subdivided, it is but one plea, viz.:—that the prisoner is entitled to be tried in the *visne* or the locality of alleged crime. This was the rule in England before it was divided; and admitting, for the sake of argument, that British Columbia is not divided into Counties or Districts for criminal purposes, the same rule, on principle, is in force here. He argued that the Province had been divided into Criminal Divisions—(1) under the "Mineral Ordinance,

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1869," which creates Kootenay District, in which Fifteen-Mile Creek is; (2) by "Judicial District Act, 1879," which creates Judicial Districts, and merges Kootenay District in Victoria Judicial District; and (3) by the "Jurors' Act, 1883," which creates Jury Districts for civil and criminal purposes; and (4) by the "Assize Courts Act, 1885," which recognizes the existence of Districts. That the Province having been divided as above, the Crown is proceeding illegally by trying the case here without an order for change of venue under sec. 11.

As to validity of Lieutenant-Governor's Commission, *R.* v. *McLean* was not conclusive, as the Full Court at the time of the giving of that judgment consisted of but three Judges, while now it has five. He referred to *R.* v. *Amer*, (42 U. C., Q. B., p. 391), and *R.* v. *Whelan* (28 U. C., Q. B., p. 1).

WALKEM, J.:—

The affidavit of verification of the plea is very vague and appears insufficient in so important a matter as the present, but as the demurrer has been put in, it is too late to disallow the plea on this ground.

As to the Lieutenant-Governor's Commission, I concur in the opinions expressed by a majority of the Full Court in 1880 in *R.* v. *McLean*, to the effect that the Lieutenant-Governor has authority to issue it under s. 129, B. N. A. Act. Further reasons than those given by the then Court have occurred to me since then in favour of this view, but I need not give them at present. The Commission is valid; even if invalid, the combined effect of sec. 14 of the "Judicature Act, 1879," and of the "Assize Court Act, 1885," is to give any Judge of the Supreme Court power to hold Courts of Assize, &c., as mentioned in those Acts, with or without a Commission. The constitutionality of sec. 14 was affirmed by the Supreme Court of Canada, on report to the Executive, under sec. 52, Supreme and Exchequer Court Act. [See Canada Gazette 18th June, 1883.]

In either case, therefore, the present Court is properly constituted. It has, in fact, a two-fold authority—by Statute and by Commission. Its jurisdiction is complete; hence so much of the plea as states that it is without jurisdiction at all, by reason of an invalid Commission, is bad.

As to divisions of British Columbia, for purposes relating to the administration of justice, there never have been any.

The "Mineral Ordinance, 1869," merely provides for the creation of mineral districts, "for the purposes of this Ordinance" (I am quoting from sec. 39), the purposes indicated being connected with the sale or lease of mineral lands. The Ordinance, moreover, was repealed in 1884 by Act No. 10.

The "Jurors' Act, 1883," was repealed (see c. 15, Acts of 1885) last March, so far as all the Mainland is concerned (excepting New Westminster), and save the sections for remunerating jurors. There are, therefore, no jury districts now on the mainland, except that of New Westminster, which is far distant from either this place or Kootenay, and is not in question. The old law—that is of 1860—as modified by Dominion legislation (British Columbia Revised Statutes, No. 30; "Criminal Procedure Act, 1869"), has been re-enacted by the last-mentioned Statute (c. 15 of 1885). By the Act of 1860 (sec. 2) the Sheriff may summon any British subject or alien to act as a juror, and (see sec. 5) every jury of twelve men so summoned in a criminal case shall be a good jury, if unobjected to by either party. The right the Judge had then of approving of and putting a rejected juror in the box is, of course, done away with by the rules laid down in the Dominion Act as to challenges, &c. In addition to this, sec. 86 of the "Jurors' Act, 1883," excepted Kootenay from its operation, so that Kootenay never was even a jury district. But the repeal of the Act, as stated, settles any question which might have arisen had it been otherwise.

The 'Judicial District Act, 1879," (supplemented by sec. 7 of the "Administration of Justice Act, 1881,") merely provides for the distribution of the Judges of the Supreme Court over the Province, each being allotted a certain area, called a "Judicial District," within which he "shall in general discharge" his "duties" (I am quoting from the Act). In connection with instructions from Ottawa under sec. 7 mentioned, the Act is simply a statutory direction to each Judge to take judicial charge of a particular section of the Province, but there is nothing to prevent him from acting judicially in any other section, as his Commission, or rather his jurisdiction under it, is co-extensive with the Province.

With respect to the "Assize Courts Act, 1885," there is not a word about divisions of the Province in it, nor is it framed, in any respect, with relation to any divisions. There are, of course, electoral divisions, but they are not in point.

It was no doubt the practice in early English history to try a prisoner in the *visne* or locality of his alleged offence; but this practice, as we know from the authorities (1 *Chitty's* Crim. Law, 177) and experience, has been much modified. Visne and venue, though words of different derivation, have gradually become convertible terms. "The general common law rule," as stated by *Archbold*, "is that the venue in the margin" of an indictment "should be the county in which the offence was committed," except in certain cases which need not be discussed (*Archbold's* Criminal Pleadings and Evidence, 15 ed., p. 20). "The venue," he continues, "should be co-extensive with the jurisdiction of the Court," *i. e.*, descriptive of the limit of its jurisdic-

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tion; and the offence must have been committed within such limit. Difficulties arose as to trial, which were removed by Statute; where, for instance, a wound was inflicted in one county and the wounded man died of his wound in another county. With this branch of the subject we are not, however, concerned. The common law rule, as above stated, is the rule now, as applied to the present case. There being no divisions of the Province with relation to the administration of justice in cases of crime, the Province is but one venue, properly stated in the indictment against the prisoner as "British Columbia," which is descriptive of the place or territory within which the alleged offence has been committed, and is a venue co-extensive with the jurisdiction of this Court. Moreover, British Columbia has always been treated as one venue in criminal cases. It could not have been otherwise, in view of the law as it is and has been.

As contended by counsel for the Crown, the plea is fatally defective in not stating or showing that some other Court than this has jurisdiction over the present proceedings. (See 1 *Chitty's* Crim. Law, 438; *Stephens'* Dig. Crim. Proc., art. 261, p. 172; *R.* v. *Johnson*, 6 East, 601, per *Lord Ellenborough* following *Lord Hardwicke* in 2 Ves. 357.)

For the above reasons, the demurrer put in by the Crown must be allowed, the prisoner being, of course, entitled to plead the general issue.

The prisoner was then put upon his trial and found guilty, and sentenced to be hanged on the 17th December, 1885.

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ALBERT MALOTT, Plaintiff in error,

v.

THE QUEEN, Defendant in error.

Criminal law—Venue—Jurisdiction—32-33 Vic., c. 29, s. 11—"District, county, or place—"Sheriffs' Act, 1873"—*Sheriffs' Amendment Act*, 1878."

The Plaintiff in error had, on being arraigned at the Court of Oyer and Terminer holden at Kamloops, in the Bailiwick of the Sheriff of Clinton, pleaded to the jurisdicton of the Court, stating that the scene of the alleged homicide was in Kootenay District, and that no order changing the venue had been made under sec. 11 of 32-33 Vic., c. 29 (D). This plea was over-ruled on demurrer by Mr. Justice Walkem (*ante* p. 207).

Held, on a Writ of Error, that the prisoner was improperly arraigned, and that the proceedings at Kamloops were null and void.

Held, that British Columbia had been divided into Districts for purposes relative to the Administration of Justice in Criminal cases by the "Sheriffs' Act, 1873," and the "Sheriffs' Amendment Act, 1878."

The plaintiff in error was convicted of murder at the Assizes held in Kamloops in October, 1885, and judgment of death was passed upon him, to be executed on the 17th December, 1885.

At the trial a plea to the jurisdiction had been put in by the prisoner, and over-ruled, on demurrer, by Mr. Justice Walkem—*Ante* p. 207.

A writ of error, returnable before the Supreme Court of British Columbia, was afterwards obtained upon the fiat of the Attorney-General, and the prisoner was respited in the meanwhile.

Those portions of the record which are material to this report, are set out at length in The Queen *v.* Malott—*Ante* pp. 207 & 208.

On the 7th January, 1886, under a writ of *Habeas Corpus*, the plaintiff in error was brought into Court, and after the writ of error and return thereto were read, *Theodore Davie*, on behalf of the prisoner, craved leave to assign errors, which was granted. The assignment of errors was as follows:—

And now on this seventh day of January, in the year of Our Lord eighteen hundred and eighty-six, comes the said Albert Malott in his own proper person, and says that in the record and proceedings aforesaid, and also in the giving of judgment against him, the said Albert Malott, there is manifest error in this, to wit:—

No Courts of Oyer and Terminer and General Gaol Delivery have been constituted by Statute in the Province. If the Honourable George Anthony Walkem sat as a Court of the Supreme Court of British Columbia, the trial was void as not being had at Bar, or in term time, or at Nisi Prius by warrant of the Attorney-General. If the said Honourable George Anthony Walkem sat as a Commissioner under the Commission and Letters Patent, then such Commission or Letters Patent are void, being issued by the Lieutenant-Governor, who has no authority to constitute a Court or to issue the Commission. This was not a Court the time and place of which had been directed by the Lieutenant-Governor; and there is no power to hold other Courts of Oyer and Terminer without Commission. Therefore in this there was manifest error.

There is also error in this, that there was no proper jury process.

There is also error in this, that the trial was not had in, nor were the Jurors summoned or returned from, the *visne* of the alleged homicide, and no order was made to the contrary.

There is also error in this, that the alleged Sheriff of the Clinton Judicial District was not the proper officer to return or summon Jurors, and the jury process was awarded to a wrong officer.

There is also error in this, that the said Albert Malott had no jury properly empanelled upon which he could put himself for his trial, as by law he was entitled to have, and the jury should not have been "of good and lawful men of British Columbia," but should have been good and lawful men of some locality, district, or place of British Columbia.

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And the said Albert Malott prays that the judgment aforesaid for the errors being in the record and the process aforesaid may be reversed and annulled, and absolutely be held for nothing, and that he may be restored to the Common Law of the Realm, and to all things which he has lost on the present occasion.

THEODORE DAVIE,
Counsel for Prisoner.

The Crown immediately joined in error.

Theodore Davie for the Plaintiff in error.

The *Attorney-General* (*A. E. B. Davie*, Q. C.) for the Crown.

The argument was had before the Full Bench, Begbie, C.J., Crease, Gray, McCreight, and Walkem, JJ., and judgment was given on 21st January, 1886.

BEGBIE, C. J.:—

The only point of error in this case which I shall deal with, and which, in my opinion, is sufficient to enable us to come to a decision, is as to the composition of the jury. The offence was committed in Kootenay district: the trial was before a jury summoned from Kamloops district; and it is admitted that there was no previous order for the removal of the trial from the one district to the other, under sec. 11 of the Procedure Act.

All the text writers on English law lay down this as undoubted: that an alleged criminal must be tried in the county where the alleged crime was committed. *Hawkins* (Pl. Cr. 2, p. 559) says:—"I take it to be "agreed that regularly by the common law" (*i. e.*, without some special authority, which can only be by Statute) "the jury must be returned "in all cases for the trial of the general issue from the same county "wherein the fact was committed;" referring to the year books, and also to *Dyer* and *Coke* (3rd Inst., p. 27). Coke, however, is not very distinct. Speaking only of treason, petit treason, and misprision of treason, he says these are to be tried in the "proper" county, and not in a foreign county, without expressly stating what the "proper" county is; although it seems highly probable that the epithet "proper" was used by Coke as meaning "peculiar to," and that the county, the scene of the offence, is intended. But when he speaks of murder or other felony, Coke says that the trial shall be in the county where the indictment is taken, *i. e.*, that the petit jury is to be of the same county as the grand jury, without saying what county that is to be. Hale, however, is as express as Hawkins:—"The jury are to be *de vicineto*, "but this is not necessarily required, for they of one side of a county "are by law *de vicineto* to try an offence of the other side of the county" (2 *Hale* Pl. Cr., p. 264, chap. xxxiv., s. 2). In this passage Hale seems to be anticipating the effect of 16 and 17 Car. 2, c. 8, and 4 Ann., c. 16, authorizing the jury to be summoned from the body of

a county without respect to the actual hundred where the facts arose. But in truth the practice, and therefore the law, of trying a criminal at or near the place of his crime, by jurors of the same place, has been so recognized and so inveterate that the very term "venue" ("*vicinetum*," "*visne*"), which originally indicated the locality of the crime only, has come to indicate with equal propriety, and is more often used to signify, the locality of the trial: as when we speak of the change of venue, which cannot possibly mean a change of the locality of the crime. And the common user of the word in this secondary sense seems to prove to demonstration that "regularly," as Hawkins says, the *visne* of the place of trial was always in the *visne* of the place of the crime; *i. e.*, as explained by Hale, in the same county. And section 11 of the Canada Procedure Act, c. 29, seems necessarily to imply the same thing (viz.): that "regularly," an offence is to be tried in the county where it was committed, by a jury of that county, taken from a panel summoned by the Sheriff of that county.

Are there any "counties" in British Columbia within the meaning of these authorities? We have no districts called counties; but have we not the same thing, for the purposes of a criminal trial, and in contemplation of the extreme punctiliousness of English law, in dealing with the alleged rights of a prisoner?

It cannot be denied that an English "shire" is, for the purposes of trial, the exact equivalent of an English "county," nor that the Sheriff is exactly a "vice comes." In fact, "shire" is a portion "shorn" out of the whole kingdom and placed under the administration (*ad haec*) of a "reeve," the Sheriff. The "comitatus" is the definite portion of the kingdom which is placed under the authority of the "comes" or his "vice comes," *i. e.*, the Sheriff—the same officer, for the same purposes; it is the same thing expressed in different languages, Latin and early English, and "county" or "shire" equally mean a geographical district divided off from the rest of the realm by definite boundaries and placed under the authority of a Sheriff, who has to perform therein all executive functions in the administration of justice; it is his "bailiwick"—the *vicus* or district which has been bailed or handed over to him.

Are there such districts in British Columbia? Is Kootenay such a district?

Up to 1873 the whole of the mainland of British Columbia, so far as the shrievalty was concerned, continued to be one bailiwick, with one Sheriff, whose executive powers extended over the whole Province, as, up to Confederation in 1871, they had extended over the Colony. But in 1873 there were carved out of the mainland two shrievalties—one Sheriff, the Sheriff of New Westminster, to have jurisdiction over the electoral districts therein mentioned, including the electoral district of Kootenay, and extending also over Kamloops; and another, the

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Sheriff of Cariboo, to have jurisdiction over the electoral districts of Clinton and Cariboo: all such electoral districts being clearly defined by geographical boundaries, under the authority of the "Constitution Act, 1871," which in turn had adopted and confirmed, as regards Kootenay District, the boundaries assigned under the authority of the "Mineral Ordinance, 1869." The western boundary of Kootenay District begins at the intersection of the 118th parallel of longitude with the 49th parallel of latitude, and runs in a northerly direction, and always on the west or right bank of the Columbia River, and at some distance, generally about ten miles, west of that river, which it never crosses—ten miles, therefore, or thereabouts, west of Farwell. And the boundaries of these electoral districts have never been changed.

The scene of the prisoner's alleged offence is fifteen miles east or northeast of Farwell: twenty-five miles, therefore, or thereabouts, within the boundary of the shrievalty of Kootenay District. Under the "Sheriffs' Act, 1873," the *vicinetum* or vicinity of the offence would thus have been clearly within the jurisdiction of the Sheriff of New Westminster, created by that Act. By the "Sheriffs' Amendment Act, 1878," the district of Kootenay was quite dissociated from Kamloops, and was taken out from the jurisdiction of the Sheriff of New Westminster and placed under a Sheriff of its own; and there is accordingly at this day a Sheriff of Kootenay, and last summer (but previous to the commission of this offence) a Court of Assize was held at Farwell, at which criminals were indicted and tried by grand and petty juries summoned in Kootenay by the Sheriff of Kootenay. And almost the only question is whether, under these circumstances, the prisoner's trial, stated in the record to have been held in Kamloops District, ought not to have been, "regularly," held before a jury summoned from the district of Kootenay District by the Sheriff of Kootenay, as would have been the case in England if there had been in England a county of Kootenay, within which the alleged offence had been committed: there having been no previous order of a Judge for a change of venue.

There is no magic in names. A county or *comitatus* is, as I have said, the district, shire, or portion "shorn" or divided off from the rest of the realm and lawfully allotted to the separate jurisdiction of a comes, or his *vice comes—anglice*, the Sheriff. I cannot doubt the perfect capacity, under the B. N. A. Act, s. 92, sub-sec. 14, of the Provincial Legislature, in its care for the administration of justice, to divide the Province into districts, the exact equivalent of English counties so far as the jurisdiction of the Sheriff is concerned, and to provide for the appointment of Sheriffs in such districts. The "Criminal Procedure Act, 1869," which came into effect in British Columbia on the 1st January, 1875, has not one word against this view, but rather by the language of s. 11, where it speaks of some "district, county, or place, "other than that in which the offence is alleged to have been com-

"mitted," and providing for trial there, seems clearly to imply that there may be a *vicinetum* legally cognizable in a "district" or "place" which is not known by the designation of "county," though equivalent to it for the purposes of the trial of offences.

I am, therefore, compelled to the conclusion that the record shows that there has been error in this respect: that the prisoner was tried at Kamloops by a Kamloops jury, for an offence committed in Kootenay, without any removing order under sec. 11 of the Canada Procedure Act. In the absence of such an order the prisoner ought to have been tried in Kootenay, and by a Kootenay jury, summoned by the Kootenay Sheriff. All the proceedings from the presentment of the Grand Jury onwards are, therefore, in my opinion, null. The prisoner is in the same position as if he had never been tried; and he will be remanded in custody to be tried on the charge on which he has been committed.

MCCREIGHT, J.:

It appears by the record in this case that the indictment was found at a Court of Oyer and Terminer held at Kamloops by a Grand Jury summoned by the Sheriff of the Clinton Judicial District, and that the prisoner was afterwards at the same assize tried by a Petit Jury likewise summoned by the said Sheriff, found guilty, and sentenced.

It appears also from the record that the murder of which the prisoner was found guilty was committed at the Fifteen-Mile Creek, within the district of Kootenay, as defined under the "Mineral Ordinance, 1869," at a spot east of Farwell, and not within the district of the Sheriff of Clinton, and that so he was tried by a jury not empannelled, and which, of course, could not have been empannelled from the *visne*, locality, or district where the crime was committed.

It appears, moreover, that no order of a Court or Judge was made under section 11 of the "Criminal Procedure Act, 1869," "directing "the trial to be proceeded with in a district, county, or place other "than that where the said crime is supposed to have been committed, "or would otherwise be triable," and the question is whether these facts do not show error, and I am of opinion that they do.

I am much inclined to think that the "Sheriff's Act, 1873" (see especially sec. 16), and that of 1878, for the appointment of a Sheriff for Kootenay and defining his jurisdiction, and that of 1880, for the appointment of one for the Clinton Judicial District, and stating their duties with respect to jury process for criminal trials in their respective districts, to say nothing of other Acts referred to in the argument, are sufficient to bring this Province within sec. 1, sub-sec. 1, of the "Criminal Procedure Act, 1869," and to satisfy that provision of the interpretation clause, which says that the expression,—"district, "county, or place, shall include any division of any Province of Canada "for purposes relative to the administration of justice in criminal

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"cases;" but in any event it is plain that Kamloops, to use the words of sec. 11, is a *place* "other than that in which the offence is supposed "to have been committed or would otherwise be triable," and that, to warrant the trial which had taken place, an order should have been obtained for a change of venue.

I think also that 37 Vic., chap. 42 (D), applying this Act to British Columbia (and see sec. 7), implies that if any law had existed in British Columbia for the trial of an offender at a distance from the neighbourhood of the commission of the crime, that law was to be repealed, and thenceforth the procedure on a point of so much importance was to be uniform throughout the whole of the Dominion—and that, moreover, independently of inaction on the part of the Provincial Legislature as to dividing the Province into districts or counties for purposes relative to the administration of justice in criminal cases.

It may be added that the construction placed by the Attorney-General on section 11 seems to give no effect to the word "place," but deals with the section as if the expression used was "district or county," omitting "place."

It is unnecessary to discuss the other assignments of error, and I give no opinion on them.

Crease, Gray, and Walkem, JJ., concurred.

The following was drawn up and filed with the record:—

And afterwards, to-wit, on the twenty-first day of January, eighteen hundred and eighty-six, the said Albert Malott in his own proper person cometh, having been brought hereto in custody; whereupon the Court of Our said Lady the Queen having seen and fully understood the premises, it appears to the said Court here, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error.

Therefore it is considered and adjudged by the said Court here, that the judgment aforesaid, for the errors aforesaid, and for other errors appearing on the record and proceedings aforesaid, be reversed, annulled, and made void, and that the said Albert Malott be restored to all things which by reason of the judgment and proceedings aforesaid he has lost, and that he may go thereof without day.

The prisoner was subsequently tried, found guilty, and sentenced to be executed.

ROBERT E. SPROULE, Plaintiff in error,

v.

THE QUEEN, Defendant in error.

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February 19 *to* 23 *and* 27.

*Criminal Law—Writ of Error—Polling Jury—Venue, change of—*32-33 *Vic., c.* 29, *s.* 11—*Completion of Record—Courts of Oyer and Terminer—"Judicature Act,* 1879," *s.* 14—*"Assize Court Act,* 1885"—*Power of Lieutenant-Governor to issue Commissions—B. N. A. Act,* 1867, *s.* 129—*Summoning Jurors—"Jurors' Act,* 1883," *intra vires of Local Legislature—B. N. A. Act, s.* 92, *sub-s.* 14, *and sec.* 91, *sub-s.* 27.

The Plaintiff in error was committed for trial on a charge of murder. The scene of the alleged homicide was in the Bailiwick of the Sheriff of Kootenay.

On the application of the Crown, Victoria (in the Bailiwick of the Sheriff for Vancouver Island) was fixed as the place of trial; the Chief Justice, before making the order, required from the Crown "an undertaking that the Crown would abide by such "order as the Judge who might preside at the trial should think just to meet the equity "of sec. 11 of 32-33 Vic., cap. 29."

The order so pronounced was not drawn up, but a document incorrectly stating the order, and omitting all mention of the terms imposed, was signed at the time and handed to the gaoler, and under this document the prisoner was detained in the gaol at Victoria until his trial.

The prisoner was tried and found guilty at the sittings of the Court of Oyer and Terminer and General Gaol Delivery held at Victoria under the "Assize Court Act, 1885," and presided over by Gray, J., a Judge of the Supreme Court of British Columbia, and a Justice named in a Commission of Oyer and Terminer and General Gaol Delivery issued by the Lieutenant-Governor.

In the body of the indictment there was no venue stated, and the marginal venue was simply "British Columbia, to-wit."

The jurors were selected, not from the whole of the Bailiwick of the Sheriff for Vancouver Island, as defined by the "Sheriffs' Amendment Act, 1878," but from that portion of the Bailiwick created by the "Jurors' Act, 1883," as Victoria District.

On the return to a writ of error, the prisoner alleged a diminution of the record, and applied for a writ of *certiorari*,

Held, (1), that where an order has been made orally and afterwards imperfectly drawn up (*i. e.*), without specifying the terms upon which it was made, and such terms appear in the Judge's note made at the time of the application, it is proper, in making up the record on a writ of error prayed, that a true and perfect order should be drawn up and placed on the record.

Held, (2), that the refusal of the Judge at the trial to allow the prisoner's counsel to poll the jury after verdict was not a matter that could be dealt with on a writ of error, and, therefore, should not appear in the record.

On the writ of error—

Held, (1), that assuming the Lieutenant-Governor's Commission to be void, the Court was properly constituted without Commission, under sec. 14, "Judicature Act, 1879," and the "Assize Court Act, 1885."

Held, (2), following *McLeans'* case, that the Commission of Oyer and Terminer and General Gaol Delivery was sufficient, and that the Lieutenant-Governor had power to issue it under sec. 129, B. N.A. Act, 1867.

Held, (3), that the Commission was not exhausted by reason of the Justices therein named having held under it Courts of Oyer and Terminer in other districts of the Province.

Held, (4), that there was no objection to the summoning of jurors from a limited portion of the shrievalty, under the "Jurors' Act, 1883," as that Act in effect created new districts for the purposes of the administration of justice in criminal cases.

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Held, (5), that the prescribing of the qualifications of jurors and the manner of preparing the jury lists, by the "Jurors' Act, 1883," were not matters of "crimina procedure," within the meaning of sec. 91, sub-s. 27, of B. N. A. Act, 1867, but were matters belonging to the "organization of Provincial Courts," within the meaning of sec. 92, sub-s. 14, and therefore *intra vires* of the Provincial Legislature.

Held, (6), that the venue was sufficiently stated in the record, and that the marginal venue, "British Columbia, to-wit," was at the lowest but an imperfect venue, and therefore cured by sec. 23, "Criminal Procedure Act, 1869."

Held, per Crease, J., that the statement of the imposition of conditions in an order under sec. 11, 32-33 Vic., c. 29, is not jurisdictional.

Held, per Begbie, C. J., that any application for an order for a change of venue under sec. 11 should be made as early as possible after the commitment.

Held, by Gray, J., after argument before himself and brother Justices, sitting as Assessors, on a case stated, that on a trial on a charge of felony the prisoner is not entitled, in this Province, as of right, to have the jury polled; and that where, in such a trial after verdict given, the prisoner's counsel moved to have the jury polled, but as the Court perceived nothing to create a doubt respecting the agreement and concurrence of the whole jury, the motion was refused.

Held, that such refusal was proper.

The Plaintiff in error was committed by A. W. Vowell, Esq., J. P. and Stipendiary Magistrate, to stand his trial for the murder of one Thomas Hammil on the 1st June, 1885, at Kootenay Lake, in the Bailiwick of the Sheriff of Kootenay; and the prisoner was brought for safe keeping to the gaol at New Westminster.

On the 13th October, 1885, in obedience to a Writ of *Habeas Corpus*, the prisoner was produced by the Keeper of the New Westminster Gaol before the Chief Justice at Victoria.

Irving (Deputy Attorney-General) asked, on behalf of the Crown, that Victoria should be fixed as the place of trial.

Theodore Davie appeared for the prisoner, and alleged that he intended to call four witnesses who were at the Kootenay Mines, and urged that, even if the Province of British Columbia was not divided into Districts for the purposes of Administration of Criminal Justice (the view which had hitherto prevailed), it was but right that the Court should, in a capital case, give the prisoner the benefit of provision contained in sec. 11 of 32-33 Vic., c. 29.

The Chief Justice, referring to section 11, stated he did not see how any additional expenses could be occasioned to the prisoner by the change of venue, but as there might turn out to be some, and as the application was being made by the Crown, he would only make the order on the terms that the Deputy Attorney-General, on behalf of the Crown, would undertake to abide by such order as the Judge who may preside at the trial may think just to meet the equity of the said eleventh section.

These terms were then accepted by the Crown; but the order as pronounced by the Chief Justice was not then drawn up. The Chief Justice at the same time ordered that the prisoner should be detained in custody at Victoria to await his trial here; and as the New West-

minster Gaoler was obliged to return thither immediately, the following document was drawn up and signed by the Chief Justice as a warrant for changing the custody of the prisoner:—

BRITISH COLUMBIA, }
To-wit: }

Whereas it appears to the satisfaction of me, Matthew Baillie Begbie, Chief Justice of the Supreme Court of British Columbia, a Judge who might hold or sit in the Court at which Robert E. Sproule, a prisoner now confined in New Westminster Gaol under a warrant of commitment given under the hand and seal of Arthur W. Vowell, one of Her Majesty's Justices of the Peace in and for the Province of British Columbia, is liable to be indicted, for that he, the said Robert E. Sproule, did on the first day of June, A. D. 1885, feloniously, wilfully, and of his malice aforethought did kill and murder one Thomas Hammill: that it is expedient that the trial of the said Robert E. Sproule should be held in the City of Victoria (being a place other than that in which the said offence is supposed to have been committed).

I do order that the trial of the said Robert E. Sproule shall be proceeded with at the Court of Oyer and Terminer and General Gaol Delivery to be holden at the City of Victoria: and I do order the keeper of the New Westminster Gaol to deliver the said Robert E. Sproule to the keeper of the gaol at Victoria City; and I do order and command you, the keeper of the said gaol at Victoria City, to receive the said Robert E. Sproule into your custody in the said gaol, and there safely keep him until he shall be thence delivered by due course of law.

Dated at Victoria this 13th October, 1885.

(Signed) MATT. B. BEGBIE, *C. J.*

This document, of which no copy was kept, was prepared after office hours and handed out to the Gaoler in attendance, who forthwith lodged the prisoner in the Gaol at Victoria, where he was detained until his trial.

The trial of the plaintiff in error was proceeded with before Mr. Justice Gray, at the Court of Oyer and Terminer and General Gaol Delivery holden at Victoria on the 23rd November, 1885, and resulted in a verdict of guilty, coupled with a recommendation to mercy.

Questions as to the rejection of certain evidence tendered by the prisoner, and as to the refusal by the Court to allow the prisoner's Counsel to poll the jury, were reserved and argued before all the Judges on a case stated. These points having been decided in favour of the Crown, the prisoner was, on the 5th January, 1886, sentenced to be hanged on 6th March, 1886.

A writ of error, returnable in the Supreme Court of British Columbia, was afterwards obtained upon the fiat of the Attorney-General.

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WRIT OF ERROR.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland QUEEN, Defender of the Faith.

To our Keepers of the Peace and Justices assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed in the Province of British Columbia, and to every of them—GREETING:

Because in the record and proceedings, and also in the giving of a judgment in a certain presentment made against Robert Evan Sproule at a General Session of the Court of Oyer and Terminer and General Gaol Delivery holden at the City of Victoria on Monday, the 23rd day of November, in the forty-ninth year of Our reign, and subsequent days, before the Honourable John Hamilton Gray, one of the Judges of the Supreme Court of British Columbia, for murder, whereof the said Robert Evan Sproule was accused before the said Honourable John Hamilton Gray, and was thereupon convicted by a certain jury of the Victoria District, taken between us and the said Robert Evan Sproule, as it is said manifest error hath intervened, to the great damage of the said Robert Evan Sproule, as by his complaint we are informed. We being willing that the error (if error there be) should in due manner be corrected and full and speedy justice done to the said Robert Evan Sproule in this behalf, do command you that if judgment be thereupon given then you send us distinctly and openly, under your seals or the seals of one of you, the record and proceedings aforesaid, with all things concerning the same, with this writ, so that we may have them before us on the 10th day of February now instant, wheresoever we shall be in British Columbia, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for respecting that error what of right and according to the law and custom of the Dominion of Canada and the Province of British Columbia ought to be done.

WITNESS, Ourself, at James' Bay, the eighth day of February, in the forty-ninth year of Our reign.

By the Honourable Alexander Edmund Batson Davie, Attorney-
[L.S.] General of Our Lady the Queen for our Province of British Columbia.

RETURN TO THE WRIT OF ERROR.

The record and proceedings whereof mention is within and above made appear in a certain schedule to this writ annexed the answer of the Justice within named.

Signed, sealed, and delivered in the presence of J. C. BALES. } J. H. GRAY, [L. S.]

PROVINCE OF BRITISH COLUMBIA.
That portion of Vancouver Island up to the forty-ninth parallel of north latitude,
To-wit:

Be it remembered that on Tuesday, the 13th day of October, in the year of Our Lord one thousand eight hundred and eighty-five, before the time of the sitting of the Court of Oyer and Terminer and General Gaol Delivery hereinafter mentioned, and before the time of the presenting of the indictment hereinafter mentioned, and after the time of issuing of the Commission and Letters Patent hereinafter mentioned, cometh, in the custody of the keeper of the gaol of New Westminster, before the Honourable Sir Matthew Baillie Begbie, Knight, Chief Justice of British Columbia and one of the Justices named in and empowered by the said Commission and Letters Patent, Robert E. Sproule, who is charged with and has been committed to stand his trial for having on the first day of June, in the year of Our Lord one thousand eight hundred and eighty-five, at Kootenay Lake, in the district or bailiwick of the Sheriff of Kootenay, feloniously, wilfully, and of his malice aforethought, killed and murdered one Thomas Hammill, the said Sir Matthew Baillie Begbie, being a Judge who might hold or sit in the Court at which the said Robert E. Sproule was liable to be indicted for the cause aforesaid. And also cometh Paulus Æmilius Irving, Counsel for the Crown, and thereupon on the said Tuesday, the thirteenth day of October aforesaid, the said Honourable Sir Matthew Baillie Begbie, Knight, in the presence of the said Robert E. Sproule, after hearing the said Paulus Æmilius Irving and Mr. Theodore Davie, Counsel for the said Robert E. Sproule, doth make and pronounce the order hereinafter set forth, that is to say:—

CANADA,
PROVINCE OF BRITISH COLUMBIA.

Regina *versus* Robert E. Sproule.

At the City of Victoria.

Tuesday, the thirteenth day of October, A.D. 1885.

Upon motion of Mr. P. Æ. Irving, of Counsel for the Crown, in the presence and hearing of Robert E. Sproule, a person charged with and committed to stand his trial for having on the first day of June, A.D. 1885, at Kootenay Lake, in the bailiwick of the Sheriff of Kootenay, in the Province of British Columbia, feloniously, wilfully, and of his malice aforethought, killed and murdered one Thomas Hammill.

And upon hearing Mr. Theodore Davie, of Counsel for the said Robert E. Sproule, and it appearing to my satisfaction that it is expedient to the ends of justice that the trial of the said Robert E. Sproule for the said alleged crime should be held at the City of Victoria.

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And Mr. Irving now undertaking, on behalf of the Crown, to abide by such order as the Judge who may preside at the trial may think just, to meet the equity of the eleventh section of 32 and 33 Victoria, cap. 29, intituled "An Act respecting procedure in criminal cases and other matters relating to criminal law," such being the conditions which I think proper to prescribe.

I, Sir Matthew Baillie Begbie, Knight, Chief Justice of British Columbia, and being a Judge who might hold or sit in the Court at which the said Robert E. Sproule is liable to be indicted for the cause aforesaid, do hereby order that the trial of the said Robert E. Sproule shall be proceeded with at the City of Victoria, in the said Province, at the Court of Oyer and Terminer and General Gaol Delivery to be holden at the said city on Monday, the 23rd day of November, 1885, next.

And I order that the said Robert E. Sproule be removed hence to this gaol at the City of Victoria, and that the keeper of the said gaol do receive the said Robert E. Sproule into his custody in the said gaol, and him safely keep until he shall thence be delivered by due course of law.

(Signed) MATT. B. BEGBIE, *C. J.*

And be it also remembered that at the General Session of Oyer and Terminer and General Gaol Delivery holden under an Act passed by the Legislature of the Province of British Columbia in the forty-eighth year of the reign of Our present Sovereign Lady the Queen Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, at the City of Victoria, in and for that portion of Vancouver Island which is south of the forty-ninth parallel of north latitude, on Monday, the twenty-third day of November, in the year of Our Lord one thousand eight hundred and eighty-five, and in forty-ninth year of the reign of Our said Sovereign Lady the Queen, before and presided over by the Honourable John Hamilton Gray, one of the Judges of the Supreme Court of British Columbia, the said Honourable John Hamilton Gray being also a Justice of Our said Lady the Queen, duly assigned, in, under, and by virtue of a Commission and Letters Patent under the Great Seal of the Province of British Columbia, bearing date the third day of September, in the year of Our Lord one thousand eight hundred and eighty-five, duly named, authorized, and empowered, in manner and as by reference to the said Commission and Letters Patent will more fully appear, and which Commission and Letters Patent are in the words and figures following, that is to say:—

[L.S.] CLEMENT F. CORNWALL.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the Colonies and Dependencies thereof in Europe, Asia, Africa, America, and Australasia, QUEEN, Defender of the Faith, &c., &c., &c.

To the Honourable Sir Matthew Baillie Begbie, Knight, the Honourable Henry Pering Pellew Crease, the Honourable John Hamilton Gray, the Honourable John Foster McCreight, the Honourable George Anthony Walkem, Justices of Our Lady the Queen—GREETING:

We, reposing special trust in your learning, integrity, and ability, do hereby assign and commission you, the said Sir Matthew Baillie Begbie, Knight, Henry Pering Pellew Crease, John Hamilton Gray, John Foster McCreight, and George Anthony Walkem, jointly, and each of you severally, to enquire by the oaths of good and lawful men of this Our Province of British Columbia, Dominion of Canada, by whom the truth of the matter may be better known, and by other ways and means whereby you, or either of you, can or may the better know more fully the truth of all treasons, misprisions of treasons, felonies, misdemeanors, misdeeds, offences, and injuries whatsoever; and also the accessories of the same, so far as they are criminally liable, by whomsoever and howsoever done, perpetrated, or committed, and by whom, to whom, when, how, and in what manner, and of all articles and circumstances to the premises and every or any of them howsoever concerning, and to hear and otherwise determine the said treasons and other the premises in Our Province of British Columbia, according to the laws of this Our Province for the time being in force; and also from time to time to deliver the gaols within this Our Province of British Columbia of the prisoners therein being, according to the said laws of this Our Province for the time being in force, and also with power and authority to hold Courts of Judicature and to summon or cause to be summoned before you and each of you, in such manner and by such form as you or either of you may think proper, all persons by means of whom it may be deemed that the truth of the matters aforesaid may be fully disclosed and made known, and also to order the production of all books and documents which could be produced or examined in any Court of Law, and also to commit to the custody of the keeper of any of Our gaols in this Our Province of British Columbia any person or persons who shall in any way presume to refuse or neglect to obey any of your lawful commands in the premises.

IN TESTIMONY WHEREOF, We have caused the Great Seal of Our said Province to be hereto affixed: WITNESS, the Honourable CLEMENT F. CORNWALL, Our Lieutenant-Governor of Our said Province of British Columbia, at Our Government House in Our City of Victoria, this third day of September, A.D. 1885, and in the forty-ninth year of Our reign.

By Command.

JNO. ROBSON,
Provincial Secretary.

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By the oaths of Charles William Ringler Thompson, Percival Rideout Brown, Frank Stillman Barnard, John Ralph Mitchell, Peter John Leech, Rout Harvey, Charles Kent, Thomas Napier Hibben, John Teague, Thomas Hickman Tye, Alexander Alfred Green, Alexander Blair Gray, William Fisher, William Dalby, Henry Edward Croasdaile, Thomas Augustus Collier, good and lawful men of the District or Bailiwick of the Sheriff of Vancouver Island, summoned only from the Victoria District as established by the "Jurors' Act, 1883," and qualified according to law, then and there empanelled, sworn and charged to enquire for the said Lady the Queen and for the body of the said Bailiwick of the Sheriff for Vancouver Island, it is presented in manner and form as followeth, that is to say,—

BRITISH COLUMBIA, }
To Wit: }

The Jurors for Our Lady the Queen upon their oaths present that Robert E. Sproule, on the first day of June, in the year of Our Lord one thousand eight hundred and eighty-five, feloniously, wilfully, and of his malace aforethought did kill and murder one Thomas Hammill, against the peace of Our Lady the Queen, her Crown and Dignity.

Whereupon the said Sheriff is commanded that he omit not for any liberty within his Bailiwick, but cause him, the said Robert E. Sproule, to come and answer the felony whereof he stands indicted.

And the same Session of Oyer and Terminer and General Gaol Delivery of Our said Lady the Queen, is held and continued during the said twenty-third day of November aforesaid, and is then duly held and adjourned from day to day till Wednesday, the second day of December, in the year of Our Lord one thousand eight hundred and eighty-five.

And thereupon at the same Session of Oyer and Terminer and General Gaol Delivery of Our said Lady the Queen, holden at the said City of Victoria aforesaid, on the said twenty-third day of November, in the year of Our Lord one thousand eight hundred and eighty-five, and the succeeding days from day to day as aforesaid, before the said the Honourable John Hamilton Gray last above-mentioned, here cometh the said Robert E. Sproule, under the custody of James Eliphlet McMillan, Esquire, Sheriff for Vancouver Island as aforesaid, and in whose custody in the Gaol at the City of Victoria aforesaid, for the cause aforesaid he had been before committed, being brought to the bar here in his proper person by the said Sheriff, to whom he is here also committed, and having heard the said indictment read, and being asked whether he is guilty or not guilty of the premises in the said indictment above charged upon him, and neither demurring to or moving to quash the said indictment, or otherwise objecting thereto, he saith that he is not guilty of the premises in the said indictment above charged upon him, and thereof he puts himself upon the Country, and

the Honourable Alexander Batson Davie, the Attorney-General of the said Province, who prosecutes for Our said Lady the Queen, in this behalf, doth the like.

Therefore let a jury thereupon immediately come before the Honourable John Hamilton Gray last above named, of good and lawful men of that portion of Vancouver Island which is south of the forty-ninth parallel of north latitude, summoned only from the Victoria District as established by the "Jurors' Act, 1883," and qualified according to law, by whom the truth of the matters may be better known, and who are not of kin to the said Robert E. Sproule, to recognize upon whether the said Robert E. Sproule be guilty of the felony and murder in the indictment above specified, or not guilty, because as well the said Alexander Edmund Batson Davie, who prosecutes for Our said Lady the Queen as aforesaid, as the said Robert E. Sproule, have put themselves upon that jury.

And thereupon the said Robert E. Sproule challenges for cause one of the said jurors, namely, Ralph Borthwick, and peremptorily challenges sixteen others of the said jury, namely, John Matthews, Frederick Carne, the younger, Michael Baker, Jonathan Bullen, John Thomas Higgins, Joseph Wilson Armstrong, Willis Bond, George William Anderson, Herbert Dodgson, Stephen Fulton McIntosh, James Shopland, George Deans, John Black, James Hood, Arthur Rowbotham, and Thomas King, all of which challenges are allowed to him.

And Roger Elphinstone, one of the jurors of the said jury, upon the prayer of the Honourable Alexander Edmund Batson Davie, who prosecutes for Our said Lady the Queen as aforesaid, is ordered by the Court to stand aside.

And thereupon the jurors of the said jury for this purpose empanelled and returned, to wit:—William Henry Mason, Andrew Laing, William Hick, George Good, Joseph Goyette, William Mann, John Ellis Blackmore, Joseph Rowe, Thomas Lloyd Davies, Thomas Benallick, Peter Corr, and James Boyd being called, come, who to speak the truth of and concerning the premises, are without any objection chosen, tried and sworn. And because, after the said trial had been duly proceeded with for and during several hours on the said Wednesday, the second day of December, it manifestly appears to the Court that the trial of him, the said Robert E. Sproule, cannot be concluded on this said Wednesday, the second day of December, the same trial of the said Robert E. Sproule, and also the said Session of Oyer and Terminer and General Gaol Delivery, are by the Court here duly adjourned, at a late hour, until the next Thursday, the third day of December aforesaid, at the Supreme Court House, in Victoria aforesaid, and the said Robert E. Sproule is committed to the custody of the said Sheriff in the said gaol aforesaid, and the said Jurors committed to and kept together in the custody of the said Sheriff (the said Jurors being first cautioned by

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the said Justice in Court here not to communicate with any person or to permit any person to communicate with them, or to separate) until the said Thursday, the third day of December, at which said last mentioned Session of Oyer and Terminer and General Gaol Delivery holden by adjournment at the Supreme Court House, in Victoria aforesaid, in and for the said Bailiwick, on the said Thursday, the third day of December, before the said Justice last above mentioned, come as well the said Alexander Edmund Batson Davie, who prosecutes for Our Lady the Queen as aforesaid, as the said Robert E. Sproule, and the jurors also come, and the trial of the said Robert E. Sproule is also proceeded with.

And because, after the said trial had been duly proceeded with for and during several hours on the said Thursday, the third day of December, it manifestly appears to the Court that the trial of him, the said Robert E. Sproule, cannot be concluded on the said Thursday, the third day of December, the same trial of the said Robert E. Sproule, and also the said Session of Oyer and Terminer and General Gaol Delivery, are by the Court here duly adjourned, at a late hour, until the next Friday, the fourth day of December aforesaid, at the Supreme Court House, in Victoria aforesaid; and the said Robert E. Sproule is committed to the custody of the said Sheriff, in the said gaol aforesaid, and the said jurors committed to and kept together in the custody of the said Sheriff (the said jury being first cautioned by the said Justice in Court here not to communicate with any person or permit any person to communicate with any of them, or to separate) until the said Friday, the fourth day of December, at which said last mentioned Session of Oyer and Terminer and General Gaol Delivery, holden by adjournment at the Supreme Court House, in Victoria aforesaid, in and for the said Bailiwick, on the said Friday, the fourth day of December, before the said Justice last mentioned, come as well the said Alexander Edmund Batson Davie, who prosecutes for Our Lady the Queen as aforesaid, as the said Robert E. Sproule, and the jurors also come, and the trial of the said Robert E. Sproule is proceeded with.

And because the said trial had been duly proceeded with for and during several hours on the said Friday, the fourth day of December, it manifestly appears to the Court that the trial of him, the said Robert E. Sproule, cannot be concluded on the said Friday, the fourth day of December, the same trial of the said Robert E. Sproule, and also the said Session of Oyer and Terminer and General Gaol Delivery, are by the Court here duly adjourned, at a late hour, until the next Saturday, the fifth day of December aforesaid, at the Supreme Court House, in Victoria aforesaid; and the said Robert E. Sproule is committed to the custody of the said Sheriff, in the said gaol aforesaid, and the said jurors committed to and kept together in the custody of the said Sheriff (the said jury being first cautioned by the said Justice in Court here not to communicate with any person or permit any

person to communicate with any of them, or to separate) until the said Saturday, the fifth day of December, at which last-mentioned Session of Oyer and Terminer and General Gaol Delivery holden by adjournment at the Supreme Court House in Victoria aforesaid, in and for the said Bailiwick, on the said Saturday, the fifth day of December, before the said Justice last mentioned, come as well Alexander Edmund Batson Davie, who prosecutes for Our Lady the Queen, as aforesaid, as the said Robert E. Sproule, and the jurors also come, and the trial of the said Robert E. Sproule is also proceeded with.

And because, after the said trial had been proceeded with for and during several hours on the said Saturday, the fifth day of December, it manifestly appears to the Court that the trial of him, the said Robert E. Sproule, cannot be concluded on the said Saturday, the fifth day of December, the same trial of the said Robert E. Sproule, and also the said Session of Oyer and Terminer and General Gaol Delivery, are by the Court here duly adjourned, at a late hour, until the next Monday, the seventh day of December aforesaid, at the Supreme Court House, Victoria, aforesaid; and the said Robert E. Sproule is committed to the custody of the said Sheriff in the said gaol aforesaid, and the said jurors committed to and kept together in the custody of the said Sheriff (the said jury being first cautioned by the said Justice in Court here not to communicate with any person or permit any person to communicate with any of them, or to separate) until the said Monday, the seventh day of December, at which said last-mentioned Session of Oyer and Terminer and General Gaol Delivery, holden by adjournment at the Supreme Court House, in Victoria aforesaid, in and for the said Bailiwick, on the said Monday, the seventh day of December, before the said Justice last mentioned, come as well the said Alexander Edmund Batson Davie, who prosecutes for our Lady the Queen, as aforesaid, as the said Robert E. Sproule, and the jurors also come, and the trial of the said Robert E. Sproule is also proceeded with.

