THE BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

SUPREME AND COUNTY COURTS AND IN ADMIRALTY

AND ON APPEAL IN THE

FULL COURT

WITH

A TABLE OF THE CASES ARGUED
A TABLE OF THE CASES CITED
AND
A DIGEST OF THE PRINCIPAL MATTERS,

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA,

BY

PETER SECORD LAMPMAN, - - BARRISTER-AT-LAW.

VOLUME X.

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JUDGES

OF THE

SUPREME AND COUNTY COURTS OF BRITISH COLUMBIA

AND IN ADMIRALTY

During the period of this Volume.

SUPREME COURT JUDGES.

CHIEF JUSTICE.

THE HON. GORDON HUNTER.

PUISNE JUDGES.

THE HON. GEORGE ANTHONY WALKEM.
THE HON. MONTAGUE WILLIAM TYRWHITT DRAKE.
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THE HON. CHARLES WILSON, K. C.

MEMORANDA.

On the 26th of February, 1904, Lyman Poore Duff, one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of British Columbia in the room and stead of the Honourable George Anthony Walkem, resigned.

On the 28th of September, 1904, Aulay Morrison, one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of British Columbia in the room and stead of the Honourable Montague William Tyrwhitt Drake, resigned.

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RULE AMENDING TARIFF OF COSTS

PREPARED UNDER SECTION 83 OF THE "LEGAL PROFESSIONS ACT," AND SIGNED 5TH APRIL, 1897.

SCHEDULE I.

Item 5a to be added :—

Writ of Commission for examination of witnesses out of jurisdiction . $2.00

Item 35 is amended by striking out the words "including copy" in the 3rd line.

Item 51 is amended by substituting the word "for" in place of the word "and" between the words "copy" and "service" in the 1st line.

Item 80A to be added :—

For brief on hearing of an originating summons. $2.00

Or not to exceed 5.00

Item 81 is amended by striking out the words "when witnesses are examined or cross-examined, or on appeal or motion for new trial," in the 7th and 8th lines.

Item 83 is amended by striking out the words "and for brief on the hearing of an appeal," in the 1st and 2nd lines, and inserting said words in the 3rd line after the word "cross-examined"; and by striking out the words "not to exceed $25.00" in the 8th line and substituting therefor the words "subject to an appeal to a Judge in Chambers."

Item 84 is amended by adding the words "or for discovery" at the end thereof.

Item 126 is amended by striking out the words "including attendance."

Item 164 is amended by striking out the words "To deliver or file in lieu of delivery," and substituting therefor the words "To file in lieu of service."

Item 200 is amended to read No. 201.

Item 201 is amended to read No. 200.

Item 210 is amended by adding at the end thereof the words "or in case of the settlement of an action such fee may be allowed, in special cases, as the Taxing Officer may think fit, subject to an appeal to a Judge in Chambers."

Item 219 is amended by inserting the words "one dollar" before the word "each" in the 2nd line, and by substituting "$5.00" for "$1.00" at the end thereof.

Item 230 is amended by adding the words "special endorsement" after the words "special affidavits" in the 1st line.

Items 5, 6 and 7 of Schedule No. 4 are struck out.

G. HUNTER, C.J.
M. W. TYRWHITT DRAKE, J.
P. Æ. IRVING, J,
ARCHER MARTIN, J.
LYMAN P. DUFF, J.

July 30th, 1904.

REPORTS OF CASES

DECIDED IN THE

SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA.

TOGETHER WITH SOME

CASES IN ADMIRALTY.

REX v. LOUIE.

Criminal law—Admissibility of evidence—Dying declaration—Indian woman—Consciousness of impending dissolution—Hearsay evidence to prove dying declaration.

An Indian woman's statement that she thinks she is going to die is a sufficient indication of such a settled hopeless expectation of immediate death as to render the statement admissible as a dying declaration.

Before the death of an Indian woman, for whose murder the prisoner was being tried, a statement was obtained from her in the following way: A Justice of the Peace swore an Indian to interpret the statement the woman was about to make; a constable then asked questions through the interpreter and a doctor wrote down what the interpreter said the woman's answers were. The doctor and the Justice of the Peace then signed the statement. To some of the questions the woman indicated her answer by nodding her head.

At the trial the statement was tendered as a dying declaration and the doctor, the Justice of the Peace and the constable identified the statement; the interpreter deposed that he interpreted truly, but he gave no evidence as to what the woman really did say:—

Held, disapproving *Reg.* v. *Mitchell* (1892), 17 Cox, C.C. 503, that the statement was admissible as a dying declaration; also that it had been properly proved.

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A dying declaration may be obtained by means of questions and answers and if it is reduced to writing it is sufficient if the answers only appear in the writing.

IN the Supreme Court of British Columbia *in banc.* Crown case reserved. The following case was reserved by IRVING, J., the trial Judge:

"Alex Louie, an Indian, was tried before me at the last Assizes for the County of Yale, held at the City of Vernon, upon an indictment charging him with the murder of an Indian woman named Julian, alleged to have been committed by him on the 1st day of April, 1903.

"On the trial the prosecution sought to put in evidence a document in writing which purported to be the dying declaration of the said Julian, the murdered woman.