And because, after the said trial had been duly proceeded with for and during several hours on the said Monday, the seventh day of December, it manifestly appears to the Court that the trial of him, the said Robert E. Sproule, cannot be concluded on the said Monday, the seventh day of December, the same trial of the said Robert E. Sproule, and also the said Session of Oyer and Terminer and General Gaol Delivery, are by the Court here duly adjourned, at a late hour, until the next Tuesday, the eighth day of December aforesaid, at the Supreme Court House, in Victoria aforesaid; and the said Robert E. Sproule is committed to the custody of the said Sheriff in the said gaol aforesaid, and the said jurors committed to and kept together in the custody of the said Sheriff (the said jury being first cautioned by the said Justice in Court here not to communicate with any person or permit any person to communicate with any of them, or to separate) until the said Tuesday, the eighth day of December, at which last-mentioned

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Session of Oyer and Terminer and General Gaol Delivery, holden by adjournment at the Supreme Court House, in Victoria aforesaid, in and for the said Bailiwick, on the said Tuesday, the eighth day of December, before the said Justice last mentioned, come as well the said Alexander Edmund Batson Davie, who prosecutes for Our said Lady the Queen as aforesaid, as the said Robert E. Sproule, and the jurors also come, and the trial of the said Robert E. Sproule is also proceeded with.

And because, after the said trial had been duly proceeded with for and during several hours on the said Tuesday, the eighth day of December, it manifestly appears to the Court that the trial of him, the said Robert E. Sproule, cannot be concluded on the said Tuesday, the eighth day of December, the same trial of the said Robert E. Sproule, and also the said Session of Oyer and Terminer and General Gaol Delivery, are by the Court here duly adjourned, at a late hour, until the next Wednesday, the ninth day of December aforesaid, at the Court House in Victoria aforesaid; and the said Robert E. Sproule is committed to the custody of the said Sheriff in the said gaol aforesaid, and the said jurors committed to and kept together in the custody of the said Sheriff (the said jury being first cautioned by the said Justice in Court here not to communicate with any person or permit any person to communicate with any of them, or to separate) until the said Wednesday, the ninth day of December, at which last-mentioned Session of Oyer and Terminer and General Gaol Delivery, holden by adjournment at the Supreme Court House in Victoria aforesaid, in and for the said Bailiwick, on the said Wednesday, the ninth day of December, before the said Justice last above mentioned, come as well the said Alexander Edmund Batson Davie, who prosecutes for Our Lady the Queen, as aforesaid, as the said Robert E. Sproule, as the jurors also come, and the trial of the said Robert E. Sproule is also proceeded with; and after the case on the part of the Crown and the said Robert E. Sproule, respectively, has been duly concluded, the said Justice duly proceeds to charge, and does charge, the jury, and afterwards, and immediately after the conclusion of the said charge of the said Justice, the jury do retire from the bar here to the custody of the said Sheriff, to consult upon their verdict to be given upon the premises in the said indictment specified (the said jury being first cautioned by the said Justice in Court here not to communicate with any person nor permit any person to communicate with any of them, or to separate), and having consulted upon their verdict, the said jurors so chosen, tried and sworn as aforesaid, returned to the bar here, and upon their oath say that the said Robert E. Sproule is guilty of the felony and murder aforesaid on him above charged in the form aforesaid as by the indictment aforesaid is above supposed against him.

And the said Robert E. Sproule is thereupon remanded to the custody of the said Sheriff in the gaol aforesaid, until such time as the

Court shall award judgment, and also the said Session of Oyer and Terminer and General Gaol Delivery is by the Court here duly adjourned, at a late hour, until the next Tuesday, the fifteenth day of December aforesaid, at the Supreme Court House, in Victoria, and is then duly held and continued during the said Tuesday, the fifteenth day of December aforesaid, and is so duly held, continued, and adjourned from day to day until Monday, the twenty-first day of December aforesaid. And afterwards, on the said Monday, the twenty-first day of December aforesaid, at the said last-mentioned Session of Oyer and Terminer and General Gaol Delivery duly holden by adjournment at the Supreme Court House, in Victoria aforesaid, in and for the said Bailiwick, on the said Monday, the twenty-first day of December, before the said Justice last above mentioned, cometh the said Robert E. Sproule in the custody of the said Sheriff, and because the Justice last before named, now in Court here, is not yet advised about awarding judgment of and upon the premises whereof the said Robert E. Sproule has been found guilty as aforesaid, the said Robert E. Sproule is remanded to the custody of the said Sheriff, in the gaol aforesaid, till such time as the Court shall award judgment, and also the said Session of Oyer and Terminer and General Gaol Delivery is by the Court here duly adjourned until Monday, the fourth day of January, in the year of Our Lord one thousand eight hundred and eighty-six, at the Supreme Court House, in Victoria aforesaid, and is then duly held and continued during the said Monday, the fourth day of January aforesaid; and afterwards, on the said Monday, the said fourth day of January aforesaid, at the said last-mentioned Session of Oyer and Terminer and General Gaol Delivery duly holden by adjournment at the Supreme Court House, in Victoria aforesaid, in and for the said Bailiwick, on the said Monday, the fourth day of January aforesaid, before the said Justice last above-mentioned, cometh as well the said Alexander Edmund Batson Davie, who prosecutes for Our Lady the Queen as aforesaid, as the said Robert E. Sproule, in the custody of the said Sheriff. And because the Justice last above named now in Court here is not yet advised about awarding judgment of and upon the premises, whereof the said Robert E. Sproule hath been found guilty of as aforesaid, the said Robert E. Sproule is remanded to the custody of the said Sheriff, in the gaol aforesaid, until such time as the Court shall award judgment, and also the said Session of Oyer and Terminer and General Gaol Delivery is by the Court here duly adjourned until Tuesday, the fifth day of January aforesaid, at the Supreme Court House, in Victoria aforesaid.

And afterwards, on the said Tuesday, the fifth day of January aforesaid, at the said last-mentioned Session of Oyer and Terminer and General Gaol Delivery duly holden by adjournment at the Supreme Court House, at Victoria aforesaid, in and for the said Bailiwick, on the said Tuesday, the fifth day of January aforesaid, before the said

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Justice last above mentioned, cometh as well the said Alexander Edmund Batson Davie, who prosecutes for Our Lady the Queen as aforesaid, as the said Robert E. Sproule, in custody of the said Sheriff, and it is demanded of the said Robert E. Sproule if he hath or knoweth anything to say wherefore the said Justice here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him, who nothing further saith unless as he before had said.

Whereupon all and singular the premises being seen, and by the said Justice here fully understood, it is considered and adjudged that the said Robert E. Sproule be taken to the gaol of the said Lady the Queen, at Victoria aforesaid, and from thence to the place of execution, and that on the sixth day of March, in the year of Our Lord one thousand eight hundred and eighty-six, he be there hanged by the neck until he be dead.

On 19th February, 1886, under a writ of *habeas corpus* directed to the Sheriff for Vancouver Island, the plaintiff in error was brought into Court in custody of the said Sheriff, and by his Counsel, *Theodore Davie*, prayed oyer of the writ of error and the return, which were read. *Theodore Davie* thereupon alleged a diminution of the record, and applied for a writ of *certiorari* on his (Counsel's) own affidavit, on the following grounds:—

1. The order for change of venue set out in the record was not the true one, or in existence at the time of the trial and judgment.

In this connection Counsel argued that the order drawn up and in existence at the time of the trial was the order governing the case. It had been acted upon. Under it the plaintiff had been tried and condemned. Any condition which did not appear on its face he could not have. It is useless now to refer to alleged conditions imposed by the Judge at the time of the pronouncing the order. It was competent for the Judge to recall those conditions at any time before the order was drawn up and issued, and by drawing up the order in the manner in which it is the Crown declared that it did not intend to be bound by any conditions as to expense.

Amendments are allowable after judgment under the statutes of jeofail (14 Ed. III., c. 6, 8 Hen. VI., c. 12), only for misprision of the clerks and not of the party (*Green* v. *Miller*, 2 B. & Ad. 782); but as these statutes do not apply to criminal cases (8 Hen. 6, c. 12, s. 2; *R.* v. *Stedman*, 2 Ld. Raym. 116; *R.* v. *Gregory*, 4 D. & L. 777), there exists no power to alter the original order. Even the order as desired to be amended would not comply with section 11, for the Judge does not exercise the discretion which the statute requires him to do, but delegates that discretion to the Judge who may preside at the trial, which the statute does not permit him to do. By leaving the question of payment of witnesses' expenses to be settled by the Judge at the

trial, the very object of the condition which the statute imposes in a prisoner's favour is frustrated, for there is then (*i. e.*, at the trial) no time or opportunity to secure the attendance of witnesses.

The only remaining question is, whether the condition in the statute is directory or imperative—for if the latter, then upon failure to comply with the condition "the whole thing fails, and the proceedings which follow upon it are void." (*Howard* v. *Bodington*, L. R. 2 P. D., 210.) Enactments regulating the procedure in Courts seem usually to be imperative and not merely directory. See cases cited, *Maxwell* on Stat., p. 456; and here, the statute permitting the making of the order only upon the condition mentioned, there would seem to be no doubt of its imperative character.

2. The refusal of the Judge at the trial to grant the prisoner's application to have the jury polled should appear upon the record. He cited *Commonwealth* v. *Tobin* (7 Cent. L. J. 265); *Watts* v. *Brains* (Cro. Eliz. 778); 2 H. P. C. 229, 309; *U. S.* v. *Potter* (6 *McLean* 186); *State* v. *Young* (77 N. C. 498); *Tilton* v. *State* (52 Ga. 478): *Nomaque* v. *People* (*Breese* 109); *Taschereau* Crim. Law, vol. 2, p. 251; and *Reg.* v. *Ford* (3 U. C. C. P. 209).

MCCREIGHT, J.:—

The order for the change of venue is not necessarily part of the record.

BEGBIE, C. J.:—

The order set out in the record is the order made and pronounced on the 13th October, 1885. On referring to my note-book I find that I made the following minute in this case on that day:—

"Order: Crown undertaking to abide by such order as the Judge "who tries the case may think just to meet the equity of the Statute "of Canada, 1869, c. 29, s. 11, trial to take place at Assizes here—23rd "November.

"Prisoner to remain at Victoria in custody."

CREASE, J.:—

The warrant handed to the Gaoler would be a sufficient order to change the venue. The only objection to it is, that it does not formally set out the terms imposed as conditions precedent. The prisoner was, in any event, properly before the Court.

After some consultation the application was refused, on the grounds that the order set out in the record was the order made by the Chief Justice,* and that the question of prisoner's right to poll the jury was not a matter to be dealt with on a writ of error.†

* *See* Goff's case R. & R. 179; Risca Coal Co., 4 DeG. F. & J. 456; Lawrie *v.* Lees, L. R. 7 App. Cas. 19; Regina *v.* Sarah Virrier, 12 A. & E. 317; Regina *v.* Vodden, 1 Dears. 229; King *v* Barker, 1 East., pp. 186–188, *per* Lord Kenyon, C.J.; Bishop,

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Theodore Davie then, on behalf of the plaintiff in error, craved leave to assign errors, which was granted.

The assignment of errors was as follows:—

And now, on this 19th day of February, 1886, before Her Majesty's Supreme Court of British Columbia, cometh the said Robert Evan Sproule into the Court here, under the custody of the Sheriff for Vancouver Island, by virtue of a Writ of *Habeas Corpus* issued in that behalf, and immediately saith that in the record and process aforesaid, and also in giving the judgment aforesaid, there is manifest error in this—

1. That the indictment does not appear by the said record to have been found and presented by good and lawful men of the body of the County or Bailiwick of the Sheriff of Vancouver Island, which County or Bailiwick is by the "Sheriffs' Act Amendment Act, 1878," declared to extend over all that portion of Vancouver Island which is south of the forty-ninth parallel of north latitude, sworn to enquire for Our said Lady the Queen, for the body of the said County or Bailiwick, wherefore in that there is manifest error.

2. There is also error in this, that the said Robert Evan Sproule had not a jury from the body of the County upon which he could put himself upon his trial, as by law he was entitled to have, and section 1, sub-section 1, and sections 3, 34, and 35 of the Jurors' Act, which assume to enact that jurors shall be summoned only from a limited portion of the Bailiwick or County, is *ultra vires* and void, wherefore in that there is manifest error.

3. There is also error in this, that the indictment does not shew the alleged offence to have been committed within the jurisdiction of the Court or within the realm at all, wherefore in that there is manifest error.

4. There is also error in this, that the record alleges the offence to have occurred at Kootenay Lake, within the District or Bailiwick of the Sheriff of Kootenay, and shews no valid order to try the prisoner elsewhere than in that District, which, in the absence of a valid order,

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Crim. Procd., 3rd Ed., Vol. 1, Sec. 1341, *et seq.*; Regina *v.* Dudley, 15 Cox pp. 326-7; following Hazel's case, 1 Leach 383, *per* Mansfield, C.J.

† At the trial Mr. *Theodore Davie* moved to have the Jury polled. As the Court perceived nothing to create a doubt respecting the agreement and concurrence of the whole Jury, the motion was refused. Before sentence was passed an argument was had before Gray, J., sitting with the Chief Justice, Crease, McCreight, and Walkem, JJ., as Assessors, on a case stated. And it was *held* that such refusal was proper, and that the prisoner is not entitled, in this Province, as of right, to have the Jury polled.

The practice of permitting the Jury to be polled is not uniform in the different Courts of the United States. *See* Archbold's Cr. Prac., Pomeroy's Notes, vol. 1, p. 561. It is not allowed in Maine—Fellows' case, 5 Greenleaf, 333; in Massachusetts—Commonwealth *v.* Roby, 12 Pick., 496; in Virginia—State *v.* Wise, 7 Richardson, 412; nor in South Carolina—State *v.* Allen, 1 McCord, 525; Lewis *v.* Maverick, *ib.*, p. 24.

under section 11 of the Procedure Act of Canada, was the only venue where the said Robert Evan Sproule could be legally tried, wherefore in that there is manifest error.

5. There is also error in this, that the Commission under which the proceedings were taken is void, firstly because it is the Commission of the Lieutenant-Governor of the Province, who has no power to issue the same, and secondly because the said Commission empowers the Commissioners nominated by it contrary to the common and statute law of the land, in this that it empowers them to enquire by the oaths of good and lawful men of the District of British Columbia generally instead of by the oaths of good and lawful men of the District, County, or jurisdiction wherein the enquiry is being taken, wherefore in that there is manifest error.

6. There is also error in this, that the Commission does not name the Counties or Districts in which the enquiries are to be made, and one previous Court held under it exhausts the Commission, wherefore in that there is manifest error.

7. There is also error in this, that so much of the "Jurors' Act, 1883," as provides the practice in relation to juries in criminal cases is unconstitutional and void, wherefore in that there is manifest error.

And this the said Robert Evan Sproule is ready to verify.

Wherefore he prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid appearing, may be reversed and annulled and altogether had for nothing, and that he may be restored to the free law of the land, and all that he hath lost by the occasion of the said judgment.

THEODORE DAVIE.

The Crown immediately joined in error.

JOINDER IN ERROR.

And thereupon the Honourable Alexander Edmund Batson Davie, Attorney-General, present here in Court in his proper person, who for Our said Lady the Queen prosecuteth, and having heard the matters aforesaid above assigned for error in manner and form aforesaid, for Our Lady the Queen, saith, that neither in the record and proceedings aforesaid is there any error; therefore the said Attorney-General of Our Lady the Queen prayeth that the Court of Our said Lady the Queen, now here, may proceed to examine as well the record and proceedings aforesaid and the judgment thereon given as aforesaid as the matter above assigned and alleged for error, and that the judgment may in all things be affirmed.

Theodore Davie, for the plaintiff in error, then prayed for a concilium, which was appointed for Saturday, the 20th February then instant.

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On the 20th February, 1886, the prisoner was brought into Court, and the case was argued on the 20th, 22nd, and 23rd, before Sir M. B. Begbie, C. J., Crease, Gray, McCreight, and Walkem, JJ., and judgment reserved.

The *Attorney-General* (*A. E. B. Davie*, Q.C.,) for the Crown.

Theodore Davie (with him *Richards*, Q.C.,) for the Plaintiff in error.

On the 27th February, 1886, the prisoner was again brought into Court, when judgment was given "that there was no error in the "record or proceedings aforesaid, or in the giving of the judgment "aforesaid."

BEGBIE, C. J.:—

We are all of opinion that the prisoner can take nothing by this writ, and that the assignments of error are insufficient.

1st. We are all of opinion that the order of the 13th October, 1885, for the removal of the trial to Victoria was a good and proper order under s. 11 of the "Criminal Procedure Act, 1869," c. 29, and that the condition as to costs was an expedient and sufficient condition. Mr. Theo. Davie contended that the removal mentioned in that s. 11 was only to be a removal of some indictment previously found by a grand jury in the proper venue, and that until some indictment was found, no application under s. 11 could be entertained. We think that this contention is inconsistent with sub-sec. 2 of that section, and with the practice in *certiorari*, and with convenience. We think, on the contrary, that the application should be made as early as possible after commitment by the magistrate, and may be made even where the magistrate has refused to commit, and has merely bound over the prosecutor to prosecute, (*re Beyfus*, Q.B.D., Jan., 1886).

2nd. We are all of opinion that the venue sufficiently appears—(*a*) because the words "British Columbia" in the margin of the indictment constitute at the lowest an incomplete or "imperfect" venue within sec. 28, a view which is supported by the *quasi venues* in the forms scheduled 32 and 33, Vic. c. 30 and c. 31, Canada. (*b*) Because the word "indictment" is by the interpretation clause to include "any record;" a deliberate enlargement of the interpretation clause in the corresponding English Statute, 14 and 15 Vic., c. 100, where it is confined to "nisi prius record" (apparently referring to cases which had been removed by *certiorari* and sent to be tried at N. P.) (*c*) Because in the record the venue, *i.e.*, the locality, whether of the offence, or of the place of trial, or of the district from whence the jury was to come, is clearly described.

3rd. We are all of opinion that the Judge who tried the case (Mr. Justice Gray) was properly armed with full jurisdiction to try at the time and place and in the Court where the trial took place; being duly appointed thereto by a valid Commissson of Oyer and Terminer and

Gaol Delivery. Such Commission was not, as alleged in the sixthly assigned error, exhausted by holding a previous Court under it, viz.: a Court to deliver the gaol in some other district or bailiwick in the Province. The old form of Commission set forth by Coke, 4 Inst. 161, which he received from Antiquity, and which in substance and in many of its words, is followed here to-day, shows this. It directs the Commissioner to enquire by the oaths of good and lawful men of our counties of S. D. W., S. D. & C., or of any whatsoever of them (*eorum quolibet*) of all offences, &c. These counties compose what was well known as the Western Circuit. I cannot perceive the difference between naming B. C. at once as the whole geographical extent of the operation of the Commissioners, and enumeration of all the several districts making up that same geographical area, which is what Mr. T. Davie insisted should have been received in the Commission. And from the form of the Commission in 4 Inst. another inference is to be drawn as to the exhaustion of the Commission. Each of the counties therein named constitutes for jury purposes a separate venue. After the Court has sat to try offences in Dorset, with a Dorset jury, and completed its criminal business, can it be contended that the Commissioner cannot go and hold his Court in Devonshire. So much force has never been given to the word *quolibet* cited above as to suggest that the Judge may select one only county, and need not sit in more than one; and that he can sit there with a Dorsetshire jury, try all offences from all parts of the circuit; or that he can cause Devonshire juries to be summoned to Dorchester. And yet that would have to be so, if sitting and holding a Court at one place mentioned in the Commission exhausts it. The very form of the Commission proves therefore that it may be opened, as everybody knows that it is opened, in an assize-town in each county by reading and proclaiming the Commission and the Court there anew, which would not be done on a mere adjournment. To exhaust the Commission for any county, district or bailiwick, a Court must be held in that bailiwick. If that be done and the Court rises without adjourning to some other time or place in that bailiwick, no doubt Coke says that the Commission is exhausted, *i. e.*, as to that county. But nothing of the sort occurred here.

4th. We are all of opinion that it is competent for the Provincial Legislature exclusively to divide the Province into such districts or bailiwicks for the administration of criminal justice as it shall deem desirable; and that, by virtue of sub-sections 14 and 16 of s. 92 of the B. N. A. Act, besides the necessity of the thing. What other authority can define the districts? Lastly, this Court has just unanimously decided this point in the affirmative in Malott's case (*ante* p. 207). We think, moreover, that it is not necessary that the limits of a bailiwick for criminal purposes should be identical with the boundaries of some bailiwick already defined for civil purposes. The Sheriff of Vancouver Island has by the Provincial Act of 1878 a very extensive civil baili-

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wick. Without change of name he is in fact by the "Jurors' Act, 1883," directed, and therefore empowered, to act as Sheriff of a smaller bailiwick created by that Act for criminal purposes. Section 3, therefore, and sub-sec. 2 of sec. 1, of the "Jurors' Act, 1883," appear to all of us to be constitutional and valid within the B. N. A. Act; nor does there appear anything unreasonable in providing that settlers at Alberni shall not be liable to be summoned to serve on juries at Victoria, nor settlers at Fort Rupert or Alert Bay summoned to Nanaimo.

5th. We are all of opinion that the other impeached section of the "Jurors' Act, 1883," touching the qualification of jurors and construction of the lists or rolls of Grand and Petty Juries are constitutional, and that the lawfulness of the jury cannot be impeached on this ground.

It was urged by Mr. Theo. Davie that even if the Provincial Legislature be competent to divide the Province into districts for jury purposes, as we lately held in *Malott* v. *The Queen*, and to sub-divide these districts, it is at least incompetent for them to prescribe or limit the qualifications of jurors, or to alter the method of preparing the lists from which the jury panel at any assize is to be struck: such limitation and methods being a part of that large and complex system called "procedure in criminal matters," which by sec. 91, sub-sec. 27, is wholly reserved to the Dominion Parliament, and implicitly forbidden to the Provincial Legislature by the phrase in sub-sec. 14, which limits the procedure to legislate for civil procedure in Courts of Provincial creation. It was strongly urged that although similar Provincial legislation in Ontario was declared in O'Rourke's case (1 Ont. Rep. 464) to be constitutional, that decision was of no authority in British Columbia, not only because our Courts are not bound by decisions in the Courts of other Provinces but because it was founded on Statutes in Ontario of undoubted validity, enacted while that Province was still autonomous, and entirely absent here. [Con. Stat., U. C. c. 31, s. 139; Rev. Stat., Ont. c. 511]. It was further argued that the British Columbia Jurors' Act of 1883, could not be validated *ab ante* by sec. 44 of the "Criminal Procedure Act, 1869," introduced into British Columbia by a subsequent Canada Statute of 1874, c. 42, (assented to 26th May, 1874): that the test, in the case of created (as distinguished from *self-existing*) legislatures, is—"Has the proper authority applied its mind to the subject, and fixed times, places, persons, powers?" That under the B. N. A. Act, sec. 91, sub-sec. 27, the Dominion Parliament is the proper authority; but clearly it could not in 1869 (sec. 44) have applied its mind to consider and approve of regulations formulated in B. C. for the first time in 1883. That the Dominion Parliament could not constitutionally eliminate sub-sec. 27 from sec. 91 of the B. N. A. Act (which describes, but does not limit Dominion legislative powers) and insert it as an additional sub-section

in sec. 92 of that Act, which both defines and limits the powers of the Provincial Legislature; the B. N. A. Act being an Imperial Act, cannot be repealed and altered in this way by the authority of one of two legislatures of its own creation; and that O'Rourke's case, so far as it maintains any such theory, is bad in law. It was further pointed out that the words of sec. 44 do not necessarily or even properly bear the sense attributed to them in O'Rourke's case; that the section does not at all speak of laws which may have been enacted by the Provincial Legislature, much less profess to validate any law otherwise unconstitutional; but it speaks only of laws *in force* in the Province, *i. e.*, valid laws, whether of Imperial, or Dominion, or Provincial origin; and clearly reserves, and therefore asserts, the right of the Dominion to legislate on the subject, and in that way seems to deny the right to the Province. And that nothing in *The Queen* v. *Hodge* (9 L. R. App. Cas. 117) militates against this view.

We are all of opinion that there is nothing in this objection to authorize us upon this Writ of Error to interfere with the judgment and sentence pronounced against the prisoner. I shall only state my own grounds for this conclusion, which are entirely, irrespective of any opinion stated in O'Rourke's case, and of any supposed construction placed in that case upon sec. 44 of the Statute of 1869. I arrive at this conclusion even if O'Rourke's case be bad in law and sec. 44 unconstitutional, as was contended by the prisoner's Counsel.

What is a Court of Oyer and Terminer? I shall take the words in which it is described by Lord Brougham in O'Connell's case (11 Cl. & Fin., p. 347). "The Court is composed of a Judge and Jury for the trial "of prisoners. That Court consists of one permanent high officer, "having jurisdiction," (by which I suppose he means, being named in the Commission) "and of others who are not permanent. It consists of the "Judge and twelve lawful men. These men have jurisdiction given to "them by the law of this country in respect of their being selected after "a particular manner; and if they are not selected in that manner they "are not a body having the jurisdiction which the law vests in them if "well selected; consequently, the question always is 'have they been so "well selected?' For if they be not well selected, they are not the "body vested with that jurisdiction, clothed with those high judicial "attributes of being necessary assistants to the Judge upon the trial "of the issue." In other words, unless lawfully selected, they are not part of the Court of Oyer and Terminer; the Court is not lawfully organized; it is not organized at all. But a Court of Oyer and Terminer is a Provincial Court of criminal jurisdiction; precisely one of those Courts the "organization" of which is expressly, by sub-section 14, B. N. A. Act, s. 92, placed in the exclusive discretion of the Provincial Legislature. That Legislature must organize the Court. By sub-section 14 no other Legislature can do so. And in order to select the twelve men, the Jury who form a necessary branch of the

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Court, the body from whom selection is to be made, *i. e.*, the rolls or lists mentioned in sections 14, 15, 22 and 23 must be prepared under the authority of the Provincial Legislature alone That done, the Court is constituted. In all further things the direction of the procedure in criminal matters seems to be by sub-section 27 reserved to the Dominion Legislature, and provided by cc. 29, 30 and 31 of 1869 (Canada). Nor need it be apprehended that this view would leave it open to the Provincial Legislature under sub-section 14 to constitute a criminal Court in which a Judge would sit without a Commisssion, or a Commission might be issued without inserting therein the name of any Judge, or a verdict arrived at by a majority of the Jury, or by a less number than twelve. Whatever the validity of such legislation would be, the Court thereby constituted would not be a Court of Assize, or of Oyer and Terminer, or of General Gaol Delivery. When it shall be proposed to create a new Court, its constitution and organization will have to be discussed. But as regards these three, their constitution, *i. e.*, their source of authority, their composition, and their powers, are well established. Without pursuing this argument further, it seems clear that it provides a very substantial basis for supporting the validity of the impeached sections of the "Jurors' Act, 1883." But even if I were of a different opinion, and if I thought that the (otherwise eligible) inhabitants from Sooke and Alberni ought not to have been deliberately excluded, it seems to me that this objection comes too late. It is an objection of very much smaller dimensions than that which was alleged in the O'Connell case to have taken place with regard to the Jury. There, an entire sheet with 59 names had been mislaid, and none of these was or could be among the 48 of whom the panel consisted. The whole number of special jurymen was 719; but it was clear that if these 59 had not been suppressed, they might have vitally affected the constitution of the panel,—in fact the whole panel of 48 might possibly have been struck from this sheet alone. Lord Campbell in his judgment intimates that he thought such a vice would have authorized the Court to quash the panel and do what was necessary for assembling a fair Jury, although no complaint were made of unindifferency or default in the Sheriff. But he immediately states that he will not base his judgment upon that point. Lord Denman was the only one of the five Law Lords in that case who held such an error sufficient to quash the array; and all the nine Judges who attended their Lordships and gave opinions, were unanimously of opinion that this was no ground of challenge to the array. And this was where the objection was taken before the trial; and before the 14 Vic., c. 100, ss. 25 and 30, and which provides that "objections for any formal defects shall be taken before pleading, and not afterwards." It is to be observed that in the reproduction of s. 25 in the "Criminal Procedure Act, 1869," s. 32, the word "formal" (which is in the English Act) is omitted; instead of "formal

defect" it is now "any defect." We were assured that this was a clerical error; that the French version exactly follows the Imperial Act; that the word "formal" has been accidently retained in the English version of the Canadian Statutes, and that we ought to omit it; and that no error which may affect the composition of a jury can be deemed formal merely. In this last observation, as a matter of epithets, I am disposed to agree. Such an error is a matter of substance in my opinion, but here surely an extenuated substance of infinitesimal dimensions. There was a possibility upon a possibility upon a possibility. First, there was of course a possibility that (but for the "Jurors' Act, 1883," s. 2, sub-sec. 1) the selectors might have placed on the roll the name of a juror from Sooke or Alberni. There was then a chance of his being summoned. If summoned, he might have escaped challenging, and so have sat on the jury. Lastly, his opinion might have been wholly favourable to the prisoner, and contrary to the view taken unanimously by the twelve men who did sit. Compare the dimensions of this error with that of the O'Connell case. If not a formal defect, it surely is a very trivial one. And as to the proposed insertion by us in the Act of the word "formal," it is more than such a Court as ours dare venture on. And it is just as easy to say that it was accidentally retained in the French version, as that it was accidentally omitted in the English. If it were important to speculate, I should incline to think that the Parliament of Canada intended to imitate the Imperial Parliament by restricting still further the trivialities and unfounded quibbles and objections which have long defaced the administration of English law; whose forms, humanely intended to protect innocence and insure a fair trial by insisting on full accurate proof of guilt, have too often been perverted and applied for perplexing the innocent and insuring impunity to criminals. Notwithstanding the indignant eloquence of Lord Denman (*O'Connell's* case, 11 C. & L. 350); Lord Chief Justice Cockburn (*Martin* v. *Mackonochie*, 3 Q. B. D. 775); the language of Lord Penzance (*Combe* v. *Edwards*, 3 Pro. Div. 142), is not only equally eloquent, but is the language of common sense. "The picture of law triumphant and justice prostrate, is not, I am aware, without admirers. To me it is a sorry spectacle." The final cause of courts of justice is to ascertain guilt and innocence. Forms and methods are prescribed for the purpose of assisting, not of perplexing or frustrating, the investigation. Errors in applying those forms and methods may well be deemed formal merely, unless they embarrass the prisoner's defence or give undue advantage to the prosecutor. How can anything of the sort be alleged here? How can the prisoner allege any obscurity in the time or place of the offence, or the time or place of trial, when the day of trial was actually postponed and fixed on his own application, and public money was provided for the expenses of his witnesses attending here? Nor is there any thing repugnant to the true spirit of English law in limiting the time or the

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occasions for taking objections or correcting mistakes, even of the gravest importance. If a prisoner on his trial fails to challenge any juror until sworn, his right of challenge is gone, and the juryman sits, though the known enemy of the prisoner. If the prisoner plead guilty, and that plea be recorded, it is too late for him to withdraw it and plead not guilty. If he submit to have his Writ of Error decided on by two Judges, he loses any supposed advantages which he might have found in appearing before five Judges, *e. g.*, an appeal (as in *R.* v. *Amer*, 2 S. C. R., Can., 596). The Ontario Legislature and judiciary cannot be said to be insufficiently imbued with the spirit of English justice; yet they have deliberately adopted and approved provisions which it is admitted would deprive the prisoner of the power of taking such objections as are here taken, unless he take them at once. There is therefore, very good ground for supposing that the Dominion Legislature advisedly intended to omit the word "formal" in sec. 32, and to limit the range of the objections assignable on a Writ of Error to matters occurring in the conduct of the trial, and subsequent to the prisoner's putting himself upon the jury.

For these reasons there must be judgment for the Crown on the Writ of Error and on the Writ of *Habeas Corpus*; the prisoner will be remanded on the judgment and sentence of the Court of Oyer and Terminer.

CREASE, J.:—

I concur in giving judgment for the Queen on all points, and confirm the judgment of the Court below and sentence recorded thereunder.

GRAY, J.:—

On behalf of the prisoner there are six errors assigned upon the record, which, as set out clearly by his counsel on the argument, are as follows, viz.:—

1. That the plaintiff in error was entitled by law to have a jury from the body of the county, *i. e.*, the Bailiwick of the Sheriff of Vancouver Island, which, under the "Sheriffs' Act Amendment Act, 1878," extends over that portion of Vancouver Island south of the 49th parallel of north latitude. That sec. 1, sub-sec. 1, and sections 3, 34, and 35, of the "Jurors' Act, 1883," in so far as they limit the selections to certain portions of the county, are void, and the *venire* set out in the record to return the jury from the limited portion only, renders the proceeding void.

2. That the want of a venue in the body of an indictment is fatal; no district, county, or place in British Columbia being mentioned in the margin.

3. That the alleged order for change of venue did not authorize the trial of the plaintiff outside county or district of his alleged offence;

the said alleged order having no legal force, not being made upon the terms as to the payment of expenses provided by the Act.

4. That the Commission under which the proceedings were had is void, inasmuch as it authorizes the Commissioners to enquire by the oaths of good and lawful men of the Province of British Columbia, instead of the County wherein the enquiry is being taken.

5. That the Court was held under a Lieutenant-Governor's Commission, and the Lieutenant-Governor has no power to issue the same.

6. That the "Jurors' Act, 1883," is *ultra vires* and void as dealing with criminal procedure.

With reference to these objections, it is to be observed that none of them were raised or taken before trial, and therefore come within the curative sections of the Criminal Procedure Act, if of the class to which those sections apply.

The first objection appears to me to be clearly governed by the 44th section, which is both declaratory and confirmatory; and for removing all doubt expressly declares and enacts that the existing jury laws in force in the Province at the time of the trial as to summoning and qualification of jurors are and shall be sufficient. The "Jurors' Act, 1883," expressly regulates and defines the district from which the jurors shall be summoned, was within the power of the Local Legislature to enact, and was complied with in the present case. The proviso at the close of the 44th section is of no bearing, for there is no provision in any Act of the Parliament of Canada on the subject, and consequently there is no inconsistency with any such Act. When the Canadian Parliament legislates on the subject it will be time to discuss the question. And I am further of opinion, that for criminal purposes in cases of treason and felony, &c., the jury forms a part of the constitution of the Court, and, therefore, falls within the power of the Local Legislature, as to its being summoned, assembled, and brought together for the purposes of the administration of justice. As to the detailment of members of that jury, when so brought together to the trial of individual offenders, that is a matter of criminal procedure, and governed only by Dominion law.

The case of *Regina* v *O'Rourke* (1 Ont. Rep. 464) seems to me to make the point clear.

The second objection is governed by the 15th and 23rd sections. That no venue was necessary in the body of the indictment, and that "British Columbia, To Wit," in the margin, was, at the utmost but an improper or imperfect venue. That the 32nd and 78th sections expressly enact that such objections shall not prevail after trial, and that upon the whole record it distinctly appeared that the offence was committed at Kootenay, within British Columbia, and was set forth in the order under the 11th section, made for changing the venue and trial from Kootenay to Victoria which order itself was set out in full in the record.

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That the third objection is not tenable, as the order complies to the fullest extent with the requisites of the 11th section; and it is not alleged that anything took place under it to the prejudice of the prisoner, nor did he make any application under it of any kind whatever.

That the fourth objection is answered in the reply to the first.

That the fifth objection, that the Lieutenant-Governor had no power to issue a Commission of Oyer and Terminer is answered, so far as I am individually concerned, by my judgment in *Regina* v. *The McLeans*, in June, 1880, to which opinion, then expressed, I still adhere.

And the sixth objection is met by the answer to the first.

Of whatever avail these, or some of these, objections might formerly have been, after the Parliament of Canada has legislated upon the subject, there is an end of the matter. Had all or any of them been taken before trial, they might, if important, have been amended. They had no bearing upon the trial of the prisoner, and it cannot be contended that a single one of them operated in the slightest degree to his prejudice or disadvantage.

He has waived no right, was asked to waive no right. He was not overruled on a matter bearing on any one of these points at the trial. He was not by rule or order of the Court compelled to acquiesce in the abnegation of a single privilege that he claimed. He was not compelled to take a single step to which he objected.

I am particular in these statements from having tried the cause, and I have purposely abstained from any enlarged discussion on the points raised upon the record, desiring rather to express my concurrence with the conclusions of the Full Court, than to give reasons for them.

MCCREIGHT, J.:—

In view of the judgments already delivered, it is unnecessary to refer to the record in this case at any length; but I will briefly deal with the objections raised and argued by Mr. T. Davie, and stated in his factum on behalf of Sproule, as follows:—

"The plaintiff in error was convicted on the 8th of December, A.D. "1885, at the Court of Oyer and Terminer, holden at Victoria, of the "crime of murder, and subsequently sentenced to death. The record "now being brought before the Court upon Writ of Error, the follow- "ing errors in effect are assigned:"—

1. "That the plaintiff in error was entitled by law to a jury from "the body of the county, *i. e.*, the bailiwick of the Sheriff for Van- "couver Island, which, under the 'Sheriffs' Amendment Act, 1878,' "extends over that portion of Vancouver Island south of the 49th "parallel of north latitude. That section 2, sub-section 1, and sections

"3, 34, and 35 of the 'Jurors' Act, 1883,' in so far as they limit the "selection to certain portions of the county, are void, and the *venire* "set out in the record to return the jury from the limited portion "only, renders the proceedings void."

2. "That the want of a venue in the body of the indictment is fatal, "no district, county, or place in British Columbia being mentioned in "the margin."

3. "That the alleged order for change of venue did not authorize "the trial of the plaintiff outside of the county or district of the "alleged offence, the said alleged order having no legal force, not being "made upon the terms as to the payment of expenses provided by the "Act."

4. "That the Commission under which the proceedings were had is "void, inasmuch as it authorized the Commissioners to enquire by the "oaths of good and lawful men of the Province of British Columbia, "instead of the county wherein the enquiry is being taken."

5. "That the Court was held under the Lieutenant-Governor's "Commission, and the Lieutenant-Governor has no power to issue the "same."

6. "That the 'Jurors' Act, 1883,' is *ultra vires* and void as dealing "with criminal proceedings."

Mr. T. Davie also objected that the indictment should have been found by the Kootenay Grand Jury in any event; but it seems to me that this argument conflicts with the words of sec. 11 of the "Criminal Procedure Act, 1869," which says that "any Judge who might hold or "sit in such Court may at any other time order, either *before* or after "the presentation of a bill of indictment, that the trial shall be "proceeded with in some other district, county, or place," &c.

Again, sub-sec. 2 says "that upon the order of removal being made "by the Court or Judge, the indictment, *if any*, has been found against "the prisoner, and all inquisitions, informations, depositions," &c., "shall be transmitted," &c., thereby clearly contemplating that the order may take effect without indictment found. The remainder of sub-sec. 2 is to the same effect.

1. As to the next point, which is point 1 in the factum, I think perusal of the "Jurors' Act, 1883," shows that "Victoria District," as interpreted by sub-sec. 1 of sec. 2, becomes a new district for the purpose of selecting and summoning jurors for Courts of Oyer and Terminer held therein; that such district becomes the shrievalty of the Sheriff for criminal purposes; and that secs. 3, 34, and 35 are necessary and proper provisions for the purpose of obtaining the attendance of jurors at criminal trials.

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It can hardly be disputed that the Provincial Legislature has power to create Courts of Oyer and Terminer, to divide the Province into districts for purposes relative to the administration of justice in criminal cases, and to provide for the appointment of Sheriffs to discharge the necessary duties in such districts; and that if the selection and summoning of jurors is beyond the scope of the 92nd section of the British North America Act, sub-sec. 14 (which is by no means clear), the Provincial Legislature can legislate thereon by virtue of the 44th section of the "Criminal Procedure Act, 1869," as illustrated by *O'Rourke's* case (1 Ont. Rep., p. 464), and the doctrines laid down in *Hodge* v. *The Queen* (L. R. 9 App. Ca., p. 117).

2. As to point 2 in the factum, whatever is the true reading of sec. 32 of the Criminal Procedure Act, and whether the word "formal" is to be read into it or not, the defective venue, "British Columbia, To-Wit," must, for the purpose of trial, be taken as one of the formal defects which the Judge would formerly have been warranted in amending by the authority of the grand jury, and not to be a substantial defect, as, *e. g.*, the substitution of a charge of murder for that of manslaughter (see cases cited, 2 Tasch, pp. 174 and 175), and he would since have amended it under the above section, if, indeed, the objection could have been usefully taken, having regard to section 23, which provides that no indictment shall be held insufficient for, among other defects, "want of a proper or perfect venue."

In considering these words, and with a view to determine whether they require the narrow interpretation contended for by Mr. T. Davie, we should not disregard their collocation with the words immediately following, "or for want of a proper or formal conclusion," which provision would seem to cover the total absence of the usual conclusion.

But however this may be, I have no doubt after a perusal of sec. 78, which deals with the trial after verdict, that the use again of the words in that clause, "nor for the want of a proper or perfect venue," should not be treated as a mere vain repetition, but reading them in connection with the expression which follows, "where the Court appears by the indictment" (*i. e.*, record; see the interpretation clause, sec. 1, sub-sec. 1) "to have had jurisdiction over the offence," are amply sufficient to cover the case of the present defective venue, *i. e.*, British Columbia, To-Wit, instead of British Columbia, Victoria District.

Mr. T. Davie indeed suggested that it did not appear by the record that the Court had jurisdiction; but I think the existing venue, coupled with the terms of the Chief Justice's order for the removal of the proceedings to Victoria, as set out on the record, makes this point past debate.

3. As to the point that the learned Chief Justice's order did not authorize the trial outside of the Kootenay District, not being made

upon the terms as to the payment of expenses, it was not, and could not be suggested how the Chief Justice could have framed his order more advantageously (where no application for an advance appears to have been made), than by leaving the question of such costs to be determined by the Judge who presided at the trial, and who alone could fix their amount satisfactorily after its conclusion. The Legislature must have contemplated some such proceeding.

4. I think the Commission must be read as authorizing the Commissioners to enquire "by the oaths of good and lawful men," selected and summoned according to law, and especially as regards cases to be tried at the Victoria Assizes, according to the "Jurors' Act, 1883," sec. 2, sub-sec. 1, and secs. 3, 34, and 35.

5. I think the British North America Act, sec. 92, sub-sec. 14, assigning to the Provincial Legislature "the administration of justice, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction," makes it plain that the Local Legislature can constitute Courts of Oyer and Terminer and General Gaol Delivery, and empower the Lieutenant-Governor to issue Commissions as provided in sec. 14 of the "Judicature Act, 1879," and the "Assize Court Act, 1885." These Acts, perhaps, rather imply that the Lieutenant-Governor has that power already, no doubt, under sec. 129 of the British North America Act, which also seems to be plain. I gather from the remarks of Mr. Justice Wilson in *The Queen* v. *Amer* (42, U. C. R., p. 403), that he considers the Ontario Legislature might authorize the Lieutenant-Governor to issue Commissions for holding such Courts under sec. 92, sub-sec. 14, of the British North America Act, and it is observable that a section equivalent to our own is re-enacted in the Revised Statutes of Ontario, 1877.

But supposing, for the sake of argument, that the Lieutenant-Governor's Commission was void, yet sec. 14 of the "Judicature Act, 1879," authorized such Courts to be held with or without Commissions, at such times and places as the Lieutenant-Governor may direct, and provides for the Judges presiding therein. I do not know how better he could have directed the time and place for holding the last Victoria Assizes than by assenting to the "Assize Court Act, 1885." Moreover, the expression "with or without Commissions" should be read into the "Assize Court Act, 1885," according to Lord Campbell's observations in *Waterloo* v. *Dobson* (27 L. J., Q. B., 55). And it is observable that sec. 3 of the "Assize Court Act, 1885," in effect gives statutory authority to the five Judges to hold Courts of Oyer and Terminer at the various places named in sec. 2.

6. I have already stated my opinion that if the selection and summoning of jurors does not fall with sec. 92, sub-sec. 14, of the British North America Act, the subject is covered by the 44th section of the Criminal Procedure Act, as illustrated by *O'Rourke's* case and the

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doctrine laid down in *Hodge* v. *The Queen*, and I have only to add that I can see nothing in the record which is of any use to the plaintiff in error.

Walkem, J., concurred in the judgment of the Chief Justice.

On the 3rd May, 1886, on the application of prisoner's Counsel, an order *nisi* for a writ of *habeas corpus*, or in the alternative for the discharge of the prisoner, was granted by the Hon. Mr. Justice Henry, a Judge of the Supreme Court of Canada. On the return of the rule, after argument, Mr. Justice Henry directed the issue of a writ of *habeas corpus*, commanding the Sheriff for Vancouver Island to produce the prisoner at the Supreme Court of Canada, Ottawa, together with the day and cause of his detention.

On the 19th July, 1886, the said Sheriff returned the said writ, with an answer endorsed thereon, to the effect that he must decline to obey the writ, as he was advised that the order of the Court of Oyer and Terminer and General Gaol Delivery, affirmed by the Supreme Court of British Columbia, was, in this matter, paramount. See *Reg.* v. *Crabbe* (11 U. C. Q. B., 448); *Rex.* v. *Suddis*, *per* Leblanc, J. (1 East, p. 317); In re *Dunn* (17 L. J. C. P., 97); *R.* v. *Lees* (27 L. J. Q. B., 403); *R.* v. *Newton* (24 L. J. Q. B., 246); Ex. p. *Newton* (24 L. J. C. P., 148); and *State* v. *Burr*, a Nebraska case, reported in the North-Western Reporter of 12th June, 1886.

On the 2nd August, 1886, an application was made to Mr. Justice Henry for the discharge of the prisoner, on the ground that the Sheriff had disobeyed the writ. Mr. Justice Henry ordered the prisoner's discharge.

On the 1st September, 1886, the Supreme Court of Canada was moved by the Attorney-General for British Columbia to set aside the writ of *habeas corpus* and the order of the 2nd August. On the 13th September the order and writ were set aside.

On the 20th September, 1886, prisoner's Counsel applied to Mr. Justice Gray for a reprieve, in order that the case might be taken to the Privy Council. The application was refused.

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B. C. "Replevin Act, 1873"—Procedure—"Court of Record for British Columbia"—Constitutional Law—B. N. A. Act, 1867, sec. 92, sub-sec. 10 (a) (c), and sub-sec. 14 and sec. 101—"Provincial," meaning of—31 Vic. (D.) c. 28—32-33 Vic. (D.) c. 24.

On an application to set aside a writ of replevin under the B. C. Statute, 1873, c. 24,

Held, the affidavit under sec. 4 need not state that the deponent is "the servant or agent" of the claimant.

Held, that the delivery to the Sheriff of the bond required by sec. 5 is not a necessary preliminary to the issuing of the writ of replevin, but to the Sheriff's acting upon such writ.

Although the "Peace Preservation Act, 1869," 32-33 Vic. (D.), c. 24, makes no provision for the appointment of a "Commissioner under that Act," yet its provisions can be enforced here by a Commissioner appointed for the Province under the Canada Police Act, 31 Vic. (D.), c. 28, as such Police Commissioner is a Justice of the Peace in respect of the "criminal laws and other laws of the Dominion."