"The circumstances under which this dying declaration was made are to be found in the evidence given before me, a transcript of which is made a part of this case.

"The evidence satisfied me that the said Julian was fully conscious when she made the said declaration, and that when she made it she had a settled hopeless expectation of impending death. I then directed a certain portion of said declaration, which I considered not to be admissible in evidence against the accused, to be struck out, and ruled that the portion of the said declaration hereinafter set out should be admitted in evidence and read to the jury, which was thereupon done.

Statement

"The portion of the said declaration admitted in evidence and read to the jury as aforesaid, is as follows:

"'Head Okanagan Lake, April 2nd, 1903.

"'I, Julian, knowing that I am likely to die, make oath and say:

"'Yesterday he came to me to my mother's house (here) and asked me to go home. I said no, I will not go, because you have been beating me and have been bad to me. He was on his horse, and he said, I will try and kill you right straight. Then he shot and I tried to turn away. I fell down and did not know anything. I think I am going to die and am telling only what is true. Julian, her x mark.'"

"The jury brought in a verdict of 'guilty,' and the prisoner

was sentenced to be hanged on the 19th day of June, 1903.

"The question for the consideration of the Court is:

"Was the dying declaration given by Julian, the murdered woman, rightly admitted in evidence?

"If this question be answered in the affirmative, then the conviction should stand.

"If this question be answered in the negative, then such order and direction should be made as to the Court may seem just."

It appeared from the evidence that the woman was wounded by a rifle bullet at three o'clock in the afternoon of April 1st; the bullet entered the right side of the chest, passed through the upper lobe of the left lung, entered the wall of the chest, fracturing three ribs and then turned backwards and imbedded itself underneath the shoulder blade. The next day at noon she was visited by Dr. Williams, who found her suffering from traumatic pneumonia, as a result of the wound; she was then breathing very rapidly and the doctor told her that she could not live.

At two o'clock in the afternoon of the same day a declaration was obtained from the woman in the following manner: Mr. O'Keefe, a Justice of the Peace, swore an Indian named Brazil to interpret the statement the woman was about to make. Simmons, a constable, then asked questions which were put to the woman by Brazil, and Dr. Williams wrote down on paper what Brazil said were the woman's answers. To some of the questions put to her the woman indicated her answer by nodding her head. The statement was then signed by Mr. O'Keefe and Dr. Williams.

Statement

At the trial the Crown tendered this statement in evidence as a dying declaration and Mr. O'Keefe, Dr. Williams and Simmons were called and identified it. Brazil was also called by the Crown and his evidence in full was as follows:

"(To *Allan Macdonald*, counsel for the Crown).

"What is your name? Brazil.

"Are you Brazil? Yes.

"Were you present about the 2nd of April last when Julian was dying and doctor Williams and Mr. O'Keefe were present; were you present at that time? Yes.

"Now, you were sworn as an interpreter? Yes, I am.

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"To interpret the words that might be spoken by the dying woman? Yes.

"And did you interpret the words that were spoken by the dying woman at that time? Yes.

"Was that interpretation correct and true? Yes.

"It was made in the presence of Mr. O'Keefe, was it? Yes.

"Who was it that asked the questions? Simmons.

"(Cross-examined by Mr. *Macintyre*).

"Mr. Simmons asked the questions? Yes.

"And then you put the questions to Julian? Yes.

"Did you want Mr. Harris just now to interpret for you? "Just I think it would be some better to.

"(By the Court).

"Did you interpret, did you tell her she was dying? Yes.

"Why did you do that? The woman said, 'I think I be "'dying.'

"Then what did you say? (The witness did not answer).

Statement "(By Mr. *Macdonald*).

"Were you sworn at that time? Yes."

The trial Judge admitted the document (with certain exceptions) as a dying declaration.

The jury returned a verdict of guilty and the prisoner was sentenced to be hanged.

The Judge refused to reserve a case for the opinion of the Supreme Court *in banc* and on the 9th of June, 1903, on motion to the Court (WALKEM, DRAKE, IRVING and MARTIN, JJ.), leave to appeal was given and subsequently a case was stated by IRVING, J.

The question was argued at Victoria on the 15th of June, 1903, before WALKEM, DRAKE and MARTIN, JJ.

Argument *Macintyre*, for the prisoner: The woman was not conscious of her surroundings; she was passing from consciousness to unconsciousness; the declaration on its face is bad as it does not shew a settled hopeless expectation of death in the declarant: He cited *Reg.* v. *Errington* (1838), 2 Lew. C.C. 148; *Reg.* v. *Megson* (1840), 9 C. & P. 418; *Reg.* v. *Gloster* (1888), 16 Cox, C.C. 471; *Rex* v. *Laurin* (1902), 6 C.C.C. 104; and *Reg.* v.

Jenkins (1869), L.R. 1 C.C. 187. Some of the answers were made by nods of the head and the Crown should shew that the woman understood; the declaration is only the substance of what the doctor thought was passing through her mind. Where a declaration is obtained by question and answer the questions and answers should be given in evidence: see *Reg.* v. *Mitchell* (1892), 17 Cox, C.C. 503; *Rex* v. *Smith* (1901), 65 J.P. 426 and *Rex* v. *Trowter* (1721), 1 East's Pleas of the Crown, 356. *Reg.* v. *Whitmarsh* (1898), 62 J.P. 680 and 711 is distinguishable.