The "Peace Preservation Act, 1869," and the "Canada Police Act, 1868," can be enforced in this Province, as they are *intra vires* of the Parliament of Canada, under sec. 101 and sub-sec. 10, (*a*), (*c*), sec. 92, of B. N. A. Act, 1867.

The word "Provincial," in sub-sec. 14, sec. 92, B. N. A. Act, 1867, is to be read in its *political*, and not in its geographical, sense.

The Court of a Police Commissioner is a "Court of Record for British Columbia" within the meaning of sec. 2 of B. C. Replevin Act.

This case came before the Chief Justice on two applications—one by the plaintiff, on a motion to commit the defendant for contempt, viz., in forcibly taking away goods of the plaintiff in defiance of a writ of replevin; the other, by the defendant, to set aside the writ and all proceedings thereon, under the following circumstances:—

On the 28th August, Mr. Todd, who holds a commission under the Canada Police Acts, 1868, c. 73, and 1879, c. 37, and also a commission under the Peace Preservation Acts, 1869, c. 24, and 1870, c. 28, received information from three credible witnesses against the plaintiff Keefer, on which he issued a search warrant to Archibald Macdonald to seize the goods in question, being alcoholic liquors alleged to be within the prohibition of the Peace Preservation Acts. On the 12th September, while the goods were thus in the custody of Macdonald, the plaintiff Keefer procured a writ of replevin to be issued out of this Court, whereby the Sheriff was commanded, in the Statutory form, "without delay to cause to be replevied" to Hugh Keefer the goods (enumerating them) alleged to be of the value of $3,211.71. And on the same 12th September an action was commenced in this Court by Keefer against Todd, claiming $3,211.71, and $2,000 for unlawful taking. By the affidavits of the plaintiff's Solicitor and of the Constable in charge, Arch. Macdonald, it would appear that no attempt has ever been made by the Sheriff to comply with the exigency of the writ. The plaintiff's Solicitor deposed that on the 8th October *he was told* by the

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Sheriff's deputy "that he had not delivered the said goods to the "plaintiff on account of objections to his so doing taken by Mr. Todd, "but that he had taken and kept possession of the liquors until the "5th October, when they were forcibly taken from his custody under "the direction of Mr. Todd." This was the contempt complained of. Constable Macdonald stated on oath that he seized the goods on the 29th August and continued in possession till the 5th October, uninterruptedly, except that on the 25th September the Sheriff's deputy violently entered the building in which the goods were kept and made an inventory of them, and then retired without having taken possession or removed any of them; and that the liquors were on the 5th October removed by order of Mr. Todd, and in custody of his officers, to Eagle Pass, where they remained, not interfered with. This affidavit was made on the 10th October and was not answered, and the Chief Justice found that it was the only evidence before him (other than hearsay) of the facts connected with the custody of the liquors since the seizure on the 29th August.

Mr. Todd had in the meantime, on the 29th September, condemned the liquors under the Peace Preservation Act, and ordered them to be destroyed; but this last direction had not at the time of the making of the present application been carried out.

Theodore Davie for the plaintiff.

Richards, Q. C. (with him *Helmcken*), for the defendant.

The arguments of Counsel on the constitutional questions are set out at some length in the judgment.

BEGBIE, C. J. (after shewing that, in his opinion, the facts proved did not amount to a contempt, and that the plaintiff's application for the commitment of Mr. Todd for this alleged obstruction had wholly failed, and must therefore be dismissed with costs, continued):—

The counter application, to set aside the writ, is more difficult to deal with. The grounds on which this was asked were—1st, irregularity in the issuing of the writ; 2nd, because the action is by the Statute itself made inapplicable.

The proceedings are taken under the British Columbia Ordinance, 1873, c. 24 (Consolidated Statutes, c. 141), which seems exactly copied from the Ontario Statutes, 1859, c. 29, without embodying the amendments in the Ontario Statutes, 1860, c. 45. Under the original Statute the writ issued, as of right, to any claimant on his own sole affidavit of ownership. It being very quickly seen in Ontario that this might give rise to inconvenience, it was in the next session (Ontario, 1860, c. 45) provided by sec. 6 that the writ is not to issue without the previous sanction of a Judge (obtainable *ex parte*), and by sec. 9 that the Court or a Judge may set aside a writ, notwithstanding such previous sanction, if on further information it seems improper. In

British Columbia, without these safeguards, the writ appears to issue as of course (as it would in Ontario in 1859), and the Sheriff, where the Act applies, must seize and deliver the goods to the claimant at once, merely taking money security for their replacement. So that a criminal seized with property in his possession, the production of which before a jury might be essential to his conviction, would, it might be argued, have a right by this method to regain possession of the evidence of his guilt, with a full opportunity of destroying it before his trial or examination. That perhaps would be an extreme case; but the present case, though perhaps less glaring, may be deemed as mischievous in its degree. For the policy of the Peace Preservation Act being that alcoholic liquors introduced for sale should be destroyed this method of replevin would enable the illicit dealer to entirely elude the Act. He would thereby acquire the sole custody of the liquor pending the result of the action (his own action, which he might conduct as languidly or energetically as he pleased), with the power therefore of selling it by retail, in defiance of the law, and at a price far exceeding the double value provided for by his bond. In this present writ the liquors are valued at $2.50 per gallon, and security is therefore given to the Sheriff at the rate of $5 per gallon. Probably that was all that it cost. But in a recent action before me in the same district for damages for liquors mislaid and lost, no witness spoke of a less value than $15 per gallon, in bulk. The plaintiff could well afford at any such price to forfeit his bonds and make a profit by defying the law.

The objection to the writ on the ground of irregularity was merely that the preliminary affidavit on which the writ issues is, by the British Columbia Statute (sec. 4), to be made by "the claimant, his servant, or agent," and that it does not appear what character is occupied by Mr. Macfarland, who makes the affidavit. This, however, the Statute does not require to be mentioned in the affidavit itself. The agency may, I think, be proved at any time. And the term "agent" is so general that it might probably be held to include any person employed or instructed by the claimant to make the affidavit. I do not feel at liberty to set aside the writ on this ground, it not being denied that Macfarland was in fact the claimant's agent for this purpose. As to the other alleged irregularity, viz., in respect of the security to the Sheriff, that is not a preliminary to the issuing of the writ, but to the Sheriff's making replevin; and it is unimportant to inquire concerning it.

The main ground on which it was sought to set aside the writ, was because it could not legally be executed, and must remain a mere dead letter, for that the liquors were on the 12th September already seized under the warrant of a Court of Record and, therefore, exempt from replevin. This contention opened a very wide field. First it was alleged that the seizure and condemnation being under the Peace

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Preservation Act (Canada) 1869, c. 24, sec. 17 indicates the tribunal; the case must be heard and determined by a Commissioner or else by a Justice of the Peace. That Mr. Todd did not, either on the 28th August or on any subsequent date, hold any Commission as a Justice of the Peace within the Province; which is admittedly true; that by the interpretation (sec. 21) the word "Commissioner" means "a Commissioner under this Act," and not another; that there is no power reserved in the Act to any person to appoint any Commissioner nor any method prescribed by which the appointment is to be made; and that Mr. Todd's appointment as a Commissioner under the Peace Preservation Act is therefore a nullity.

Now, as to this point, I should feel inclined to adopt the plaintiff's view. The defendant's argument was, that since the Statute evidently supposes a Commissioner, but does not designate any appointing authority, nor any method of appointment, therefore it must be the Governor-General who is to appoint, and the method must be by Commission under his hand and the Great Seal,—that as the Statute is silent on the subject, he may appoint any person he pleases, without any qualification as to profession, residence, &c., and may appoint what salary he pleases. Evidently, either this Statute (the Peace Preservation Statute, 1869) is quite defective and incomplete in this respect, or else the Canada Police Act, 1868, contains a good deal of superfluous matter, which is altered and augmented with equally superfluous care in the Police Amendment Act, 1879; both which Acts contain anxious provisions authorizing the appointment of Commissioners of Police. It becomes, however, in my opinion, unnecessary to consider this point, inasmuch as Mr. Todd is armed with a Commission under these last-mentioned Acts, which undoubtedly and expressly authorize this last-mentioned Commission and define the powers of the Commissioner. He is "for the purpose of carrying out the criminal laws "and other laws of the Dominion only, "to have" (42 Vic. D., c. 37, s. 2) "all the powers and authority, rights and privileges by law "appertaining to Justices of the Peace generally . . . . . and to "Police Magistrates of cities, ... and Stipendiary Magistrates "in the Province." That is to say, he is to have, for the purpose of carrying out any laws of Canada only, all the powers of a Justice of the Peace. The Peace Preservation Act is a law of Canada only, and its provisions may (32-33 Vic. (D.) sec. 18) be carried out by a Justice of the Peace. It follows necessarily that they may be carried out by a Commissioner under the Canada Police Acts, *i. e.*, by Mr. Todd.

This conclusion, however, was then disputed by the plaintiff on still wider grounds. He impeached the constitutionality of all these Acts of the Dominion Parliament as being in direct conflict with the B. N. A. Act, 1867, and therefore *extra vires* and void. The portions of the B. N. A. Act which were relied on were certain sub-sections of sec. 92 of the B. N. A. Act. That section reserves exclusively to the Provin-

cial Legislature "the power to make laws in relation to matters coming "within the classes next hereinafter enumerated, viz.:" . . . (Sub-section 4) "The establishment and tenure of Provincial offices, and the "appointment and payment of Provincial officers." . . . (Sub-section 9) "Shop, saloon, tavern, and other licenses, in order to the raising a "revenue for Provincial, local, or municipal purposes." . . . (Sub-section 14) "The administration of justice in the Province, including "the constitution, maintenance, and organization of Provincial Courts, "both of civil and criminal jurisdiction, and including procedure in "civil matters in those Courts." Mr. *Davie* argued, what can scarcely be disputed, that by such legislation as that of the Peace Preservation Acts, the power of the Province to raise a revenue for Provincial or local purposes is very largely and directly interfered with; so that sub-section 9 would be thereby almost reduced to a dead letter over half the Province. He further argued that the functions of Mr. Todd being confined to a particular district, situated wholly within the Province, demonstrate that his is a Provincial jurisdiction. That every officer whose jurisdiction is limited geographically within the Province is a Provincial officer; and he cited with emphasis and approval the dictum of a very learned Judge to the effect that but for the express words of s 96 of the B. N. A. Act, the Province would have the nomination of all judicial officers, including the Judges of the Superior and County Courts; and that the exception in that section (s. 96) was very strong to prove the rule to be as laid down in sub-section 14, whereby the administration of justice in the Province, and the constitution, &c., of Provincial Courts, is unreservedly given to the Province exclusively. And his conclusion was, that the provisions of the Peace Preservation Act were *extra vires* and bad, at least so far as it affected the Provincial power of granting liquor licences (for a Statute, like an award, may be good in part and bad in part), and that, however that might be held, all the proceedings before Mr. Todd were merely void as being *coram non judice;* he was not a duly appointed Judge; the Dominion has no power to appoint a Provincial Judge at all.

I shall not repeat my observations in the *Thrasher* case on the meaning of the term "Provincial." I shall merely point out that it may have a political, as well as a geographical, meaning; that the former, not the latter, is its true meaning in sub-sec. 14; and sec. 130 of the B. N. A. Act declares that . . . . . "all officers of the several "Provinces having duties to discharge in relation to matters other than "those . . . by this Act assigned exclusively to the Legislatures "of the Provinces shall be officers of Canada." It would have been, perhaps, less liable to criticism to say, "all officers having duties to "discharge *in* the several Provinces, other than," &c., "shall be officers "of Canada;" rather than, as the section is printed, "all such officers "*of* the Province . . . . shall be officers of Canada." But the very awkwardness of the phrase, if it be awkward, shows more forcibly the

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intention that all officers within the description in s. 130, though officers of the Province in one (*i. e.*, the geographical) sense, are not Provincial officers within the meaning of sub-section 4; and so, I conceive, the Courts held by them are not Provincial Courts within sub-section 14. At all events, which is all I have now to decide, I am quite clear that those sub-sections do not include or refer to officers who hold office under purely Dominion laws, and exert a jurisdiction under Acts of the Parliament of Canada over matters which are exclusively placed under the control of the Dominion Legislature; and that Mr. Todd is not a Provincial officer, nor his Court a Provincial Court, within the sub-sections relied on by Mr. *Davie*.

The validity of the Peace Preservation Act (and incidentally of the Canada Police Act) on constitutional grounds, as affected by the B. N. A. Act, 1867, was much debated before me, and the arguments now produced were taken, in the cases of *Rodd* and *McGillis*, which came before me on appeal, during the recent circuit in the Kootenay District, *McGillis's* case having been twice adjourned. On the last occasion I was requested to abstain from giving a definite decision (which could not be subject to appeal), in order to have a third argument in Victoria. No third argument, however, has ever been had, and, consequently, no decision has been given in *McGillis's* case. But having now to state my conclusion on these points, I am bound to decide wholly in favour of the validity of both Acts, for reasons not necessary now to be stated at large, as they were given, though provisionally only, on the adjournment of *McGillis's* case. I may, however, state shortly that the impugners of these Acts seem not to have duly considered the force of certain other sections of the B. N. A. Act than those above quoted. The Act, of course, is to be construed as a whole; nor do I see any difficulty in so doing, one clause being taken not as a contradiction of but as an exception to another. The two clauses I particularly refer to are s. 101, and the exceptions (*a*) and (*c*) in s. 92, sub-section 10. Section 92, enumerating the matters exclusively within the cognizance of the Provincial Legislature, includes, by sub-section 10, "local works and undertakings *other than* "such as are of the following classes, viz.: (*a*) Lines of . . . railways " . . . and other works and undertakings connecting the Province "with any other or others of the Provinces," and "(*c*) Such works as, "although wholly within the Province, are before or after their execu- "tion declared by the Parliament of Canada to be for the general "advantage of Canada, or for the advantage of two or more of the "Provinces." And s. 101 declares that "The Parliament of Canada "may, notwithstanding anything in this Act, from time to time, "provide for the construction, maintenance, and organization of a "general Court of Appeal for Canada, and for the establishment of "any additional Courts for the better administration of the laws of "Canada."

In my opinion, the C. P. R. is a public work within the meaning of s. 92, sub-section 10 (*a*); therefore, though geographically, of course, situate in many Provinces, not placed by the B. N. A. Act, s. 92, under the exclusive legislation of any Province in any part of its extent: therefore (by s. 91) placed for its whole extent under the exclusive legislation of the Dominion Parliament. The Peace Preservation Acts are, in my opinion, laws of Canada in relation to this public work and confined to it; and I include in the term "work" not merely the railway track, but all such works, approaches, erections, and clearings as are necessary for laying out, constructing, and maintaining the railway proper. Section 91, therefore, expressly empowers the Dominion Parliament to pass a law concerning such a work, and s. 101 further empowers the same Parliament, if it thinks fit, to establish additional Courts for the better administration of that law. And Mr. Todd is a duly appointed officer of Canada, to whom authority is given to enforce and administer all laws of the Dominion only, and therefore to enforce this law.

Mr. Todd's Court being then, in my opinion, a legal Court, the defendant further maintains that it is a Court of Record, and that as the provisions of the "Replevin Act, 1873," are by section 2 declared "not to authorize the replevying of or taking out of the custody of "any Sheriff or other officer any personal property seized by him "under any process issued out of any Court of Record for British "Columbia," the Sheriff, therefore, cannot replevy these goods. And then, inasmuch as by section 8 it is enacted that the Sheriff "shall not "serve a copy of the writ until he have replevied the whole," or so much as he finds in his Bailiwick, and as the action cannot proceed, evidently, until the defendant be served with the writ, and yet that it is not lawful to serve it, by reason of this dead-lock, the defendant asks that the writ and all proceedings thereon be set aside.

Now, dealing with these points in succession, I have very little doubt but that Mr. Todd, sitting to perform any judicial business by virtue of his Canada Police Commission, does constitute a Court of Record. He is to have all the powers and authorities of a Justice of the Peace, or of a Stipendiary Magistrate. Such Justices, sitting judicially, are a Court of Record. (*Dalt*, c. 2, 4, and the useful note at the commencement of part ii., ch. 1, of *Paley* on convictions, cited by Mr. *Richards*.) And I think that every proceeding before them is judicial, if had or taken in a matter with which they can deal judicially, and which leads obviously and purposely up to a judicial decision. It might be otherwise if they were merely acting ministerially, and in a matter on which they had not power to adjudicate finally. But apart from his status and authority as an ordinary Justice of the Peace, the "Canada Police Act, 1868," section 5, enacts that "every such Commissioner" shall keep minutes of "every proceeding had by and before him." What is this, but to enact that he

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is to keep a record of all proceedings in his Court? And it is everywhere said that a record (not being a mere private memorandum, but a record), which it is the bounden duty of any Court to keep, proves by the mere production of it that the Court, whose record it is, is a Court of Record. And Mr. Todd's jurisdiction is, by his commission, the act of his creation, co-extensive with the Province. His Court is, therefore, in the words of the Statute, "a Court of Record for British Columbia." The goods seized under his warrant are "seized under the process of a Court of Record for British Columbia;" and so by s. 2 are not to be retaken or replevied.

What, then, is to be done with the writ? In the case cited by Mr. *Richards* (*Scott* v. *McCrea*, 3 U. C. Pr. 16), the Court set aside the writ; but they did so expressly acting on the authority given to them to that effect by s. 9 of the amending Act (Ontario, 1860, c. 45), which (as already remarked) has not been introduced here. The present action, perhaps, may proceed and the plaintiff recover appropriate damages without serving the writ of replevin, as it might without any actual replevin or reduction or re-delivery of the goods. *Parke*, B., in *Jones* v. *Johnson* (5 Exch, p. 875), says: "Replevin lies in all cases against the party by whose orders goods have been improperly taken." But I give no opinion now upon that. Neither do I give any opinion as to the effect which the conviction of the 29th September may have on the rights of the plaintiff. All points connected with the action itself, in which, if successful, the plaintiff will recover either the goods or their value, as well as damages *ultra*, can be best determined in the course of the action itself, and after the parties have put in their pleadings. At present I refuse the defendant's application. As to costs: If it ultimately appear that the plaintiff be in the right he ought not to have been harassed with this summons; if he fail, he ought not to have resisted it. The costs of this application by the defendant will therefore abide the result of the action.

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GRAY, J.
1886.
27 February.

"Homestead Amendment Act, 1873"—Exemption from execution—Seizure by Sheriff—Costs of Seizure.

Held, that where a judgment debtor claims the benefit of the "Homestead Amendment Act, 1873," in respect of goods seized by the Sheriff under a *fi. fa.*, the judgment debtor must pay the Sheriff's costs of seizure and possession money.

In this case the Sheriff seized, under a judgment, certain quantities of personal property in the residence of the defendant, consisting of furniture and household goods. The defendant's wife claimed a portion of those goods as her separate and distinct property, and an interpleader suit was at the time of this application pending relative thereto. The defendant himself put in a claim to the Sheriff of the exemption of the remaining goods he had seized, under the "Homestead Amendment Act, 1873." The goods so remaining seized were valued by Mr. Clark, the auctioneer, at $446. The ownership by defendant was proved and admitted, the right to exemption under the above Act conceded, and the Sheriff ordered to deliver them up on payment of the costs of seizure and possession money; the question then arose who was to pay the Sheriff those costs, both sides admitting he should be paid.

Walls, for the defendant, contended that as the goods were exempt by law, the plaintiff must pay the Sheriff's costs.

Mills, for the Sheriff, stated that Mr. Justice Walkem had so decided in a case lately before him.

Helmcken, for the plaintiff—The goods of the defendant are liable for the costs, as they were not exempt from seizure until the defendant claimed the benefit of the Act.

GRAY, J.:—

As I differ from the conclusion arrived at by my brother Walkem both on principle and the construction of the statute, I shall assign my reasons, that the point may be brought before the Full Court and be finally determined; and I should order that the Sheriff retain possession until his costs are paid by the defendant Humphreys; and if not paid within a reasonable time, then that he proceed as he may be advised according to law under execution. To obviate the necessity of this order it may here be stated that, without prejudice to his contention, to save further expense, Mr. Walls has given an undertaking to pay the Sheriff's costs and possession money, if the Court should order them to be paid by Mr. Humphreys, which undertaking was accepted by Mr. Mills on the part of the Sheriff, and the possession relinquished.

The words of the Act are very simple:—"The following personal "property shall be exempt from forced seizure or sale by any process

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"at law or in equity, that is to say, the goods and chattels of any "debtor, at the option of such debtor, or if dead, of his personal repre- "sentative, to the value of $500, the same not being homestead "property under the provisions of the 'Homestead Ordinance, 1867.'"

This is an exceptional privilege. It is to be enforced, it will be perceived, at the option of the debtor. The Sheriff is by the writ commanded to seize and sell the goods of the debtor to pay his debt. He acts according to law. The goods are in defendant's possession; the seizure is made according to law, and the expenses incurred. The Sheriff cannot possibly know of any exemption, until the defendant declares his option. The debtor has laid by, never informed his judgment creditor, or the Sheriff, of his intention to claim this exemption, permits the expenses to be incurred, and then, in addition to depriving his creditor of the means of realizing for his debts, tells him he must pay the expenses of seizing the goods which the defendant openly held in his possession as his own, and which in law were at the time liable to seizure; for up to the time of the debtor's statement of his option to the Sheriff there was no exemption, and no one but himself could say that he intended to exercise that option.

The Act never meant to give such encouragement to fraud. A man who claims a latent personal privilege, which exempts him from the ordinary consequences attached by law to his conduct, must take the consequences of omitting to state his privilege. The goods were not exempted when the Sheriff seized them. The expenses, therefore, operated as a legal encumbrance on the goods, and they could only be redeemed by the removal of that encumbrance. Who wants to redeem them? The defendant—not the Sheriff. The defendant must, therefore, remove the encumbrance. If a man is in such financial difficulty that his chattels are liable to seizure under an execution for defendant, he can obviate expenses by leaving at the Sheriff's office a notification of his exemption under a Judge's order. If he will not exercise his option until the expenses are incurred, he must bear them like any other encumbrance on his property.

The goods were in his possession up to the issuing of the execution; he could have sold them and appropriated the proceeds to himself, the very goods, perhaps, which formed the consideration of his debt and the judgment; and in my opinion the law never for one moment assumed that when he exercised this privilege for his own benefit he was to do so at the expense of the man he had already injured.

The question of privilege under the Homestead Act was fully argued before me in June, 1878, in *Johnson* v. *Harris*, by two of the ablest lawyers in the Province, the late Hon. Mr. Justice Robertson and the present Hon. Mr. Justice McCreight, the point there distinctly taken being "that a claim of exemption from seizure is a matter of "privilege, which the Sheriff is not bound to notice unless effect be

"given to the privilege by the order of a Court or Judge." I shall quote from the judgment then delivered by me, that part of it which bears on this point:—

"*Addison* on Torts (c. 14, p. 662, 4th ed.), lays down the law with "great distinctness, that an action is not maintainable against a "Sheriff who has seized privileged or protected goods in obedience to "the command of a writ, but the person injured must apply to the "Court for an order upon the Sheriff to release the goods. The "case of *Ewart* v. *Jones* (14 M. & W., 774), confirming *Tarlton* v. "*Fisher* (2 Dougl., 676), clearly sustains this view with reference to "personal arrests, while *Rideal* v. *Fort* (11 Exch., 847) confirming the "position, extends it to the case of goods seized under a *fi. fa*, and "points out the distinction which would exist, where case has been "brought, showing the process of the Court had been maliciously "used, and trespass for acts done under a *fi. fa.*, or *ca. sa.*, in the bonâ "fide discharge of duty. There Alderson, B., says:—'A writ is "'delivered to the Sheriff, commanding him to levy on the plaintiff's "'goods. The Sheriff has no means of knowing whether the goods "'are in fact protected from seizure; and if he acts in obedience to the "'writ, that is a sufficient defence to an action against him. It may "'be, that if he wrongfully and maliciously seizes the goods, he is "'liable to an action on the case. Here, however, the only question "'is, had the Sheriff the right to do what he has done, and in my "'opinion he had. If these goods are really exempted from the oper-"'ation of the Acts, the proper course was to apply to the Court to "'order the Sheriff to withdraw, and restore them, not to bring an "'action against him for simply obeying the writ.

"'In all the cases of privilege, whether on the ground of the person "'being a member of the Legislature, or having a duty to perform "'about the person of the Queen, or from any other cause, it has "'always been considered that the Sheriff is justified if he obeys the "'commands of the writ, and that the privileged party must apply to "'the Court for his discharge. The same principle applies to goods "'which are protected.'

"The reasoning on which these decisions rest is so clear that a "doubt cannot exist of its soundness. Exemptions under statutes "depend upon a great many requisites, pointed out in those statutes, "many involving very nice points and requiring the consideration of "judicial minds. How is a Sheriff, a mere ministerial officer, acting "under a positive writ or order of the Court, to know whether all the "requisites of these statutes have been complied with?"

The law says, if a man wants the benefit of "a certain privilege, "which is different from that which men ordinarily possess, let him "come forward, claim his right, and prove it before the proper "tribunal, and then he shall have the benefit of it."

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In that case from which I have just made this extract, the claimant, the plaintiff, was non-suited.

In *Lakin* v. *Nuttall*, in December, 1878—also heard and decided by myself, an application similar to the present—the order of exemption was made subject to the payment of the Sheriff's costs. In the present case I must adhere to the same practice and principle. It is difficult to see what such a defendant wants. First, he gets the goods without having paid for them; 2nd, he gets relieved of six years' interest on the debt and cost, at 12 per cent.; 3rd, he keeps the goods ostensibly as his own, as long as they give a certain amount of credit from apparent ownership; 4th, when they are seized for debt he then claims he may exercise his latent option of exemption, but his creditor must pay for his conferring that benefit upon himself. The statute never intended anything so unreasonable.

I adjudge and order that the defendant Humphreys is liable for the Sheriff's costs and possession money, to be duly taxed according to law, and that Mr. Walls carry out the undertaking given by him above set forth. If desired, the defendant may appeal to the Full Court.

DIVISIONAL COURT.
1886.
August 21.

REGINA *v.* GOLD COMMISSIONER OF VICTORIA DISTRICT.

Mandamus—Sec. 14 "Chinese Regulation Act, 1884"—Sec. 20 "Mineral Act, 1884"—Free Miner's Licence—Differential taxation—B. N. A. Act, 1867, sec. 92.

Held, by the Divisional Court, consisting of Begbie, C. J., Crease, Gray and McCreight, JJ., that sec. 14 of the "Chinese Regulation Act, 1884," declaring "that "no Free Miner's Certificate shall be issued to any Chinese except upon payment of "fifteen dollars," was an attempt to impose a differential tax on the Chinese, and, therefore, *ultra vires* of the Provincial Legislature.

Taylor obtained from the Chief Justice a rule *Nisi* calling upon the Hon. William Smithe, Chief Commissioner of Lands and Works, as Gold Commissioner of Victoria District, to shew cause why a writ of *mandamus* should not issue, commanding the said Commissioner to issue to the applicant—a Chinese, not being a British subject by naturalization or otherwise—a free miner's certificate, under section 20 of the "Mineral Act, 1884," upon payment of five dollars.

Upon the return of the rule the argument was adjourned into the Divisional Court.*

14th August, 1886—The Attorney-General (*Davie*, Q. C.), for the Commissioner, now showed cause.

It is not denied that the formal requisites necessary to obtain the certificate have been complied with. The Commissioner's refusal is based on sec. 14 of the "Chinese Regulation Act, 1884." That

* Present—Begbie, C. J., Crease, Gray, and McCreight, JJ.

section enacts that "no free miner's certificate shall hereafter be issued to any Chinese, except upon payment of the sum of fifteen dollars." In supporting the validity of this section he referred to his argument in *Wing Chong* v. *Bull* (*ante*, p. 150), and in particular to the judgment of *Field*, J., in *Lin Sing* v. *Washburn* (20 Cal. 534), and the case of *The People* v. *Naglee* (1 Cal. 232). He further argued that as a free miner's licence conferred upon the holder the privilege of entering upon the waste lands of the Crown, the Crown had a right to say upon what terms this privilege should be granted.

Taylor, for the applicant *in limine*, contended that sec. 14 of the "Chinese Regulation Act, 1884," was by necessary intendment repealed by secs. 15 and 16 of the "Mineral Act, 1884," the latter Act having last received the royal assent (*Rex* v. *Justices of Middlesex*, 2 B. and Ad. 818; *O'Flaherty* v. *McDowell*, L. R. 6, H. L. Cas., p. 142).

On the constitutionality of sec. 14 he argued:—

1st. The subject matter of the Act did not fall within any of the classes of subjects by sec. 92, B. N. A. Act, 1867, assigned to the Province, and hence the Act was *ultra vires* (*Dobie* v. *Temporalities Board*, 1 *Cartwright's* Constitutional Cases, p. 351). The Local Legislature could not, under the guise of enacting something within its powers, act in fraud of the law and exceed those powers, by doing indirectly that which it could not do directly (per *Dorion*, C. J., *Attorney-General* v. *Queen's Insurance Company*, affirmed on appeal, L. R. 3, App. Cas. 1090, *Doutre* Constitution of Canada, ed. 1880, p. 209).

The real subject matter of the "Chinese Regulation Act, 1884," was the exclusion of Chinese from the Province, and not the management of Crown lands or the raising of a revenue (per *Crease*, J., *Regina* v. *Wing Chong*, 2 B. C. Law Reports, p. 150, *et seq.*, and B. C. Interpretation Act, 1872, sec. 7, sub-sec. 38).

2nd. If the subject matter of the Act did fall within sec. 92, it also fell within sec. 91, B. N. A. Act, 1867, and was thereby overborne and the Province deprived of the right to legislate upon the same subject (*Potter's Dwarris* on Stats. and Limitations, p. 673, ed. 1878,—citing, with approval, *Story* on Constitution, p. 447; *Doutre's* Constitution of Canada, ed. 1880, p. 135; per *Story*, J., *Railroad Co.* v. *Husen*, 95 United States Supreme C. R., p. 465).

The expressions in *Regina* v. *Hodge* and *Regina* v. *Severn* were dicta, and did not purport to lay down any rule of general application, nor were they authority in support of the contention of the Province of the right to legislate concurrently with the Dominion in this instance.

The Act conflicted with the right of the Dominion to regulate "trade and commerce" and the rights of aliens.

By requiring a larger sum to be paid by Chinese than required from other miners, before being entitled to equal privileges with

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natural born British subjects in acquiring mineral lands, a disability was imposed upon a class of aliens from which the Dominion had expressly relieved them (sec. 24, "Mineral Act, 1884," "Naturalization Act, 1881," 44 Vic., cap. 13, sec. 4).

If the power of the Province so to tax was admitted, there were no limits to its exercise, and it might be carried to the extent of prohibiting the carrying on of the trade or business of mining altogether, in such respect interfering with and working a practical assumption of the powers of the Dominion, and therefore void (per *Ritchie*, C. J., in *Reg.* v. *Justices King's County*, 2 *Pugsley* 485; *City of Fredericton* v. *The Queen*, 3 Can. S. C. R. 505; per *Story*, J., *Railroad Co.* v. *Husen*, 95 United States Supreme Court R., 405; *Cooley* Constitutional Limitations, pp. 24, 603, 4th ed.; *Gibbons* v. *Ogden*, 9 Wheaton 210; *Potter's Dwarris* on Statutes and Constitutions, pp. 671-2-3, ed. 1878.)

3rd. A tax was imposed falling unequally upon particular individuals in a class, and Chinese miners could not be singled out from a class of miners generally and be subjected to burdens over and above those borne by others of the same class, such imposition being a lawless exaction not within the province of free governments (*Cooley* on Taxation, ed. 1876, pp. 127-8-9; *Lin Sing* v. *Washburn*, 20 California Reports, p. 534; *Cooley* Constitutional Limitations, 4th ed., pp. 441-2-3, 611.

4th. In any event, the exercise of a power of this nature was inconsistent with existing obligations of Great Britain under the present treaties between Great Britain and China (per *Gray*, J., *Tai Sing* v. *Maguire*—not reported; *Regina* v. *Wing Chong*, *ante* p. 150).

Treaties were a fundamental law of transcendent force, to be construed in a much wider and liberal spirit than ordinary contracts, and the power of legislation was restrained by them (*Chitty's* Prerogatives of the Crown, p. 167; *Sedgwick* on Construction of Statutory and Constitutional Law, 2nd ed., p. 384; *Hall's* International Law, pp. 281-3-4).

The judgment of the Court was delivered by—

McCREIGHT, J.:—

This was a motion to make absolute a rule *Nisi* for a *mandamus* in the usual form, obtained by Low Chin, a Chinaman, against the Chief Commissioner of Lands and Works as Gold Commissioner for the Victoria District, for the issue of a free miner's certificate upon payment of the sum of five dollars, under section 20 of the "Mineral Act, 1884."

The Chief Commissioner of Lands and Works appears to have insisted that fifteen dollars was the sum legally demandable from Low Chin as a Chinaman, under the "Chinese Regulation Act, 1884," sec. 14; and the question before us is shortly this—whether the latter section is constitutional or not?

A case under the 5th section was determined by Mr. Justice Crease last year, where he held *(Reg.* v. *Wing Chong, ante* p. 150*)* in effect that the 5th section was unconstitutional.

The case of *Tai Sing* v. *John Maguire*, before Mr. Justice Gray, under another Provincial Act of 1878, was substantially the same, and the decision to the like effect.

These decisions appear to have been acquiesced in by the Government, and were scarcely questioned before us: but it was contended by the Attorney-General that a free miner's licence rested on a different footing: that it was a privilege for going on lands of the Crown, and not like a store-keeper's licence. But we cannot agree with that contention, for a perusal of the two Acts shows that a Chinaman can scarcely reside on the gold-fields for any length of time without taking out a free miner's certificate.

Sec. 24 of the Mineral Act provides that interests in mines or ditches can only be recognized, in case of dispute, where the claimant has had a licence at the time the dispute arose.

We think a Chinese store-keeper, for instance, could not carry on his business, except at a serious disadvantage, without taking out a miner's licence which would enable him to realize mining shares, a kind of property which, no doubt, he must frequently take, as a security for debts due to him by miners, as well as otherwise.

Section 25 would prohibit a Chinaman from recovering wages for labour performed as a miner, &c., or on any ditch, &c.

Section 26 would leave him liable to distress of his goods and chattels by the Collector if he is engaged in mining without a licence: such distress, moreover, to extend to the goods of others on his premises.

Reverting to the Chinese Regulation Act of 1884, section 15, we find special provision calculated to oblige Chinese residents on a gold-field to take out a mining licence.

That section provides that any Chinese found mining for gold, &c., following the ordinary occupation of a free miner, whether on his own account or for others, without having in his possession a free miner's certificate, &c., and any person who shall employ any Chinese in and about gold mining who has not in his possession such a certificate, shall forfeit a sum not exceeding $30.

We think these various provisions are calculated to oblige Chinamen, residents of gold-fields, to pay $15 for a mining licence, instead of the sum of $5, payable by others.

But even if the tax only applied to Chinese mining on their own account, it or some other similar tax might likewise be applied differentially to all other employments in which they happen to be engaged; and it will scarcely be contended that such discriminating taxes would be constitutional.

DIVISIONAL COURT. 1886.

REGINA v. GOLD COMMISSIONER OF VICTORIA DISTRICT.

Indeed, Mr. *Taylor* quoted from *Todd's* Parliamentry Government, pp. 154 and 155, A.D. 1880, where the Queensland Legislature seem to have passed an Act imposing a differential tax on Chinese miners, and which was disallowed by the Imperial Government, acting, of course, under legal advice.

If this Act was wrong on the part of Queensland, it would, moreover, be unconstitutional if passed by our Local Legislature.

The Attorney-General relied on the judgment of *Field*, J., dissenting from the majority of the Court in *Lin Sing* v. *Washburn*, 20 California Reports, p. 534, and relying upon the case of *The People* v. *Naglee*, 1 Cal. 232.

As far as we can gather, not having access to the latter report, these opinions appear to have gone upon the principle that the Federal powers proceeded from the States, and the power of taxation "not "having been parted with by the people of the States when they "organized the Federal Government, it consequently extends to all "persons within the territorial jurisdiction of the respective States, 'and embraces foreigners residing therein as well as citizens. The "power being conceded, the limitation and extent thereof must, as to "subject matter, persons, amounts, and times of payment, rest in the "discretion of the Government of each State: and if a State, enacting "laws in pursuance of this acknowledged power, sees fit to impose the "burden of taxation upon a portion of the persons within the sphere "of its jurisdiction, and specially exempts others, its legislation, even "though it might be unequal and unjust, would yet be no infringe-"ment of the Constitution of the United States."

But the very different origin of the respective Dominion and Provincial powers, under the B. N. America Act, 1867, are, of course, known to all, and have often been referred to by Judges as essential to be borne in mind when a question arises between Dominion and Provincial jurisdiction.

If *The People* v. *Naglee* and Mr. Justice Field's dissenting opinion in *Lin Sing* v. *Washburn* proceeded on any other principle than what appears from the above quotation, then we can only say we perfer the judgments of the majority of the Judges in that particular case.

We think that a free miner's certificate must issue to Low Chin on payment of the sum of five dollars, and, therefore, the rule must be made absolute.

JOHNSON AND OTHERS *v.* BRADEN AND OTHERS.

WALKEM, J.
1887.
26th March.

Mechanics' Lien Act, 1879—Lis Pendens—Filing Statement of Claim not Imperative—Equitable Assignment—Money Orders.

R. contracted with N. to build for him a house—the last instalment ($1,125) to be paid 31 days after its completion. The contract contained a condition that R. should pay his sub-contractors and protect N. and his estate in the premises from registration of any liens; in case of default, N. was to be at liberty to satisfy such liens and deduct the amount payable, or to become payable, to R. by virtue of the contract.

The building was completed on 30th October, and on 3rd November R. by a number of instruments in writing, directed N. to pay the Defendants (sub-contractors who had supplied materials) sums amounting to $920.50, out of moneys due or to become due from N. to R. on the contract.

About one hour after the last of these documents had been presented to N. (who refused to accept them), the Plaintiffs notified N. that they claimed a lien for $889.00 for materials supplied, and on the same day they instituted proceedings to enforce it.

Held, that notwithstanding that these documents were good as equitable assignments without any acceptance by N., the lien-holders were entitled to be paid in preference to the Defendants.

The Plaintiffs' statement of claim omitted to state the *kind* of material supplied.

Held, that the statement was inoperative.

By the Mechanics' Lien Act (unless there is an express agreement to the contrary), every mechanic or other person shall, by virtue of being employed upon a building or furnishing materials, have a lien without any preliminary registration of a statement of claim, provided he institutes an action to enforce the lien and registers a certificate of *lis pendens* in the Land Registry Office within 30 days,

Held, therefore, that the filing of the defective statement did not prejudice the plaintiffs' lien.

This was an interpleader issue, which was tried, by consent, before Mr. Justice Walkem, without a jury, to ascertain which of two classes of claimants, viz.: The holders of mechanics' liens on a building, and the holders of money orders given by the contractor on the owner was entitled to the unpaid balance of the contract price in the owner's hands after the contractor had completed his work. It arose out of an action on a building contract, brought by the present plaintiffs (as sub-contractors), to enforce a mechanics' lien against C. B. Robelee, the contractor, and Messrs. Norris and Yates, as owners, respectively, of the house and land mentioned in the contract.

By the contract, Robelee agreed to build a house for Norris, and complete it by the 30th of September, 1886, under a penalty of $4 for each day's delay thereafter. The price was $4,500; and the last instalment of $1,125 (with which we have alone to deal) was made payable 31 days after completion, and also subject to conditions which will be mentioned in the judgment. The building was not completed until October 30th—thus involving a month's delay, with consequent penalties of $120. The instalment would not, consequently, fall due until the 30th of November.

During the progress of the building Robelee was supplied with labour and materials by the plaintiffs and defendants, respectively, for which

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he owed the plaintiffs $889.94; and the defendants collectively, $910.50. Within four days after the completion of the building, and, therefore, nearly a month before the last instalment would mature, Robelee gave the defendants the following orders on Norris:—

"VICTORIA, B. C., Nov. 1, 1886.

"Fred. Norris, Esq.:

"Please pay to Dobbs the sum of $110 and charge the same to my "account

"C. B. ROBELEE.

"For painting your house."

"VICTORIA, B. C., Nov. 1, 1886.

"Fred. Norris, Esq.:

"Please pay to McKillican & Anderson the sum of $140, on account "of stairs in your house, and charge the same to my account.

"C. B. ROBELEE."

"VICTORIA, B. C., Nov. 3, 1886.

"F. Norris:

"Please pay to Mr. Sayward the sum of $350 for material furnished "in the construction of your house, and charge the same to my account

"C. B. ROBELEE."

"VICTORIA, B. C., Nov. 3, 1886.

"To Fred. Norris, Esq.:

"Please give Mr. Braden one hundred and fifty dollars ($150), and "charge the same to my account of residence.

"C. B. ROBELEE."

"VICTORIA, B. C., Nov. 3, 1886.

"Mr. F. Norris:

"Please pay to the Albion Iron Works (Lim.) the sum of $160.50, "and charge the same to my account, for grates, etc., supplied on your "house.

"C. B. ROBELEE."

These orders were presented to and left with Norris on their dates, and in the sequence in which they are set out. Norris was asked, but refused, to accept them. He said, however, he would keep them and pay them if any money should be found coming to Robelee.

About an hour after the last order had been so left, the plaintiffs notified Norris that they claimed a lien for the materials supplied to Robelee, and they also instituted legal proceedings the same day to enforce it. With respect to the orders, the defendants submitted at the trial that they were absolute assignments *pro tanto* of Norris' indebtedness to Robelee, and were governed by sub-section 6, of section 3, of the Judicature Act, which is as follows:—

"Any absolute assignment by writing under the hand of the assignor "for any debt or other legal chose in action, of which express notice in "writing shall have been given to the debtor, or other person, from

"whom the assignor would have been entitled to receive, or claim, such "debt or chose in action shall be and be deemed to have been effectual "in law (subject to all equities which would have been entitled to "priority over the right of the assignee if this Act had not passed) to "pass and transfer the legal right to such debt or chose in action from "the date of such notice, and all legal and other remedies for the same, "and the power to give a good discharge for the same, without the "concurrence of the assignor," &c.

The plaintiff's counsel, *Drake*, Q. C., contended:—

1st. That they were not assignments of debts, but were imperfect money orders, or bills, which imposed no liability on Norris, for want of acceptance, and no charge, in any event, upon any money in his hands belonging to Robelee:

And 2nd. That if they were assignments, they were inoperative, as no written notice of them had been given to Norris, as required by the section quoted, and as instanced in *Brice* v. *Bannister* (L. R. 3 Q. B. D. 569) where the notice was by a distinct document.

Wilson and *Yates*, for the defendants, contended that the orders were equitable assignments of the contractor's interest in the contract price, made before notice had been given to the owner (Norris) by the plaintiffs of their claiming a lien on his building and land; and that notice of the assignments being also prior to notice of the lien, the section of the Judicature Act took effect, and vested the right to the moneys so assigned in the defendants. They relied on *Brice* v. *Bannister*. They also argued that the plaintiffs had lost their lien, as their statement of claim as to the lien was fatally defective in not mentioning the *kind* of materials which they had furnished to the contractor.

WALKEM, J.:—

I confess that were it not for clear decisions to the contrary, which are binding here, I should have considered some, at least, of the instruments to be money orders.

The document, for instance, in favour of Dobbs is a very common form of money order requiring acceptance; but the words at the foot, "for painting your house," when taken in conjunction with the direction by Robelee to Norris to charge the $110 to his account, viz., "the residence account," as explained in evidence, makes the documents, according to the authorities, an equitable assignment of a debt of $110 payable by Norris out of a special fund, *i. e., the contract price* of the house, when due to Robelee. The same remarks apply to the wording of the other orders, *e. g.*, "for grates, &c.," "stairs," "material," "for your house." Braden's order is the clearest assignment, as it is made payable by Robelee out of "my account of residence;" that is, out of a special or limited fund. Now, it is a matter of common business knowledge that an instrument intended as a note or bill is neither

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one nor the other if made payable out of a special or limited fund, as Braden's order is, or upon a contingency such, for instance, as the arrival of a certain ship. The reason is that the fund may not be sufficient, or may not exist at all, and the ship may never arrive; and certainty as to the time of payment is essential to a bill or note.

It has been decided that no form of words is necessary to constitute a valid assignment of a debt; nor is acceptance, or assent to pay it, by the debtor needed to give it effect. If the debtor owes the money he must pay it to the person to whom the debt may have been transferred, whether he likes it or not. It may be inconvenient or disagreeable to do so, but it is the law. In *Brice* v. *Bannister*, at p. 580, Bramwell, L. J., observes: "It does seem to me a strange thing, and hard on a "man, that he should enter into a contract with another and then find "that because that other has entered into some contract with a third, "he, the first man, is," sometimes, "unable to do that which is reasona- "ble and just he should do for his own good. But the law seems to be "so; and any one who enters into a contract with A must do so with "the understanding that B may be the person with whom he will have "to reckon."

The following documents, which I have selected (out of several that I have examined) on account of their close resemblance to Robelee's orders, were respectively held, in *Garner* v. *Hayes* (10 O. A. R. 24), and in *Farquhar* v. *City of Toronto* (12 Grant 186), *not* to be money orders or bills needing acceptance, but valid, equitable assignments of debts:

"LONDON, Oct. 21, 1880.

"*To Thos. Hayes, Esq.:*

"Please pay W. C. Garner $311.64, for lumber used in your house, one month after the building is finished, and oblige,

"T. MILTON."

"TORONTO, Aug. 5, 1864.

"*To Mr. McCord, Chamberlain of the Corporation of the City of "Toronto:*

"Pay Mr. James Farquhar the sum of $178, due from me to him, on account of work done at Registrar's office in Court street.

"R. STOREY."

In view of these instances, and of other decided cases, and particularly of those referred to in *Royall* vs. *Rowles* (L. C. Eq.), I feel justified in deciding that all the orders signed by Robelee were valid assignments of the debts they represented; and although the money to which they related would not be due for nearly a month after their dates, still they would be effectual, as they were transfers by Robelee of his interest in the *contract price* as far as they went (see *Brice* v. *Bannister*, and, also, *Buck* v. *Robson*, L. R. 3 Q. B. D. 686) But, like all such assignments, they were subject to all pre-existing equities which

Norris had, under his contract; for instance, his prior right to deduct from the instalment, when due, the penalties incurred by Robelee for delays; his prior right to pay off any liens, and deduct their amount, also, as provided by the following clause:—"The contractor (Robelee) "will pay and satisfy all dues and demands for work, labour, and "materials in the premises, and protect the proprietor (Norris) and all "his estate, right, title, and interest, in the land and premises from "registration of any lien or liens under the Mechanics' Lien Act of 1879 "and amendments thereto, and if default shall be made in this condition, "the proprietor may pay and satisfy the amount of any lien or liens, if "registered, and all expenses in the premises, and deduct the same from "any amount payable, or to become payable, to the contractor by virtue "hereof."