If the Court should be of the opinion that the declaration was wrongly admitted there should be a new trial: *Reg.* v. *Hamilton* (1898), 2 C.C.C. 390. The declaration was the convicting evidence.

Duff, K.C., on the same side: A dying declaration must be proved in the regular way; it can't be proved by hearsay evidence as was done in this case. There is only one person who knows what the woman really did say, and that is Brazil, and his evidence is silent on that point. The evidence of Dr. Williams and Mr. O'Keefe is hearsay; it is an account of what Brazil told them the woman said.

Maclean, D.A.-G., for the Crown: The state of the woman's mind and the circumstances under which the declaration was made are facts to be passed on by the trial Judge who was satisfied that the woman was conscious of impending dissolution: see *Reg.* v. *Woods* (1897), 5 B.C. 585 at p. 590; *Reg.* v. *Davidson* (1898), 1 C.C.C. 351 and *Reg.* v. *Goddard* (1882), 15 Cox, C.C. 7. The wound was such a one as a person of the utmost simplicity would think fatal. In *Reg.* v. *Morgan* (1875), 14 Cox, C.C. 337, the injury itself was held to be conclusive of impending death.

Argument

[*Per curiam:* An Indian woman's expression "I think I am going to die," is a sufficient indication of a settled hopeless expectation of impending death.]

The statement was properly admitted as the interpreter was sworn and Dr. Williams was sworn; it comes through them both.

As to getting declaration by question and answer. The trial Judge was satisfied he had what was substantially the woman's statement before him. No one but the prisoner and the woman

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knew the circumstances of the shooting, so in putting questions to the woman no one could have suggested answers that would be against the prisoner. The decision of Cave, J., in *Reg.* v. *Mitchell* is not generally followed: he referred to *Reg.* v. *Whitmarsh* (1898), 62 J.P. 680 and 711: also *Rogers* v. *Hawken* (1898), 19 Cox, C.C. 122.

Duff, in reply, cited *Rex* v. *Smith* (1901), 65 J.P. 426. As to the argument that the Court will not interfere with the discretion exercised by the trial Judge, this is a pure question of law, and the Court is free to deal with it as it sees fit. To admit the declaration on the evidence of Dr. Williams and Mr. O'Keefe would be to wipe out the rule against hearsay evidence.

Cur. adv. vult.

22nd June, 1903.

WALKEM, J.: This case comes before us as a Court of Crown Cases Reserved. The facts connected with it are sufficiently stated in the record submitted to us. The question which has been referred to us is whether the dying declaration made by an Indian woman of the name of Julian, who was recently shot by the prisoner with a bullet from a Winchester rifle, should have been admitted as evidence. The objection taken to it by counsel for the prisoner is that although it is composed of questions and answers, it appears in the shape of the answers only as given by the woman to her medical attendant, who undertook to take down the declaration. The objection is based on the refusal of Cave, J., in *Reg.* v. *Mitchell* (1892), 17 Cox, C.C. 503, to accept such a document as a dying declaration. The authorities have not been at all uniform on this subject, and in the recent case of *Rex* v. *Bottomley*, handed to me by my brother DRAKE, which was tried at the Liverpool Assizes about the middle of May, and reported in the Law Times, 1903, at p. 88, the presiding Judge, Lawrence, J., received a dying declaration similar to that objected to by Cave, J., and very similar in some respects to the present declaration. For instance, it uses the words "I am dying. I don't think I shall get better." The declaration in question contains two similar statements, namely, "knowing I am likely to die," etc., and "I think I am going to die." The medical

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attendant had informed her that she would die, and that there was no hope for her; and we consider that the learned trial Judge was right in admitting the statement alluded to as a dying declaration.

The verdict, and the sentence of the Court are therefore confirmed.

DRAKE, J.: This is rather an exceptional case. The deceased, who met her death at the hands of the prisoner, was an Indian ignorant of the English language, and her statement was obtained by an Indian interpreter and by him translated to Dr. Williams, who took it down in writing. The deceased at the time was in a dying condition and suffering in addition to the gun-shot wounds, from traumatic pneumonia, and was enjoined by the doctor to speak as little as possible. According to the doctor's evidence she was quite capable mentally of giving her statement, though very weak in body. Mr. *Macintyre* objected to the reception of this evidence on several grounds. First, that it was not shewn clearly and distinctly that the deceased was in fear of impending death, or rather that her knowledge of impending death was not without hope of recovery. I think when the whole of the evidence is read that this contention cannot be supported. Dr. Williams had informed her more than once that she was dying. This standing alone is his opinion, and it does not follow that the deceased accepted this view. But here Dr. Williams says that she recognized the truth of his statement, and there is no suggestion that she at any time expressed a contrary opinion, and in her statement she reiterates the fact that she is about to die; and Brazil says that the deceased said "I think I be dying." Indians use the term "think" generally as a statement of fact. In my opinion the statement was made at a time when she was in fact dying, and there never was any chance of recovery.