This provision was not for Robelee's benefit, but for Norris' protection. It clearly means that Robelee thereby undertook to pay his sub-contractors, and, in case of default, to leave any moneys coming to him, available to Norris to enable him to relieve his property from any liens arising out of such default. Robelee's right to the money when due would, therefore, be, so far, subordinate or secondary to Norris'; and, independently of the rule of law just stated, that the right of the defendants, as assignees of Robelee, would be subject to Norris' prior equities as between him and Robelee, their rights, as *sub-contractors*, could stand no higher than Robelee's as contractor. Their rights grew out of his, and were therefore limited by his; hence their rights, for instance, under the clause of the contract quoted, were subject to Norris,' for, as a matter of law, they were presumed to have known, and ought to have known, the character of the contract upon which their sub-contracts were based. (See *Phillips* on Mechanics' Liens S. 272; and *Forhan* v. *Lalonde*, 27 Grant, 604.)

Again, section 12 makes every lien a charge on 10 per cent. of the contract price under conditions, which, if complied with by the plaintiffs, would give Norris a right, prior to any rights Robelee or his assignees might have, to protect himself against that charge, by insisting on its being extinguished out of the contract moneys in hand. If he should fail to do so, he would run the risk of having to pay the amount twice. Now, Norris has never abandoned any of these rights; nor has he waived them by depositing the money in dispute in Court, as he was ordered to pay it in, but without prejudice, as I stated at the time, to any rights that he might be found entitled to. The pleadings were in such a confused state that it was difficult to see what other order to make; and I now think, after full knowledge of the case, that it was the best order that could have been made. The amount paid in was $1,125, less the penalties of $120, making $1,005. Norris' right to deduct the penalties was never questioned; why should not his other rights, standing, as they do, upon the same footing, be allowed? It

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cannot be fairly suggested that he has had any opportunity of exercising them, for, from the moment his building was completed, and hence for nearly a month before the money now in dispute was due, he has been harrassed by the present litigation and by adverse claims upon the money—and all through Robelee's breach of contract, and not from any fault of his own.

We now come to the plaintiffs' case, and necessarily to the consideration of the "Mechanics' Lien Act, 1879," as amended in 1883.

In the first place, the plaintiffs claim that they have a lien on Norris' house, and the land connected with it, and also a charge, amounting to 10 per cent. (or $450) on the contract price, as security for payment of their account of $889.94 against the contractor, Robelee. Their claim depends upon sections 3, 12 and 21 of the Statute. Sections 3 and 21, when read together, provide, in effect, that every mechanic or other person shall, by virtue of being employed upon a building, or furnishing materials for it, have a lien or charge upon it, and the land connected with it, without any preliminary registration of a statement of claim, provided he institutes an action to enforce the lien and registers a certificate thereof in the Land Registry Office within 30 days. (See *Walker* v. *Walton*, I. O. A. R. 597.) By sec. 12 "the lien shall also "operate as a charge to the extent of ten per cent. of the price to be paid "by the owner, up to ten days after completion of the work, in respect of "which such lien exists, or of the delivery of the materials and no "longer, unless notice in writing be given," of the lien by the person claiming it, to the owner of the building, &c. The plaintiffs further claim that they have complied with the conditions of the above sections, and are therefore entitled to payment of their lien in full, out of the fund in Court, as it was deposited to abide the result of this action on the only issue tried, viz. :—"Who is entitled to the money; the lien-"holders or order-holders?" At the trial, the plaintiffs proved their account, and showed that it arose from a written contract which they made with Robelee in July, 1886, to supply him with certain specified building materials for Norris' house, in consideration of a lump sum of $1,200. The materials were to be delivered in parcels as Robelee wanted them. The last parcel was delivered ten days before the house was completed, that is to say, on the 20th October, 1886. According to a well-known rule, this date would, in contemplation of law, be the date on which all the materials were delivered, as the contract would only then be completed, and the price for all fully earned. As the date of completion, the 20th of October would, therefore, be the date from which the lien would take effect, by virtue of sections 3 and 12, on the real estate and on the contract price. Possibly the lien existed sooner, but I have not to decide that point; besides it is immaterial here. Under section 12, notice of the lien should have been given to Norris within ten days afterwards, to make it a charge on the $450; but it

was not given till the 3rd of November, or 14 days afterwards; hence it was too late. The plaintiffs, however, entered their action to enforce their lien on the 3rd of November, and filed a certificate thereof on the 9th in the Land Registry Office. They were, therefore, well within the 30 days (computing from Oct. 20th) allowed them for the purpose. But the certificate has been objected to on the ground that, though signed by the Registrar, the seal of the Court was not attached to it. On enquiry, I find that it has been the practice of the Registrar to issue certificates in this manner, and that it has been the corresponding practice of the Registrar-General of Titles to accept them, and to register or file them as valid certificates from the Court. This practice was followed in the present case; but, I must say, I think it is a bad one, and should be abandoned. The object of registering the certificate, which is merely a certificate of *lis pendens*, is to give notice of the lien to the public, and also to settle any questions of priority that might arise between different incumbrances—nothing more. As the certificate has been registered; this object has been carried out. I do not feel justified, therefore, in holding that the absence of the seal has deprived the plaintiffs of their lien.

Objection has also been taken to the statement of claim filed by the plaintiffs under sections 4 and 5 of the Act, inasmuch as it omits to state the *kind* of material furnished. I think the objection is a good one, and renders the statement inoperative; but the filing of a statement of claim is not imperative. It in no way creates the lien, nor is it necessary to sustain it. When properly framed and filed it gives the lien-holder the status of a purchaser, to the extent of his lien on the property affected by it; in other words, it further secures the lien; and this further security, together with the costs incidental to it, is all that the plaintiffs lose by the document being inoperative.

A review of the Ontario legislation, which led up to the Act from which ours has been taken, throws considerable light on this subject. At the trial, one of the main points relied upon by the defendants was, that as their orders were prior, on the 3rd of November, to notice of the plaintiffs' lien, they were prior to the plaintiffs' lien, and should prevail over it: but this conclusion is a mistake, for the lien was in existence, as I have said, on the 20th October (if not sooner) by virtue of section 3 of the Act; that is, for twelve or fourteen days, at least, prior to the date of the orders.

For the several reasons given, I am clearly of the opinion that the plaintiffs have established their lien for $889.94 on the house and land in question, and have a claim, paramount to the claims of the defendants, for that amount, on the $1,005 deposited in Court. As by section 16 of the Act, the plaintiffs represent, in this action, all other lien-holders of the same class, the title to the balance, of about $115 in Court, must remain unsettled until the rights of such lien-holders

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are determined (as they will be) in the original action. It might be suggested that, as Messrs. Norris and Yates are not parties to this action, they are not affected by this decision, so far as it declares that their property is subject to the plaintiffs' lien; but it must be borne in mind that the issue submitted to me for trial was, "Who is entitled to the money in Court: the lien-holders or the order-holders?" and that such issue was submitted at their instance, for their benefit, and necessarily involved two questions, namely: Whether the plaintiffs' lien was valid or not?—and I have decided that it was,—and next, whether, if valid, it should not be discharged in accordance with the terms of Norris' contract, out of the money which he has paid into Court?—and this I have also decided in favour of Norris. But, furthermore, as the money is to go to the plaintiffs and any other lien-holders hereafter found entitled to it, *pari passu*, it will discharge all their liens *pro tanto*, and to that extent protect his property. The defendants have not shown a title, as yet, to any of the money. If, in the original action, it should hereafter appear that no claim, by reason of other liens, is established to the balance of $115, possibly, it may be ordered to be paid to the defendants, according to the priority of their orders. But I have no power to deal with such a question now.

I think both parties to this action were warranted in having a judicial decision on the questions submitted, as they are new here and of considerable importance. Therefore, in directing judgment to be entered for the plaintiffs, I do so without costs.

EDMONDS AND OTHERS
v.
THE CANADIAN PACIFIC RAILWAY COMPANY.

BEGBIE, C. J.
1886.
6th August.

Consolidated Railway Act, 1879 (42 Vic. D. c. 9)—Application of, to Special Act—Canadian Pacific Railway Incorporation Act (44 Vic., c. 1)—Powers of Company under——Right to build line beyond terminus.

Held, on the construction of the C. P. R. Act, 1881, and the contract and charter incorporated therewith:—

1. That Port Moody is thereby constituted the Western terminus of the Canadian Pacific Railway.

2. That sub-s. 19 of s. 7 of the "Railway Consolidated Act, 1879," forbidding the extension of any line beyond the terminus is, by s. 18 of the Company's Charter, imported into the Act of 1881, and is not inconsistent with the general power of the Company given by such last-mentioned Act, to construct branches from any point along their line, to any other point in Canada.

3. That the Company has no power to take lands for any purposes not authorized by some Act of Parliament, and, therefore, no power to interfere with or construct a line on the Plaintiff's lands, which were all to the westward of Port Moody.

The plaintiffs are owners of real estate through which the defendants proposed to construct their railway from Port Moody to Coal Harbour and English Bay

From the affidavits filed it appeared that the Company had caused notice of arbitration to be served on each of the plaintiffs, but from one cause or other the arbitration proceedings had fallen through.

The Company proceeded under sec. 9 of the "Consolidated Railway Act, 1879," and deposited a plan of the proposed line, and gave notice to the plaintiffs that an application would be made to Mr. Justice McCreight for a warrant to the Sheriff of the City of New Westminster to put the Company in possession of the right of way through the said lands. The application was refused by Mr. Justice McCreight. Subsequently, notice was given of a similar application to the Chief Justice, but the application was abandoned.

The Company then served a notice of its intention to apply on the 6th August to Mr. Justice Gray for a warrant.

On the 4th August, 1886, *Pooley*, for the plaintiffs in this action, moved, on notice, before the Honourable the Chief Justice, for an order restraining the defendants, the Canadian Pacific Railway Company, their officers, contractors, servants, workmen, and agents, from making, constructing, and extending the main line of the Canadian Pacific Railway from Port Moody to Coal Harbour and English Bay, in the Province of British Columbia.

Drake, Q. C., for the defendants.

The arguments are set out at great length in the judgment.

6th August, 1886, Begbie, C. J., delivered the following judgment:—

In this case I feel compelled to adhere to the opinion I have already twice intimated. I do so, necessarily, with regret, because I think it is contrary to the interests of everybody in the Province, including the plaintiffs. But what I have to do is to construe two Acts of Parliament, and to say whether, according to them, the defendants have the power to construct their proposed line from Port Moody to Coal Harbour. And I am obliged to say that I think they have not. A public railway company cannot construct a line except by the authority of an Act or Acts of Parliament. It shares in the disability of all other corporations: it cannot acquire or hold land for any purposes not authorized by some Act of Parliament, either Dominion or Provincial. There is here no question of any Provincial Act. The Company owe their existence and their powers solely to the Dominion Act, 1881. The Company may, undoubtedly, acquire and hold all land necessary for the purposes authorized in their Act. It is admitted that the plaintiffs' lands, or parts of them, are necessary for the construction of the proposed works. The only question, therefore, is whether the proposed works are authorized by the Company's Act? For if not, even if the shareholders should be entirely unanimous and sanction any contract for land beyond what is necessary for the works so authorized by Parliament, the Company cannot hold such land; cannot protect themselves against trespassers; cannot enjoy the privileges of a public

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line there; it is not their land; nothing can make it their land but an Act of Parliament. And the question, as just stated, have the Company the authority of an Act of Parliament to construct this line from Port Moody to Coal Harbour?

The process of obtaining parliamentary powers is much the same as in England. In Canada, as in England, a company procures what is called a Special Act, empowering them to go from one point to another, with more or less power of deviation. This Special Act sometimes contains special powers and clauses modifying the General Act. The only Special Act of the defendants is the Act of 1881, 44 Vic., c. 1. Then the "Consolidated Railway Act, 1879," steps in, and is to be read along with, and as part of, the Special Act, modified or entirely abrogated by any clauses in the Special Act which modify or abrogate any part of it. The provisions in the first part (sections 5 to 34) of the "Consolidated Railway Act, 1879," are, by section 2, "to apply to "every railway constructed, or to be constructed, under the authority "of any Act passed by the Parliament of Canada, and shall, so far as "they are applicable to the undertaking, and unless they are "expressly" "(not impliedly) "varied or excepted by the Special Act be incorporated "with the Special Act, form part thereof and be construed therewith as "forming one Act." The method, or at least a method by which any sections of the General Act are to be excepted from the Special Act, is declared in s. 3: "It shall for this purpose be sufficient in the Special "Act to enact that the sections of the General Act proposed to be "excepted, referring to them by the words forming the headings of "such sections respectively, shall not be incorporated with the Special "Act; and the Special Act shall thereupon be construed accordingly" This is not declared to be the only method, but as a sufficient method. This method has accordingly been followed in various parts of the defendants' Special Act: (*e. g.*) by section 18 of the charter says the 11th sub-s. of the 8th section of the Consolidated Railway Act shall not apply. By s. 21 of the charter, sub-ss. 1 and 2 of s. 22 of the Consolidated Act are "not to apply." By s. 23 of the charter, various other sections and sub-sections are declared "not to apply" to the Canadian Pacific Railway Company, etc. But it has been argued that certain other clauses of the Consolidated Act, not thus expressly excepted, are, nevertheless, excluded from being incorporated with the defendants' Special Act: a matter which shall be considered presently.

The Special Act of the Canadian Pacific Railway is, as has been stated, 44 Vic., c. 1. This Act sets forth in a schedule the contract between Her Majesty and the promoters of the Railway Company (approved and ratified in s. 1, and, so I take it, is of equal authority with an Act of Parliament). It then (s. 2) declares that the Governor may grant to the promoters and their associates, under the name of the Canadian Pacific Railway Company, a charter conferring on them

the powers and privileges embodied in another schedule (a schedule to the contract), which charter being published as therein mentioned is to have the effect of an Act of Parliament incorporating the Company with those powers. No evidence was produced before me to show that such a charter was granted or published; but I assume that this was duly done—and this seems admitted by both parties. Both the schedules,—viz., the contract, which is the schedule to the Act (44 Vic., c. 1) and the schedule to the contract,—are printed along with the Act, and are to be read, I think, as substantive Acts of Parliament would be read. In order to avoid confusion, I shall refer to the first schedule to the Act as the contract, and the schedule to the contract I shall refer to as the charter of the Company. Now, by section 15 of the charter, the Canadian Pacific Railway is defined to mean, 1st, a continuous line, called the main line, from Callander to Port Moody; 2nd, a proposed branch from some point not stated on the main line to Fort William; 3rd, an existing branch from Selkirk to Pembina; 4th, "other branches to be located by the said Company from time to "time, as provided by the said contract;" 5th, "such other branch "lines as shall hereafter be constructed by the said Company;" 6th, "any extension of the said main line that shall hereafter be constructed "or acquired by the said Company." The works authorized to be constructed by the Company are such as come within the first five categories; and, therefore, the Company may take lands necessary for those purposes. No power appears to be given in the charter to construct an extension of their main line; and the word "constructed" in this s. 15 must be taken to mean "lawfully constructed," *i. e.*, under some subsequent Act, if the Company choose to apply for it and obtain it, But, by s. 25 of the charter, the Company, "as an extension of the railway hereby authorized to be constructed," are empowered—not to construct a new line—to acquire, by purchase or lease, certain lines leading to the Atlantic tidal water, or to acquire running powers over any line then (1881) already constructed between Ottawa and the Atlantic seaboard. Nothing is said in the charter as to any extension westward beyond Port Moody. Indeed, it is singular to observe that whereas, in my opinion, the whole of the rights of the plaintiffs and defendants raised in this action depend on the answers to two questions: "What is a terminus?" "What is an extension, as distinguished from a branch line?" there is not, so far as I can see, anywhere, either in the Act or in the scheduled contract, or in the charter, any express declaration of what the termini of the Canadian Pacific Railway shall be; no spot is, in express words, assigned, either for the eastern or western terminus; nor is there any express definition of "a branch line" or "extension" of the main line; though "branches" and "extensions" are certainly treated as different works.

I do not think, however, that there is much difficulty in forming an

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opinion upon either of these two points. By the same s. 15 of the charter, the main line is to extend from the terminus of the Canada Central Railway, known as Callander station, to Port Moody; and all other lines which may form part of the undertaking are termed "branches" or "extensions." It seems to follow from this pretty clearly that Callander and Port Moody are the extreme termini of the main line of the Canadian Pacific Railway, at least until some "extension" of the main line be acquired. The same conclusion clearly appears from the contract: though this document, like the charter, equally refrains from using the word "terminus" as applied to any part in the Company's line. By s. 1 of the contract, the whole railway is divided into four sections: the Eastern section, commencing at Callander; the Lake Superior section; the Central section, reaching to Kamloops, in British Columbia; and the Western section, extending from Kamloops to Port Moody. This latter section is stated to be then (1881) partly built—in course of construction: and, by s. 6, the Government are, by the 1st May, 1891, to complete the remaining portion of the Western section lying between Yale and Port Moody. This is all which then (1881) remained to "complete" this Western section. Upon reaching Port Moody the Western section is completed. That is, Port Moody is the Western terminus. I pause to notice that the Company had also agreed (s. 4 of the contract) to complete the said Eastern and Central sections by the same date, viz., 1st May, 1891, and that both the Government and the Company have actually constructed these respective portions in four years, instead of the ten years which the contract allowed them. But this circumstance unfortunately, however demonstrative of energy and good faith, has nothing to do with the construction of an Act of Parliament.

An Act of Parliament, as has been often said, *loquitur ad vulgus*. It addresses itself to men of ordinary speech and apprehension. And without some very express declaration in other parts of the special Act to the contrary (and there is nothing even by implication indicating any other terminus) it really is mere common sense to say, Callander and Port Moody are the two termini of the main line mentioned in the Special Act, which embodies both the contract and the charter. These places are not, it is true, expressly called the termini; but they are, I think, indicated and determined as the termini beyond doubt or cavil; they are the only places mentioned in the Special Act which can at all be considered as termini, and they are places designated in that Act in such a way as that nobody of ordinary understanding can take them to be anything else. And if these places are not the termini, there is really no limit whatever, east or west, to the defendants' line. The line they are empowered to construct is not a line from any one place to any other place; it is not a line at all; they have no line, unless it be a line between these two places. These, therefore, are the termini.

Simple as this conclusion is, it brings us very near to a decision. For the "Railway Act, 1879," s. 7, is express. After providing (sub-sections 17 and 18) that a Railway Company may make branches as therein mentioned either from their terminus or from any other station, sub-section 19 proceeds to enact: "But no Railway Company shall have "any right to extend its line of railway beyond the terminus mentioned in the Special Act." Now it is proved, and indeed not denied, that the lands of the plaintiffs upon which the Company proposes to construct a railway are beyond Port Moody, all of them being from half a mile to 7 miles westward of that point. The proposed works seem therefore forbidden in terms by sub-s. 19.

It was contended by Mr. *Drake* that, in consequence of the special powers and clauses in the contract and the charter, this sub-section 19 does not apply. By s. 22 of the contract, the "Consolidated Railway "Act, 1879," is to apply "in so far as the provisions are applicable to "the undertaking, but are not to apply so far as they are inconsistent "with or contrary to the provisions" of the contract or the charter. And he insisted, 1st, upon the very large powers conferred on the Company by s. 4 of the charter being a grant of "all the franchises "and powers necessary or useful to the Company to enable them to "carry out," etc., "and avail themselves of every condition, stipulation, "obligation, right, privilege, and advantage contained or described in "the contract." Now, in the first place, the very wideness of these expressions shows that they are little more than mere verbiage. It might be "useful" for the Company in the execution of its works to requisition stores, rails, provisions, etc., of which it might happen to be in pressing want. This would come within the description of "a "franchise or power." Of the utility for their own purposes they would be the sole judge. But nobody would dream that the words extended so far, any more than the present defendants would dream of attempting to exercise such a power. Section 4, I apprehend, merely expresses in large words that the Company shall have full power to do everything that they may lawfully do to enable them to carry out the contract. At all events I do not see in this (s. 4) any implication even that any clause of the "Railway Consolidated Act, 1879," is to be excepted from applying; in particular nothing whatever which, even by implication, prevents sub-s. 19 from applying. On the contrary, section 4 gives the Company the benefit of all the stipulations in the contract, and one of those stipulations is, that the "Railway Act, 1879," is to apply generally (charter, s. 17). And this stipulation may prove to be of service to the Company; for one of those clauses of the General Act (sec. 7 sub-s. 17) gives the Company express power to construct branches from either terminus—a power which is not expressly given to the Company, either in the contract or in the charter, and can only be given to them (apart from this provision in the General Act) by a rather forced interpretation of section 14 of the contract. Nor can the general

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obligation and precise enactment of a statute, such as is contained in sub-s. 19 above cited, be thus set aside by implication by the suggestion of an apprehended inconsistency. In the first place, the provisions of the Consolidated Railway Act cannot be excepted by implication. They must (s. 2, 1879) be "expressly varied or excepted." And, as has been shown, the Company were aware of this, and have acted on s. 2 in various parts of the charter. But, in fact, in my opinion, no inconsistency exists. Sub-s. 19 is entirely consistent with the gift of powers in s. 4 of the charter. And it is, in fact, along with other sections and sub-sections of the Consolidated Railway Act, expressly incorporated with the Act of 1881, by ss. 17 and 18 of the Charter.

Mr. *Drake* then contended that the proposed new works were a mere branch of the railway: that by section 14 of the contract the Company were to have power to lay out and work branch lines of railway from any point or points along their main line to any point or points within the territory of the Dominion: provided always that before commencing any branch they shall first deposit a map and plan of such branch in the Department of Railways. Mr. *Drake* insisted that this deposit of a map and plan was made the only requisite preliminary to the construction of the branch, and that this section operated to repeal sub-sections 17 and 18 of section 7 of the Consolidated Act (which contains other provisions respecting branches, and limits them to six miles in length), and also to repeal sub-section 19, forbidding any extension of works beyond the terminus. That by section 18 (*d*) of the charter, a copy of the map or plan so deposited, when certified by the Minister, was to be received as evidence in any Court of Law in Canada, which meant, he said, that the Government had approved the scheme, and had declared it within the Company's powers, approving also, of course, of the plan as accurate: and that the production of such certified copy was to be evidence of all this. Then, reverting to section 14 of the contract, Mr. *Drake* said Port Moody is a point on the company's main line, and Coal Harbour is a place in the Dominion, therefore section 14 is quite express in favour of the Company.

Now, so far from section 14 of the charter operating as a repeal of sub-sections 17, 18, and 19, above set out, I think they may all very well stand together: and, indeed, in one respect, as I have already stated, sub-sections 17 and 18 of section 7 of the Railway Consolidation Act, give a clearer power as to making certain branches than section 14 of the charter does, viz., branches from the terminus, which are expressly within section 17, whereas the words of section 14 "from any point or points *along* the main line" appear to indicate any point or points not being the terminus, though they certainly would authorize a branch from a point not being a station at all, whereas sub-section 17 merely speaks of branches from stations (or from the terminus) on the main line. And on a line of the dimensions of the Canadian Pacific Railway, such a difference of powers is not unreason-

able. Mr. *Drake* treated it as clear that the power to build branches to any point in the Dominion repealed the six-mile limitation of distance by reason of repugnancy or inconsistency. But to me there seems no necessary inconsistency, though this point is not before me, and any opinion upon it is unnecessary for forming a conclusion in the present case. It is surely competent to say "the Company may go to any point in the Dominion within six miles of any point of their main line": only instead of saying this in two lines, they have said it in two Acts of Parliament. If the intention had been to prevent the application of section 7, sub-section 17, the statute itself points out a very simple method, and nothing would be easier than to say: "sub-section 17 of section 7 shall not apply." And this the Company well knows: for they have adopted this method in various parts of the charter. In fact, section 18 of the charter appears most expressly and deliberately to accept section 7 ("powers") of the Consolidated Act, with all its sub-sections, including 17, 18, and 19, only adding this further power, that the Company may enter and take certain Admiralty lands (powers of the Company). The other modifications in section 18 of the charter grants apply to section 8 of the Consolidated Act (plans and surveys) and not to section 7 ("powers"). As to sub-section 19, which forbids the extension of the line beyond the terminus, it is really difficult to see how even an apparent contradiction, or inconsistency, can be shown between this and anything in the charter. And there must be some limitation to the excessive generality of the power to go to "any point in the Dominion." Can it be argued that this would authorize the construction of a line from Callander, or from any point short of Callander, to the Atlantic seaboard below Quebec? Unless it will authorize such a line, it will not authorize the prolongation from Port Moody to Coal Harbour. The difference in the length of the proposed extension does not affect the principle. But in fact their Act gives the Company no power to "construct" any extension whatever. Neither can I possibly listen to Mr. *Drake's* suggestion that the signature of the Deputy Minister of Railways on the deposited plan is evidence of the accuracy of the plan (how could he undertake for the surveys?) or of the correctness or the legality of the scheme. What possible weight could his opinion of the powers of the Company be allowed to have in discussing the construction of two or three Acts of Parliament? His signature probably binds neither himself nor the Government to anything of that sort. It merely certifies that this is a true copy of the plans which the Company have deposited, and the statute makes such copy admissible in evidence, probably as against the Company. It may be suspected that the argument was founded on some confusion of the plans of this Company and the plans of a Government railway, which is quite a different thing, and governed, very reasonably, by a different Act. (See. 1881, chapter 25, section 10, sub-section

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5.) Neither can I listen to the proposition that section 4 makes the deposit of the plans the sole preliminary necessary, and by implication sweeps away all the safeguards in section 7, sub-sections 17, 18 of 1879, and enables the Company immediately on such deposit of a map to construct any line which they may choose to call a branch line, though it be 500 miles in length, and pass through the heart of the chief cities in Canada, without notice to private owners, and without compensation, or security for compensation; that all the Company have to do is to deposit the plans they propose to carry out. When put in that light, even Mr. *Drake* shrunk from his proposition. Yet unless the argument will support that, it leaves sub-section 19, and also, I rather think, leaves untouched the greater part, at least, of sub-sections 17 and 18.

The defendants to-day are very careful to term their proposed addition a branch, merely. From the copy of the map produced it would appear that they called it originally an extension. This is entirely immaterial. There is no magic in names. If the proposed works could, in my opinion, be brought within the meaning of a branch line, I should feel it my duty to remove every obstacle impeding their progress, even though they themselves insisted upon calling it an extension. If what they propose is in reality an extension of the main line, it is not in the power of any Court to give them an authority which their own statute does not give them, much less to do what their own statute (in which the Consolidated Act is embodied) forbids. Mr. *Drake* urged that a prolongation beyond the terminus, even if not exactly a branch, would not necessarily change the terminus; and if it did not change the terminus, it would be really only a branch. The answer is, it is not a change of terminus which the statute forbids, but the construction of a line extending beyond the terminus. But that a real, and, in fact, a total change of terminus is contemplated by the Company, appears clearly from the terms of their arrangement with the Provincial Government—not that I rely upon that at all, any more than on the nomenclature "branch line," or "extension" line, which they may choose to adopt. There being no statutory definition, we are left to common usage, and the common meaning of the words. It is admitted theoretically possible to conceive an "extension" westward from Port Moody. It is not even theoretically possible to conceive any line which is more appropriately and exactly an extension of the main line than the works now proposed. The Company have, in my opinion, no power to construct these works, nor to purchase the lands, nor to hold the lands. Their charter gives them many powers, and power to acquire and operate on an "extension" eastward (by purchase, or lease, or running powers on existing lines), but it gives them no power to construct any extension whatever, either westward or eastward, beyond their termini, and no power even to acquire any extension or running powers over any extension

westward from Port Moody. They have no power under their Act to acquire lands except for the purpose of constructing works authorized by that Act. Therefore, they fall within the general incapacity of corporate bodies to take and hold land; and besides this, sub-section 19 appears to me expressly to forbid this prolongation of their main line westward from their terminus mentioned in their Act. They have, therefore, no possible right—at present, so far as I can see, no power to acquire a right—to enter on the plaintiff's lands. That power and that right they may, probably, readily acquire from the appropriate Legislature. I think it is proved that they have done so, after notice of objection by the plaintiffs, and after a promise to withdraw by the defendants. The plaintiffs, therefore, are entitled to have an order as to their respective lands. At one time plaintiffs in such a case would have been left to their actions of damages in trespass, but it is now in the discretion of the Court to grant a restraining order, which I now do until the hearing or further order of this Court. Reserve costs. Liberty to apply.

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1886.
31st July,
2nd, 3rd, & 20th Aug.

Water-Rights—Ditches—Land Acts—Riparian Proprietors.

On Appeal from the Chief Justice (*ante*, p. 189).

Held, that the Land Acts do not limit statutory water-rights in a stream to those who are riparian proprietors thereon.

Where water-rights have been enjoyed under an alleged water record, and such rights are subsequently attacked, in an action for damages, on the ground that the statutory notices and conditions were not complied with:

Held, that error in these matters could not be taken advantage of long afterwards, at a trial, but should be raised within a reasonable time by prohibition or *certiorari*.

The word "adjacent," considered.

This was an Appeal to the Full Court* from the decision of the Chief Justice, reported (*ante*, p. 189).

The Appeal was argued on 31st July, and 2nd and 3rd August.

Drake, Q.C. (with him *Eberts*), for Appellant Carson.

Davie, Q.C., for Respondent Martley.

Wilson, for Respondent Clark.

20th August, 1885.—The judgment of the Court was delivered by McCREIGHT, J.:—

This was an appeal from a judgment of the learned Chief Justice, by which he decided that Carson and Eholt were and neither of them was entitled to recover against Martley and Clark, or either of them, for

*Crease, Gray, McCreight, and Walkem, JJ.

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having deprived them of water; and Martley, on the other hand, and Clark were entitled to recover on their counter-claims respectively against Carson, for damage to crops, owing to the latter having deprived them of the use of water. The facts sufficiently appear in the judgment appealed from. The learned Chief Justice, in his judgment, pp. 191 and 192, refers to an incorrect copy of an application for and record by Carson of a water right, May, 1868, but a correct copy was handed up to us and is as follows:—

"May 16th, 1868, No. 43, Robert Carson, Pavilion Mountain, 200 "inches.

" 'A ditch on Pavilion Mountain, coming from a large creek on a " 'mountain to about opposite to 26-mile post, said water ditch for " 'farming purposes on my ranch. I wish to record 200 inches of " 'water.'

(Signed) "E. H. SANDERS, S. M."

Certified a correct copy.

F. SOUES, Govt. Agent.

This document, when compared with two maps, also used by the Full Court, as well as by the learned Chief Justice, we think makes a satisfactory record and sufficiently indicates the water right, which is recorded, to be from Pavilion Creek, above Martley's military grant.

The learned Chief Justice likewise refers, p. 197, to the conditions mentioned in ss. 44 and 45 of the Land Act of 1865, and to paragraph 1 of the statement of defence, denying the performance of all these conditions, and to the failure of the plaintiff, Carson, to prove the affirmative. We think that if performance of these conditions went to the jurisdiction of the Stipendiary Magistrate, proceedings might and should have been taken by prohibition before he took action (under ss. 44-50, inclusive, "Land Act, 1865,") or *certiorari* afterwards (see cases cited, *Archbold's* Cr. Of. Pr. 153, 179, 180, and passim), and if the performance did not go to his jurisdiction, then his action thereon must be conclusive, as there appears to have been no "dispute," &c., within s. 48; and we may add that these remarks have some application to the word "adjacent," which the learned Chief Justice also discusses, p. 197, and which expression we shall deal with presently as between Carson and Clark.

As between Carson and Martley, however, it seems to us that these questions are of little moment, and that the award set out in the statement of claim and admitted by the defence, determines their mutual rights and liabilities in the present case.

The award is as follows:—

"We have been appointed arbitrators in a cause between Captain "Martley and Robert Carson, respecting the right to water in a certain "ditch passing through Captain Martley's farm on Pavilion Mountain,

"and damages that either may have sustained by the loss of water for "irrigation in the year 1869.

"We find that neither is entitled to damages. That while Captain "Martley has a sufficient supply of water in the two creeks passing "into his farm, he shall not be entitled to any water from Carson's "ditch; but in case of scarcity Captain Martley shall be entitled to "half the water in Carson's ditch, the half not to exceed in any case "fifty inches, and he will be entitled to get this for use on his farm "round his house, and to take it out of the ditch where it joins the "Island creek. Captain Martley may use these fifty inches on Pavilion "Mountain if he chooses.

"June 2, 1870. (Signed) "GEORGE A. KELLEY,
"JOSEPH L. SMITH,
"J. A. SMART."

And the questions are: Firstly, has Carson, in view of the evidence, an action against Martley? and, secondly, can Martley counter-claim against Carson successfully? and we are of opinion that Carson must succeed on the first question. The second we shall deal with presently.

It is plain from the award that Martley had no right to take water from Carson's ditch as long as he could get sufficient from Gillon and Island creeks—that in case of "scarcity" he could only use this water, or rather half of it, not exceeding fifty inches, on his farm round his house, and was not warranted in giving it to Clark—that he was to take it only from the junction of the ditch with Island creek, and that if he did use the fifty inches on Pavilion Mountain, he was to do so for his own agricultural purposes, not to waste it by returning it to Pavilion Creek or otherwise, and certainly not to give it away; and the award is to receive a liberal and sensible construction (*Russell* on Awards, p. 491). We think the evidence shows that Martley broke all, or nearly all, these stipulations, and that Carson sustained damage by his conduct.

We think also that the award and the evidence show that Martley has no demand against Carson, so far as regards the proper use by the latter of the water not exceeding two hundred inches by himself from his ditch (the question of "scarcity" as used in the award and the right to the fifty inches not arising), and that the counter-claim to this extent must fail. The learned Chief Justice seems to base his decision against Carson on this point, on the theory that "Martley had a preferential right to fifty inches," either under or independent of the award, to which we cannot agree; and the further theory that Carson's water right and record of May, 1868, "constituted no show of title," which we think is also contrary to the award and the water record as shown to us.

It must be remembered, however, that the award only deals with Carson's 200 inches and record, and any larger body of water

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abstracted by Carson's ditch involves considerations independent of the award, and to this extent it does seem that Martley's riparian rights have been invaded, in the abstract at all events. To what amount of damages that entitles him, having regard to Clark's intervening record, dated December 14, 1876, of 200 inches, from Pavilion creek, below Carson's ditch, and his (Clark's) ditch, made accordingly, we shall consider hereafter, when we deal with the subject of damages.

This brings us to the claim of Carson against Clark, and that of Clark against Carson, by a counter-claim, and as there has been no award between them, different considerations arise from what we have discussed.

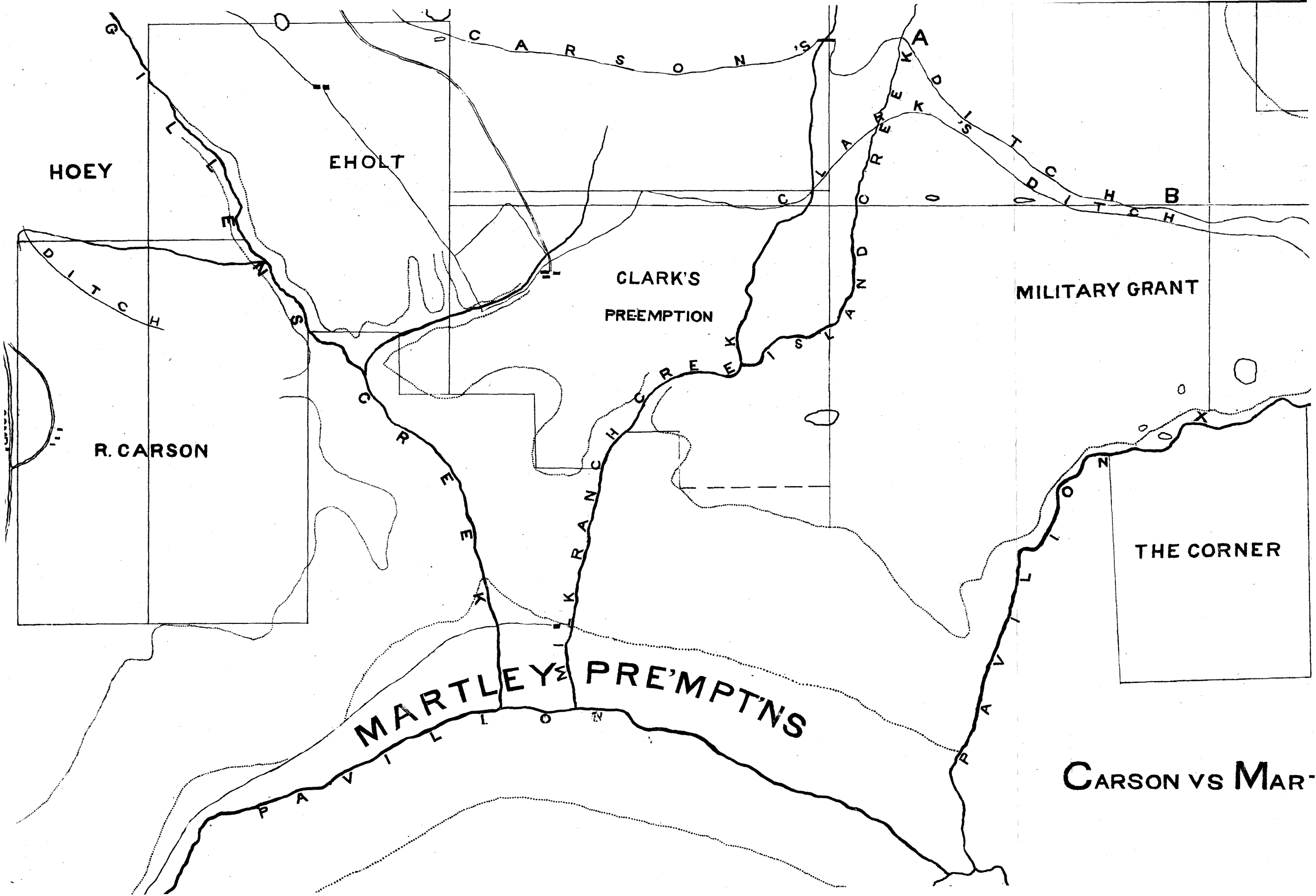
Clark seems to admit, in his statement of defence, the regularity and sufficiency of Carson's record of May, A.D. 1868, except that he says that the written authority of the Stipendiary Magistrate of the district was never obtained.

The record by the Stipendiary Magistrate is, we think, however, ample proof of this, and the omission to raise the point under s. 48, "Land Act, 1865," leaves it now past question.

We shall not repeat our remarks on this and similar questions, made in the case against Martley, but the observations of the learned Chief Justice, as to the word "adjacent" and that "the 44th section empowers "no man to take water from any stream who is not already at common "law entitled to riparian rights," are so important, that though the pleadings render the discussion unnecessary, we think we ought to express our opinion on them as (with sincere respect) we cannot agree with them.

If the Legislature intended to limit statutory water rights to riparian proprietors it is very singular that in the various Land Acts of A.D. 1865, 1870, 1875, and 1884, it should never once have made use of the expression "riparian" owner, although inspection of the various sections on the subject of "water" shows many occasions on which it would naturally have adopted that expression if applicable to the objects of the Acts. We may say that the Legislature has carefully avoided those words, although in every Act, except the last, it has altered its definition of the class of persons whom it authorizes to record water rights.

It has, moreover, uniformly made use of the word "adjacent," which the dictionaries to which we have had access show to be an elastic expression. Webster, for instance, defines it "lying near, close or "contiguous, but not actually touching, as a field adjacent to the high-"way, the adjacent forests, &c" And he says things are "adjacent" when they lie near to each other, without actually touching, as adjacent fields, adjacent villages, &c., and further he distinguishes it from the words "adjoining" and "contiguous." Again, to understand the meaning of the Legislature we should, of course, attend to the



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topography of the country with which it deals; and the greater part of British Columbia consisting of mountains and valleys, in which last the agricultural land chiefly lies, seems to explain why the expression "adjacent" should be used without the inconvenience and uncertainty which might arise if the Province had been a level or prairie country and all the lands which may be benefited by streams or lakes in their neighbourhood may in the view of the Legislature have been considered as coming within the expression "adjacent." Of course each case must depend on its own circumstances, and the question does not arise on the pleadings; if it did, we think we should have no difficulty in saying that both Clark's and Carson's farms were adjacent to Pavilion Creek, or in some part of its course.

On referring to the evidence we think the defendants are both equally to blame for the damage which Carson has sustained; indeed, Martley seems to have acted for the benefit and interest of Clark, and they are therefore equally liable. Carson proves his damages at $1,500 for 75 tons of hay short, the net value of which over expenses would have been $20 per ton, in all $1,500; also $300 for loss of summer fallow. Total, $1,800.

There appears to have been no cross-examination as to these valuations, which we think we must assume to be correct; indeed they were undisputed, and we think Martley and Clark are jointly and severally liable to pay Carson that amount.

With respect to Martley's counter-claim, the learned Chief Justice awards him $200, subject to a deduction which need not be dealt with; but he seems to us to do this on a supposed preferential right of Martley to 50 inches; but we think we have shown he had no right to that 50 inches under the circumstances, as there appears to have been no "scarcity" in Gillon's and Island Creek, except that occasioned by his giving away their water; and, again, he was only entitled to 50 inches in any event, after deducting Clark's 200 inches, and whatever Carson was entitled to take from his ditch.

We cannot give him more than nominal damages, as an acknowledgment of his riparian rights to Pavilion Creek. To this he seems to be entitled, as Carson took for himself as well as Eholt, which was an illegal proceeding, because we think Eholt had no right to the water as the learned Chief Justice considers; and as Martley could have maintained an action against Carson for that, even if the latter had been a riparian owner, as for the invasion of a riparian right without actual damage (see judgment in *Embrey* v. *Owen*, 6 Ex. 369, and *Gale* on Easements, 226, 232), so Carson, having only a recorded right which he exceeds, cannot stand in a better position than the riparian owner who, like him, makes use of the water regardless of the rights of others.

Eholt's rights and liabilities require but little discussion. The learned Chief Justice's ruling, that he had no rights, was hardly

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questioned. His counsel only argued that he had a statutory right by virtue of section 36 of the Land Act, A. D. 1870, to which it was conclusively answered that this section was repealed by the Land Act of A. D. 1875, whereas the conveyance under which he claimed, and which was silent as to water rights, was not executed until A. D. 1882. It becomes unnecessary, therefore, to enquire into the nature of a water privilege under the Land Acts, and whether it amounts to more than a license or personal privilege incapable of transfer.

His liability to Martley seems to be the same as Carson's, that is for nominal damages only; for Martley can sue in either case for the invasion of a right, but this is subject to the prior substantial rights of Carson and Clark.

It only remains to deal with Clark's counter-claim. On this the learned Chief Justice has assessed the damages at $500 against both plaintiffs; and this, if his theory that Carson had no right to the water had been correct, would seem to be unobjectionable. If his view had been the same as ours, that Carson was entitled to 200 inches, we think he would have given probably only $250, and we therefore assess these damages at that amount.

This disposes of the various questions between the two plaintiffs and the two defendants.

That of costs is governed by the law as laid down in *Baines* v. *Bromley*, (L. R. 6, Q. B. D. 691), and the later case of re *Brown*, *Ward* v. *Morse*, (L. R. 23, Ch. D. 386), where Baggallay, L J., says "the plaintiff "should recover from defendants the costs of action, except so far as "they are attributable to the counter-claim, and that the defendant "should recover from the plaintiff the costs of the counter-claim."

In that case the plaintiff's claim and the defendant's counter-claim were both successful, and (see *Wilson's* Judicature Acts, p. 408, ed. 1882). This would give Carson the general costs of the action and the defendants the costs of their counter-claims. Eholt, of course, can recover no costs, but must pay costs as a plaintiff who has completely failed.

We think this ruling should govern the costs in the Court below, as well as the Full Court.

[This case has been taken to the Supreme Court of Canada.]

THE CANADIAN PACIFC RAILWAY COMPANY *v.* MAJOR.

GRAY, J.
1886.
21st July.

Railways—"Consolidated Railway Act, 1879," (42 Vic. D., c. 9)—Application of to Special Act—Canadian Pacific Railway Act (44 Vic. D., c. 1)—Right to build line beyond terminus.

On the construction of the C. P. R. Act, 1881, *Held*,—

1. The construction of the Canadian Pacific Railway from Port Moody to Coal Harbour and English Bay clearly comes within the powers of the Company under their Act of Incorporation, and carries with it, as incident thereto, the right of appropriation of land (necessary for its construction), in the mode provided for by the Consolidated Railway Act of 1879.

2. It is immaterial whether the portion so constructed be called an extension or a branch, sub-sections 17 and 19 of section 7 of the "Consolidated Railway Act, 1879," being inapplicable.

3. It can come within the 14th paragraph of the contract, and, as a branch is fully authorized by the 15th section of the Company's Act.

This was an application under the following notice:—

"IN THE SUPREME COURT OF BRITISH COLUMBIA.

"*In the matter of the Canadian Pacific Railway Company, and in the matter of the Consolidated Railway Act, 1879, and amending Acts, and of all other Statutes in that behalf.*

"Take notice that application will be made to the Honourable Mr. "Justice Gray, at the Court House, in the City of Victoria, on Monday, "the twelfth day of July, 1886, at the hour of eleven o'clock in the "forenoon, or so soon thereafter as the same can be heard, for his 'warrant to the Sheriff of the City of New Westminster to put the 'Canadian Pacific Railway Company in possession of those portions "of lots one, four, eight and nine, in block eighteen; lot three, in block "nine; lots one A and three, in block eight; lots four, five and seven-'teen, in block one; according to the plan of the subdivision of lot one "hundred and eighty-four, in group one, in the District of New West-'minster, in the Province of British Columbia, that lies within a strip 'of land forty-nine feet six inches in width on each side of the centre 'line of the Coal Harbour and English Bay branch of the Canadian "Pacific Railway, as the same is staked out across said land and land "adjoining the same, containing fifty-eight hundredths of an acre, more "or less. Possession whereof is necessary for the construction of the "Coal Harbour and English Bay branch of the Canadian Pacific "Railway, with which the Company are ready forthwith to proceed.

"Dated the 29th day of June, 1886.

"CORBOULD, MCCOLL & ATKINSON,
"*Solicitors for the Canadian Pacific Railway Co.*

"TO CHARLES S. MAJOR, ESQ.,
"*New Westminster.*"

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McColl, on behalf of the applicants, read the affidavit of Mr. Abbott, the General Superintendent, setting forth "that the contract "for the construction of the whole of the Coal Harbour and English Bay "branch of the Canadian Pacific Railway had been awarded to Hugh "F. Keefer, who was ready to proceed with the construction;" and that for that purpose the immediate possession of certain parcels of lands which are described in the affidavit and notice, and which belong to the defendant Major, were necessary to be taken.

Taylor, for the defendant.

GRAY, J.:—

No objections are raised or taken to the details of the proceedings necessary to bring the case within the several statutes cited—if it be a proper case so to bring,—but the objection is taken *in limine* that there is no case at all.

The defendant is a friendly opponent—and holding the interests of others as well as his own at stake—says prove your case.

On the hearing the matter was reduced to two simple propositions:

1st. Is the contemplated work for which this land is needed and claimed an extension of the Canadian Pacific Railway, or is it a branch line?