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The next point raised is that this statement was obtained by question and answer. The statement does not shew that, but the evidence of Brazil is that Simmons asked the questions and he put them to the deceased woman. Sometimes she nodded her head and sometimes spoke in reply. Dr. Williams had told her

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not to speak if possible. Mr. *Macintyre* contends that under the authority of *Reg.* v. *Mitchell* (1892), 17 Cox, C.C. 503, both the questions put as well as the answers given should be taken down. This was contrary to what was previously held: see *Rex.* v. *Fagent* (1835), 7 C. & P. 238; *Rex* v. *Woodcock* (1789), 1 Leach, 500. *Reg.* v. *Smith* (1865), L. & C. 607, was a case decided by Erle, C.J., and four other Judges. The evidence was obtained by question and answer, and was admitted. Channel, B., there says when the Judge has decided on the admissibility of the declaration a question arises what does the declaration amount to? That is for the jury; and he goes on to point out that if a declaration had not been reduced into writing, and two witnesses gave different accounts of it, it is for the jury to determine how much of the statement was true, and if reduced into writing, what weight should be attached to it, and the case of *Reg.* v. *Mitchell* was not followed. In *Reg.* v. *Whitmarsh* decided by Darling, J., 22nd October, 1898, with the assistance of the Recorder, the above cases were then cited and considered.

In dealing with Indians and Chinese in our Province who have to have all their evidence filtered through an interpreter, who is seldom acquainted with the niceties of the language into which he interprets the native tongue, one has to take what is the actual purport of the statement without criticising the terms in which it is couched. Here, Brazil the interpreter, swears that

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the interpretation was correct and true and was taken down in reply to questions by Mr. Simmons. The answers were accurately taken down by Dr. Williams and the document was signed by him and Mr. O'Keefe, a Justice of the Peace. It is not necessary that a dying statement be reduced into writing if the witnesses present can speak to the words used. If it is reduced into writing it is better that it should be read over to the person making the statement, but this is not absolutely essential if the evidence is clear that the interpreter properly translated the statement, and the person who wrote it down properly took the language down that was used. Here both these requisites were distinctly sworn to. If it is read over to the declarant it has to be translated back, so it does not lend itself to greater accuracy. I may mention that *Reg.* v. *Mitchell* was dissented from in *Rex*

v. *Bottomley; Rex* v. *Earnshaw* (1903), 115 L.T.J. 88, tried before Mr. Justice Lawrence at Liverpool, in May last, and the only authorities absolutely binding on this Court are the decisions of the Supreme Court of Canada and of the Crown Cases Reserved, the decisions of a single Judge sitting at *nisi prius* ought to be considered, but not of necessity followed.

MARTIN, J. (oral): I agree with the judgments read by my learned brothers confirming the course taken by the learned trial Judge, and need only add that in the same volume of the Law Times which they have referred to (May 9th, 1903), at p. 27, is contained a note of the case of *Ryan* v. *Ryan* which supports the view, if it required support, that acquiescence by nodding in answer to some of the statements or questions was quite sufficient in view of the doctor's direction to his dying patient to speak as little as possible.

Conviction affirmed.

HASTINGS v. LE ROI No. 2, LIMITED.

Master and servant—Negligence—Common employment—Mine owner and contractor.

H. & M. contracted to sink a winze in defendants' mine at a certain price per foot, and by the terms of the contract the direction and dip of the winze were to be as given by the defendants' engineers; the defendants were to provide all necessary appliances, etc.; H. & M.'s workmen should be subject to the approval and direction of the defendants' superintendent, and any men employed without the consent and approval of or unsatisfactory to such superintendent should be dismissed on request.

A hoisting bucket hung on a clevis was supplied to H. & M. by defendants, and through the negligence of the defendants' superintendent, master mechanic or shift boss, a hook substituted for the clevis, by defendants, at the request of H. & M., got out of repair, in consequence of which

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the bucket slipped off and in falling injured the plaintiff, who was one of H. & M.'s workmen engaged in sinking the winze.

Held, that the plaintiff being subject to the orders and control of the defendants was acting as their servant and the doctrine of commom employment applied, and the action was not maintainable.

Judgment of IRVING, J., reversed.

APPEAL from the judgment of IRVING, J.

This was an action at common law for damages for personal injuries sustained by the plaintiff while working as a miner in the Josie mine, owned by defendants. The plaintiff while working for Hand & Moriarity, who were under contract with the defendants to sink a winze in the Josie mine from the 700 foot level, was injured by the fall of an iron bucket used for hoisting waste rock.

The defendants and Hand & Moriarity had entered into a written contract for the sinking of the winze; by the contract the direction and dip were to be as given by the defendants' engineers; the defendants were to provide the contractors with all necessary appliances, explosives, etc.; all the men employed in carrying out the contract should be subject to the approval and direction of the defendants' superintendent, and any men employed without his consent and approval or unsatisfactory to him should be dismissed on request. The superintendent also had control of the increase or decrease in the scale of pay and hours of labour where there was any change from the regulation and lawful number of hours for underground miners.

Statement

The defendants supplied the contractors with the bucket hung on a clevis, but at the request of the contractors the clevis was changed for a hook, and subsequently, on account of a broken catch, the bucket slipped off the hook and fell and struck plaintiff injuring him, and in respect of which injury the present action was brought.

The trial took place in Rossland on 24th February, 1903, before IRVING, J., and a jury. The defendants set up the defence of common employment, and moved for a non-suit, which was refused, the Judge holding that the circumstances were not such as to entitle defendants to set up that defence.

The Judge put no questions to the jury; in his charge he told

them that if they found that the defendants took reasonable precautions for the protection of plaintiff to find for them, but if they found that they didn't then to find for the plaintiff and assess the damages.

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The jury returned the following verdict:

"We, the undersigned jurors, empanelled on the case of *Hastings* v. *Le Roi No. 2*, in which it is attempted to shew that the said defendant Company did not take the proper precautions to safeguard the lives of the workmen engaged in sinking the winze on the seven hundred foot level of said Company's property, hereby find that the plaintiff is entitled to damages to the extent of $3,400.

"We wish to add that in giving a verdict for the plaintiff we do not wish to impute perjury to any of the witnesses who said they did not see any defect in the hook and appliances from the fact that the hook and appliances constantly get covered with mud and muck, and so render it impossible to notice any such defect."

Statement

It was through the negligence of the defendants' superintendent, their shift boss or their master mechanic that the hook was allowed to get out of repair, or to be used after it got out of repair.

His Lordship ordered judgment to be entered in plaintiff's favour for the amount found.

The appeal was argued at Vancouver on the 8th of April, 1903, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Davis, K.C. (*Clute*, with him), for appellants: The agreement shews that the plaintiff was in the employ of the defendants, who controlled the manner in which the work was to be done; a servant is in the employ of the person under whose control he is; control is the test: see *Wiggett* v. *Fox* (1856), 25 L.J., Ex. 188; *Abraham* v. *Reynolds* (1860), 5 H. & N. 143; *Rourke* v. *White Moss Colliery Co.* (1877), 2 C.P.D. 205, and *Johnson* v. *Lindsay & Co.* (1891), A.C. 371.

Argument

In the alternative, if Hand & Moriarity were independent contractors the plaintiff has no case against defendants.

MacNeill, K.C., for respondent: If Hand & Moriarity were

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independent contractors, *Indermaur* v. *Dames* (1867), L.R. 2 C.P. 311, shews that the defendants would be liable.

Directions were given by defendants' superintendent to Hand, who directed his own men; the plaintiff was not the defendants' servant; he was engaged by Hand, who would have had to discharge him on defendants' request. He cited *Smith* v. *London & Saint Katharine Docks Co.* (1868), L.R. 3 C.P. 326; *Miller* v. *Hancock* (1893), 2 Q.B. 177; *Marney* v. *Scott* (1899), 1 Q.B. 986; *Cameron* v. *Nystrom* (1893), A.C. 308; *Union Steamship Co.* v. *Claridge* (1894), A.C. 185; Beven on Negligence, 816-23; *Wiggett* v. *Fox* is overruled by *Johnson* v. *Lindsay & Co.*, *supra*.

Even assuming the defence of common employment otherwise open, the defendants would be liable because they did not supply good materials.

Davis, in reply.

Cur. adv. vult.

16th June, 1903.

HUNTER, C.J.: I think the appeal must be allowed. The authorities shew that the decisive test of whether or not the relation of fellow servants exists is furnished by the inquiry as to who has the control and direction of the negligent and injured persons; see especially the judgment of Mellish, L.J., in *Rourke* v. *White Moss Colliery Co.* (1877), 2 C.P.D. 205 at p. 209, and of Bowen, L.J., in *Donovan* v. *Laing Syndicate* (1893), 1 Q.B. 629 at p. 634.

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In this case it is clear from the contract that the defendants had the control and direction of both, and therefore the defence of injury by the negligence of a fellow servant is open to the Company.

I may add that the case considerably resembles that of *Griffiths* v. *Gidlow* (1858), 3 H. & N. 648, except that here the plaintiff denies that he knew the defective condition of the hook, which, notwithstanding the suggestion thrown out by the jury, seems remarkable, as, even if he did not actually work with the tackle himself, he was for two or three days before the accident in the winze in which it was being used.

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DRAKE, J.: The plaintiff in this action by his statement of

claim sets up a case under the Employers' Liability Act, and also at common law; but at the trial of the case proceeded under the common law only. The appellants' counsel, Mr. *Davis*, confined his argument to one point only, *viz.*: That the respondent was in fact a fellow servant of the appellants' employees, and as such not entitled to recover.