2nd. If a branch line, does the right of appropriation under the Act of 1881, chap. 1, "The Canadian Pacific Railway Act," attach or not?

Without unnecessary waste of words, the proceedings being *per invitum*, the onus of making out a clear case rests on the applicants: no weakness of his opponent avails him.

It is equally unnecessary to waste time in contending that the construction of the Canadian Pacific Railway was and is an exceptionally special work—a great national undertaking of the highest importance,—to which the State contributed by enormous grants of public funds and material aid; that the Parliament recognized this view, and by the several statutes it passed has authoritatively declared that in construing those statutes the Courts should bear in mind the object and end to be attained by them.

It will be my duty therefore, consistently with the rules of law, to put the broadest construction upon the language and words used by the Parliament.

The Act, 44 Vic., chap. 1, under which the main road is built, recites that the Dominion had assumed the obligation of causing a railway to be constructed connecting the *seaboard* of British Columbia with the railway system of Canada.

The Contract to carry out that object is set out in the Act, and by its first paragraph, for the better interpretation of the contract, declares a division of the work into three sections, describing them, and that

"the portion of the railway now in course of construction, extending "from Kamloops to Port Moody, is hereinafter called the Western "Section." And that the words "The Canadian Pacific Railway," are intended to mean the *entire Railway*, as described in the Act 37 Vic., chap. 14. And in the 6th paragraph it says the Government shall cause to be completed the portion of the said western section now under contract, namely, from Kamloops to Yale, by the 30th June, 1885, and shall also cause to be completed on or before 1st May, 1891, *the remaining portion of the said western section lying between Yale and Port Moody.*

The Act of 37 Vict., chap. 14, after reciting the provision in the Terms of Union with British Columbia: That the Government of the Dominion should construct a Railway from the Pacific towards the Rocky Mountains, and from such point as may be selected East of the Rocky Mountains towards the Pacific to connect the seaboard of British Columbia with the railway system of Canada, enacts by sec. 1: That a railway, to be *called* "The Canadian Pacific Railway," shall be made from some point near to and south of Lake Nipissing to some point in British Columbia, on the Pacific Ocean, *both the said points to be determined*, and the course and line of the said railway to be approved of, by the Governor in Council.

Thus we have by the Statute a clear definition of what the Railway was to be, its points and object, determined by the authority of Parliament. The Vancouver Island Pilot, published by the Admiralty in 1864, titled "Straits of Georgia," and describing Burrard Inlet as the first great harbour which indents the shores of British Columbia north of the 49th parallel, says: It is divided into *three distinct harbours*, viz., English Bay on the outer anchorage, Coal Harbour above the First Narrows, and Port Moody at the head of the Eastern Arm of the Inlet; then describes English Bay, then Coal Harbour, then Port Moody, with their relative distances on a continuous line from the sea. Port Moody—"The entrance of this snug harbour is "four miles eastward of the Second Narrows, at the head of the "Eastern Arm of the Inlet. It is three miles in length, and varies in "breadth from a third to half a mile, except at the entrance, where it "is only two cables across. There are no dangers, and a uniform "depth of water, with good holding ground. The direction of the port "is N.E. by E. ½ E. for nearly two miles, and then E. by S. for a mile, "terminating in a muddy flat at its head," &c., &c. "The best "anchorage is in the widest part of the harbour in from five to six "fathoms."

Thus with the full knowledge of English Bay, Coal Harbour, and Port Moody, the contract was made "to Port Moody," under a title, "The Canadian Pacific Railway," intended to mean the *entire* railway

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The 17th sec. of the Canadian Pacific Railway Act, under the title "Powers," says: "'The Consolidated Railway Act, 1879,' in so far as "the provisions of the same are applicable to the undertaking author- "ized by this Charter, and in so far as they are not inconsistent with "or contrary to the provisions hereof, and save and except as herein- "after provided, *is hereby incorporated herewith.*"

"The Consolidated Railway Act, 1879," applies its provisions from sec. 5 to sec. 34, both inclusive, to every railway constructed, or to be constructed, under the authority of any Act passed by the Parliament of Canada, and shall, *so far as they are applicable to the undertaking*, and unless they are *expressly* varied or excepted by the Special Act be incorporated with the Special Act, *form part thereof*, and be construed therewith as forming one Act.

Secondly. It then points out that, for the purpose of excepting from incorporation with the Special Act any of the above sections of the General Act, it shall be sufficient in the Special Act to except them by reference to their headings; and in the Canadian Pacific Railway Act this rule is carried out by special reference to many sections.

In the General Act, 1879, the powers given are defined, and by sub-section 19 of section 7, which authorizes a change in the location of a line, for benefiting the line, or for any other purpose of public advantage, expressly says: "No railway shall have any right to extend "its line of railway beyond the termini mentioned in the Special Act.'

This sub-section of section 7 is nowhere excluded in the exceptions referred to in the Special Act—the C. P. R. Act; and on the particular point in this application, namely, "the construction of the Coal Harbour and English Bay branch," there is, *eo nomine*, no special provision of any kind in the Special Act, nor can it be said to be directly necessary to the object of the Act, namely, "to connect the seaboard of British Columbia with the railway system of Canada," for that has been done, and, in the wisdom of Parliament, sufficiently done by bringing the railway to Port Moody; and more particularly must this be assumed to have been within the knowledge of the Company, for by section 4, in the schedule to the contract, signed by both parties, it is set forth that "all the franchises and powers necessary or useful "to the Company to enable them to carry out, perform, enforce, use, "and avail themselves of every condition, stipulation, obligation, "duty, right, remedy, privilege, and advantage *agreed upon, contained "or described in the said contract* are hereby conferred upon the "Company."

The contract was to go to Port Moody; whatever power was necessary, or might be useful, for that purpose was conferred, and by the language of Parliament itself Port Moody is the Parliamentary terminus of the road, on the seaboard of British Columbia.

It is contended, however, that the proposed construction is a branch line, authorized by the express powers given by the C. P. R. Act, and carrying with it the incidents and privileges attached to the construction of the main line, of which, when completed, it becomes a part.

The power to construct branch lines is defined in paragraph 14, set out in the contract embodied in the C. P. R. Act. It says: "The "Company shall have the right from time to time to lay out, construct, "equip, maintain, and work branch lines of railway from any point or "points along their main line of railway, '*to any point or points within* "'*the territory of the Dominion.*' Provided always that before com- "mencing any branch they shall deposit a map and plan of such branch "in the Department of Railways. And the Government will grant the "lands required for the road-bed of such branches, and for the stations," etc., "in so far as such lands are vested in the Government."

The 17th and 19th sub-sections of section 7 of the general Act, that is, the "Consolidated Railway Act, 1879," are as follows:—

"17. Any railway company may construct *a branch or branches* not "exceeding six miles in length from any terminus or station of their "railway, whenever a by-law sanctioning the same has been passed by "the Municipal Council of the municipality within the limits of which "such proposed branch is situate, and no such branch shall, as to the "quality and construction of the road, be subject to any of the restric- "tions contained in the Special Act, or in this Act. Nor shall any- "thing in either of the said Acts authorize the Company to take for "such branch any lands belonging to any party *without the consent of* "*such party first obtained.*"

"19. Any railway company desiring at any time to change the "location of its line," etc., "may make such change, but no railway "company shall have any right to extend its line of railway beyond "the termini mentioned in the Special Act."

These two sub-sections are not excepted from the Canadian Pacific Railway Act by the particular mode in the General Act declared sufficient for that purpose, and, therefore, become incorporated with the C. P. R. Act, "in so far as applicable to the undertaking in that "Act specified, and in so far as they are not inconsistent with or "contrary to the provisions thereof," and not expressly varied by that Special Act. (See sub-section 2, section 1, of the General Act, and section 17 of the C. P. R. Act.)

The distinction between these two sub-sections and paragraph 14 of the contract is marked. In the former, 1st. As to distance not exceeding six miles in length from any terminus or station. 2nd. Requiring the sanction of a municipal by-law. 3rd. Non-restriction as to quality and construction. 4th. No right to take lands for such branch without consent of owners; and, lastly, by the 19th sub-section, no right at all to

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extend its line of railway beyond the termini mentioned in the Special Act.

The 14th paragraph of the contract in the C. P. R. Act has no limitation as to distance, length, quality, construction, sanction of municipality, appropriation without consent, or extension beyond the termini. Its limit is solely *within the territory of the Dominion.* Its sole proviso: that a map or plan of such proposed branch shall first be deposited in the Department of Railways.

The question, therefore, arises: Are the provisions of these two sub-sections applicable to the undertaking to construct the Canadian Pacific Railway; are they consistent with the power given it, and can they override and restrict the 14th paragraph of the contract, the powers conferred and the privileges given to the Company to undertake and carry out that work?

The "Company's Act" was passed in 1881; the General Act in 1879—two years previously. The expression in the General Act, 1879, "nor shall anything in either Act authorize the taking of land without "the consent," &c., cannot prevent the Parliament *at a subsequent period* legislating otherwise if it so chooses. Did it so choose? The legislation with reference to the Canadian Pacific Railway was exceptionally special from its commencement. Its construction was admitted to be a national necessity, compelled by treaty. Its being brought to the Pacific seaboard might fill that treaty; but it was necessary to offer extraordinary inducements to parties to undertake the contract to bring it to the seaboard. The proffered gifts of land and money were not sufficient. It was a grave question whether anyone would undertake it, and a graver one whether it would pay if undertaken. It was therefore necessary to grant extraordinary powers to enable the Company to draw vitality from any and every quarter, and the 14th paragraph seems to have been framed to bring in *traffic from "any point or points within the territory of the "Dominion."* The main line was defined by subdivisions or sections from point to point. The branch lines are undefined, starting only from a point or points on the main line, unlimited as to direction, distance, or course, save only that they should be within the Dominion. How could the Parliament have used those specific terms, if it intended that a couple of sub-sections of a pre-existing Act should render them entirely nugatory? for if those sub-sections were applicable, one man or one municipality on a branch line from a terminus—the latter by refusing to part with his land, or the former to give its sanction by a by-law—might paralyze the construction of the main line by destroying an important inducement to construct it.

Those sub-sections of the General Act were evidently intended for railways of a less national character; where the public interests did not so far override private rights as to justify an arbitrary interference

with the latter. It must be assumed that the Parliament recognized this distinction, and gave these powers advisedly to the C. P. R., or it would not have adopted the unqualified language of the 14th paragraph. It was a matter of express contract, and doubtless had its influence in inducing the contractors to enter into the contract. To break that contract now would be a national fraud, if such a thing could be.

But the question is practically disposed of by the 15th section of the Act—the C. P. R. Act—which enacts:—

"The Company may lay out, construct, acquire, equip, maintain, "and work a continuous line of railway of the gauge of 4 feet 8½ "inches, which railway shall extend from the terminus of the Canada "Central Railway near Lake Nipissing, known as Callander Station, "to Port Moody, in the Province of British Columbia, and also a "branch line of railway from some point on the main line of railway "to Fort William on Thunder Bay, and also the existing branch line "of railway from Selkirk, in the Province of Manitoba, to Pembina, in "the said Province, and, *also other branches to be located by the Com-* "*pany, from time to time, as provided by the said contract, the said* "*branches to be of the gauge aforesaid;* and the said main line of "railway, *and the said branch lines* of railway, shall be commenced "and completed as provided by the said contract; *and together with* "*such other branch lines as shall be hereafter constructed* by the "Company, and *any extension of the said main line of railway* that "shall hereafter be constructed or acquired by the Company, shall "*constitute the line* of railway hereinafter called the Canadian Pacific "Railway."

In this section there are no less than six terminal points referred to, apart from those that would necessarily attach to any other branch lines that might thereafter be constructed under it. It authorizes other branch lines, *as provided in the contract*, which, as shown, were unlimited as to distance or course, but expressly varies as to construction by requiring those branch lines to be of a specific gauge, and when constructed enacts that *they shall be part of the main line*, and consequently clothed with the powers incident to the main line.

Can it then be contended that the restraining language of those two sub-sections was to overrule this special concession of powers subsequently made? If so, what was the use or meaning of the 14th paragraph of the contract, or the 15th section of the C. P. R. Act? They would be utterly inconsistent and contradictory. Was the whole Parliament asleep when the C. P. R. Act was passed?

I think the Parliament gave those powers with the full knowledge of their intent, purport, and effect; and it was clearly meant that this great work was not to be stayed by the prejudices or interests of municipalities or individuals.

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In considering whether the contemplated construction to Coal Harbour may not be legally designated as a branch line, it is to be borne in mind that the Parliament made Port Moody the terminus, *not as defining the end of a commercial or business road, but as determining a treaty obligation.*

To that end or extent, as bound by treaty, the Parliament contributed from the Public Treasury. The power to go on further was not restrained by the mere use of that term, nor the means which the Parliament gave by adopting the 14th paragraph of the contract and passing the 15th section to utilize what had been done or to make it profitable.

Port Moody was intended, so far as the Dominion was bound and Parliament declared, to be the terminus of the public obligation—"the "connection of the seaboard of British Columbia with the railway "system of Canada." The Company, under the 14th paragraph and 15th section, could go on further for business purposes, but at their own expense, and Parliament gave to the Company to aid them in so doing the legal privileges for the branch lines that it had given for the main line, and among those privileges was the power of appropriating lands without the consent of the owner, on the terms and in the mode provided by the Consolidated Railway Act, 1879.

To my mind it is of very little consequence whether the contemplated construction to Coal Harbour be called a branch or an extension, for as those sub-sections are clearly inapplicable, they cannot affect the question, but as it may unquestionably be called a branch line, I have so considered it.

New Westminster, Coal Harbour, and English Bay are certainly "within the Territory of the Dominion," and not so far from the main line, or terminus, at Port Moody as to render branches thereto at all inconsistent with the tenor and object of the Act. In fact they come almost within its "*ipsissima verba*"—for the terminus itself is a point on the main line. The Courts cannot go against the direct language of the Act. It is not a question whether the Court thinks it expedient or not. If the Parliament has plainly declared it, that is sufficient. The Parliament of Canada is and ought to be supreme in the management of the public affairs within its own Dominion.

To limit this great work, for which such exceptionally special legislation was required, by the restrictions imposed by those sub-sections of the General Act passed previously in view of other undertakings would be most unsuitable, besides being incapable of performance, for, at the termini of the different sections into which the work was divided, and, indeed, it might be said for 1,500 to 2,000 miles along the line there were no municipalities to pass by-laws or give consent, though there might have been persons whose land it was requisite to take.

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I, therefore, consider that the proposed construction comes within the term "Branch Line" under the 14th paragraph of the contract and 15th section "Canadian Pacific Railway Act, 1881," and carries with it as incident thereto the right of appropriation of lands necessary for its construction in the mode provided by the Consolidated Railway Act of 1879.

I shall not make any order for the issuing of a warrant until a further hearing, for several reasons. 1st. That on a similar application Mr. Justice McCreight refused so to do—though he abstained from the expression of any opinion on the points now before me. 2nd. I understand that the Chief Justice, on an application before him, issued an injunction restraining the Company from proceeding on other conclusions different from those now expressed. 3rd. The application before me was not assented to though not opposed; the object being, I conceive, by an amicable proceeding, to obtain a judicial construction of the Act on the point raised as to the conflict between the General and Special Acts, more than to press for the warrant.

Altogether it is exceedingly embarrassing, and contrary to the policy of the law, to have proceedings of a similar nature before different Judges of the same Court at the same time. I have endeavoured to obviate this embarrassment by giving what I conceive to be the construction of the Acts, and will on a future day, if necessary, hear the question of compliance with the General Act to determine whether a warrant should issue, my attention on the present argument having been turned exclusively to the question of construction, and not the mode of proceeding

[This case was carried to appeal, see 13 S.C.R., p. 233.]

THE CANADIAN PACIFIC RAILWAY Co.

v.

EDMONDS AND OTHERS.

DIVISIONAL COURT.
1886.
20th August.

Railways and Railway Companies—"Consol. Railway Act, 1879," (42 Vic. D., c. 9)—Application of, to Special Act—Canadian Pacific Railway Act (44 Vic. D., c. 1)—Right to build line beyond terminus.

On the construction of the C. P. R. Act, 1881, and the contract and charter incorporate therewith,

Held, by the Divisional Court (Gray, J., dissenting)—

1. That Port Moody is thereby constituted the Western terminus of the Canadian Pacific Railway.

2. That sub-s. 19 of s. 7 of the "Railway Consolidated Act, 1879," forbidding the extension of any line beyond the terminus is, by s. 18 of the Company's Charter, imported into the Act of 1881, and is not inconsistent with the general power of the Company given by such last-mentioned Act, to construct branches from any point along their line, to any other point in Canada.

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3. That the Company has no power to take lands for any purposes not authorized by some Act of Parliament, and, therefore, no power to interfere with or construct a line on the Plaintiff's lands, which were all to the westward of Port Moody.

Held (*per* Gray, J.), that wherever the provisions of the "Consolidated Railway Act, 1879," were inconsistent with or contrary to the provisions of the C. P. R. Act, the former were, as to the undertaking carried under the latter Act, to be inoperative.

This was an Appeal to the Divisional Court* from the judgment of the Chief Justice (*ante* p. 272), restraining the Canadian Pacific Railway Company from entering the Respondent's lands, required for the purpose of constructing the line of the C. P. R., from Port Moody to Vancouver and English Bay.

Drake, Q. C., for the Appellants.

Richards, Q. C. (with him *Pooley*), for the Respondents.

GRAY, J. :—

This is an appeal from the judgment of the learned Chief Justice of the 6th August last, and the order thereupon made restraining the defendants, so far as the properties and lands of the plaintiffs were affected, from proceeding with the construction of the present railway works towards Coal Harbour. That is the result, though not the exact language of the order.

In the conclusions at which the learned Chief Justice arrived in this case, and the reasonings on which those conclusions are based, I cannot agree.

In a carefully prepared judgment delivered by myself on the 21st July previous, in the case of the *C. P. R* v. *Major* (*ante* p. 287), I reviewed the conflicting rights of the Company and the landowners under the various provisions of the C. P. R. Act, 44 Vic., c. 1, and the "Consolidated Railway Act, 1879," so far as the latter was in any way, by the former Act, or any other law, incorporated with it, and came to conclusions diametrically opposite to those which have impressed themselves so forcibly on the mind of the Chief Justice. Since then I have had the advantage of hearing an able argument from Mr. *Richards*, on this appeal, in support of the reasoning and views of the Chief Justice, and find myself strengthened and confirmed in the views and conclusions I had previously expressed. To avoid unnecessary repetition, I desire to incorporate in this, my present judgment, the reasonings set out by me in the *C. P. R.* v. *Major*:

I regret still more that I cannot agree with my two learned brethren now with me, who have concluded to sustain the views of the Chief Justice. They add nothing to his argument, except an inference to be drawn from the 18th sub-section of section 7 of the "Consolidated Railway Act, 1879." I cannot see that this has any bearing on the point. The non-existence of any Order in Council *under that section*, if, in the first place, it were requisite, which was not contended for;

*Present—Crease, Gray, and McCreight, JJ.

or, in the second, if it were true that no such order existed, of which, throughout the whole argument before the Chief Justice and this Court, there was not even the remotest allegation, cannot now, after the close of the hearing, be set up by this Court.

So to do, in the absence of any proof, or of any demand therefor by the plaintiffs or their counsel, it being a matter capable of proof, affirmation or denial, from which a conclusion, in law, was to be drawn, would simply be, in my opinion (though with me my learned brethren do not concur), a voluntary infraction by the Court of the well-known principle:—"*Omnia presumuntur rité et solemniter esse acta donec probetur in contrarium.*" In fact, it would be saying that something was wanted, which nobody asked for, and deciding that it was most material and conclusive without hearing any argument, whether it was or was not. That is not the usual practice of Courts. If that provision had had any bearing whatever on the case, it would not have escaped the attention of the learned counsel for the plaintiffs.

Without going into details, a few words only with reference to the extraordinary powers conferred on the Company, may not be out of the way. In 1881, when the C. P. R. Act was passed, the "Consolidated Railway Act, 1879," was well known. It was simply with some few changes and amendments the consolidation of a previous Railway Act of 1868, and its subsequent amending acts. It was, in various stages, in force during the whole discussion in Parliament on the construction of the C. P. R., from its initiation down to the passing of the final Act of 1881.

In the C. P. R. Act of 1881, the very first clause in reference to powers, section 17, says:—

"The 'Consolidated Railway Act, 1879,' in so far as the provisions "of the same are *applicable to the undertaking authorized by this* "*Charter*, and in so far as they are *not inconsistent* with or *contrary* "*to the provisions* hereof, and save and except as hereinafter provided, "is hereby incorporated herewith."

In this section there are two leading guides: 1st. The provisions of the "Consolidated Railway Act, 1879," are only to be incorporated in the Canadian Pacific Railway Act, or to affect its charter, when those provisions are "*applicable to the undertaking authorized* by the "charter." From the context of the whole Act, that is—when these provisions are in futherance of the object set out in that Act, and the charter embodied in it, and will promote and aid its construction, the "Consolidated Railway Act, 1879," was to be good for all general purposes, but it was not to affect the Canadian Pacific Railway Act unless its operation was beneficial. 2nd. Wherever the provisions of the "Consolidated Railway Act, 1879," were inconsistent with or contrary to the provisions of the Canadian Pacific Railway Act, they were, as to the undertaking carried on under the latter, to be inoperative.

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These provisions of law are clear and undoubted.

To attempt, then, to apply to a road running through every Province of the Dominion, 3,000 miles, from ocean to ocean, built largely out of the public funds, and sustained by public taxation, the petty restrictions of six-mile branches, municipal by-laws, and the other limitations set out in the antecedent Consolidated Railway Act, regulating works under entirely different circumstances, and a different character, in face of the whole tenor and language of the C. P. R. Act from beginning to end, is simply, in my mind, perverting the legislation of Parliament. I ought here to say that on one point, at least, viz., the six-mile branch limitation, I am fortunate enough to have the concurrence of my learned brethren.

With all deference to the able views of my learned brethren—if I may be allowed an illustration,—to apply these restrictions looks to me very much like attempting to construct the largest Mediterranean iron-clad with the machinery and fittings of a harbour punt.

In this case, one Act or the other must give way. They are utterly irreconcilable. They were not intended to work together in all their parts, but only so far as the first could be beneficial to the last. So far as the Act of 1879 could aid the Act of 1881, the Parliament intended it should do so, but nowhere that it should cripple the latter. Wherever there is a conflict, 1879 must give way to the legislation of 1881.

My opinion is that the learned Chief Justice's order should be discharged, his judgment reversed, and the injunction raised.

It by no means follows that large as are the powers given to the C. P. R. Company to induce them to undertake and carry on this work, the owners of land or property through which the railroad, or its branches, may pass, are without adequate means of protection and redress in case of an illegal invasion of their rights. The provisions with reference to taking lands, to paying for them, to settling the value by arbitration, are numerous and varied. They are the same as exist in all the other Provinces, and are not harder on the people of British Columbia than they have been on the people of Manitoba, or the people of Ontario.

The powers given to the Company are certainly exceptionally great; but they were given by a Parliament in which British Columbia was represented, as well as the other Provinces of the Dominion, and no part of the Dominion clamoured for this road more loudly than did British Columbia.

I hope that some steps will be taken, if possible forthwith, to bring the judgment of this Court before the Supreme Court of Canada, for as the matter now stands the New Westminster branch, and all other branches in British Columbia, are in a helpless condition, and at the mercy of miscreants who may, perhaps (as the law now affirmed stands), escape punishment.

The judgment of Justices Crease and McCreight was delivered by Crease, J.:—

We are, unfortunately, unable to agree with our learned brother, Mr. Justice Gray, either in his arguments, or in his conclusions. We think the judgment of the learned Chief Justice should be affirmed, substantially for the reasons he has assigned. We think it appears distinctly from sections 1 and 6 of the Contract with the Company (contained in schedule to 44 Vic., c. 1), and from section 15 of the Charter, that Port Moody is fixed as the western terminus; and that as the Consolidated Railroad Act, 1879, section 7, sub-section 19, says: "That no railway company shall have any right to extend its line of "railway beyond the termini mentioned in the Special Act," therefore the proposed line from Port Moody to Vancouver City is clearly forbidden.

Having regard to the topography of Burrard Inlet, and it southern shore, we cannot conceive that any line could be built more in the nature of an "extension" than that which is proposed. It is hardly necessary to add that section 1 of the Act of 1881, before referred to, and section 21 of the same Act, require us to construe and, indeed, make the agreement and the charter a portion of that Act.

We should not make any further observations, except that there are some remarks in the judgment appealed from as to the Company's power of making branch lines, with which we do not agree; and which, we think, we should not pass over unnoticed; although they do not form part of the actual decision.

The learned Chief Justice seems to consider that the Company may not build a branch line of more than six miles in length, but we are disposed to agree with Mr. *Drake's* contention on this point, that section 14 of the Act of 1881, authorizing the Company to make "branch "lines from any point or points along their main line of railway, to any "point or points within the territory of the Dominion," repeals the six-mile limit as being totally inconsistent with it. But we do not wish to be understood as applying this observation to the cases dealt with by section 7, sub-section 17, of the Act of 1879.

The learned Chief Justice says that according to the tenor of Mr. *Drake's* contention, the Company are entitled, on the deposit of a map, to construct any line which they may choose to call a branch line, though it be 500 miles in length, and pass through the heart of the chief cities of Canada, without notice to private owners, and without compensation, or security for compensation. But we think the legislature has guarded against such abuses by Companies in making their branch lines, in section 7, sub-section 18, of the "Consolidated Railway Act, "1879," where, among other conditions precedent to the making of a branch line, it is provided that the Company must apply to the Governor-General in Council to sanction the building of such branch line, and

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appropriate the necessary land for that purpose, under the compulsory powers vested in them by the Act, and obtain the approval of the Governor-General in Council to the maps and plans, after the expiration of a six weeks' notice to the public by advertisement. And the Order in Council approving the map and plans must limit the time of construction to two years from its date.

We think it is unfortunate that these provisions were not brought under the notice of the learned Chief Justice, otherwise, we venture to think, he would not have expressed himself as he did.

We need hardly repeat that we entirely agree with his actual decision that the proposed line is an extension beyond the terminus of Port Moody, and as such clearly forbidden by the Legislature. We think the respondents should have their costs of this appeal according to the usual practice.

The learned Chief Justice reserved the costs before him, and we see no reason for interfering with him as to them.

[*For judgment of Supreme Court of Canada see 13 S.C.R., p. 233.*]

GRAY, J.
1886.
27th January.

IN *re* CLAY
AND THE
CORPORATION OF THE CITY OF VICTORIA.

"Municipality Act, 1881"—By-Laws—Saloon Licences—Vested Interest.

On an application to quash a conviction under a Municipal By-Law, *Held*,—

1st. A "Saloon" licence under the Municipality Act of 1881, the fee for which is paid in advance under the provisions of the Act, is a statutory contract with the Municipality, and during the statutory term for which it is given, cannot be so altered or varied by a By-Law, passed by the Corporation or Municipality granting the licence, as to destroy the object for which it was granted, or materially reduce its value. Like other contracts it carries the elements of mutuality.

2nd. The Municipality Act provides fixed periods of six months, 30th June and 31st December, for the expiration and renewal of saloon licences. New restricting regulations must come in at those periods, form part of the implied contract, and be in force concurrently with the licence when granted.

3rd. This construction in no way interferes with the power of suspension, forfeiture, fines, or punishment otherwise existing for misconduct, under laws specially or generally applicable.

Ex post facto legislation objectionable.

This was an application on behalf of Samuel Clay to set aside a conviction for an alleged breach of "The Retail Licence Regulation By-Law, 1885," by the City Police Magistrate, Mr. Edwin Johnson, in December, 1885, and the imposition of a fine of $50 or imprisonment for one month, unless the fine with costs be paid.

The 1st section of the By-Law, under which the offence was charged, is as follows:—

"1. No person shall open, or keep open, or permit to be opened, or "kept open, or assist in opening, or keeping open, any saloon, tavern "or place for the sale of, or sell, any intoxicating liquor by retail "within the City of Victoria between twelve o'clock at night and five "o'clock in the next forenoon, on any day, nor between ten o'clock in "the forenoon and five o'clock in the afternoon on Sunday; but this "clause shall not apply to the sale of liquor with a meal in an hotel or "restaurant"

Theodore Davie, for the applicant, contended that the By-Law under which the conviction was made was bad, on the following grounds:—

(1.) It discriminates against saloons in favour of hotels and restaurants.

(2.) It interferes with the applicant's vested rights, because it places a restriction upon his business, which did not exist when he paid for and obtained his licence.

(3.) It exceeds the statutory authority in the following particulars:—(*a.*) It calls for the closing, not only of saloons, but, also, "every "tavern or place for the sale of liquor." (*b.*) It not only orders that the saloons shall be "closed," but also prohibits the *sale* of liquor during the prohibited hours.

(4.) It is unreasonable, in that it makes no distinction as to requirements of travellers, nor exception in the case of sickness or other pressing necessity.

(5.) It operates as a general prohibition, rather than a restrictive regulation.

No one appeared for the Corporation.

GRAY, J.:—

The object of this By-Law was good, its enforcement desirable. The defendant Clay, a saloon-keeper in the City of Victoria, was guilty of an infringement of it, by keeping open his saloon for the sale of intoxicating liquors on the 21st and 22nd November, and there selling intoxicating liquors by retail between the hours of twelve p. m. and five a. m. the next morning, was convicted and fined, and on appeal now raises the question of the validity of the By-Law. That depends upon whether it is within the scope of the powers conceded to the Council of the Corporation, by the "Municipality Act, 1881," as controlled by the British North America Act of 1867.

The powers of the Council are defined in sec. 104 of the "Municipality Act, 1881," and, as bearing on this question, are limited to two purposes:—

1st. For raising a revenue for municipal purposes.

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2nd For the maintenance of public morals.

Sub-sections one, two and three are:—

"(1.) For raising a municipal revenue by licences, taxes, or rates, "upon persons or upon real or personal property, and for regulating "the mode of assessing or collecting the same:

"(2.) Shop, saloon, tavern, and other licences:

"(3.) Saloons, taverns and billiard rooms."

The primary object of any By-Law under these three sub-sections would be for revenue for municipal purposes, to be raised by licences, taxes or rates.

But there are other objects the public interests demand, besides money: for instance,—decency, good order, public morality. These are to be enforced by regulations, orders, penalties

The first appertains to revenue, the second to police; and both are powers the Local Legislature had the undoubted right to confer on the municipality.

Bearing on the present question we must turn to sub-section 38, as conferring a power under the second head, namely: "To order and "enforce the closing of saloons during such hours of the night and on "Sundays as may be thought expedient."

It will be observed that sub-sect. 38 is limited to saloons. The term "saloon," in English, has no absolute limited technical definition, but by general acceptation when used in Municipal and Police regulations, and by its contiguity with other places of resort, in the B. N. A. Act, 1867, and the provincial legislation thereon, may be described as a place of reception, open to the public, by municipal authority, for amusement or drinking, had or enjoyed upon the premises. Saloons, as in this country so generally accepted, differ from taverns, restaurants or hotels, which are more particularly licensed for travellers and lodgers, and which necessity and public convenience both require, should, as to hours and refreshments, be governed by different rules. Saloons are not for purposes of rest or food, but for purposes of pleasure, and in too many instances, as shown by the late November and December Assizes, are degraded into places of drunkenness and crime. Undoubtedly, in the management of municipal affairs, the Council not only have the power, but it is their duty, to make regulations for the maintenance of order and decency, and the prevention of drunkenness and crime. Important, however, as is this duty, it must be carried out in subordination to the constitution of the country and the paramount law of the land. There is no Dominion law absolutely prohibiting the sale of liquors in Canada, and the Province cannot pass any such law, as it would be a direct interference with "trade and commerce,"—one of the subjects of legislation reserved exclusively for the Dominion Parliament. The power, therefore, given by the Province to the municipality must be strictly limited as above set forth, both as to revenue and

public morals—to regulate, not prohibit,—and the municipality must act within the expressed powers conferred by the Provincial Legislature, not an inch beyond, because however good, theoretically, an object may be, it can only be enforced upon unwilling parties by law. English liberty admits of no individual restrictions, except such as are clearly defined or recognized as law; and one contention on the part of the defendant, by his counsel here, is that this By-Law operates as a general prohibition, and is not either for purposes of municipal revenue or within the limitation of the 38th sub-section.

So far as this By-Law embraces any place which is not a saloon, it is clearly beyond the power given; a tavern or a shop licence does not come within the definition of a saloon. A distinction is made between them in the 2nd and 3rd sub-sections; and though the two might be under one roof or under one annex, it is clear that a separate licence might be demanded for each, and one be closed without the other. A conjunction might add to the difficulty of enforcing the law; but that is a matter of police regulation, and does not touch the principle. I also think when the power is given to close the saloon, it means the stopping of the sale of liquors on the premises during the prohibited hours—the one is incident to the other. It is not a restraint further than that which the statute imposes. Closing a saloon does not, in its legal construction, mean merely shutting the door, but it means closing the business there carried on. Nor can such limited and local stoppage be considered as a general prohibition of sale, so as to be any interference with trade and commerce. It is simply a police regulation under competent authority, that for good municipal government the business shall not be carried on at certain times and in certain places under objectionable circumstances.

The powers of the Municipality of Victoria were so clearly defined on these points in the case of *The Queen* v. *Vieux Violard* by myself, in December, 1881, that it is not necessary to add more, further than that decision has been fully confirmed and sustained by *Hodge* v. *The Queen* (9 L. R. App. Cas.), and must now be regarded as governing law. But admitting that the by-law would be good as to saloons, and that the "closing" would comprehend the stoppage of the sale of liquor on the premises if limited to saloons, the objection still remains—that the by-law declares "that no person shall sell any intoxicating liquor by "retail within the City of Victoria between 12 o'clock at night and 5 "o'clock in the next forenoon on any day." Under which sub-section of the municipal powers can this be brought? No exception as to place, no exception as to circumstance, sickness, medical man, druggist shop licence, or absolute unexpected necessity for its use. The legislature deemed it proper to authorize interference with saloons, for many and good reasons, but where as to the general public did it authorize this interference with private rights acquired by licence, restricted, or assume that every vendor and vendee by retail of intoxi-

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cating liquors between those hours intended, or was likely to use them, for improper purposes, or to immoral ends, or contrary to law to the public detriment. "Nor between," it adds, "10 o'clock in the forenoon "and 5 o'clock in the afternoon on Sunday; but this clause shall not "apply to the sale of liquors with a meal in an hotel or restaurant." As punctuation has no place in legal construction, and as the term "clause" instead of "section" by grammatical construction limits this exception in favour of Sunday to the sale with a meal in an hotel or restaurant, the question naturally arises: Why this discrimination? Why this exclusion of the tavern? Why this limitation to the hotel or restaurant, and of the hotel or restaurant, to certain hours on Sunday? It is plain that was not what was intended, even if it could be assumed that the object was to bring the restriction under sub-section 34, "Public morals, including the observance of the Lord's Day, commonly "called Sunday."

It is not to be assumed that because this particular by-law may be ineffective to the ends proposed, that therefore there is no law regulating sales of intoxicating liquors, or punishing immoral and improper conduct resulting from their use or abuse in taverns, saloons, and other similar places. Apart from the powers conferred, and the penalties imposed by the Municipality Act with reference to offenders who attempt to carry on business without licence, and in addition to the power of revocation and suspension of the licence, when taken out, in case of misconduct, the Council, at regular short periods, have the primary power of granting or refusing licences; a *power of prevention* far more effective than the power of punishment. With reference to certain subjects the legislature has declared that the Council shall have exceptional powers of regulation and legislation. What it has not declared to be within that class of subjects cannot be assumed to be.

Had the legislature intended that this "closing" power should extend to taverns, and all persons and places, as well as to saloons, it would have said so. Had it been deemed necessary for public morals sub-section 38 might have been made as comprehensive as sub-sections 2 and 3.

As it stands the by-law in other respects is unreasonable, making no distinction as to places or requirements for invalids or travellers, and is objectionable as discriminating between hotels, restaurants, and taverns, and compelling parties to pay in particular places for what they do not require, in order that as travellers or invalids they may get what at the time may be necessary for health or alleviation from pain. Why should a traveller or an invalid in his tavern be compelled to go out to an hotel or restaurant, when the tavern-keeper pays a licence to give him what he is to get at the hotel or restaurant.

It is an essential qualification of a by-law that it should be both reasonable and impartial, bearing on all alike.

There are still, however, two points remaining to be considered.

A by-law may be good in part and bad in part, and if it be possible to separate the good from the bad, it should be so separated and the validity of the by-law maintained; but the parts so separated must not be connected with or essential to each other. Each must be whole and complete to stand *per se*.

It might be possible by striking out every part of this by-law, except the words which refer to "*the closing of saloons during certain hours of the night, and on Sundays*" to hold it good, and so far it might be held good as to all licences taken out for saloons after the passing of the by-law, namely, the 4th of November, 1885; but it leaves an instance of law-making that it would be better to repeal and re-enact in proper form.

As bearing, however, on the present case, there is another objection which, even if so much of the by-law above-mentioned were held good, would render its application illegal.

On the trial the defendant contended that the by-law was illegal and inapplicable to himself, as it was an interference with the rights acquired before the by-law under his licence from the Council, which licence was then in full force and unexpired.

Mr. Johnson, the Police Magistrate, overruled this objection, upon the ground that at the time the defendant took out his licence he must be presumed to have known that the Council had power to regulate his saloon, and close it during certain hours, and that, therefore, the by-law was applicable to him.

I regret that, in this conclusion, I have to differ from that learned and worthy Magistrate.

The issue of licences is regulated by the "Licences Ordinance, 1867," and the Municipality Act of 1881. There are certain occupations defined in the schedules to that Ordinance and the Act, which it is not permissible to carry on without having first obtained a licence so to do under a penalty of $250 for every such offence, together with the amount of the licence fee—the two together constituting one penalty.

The licences are made terminable twice a year, on the 30th day of June and the 31st day of December; the licence fee must be *paid in advance* without any deduction in amount for shortness of period from commencement of business.

The schedule specifies distinctly the business of a saloon-keeper, and the form of licence is simply "That *A. B.* has paid the sum of $ in respect of a licence to , and is entitled to carry on "business or occupation of " (in the Municipality Act, added "from to 188)."

Neither in the Ordinance, the Acts, the schedule, or the licence, is there any limitation as to the time of hours during which the business shall be carried on.

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A marked distinction exists between a mere personal licence, or arbitrary permission, revocable at will, and a municipal licence for a stated period, authorized by statute, and based upon a pecuniary consideration. The first is a voluntary sufferance, the second is a statutory contract. Under the "Licences Ordinance, 1867," and the "Municipality Act, 1881," the term licence bears the latter construction.

It thus becomes a contract between the licensing power and the licensee, for good consideration, that during that period (each half-year, terminable on the 30th of June and 31st December), the business may be carried on, subject to the general existing law, whatever that may be.

There is nothing in the general law which says a man may not, with certain exceptions as to Sundays, carry on his business during any hour of the day or night.

The Legislature transferred this power of issuing licences and raising a revenue thereby to the municipalities. It went farther, and gave to the municipalities a power of closing saloons "during particular times." But that power was to be exercised subject to the immutable principles of justice, and the general law of the land.

The intention of the Legislature must be gathered from the whole of the Municipality Act and the general legislation of the Province on the subject of licences. *Ex-post facto* legislation is always objectionable; and particularly so in cases like the present, when the consideration money for the licence has to be paid in advance. When the Legislature enacted that stipulation, and limited the duration of the licence to six months, it conclusively showed that during that period "faith" was to be kept, and nothing but a paramount overwhelming necessity could justify a breach of it on the part of the licensing power. No such necessity here existed or has been shown. In six weeks from the passing of that by-law every licence expired. Its application to new licenses in principle could not be objected to.

The Legislature itself had no power to authorize the breaking of contracts. It transferred none, it attempted to transfer none. It gave its saving power for the public interests in making these contracts extremely short. All that is required in by-laws to this end is to make them come into operation "on the 1st of July" or the "1st day of January next." On the days previous the old contracts expire, and the licensee takes out his new licence or contract under the new law, and subject to any existing regulations then in force under the Municipality Act. That Act has substantially adopted the "Licence Ordinance, 1867," its schedule, scales, and terms, and has at great length defined the extended power given by the Legislature to the municipalities, and has, by sec. 156, expressly, *on complaint*, authorized the revocation or suspension of liquor licences. It would sap all confidence in contracts

with the corporation if, after large sums paid for these licences in advance, the corporation could pass by-laws materially depreciating the value of the licence. In cases of individual misconduct the law provides for punishment or forfeiture, but a by-law of this nature violates the contract where there has been no misconduct.

When, therefore, the presumption that the power of passing such a by-law was known to the defendant is urged by the Magistrate, it must equally be presumed that the defendant knew that it could not be enforced against himself, pending his contract.

It is, undoubtedly, in the general interest of good order, morality, temperance, and the prevention of crime, that a by-law closing saloons during particular times and hours should be passed and enforced, but no good can be obtained by a violation of principle.

The conviction must be set aside with costs.

REGINA *v.* HOWES.

Grand Jury—Deposition of absent witness—Practice—32-33 Vic. (D.), c. 30, s. 30.

Upon a bill of indictment being presented, the Grand Jury reported that without the evidence of an absent witness they had no materials to find a bill.

Held, per Crease, J., that they were entitled to peruse the depositions without proof that the witness was too ill to travel or absent from Canada.

The prisoner was charged at the Victoria Fall Assizes with larceny.

The Foreman of the Grand Jury came into Court and asked his Lordship for the deposition of an absent witness, without whose evidence they had no materials to find a bill.

CREASE, J., after referring to *Regina* v. *Bullard* (12 Cox 353), and *Regina* v. *Gerrans* (13 Cox 158), granted the application, stating that the Grand Jury might send for and look at any deposition, and act upon it as they should think proper.

GRAY, J.
1886.
23rd March.

McEWEN *v.* ANDERSON.

Obstruction in Navigable Waters—Nuisance—Trespass.

1 Every subject of the Realm has a right to the user, for legitimate purposes, of public navigable waters and harbours within the Realm, where the tide ebbs and flows.

2. He cannot be deprived of that right, except by Legislative authority, duly exercised.

3. If his land fronts on tidal waters, and access thereto is obtainable by the user of such waters, no mere licence or permission from the Crown to another, to obstruct that user, can be sustained; and any plea to that effect is bad.

4. The right to continue such an obstruction cannot be acquired by the Statute of Limitations, because there can be no presumption of a grant.

5. Remedy for personal loss sustained by obstruction to such right, may be materially affected by party's presumed acquiescence, or, silence with knowledge.

6. Such an obstruction inflicting private injury cannot be justified by the allegation that the obstruction itself is a public benefit; nor is the remedy lost by the allegation that the private injury is merged in the greater public wrong.

7. In such cases, the Crown acts for the public, the individual for himself.

8. The description "having a frontage of 40 feet, more or less, on Store street, "and running back to the harbour," is sufficient to include all land within the parallel side lines, extending from Store street to the harbour or bay, according to the curvature of the shore line, up to which the tide flows.

9. *Semble*, the Crown could not, in British Columbia, at the time the titles herein were originated (viz., in 1858), or at any time since, by subsequent licence, legalize any addition to, or the continuance of an obstruction which it had not the power to authorize in the first instance; and any leave or licence to that effect would be inoperative.

This action was commenced on the 18th of May, 1882, and was tried on the 22nd and 24th June, 1885, before Gray, J.

The pleadings state: 1, that the plaintiff, on the 20th August, 1863, purchased from the legal owner in fee the northern portion of Lot 182 D, Victoria City, having a frontage of 43 feet on Store street, thence running back, westerly, to Victoria harbour, and having a frontage on said harbour of 30 feet; which said land is now in possession of the plaintiff;

2. That the whole of said Lot 182 D, at the time of the said purchase, was bounded on the west by Victoria harbour.

3. That defendant is the owner of Lot 130, lying immediately to the north of plaintiff's land, and has erected a wharf and buildings on the west of plaintiff's property, and is now in occupation of the same, whereby all access to plaintiff's property by water is excluded; that such erections were made without the leave or licence of plaintiff.

4. That the plaintiff purchased the land because the access by water added to the value of the lot, and he paid a higher price for it on that account.

5. He claims $6,000 damages, and prays that defendant may be restrained from continuing or allowing the said wharf and buildings

to remain, or any wharf or buildings that obstruct or hinder his access to the harbour.

The defendant denies, 1st, the plaintiff's title.

(2nd.) He denies that the whole, or any part, of 182 D was, at the date of alleged purchase, bounded on the west by the harbour.

(3rd.) Admits his ownership of lot 130 lying immediately to the north of plaintiff's alleged land, *and that he has erected a wharf and buildings on the west of the land alleged to be plaintiff's*, but he denies that access by water to plaintiff's alleged land is thereby excluded. He further states that he is the owner of 130, and of the wharf and buildings erected by him, and that they were so erected, and have been used by him for a long time, without objection from plaintiff, or any one on his behalf.

(4th.) He denies that when plaintiff purchased, the supposed fact of access by water added to the value, or that he paid a higher price therefor on that account.

(5th.) He states he erected the wharf and buildings under licence from the Crown, and that plaintiff is not entitled to any right of access to Victoria harbour, or to any right or easement which has been prejudicially affected by the erection of the wharf and buildings referred to.

Issue was joined on these points.

Drake, Q.C., for plaintiff.

Richards, Q.C. (with him *Hett*), for defendants.

GRAY, J.:—

Before going into the facts and evidence, it is desirable briefly to state the law which must govern the case.

As to the right to the free user for legitimate purposes of the public navigable waters and harbours in the country, where the tide ebbs and flows, by every subject of the Realm, the law is so well recognized and admitted that it requires the citation of no authority. The case of *Woods* v. *Esson* (9 Can. S. C. R., p. 239) as late as 1884, renders unnecessary all preliminary investigation. It shows distinctly that without Legislative authority there can be no power to obstruct or prevent the user of navigable tidal waters, or where the tide ebbs and flows in harbours. If the plaintiff's land, at the time of his purchase, had a frontage on the harbour of Victoria, and access to it over the waters of the harbour, he cannot be deprived of that right by any act, leave, or licence, save that of the Legislature constitutionally empowered to deal with the subject. The Crown cannot give such leave or licence. The Government, to use a synonymous term, cannot give it, unless authorized by the Legislature so to do. The Statute of Limitations cannot confer it, because there can in such case be no presumption of a

GRAY, J. 1886.

McEWEN v. ANDERSON.

grant. The ownership of the adjoining land cannot give it, or the conveniences or benefit that might result. The Legislature is the sole and only judge in such case. If a man has a right under the law, it can be taken from him only by law, or by his own consent. If it is of no great value, the greater reason it should be sacred. If it stands in the way of public progress or improvement, the Legislature can say how, when, and on what terms he may be deprived of it—no one else.

A party's personal claim for damage resulting from an obstruction to his free user of navigable waters may be materially affected by his not opposing its erection, but it does not take away his abstract right, unless his own acts, concurrence, or acquiescence render the conclusion irresistible that he himself was a party to it, and should be prevented from taking advantage of his own wrong.