The facts undisputed are that J. Hand and J. Moriarity were contractors under the Company for certain mining operations to be carried on in the Le Roi No. 2, and, as such contractors, entered into a written contract with the respondent for the respondent's service. The appellants were to find the contractors with all necessary appliances, steam-power, etc., for the work to be done. The terms of the contract set out that all the men employed by the contractor should be subject to the approval and direction of the superintendent of the Company; and any men employed without the consent and approval of or satisfactory to the superintendent should be dismissed on request. The superintendent also had control of the increase or decrease in the scale of pay and hours of labour where there was any change from the regulation and lawful number of hours for underground miners. The question here is a simple one. Does this contract give such a control over the men employed by the Company as to constitute them the workmen of the Company? The engagement, it is to be noted, is subject to the approval of the Company, and the men employed are subject to the direction of the superintendent of the Company, and are liable to be dismissed at his request. I think this, taken in connection with the evidence of Kenty, the foreman of the mine, who gave instructions how the work was to be done, and these instructions were conveyed to the plaintiff by Hand, shews that there was such a control exercised over the men working under the contract as made the contractors' employees completely subject to the orders of the Company. The defendants rely on the case of *Wiggett* v. *Fox* (1856), 11 Ex. 832. In that case the defendants employed to do some building made a sub-contract to do piece work, the material and tools being found by the defendants. The sub-contractor employed the plaintiff, who was killed by an accident caused by one of the

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defendant's men. It was held the sub-contractor and his workmen were engaged in one common employment, and consequently the defendants were not liable for the acts of a fellow servant. This case was discussed in *Johnson* v. *Lindsay & Co.* (1891), A.C. 371 at p. 379. Lord Herschell says: "If the law there laid down, *i.e.*, *Wiggett* v. *Fox*, would determine the present case, I should feel bound to reject it as inconsistent with other English authorities." And Lord Watson is more emphatic; he says at p. 383, that "if it must be taken to establish the proposition maintained by the respondents, I could have no hesitation in holding that it was not decided according to law;" and he goes on to point out that Baron Channell subsequently explained that he assented to the judgment because he thought Fox had control over Wiggett; in other words, the relation of master and servant actually existed between Wiggett and Fox & Co.

In my opinion there must be shewn to be not only common employment, but a common master. Here there was a common employment and a common master. The fact that the defendants' foreman had the right of selection, approval and direction of the workmen, and the right to tell the contractor to dismiss, he became in fact the plaintiff's master. The plaintiff's engagement being subject to the defendant's approval alone did not make him the servant of the defendants, neither did the right to suggest his dismissal. But he was to be subject to the direction of the defendants. The rule with respect to common employment is laid down by Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. H.L. 266, that when several workmen engage to serve a master in common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness against which their employer cannot secure them; and they must be supposed to contract with reference to such risks; and in *Swainson* v. *North-Eastern Railway Co.* (1878), 3 Ex. D. 341, at p. 349, Brett, L.J., says, "in order to give rise to the exemption there must be a common employment and a common master; there need not be a common servant or fixed wages." Thus the point in issue is in fact limited to the construction of the plaintiff's contract. Under that he was subject to the approval and

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direction of the superintendent of the defendant Company. If it was only a question of approval, the exemption would not apply, but when he is subject to the direction of the defendants he becomes at once a servant who is bound to obey the orders of the superintendent. I think the question of common employment arises in this case, and being so, I think the defendants are not liable. The appeal will be allowed with costs.

MARTIN, J.: This is a common law action for negligence, and the circumstances are such that if the defendant Company is entitled to set up the defence of common employment then the plaintiff cannot recover. The facts of the case resemble those in *Dynen* v. *Leach* (1857), 26 L.J., Ex. 221, and *Griffiths* v. *Gidlow* (1858), 3 H. & N. 648. See also *Clarke* v. *Holmes* (1862), 7 H. & N. 937, 943; and *Murphy* v. *Phillips* (1876), 35 L.T.N.S. 477.

It is contended by the plaintiff that his original employers stood and continue to stand in the relation of independent contractors to the defendant Company under the written contract in question, and that he was employed by them alone, while the Company submits that by the true construction of that contract the relationship of master and servant was, so far as liability for the negligence now complained of is concerned, established between it and the plaintiff.

The case of *Wiggett* v. *Fox* (1856), 11 Ex. 832; 25 L.J., Ex. 188, is largely relied upon by the defendant, and, though to a certain extent the effect of that decision has been curtailed by *Abraham* v. *Reynolds* (1860), 5 H. & N. 143; *Rourke* v. *White Moss Colliery Co.* (1876), 1 C.P.D. 556; (1877), 2 C.P.D. 205; and *Johnson* v. *Lindsay & Co.* (1891), A.C. 371, nevertheless, insofar at least as the question of control by a common master is concerned, it is, as explained by Baron Channell in *Abraham* v. *Reynolds*, still an authority in favour of the plaintiff.

MARTIN, J.

In the determination of the question of the existence of the relationship of master and servant in such cases as the present, there are four principal elements which may or may not require consideration according to the circumstances of each case; (1.) the selection or engagement of the workman; (2.) his payment; (3.) his discharge; (4.) the control and direction of his work or

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labour. A perusal of the authorities makes it clear that the last is the essential one, and that even if the workman's original employer retains in himself the first, second and third, yet parts with the last, that of itself establishes for the purposes of cases of this class the relationship of master and servant between the workman and the third party in whose favour such original employer relinquished that right of control.

This question of control is generally one of fact to be determined by the jury according to the circumstances of each case: *Masters* v. *Jones & Co.* (1894), 10 T.L.R. 403; *Cahalane* v. *North Metropolitan Railway and Canal Co.* (1896), 12 T.L.R. 611, and as is pointed out in Ruegg on Employers' Liability (4th Ed.) p. 18, "the difficulty is only as to the right inference to be drawn from the facts, not as to the principle upon which the liability depends." Here, fortunately, there is a written contract the construction of which will enable this Court to arrive at the necessary conclusion without the assistance of the jury.

Of all the cases which I have consulted, the decision of the Court of Appeal in *Donovan* v. *Laing Syndicate* (1893), 1 Q.B. 629, most closely resembles the case at bar, and establishes the principle above enunciated. Lord Justice Bowen, after stating that "the law on the matter now before us seems to me to be perfectly clear," goes on to say that "by the employer is meant the person who has a right at the moment to control the doing of the act. That was the test laid down by Crompton, J., nearly forty years ago, in *Sadler* v. *Henlock* (1855), 4 E. & B. 570, in the form of the question: 'Did the defendants retain the power of controlling the work? . . There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another—that is, he may lend them—and in that case he does not retain control over the work."

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In the case at bar, the contractors not only placed their workmen but themselves under the direction and control of the defendant Company, which alone would be sufficient, but, in

addition, they also subordinated even their right of selection of their workmen to the will of the Company, and further undertook to discharge them upon its bare request without cause assigned.

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I may add that the importance of this question of parting with control was recognized by Lord Chief Justice Russell in *Jones* v. *Scullard* (1898), 2 Q.B. 565 at p. 569, wherein *Rourke* v. *White Moss Colliery Co.* and *Donovan* v. *Laing Syndicate,* were considered and applied.

The result is that the appeal should be allowed with costs.

Appeal allowed with costs.

HOPPER v. DUNSMUIR (No. 1).

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Practice—Jury—Rules 81 and 330.

In an action to set aside a will on the ground that it was obtained by fraud and undue influence, the plaintiff asked for a jury:—

Held, by the Full Court, reversing WALKEM, J., that the action was one of those referred to in r. 81, and as such, according to r. 330, must be tried without a jury.

Per DRAKE, J.: The character of an action is determined by the issues raised in the pleadings rather than by the prayer for relief.

Stewart v. *Warner* (1895), 4 B.C. 298, and *Corbin* v. *Lookout Mining Co.* (1897), 5 B.C. 281, approved.

APPEAL by defendant from an order of WALKEM, J., ordering that the action be tried with a jury.

This was an action by Edna Wallace Hopper, the daughter of the widow of the late Alexander Dunsmuir, against James Dunsmuir, to have it declared that the will of the said Alexander Dunsmuir, dated 21st December, 1899, be set aside; that the said will be delivered up to be cancelled; and that probate

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thereof be recalled on the ground that the said Alexander Dunsmuir was mentally incompetent to execute the same, and that it was obtained by the undue influence of the defendant.

By the statement of claim it was alleged that after the death of the said Alexander Dunsmuir, the defendant by undue influence and fraud, induced Josephine Dunsmuir, the widow of Alexander Dunsmuir, to execute an agreement by which she, in consideration of $25,000 a year to be paid to her during her lifetime, waived, relinquished and renounced for herself, her heirs, administrators and assigns all claim, right and interest in and to the property left by her husband.

Statement

At the time of the hearing of the summons before WALKEM, J., the prayer of the statement of claim contained clauses asking that it be declared that the said agreement be delivered up to be cancelled on the ground that it was obtained by means of undue influence; that it be declared that Alexander Dunsmuir died intestate; and that the plaintiff be declared entitled to be administratrix, and for the distribution of the estate of Alexander Dunsmuir under order of the Court.

After the order for a jury was made, and before the appeal came on for hearing, the same learned Judge made an order striking these last mentioned prayers out of the statement of claim.

The appeal came on for argument at Victoria on 4th July, 1903, before DRAKE, IRVING and MARTIN, JJ.

Argument

Davis, K.C. (*Luxton*, with him), for appellant: This action is one of those referred to in r. 81, and under r. 330 the causes or matters referred to in r. 81 must be tried without a jury, and the Court has no discretion to order a jury: see *Stewart* v. *Warner* (1895), 4 B.C. 298 and *Corbin* v. *Lookout Mining Co.* (1897), 5 B.C. 281.

Duff, K.C. (*Helmcken, K.C.*, with him), for respondent: The Court has a discretion to direct questions of fact to be tried with a jury. The claim to set aside the agreement is only in the nature of consequential relief, and may be disregarded for the purpose of this appeal: all that is necessary is to set up the facts relied on for the purpose of attacking the document: the Court

need not set the document aside with regard to its effect in future, it may for the purpose of determining the action treat it as set aside: see *Mostyn* v. *West Mostyn Coal and Iron Co.* (1896), 1 C.P.D. 145 at p. 150.

The question of whether there was undue influence exerted in obtaining the signature to the document is a question of fact to be determined by a jury, and the determination of that question settles whether the document is good or bad.