If the obstruction be one of a public nature, of which the whole community may complain, the steps for removal must take place at the instance of the Crown, as guardian of the public interests, and by its officers; but a man who is specially injured thereby in his person or property, retains and has the fullest right to apply to the Courts of the country for redress for that personal injury, and it is useless for the wrongdoer to attempt to justify the private and personal wrong and injury resulting from his act by the allegation that the act was a wrong to the whole public. The law is plain; the ebb and flow of tidal waters constitute a public highway.

The questions as to the facts are:—

1st. Did the plaintiff's title give him access to his land by means of the tidal waters of the harbour?

2nd. Has he been deprived of that advantage by the act of the defendant?

3rd. If so, what the damage and remedy?

[His Lordship then proceeded to deal exhaustively with the plaintiff's title, and concluded that the plaintiff's title gave him access to the land by means of the tidal waters, and then concluded as follows:—]

But if there be a doubt, who has caused that doubt?

This brings us to the second question: Has the plaintiff been deprived of the advantage of access to his land by means of the tidal waters of the harbour by or through the acts of the defendants?

If upon the evidence a doubt could exist on the first question, it would be one created by the acts of the defendants themselves, for the evidence shews that they altered the old land marks, and created the obstruction for their own purposes. While tenants under the Vignolo lease they removed the earth from the southern portion (the Vignolo property) and deposited it during their

years of tenure upon, and across, and in front of the Pauvillier and northern portions, until they cut off all communication of plaintiff's portion of lot 182 D with the harbour, forming a complete and entire land obstruction of great height, solidity, and width, with buildings thereon and wharves attached thereto, without leave of licence from the plaintiff, or any legal authority whatever, entirely changing the aspect of the locality, cutting him off from the harbour, and, as a necessary consequence, materially lessening the value of plaintiff's property, and the uses to which, as bordering on the harbour, it could be put.

Upon the second question itself there can be no doubt, for the defendants in their pleadings admit the erection, though they deny its effects, and state that they erected the wharf and buildings under licence from the Crown. Even if such licence could be of any avail, not the slightest evidence of any such licence was shown.

Some minor points arose on the hearing and argument, which have no material bearing on the case. The narration of facts and discriptions of locality from memory, as detailed by the different witnesses, were of a most confused and conflicting nature. The appearance of the place is so entirely changed by the deposit of rubbish, filling in of ravines, building of wharves, broken and rotten debris of all kinds scattered around, that it is most difficult at the present time to realize the old conformation of the water line of the harbour; but this fact is plain, not only from the evidence, and the old maps and plans, but from ocular inspection, that access to the plaintiff's portion of lot 182 D, by means of the harbour or its tidal waters, is entirely prevented by the acts of the defendants, who have filled in, and now use and claim as their exclusive property, a large portion of ground covered with material and buildings created and erected by themselves in front of plaintiff's portion of 182 D, in places over which the tide formerly ebbed and flowed, and which before such occupation and obstructions afforded to the plaintiff's property free and ready access to the harbour and its tidal waters.

As to the 3rd question: What is the damage? What is the remedy?

I have no doubt whatever in my own mind that the plaintiff is entitled to the relief claimed, but in view of the long silence of the plaintiff on this invasion of his rights, and the absence of any proof of great pecuniary loss to him, I am not prepared at this moment to estimate that damage. This application may be considered rather as a suit to obtain a declaration of right. It would certainly entail large and uncalled for expense to remove the obstructions complained of. The question of public benefit does not arise. A man cannot enlarge his own property and purse at the expense of his neighbour and get rid of the consequences of the spoliation by calling it a public benefit. If such benefits were permitted there would soon be no harbour at all.

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1886.

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v.
ANDERSON.

The Legislature alone is to determine with reference to tidal waters and harbours what is or is not a benefit. Nor can he get rid of the personal injury he has done to another, by contending that the wrong he has done to the public by his obstruction is so much greater, that the former is merged in the latter. He can be punished for both; by the Crown for one—the public wrong; by the individual injured for the other—the personal wrong to himself. I shall, under all the circumstances, suspend any order for an injunction until the 10th day of May next, to afford an opportunity to the plaintiff and defendant, both of whom reside in England, to come to some arrangement by which their mutual interests may be subserved. Failing any arrangement, plaintiff on that day to be entitled to a decree absolute for an injunction with costs, with nominal damages to the extent of $100.

HAYDEN *v.* SMITH & ANGUS.

BEGBIE, C. J.
1887.
8th August.

Contract—Trustee or Agent—Estoppel.

Prior to the issue of a Crown grant to the defendants (as trustees for the C. P. R. Co.) of some 6,000 acres, the plaintiff with others, who, notwithstanding a reserve placed upon the land, had settled upon some lots near Granville, petitioned the C. C. L. & W. that clemency would be shewn them, and that they might be allowed to purchase their improved lands on fair terms.

While the negotiations for the issue of the Crown grant to the Co. were being carried on between the C. C. and B. (the agent of the Co.), the C. C. requested B. to authorize him (the C. C.) "to inform all such persons as shall be found to have located in a *bona* "*fide* manner previous to 4th August, and who have made substantial improvements "thereon," that the Co. would sell to each such locatee his respective lot at $200. To this B. replied, somewhat varying the conditions, but giving the C. C. no authority to communicate with plaintiff and other petitioners. On the same day that the Crown grant issued, the C. C. announced to the petitioners that the Co. would convey to them their respective lots on terms somewhat different from those mentioned, either in his letter to B. or in B.'s letter to him. The Co. afterwards refused to convey to the plaintiff his lot. On motion for judgment,

Held, that the C. C. was neither the agent of the plaintiff nor a trustee for him, and that there was no concluded agreement of which the plaintiff could claim performance; and although the plaintiff had substantially complied with the conditions proposed his action must be dismissed, but without costs.

As there was no evidence that the defendants were aware of the plaintiff's improvements,—

Held, that the doctrine of estoppel did not apply.

The plaintiff was one of several persons who, notwithstanding the railway reserve placed by the Provincial Government upon the land on 3rd August, 1878 (not rescinded until 10th May, 1884), had settled in February, 1884, upon a lot near Granville, now included in the Crown grant of 6,000 acres to the defendants, as trustees for the Canadian Pacific Railway.

On the 29th December, 1884, the petitioner and 38 other persons presented a petition to the Executive Council in the following terms:—

"*To the Honourable Chief Commissioner of Lands and Works, and "Members of the Executive Council of British Columbia:—*

"We, the undersigned citizens of Granville, New Westminster Dis- "trict, respectfully represent to your honourable body that those who "have taken possession of town lots in Granville, and have made "improvements, built houses, &c., with the express understanding that "they would be allowed to purchase them at a fair valuation when "placed in the market by either the Dominion or Local Government;

"We, therefore, now implore Executive clemency in their behalf, that "they may now be shewn that consideration that they were formerly "led to expect, and respectfully request that they will be allowed to "purchase them on fair terms. And your petitioners, as in duty bound, "will ever pray."

On the 31st January, 1885, Mr. Smithe, the Chief Commissioner of Lands and Works, addressed the following letter to Mr. Beatty, the "general and confidential agent of the Canadian Pacific Railway in "matters relating to the Pacific terminus of the Company":—

"SIR,—Referring to our conversation upon the subject of persons "who had located upon lots in the townsite of Granville previous to "the date of Mr. Van Horne's visit to that place, I have now the honour "to request that you will, on behalf of the Canadian Pacific Railway "Company, authorize me to inform all such persons as shall be found "to have located in a bona fide manner previous to that date upon lots "there, and who have made substantial improvements thereon, that "the Company will sell to each such locatee his respective lot at ($200) "two hundred dollars. So far as I have information, the number will "not exceed a dozen."

On the same 31st January, Mr. Beatty wrote and sent to Mr. Smithe a letter as follows:—

"DEAR SIR,—I have the honour to acknowledge the receipt of your "letter of this date, regarding bona fide occupants who made substantial "improvements on lots in the town plot of Granville previous to Mr. "Van Horne's visit. In the conversation I had the pleasure of holding "with you on this subject, it was understood that $250 would be con- "sidered, under the circumstances, a fair price to fix on these lots; but "if since the date of our conversation you have considered the question "more fully and think that figure excessive, I am willing, on behalf of "the Company, to accede to your wishes and have the price fixed at "$200.

"I would point out, however, that it may be necessary to alter the "plan, and any arrangement made with these people should be on the "understanding that, in the event of this happening, there would be no

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"opposition raised on their part, provided the Company granted them "lots as well situated as those they now occupy."

At the foot of which letter there was subsequently written the following note:—

"On behalf of the Canadian Pacific Railway Company, I agree to "the within arrangement.

(Signed) "W. C. VAN HORNE,
"*Victoria, 10th November, 1885.* "*Vice-President.*"

On the 13th February, 1885, Mr. Smithe sent the following letter to the 39 petitioners (including the plaintiff):—

"GENTLEMEN,—In reply to your petition, received at the Lands and "Works Office here on the 29th December last, I have the honour to "inform you that I have arranged with the Agent of the Canadian "Pacific Railway Company that bona fide settlers upon town lots at "Granville, who have substantially improved their lots, and who located "previous to June, 1884, shall get their respective lots at ($200) two "hundred dollars each."

On the 13th of February, 1886, a Crown grant of the 6,000 acres was issued to the defendants, Sir Donald A. Smith and Richard B. Angus as trustees for the Company. The petitioners thereupon endeavoured to procure from the defendants re-grants of their several lots, which in several cases the Company acceded to; but having ultimately refused any conveyance to the plaintiff, he commenced this action, praying that the defendants might be ordered to convey to him the lot claimed by him.

The action was tried at Victoria on 8th July, 1887, before the Chief Justice and Special Jury; the Jury found that the "plaintiff was "a *bona fide* occupant, and had made substantive improvements on the "land prior to Van Horne's visit on the 4th August, 1884."

Theodore Davie (with him *Walls*), for the plaintiffs.

Drake, Q. C., for the defendants.

On motion for judgment, the following judgment was delivered by—

BEGBIE, C. J.:

The plaintiff's claim to relief rests on two documents—the petition to the Council, presented 29th December, 1884, and the answer to that petition, dated 13th February, 1885; which are to be taken in conjunction with three others: Mr. Smithe's letter to the defendant's agent, dated 31st January, 1885, Mr. Beatty's reply of the same date, and Mr. Van Horne's memorandum thereon of the 10th November, 1885.

The petition prays that occupants in situation of plaintiff be allowed "to purchase their lots at a fair valuation when placed in the market "by the Dominion or Local Government," and "implores Executive

"clemency, and to be allowed to purchase on fair terms." The town lots in question, including the plaintiff's lot, have never been placed in the market, either by the Dominion or Local Government.

Mr. Smithe, in his letter, terms the persons forming the class in question "locatées;" Mr. Beatty styles them "occupants:" both evidently meaning the same persons, and, I think, there is no ground for importing into the word "occupants" the meaning required by "occupation" in the Provincial Land Acts. Both letters taken together refer to persons who have previous to the 4th August, 1884, "located," taken up, or occupied lots in a *bona fide* manner, and also made substantial improvements thereon. Mr. Smithe refers in his two letters to two different dates, but he refers to the date as fixing only the location; Mr. Beatty, who writes only one letter, refers to only one date, using it to fix both the location and the improvements.

The jury have found that the plaintiff had brought himself within this description; and I quite agree with this conclusion, which, indeed, appears irresistible, unless we adopt one or both of two theories which, though not broadly advanced, seemed to underlie all the contention of the defendants. The first of these is that: "Shall be found to be *bona fide* locatees, means shall be determined and acknowledged as such by the C. P. R. at their own corporate pleasure, arbitrarily determined by them—as a joint stock Company, or by their directors—on such evidence, and after such enquiries, as they may think proper in their sole judgment. But this is not a conclusion which recommends itself to common sense. The determination of an issue of fact as between two parties can never, unless so expressed in the clearest words, be left entirely to the arbitrary will of either party, especially when that party is a Corporation. It is often left in Government contracts to the sole determination of the Government engineer; but never, I think, to the arbitrary will and pleasure of the Executive. Here it was loudly alleged by the plaintiff, and not denied by the Company, that the private tribunal appointed by the Company to examine this claim had reported in favour of the plaintiff; but that the Company had arbitrarily refused to accept that report. No evidence was given to support that allegation—it would, probably, have been inadmissible—but the allegation was not denied. In default of a private tribunal, the decision seems most naturally and decisively left to be dealt with by a judge and jury, like any issue of fact in an action. The other theory, which seems equally to underlie the defendants' argument, and which, I think, is equally unfounded, was this: That any person taking up land with a view to a prospective rise in value, or with any other object than merely residing (and it might be cultivating), could not be deemed a *bona fide* occupant. But it seems to me that no person in the world would locate or seek to acquire a title to any piece of wild land in the Province (except for the most temporary purposes) unless he

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did expect a rise in its value. No purchaser of a town lot would be a *bona fide* purchaser from that point of view. Nay, the Company themselves are not acting *bona fide* in acquiring the large tract of 6,000 acres, for they expressly demanded it with the object of profit on a re-sale, and not for occupation, or utilizing it for their works, except a comparatively small portion. And, perhaps, the whole amount expended by the Company in the extension of their line and erection of works does not bear a larger proportion to their 6,000 acres than the expenditure of this plaintiff bears to the lot occupied by him. In fact, before the 4th August, 1884, the plaintiff had opened up an access through the jungle, had built a residence, which he at first occupied himself, and which, when his other avocations called him away, he rented out to another man with his wife and two children, at a rent which gave a very substantial return for his expenditure. This evidence is quite uncontradicted; one witness, the claimant of another lot, who had been favourably accepted by the Company, and who, no doubt, had erected more expensive buildings on the lot claimed by him, did indeed uniformly abstain from speaking of the plaintiff's "house," always designating it as a "shanty." But the fact of residence, occupation, and rental were not attempted to be denied. I cannot but agree, therefore, with the jury in the conclusion that the plaintiff was a *bona fide* locatee who had placed substantial improvements on the lot previous to 4th August, 1884. Since that date, and, indeed, since the 31st January, 1885, the plaintiff has expended about $800 or $900 on this lot; which, of course, could not affect the question before the jury. But it was relied on by Mr. *Theo. Davie* on another principle, (viz.,) estoppel, which I shall examine presently.

Both parties now move for judgment. But here the plaintiff's difficulties are much greater, in contending that the letters above set forth contain any promise, or undertaking, or contract, of which the plaintiff can enforce the performance as against the Company.

The plaintiff's right to a grant from the Crown, on the 4th August (considered apart from any question of the Company's rights or liabilities), was, in my opinion, on the principles lately enunciated in *Jaques* v. *Regina*, and *Clarke* v. *Regina*, entirely in the discretion of the Chief Commissioner. He had placed himself, indeed, in such a position, by locating and improving, that the Chief Commissioner would, perhaps, have been justified (but for the reserve) in advising a Crown grant of this lot to be issued to him; but, on the other hand, the plaintiff could not have compelled the issue of such grant, *i. e.*, could not have compelled the Minister to give any such advice to the Lieutenant-Governor. The plaintiff, therefore, with several other persons claiming to be similarly circumstanced, presented, on the 29th December, 1884, the petition to the Chief Commissioner and Executive Council, alleging occupation and improvement by them of their respective lots, and

praying "that they may be shown that consideration that they were "formerly led to expect," and that they (*i. e.*, the lots, I suppose), "will "be allowed them on fair terms;" it being by this time well known, or (which raises the same equities), universally believed, that the Canadian Pacific Railway were negotiating with the Provincial Government for the grant to them of an extensive tract of land (then or afterwards fixed at 6,000 acres), which would include the lots claimed by the several petitioners.

It is to be observed, however, that the petitioners do not refer to any terms to be made with the Canadian Pacific Railway; nor to any negotiations—either by the Government or by themselves—with the Company; nor do they ask the Executive Council to intercede with the Company, or to act as their agents with the Company. They simply pray that "the consideration they had been led to expect" may be exhibited, and that they may be allowed to purchase on fair terms.

Mr. Smithe seems hereupon to have had some verbal communications with Mr. Beatty, the agent of the Company, the upshot being, as he supposed, that the Company would be ready, upon getting their 6,000 acres, to re-grant to the several claimants the lots respectively claimed by them, at $200 apiece, upon proof, 1st, that they had *bona fide* located before August, 1884, and, 2nd, that they had made substantial improvements thereon (without any limitation as to date); and he wrote the letter of the 31st January to Mr. Beatty, requesting that he (Mr. Smithe) might be authorized by the Company to inform the claimants to that effect. Mr. Beatty, by letter of the same date, acquiesced in this view of the price and the conditions, save that he stipulates that the improvements as well as the locations must have been made before the 4th August; but he adds a fresh condition (viz.), stipulating for an exchange, if rendered necessary by the further surveys; and he rather pointedly abstains from giving Mr. Smithe the authority requested in his letter for communicating to the plaintiffs the result of their negotiations, in fact, he entirely abstains from noticing at all the only expressed request made by Mr. Smithe; nor does it appear that Mr. Smithe ever was authorized by the Company, or that the Company were ever informed (until quite recently) that he had communicated that result. On the 13th February, however, Mr. Smithe did send a letter to the petitioners, informing them that he had "arranged" with Mr. Beatty that "*bona* "*fide* settlers on town lots, who had substantially improved their lots, "and had located previous to *June*, 1884," should get their lots at $200 apiece. It will be seen that this differs both from his own view in the letter of 31st January and from Mr. Beatty's of the same date; nor does he notice the somewhat important stipulation in Mr. Beatty's letter as to substituting other lots if necessitated by the survey.

Can there be gathered from these four documents (viz.), the petition, the two letters of 31st January, and the letter of the 13th February, a

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contract between the plaintiff and the defendant Company? In my opinion there cannot. An agreement or contract in the words of V. C. Kindersley, *Haynes* v. *Haynes* (1 *Drew* 433), is not constituted until two parties will the same thing, and each has communicated his will to the other, with a mutual engagement to carry the same into effect; when this mutual engagement and the terms of this common will are to be evidenced by letters, the evidence must be clear and unconditional.

No two of the documents adhere to the same terms. The Company's agent does not adopt, pure and simple, the proposals of the Minister; he introduces a considerable modification. Nor is there any acceptance, even verbal, of the additional terms proposed in the only document signed by the Company's agent. Mr. Smithe was the common correspondent of both parties; but the agent, for the purpose of making a contract, of neither. He asks to be appointed the agent of the Company, *ad hoc;* but the Company decline. He neither offers to act, nor is asked to act, as the agent of the petitioners; and if he represent anybody but himself, it is the Executive Council, whose agent he is. The petitioners throw themselves direct on the "Executive clemency," and the petition is addressed to the whole Executive Council. The claimants never address the Company, nor do they request anybody else to do so. Then again, to what does this correspondence bind the claimants? To nothing at all. If they will pay their $200 they are, it says, to have the lots; but there is no stipulation binding them to pay $200 for their lots, nor to give any consideration whatever, pecuniary or otherwise, to the Company. Where a contract has to be pieced out from several letters, the first thing to be shown is, that they all agree. Here the Minister's letter to the defendant's agent mentions one set of terms; the agent's letter introduces two fresh terms. The Minister then sends a letter to the claimants differing in its terms from either of the former letters, and entirely omitting to inform them of the last important modification. How can it be said that the minds of the parties were ever at one?

Let us assume that Hayden was personally contemplated in the letter of the 31st January, 1885; and that the two letters of the 31st January, and the letter of 13th February, 1885, were identical in terms, which is far from the case. These two assumptions are clearly very favourable to the plaintiff's position in this action. We then have, from the facts proved before the jury, this state of affairs:—

1st. Hayden was in a position to claim from the Provincial Government, and the Government might (but for the Reserve) have been justified in issuing to him, a Crown grant of his lot for $100. But he could not have enforced this claim against the Government. The

Minister might, in his discretion, have refused, being responsible only to Parliament for his ministerial advice.

2nd. The Minister, negotiating with the defendants for the grant to them of a much larger tract of 6,000 acres, extending over and including Hayden's lot, and being aware of Hayden's position and rights, procured a promise to himself from the Company that they would, out of their conveyance, re-grant to Hayden his lot for $200. This promise was communicated to Hayden, but there is no evidence that the defendants authorized that communication, or were aware that it had been made; rather the contrary.

It is very probable, and I assume, further, that this understanding as to the execution of a re-grant was, in fact, part of the consideration inducing the Government to execute the grant of 6,000 acres to the defendants. There is not in all this (and this statement is far more favourable to Hayden than the actual circumstances) anything to support the present action by Hayden, unless the Minister could be treated either as a trustee for Hayden, so as to come within *Touche* v. *Metropolitan Railway Warehousing Company* (L. R. 6. Ch. App. 671), or as an agent for Hayden, so as to come within *Hook* v. *Kinnear* (3 Swans. 417). The cases cited by Mr. *Davie* of *Routh* v. *Thompson* (13 East. 274); *Foster* v. *Bates* (12 M. & W. 226); *Muir* v. *Holten* (4 U. C. R., p. 505); *Bird* v. *Brown* (4 Ex. 786), all fall within the latter principle. *Sutherland* v. *Pratt* (12 M. & W. 16) may be referable to either. In fact the functions of an agent and of a trustee are often identical, as are the equities arising on their acts in favour of principals or *cestuique* trusts, though not named or parties to the negotiations. I omit all reference to numerous cases where contracts for marriage settlements have been enforced by children, who, of course, were not and could not have been parties to the contract. As Mr. J. *Fry* observes (*Fry* S. P. 43) the consideration which permeates marriage settlements has induced, and justifies, doctrines specially affecting such contracts, not necessarily applicable to other agreements. But in order to apply the above-mentioned cases to the present, it would be necessary to show either that the Minister occupied the position of agent to conduct negotiations with the Company, or else that of trustee for the claimants to hold any benefits bestowed on them. And I do not see any evidence that he ever was asked to occupy such a situation, or ever held himself out as such, or was considered to be such. What the position would have been if, in consequence of the correspondence, the Minister had reserved all the disputed lots out of the Crown grant of the 6,000 acres until the rights of parties should be ascertained, or if he had stipulated, as part of the consideration, that the Company should re-grant to himself the lots which might turn out to have been duly located, etc.,

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thereby constituting himself a trustee, very much as in *Touche's* case, it is unnecessary to inquire. I do not think the Court can give to the plaintiff the relief which he asks on the ground of any contract to be extracted from this correspondence.

The plaintiff, however, urged that if not on the ground of contract, yet on the principle of estoppel, the defendants having stood by with folded arms while he was expending $800 or $900 on his lot, could not now take advantage of the informality of the negotiations.

The doctrine of estoppel is in many cases extremely just and equitable, though sometimes apparently the reverse. But in all cases, I apprehend, the acts relied on must be clear and unmistakeable, and must refer unequivocally to some supposed contract, express or implied. In the present case, the plaintiff's expenditure would have to be shown to have been made by him in reliance on the supposed contract and on nothing else; and the Company must be shown to have known that he was so relying. Now in the first place, there is nothing to show that the defendants (the Company) knew that plaintiff was at all aware of the promise made by Mr. Beatty, or of the negotiations. There is nothing to show that Mr. Beatty was aware that his last important suggestion had been assented to by Mr. Smithe or by anybody else. There is evidence that Mr. Beatty had been asked, and had declined, to authorize Mr. Smithe to inform the claimants of the state of negotations on the 31st January; and on the other hand there is no reason to suppose that the plaintiff knew anything of these negotiations before the 13th February. There is reason to suppose he knew nothing till that day. But his improvements, he tells us himself, were commenced immediately after the 31st January, and were commenced not in consequence of any supposed contract or promise by Mr. Beatty or Mr. Smithe, but in consequence, as he said, of his being perfectly satisfied with some assurances he had received after his attendance on the Parliamentary Committee here in January, 1885. The doctrine of estoppel fails to apply to such a case. *Ramsden* v. *Dyson* (L. R. 1 H. L. 140.)

The result is that there must be judgment for defendants. But as I think the plaintiff wholly right on the facts, and that the defendants' refusal is wholly unjustifiable, though the plaintiff's legal remedy fails, he will not have to pay any costs but his own.

BEGBIE, C.J.

1885.

August.

In re TRIMBLE.

In re THE LAND REGISTRY ACT.

Certificate of Indefeasible Title — Whether Devisee of Testator entitled to such Certificate is himself entitled.

A devisee in fee from a testator who was entitled to a certificate of Indefeasible Title, but which had not been issued, is not entitled to such certificate except upon the usual conditions.

Semble, that even if such certificate had been issued to the testator the devisee would not *ipso facto* have been entitled.

Petition for an order on the Registrar-General of Titles to give the applicant a certificate of Indefeasible Title under circumstances that appear in the judgment.

Pooley, Q. C., for the petitioner; the Registrar-General contra.

SIR M. B. BEGBIE, C. J.:—

Mr. Pooley, for the petitioner, Andrew Trimble, brother and devisee of the late Dr. Jas. Trimble, asked that the Registrar might be ordered to issue a certificate of indefeasible title to him under sec. 47. The will has been admitted to probate and no difficulty arose as to its validity and effect, but the Registrar alleged that the practice of the office was to grant such certificate only when the applicant himself had been the registered owner for seven years; that the will itself had not been as yet registered as an instrument of title and that when it should be registered then, and not till then, Andrew would become entitled to the benefit of sec 47, and must wait seven years before he could get the certificate of indefeasible title.

The Act itself does not say that. It says that the owner in fee of any land, the title to which has been registered for the space of seven years, may apply for such certificate, which is to be issued on the production of certain affidavits and three months' notice by advertisement without any adverse claim and appearing under (ss. 47, 48). Title to this land was registered by him so long ago as 1864 or 1865 as an absolute fee. It is admitted that the testator could in his lifetime, at any time after 1872, have demanded the certificate of indefeasible title. If he had done so Andrew, as devisee in fee of the land, would now be entitled to hold that document as one of his muniments of title. But he is now claiming to be placed on a better or more advantageous position than if the testator had obtained such certificate. Andrew's position in such case would be that the holding such certificate would register the will showing his title as devisee. His title would then as to all matters previous to the testator's death be indefeasible so far as the will is concerned, but it would not be free from

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liability to impeachment until after seven years. If however the present application be granted Andrew will, at the end of three months from this date, obtain a certificate of indefeasible title under which (sec. 49) neither the validity nor the construction of the will can any longer be called in question. And so if, at the end of three months, Andrew should, for valuable consideration duly paid, convey to another purchaser, that purchaser will in his turn be equally entitled to a certificate of indefeasible title which would for ever conclusively demonstrate the validity and effect of the conveyance to him, and so this Statute might be perverted into a three months Statute of Limitations as regards the title to any land registered in fee. And sec. 45 taken with sec. 35 seems rather against the view of applicant. By sec. 45 when any conveyance or transfer is made of any registered real estate (*e. g.*, here, when this Broad Street land is devised to Andrew) the transferee or grantee (which I take it includes devisee) shall be entitled to be registered as the owner of the same estate or interest then held by or vested in the transferor or grantor (testator); and in the case of an absolute fee (as in the present case) a new certificate of title shall be issued to such transferee or grantee (devisee) on production and cancellation of the former one (*i. e.* that issued to Dr. James). This new certificate of title seems all that the devisee is, under this section, entitled to. It is by sec. 35 to be in the form T and is to be taken in all Courts in B. C. (which are the only Courts which can decide on the right to land, the Courts of Appeal are B. C. Courts in this sense) to be received as *prima facie* evidence (not conclusive evidence, as is the Court now asked for) of the particulars therein set forth. Of course before issuing this new certificate of title in the form T to the devisee, the Registrar will see that sec. 50 is complied with; that there is *prima facie* evidence of the genuineness of the will. But I think the true view of sec. 47 is that nobody can claim a further certificate until he has held a certificate in the form T for seven years, irrespective of the question whether some one or more of his predecessors may have been entitled to apply and obtained such certificates, or whether he neglected to do so. He cannot get the certificate himself of indefeasible title until he has been seven years on the register. If his predecessor has obtained such a certificate of course the present holder would have the benefit of that. But an indefeasible title in his predecessor would not entitle him to such a certificate in his own name; that would operate to confer indefeasibility at once on the conveyance to himself (here, for instance by Dr. Trimble's will), although it may not have been on the register more than three months. In establishing an indefeasible right to land simply upon seven years' prescription, which may in general terms be said to be the object of this statute, care was of course taken to estimate all grounds of suspicion. And these are chiefly two: 1st, personal identification of the parties to each conveyance and satisfactory

evidence that each conveyance was fully understood and voluntarily executed. And 2nd, identification of the conveyance. When a title thus *prima facie* established, has maintained its position unassailed for seven years on the absolute fee book, the holder is entitled to the further certificate termed of indefeasible title. After that has issued, the intermediate conveyance upon which it is based and the right of the holder to the estate thereby conveyed is not afterwards to be allowed to be called in question either in his own hands or in the hands of any person claiming through him. But when such holder conveys his title to a purchaser although the conveyance previous to the certificate of indefeasible title cannot be impeached, yet, subsequent conveyances may until they in turn have remained on the Registry unchallenged for the space of seven years. The certificate of indefeasible title is therefore very valuable to subsequent purchasers and establishes a perfectly satisfactory root of title, whereas the registration of an owner in the absolute fee book does not protect any of the previous conveyances from being disputed. But long practice of the office should not be lightly set aside. That practice was probably adopted in view of the operation of sec. 47 and sec. 40. Registration under sec. 40 protects only purchasers for valuable consideration; and protects them only against unregistered claims. It leaves their title liable to be impeached by any attack on the validity or on the construction of their own purchase deed or of any deed forming a necessary link to the chain of evidence to their title or by attacks on the regularity or proficiency of the registration of any such deed. Whereas the certificate of indefeasible title under sec. 47 protects its holder whether he take as purchaser for valuable consideration, or by free gift, or by devise or inheritance. And it protects him as owner of the fee not only against unregistered claims or deeds, but also against any supposed objection to any registered document, or to his own immediate conveyance. After the lapse of seven years the fact of heirship, the validity of a devise, is not to be disputed. And the certificate of indefeasible title places a devisee, or heir, in as advantageous a position as if he had been purchaser for valuable consideration. If Andrew be now entitled to a certificate of indefeasible title in his own name establishing for ever the validity of their devise to him, then any purchaser from Andrew may, three months hence, demand in his turn a certificate of indefeasible title which would make the conveyance to himself for ever unimpeachable, and so on from time to time which would in full amount to this, that so soon as land has been on the absolute fee register during seven years, under sec. 40 it would thenceforth be always indefeasibly assured to any subsequent taker whether purchaser for valuable consideration, or a devisee, or heir-at-law, after a three months' possession, which can hardly have been intended by the Statute. It must, according to the petitioner's construction of the Statute, be immaterial whether the testator were himself regis-

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tered in 1864 or whether he purchrsed subsequently from an owner registered in 1864, in fact the number of successive owners and of the necessary intermediate conveyances has, according to the applicant, nothing to do with the case. It is sufficient in his view if the land have been on the register of absolute fees in the name of any of the applicant's predecessors for seven years, and if the fee is now *prima facie* vested in the applicant so as to enable him to claim a certificate of title in the form T, he is then further entitled to a certificcte of indefeasible title. I do not think this is the true view. I think that the title mentioned in sec. 47 must mean the applicant's title and not merely a title in some one else from whom the present owner may be able to make out a *prima facie* line of claim.

The petitioner's application was accordingly refused.

[NOTE.—Compare *In re Shotbolt*, reported *infra* p. 337.]

ANDERSON *v.* SHOREY.

McCREIGHT, J.

1885.

Insolvency—What is—Fraudulent preference—What amounts to—Doctrine of pressure—Provincial Fraudulent Preference Act—Constitutionality of.

A chattel mortgage to two of his principal creditors, made by a trader while unable to pay his debts in full and knowing himself to be on the eve of insolvency, covering all his property except a leasehold interest and his book debts, held void as being made with intent to defeat or delay his other creditors, and to give the mortgagees a preference over them.

The mortgagees had requested the trader to secure them by chattel mortgage, he stating to them at the time that he was solvent, that his other creditors were small, and that he could arrange to pay them off and concentrate the business.

Held, insufficient to bring into question the doctrine of pressure.

Stat. B. C., 43 Vic., cap. 10, considered constitutional.

Interpleader issue directed to try validity of claim under prior chattel mortgage to goods seized under execution.

The facts and arguments of counsel fully appear from the judgment.

A. J. McColl for the claimant, the plaintiff in the issue.

M. W. T. Drake, Q. C., for the execution creditors, the defendants in the issue.

McCREIGHT, J.:—

This was an interpleader issue in which Anderson, claimant under a bill of sale from Rae, dated 14th April, 1885, was plaintiff, and Shorey, the execution creditor of Rae under a judgment recovered 14th May, was defendant.

It appears from the evidence that Anderson, as manager for Strouss & Co., had written to Rae on the 9th April asking for security for a debt of about $2,500 due by Rae, and, on receiving Rae's reply that he did not know what he could give as security, Anderson went to Rae on the 13th. The conversation took place between them as follows, as stated by Anderson: "I then asked Rae if he could pay the account. He said he had not the means to pay then. I then asked him to secure us by a chattel mortgage, and he said he did not want to prefer one creditor to another. He said he was in perfectly solvent circumstances and well fixed, but he said if Turner & Co., his largest creditors, were included he would give it, that his other creditors were small, and he could arrange and pay them off and concentrate the business with Strouss and Turner. So I consented to the mortgage. I never made any representations as to fending off other creditors, for he said he could pay them," etc. And on the 14th the bill of sale was given of all Rae's stock in trade, present and future, but not including

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book debts, which appear to have amounted to $800 or $1,000, nor including his real estate, which consisted of the leasehold premises on which the store was situated, mortgaged, however, to T. Earle for $3,400, and some 160 acres of land, mortgaged for $1,000, but Mr. Black only thinks the mortgage was after the 14th of April. The value of this land is not shown. Rae's liabilities are computed by Atkinson at $16,608, by Anderson at $15,817, and the latter says the assets were $16,901. The conclusion, however, that I come to on the evidence is that it cannot be said there was a substantial exception of property from the mortgage; further, the stock to be acquired in future by Rae was included in the bill of sale.

Mr. *Drake*, for the execution creditors, contended that the bill of sale was void, under the local Act, 43 Vic. B. C., cap. 10, sec. 2, which is a copy of the Revised Statutes Ontario, 1877, cap 118, and that Rae fell within the words of the Act, "being in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency," and I think his contention his correct. The late Master of the Rolls held that these words, "or unable to pay his debts in full," were satisfied by proof of a promissory note of the grantors having been protested—*In Re Globe New Patent Iron & Steel Co.*, L. R. 20 Eq. Cas., p. 337. Atkinson says in his evidence, "I had a conversation with Rae after his purchase and the delivery of the goods. His note for $400 was protested on 4th of November. I was not aware of this at time of sale. After the protest I went to the bank and to Rae, and Rae said he was in a position to meet it, but not all at that time." Indeed, the general assignment for creditors of the 20th April, *i. e.*, six days afterwards, and the evidence generally, leaves no doubt on this point. Further, this last conveyance fully satisfies the alternative condition of Rae, "knowing himself to be on the eve of insolvency."

Mr. *McColl* contended that Shorey & Co. had no right to litigate this question, because of the conveyance of 20th April, but I think this objection is irrelevant, for the only question I have to deal with is, has Anderson a better claim than Shorey in view of the Act in question?—see *Edwards* v. *English*, 7 El. and Bl. 564—and I have nothing to do with the rights of third parties, and no means of ascertaining the validity, or otherwise, of other bills of sale. He objected also that the judgment was signed on the 16th of May, but I think this is immaterial under the present Act, as it would be under the Statute of 13 Elizabeth; and he further contended that the exception of the book debts and 160 acres of leasehold premises was substantial, but I have already said the evidence leads me to an opposite conclusion.

I do not think either that the local Act or the Ontario Act is *ultra vires*, as he contended.

In the Ontario cases the point seems not even to be raised, and I do not see how it could be. The Act does not deal with the subject of insolvency.

The only other point to which I need refer is that involving the "doctrine of pressure," as it is termed. On this see *Brayley* v. *Ellis*, 9 Ont. App. 565, a somewhat similar case on the Ontario Act. There the Court was equally divided on the point whether this doctrine had any application to cases falling within the Act. I do not propose to give any opinion on the point. In the view I take of this case it is unnecessary to do so, for I do not think Rae, in giving the deed now in dispute, acted so as to be affected by the criterion mentioned—*Ex parte Griffith*; *In re Wilcoxon*, 23 Ch. D. 69, and *Ex parte Hill*, *In re Bird*, ibid, 695.

In *Brayley* v. *Ellis*, 9 Ont. App., at p. 568, it is pointed out that in cases of pressure the evidence should be scrutinized with great care.

I think the evidence, coupled with the surrounding circumstances, indicates that the dominant or effectual view which Rae had in making a conveyance to Anderson, in trust for Strouss and Turner & Co., was to prefer them to the other creditors, and by means of such preference, perhaps, be enabled to carry on his business secure from the immediate pressure of smaller creditors, whom he no doubt intended to pay off when in a position to do so; but surely this is against the Act.

If Rae had executed the general conveyance for creditors on the 14th, instead of the particular deed for the benefit of the three several creditors, he would have been acting in conformity with the local Act and with fairness towards all his creditors, and it is by no means clear that Anderson would not have consented to this, for he says: "I considered him not insolvent. I thought at the time of taking the bill of sale that he was perfectly solvent." Further, the conveyance in the bill of sale of after-acquired stock was the suggestion of Rae only. The act of including such property is naturally treated as important in the cases on the subject. In estimating Rae's conduct I place no stress on what Rae said after the execution of the conveyance. Mr. *McColl* objected to the admissibility of these statements, and I think correctly.

I have said little or nothing as to the conveyance to Earle of 15th April, and the other deed of 20th April, as these may be the subject of further litigation.

This is my judgment on this issue, and, of course, it leaves untouched the claims under those other two bills of sale. Had I been aware of these deeds at the time the present issue was settled, I think I should have suggested some proceeding more calculated to settle the rights of all parties interested in the goods.

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Inconvenient issues sometimes come before the Courts—see *Belmont* v. *Aynard*, 4 C. P. D., 221, and *ibid*, in the Court of Appeal, at p. 353, and the remarks of the Lord Justices, especially of Cotton, L. J.

I think the best thing I can do is to direct a stay of proceedings for a fortnight so as to allow of proceedings under the bills of sale of the 15th and 20th April respectively.

As I already intimated, of course, I cannot decide that Anderson's claim is good, merely because of the existence of these bills of sale, nor, on the other hand, should Shorey & Co. be allowed to realize regardless of them.

The costs of this issue must follow the usual rule, in favour of the successful party.

GRAY, J.
1886.
November.

CLARKE ET AL
v.
THE CHIEF COMMISSIONER OF LANDS AND WORKS.

Chief Commissioner of Lands and Works—Mandamus to issue Crown grant—Petition of Right.

Mandamus does not lie to compel the Chief Commissioner of Lands and Works to issue a Crown grant: the remedy is by petition of right.

MANDAMUS.

The facts appear in the judgment.

Theodore Davie and *C. Wilson* for the applicants; *Irving*, Deputy Attorney-General, *contra*.

GRAY, J.:—

This is an application on behalf of the plaintiffs to the Court for a *mandamus* to the Chief Commissioner of Lands and Works commanding him to issue Crown grants to the plaintiffs of certain lands in the District of New Westminster claimed by them under the Land Acts.

Before going into the merits of the case, a preliminary objection is taken by Mr. *Irving*, Deputy Attorney-General, on behalf of the Crown, that the plaintiffs have mistaken their remedy, that a *mandamus* will not lie in a case like the present, but their remedy must be by petition of right.

There is a marked distinction between departmental acts, to be performed by a Minister of the Crown in discharge of the duties pertaining to his office, and proceedings in which he simply acts in a representative capacity. In the first a *mandamus* will lie because the Queen is simply commanding him to do his own duty as defined by

law. In the latter, the act he does is not his own act, but a vicarious act—the act of the Sovereign. Practically the results may be the same, but constitutionally the proceeding is entirely different. The present case illustrates the distinction under the constitution. All ungranted lands are vested in the Crown, held, it is true, for the use of the public, but theoretically under the constitution disposed of by the Crown *ex gratia*. The grant is made in the Queen's name, the fee is held from the Queen, and can only be divested out of the Queen by her own act. A Minister of the Crown, be he Commissioner of Crown Lands or filling any other office, cannot do it in his own name; what he does to divest the fee is regarded and supposed to be the personal act of the Queen. By her assent constitutionally given to the Land Acts it is enacted that, under certain terms and on certain conditions, grants of land from the Crown may issue, and it is the duty of the Commissioner of Crown Lands to see that those terms and conditions are complied with, and when they have been complied with, then the Crown will make the grant, not the Commissioner or any other Minister. The fee will pass from the Crown, not from the Commissioner or Minister. A *mandamus*, as already stated, is simply an order from the Crown to a subordinate officer to do something the law states to be his duty. An order, therefore, from the Crown to the Crown to do something would simply be an anomaly, and under our constitution cannot be. The local government itself, whatever may be its power, acts in the name of the Queen. The lands, though under the control of the Local Government, are held by the Government in the name of the Queen; the fee is not vested in the Local Government. The distinction between the *mandamus* and the petition of right, so far as the subject is concerned, is one of form, but of constitutional form which the Court cannot depart from without positive legislation permitting it. The subject who claims that he has complied with the law, and therefore becomes entitled to a grant of land, is not without his remedy. Under the constitution that remedy is by petition of right. He sets forth his case. The Commissioner of Lands, or other Minister whose duty it is, gives his answer; the case is heard, determined by the Court, and the law carried out. The law and practice are both well known in this Province, and the distinction between the departmental duties and vicarious duties of the Minister shewn in the cases determined in this Province, namely: In the matter of *Eli Harrison, Jr.*, under the "Land Ordinance, 1870," July 15th, 1870; *Vowell* v. *The Queen*, 9th August, 1875; *Peck et al.* v. *The Queen*, 17th March, 1884; *DeCosmos* v. *The Queen*, 1 B. C. R., Pt. ii., 26. Until overruled, these cases must govern.

The application for a *mandamus* must therefore be refused. The Crown asks for no costs.

Application dismissed.

DIVISIONAL COURT.

1887.

October.

FULLER *v.* YERXA.

Appeal to Divisional Court—Order final or interlocutory.

No appeal lies to the Divisional Court from an order setting aside an order giving leave to issue a writ of summons for service out of the jurisdiction.

Appeal to the Divisional Court by the plaintiff against an order of Mr. Justice Crease setting aside an order for leave to issue writ of summons for service out of the jurisdiction of all subsequent proceedings had thereunder. It came on to be heard before Begbie, C. J., and Gray and Walkem, JJ., on October 20th, 1887.

Bodwell for appellant; *Helmcken* for defendant.

On the appeal being called on, *Helmcken*, on behalf of defendant, objected to the jurisdiction of the Divisional Court entertaining the appeal, as the order appealed against was final and not interlocutory. The Court sustained the objection, and dismissed the appeal with costs.

Appeal dismissed with costs.

FULL COURT.

1888.

March.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* THE CANADIAN PACIFIC RAILWAY, CO., *et al.*

Order allowing demurrer—Whether final or interlocutory.

An order allowing a demurrer to a pleading is a final order for the purpose of an appeal.

Appeal by the defendants against an order of the Honourable the Chief Justice allowing a demurrer to so much of the statement of defence as set up injunctions issued at the suit of third parties, restraining the Company from proceeding under a contract with the plaintiff, as a defence to an action on a bond securing the completion of said contract.

It came on to be heard before Crease, McCreight and Walkem, JJ., on March 16th, 1888.

Drake, Q. C., and *Helmcken*, for the appellants: *Wilson* for respondent.

Wilson, for the respondent, argued as a preliminary objection that the order appealed from was an interlocutory and not a final order, and that therefore the appeal lay to the Divisional and not to the Full Court

Per curium. The objection is over-ruled.

Objection over-ruled.

REGINA *v.* CORPORATION OF VICTORIA,

AT THE PROSECUTION OF MOCK FEE AND ANOTHER.

Trade licenses—Power of Legislature or Municipality to deny to certain nationalities or individuals—Right of Chinese to apply for pawnbroker's license.

It is not competent to the Provincial Legislature, or to a municipality, to deprive, generally, particular nationalities or individuals of the capacity to take out municipal trade licenses; *e. g.*, a Chinaman has a right to apply for a pawnbroker's license.

Application for a *mandamus* to the Corporation of the City of Victoria to compel the renewal to the prosecutors (Chinamen) of a pawnbroker's license.

Fell for the application; *Taylor* for the Corporation.

SIR M. B. BEGBIE, C. J.:—

This is an application for a *mandamus* to the Corporation of the City of Victoria, ordering them to issue a renewal of a pawnbroker's license to the prosecutors. The reason alleged by the Corporation for their refusal is that they have passed a resolution stating that in their opinion the prosecutors are not fit persons to be the recipients of such a license. It is alleged by the prosecution, and not denied, that the Council have in fact ordered the Collector to issue no pawnbroking license to any Chinaman. And the proposition was broadly advanced before me that the Provincial Legislature have the right to eliminate nationalities or individuals from the capacity to receive these trade licenses: and that they have, in conformity with *Regina* v. *Hodge*, delegated to the Council authority to exercise that right. The first of these contentions has already been before this Court, and has, I think, been entirely denied by several Judges now on the bench. In the first place by Mr. Justice Gray, in *Tai Sing* v. *Maguire* (1 B.C.R. pt. i. 101, 1878): by Mr. Justice Crease in *Wing Fong's* case (1 B.C.R. pt. ii. 150, 1885); and by myself in *Mee Wah's* case (not reported). These decisions have never been appealed, and I do not feel at liberty to disregard them. I must, therefore, assume that no such authority exists in the Provincial Legislature, and therefore it is impossible that they could have delegated it, or conferred it on the Council. Evidently, if such a power existed, then, since no man may in any municipality pursue any avocation without such license, the Local Legislature might exclude large classes of men from gaining a livelihood, or indeed existing in the Province—a very wide interference with "trade and commerce," which is totally removed from their control by the B. N. A. Act.

It may be useful, however, to examine briefly the grounds on which the Council have been advised that they have a discretion in the matter. This was, in the argument before me, entirely based on the

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permissive form adopted in the Statute ("Municipal Act, 1887," c. 16, s. 104). "The municipality shall have power to issue licenses" for the trades and professions enumerated, including pawnbrokers (sub-s. 10), "and to levy and collect by means of such licenses the amounts" therein specified. And stress was laid on the word "license," as intimating a permission; without which antecedent license or permission the proposing trader could not lawfully commence business (ss. 112, 113). But these words do not imply any discretion, *i. e.*, authority to grant or refuse. *Prima facie*, every person living under the protection of British law has a right at once to exercise his industry and ability in any trade or calling he may select. The only instances in which some antecedent certificate of fitness or qualification is required are, I think, liquor dealers, medical men, and barristers and solicitors. These also have to take out annual licenses under the Municipality Act. But special tribunals are appointed to judge antecedently of their fitness. And, I think, it is quite unheard of that the Council should arbitrarily assume to refuse a license to any of these classes, or to volunteer any statement of their opinion of the fitness or unfitness of a doctor or solicitor. If the Council is to have an absolute discretion to refuse a license to any person applying, on the ground of what they choose to allege as unfitness, then half a dozen tradesmen may secure themselves an entire monopoly of their respective trades throughout the municipality, by simply voting that in their opinion each proposing competitor is an unfit person.

But if the least attention be bestowed on the Statute, it will be seen that the Legislature has given no discretion to the Council. The Statute does not even say they may "grant" licenses; but only that they may issue them. The industrial classes are told, "You may not carry on your trade in the municipality without a license; if you ask where to get a license, we have authorized the municipality to issue it on payment to them of the annual amount fixed by by-law." Now, enabling words are always compulsory when they are words to effectuate a legal right (*Julius* v. *Bp. Oxford*, 5 App. Ca., L. R. 214). And it is of course unnecessary to prove—I should, but for this class of cases, have supposed that it was unnecessary even to state—the undoubted right, which is the boast of English law, that every person living under it has a right to his industry, and to the fruits of it. And when we look to the form of the license in the schedule to the Act we see that it is not issued by the corporation at all (which could only be done under seal), and that it amounts to nothing more than the collector's receipt for the license money, and a certificate that so far as that is concerned (and that is all that concerns the corporation) the holder may exercise the calling therein specified.

It was alleged that the occupation of a pawnbroker affords peculiar facilities for the concealment of stolen goods and the escape of criminals, and that it is particularly essential that care should be exercised

in the selection of persons to carry it on. It is, however, for the Legislature to speak on such a subject, and it has spoken. There are special laws relating to pawnbrokers. The business, it is true, is not, to most persons, attractive. A pawnbroker deals always with the needy, occasionally with the criminal classes; he must generally be hard, and always usurious. But he has always been considered a necessary evil. There has never, so far as I know, been placed any limit on their number, any more than on the number of bakers or butchers. It has been deemed sufficient to make special laws in respect to them and their books, and the supervision of the police. But so, also, are there many special laws for the inspection of butchers' shops under the Health Acts, and of grocers, and bakers, and milk dealers, and in fact of all traders, under the Weights and Measures Acts and the Adulteration Acts; and a reference to the London Police Courts will show that many classes of tradesmen far surpass the pawnbrokers in the number and importance of the charges against them before the stipendiary magistrates. In fact, the pawnbroker assists the detection of criminals perhaps as often as he defeats it, and is a most useful ally of the police.

It is not uninteresting to note the uniformity with which the same events result from the same principles, although in very different parts of the world. Victoria does not possess a monopoly of race jealousy. In the French colony of Cayenne, the Town Council recently handicapped the superior capacities of the Chinaman by imposing on merchants of that empire an extra tax of $300 per annum, deeming it also expedient to handicap English and German traders by a surtax of $200 on them. But on an appeal to the Courts at Paris, all these impositions were declared null on the very same principles as those on which the Courts here insisted when they decided the cases above referred to, viz., as being infringements at once of personal liberty, and of the equality of all men before the law, and also negation of international rights.

The prosecutors are entitled to their writ, and as the law on the subject has been quite clearly laid down ten years ago by Mr. Justice Gray, and again and again by other Judges, the defendants must pay all costs.

Mandamus allowed.

GRAY, J.
1888.
April.

IN THE MATTER OF THE "LAND REGISTRY ACT, 1870," AND THE ESTATE OF BISHOP MODESTE DEMERS, DECEASED, AND OF E. M. JOHNSON, AND OF AUGUST BRABANT, PETITIONER.

"Land Registry Act"—Right of Agents not being Barristers or Solicitors to practice in the Supreme Court.

A land agent, not being a barrister or solicitor, has no right to practice in the Supreme Court, whether under the "Land Registry Act," or otherwise.

Petition by August Brabant, by his agent, E. M. Johnson, who was not a barrister or solicitor, to have his title and interest in certain lands declared, and for an order directing the Registrar-General to register the same.

GRAY, J. :—

The petitioner, August Brabant, in November last applied by his agent, the above-named E. M. Johnson, to the Registrar-General of Titles to register his title to certain lots and real estate situate in the town of Nanaimo, in British Columbia, which the said Registrar-General declined to do, and under sec. 56 of the then existing Act notified in writing the said petitioner, stating briefly his reasons for such refusal, and therefrom the said petitioner now petitions this Court, praying that his title and interest in the said land may be declared, and that the Registrar may be ordered to effect registration thereof.

The petition and affidavit of the petitioner have been duly filed by the above named E. M. Johnson, and the application is now made to me in this Court by the said E. M. Johnson on behalf of the said petitioner.

The said E. M. Johnson is not an attorney, solicitor, or barrister of this Court or of any Court in British Columbia, and does not claim to be in any way authorized or entitled to act in this Province under the "Legal Professions Act, 1884."

The "Land Registration Act, 1870," and the amending Acts, and the "Legal Professions Act, 1884," have been re-enacted and consolidated in the first volume of the "Consolidated Acts, 1888," adopted and enacted by the Legislature sitting in February, 1889.

The first and broad question therefore comes directly up: Has Mr. Johnson any right on behalf of the said petitioner to make this application in this Court, and have I in this Court any authority to hear this application so made by him, or to give him audience?

For over 200 years the legal profession in England has been regulated in the strictest manner by Statutes passed during that period. These Statutes are ably collected, commented upon and traced down during that period in the 3rd chapter of *Tidd's Practice* (3rd American

Edition, with American notes), and were in full force in November, 1858, when English law was introduced into British Columbia by proclamation, and after the union with Vancouver Island in 1867 they were by Act of the Local Government adopted, so far as the same were not inapplicable.

These Statutes pointed out in the clearest manner the qualifications as to learning, character, and conduct, and the period of preparatory services and so forth, that the Parliament deemed essential for those who intended to practice the profession, and required annually from those practising the payment of certain fees, and the obtaining of certain certificates, under heavy penalties and disabilities, and pronounced persons not complying with these provisions "unqualified persons," giving in return for these conditions certain privileges and compensation in the way of costs, freedom from arrest, etc., and placing the parties practising under the summary supervision of the Courts as to dismissal in case of misbehaviour, dishonest or improper conduct.

These provisions were not made for the benefit of attorneys or parties practising law, but for the benefit of the suitors, or those who were compelled to resort to law to obtain a right or redress a wrong. The confidential relations that must necessarily exist between an attorney and his client enable the former, if dishonest, to skim so closely on the edge of crime without bringing himself within the reach of criminal justice that the grossest wrong may be done the client, and the dishonesty go unpunished from the inadequacy of a civil remedy to give compensation. Therefore, the Parliament made the practitioners liable to certain summary punishments by the Court, such as disabilities, suspension, penalties, expulsion out of the profession with disgrace, and others, which cannot be extended to those who have not been admitted to practice, and these powers were given and the restrictions as to practice expressly imposed for the benefit and protection of the public, not for any affection for attorneys.

Provisions of this character have been found so essential to the public interest that they have been adopted in every country where the English common law is the source of order, and prevail in every country planted by the English race, and since 1867 have been continually renewed, varied, altered, and extended in British Columbia as the Local Legislature has deemed best for the public interest of British Columbia.

From the earliest establishment of government on the Mainland, in 1858, and subsequently in Vancouver Island, in 1863, legislative enactments have been passed defining the distinct conditions on which barristers and attorneys should be admitted and enrolled and allowed to practice in the Supreme Court of the Province, declaring that "none other" should practice, and giving to the Judges of the Supreme Court the power and authority usually exercised in England by Judges

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of the Superior Courts over attorneys on the roll, or in respect of other persons practising in such Courts, and making all persons in any way acting or practising in contravention of any provisions of the Act guilty of a contempt of Court and punishable accordingly.

In 1877, chap. 136, the Legislature, after the union of the Mainland and Vancouver Island, re-enacted similar conditions as to the admission of barristers and attorneys, and declared that no others should be allowed to practice in the Supreme or Superior Courts of the Province, and in 1889 the Legislature again re-enacts similar restrictive provisions as to the admission of barristers and attorneys.

The only deviation from this uniform system of legislation was in 1873, when, owing to the paucity of regularly admitted barristers or attorneys in several sections of the country, it was enacted that any person should be entitled to appear in any County Court, or in the Court of any Stipendiary Magistrate, or Justice of the Peace, as the attorney or advocate of any party to any proceedings in such Court, notwithstanding such person shall not have been duly admitted as an attorney or barrister by the Supreme or any other Court of British Columbia, at the same time applying to such persons the rules and regulations as to character and conduct made by the Judges of the Supreme Court, and giving to the County Court Judge, or Stipendiary Magistrate, or Justice, the same power and control over such unprofessional person practising in his Court as he would have over a duly qualified practitioner practising in his Court.

Nothing in the preceding legislation or observations, it must be observed, in any way operates, or is intended to operate, to prevent any person appearing in his own case in any Court of the Province and advocating his own case so long as he conducts himself with order and decorum, but if he does not choose to act for himself he must, when his case is in the Supreme or Superior Courts of the Province, select some person to conduct his case whom the Legislature of British Columbia has authorized on certain terms and conditions to practice in those Courts.

But it is claimed on behalf of Mr. Johnson that the Land Registry Act makes an exception, and that sections 36, 37, and 38, No. 143, Revised Statutes of 1871, re-enacted by the Consolidated Statutes of 1888, viz., sections 67, 68, and 69, together with sections 13 and 42, authorize any duly authorized agent of the applicant to make the application applied for in the present case. All these sections, however general their terms, must be construed as subject to the particular provisions of the law regulating the administration of justice and the several judicial tribunals of the Province.

Certain Courts are open to persons not called to the Bar, as above specified. The express definite limitation negatives any presumption of right to practice in other Courts governed by express provisions

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actually forbidding its exercise. The County Courts, Courts of Stipendiary Magistrates, and Justices of the Peace, have no power to issue prerogative writs or orders, such as *mandamus*, etc., because, being conferred not by statute, such power is inherent alone in the Supreme Court, hence the application must be made to the Supreme Court, and the practice in the Supreme Court is governed by special local statutes which confer no such privilege on agents not members of the Bar.

Mr. Johnson not being a member of the Bar cannot be heard in the Supreme Court.

The petitioner, August Brabant, can be heard himself, or can authorize a barrister to speak for him, but not any other person.

The law must be carried out. I have no power to hear Mr. Johnson.

Application as presented refused.

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AND

In re PART OF LOT 173, VICTORIA.

Land Registry Act—Transfer of indefeasible title—Characteristic features of Land Registry legislation.

Under the Land Registry Acts, the transferee of an indefeasible title in fee simple is entitled to be registered as the owner of the same estate, and there is no retrogression after the stage of indefeasibility has been reached.

Objects, history, and working of the Land Registry Acts fully discussed.

Application on behalf of Thomas Shotbolt for an order directing the Registrar-General to register him as the owner of the indefeasible title in fee simple to a portion of Lot 173, Victoria. The facts are set forth in the judgment.

Drake, Q. C., for the applicant; the Registrar-General in person.

CREASE, J.:—

This was an application under sec. 45 of the B. C. "Land Registry Ordinance, 1870,"* for the registration of the title of Thomas Shotbolt in fee simple as an indefeasible title to a certain part of Town Lot 173, Victoria City, under the following circumstances:—

Louis Schott, on the 9th April, 1886, obtained a certificate of indefeasible title in fee simple, under the said Land Registry Ordinance, to a certain part of the said Lot 173.

* Now section 61 of the Act of 1888.

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William Henry Oliver and David Leneveu, on the 21st June, 1870, obtained a certificate of indefeasible title in fee simple, under the said Act, to the remaining portion of the said Lot 173.

On the 10th April, 1886, the said Louis Schott sold and conveyed the first-named portion of the said lot in fee simple to the present applicant, Thomas Shotbolt.

On the 9th October, 1871, the said William Henry Oliver and David Leneveu sold and conveyed the said remaining portion of the said lot in fee simple to the said Thomas Shotbolt.

Mr. *Drake*, for Thomas Shotbolt, applies to have a certificate of indefeasible title in fee simple issued to him by the Registrar-General, for and upon the registration of his title to the portion of the said lot as aforesaid, sold and conveyed to him in fee simple by Louis Schott.

This the Registrar, who appears in person, declines to grant, alleging that upon his construction of sections 35 and 47† and the practice of the Land Registry Office, the applicant is not entitled to a certificate of indefeasible title for such portion of Lot 173.

In lieu of such certificate, he offers to the applicant only an ordinary certificate under section 45, contending that it is all he can give, and that Thos. Shotbolt must remain registered for that portion for seven years before he will be entitled to a certificate as of a first application for registration of an original title, which had yet to be approved, making merely a note of the indefeasible title in Schott among the list of instruments, in the following form:—

CERTIFICATE OF TITLE.

FORM J.

No. 6840A. 16th April, 1886.

Name of owner.	Absolute Fees Book.	Date of Registration.	Parcels and short description,
	Vol. 9, Fol. 271.	16th April, 1886, 2 o'clock, p. m.	Part of Lot 173, Victoria City.

List of Instruments.

9th April, 1886.—Certificate of Indefeasible Title of Louis Schott to (*inter alia*) part of Lot 173 (one hundred and seventy-three), Victoria City. *See* Absolute Fees Book, Vol. 3, Fol. 193.

10th April, 1886.—Louis Schott (by his Attorney, M. W. T. Drake. Power filed No. 284) to Thomas Shotbolt, conveyance in fee of part (10 feet frontage) on Johnson Street by the full depth of said part of said lot.

(Signed) C. J. LEGGATT,
Registrar-General.

Such a certificate as this would merely be a memorandum of title, and the purchaser would be in no better position as to the title itself for having bought of a person who had an indefeasible title, and had gone through all the troublesome and costly ordeal of seven years' exhibition of title on the register, of searches, investigations, affidavits,

† Now sections 17, 63 and 64 of the Act of 1888.

and the additional three months' public and particular notice to the world necessary to obtain his indefeasible title. So that the Registrar-General would treat a certificate of indefeasible title as if it were merely a root of title, and, as I have shown, the whole work would have to be gone through again for a fresh seven years by each successive purchaser, and then each such purchaser would have to hold it too for seven years before another indefeasible title could be obtained.

Not only so, but on every subsequent transfer all the searches, expenses and delays of an original application would have to be again and again incurred, multiplied each time by the subdivisions of property which increased value creates.

And to this *non sequitur* the Registrar-General arrives in the face of sec. 45, which says:—"When any conveyance or transfer is made of any real estate or interest therein, the transferee or grantee shall be entitled to be registered as the owner of the same estate or interest then held or vested in the transferer or grantor."

Applying these words to the present case, they give Thomas Shotbolt, the grantee, the right to be registered as the owner of the same estate in the land in question as is vested in the grantor. Now, the estate vested in the grantor, Schott, is, admittedly, an indefeasible title in fee simple to that land. Consequently, it follows, with the clearness of a simple mathematical proposition and proof, that Thomas Shotbolt is entitled to be registered for an indefeasible title in fee simple to the same land, which has been conveyed to him by direct grant in fee simple absolute, free from incumbrances, from Schott, under his indefeasible title in fee simple thereto.

In order to see the full effect of this contention of the Registrar-General, and the practical difference between an ordinary certificate and one of indefeasible title, it is necessary to follow the working of the Act through the various stages of registration of real estate under it up to indefeasibility.

The first step towards registering an original title is given in section 19 (now section 13 of the Act of 1888) that prescribes that: "Every person claiming to be the real owner in fee simple of real estate may apply to the Registrar for registration thereof, in the form marked 'A' in the first Schedule hereunto annexed, and the Registrar shall, upon being satisfied after the examination of the title deeds produced, that a *prima facie* title has been established by the applicant, register the title of such applicant in a book to be called the 'Register of Absolute Fees,' in the Form marked 'B' in the said first Schedule, and also shall transcribe in another book, to be called the 'Absolute Fees Parcels Book,' a description of the land to which the title relates in the form marked 'C' in the said Schedule."

The form "A" is a declaration by the applicant that he is the owner in fee of the real estate thereunder described, and claims to be registered

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accordingly, giving a description of the town or district, lot or section, measurement or acreage, of the land in question, with a list of the instruments of title, and a declaration of the value of the land.

Then comes the Registrar's enquiry into the state of the title. If he finds it *prima facie* satisfactory, and a fee simple, he enters it in the "Absolute Fees" column under form "B." This form "B" gives in a tabular shape the number, name of owner, short description of parcels, where entered in the parcels book, date of application, date of registration, list of instruments, and a notice of any charge, issue or contest, &c., there may be entered against the land.

This is followed by the original certificate of title. Sec. 35 provides that: "The Registrar shall, upon the registration of every absolute fee, issue a certificate to the person who shall have effected registration in the form marked 'J' in the said first Schedule; and shall fill up a docket or memorandum thereof, and retain the same in his office. * * * Every Certificate of Title shall be received as *prima facie* evidence in all Courts of Justice in the Colony of the particulars therein set forth."

These provisions clearly apply to the first registration of the land. The reflection immediately occurs, what is the use of all these precautions in the case of lands the title to which is indefeasible?

Sec. 47, dealing with the same land and, assuming all the preliminary registration last mentioned to have been duly performed, goes on to perfect the title by a higher class of proceeding so as to gradually render it indefeasible. It says: "The owner in fee of any land which shall have been registered for the space of seven years may apply to the Registrar for a certificate of indefeasible title, but he shall first make an affidavit that all deeds, documents, and plans (with a list) relating to the title of the land in question have been produced," &c., and that "all facts material to the title have been fully and fairly disclosed, accompanied by the production and filing of a plan of the land with the Registrar." For further security the applicant for a certificate of indefeasible title must "make an affidavit of and state fully all imcumbrances, estates, rights, and interests (if any) which in any manner affect his title, and subject to which he seeks to have a certificate of indefeasible title granted."

Then, for further caution and publicity, the Registrar has to cause an advertisement to be inserted in the Government Gazette and in one or more of the newspapers published in the Colony, and elsewhere if necessary, and this for a space of not less then three months, giving notice in such advertisement of the intention of issuing a certificate of indefeasible title on a particular day named therein unless a valid objection be made to him in the meantime in writing by any person having an estate or interest in any of the land sought to be included in such certificate.

Now, in order to realize the difference between an ordinary certificate and a certificate of indefeasible title, we have to go further and note the extraordinary difference in the benefits they respectively confer on the person registered. They are as follows:—The ordinary certificate merely shows that the person registered under it is the *prima facie* owner of the land, subject to be defeated or otherwise disturbed in the possession of it by any claimant who can show a somewhat better title, or in any of the ways in which such an ownership may be legally devested in favour of some other person, such as informality, error or omission in registration, conflicting estate or interest. Both kinds of certificates are subject to all registered charges and the rights of the Crown, but these do not affect the title itself.

The certificate of indeasible title, however, the Acts says "shall be conclusive evidence in all Courts of Justice that the person therein named is the absolute owner of an indefeasible fee simple in the real estate therein mentioned against the whole world, the Crown only excepted, but subject as therein is expressly set forth."

Seeing then that the greater includes the less, what benefit can there be in beginning again to enquire whether an indefeasible title is a good *prima facie* one?

The section then goes on to say:—" and no such certificate shall be impeached or defeasible on account of any error, omission, or informality in the registration, or any proceeding connected therewith, and notwithstanding the existence in any other person of any estate or interest in the land, and (except in the case of fraud) the registered owner thereof, or of any estate or interest therein in respect of which a certificate of indefeasible title has been granted, shall hold the same subject only to such incumbrances, liens, estates, charges, or interests as appear on the register, but absolutely free from all other incumbrances, liens, estates, charges, and interests whatsoever, except any lease in possession for a term not exceeding three years, and excepting the right of the Crown." A more complete title to land it is difficult to conceive.

This contrast of the effects of the different kinds of certificates shows clearly the intention of the Act, in gradually perfecting titles by registration; from the acceptance of a *prima facie* title by carefully guarded steps, up to an absolute ownership of an indefeasible estate in fee simple in the real estate affected. Progress is a principle of the Act. Consequently when once the point of indefeasiblity has been reached in the registration of a title, a retrogression to first principles to the plan of original registration in subsequent dealings with any part of it, sought to be adopted by the present Registrar-General, is no longer practicable.

That was suitable enough when the Land Registry Act was first devised, to a certain extent tentative, when also all matters relating to the title to and devolution of real property were in a chaotic state.

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Indeed, it is still as applicable as ever it was to titles now for the first time seeking registration. It was always wise to proceed warily in a matter of such permanent importance as land; errors in dealing with which may be latent for years, before they are discovered; but the Act itself points steadily forward, its very principle is a registration of titles, as opposed to a registration of individual assurances; and as I shall proceed to show by a reference to its actual parentage and history in B. C., its very *ratio existendi* is, the provision it makes for the gradual perfection of the title by registration till it becomes indefeasible, and, comparatively speaking, as easily and safely transferable as bank stock.

The leading feature in the B. C. Act is what is now known as the *Torrens* principle, as adapted to the state and growth of the land system in this Province under English Law, and derived from the same source, the Report of the Imperial Real Property Commissioners of 1857. The evils which those Commissioners were established to remedy and which accompanied the practice of English Real Property Law to this place (although of course mitigated by the circumstances of a new Colony), were—

(1.) The length of time and expense between a bargain and the completion of the sale.

(2.) The constantly recurring searches and investigations of the same title over and over again on every purchase or mortgage.

The principal benefits of the *Torrens* system here were :—

(1.) An examination of title to remove obstacles to the registration of a *prima facie* title thereunder.

(2.) The avoidance, more or less complete, of the necessity of abstracts of title.

(3.) The ease and certainty of transfer.

(4.) The indefeasible character of the title thereby gained.

This system, introduced by legislation into Vancouver Island as early as the 18th January, 1861, was carried out in the summer of that same year (1861), on a much larger scale and at greater expense in the flourishing Colony of South Australia by their Real Property Act of 1861 (amended in 1869 and 1880); and in the united Colony of British Columbia, in the present "Land Registry Ordinance, 1870," (subsequently amended, but only in a few details, not affecting the principle).

A study of the history of this "Land Registry Ordinance, 1870," leads directly up to the conclusion of the permanent character of the indefeasible title obtained under it.

This is set out at some length in an official report of 11th May, 1870, on that Act, which, as H. M. Attorney-General for the then Crown Colony of British Columbia, I was required to send to the

Secretary of State for the Colonies for the information of Her Majesty's Government, to accompany a similar report on the Crown Grants Ordinance and Crown Lands Ordinance of the same year 1870, for the consideration of and allowance or disallowance by the Imperial Government. It was approved by the Home Government; and by singular coincidence was sent out by the Secretary of State for the Colonies for adoption in Sierra Leone, where Mr. Alston was subsequently Queen's Advocate, to cure a tangled state of land titles in that Colony.

In the early days, *i. e.* at and before 1858 and subsequently, the land titles of the Colony were in a most confused and choatic state.

The circumstances which called for the enactment under Governor Musgrave of two important measures, the Crown Grants and Crown Lands Ordinances of 1870, to clear the ground before any uniform system for the registration of titles, such as the Act of 1870, could be applied to the United Colony of British Columbia, exhibited with sufficient clearness the anomalous position in which the Crown Lands of both sections of the Colony had long been placed.

Vancouver Island and British Columbia were until their union on 19th November, 1869, two distinct Colonies, with separate staffs, revenues, Legislatures and Governments; with almost entirely opposite systems of land regulations and taxation. Vancouver Island had Victoria and Esquimalt a free port, and direct taxation. British Columbia was carried on under the Imperial customs regulations and indirect taxation. The Mainland of B. C. on the cesser of the Hudson's Bay Company's license to trade, became a Colony, with Legislative powers, on 19th November, 1858.

After that, numerous proclamations, having the force of law, were passed from time to time, arranging, sometimes very imperfectly, for the acquisition and sale of land, and at various prices, each new local land law containing a saving of existing rights, which had to be subsequently dealt with by the law under which they had been created. So that under this system if it could be called one, a great variety of interests in real estate, dealt with differently, at times conflicting, arose; and could not be settled by any ordinary means. The Mainland pre-emption laws allowed every conceivable form of squatting, under the suggestive name of "occupation" before survey could be made, and sanctioned record being made over record, until the chain of title to many a land claim became hoplessly involved.

Pre-emptions originally selected and recorded by one set of men had been mortgaged, leased, sold, or transferred to others, perhaps aliens (who were allowed to hold land), frequently by illegal or insufficient documents; without the possibility of procuring the confirmation of the faulty title, owing in many instances to the transferors having left the country.

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The confusion in land titles which met one in 1858, when I arrived and found myself the first practising barrister in Vancouver Island and British Columbia, went on increasing year after year, as transactions in land multiplied, until in 1860 I was consulted by Mr. G. H. Cary, the new Attorney-General for Vancouver Island, on the subject, and with Mr. M. W. Tyrwhitt Drake, who makes the present application, and Mr. E. G. Alston, aided him in framing the said Registry Act for Vancouver Island, of 1861, to which I shall refer later on.

The evils which gradually grew up in the two Colonies became at last so general, that a legislative solution of the difficulty was inevitable. The Mainland system of registration by copy, line for line, error for error, blot for blot, aggravated the evil. It intensified error and perpetuated danger, by first exposing and then stereotyping a bad title for all time.

In Vancouver Island, it is not known exactly to this day, at what precise date it became a Colony, but this is certain the fee of the Island was in the Hudson's Bay Company down to 1867, although their charter to trade over it expired in 1859. The authority of that Company existed for several years concurrently with that of the Crown. Several grants in fee were made to settlers by the Company under their Great Seal in England. Pretended grants in fee were made in Vancouver Island under Powers of Attorney from that Company, but not under its corporate seal.

The Government simultaneously sold lands without a proper title; without other evidence of contract beyond what is known as the "Instalment Papers," signed by the then Surveyor-General in his private capacity, a sort of receipt on account of the purchase of a contingent, conditional, defeasible, equitable freehold.

The Company claimed some land (over 1212 acres), in fact all the townsite of Victoria and its suburbs, where most of the early land transactions took place, as their fee by a possessory title acquired in 1835, anterior to Vancouver Island being claimed as British territory.

Many hundreds of town lots in Victoria up to 1861, and for years subsequently, were held by conveyances from the Company, not under the public seal of the Company; and many a property so situated has passed through numerous hands; and in the devolution of title, has been made the subject of family settlement, mortgage and every kind of trust, as if it had been in all respects an absolute fee.

The land titles throughout British Columbia consequently became very involved and defective. The "Instalment Papers" and Hudson's Bay *quasi* grants, were followed by any number of transfers, from hand to hand, during the gold rush of 1857-1858 and subsequent years. Sometimes by endorsement on the back, without words of inheritance, expressing merely the names, purchase and price, and that apparently for life estates, there being, as I have stated, no practising

barrister or conveyancer on the Mainland of British Columbia or Vancouver Island until 1858, to consult, so that the cry was universal for some legislation which would improve and gradually perfect land titles throughout the Colony. This produced the "Act to cure imperfect titles, 1860," applicable only to Vancouver Island. An extraordinary effort of legislative conveyancing it was. Its enactment shows the necessity for it and incidentally confirms the above description of the state of land titles at the time; it recited the preparation of instruments purporting to convey real estate by incompetent practitioners and the necessity of establishing and confirming the fee simple of real estate to *bona fide* purchasers thereof for valuable consideration, who had obtained a conveyance thereof defective through want of proper words of limitation or of some formality; and the owners of titles subsequently derived therefrom which were similarly defective and insufficient to pass the fee simple, were enabled under certain safeguards, by filing a bill before the Chief Justice, after a rule to show cause and long notices to all concerned, or all who in such a migratory population could be reached or whether reached or not, to decree that the real estate so affected should be vested in the plaintiffs or otherwise, either legally or equitably according to the estate of the original grantor. That Act was only partially successful.

This in turn produced the "Vancouver Island Land Registry Act, 1861," based on the *Torrens* system, the draft of the Bill to put which in force in Australia had already reached this country through the Imperial Colonial Office. The principle of it was adopted here, but not all the details; for some of these were, though found admirably adapted to the state of progress of Australia, too complicated, cumbersome and expensive for so young a Colony as Vancouver Island. It was then that this now celebrated principle, taking its origin from the same source as our own Act, the report of 1857, was introduced into this Province for the first time in the history of the American continent.

The difference, however, between this and the *Torrens* Act was only such as the peculiar circumstances of the Colony and the English system of conveyancing, rendered necessary here. Registration was not made compulsory; partly because of the state of land titles, and partly because in that early stage population was too scanty and scattered and the land itself of too little value.

It was considered, and, as it has turned out, rightly, that the advantages of the system would be so great to owners of land, and the value of land would be so much increased by the certainty and facility of transfer which registration gives, that it would without compulsory clauses lead up to the same effect, and gradually be made compulsory.

In British Columbia (then "the Mainland," and still a separate Colony) the only system possible was that in vogue in the United

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States, namely, registration by copy; copying the deeds line for line, blot for blot, error for error. The transactions in land were few and far between; and it was not so important then that this system, now happily abandoned by Canada (Upper), where it once prevailed, should have had the fatal effect on titles which I have described.

But as soon as it became important, that is in 1868, when the Union of the two Colonies was agreed upon, and Confederation with Canada seemed impending, the necessity of assimilating the law as to the registration of real estate of the formerly separate Colonies of V. I. and B. C. was apparent; and the task devolved on me as having been one of those concerned in that subject from the first, and having then long been H. M. Attorney-General for British Columbia, to prepare the necessary Bill.

In this task I was fortunate enough to have a most efficient coadjuter, the Hon. Edward Graham Alston, Registrar-General of Titles, who had aided in the preparation of the Vancouver Island Registry Act of 1861, and had personally and successfully superintended the practical working of it as Registrar-General from the commencement of its operation for many years; nor were the suggestions of the learned Counsel now applying to the Court, and the other members of the Bar who were then in the Legislature, wanting, to promote its efficiency.

The report of the Imperial Real Property Commissioners of 1857 —whence sprang the main, indeed all, the then useful principles of the *Torrens* system of land registry, and especially the principle of indefeasibility—formed the ground-work on which the new Bill proceeded; and the systems of Australasia, of the United States, and of Canada (by memorial), of Middlesex and Yorkshire, as well as Prussia and other places where registration was in force, were consulted on the occasion, and the present "Land Registry Ordinance, 1870," was the result, with indefeasibility of title by registration as its chief characteristic.

It will not be practicable, were it even expedient, in rendering an opinion on the particular point before me for decision, namely, the effect of the registration of an indefeasible title under the B. C. Act, to enter into a disquisition on the *Torrens* system, or a minute comparison of the details of the various statutory offshoots of that system now extant in Australasia, North America, and, I suppose we may now add, England, with the B. C. "Land Registry Ordinance, 1870," beyond showing, as I have done, the identity of the general principle of registration by title, instead of by assurances; and pointing out that all of these possess in common the most important characteristics of a sound registration system. For instance, we see them all commencing with a *prima facie* fee; the title in some gradually, in others quickly, ripening into an indefeasible fee simple; priority of registra-

tion giving priority of title: the register being the mirror of the state of the title at any given time; registration importing notice; simple and inexpensive arrangements being employed for registration (and discharge) of charges, and for protecting all equitable interests and trusts, and for registering *lis pendens* and judgments to bind lands, and for transfers by short forms, and for short and inexpensive trials of issues. And all such other provisions as are necessary for giving effect to the above principles in detail.

I expressly omit any reference to the intermediate kinds of title, although these occur in the English Acts of 1862, and of 38 and 39 Vict., c. 87, and the "Ontario Land Titles Act of 1885," because, although they are carrying out the same principles to a greater subdivision in the modes of registration, all kinds of real estate with us are capable of registration, either directly or as a charge.

It is to be observed that the Ontario Act of 1885 has three kinds of titles: (1.) Absolute Indefeasible. (2.) Qualified or limited, meaning certified to be good to a particular date, but not beyond it. (3.) A simple title of the proprietor in possession, called also "possessory."

And the reason for not entering into detailed comparison is that it is impossible to predicate what the actual working of the Ontario Act will be. Though every one must desire for it the most complete success, still, having once begun with possessory titles ("possessory" in the above sense), it may result in compelling land owners making transfers to bring their land under the new system of registration (as Lord Selborne called it, as "recorded possessors").

But this is only as to the mode of carrying out the principle of registration by title. In that, different countries may very well be expected to differ.

There is in the B. C. Act no guarantee fund; nor with the precautions used (as required by the Act), and the immediate reference to the Court, has the need of one ever yet been experienced; indeed I may say that in eighteen years' working of that Act no litigation as to a registered title has taken place. And experience elsewhere is against the establishment of such a fund. In Australia they found the drain on the guarantee fund to be very small indeed. We are told that it accumulates so fast in South Australia that they had £30,000 sterling which they did not know what to do with, and so had to invest it in bricks and mortar.

In England an indefeasible title is given without any guarantee fund.

In the "Ontario Land Titles Act, 1885," they have one; but it is very questionable if they will ever require it, although there the Master of Land Titles, who exercises the jurisdiction of passing titles submitted for registration (in Australia they have Boards of Examiners for the purpose) involving possibly as well in contentious as non-con-

tentious matters the determination of the right and title to a large part of the soil of Ontario, are, whatever their designations, judges discharging high duties with extraordinary powers. That means proportionate risk; especially when it comes to be applied in numerous counties. This is not so in B. C., for here, although the Registrars were well trained conveyancing counsel, of long standing and high personal character, their functions—where not ministerial—are of a simple and limited description; such as can be readily discharged by conveyancing counsel of average ability and character; and subject to such summary yet inexpensive control by the Court, at the instance of the Registrar or any of the parties, as to make serious error impossible. The power given to him is confined to requiring that at least a *prima facie* title shall be adduced; unlike the English Act of 1862, where the Registrar may refuse any title which an unwilling purchaser might refuse to accept.

Some of the good results of the adoption of this system in the B. C. Land Registry Ordinance have been well described in an official report of the successor of Mr. Edward G. Alston and Mr. H. S. Mason as Registrars-General, namely, Mr. H. B. W. Aikman, whose name will always be associated with theirs in the successful working of that Act during the years that he filled that office. These are:—

1. The title to real property has been greatly simplified, without radical changes in the general law.

2. Stability to title, with safety to purchasers and mortgagees, has been secured.

3. The ownership of property, either in town or country, is shewn by the register at a glance, and whether incumbered or not.

4. It increases the saleable value of property.

5. It enables both vendors and purchasers to accurately ascertain the expenses of carrying out any sale or transfer.

6. It protects trust estates and beneficiaries.

7. It prevents frauds and protects purchasers and mortgagees from those misrepresentations common in all countries among a certain class of legal practitioners and land agents.

8. It has secured the chief advantages of the old system of the registration of deeds (of which notice is the most important principle), and has operated so as to almost entirely dispense with the investigation of prior title.

9. Loans on mortgages are effected and transfers of the fee are made with as much ease as the transfer of bank stock is made in England, a search of from five to ten minutes being all that is necessary to disclose the state of any registered title. Retrospective investigation of title is seldom made, the Registrar's certificate, though it does not preclude retrospective investigation, being generally accepted as sufficient evidence of a good title.

To which I may add:—

10. After a certificate of indefeasible title under the Act is obtained, no retrospective investigation is necessary.

11. A transfer in the form of the Act of all or any clearly identified part of the land held by such indefeasible title, conveys to and entitles the transferee to be registered as the owner of a similarly indefeasible fee simple in the land so transferred.

The reasons I have given point only to one conclusion—indefeasibility.

The order, therefore, is made accordingly, in the terms of the application.

Application granted.

[NOTE.—Compare *In re Trimble*, reported *supra*, p. 321.]

VICTORIA COUNTY COURT.

BONE *v.* COLUMBIA LODGE No. 2, I.O.O.F.

Benefit Society—Claim for sick benefits by a member following no occupation.

In an action for sick benefits against an I.O.O.F. lodge, it appearing that the plaintiff had no occupation, being a retired merchant,—Nonsuit.

Action to recover $250 for sick benefits alleged to be due for twenty-two weeks ending April, 1888.

Plaintiff's claim was that he fractured his knee-cap in October, 1886, and the lodge paid him $170 sick benefits up to the 16th March, 1887, when, upon the certificate of Dr. Davie reporting him as convalescent, the lodge decided him to be off the sick fund. Plaintiff then claimed $30 for three weeks' further benefits; this the lodge refused to pay. Plaintiff appealed to the Grand Master, Mr. Joshua Davies, who, after careful enquiry into the facts of the case, sustained the action of Columbia Lodge. Mr. Bone then appealed to the Grand Lodge; but that body confirmed the decision of the Grand Master. Plaintiff then claimed $220 further benefits for twenty-two weeks, from November, 1887, to April, 1888, and brought this action to recover the amount, alleging that he was totally incapacitated from earning a livelihood, because he was unable to look after his garden, attend to his cow, chickens, &c.

It was shown that plaintiff is a retired merchant, following no trade or occupation, but living on his money. His Lordship the Chief

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Justice, sitting as County Court Judge, nonsuited the plaintiff, holding that as he had no occupation to follow he could make no claim upon the lodge. His Lordship also said he agreed with the decision of the Grand Master. Costs were refused, the Chief Justice stating that the lodge had encouraged the plaintiff too much by paying him as much as they had.

Walker for plaintiff; *Fell* for defendants.

Nonsuit.

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HER MAJESTY'S ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA

v.

THE CANADIAN PACIFIC RAILWAY COMPANY, DONALD A. SMITH, WM. C. VAN HORNE, AND SANDFORD FLEMING.

Action to recover penalty in bond—Securing performance of contract—Defence of interference by the Court at the instance of third parties, whether good or not.

By agreement with the Province of B. C., dated February 23rd, 1885, a Railway Company was bound to complete the undertaking by December 31st, 1886, and due performance of the agreement was secured by a bond in the sum of $250,000. The work was stopped, owing to certain landowners obtaining injunctions against the Company, which were affirmed on appeal to the Full Court, but at length dissolved on appeal to the Supreme Court of Canada on December 7th, 1886, but the Company were unable to complete the contract by the stipulated time.

Held, in an action on the bond, that a demurrer to the defence on the ground "that non-performance of a contract, or delay in performing a contract, cannot be excused or defended by setting up the order of injunction of a Court of Justice" was bad.

Demurrer to defence to an action on a bond for $250,000.

The defendants, the Canadian Pacific Railway Company, on the 23rd of February, 1885, agreed with the Government of British Columbia to extend the railway westward from Port Moody to English Bay and Coal Harbour, and to erect terminal works in the vicinity of Coal Harbour on or before the 31st day of December, 1886, and due performance of this agreement was secured by a bond in the sum of $250,000.

The Company commenced to build the road according to agreement, but certain land-owners through whose property it was to pass refused to permit the Company to proceed, and obtained injunctions forbidding the Company to go on with the work. The Company appealed to the Supreme Court of Canada, which set aside the decision

of the Full Court, and the injunctions were dissolved. But the Supreme Court did not give its decision until the 7th of December, 1886, only a few days before the road, according to the agreement, ought to have been completed. The Company went on with the work, but it was not finished until the 1st of May, 1887. The Government of British Columbia complained that it was injured by the delay, and brought this action on the bond.

Wilson for the demurrer; *Drake*, Q.C., and *Helmcken* contra.

GRAY, J.:—

The importance of the principle involved, the high standing of the litigating parties, and the large pecuniary amount at stake in this cause, render it certain that whatever may be my decision an appeal will be taken from court to court to the highest court of the empire. I shall therefore deem it necessary to express my conclusions as briefly as possibly consistently with clearness.

On the 26th November, 1885, the Canadian Pacific Railway Co., with the three defendants as sureties, executed a bond to Her Majesty the Queen for the sum of $250,000. The condition of the bond was that the Company should really and truly perform and observe all and singular the terms and conditions of an agreement made on the 23rd of February, 1885, between the Queen, as represented by the Chief Commissioner of Lands and Works of the Province of British Columbia of the one part, and the said Company of the other. As set out on the pleadings, the agreement is as follows:—

"This agreement made the 23rd day of February, A.D. 1885, between Her Majesty Queen Victoria, represented by the Honourable the Chief Commissioner of Lands and Works of the Province of British Columbia, of the one part, and the Canadian Pacific Railway Company, hereinafter referred to as the said Company, of the other part:

"Whereas the Government of the Dominion of Canada have declared and adopted Port Moody as the western terminus of the Canadian Pacific Railway:

"And whereas it is in the interest of the Province of British Columbia, and of the Company, that the main line should be extended westerly from Port Moody to English Bay and Coal Harbour, and that the terminus of the said railway should be at Coal Harbour and English Bay, and that the terminal workshops and docks should be erected there:

"And whereas negotiations relating to such extension have for some time been pending between the said Chief Commissioner and the said Company, which have resulted in the agreement hereinafter contained:

"Now this Agreement witnesseth, that for the considerations hereinafter expressed, the said Company hereby covenant and agree with Her Majesty, Her heirs and successors, in manner following, that is to say:

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"The said Company shall extend the main line of the Canadian Pacific Railway to Coal Harbour and English Bay, and shall forever hereafter maintain and equip such extension as part of the main line of the Canadian Pacific Railway, and operate it accordingly.

"2. Such extension shall be fully and completely made on or before the 31st day of December, 1886:

"3. The terminus of the Canadian Pacific Railway shall be established in the immediate vicinity of Coal Harbour and English Bay, and upon land which is to be granted in pursuance of this agreement:

"4. The Company shall erect and maintain the terminal workshops and the other terminal structures, works, docks, and equipments as are proper and suitable for the western terminus of the Canadian Pacific Railway in the immediate vicinity of Coal Harbour and English Bay, and such workshops, structures, docks, and equipments shall be commenced forthwith and prosecuted to completion with reasonable diligence, and so as to provide facilities for the opening of traffic on the through line by the 31st day of December, 1886:

"5. The survey of the line of extension shall be undertaken at once and prosecuted by the Company without delay, and the Company shall also proceed forthwith to survey the land hereby agreed to be granted and complete the survey with dispatch, and furnish the Chief Commissioner with a plan of the survey and the field-notes, and such survey shall be made by a surveyor approved of by the Chief Commissioner:

"6. In consideration of the premises, Her Majesty agrees to grant to such persons as the Company may appoint, in trust for the Company, the lands in the District of New Westminster delineated on the map or plan hereunto annexed by the colour pink, and containing by estimation six thousand acres, save and except as is hereinafter mentioned:

"7. There shall be excepted out of such grant two and one-half acres of the land at Granville, and two and one-half acres of the land on the south side of False Creek, both plots to be selected by the Chief Commissioner at any time not later than two months after the survey aforesaid shall have been completed and the map or plan and the field-notes delivered to the Chief Commissioner:

"8. The grant shall, as to the land on the south side of False Creek, be subject for its unexpired term to a lease dated the 30th day of November, A. D. 1865, and entered into between the Honourable Joseph William Trutch, acting on behalf of Her Majesty's Government, and the British Columbia and Vancouver Island Spar, Lumber, and Saw-Mill Company, Limited, and also to an agreement intended to be entered into by the said Chief Commissioner for the partial renewal of such lease, the terms of which are embodied in a letter written by the said Chief Commissioner to Richard Alexander, Mana-

ger of the Hastings Saw-Mill Company, and dated the 23rd day of February, 1885:

"9. The grant shall also be subject to such rights, if any, as may legally exist in favour of third parties:

"10. The grant shall be made upon the Company entering into a bond to Her Majesty with three sureties to be approved of by the Chief Commissioner of Lands and Works in the sum of two hundred and fifty thousand dollars at least, conditioned for the due performance by the Company of all and singular the terms and conditions herein contained and by the Company agreed to be observed and performed:

"11. And it is agreed as to the mode of operating the said extended line, and as to tolls, fares and freights, the extension shall be considered as an original portion of the Canadian Pacific Railway:

"12. No Chinese shall be employed in the construction of the extension of the main line from Port Moody to English Bay:

"13. And it is lastly agreed that upon the Corporation of the City of New Westminster satisfactorily securing, on or before the first day of May, 1886, payment to the Company of $37,500 and providing a right of way and depôt grounds, the Government will, on or before such date, undertake to pay to the Company the further sum of $37,500, and thereupon the Company shall proceed to construct a branch line of railway connecting the City of New Westminster with the Canadian Pacific Railway, and complete the same on or before the 31st day of December, 1886, and shall thereafter operate and maintain the same:

"14. This agreement may be provisionally executed by Henry Beatty on behalf of the Company, and shall within sixty days of the date hereof be properly executed by the Company, otherwise it shall not be binding upon Her Majesty, and upon its execution by the Company it shall be transmitted to the said Chief Commissioner.

"In witness whereof the parties have hereunto set their seals on the day and year first above written.

"Signed, sealed, and delivered by the within named Wm. Smithe, in the presence of PAULUS ÆMILIUS IRVING.

(Signed) "WM. SMITHE, [L. S.]

"THE CANADIAN PACIFIC RAILWAY CO.,

(Signed) per "GEO. STEVENS,

"*President.*

{ C.P.R.R.CO. SEAL. }

(Signed) "C. DRINKWATER,

"*Secretary.*"

It is then alleged that the grants of land were made by the Government of British Columbia in accordance with the agreement, but that the Company did not carry out its agreement. These allegations and the claim are in the following terms:—

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"4. Grants of land under and in accordance with the said agreement were duly executed and delivered by and on behalf of Her Majesty to the defendants, Donald A. Smith and Richard B. Angus, persons appointed by the defendant Company in that behalf under the said agreement.

"5. The defendant Company did not well and truly perform and observe all and singular the terms and conditions in the said agreement of the 23rd day of February, 1885, contained, and by the said Company agreed to be observed or performed, that is to say:—

"(*a*) The said Company did not, on or before the 31st day of December, 1886, extend the main line of the Canadian Pacific Railway to Coal Harbour and English Bay, and have not maintained and equipped such extension as part of the main line of the Canadian Pacific Railway, or operated it in accordance with the terms of the said agreement. And such extension has not yet been made.

"(*b*) The terminus of the Canadian Pacific Railway has not been established in the immediate vicinity of Coal Harbour and English Bay in accordance with the said agreement.

"(*c*) The defendant Company did not, and have not, erected and maintained the terminal workshops and other terminal structures, works, docks, and equipments as are proper and suitable for the Western terminus of the Canadian Pacific Railway, in the immediate vicinity of Coal Harbour and English Bay. Such workshops, structures, works, docks, and equipments were not commenced forthwith, or prosecuted to completion with reasonable diligence and so as to provide facilities for the opening of traffic on the through line by the 31st day of December, 1886.

"6. By reason of the premises, Her Majesty and the people of British Columbia have suffered great damage.

"The plaintiff claims $250,000 (two hundred and fifty thousand dollars)."

The defendants, in answer, after certain statements which may or may not be important in case of a future trial, alleged substantially that they did proceed to perform the agreement in full accord with its terms and conditions, and were successfully carrying on their work, having complied with the requisites required by law to enable them to do so. The 8th, 9th, 10th, 11th and 12th paragraphs of the statement of defence are then particularly set forth as follows:—

"8. The said line affected 81 owners of land, and of that number 65 allowed the defendants possession of the right of way through their lots; and over the land of this number the defendants let the necessary number of contracts for the clearing and grading the road-bed for the said line, all of which contracts were completed in time to enable the defendants to complete the said line by the 31st of December, 1886, in accordance with the terms of the said agreement, had it not been for the injunction hereinafter mentioned.

"9. Certain owners of the said lands refused to permit the said Company to proceed with the said work, and the following persons obtained from the Supreme Court of this Province injunctions restraining the prosecution of the said work over their respective lots, to wit:—

Plaintiff.	Date of granting injunction.
"William Johnson,	5th June, 1886.
"John Albert Webster,	do.
"John Ross Foord,	26th July, 1886.
"Henry Valentine Edmonds *et al.*,	6th August, 1886.
"Charles G. Major,	24th September, 1886.

"The said Company, on the 6th of August, 1886, gave notice of appeal to the Divisional Court from the order granted on that day in favour of Henry Valentine Edmonds and others, which appeal was, on the 10th day of August, 1886, heard by the Divisional Court, which took time to consider its judgment.

"10. On the 20th day of August, 1886, the said Court dismissed the said appeal.

"11. Afterwards, to wit, on the 7th day of December, 1886, an appeal was brought before the Supreme Court of Canada in one of the cases mentioned in paragraph 9 hereof, wherein Charles G. Major was plaintiff and the said Railway Company were defendants, and the order of the Supreme Court of British Columbia was reversed, and thereupon the defendants applied for and obtained a dissolution of all the aforesaid injunctions.

"12. The defendants say that they were prevented from completing the said railway solely by the orders of this honourable Court, and were not guilty of any delay or negligence in the performance of the terms of the said agreement, and upon the dissolution of the said injunctions proceeded with all reasonable dispatch and exercised the utmost diligence to complete the said railway, and the said railway was completed and in operation on the first day of May, 1887."

The plaintiff, in reply, after joining issue as to the other paragraphs in the statement of defence, demurs to the 9th, 10th, 11th and 12th, upon the grounds—

"That non-performance of a contract, or delay in performing a contract, cannot be excused or defended by setting up the order or injunction of a Court of Justice.

"And on other grounds sufficient in law to sustain this demurrer."

It is contended by the defendants that time is not of the essence of the contract; but whether it be so or not, is not now a matter of discussion. Nor are any of the other questions that might arise as to breaches of the terms and conditions of the contract. The whole enquiry now before us is limited to the single point set forth in the demurrer.

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If the language of the demurrer be construed literally, we have the question broadly brought up—Whether the order of a Court of competent jurisdiction over the persons and subject matter under consideration is to be obeyed or not, and shall the party obeying suffer for his obedience. However, it is just to Mr. *Wilson*, the learned Counsel for the Crown, to say that he disavows so strict a construction. He admits the order must be obeyed, but contends the contracting party must pay the damage resulting from his obedience, in consequence of not having in his contract guarded against the contingency which prevented its performance. Practically, as applied to the facts in this case, as set forth and admitted in the pleadings and by the demurrer, it is this: Was the Canadian Pacific Railway Company, in their agreement with the Government of British Columbia, bound to guard against errors or misinterpretations by the highest British Columbia Court in applying the law to the road under construction, and to stipulate that they would perform their contract, unless the Court erroneously and in violation of law interfered with them.

The defendants may strictly contend that a pleader must be bound by the language he deliberately puts on record in a cause; but in a matter of this gravity, I shall treat the question in its broadest aspect. Take it:

1st—As to the necessity of obedience.

2nd—As to such obedience operating as a protection.

It is stated on the pleadings, and admitted by the demurrer, that the restraining orders and injunctions issued by this Court and served upon the Company, were the sole and only cause which prevented the Company completing their contract within the specified time agreed upon. And it is equally stated and admitted that these orders were reversed by the Supreme Court of Canada, that the injunctions were consequently dissolved and the contract then forthwith completed. No other question arises, and view it in any light in which it may be regarded it comes back plainly and simply to the point—Does not that obedience and the subsequent performance protect the Company?

To clear the ground, it is this:

The defendants, for a good consideration, on the 23rd of February, 1885, contracted with the Government of British Columbia to complete the extension of the C. P. R. from Port Moody to Coal Harbour and English Bay, and establish the terminus upon the land granted by the Government "on or before the 31st of December, 1886."

During the progress of the work, in the months of June, July, August and September, 1886, sundry owners of land on the line of route, obtained from the Supreme Court of British Columbia injunctions forbidding the Company going on with the work over their lands, on the ground that they had no legal right so to do. Appeals were taken from these injunctions to the proper tribunal in the Province to have

them set aside, but were dismissed by a majority of the Judges and the injunctions confirmed.

From this dismissal appeal was then taken to the Supreme Court of Canada, and on the 7th December, 1886, that Court decided that the injunctions had been erroneously issued, that the defendants had a legal right to go on, and had been illegally prevented going on with their work, and the restraining orders must be at once set aside. The defendants then immediately applied and had them set aside and proceeded with the work, and had the whole completed by the 1st of May, 1887, and further say that it would have been done by the 31st December, 1886, if the Supreme Court of the Province had not interfered and forbidden their going on with the work.

It cannot for a moment be said that there was any delay in the effort to set aside these orders, or that the work would not have been completed by the 31st December, 1886, if the Company had been allowed to go on. The demurrer itself admits these facts. The pleadings show the first injunction was obtained on the 5th of June, 1886, and the remaining four between that date and the 24th of September; that on the 7th of December the whole of them were set aside—a period of six months. After the rescinding (from the 7th of December to the 1st of May, 1887, five months) the work was completed.

The plaintiffs, the Government of British Columbia, say to defendants: You undertook to complete the work by the 31st of December, 1886. Your being prevented by the Courts of British Columbia is nothing to us: we did not ask the Courts to stop you; therefore you must pay us the penalty agreed upon—$250,000.

The grounds of the restraining orders are, that in law the Company had no right to go on with the work. That they were not clothed with the proper powers, or in a position to construct the road on the proposed route. On the appeal to the Supreme Court of Canada, it was decided that the Court in British Columbia was wrong: that the Company at the time they were stopped by the injunctions had a perfect right to go on with the work, and had been clothed by Parliament with all the powers necessary for that purpose.

The Company says, whether the British Columbia Court was wrong or not is not the question. In British Columbia the order of the Court must be obeyed until it is shown to be wrong, and we did obey it.

If obedience does not protect, what is the use of obedience?

"Obedience to the law in its executive capacity will not work a a wrong." This is one of the oldest principles known for guidance in the administration of justice, for, as remarked by the whole Court in the *Countess of Rutland's* case (6 Rep. 53), nearly three centuries ago, otherwise "by colour of law and justice, they thereby do against law and justice, and so make law and justice the author and cause of

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wrong and injustice." And in 12 C. B. 415, speaking of the maxim, "An act of the Court shall prejudice no man," Creswell, J, observes: "It is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law." By way of illustration, the Court orders a man *not to do* a thing, punishes him by fine and imprisonment if he does it or attempts to do it, *and then if he obeys the order and does not do it, adjudges him liable to a heavy penalty for failing to do it.* To common sense that appears queer; yet, that is exactly this case: The Supreme Court of British Columbia, by a majority of its Judges, ordered the Company, under the pain of fine and imprisonment, not to go on with the work of extending that road to Coal Harbour and English Bay, and now the same Court is asked to adjudge a heavy penalty against the Company because they did not go on. The proposition is so startling on the face of it that the learned Counsel for the plaintiffs evades it and says: "You ought to have provided against such a contingency by a stipulation in your contract." A stipulation against a misinterpretation of the law by the highest judicial department to which the administration of the law in the country is committed, and erect the contractor interested into a tribunal to over-ride all law; because, under the constitution, what that judicial department adjudges to be law must be regarded as law and obeyed until it is reversed by a higher constitutional authority.

It is somewhat singular that since law has been known in England no instance of such a stipulation can be found. In the countless Courts of the United States and the British Colonies throughout the world where the principles of English law govern the administration of justice, no case has been cited where such a stipulation was ever made, nor has a case been cited where it was even deemed necessary that a prudent man in forming a contract should so protect himself.

The necessity of obedience is admitted. In all the cases cited by Mr. *Wilson*, and he has been unequalled in his search, not one case, as already has been observed, can be found where such a stipulation as above mentioned was included.

The plaintiffs' strong position is that their rights under an agreement made between themselves and the Company are affected by a judicial mistake in proceedings to which they were no party. That is simply one of the incidents which must happen in all countries where law is declared by the authorities appointed for that purpose, when the adjudication operates in *rem* as well as in *personam*. Here, though the proceedings were between other parties, the order operated in *rem*, which was the subject matter of the contract between the plaintiff and the Company, because it stopped the construction of the road; and under the constitution, and in accordance with public policy, there is no remedy against a Court or Judge who conscientiously discharging a duty takes an erroneous view of law. Had any other than a Court of competent jurisdiction interfered and stopped the work, then such

stoppage would not have relieved the defendants of their liability to the plaintiffs, for the defendants would have their remedy over against the wrong-doers who prevented their carrying out their contract with the plaintiffs, but where the order stopping the work comes from a Court of competent jurisdiction, it cannot be held in law to do a wrong to any one. Every one must obey the law and for such obedience will be protected.

The cases cited by Mr. *Wilson* (given below) may be divided into two classes. 1st; Where the validity of the agreement to be performed comes in question: 2nd; Where a matter of foreign law arises.

On the 1st, the case on which he mainly relies, is *Wade* v. *The Corporation of Brantford*, 19 U. C. Q. B., 207. That case is simply this: The Corporation of Brantford being the trustees of certain lands, made a lease of a lot in the town to the plaintiff for 10 years with a covenant for renewal at the expiration of that time for another 10 years, and imposed upon the lessee the condition of building a house of certain dimensions on the lot within the first year. The lessee went on and built the house, paid the rent, and at the expiration of the term asked for his renewal. In the meantime the inhabitants of the town, finding that the lot in question had been granted and dedicated for a market place, applied to the Court to prevent any renewal and to have the buildings removed. The Court made the order forbidding the renewal. The corporation refused to renew and the buildings were taken down. The plaintiff then sued upon the covenant in the lease for renewal and for damages. The corporation set up the orders of the Court forbidding the renewal. It was held that was no answer. The corporation in the first instance did that which it had no right to do and which it ought to have known it had no right to do, that is, lease to a private individual land dedicated for a market place and a public purpose, and to give a renewal of that lease for ten years longer, therefore, it must pay damages for breach of contract.

The first thing to be noted here is that the corporation from the very first had no right to make any such agreement or give any such lease, and still less could they then have any power to renew it. It was not the order of the Court which prevented them but the absence of any inherent power to make the lease in the first instance, much less to renew it. Therefore, to attempt to justify their refusal to renew by saying the order of the Court prevented them was a positive untruth, and was not the cause of the breach of contract.

As to the application of that authority to the present case, observe:

1st. On the 23rd February, 1885, when the contract to extend the road to Coal Harbour and English Bay was made between the Province of British Columbia and the Canadian Pacific Railway Company,

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that company had full and ample right to build and complete that extension, and had been clothed by the Parliament of Canada with every power necessary to that end. This is not a mere assertion; it has been and is the solemn adjudication of the highest Court of the Dominion on that very point being brought before it—the Supreme Court of Canada. And at the time the bond was given to the British Columbia Government to complete the road by the specified time—31st December, 1886,—that power was in full force and unimpaired, and it is stated in the pleadings, and not denied, that the company were carrying on the works and would have completed them by that time but for the injunctions and orders of the Supreme Court of British Columbia. Thus, at the very outset, there is this most radical difference between these two cases: In the first there was no power to do what was undertaken; in the second there was ample power. In the first (*Wade* against *The Corporation of Brantford*), as just shown, it was not the order of the Court which prevented the Corporation from renewing the lease, but the fact that they had no power to make such a lease at all.

In the second, or present case, the Court of British Columbia, by a majority, stopped the Company from going on with the performance of the contract when they had full and ample power and were carrying out their contract. It is conclusive that the Company had that power, because the injunctions were set aside on the very ground that they had, and the work thereupon was resumed and was completed. Criticism as to whether the Court of British Columbia was in error or not, is idle. The constitutional tribunal to settle that point has decided that the British Columbia Court was in error, and that decision has been acquiesced in.

The *Brantford* case, therefore, has very little bearing and is of no authority whatever to show that obedience to the order of a Court of competent jurisdiction is not a justification.

The case of *Marcus & Co.* v. *The Credit Lyonnais London Agency*, 50 Law Times, 194, brings up the question whether what foreign law recognizes as a *vis majore* is to be incorporated into an English contract so as to relieve from performance, but is applicable in the present case only as citing an observation of Lord Ellenborough where he says the rule laid down in *Paradine* v. *Jane* has often been recognized in Courts of Law as a sound one—*i. e.*, "That when the party by his own contract creates a duty or charge upon himself he is bound to make it good, *if he may*, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

Kirk v. *Gibbs et al.*, 1 H. & N., 810; *Spence et al.* v. *Chadwick*, 16 L. J. Q. B. 313; *Barker* v. *Hodgson*, 3 M. & S., 267, are simply as to the effect of *foreign* law and *foreign* operations excusing or not ex-

cusing non-performance of a contract made in England, unless properly guarded against in the contract.

In all these cases ordinary prudence could have foreseen or provided against the contingencies, which prevented the performance of the contracts made, and therefore might have been in general terms stipulated against, because they were more or less incident to the business, the subject matter of the contract: but no one entering into a contract in this country is bound to anticipate that the highest Court in the Province will make an erroneous decision in law and stipulate against it. Such a thing never was heard of. And, singular to say, in one of the cases cited by the learned counsel Mr. *Wilson—Bailey* v. *De Crespigny*, 38 L. J. N. S. Q. B. 98—this view is most happily expressed.

It was a case where the owner of land had contracted with his lessee for himself and his assigns, that he would not erect during the term, buildings in front of the demised premises. A railway company, under compulsory powers of their special Act, took possession of the land in front, and put up buildings most objectionable to the lessee. The lessee, therefore, sued the lessor upon the covenant he had made for himself and his assigns. "Held that the defendant was not liable as the railway company could not be taken to be assigns within the contemplation of the parties to the covenant, and it made no difference whether the company were required or empowered to take the land. The plaintiff, therefore, was one of a class of persons injured by the construction of the railway for whom the Legislature had provided no compensation."

In delivering the judgment of the Court, Mr. Justice Hannen says: "We have first to consider what is the covenant the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for their non-performance, and this construction is to be put upon an unqualified undertaking, *where the event which caused the impossibility has, or might have been, anticipated and guarded against in the contract*, or where the impossibility arises from the act or default of the promisor. But when the event is of such a character that it *cannot reasonably be supposed to have been in the contemplation of the contracting parties* when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the *possibility of the particular contingency* which afterwards happened. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. That is, in fact, an inaccurate expression, because where it is an answer to a complaint of an alleged breach of contract that the wrong done, or left undone, was so by the act of God. What is meant is, that it was not within the contract."

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Parsons on Contracts, 672, expresses the same ideas in fewer words: "If the performance of a contract becomes an impossibility by the act of God—*that is by a cause which could not possibly be attributed to the promisor*—and this impossibility was not among the probable contingencies *which a prudent man should have foreseen and provided for*, it should seem that this should be a sufficient defence."

Again at 674—"The illegality of the contract is a perfect defence. It may indeed be regarded as *an impossibility by act of Law*, and it is put on the same footing as an *impossibility by act of God*, because it would be absurd for the law to punish *a man for not doing that which it forbids his doing.*"

Then, applying the language of this distinguished Judge and the citations from *Parsons* to the present case, can it be reasonably supposed that the circumstance of an erroneous judgment and order being made by the Supreme Court of the Province was in the contemplation of the parties at the time this contract was made, or that it was a contingency that a prudent man should have foreseen and guarded against? Most unquestionably not. Such a thing never was heard of before, or such a stipulation ever made. Then it was not a contingency to be guarded against, or an incident as connected with the subject matter of the contract that could reasonably be expected.

Moreover, when a court of competent jurisdiction decides an act to be illegal, it must be taken and considered to be illegal until the decision is reversed, and the quotation from *Parsons*, at 674, applies. No man in the community could possibly be safe otherwise. But above all this, overriding all this, there is an element absent in all the cases cited which predominantly stands out in this, that is the element of public policy recognized by the constitution, namely, the enforcement of obedience to the constitutional authorities. If courts do not give protection they will not be obeyed. They will simply become ornamental suplusages of society and "law and order" be figurative expressions.

"*Actus curiæ neminem gravabit*," says Broom. "The general doctrine which is equally founded on common sense and on authority that *the act of a court of law* shall prejudice no man" has been established by numerous cases. It is not simply when right in law, but even when erroneous. The effect of the injunctions in this case was when the Supreme Court of Canada decided that they were erroneously ordered—simply a forced suspension of work under the contract during the period from their issue to their removal—and both law and justice required that the Company should have a period of equal duration to the time so eliminated to complete their contract, or even a reasonable time further if the delay so improperly caused rendered that further time necessary. The doctrine of "*nunc pro tunc*" comes in, and what might and ought to have been *done then* can be done *now*.

It is impossible to conceive anything more disastrous to a country than to establish the doctrine that a man may be punished by fine and imprisonment if he does not obey, and then afterwards by a heavy penalty because he does obey the order of the highest Court of Justice in the Province. It would be better that Courts should be done away with and government by representative institutions in the country abolished.

The proposition that in a contract a man must protect himself by stipulations against the errors of such a Court is equally unfounded in law and unsustained by authority. Such a proposition as applicable to such a Court never was heard of before, and the more important does the necessity of giving weight to the principle that *protection follows obedience* to the order of such a Court become, from the fact that no remedy ever lies against the party who obtained the order, if *fairly* obtained in furtherance of what he conceived his legal rights. "*Nullus videtur dolo facere qui jure suo sutitur.*" The whole difficulty arises from the misconstruction of the Court on a point of law, and for that no man is punishable—certainly not a Judge, for public policy does not hold him to be infallible, or require him to become an insurer; certainly not the party who obeys, because he has done what the law requires him to do. The plaintiffs in this particular instance, perhaps, belong to that class referred to in *Baily* v. *De Crespigny*, for whom the Legislature has not deemed it necessary to provide any particular compensation.

There is yet another point on which I am called upon to express an opinion. The demurrer is to the 9th, 10th, 11th, and 12th paragraphs of the statement of defence. The three first state the facts that certain injunctions or restraining orders were obtained from the Courts in B. C., forbidding the defendants to proceed with the work of construction: that they appealed to the Supreme Court of Canada, which reversed the said orders, and thereupon the defendants applied and obtained a dissolution of the injunctions; and the 12th states that the defendants were prevented solely by those orders from completing the work in accordance with their agreement.

The demurrer as stated is to the whole four, and simply asserts that "non-performance of a contract cannot be excused or defended by setting up the order or injunction of a Court of Justice." Strictly speaking, that would be limited to the 12th, but the plaintiffs' counsel contends that on the paragraph in the demurrer "and on other grounds sufficient under the law to sustain the demurrer," and on the authority of rule 183, viz.: "It (the demurrer) shall state some grounds in law for the demurrer, but the party demurring shall not on the argument of the demurrer be limited to the ground so stated;" he is now at liberty to take the objection that the four paragraphs demurred to do not state that the restraining orders or injunctions there mentioned

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were obtained without any collusion of the defendants with the plaintiffs in those proceedings, which was necessary to have been stated.

Notwithstanding the plain language of that rule 183, I have grave doubts whether its true construction was intended to sanction so dangerous a laxity in pleading; and on the argument I expressed myself strongly to that effect. I do not, however, deem it necessary to refuse his raising the point, for several reasons.

1st—If it was necessary to have raised that point, the plaintiff himself should have brought it up, by replying that those orders were obtained by collusion, and offered the defendant an opportunity of taking issue on the fact.

2nd—A collusion between two parties to obtain from a Court an order which would release one of them from the fulfillment of an obligation, or the payment of a sum of money to a third party which one of the two had agreed to pay, and which without such order he would be bound to pay, is of itself a criminal offence and a grave contempt of Court, punishable by both fine and imprisonment, and no party in a civil action defending his rights is bound to allege that he has not been guilty of a crime. It must be charged against him before he is called upon to deny it.

According to our code of pleading, a defendant is only bound to deny the facts alleged against him. Collusion is a fact, and was not alleged against him. A crime cannot be inferred; it must be charged.

3rd—The facts stated in the 9th, 10th and 11th paragraphs show there was no collusion, because the efforts of the defendants to get rid of the restraining orders and injunctions, and their success in so doing, would neutralize the very object for which such a collusion would be entered into, namely, to obtain relief from discharging the obligation they owed to the plaintiffs, and without such object the allegation of collusion is inapplicable.

If, therefore, it be permissible to the plaintiffs at this stage of the case to raise that point, I decide at once that it is not sustainable.

I have confined myself solely to the points raised by the demurrer and the facts of the case necessary to its understanding, *as set out in the pleadings*. As far as I am able to form or express an opinion, I consider the demurrer bad in law, and that the defendants are entitled to judgment thereon, with costs.

Demurrer overruled, with costs.

TIETJEN *v.* REVESBECK.

DIVISIONAL COURT.

1889.

March.

Ca. Sa.—Order refusing to rescind order for capias—What it should show—Irregularities—Practice in Appeal.

Where an application to rescind an order for a *capias* on the ground of irregularities in the issue of the writ is dismissed, if the order dismissing is not drawn up so as to disclose the irregularities complained of they will not be considered in appeal.

Appeal by defendant from an order of McCreight, J., refusing an application to rescind his directions for the issue of a *capias*, on the ground, amongst others, that the writ had been irregularly issued.

This application was refused, and the order was drawn up without stating the irregularities complained of.

The appeal came on to be heard before Crease and Walkem, JJ., sitting as a Divisional Court, on March 30th, 1889.

Bodwell for plaintiff; *Atkinson* for defendant.

The Court held that as the order in no way referred to the irregularities in the issue of the writ, which were set out in the summons, they could not be considered in the appeal; and that, as those irregularities were the foundation of the defendant's application to Mr. Justice McCreight, the order under consideration had been improperly drawn.

Appeal dismissed with costs.

HOSTE *v.* VICTORIA TIMES PUBLISHING COMPANY.

BEGBIE, C.J.

1889.

April.

Libel—Striking out Allegations in Pleading—Apology—What kind should be made and when.

In an action for libel an allegation that the defendants were willing to publish an apology in such terms as the plaintiff could reasonably require, was struck out.

Allegations which are merely matter of opinion or hearsay, and derogatory to the plaintiff, will be struck out.

Action for libel alleged to have been published in the defendants' newspaper. The statement of defence alleged, *inter alia*, that the defendants were willing to publish an apology in such terms as the plaintiff could reasonably require.

Bodwell, for the plaintiff, now moved to strike out this allegation; *Hett*, contra.

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SIR M. B. BEGBIE, C. J.:—

That is surely not sufficient. It is not the offer nor even the publication of an apology at all, but an offer to offer an apology. And even in terms, it seems to reserve to the defendant a right of judging whether the plaintiff is reasonable in demanding any particular form, *e. g.*, it offers to make such an apology as the defendant thinks fit. Such an apology as merely "beg your pardon," or "sorry for it," is not sufficient in a case of libel. The defendant should admit that the charge was unfounded, that it was made without proper information, under an entire misapprehension of the real facts, etc., and that he regrets that it was published in his paper. Merely to say you are sorry, may mean that you are sorry because you have laid yourself open to an action, not that you repent having inflicted an unmerited wrong. A libel is an injury as well as an insult. The most proper apology cannot undo the irretrievable publication and dissemination of the slander, nor be regarded as a complete restitution, though it may properly be considered in damages. And that is what Lord Campbell's Act permits. You should not offer to make, but actually make and publish at once, and unconditionally, such an apology, expressing sorrow, withdrawing the imputation, rehabilitating the plaintiff's character as well as you can; not stipulating that the plaintiff is to accept it; not making any terms, but publishing it in the interests of truth, and because you are anxious to undo whatever harm which may have accrued from a wrong which you find you have been the unconscious instrument of inflicting. Then in your statement of defence you can state what you have done. But a defendant in a libel case has no right to plead or refer to an apology, or bring it before the jury at all except under Lord Campbell's Act, which says that if the defendant, at the earliest opportunity publish an apology, he may plead that in mitigation of damages. That is the only authority I know for making any reference to an apology in the pleadings. It will be for the jury to say whether it was a reasonable and proper apology, and whether it is sufficient to absolve the defendant from any or how much of the damage the plaintiff has suffered. Obviously some libels may inflict an injury and loss that no apology or retraction by, or even remorse of, the wretched, miserable, libeller can wholly efface.

On another application the following allegation in the statement of defence was ordered to be struck out: "And the defendants say that if it shall be proved that the said words set out in the fourth paragraph of the amended statement of claim, refer to the plaintiff and his wife, or either of them, the plaintiff has so conducted himself here during several months of his stay as to make the alleged libel seem very probable to the defendants." His Lordship giving judgment as follows:—

This is merely putting on record a more extensive and more injurious libel than the other. The libel compained of may be rebutted if

untrue; what is now proposed to be placed on record is matter of opinion still more derogatory than the principal libel to the plaintiff's character, incapable, as all opinions are, of refutation (how can the plaintiff prove that the defendant's mind is not so constituted as to form these conclusions?) and calculated to enable the defendants to present, under the protection of the Court, and to press to the utmost, every act of folly or of vice to which the defendants may allege that they have heard it said, truly or untruly, that the plaintiff has given way. I will not, for my part, consent to make the Records of the Court the vehicle for disseminating and analyzing all the unsavory details and tittle tattle, true or untrue, which the defendants may have picked up, and now try to drag before me for investigation. I agree with that part of the case cited by Mr. *Hett* which rejects all these by-issues as irrelevant and false issues, which can only embarrass the jury. The libel alleges that somebody is about to be respondent in a divorce suit brought by the plaintiff's wife. The only questions will be: does the libel refer to the plaintiff? Is it true of him? Is it disparaging to him? How many dollars will compensate him for the disparagment? Now to show that the defendants had heard stories about the plaintiff which led them to believe in the truth of the libel is no answer to any of these questions. Even on the last issue, on the question of damages it has no bearing; for the damage, *i. e.*, the injury is just the same, whether the defendants believed in the truth of the alleged libel or not. An explosion of dynamite whether it be caused by the most honest or dishonest of men, causes the same devastation. And the amount of devastation is the measure of the damages which a cool-minded jury would give.

Allegations struck out.

MEE WAH *v.* CHIN GEE.

Capias ad Respondendum—Action for money lent and goods sold and delivered—Affidavit to hold to bail—Sufficiency of.

Affidavits to hold to bail for money lent and goods sold and delivered did not show that the money lent was due and unpaid, or that the goods were delivered.

Held, insufficient.

Motion to make absolute an order *nisi* calling on plaintiff to show cause why the order for a *capias* and the writ of *capias* issued thereunder should not be set aside.

The action was for money lent and goods sold and delivered.

Wilson for plaintiff; *Fell* for defendant.

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The affidavits on which the order for the *capias* was made do not show that the goods were delivered, or that the money lent was due and unpaid. The plaintiff is not entitled to double security, and, for anything shown by the affidavits, he may have the goods still in his possession. Even if the money lent be assumed to be now payable and unpaid, yet the defendant ought not to be held to bail in a larger amount than is just.

The order is that the order for the *capias* and the *capias* itself must be set aside and the prisoner discharged.

Order and *capias* set aside.

CREASE, J.

1889.

April.

THE ATTORNEY-GENERAL OF CANADA *v.* KEEFER.

Injunction—Obstruction in tidal waters of public harbours—B. N. A. Act.

The franchise of public harbours and the ownership of the soil within the limits of public harbours in Canada are both vested in the Dominion Government by sec. 108 of the B. N. A. Act, and False Creek, British Columbia, is such a harbour.

Application on behalf of the Dominion Government to restrain the defendant from driving piles into the bed of False Creek, Burrard Inlet, or from in any way interfering with the navigation of or placing any obstruction in the tidal waters of the said creek. The defendant had been driving piles into the bed of False Creek, and otherwise obstructing the tidal waters thereof. He had applied to the Provincial Government for leave to purchase part of the bed of the creek.

Drake, Q. C., for plaintiff.

CREASE, J.:—

The franchise of public harbours and the ownership of the soil within the limits of public harbours in the Dominion of Canada are both vested in the Dominion Government by section 108 of the B. N. A. Act, and False Creek is such a harbour. Interim injunction granted on the usual terms.

Injunction granted.

HUGO *v.* TODD.

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1889.

August.

Libel—"Blackleg."

The epithet "blackleg" is libellous.

Action for libel brought by the plaintiff against the defendant for having published in his newspaper at Nanaimo, known as the Nanaimo Morning Courier, on the 13th day of January last, a paragraph in which the plaintiff was styled a "blackleg." Neither plaintiff nor defendant applied for a jury, and the action was tried by the Chief Justice without the assistance of a jury.

Pooley, Q. C., for plaintiff; the defendant did not appear. The plaintiff having called and examined his witnesses, SIR M. B. BEGBIE, C.J., proceeded to give judgment as follows:—

In order not to be misunderstood I shall first state what I do not mean —I do not mean that any miner is justified in calling another miner a "blackleg" or an other opprobrious name whatever, "blackleg" being apparently the most opprobrious and damaging epithet in the miners' vocabulary. What I do mean to say is that, according to the sworn evidence before me, the term "blackleg" ought not to be used of the plaintiff; it is not applicable to a workman in the circumstances of the plaintiff. As I understand the evidence, the term clearly means that the "blackleg" has taken the place and wages of some striker, upon the same terms against which the striker has struck; whether the strike be for a rise or against a reduction of wages, or for shorter hours, or for whatever object the strikers propose to attain. Here there was no existing strike; but supposing the contemplated strike to infer an existing ground of disagreement between the employers and employed, it only had reference to the rate to be paid to the hewers per ton of coal gotton, and did not refer at all to the rate of hours or wages of the quite collateral employment of the plaintiff, who was engaged in repairing the ventilation passages in the mine. If the plaintiff had struck for a rise in his own wages while the hewers were contented, he could not have called on them to stop work under penalty of being called blacklegs. All things in a mine are in some sense connected; but it really seems as if the strikers would have no more reason to call upon plaintiff to abandon his work than to call on the baker to cease providing their employer with bread, or to call on his household servants to abandon their duty under penalty of being subjected to such annoyance as the strikers might devise. The ventilation must go on, and the passages kept in repair, whether the hewers are on strike or at work.

Nobody denies the right of men to strike. In a free country every man has a right to decide on the terms as to wages and otherwise on

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which he will sell his labour. Labour must be free, or it is the labour of slaves. But just as the striker is at perfect liberty to judge of the terms on which he will not work, so is the non-striker at the same liberty to judge of the terms on which he will accept employment. The liberty of the striker is based upon and exactly identical with the liberty of the non-striker. It is a great pity that in these disputes opprobrious epithets are introduced which stimulate the passions, and sometimes lead to deplorable crimes. And these epithets and abuse are greatly inflamed and augmented by being published in a sensational manner in print. In the present case the defendant has thought fit to print and publish a private communication which he obtained from some correspondents. It comes within no pretence of privilege; it is amply shown to refer to the plaintiff, and to be calculated to inflict the utmost mental pain and pecuniary injury that mere verbal abuse can inflict upon him, though no pecuniary injury appears to have been suffered as yet. It is no doubt libellous. The defendant has not thought fit to give to me the names of his informants, nor to explain in what innocent sense the word blackleg can be understood, nor to withdraw the epithet, nor to tender any apology or expression of regret. The epithet appears to be wholly inapplicable to the plaintiff, even according to the custom of miners. It is, therefore, a false as well as a cruel libel, published apparently to gratify a temporary majority of the miners. Of course it would be difficult to prevent a disappointed clique of violent men from misusing language in this way, but proprietors of newspapers should have higher views of their proper functions than to lend themselves to spread, and indeed to create, such mischief. However, there being no evidence of pecuniary loss, and the plaintiff's character being probably higher in the opinion of some persons than before it was thus stigmatized, so that there is only his pain and annoyance to be compensated, I think a judgment for the plaintiff for $50 and costs will meet the justice of the case.

Judgment for plaintiff.

DRAKE, J.
1889.
November.

BAXTER *v.* JACOBS, MOSS, *et al.*

Injunction to restrain removal of property out of jurisdiction where no order made for money payment.

Where there has been no order made for the payment of money, the Court will not restrain the removal of property out of the jurisdiction by the owner.

Action to restrain the breach of an agreement to sell seal skins to the plaintiff, and motion to continue an *interim* injunction obtained to stop removal of property out of the jurisdiction.

Bodwell for motion; *Taylor* contra.

DRAKE, J. :—

On 31st October, 1889, the plaintiff applied for an *interim* injunction against Solomon Jacobs and Morris Moss, based on an affidavit of the plaintiff, alleging an agreement dated 25th January, 1889, whereby the defendant Jacobs covenanted to employ the schooners Mollie Adams and E. E. Webster in the fur sealing business, and to sell all fur seals secured by each of the vessels during the season of 1889 to the plaintiff at a price therein named, the plaintiff to pay at Seattle for all skins delivered there. The parties to the agreement were both resident in Washington Territory, and the vessels were American bottoms. In April or May the Adams delivered her catch to the plaintiff and went off sealing again and came into Victoria Harbour with her catch of 1,600 skins, and sold them to the defendant Moss. On this state of facts I granted an injunction restraining Jacobs until the 5th November from parting with skins brought by him into Victoria, and from receiving any money from the purchaser, and from removing the skins, and Moss was also restrained from completing his contract of purchase, with liberty to plaintiff to move to continue the injunction on the 5th November. On the same day the plaintiff discovered that a man named Huntingdon claimed to be the master and owner of the Adams and skins on board, and that he had sold them to Liebes & Co., of San Francisco, and Moss was the agent of Liebes & Co., whereupon the Chief Justice made a further order, directing Liebes & Co. and Huntingdon to be added as parties to the action, and restraining Moss from allowing the skins to be removed out of the jurisdiction of the Court, and Huntingdon from receiving any of the consideration money for the skins, and Liebes & Co. from paying the same to him, and Moss from paying the consideration money to anyone.

On the 2nd of November, Mr. *W. J. Taylor*, counsel for Moss, applied to dissolve the injunction, stating that Moss had, prior to the service of the restraining order, received delivery from one William John Hudder of 1,200 skins, and had paid $200 on account, and William J. Hudder alleged that he was the duly registered owner of the Adams, and had purchased her for $7,000 from the defendant Jacobs on the 6th of May last, and produced the certificate of enrolment of the schooner, also stating that the schooner was sent by him on a sealing voyage, and that on the 1st of August, 1889, he had made an agreement with Liebes & Co. to sell the catch to them at a price in excess of that which Jacobs had agreed to sell to the plaintiff, and Hudder denied that he was aware of Jacobs' contract with Baxter. The crew were to have half the net profits, and the master in addition 6 per cent. of the other half.

The plaintiff put in further affidavits in reply, alleging that Hudder was the person called Huntingdon in the action, and that Hudder was

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on 30th March the master of the Adams and was aware of the Jacobs contract with plaintiff, and that he was a brother-in-law of Jacobs.

The plaintiff filed two further affidavits generally denying Hudder's statement, and alleging the sale of the Adams was fictitious and made for the purpose of defrauding him out of his contract.

On the 5th November the case came up again. Mr. *Bodwell* applied for a continuance of the restraining order, and Mr. *Taylor*, for Moss, moved to dissolve it, and the further hearing was adjourned by consent until the 11th. On this day the restraining order against Moss was abandoned, and the injunction as against him dissolved, with costs.

The evidence produced showed that Jacobs had parted with his interest in the Adams before any of the seals in question were captured, and it was not denied that the requirements of the American law were satisfied as to the transfer of the vessel. This being so, and there being no evidence that the schooner was purchased by Hudder subject to the contract with Baxter, although his knowledge of the terms of the agreement were broadly alleged by the plaintiff and denied by Hudder, I do not think that it can be held that Hudder took the vessel subject to that contract. The principle adopted by the Court of Equity is, that in cases where there has been no order made for payment of money by the Court, the Court cannot restrain a man from removing his property out of the jurisdiction of the Court—*Newton* v. *Newton* (11 P. D. 11); *Robinson* v. *Pickering* (16 Ch. D. 660).

Mr. *Bodwell* contended that the agreement made between Baxter and Jacobs, though only executory in law, yet in equity the skins, as soon as taken on board, belonged to the plaintiff, and cited *Story's Equity*, 1,010. This argument would be correct, provided the vessel still remained the property of Jacobs, but it cannot be carried to the extent of binding a purchaser of the schooner to carry out a contract to which he was no party. It was further argued that this case came within the case of *Fuller* v. *Richmond* (2 Grant, 24), in which there had been a sale of saw logs to be got out; the logs were cut and put in a boom and marked with the plaintiff's name, and subsequently they were sold to a third party without the plaintiff's consent. This case does not apply, as the logs were in *esse*, and the property had passed to the plaintiffs. No skins had been obtained at the time of the sale of the schooner. If there were at that time any on board then the argument might be applicable.

The plaintiff may have his remedy against Jacobs in damages for breach of contract, but on the evidence this is not a case in which the Court will interfere by injunction to restrain Hudder from parting with his property as he pleases.

As no other defendant has applied for dissolution of the injunction, the orders will remain *quantum valeat* as regards the other persons served. Reserve all costs, except as to the costs of Moss of dissolving the injunction until the hearing.

Injunction dissolved.

BAXTER *v.* JACOBS, MOSS *et al.*

(2.)

Capias ad respondendum—Effect of alteration of parties after capias issued—Service of amended writ of summons on defendant who has already appeared—Liability of aliens to all remedies allowed by law.

No alteration as to the parties to the record after a writ of *capias ad respondendum* has issued entitles the person capiased to have the order set aside unless he has been prejudiced by such alteration.

There is no rule requiring a plaintiff who has amended the writ of summons by adding parties to serve any defendant who has appeared with the amendment.

In the absence of agreement *ad hoc* with his obligee, a party is liable at the latter's suit on a good cause of action to all the remedies including arrest and imprisonment allowed by law, and it is immaterial that the parties are aliens, or that the particular remedy sought is not allowed in the foreign jurisdiction.

Application to set aside an order for a *capias* on facts and grounds that appear in the judgment.

Belyea for the applicant; *Bodwell* contra.

DRAKE, J.:—

This is an application to set aside the order for a *capias* made on the 4th November against the defendant Jacobs, who has put in and perfected special bail. The grounds of the application taken by Mr. *Belyea*, counsel for Jacobs, are, first, that the statement of claim which has been served since the *capias* was issued does not include the other defendant, Morris Moss; secondly, that no order amending the writ of summons (which writ was amended after a copy of the original writ had been served on the defendant Jacobs) was served on the defendant Jacobs; third, that the writ of *capias* issued in this action was against the policy of the law, the contract being a foreign contract entered into abroad and between parties domiciled abroad.

As regards the first objection I do not consider that any alteration made as to the parties to the record after the writ of *capias* was issued, can be used for the purpose of setting aside the order on which the *capias* was grounded, unless the person capiased is prejudically affected by such alteration.

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As to the second objection: There is nothing in the rules of practice that render it incumbent on the plaintiff, who has amended his writ of summons by adding parties, to serve any defendant who has appeared to the original writ with the amendment. Rule 101 points out the practice which the plaintiff appears to have followed.

The third objection, however, is one of importance, and requires consideration. From the affidavits filed in the case the plaintiff, a resident of Seattle, State of Washington, entered into an agreement in writing with the defendant Jacobs, also a resident of the State of Washington, to purchase the catch of seals made by two American schooners during the season 1889, and the defendant agreed to sell the catch and deliver the skins at Seattle.

The first catch was duly delivered; on the return from the second voyage the schooner Mollie Adams, one of the schooners mentioned in the agreement, instead of going to Seattle with the catch of seal skins, entered Victoria harbour, and the skins were disposed of to Morris Moss.

The plaintiff immediately came over to Victoria and commenced an action for damages for breach of contract against the defendant Jacobs, who was at that time resident here for a temporary purpose. The facts sworn to show an attempted fraud on the part of the defendant, who has not denied any of the allegations made against him.

Mr. *Belyea* cited and relied upon the following cases as authorities in support of his contention that it is against the policy of the law in contracts made between foreigners in a foreign country and which contracts are to be performed out of the jurisdiction of the Court, to permit proceedings in the nature of a *capias ad respondendum* to issue. *Frear* v. *Ferguson*, (2 Chambers Rep. Ont., 144); *Romberg* v. *Steenbock*, (1 P. R., 200); *Brett* v. *Smith*, (1 P. R., 309).

All these cases were decided under the Stat. 2, Geo. IV., ch. 1, section 10, which requires it to be sworn before an arrest can be permitted, that the defendant is about to leave the province with intent and design to defraud the plaintiff, and such an affidavit could hardly be made when the defendants presence in the province was merely for a temporary purpose, and he has to return to his place of domicile, where the contract sued on was made.

No such provision as this is contained in the 1 and 2 Vic., cap. 110, and the learned judge in the case of *Frear* v. *Ferguson*, already cited, points out the difference between the two Acts.

The adoption by the Provincial Legislature in 1886 of the provisions of the 1 and 2 Victoria, c. 110, places all actions in which the powers of the Court are invoked, for the purpose of issuing writs of *capias*, on the same footing as existed in England under that Act. The Supreme Court can take cognizance of actions *in personam*, in respect of contracts or torts though the cause of action may have arisen abroad,

and although the parties may be aliens, provided service of process can be effected according to the Rules of Court, and provided the contract is not contrary to the principles of justice and morality.

In the case of *Buenos Ayres Railway Company* against *The Northern Railway Company of Buenos Ayres* (2 Q. B. D., 210), the objection was taken that both parties were domiciled in the Argentine Republic, that the business was carried on there, and that the powers of adjusting all rights arising out of the construction of the railways was vested in the government, and that the Republic had assumed jurisdiction over the plaintiffs' claims. It was held that there was nothing inconsistent with the power to sue in England, both parties being within the jurisdiction of the Court. The only difference between that case and the present is that in the case cited the parties are stated not to be aliens, but I am not aware of any authority which prevents aliens suing in our Courts when both parties to the contest are within the jurisdiction.

It is of no consequence whether or not the *lex loci contractus* authorizes an arrest of the defaulting party in the country where the contract was made; if there is no exemption of personal liability in the contract itself, the party in default is still liable to arrest and imprisonment in a suit upon it in a foreign country whose laws authorize such a mode of procedure: *De la Vega* v. *Vianna* (1 Barn. and C. p. 284); *The Halley* (2 L. R. P. C., 193).

In the present case the breach of contract occurred within the jurisdiction of the Court, and the case cited by the Attorney-General, *Stein* v. *Valkenheussen* (27 L. J. Q. B., 226), by implication decides that the Court would have jurisdiction over a foreign contract if both parties were within the jurisdiction and duly served with process. As no other grounds were raised for the rescinding of the order for *capias* I dismiss the application, with costs, and give the defendant seven days to file his defence.

Application dismissed.

ROBSON *v.* SUTER.

New Trial—Power of Court to order, where the verdict shows that the jury disregarded material undisputed facts in evidence.

The Court has power to order a new trial where the findings show that the jury have disregarded material undisputed facts in evidence.

Continued hearing of a motion for a new trial of an interpleader issue had at New Westminster upon the 18th of May, 1888, to test the validity of a bill of sale of the plant contained in the printing estab-

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lishment of the *Mainland Guardian*, which plant had been seized under a writ of execution issued in a suit of Robson *v.* Suter, who was an uncle of the present defendant. The consideration in the bill of sale was alleged to be on account of eleven years arrears of wages due the woman, the present defendant, by her uncle, the defendant in the action in which the execution had been issued.

The matter came on to be heard before Begbie, C. J., and Crease, J., sitting as a Divisional Court, June 15th, 1888.

Drake, Q. C., and *Atkinson* for the plaintiff.

T. Davie, Q. C., and *Bodwell* for the defendant,

SIR. M. B. BEGBIE, C. J.:—

I think there must be a new trial in this case; and it is of no use deferring our opinion or giving a written judgment upon it. It is a case where a claim is made of a most improbable character, and supported by the weakest and most impeachable testimony; by testimony which a few years ago would not have been admissible at all, by the evidence of the claimant herself, who along with Mr. Suter, the judgment debtor, comes into the witness box and swears that her claim is just, and really nothing else than that. Then, look at the story they tell; it is of the most improbable description. Here is a distressed young woman, left with a family of children eleven years ago, taken in by the charity of her uncle to keep house for him; and we are asked, after a distance of eleven years, to believe that this arrangement for a very considerable rate of wages, secured upon the furniture now seized by the sheriff, was then made and has been existing, though none of her friends have been brought forward who ever heard before of any such arrangement; whereas, in an ordinary arrangement of this kind, a woman, if she attends to the household work and gets her board, clothing and lodging for herself and children, and a little pocket money, is considered to have been paid. No person was ever brought forward who ever heard of any suspicion of this claim for wages, which is not made known until the day after the verdict for a large sum is given against Mr. Suter, and which claim sweeps away the property comprised in the bill of sale and other properties (because they are all very much to be considered and taken as one transaction, although the bill of sale is the only document impeached in these proceedings) which sweeps away every stick and tittle of the judgment debtor's property. It comes completely within, as far as I can recollect—although it has not been referred to here—the first case mentioned in Smith's Leading Cases—*Twyne's* case. These deeds give the whole of the property—not a particular property. Then again, continuance of possession in the transferor is a badge of fraud, although, since *Twyne's* case, the statutable registration, to a certain extent, nullifies the inference to be drawn from continuous possession. The claim is for a large sum, the greater part of which,

there had been any pressure, might have been barred by the Statute of Limitations; but there was no pressure of a claim upon an unwilling debtor; and it is quite clear that he did not in the least object to it. The whole debt is at once admitted by him without a murmur. It is part of the constitution under which we live, and under which we are proud to live, that the findings of a jury upon questions of fact ought to be final. But the Court is bound to see whether the scales are held in an ostentatiously uneven manner or in an apparently even manner. Here, questions are very properly left to the jury, and the last question, though it is not, perhaps, absolutely decisive in the matter, is yet very material and to be taken into consideration, is as follows: "Was Suter at the time of the giving of the bill of sale in "insolvent circumstances, or unable to pay his debts in full, or knowing "himself to be on the eve of insolvency?" Now the jury show their animus in the case by their answer, for they simply say there was no evidence to show them that he was. That is to say, they have utterly forgotten the fact that Mr. Suter owes at this time a judgment debt of $1000, and they have utterly forgotten Mr. Suter's own evidence that he has not a stick to pay it with. If that be the state of their minds, I, for one, cannot say that the least weight ought to be placed upon their findings in other respects. If gentlemen of the jury, coming to a conclusion upon six questions, show themselves in the seventh to be utterly forgetful of the most glaring facts in the case, they cannot be permitted to give a decisive answer to uphold a most improbable story, and there must be a new trial. The costs of this application, will, I think, be reserved.

Davie, Q. C.—The practice, I think, is that they follow the event of the second trial. It will be as well, perhaps, to give that direction.

BEGBIE, C. J.—I will give it now; they are to abide the event. I have not gone at length into the case, Mr. Davie, because the jury in one of their findings have shown themselves so utterly unreasonable, and in fact that they are not in a state of mind to find upon the other six.

CREASE, J., concurred.

New trial granted.