The claim to set aside the will is not within r. 81, which embraces only the classes of actions assigned to the Chancery Division in England, where actions of this kind are always tried by a jury: see Coote, 13th Ed., 501.

Davis, replied.

Cur. adv. vult.

6th July, 1903.

DRAKE, J.: This is an appeal from an order of Mr. Justice WALKEM ordering the issues in this action to be tried by a jury. The issues are to set aside the will of Alexander Dunsmuir on the ground of incompetency and undue influence, and to set aside an agreement entered into by the late Josephine Dunsmuir and the defendant.

During the argument the Court was informed that the plaintiff had amended her statemant of claim by striking out the second, third and fourth paragraphs of the prayer of the statement of claim, leaving only the prayer that the will of the said Alexander Dunsmuir should be cancelled and probate recalled. The amendments so made do not alter the action or the issues there raised. We have to look at what is in reality the action that is to be tried. There are two branches, first the incompetency of the testator, and secondly the effect of the agreement between James Dunsmuir and Josephine Dunsmuir. The latter deed has to be disposed of first before the probate can be recalled at the request of a stranger in blood to the testator. None of the allegations in the statement of claim are altered. By paragraph 11 it is alleged that the defendant acted fraudulently in obtaining the agreement therein set out to be executed; and by paragraphs 12 and 13 fraud is alleged in obtaining the execution of the said agreement. Therefore the amendments made by the plaintiff are

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nugatory as limiting the issues which have to be tried, and on which the Court would have to pass. By r. 330 actions of the nature and description contained in r. 81 have to be tried by a Judge without a jury, and this rule has been held obligatory in the case of *Stewart* v. *Warner* (1895), 4 B.C. 298, and *Corbin* v. *Lookout Mining Co.* (1897), 5 B.C. 281, by this Court. In my opinion this action is one that comes within the language of r. 81, and should not be tried by a jury, the character of the action being determined from the issues raised on the pleadings, and not limited to the prayer for relief.

The appeal should be allowed with costs.

IRVING, J.

IRVING, J.: This is an appeal from the decision of Mr. Justice WALKEM, who, upon the pleadings as they originally existed, directed that the action should be tried with a jury. The action is brought to set aside the will of the late Alexander Dunsmuir on the grounds of incompetency on his part, and of undue influence on the part of James Dunsmuir, his brother, who was the sole beneficiary under the terms of the will. The statement of claim also asks that an agreement, dated the 1st of December, 1900, made between James Dunsmuir and the widow of Alexander Dunsmuir, by which agreement she, in consideration of $25,000 a year to be paid to her during her lifetime, did waive, relinquish and renounce as heir-at-law, and widow of the said Alexander Dunsmuir, for herself, her heirs, administrators and assigns, all claim, right and interest in and to the property left by her husband. It is alleged that this agreement also was obtained by undue influence on the part of James Dunsmuir. From this it will be seen that there are practically two sets of issues to be tried. First, the issue as to James Dunsmuir exercising undue influence upon the widow in respect of the execution of the deed of release of the 1st of December, 1900; and secondly, the issue as to James Dunsmuir exercising undue influence upon Alexander Dunsmuir in respect to the execution of the will. It seems to me that the first issue is undoubtedly an action within r. 81, and the second issue as a "probate action" comes within the same rule, and that both should, under r. 330, therefore be tried without a jury.

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Stewart v. *Warner* (1895), 4 B.C. 298, an action for the cancellation of a deed, is exactly similar to the action in this case so far as the deed of release is concerned. In that case, and again in *Corbin* v. *Lookout Mining Co.* (1897), 5 B.C. 281, it was stated that r. 330 was imperative, that by reason of an alteration in the wording of our B.C. Rules from the English Rules there was no discretion in the Court to allow a trial by jury in the actions mentioned in r. 81.

Since the order now under appeal was made, the learned Judge who made the order appealed from has struck out the second, third and fourth paragraphs in the prayer of the plaintiff's statement of claim. It is contended on the part of the plaintiff that this change has removed the only chance that the defendant had of succeeding in this appeal, and that the plaintiff's position is now impregnable. I do not think that the striking out of a portion of the prayer of the statement of claim should divert our attention from the real issue of the case. In my opinion the issues to be tried remain the same as they were before the alteration was made. In trying the action as it now stands, it will still be necessary for the plaintiff to establish that undue influence was exercised in the matter of the deed of release, and therefore that it was inoperative to release Mrs. Alexander Dunsmuir's rights.

IRVING, J.

I think the appeal should be allowed.

MARTIN, J.: There are two branches of this action, the first to set aside the will of the deceased and recall the probate thereof, and the second to set aside the written agreement of the 1st of December, 1900, between the defendant and the widow of the deceased on the ground that it was obtained by means of undue influence.

It is contended that r. 330 governs the points raised, and it is not necessary, in my opinion, to go outside that rule, which has already been held by the Court to exclude all discretion.

MARTIN, J.

The setting aside of a written instrument is one of "the causes and matters referred to in r. 81," which must be tried by a Judge without a jury, according to r. 330. The case of *Mostyn* v. *West Moystn Coal Co.* (1876), 1 C.P.D. 145, is a decision

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to the effect that, as put by Lindley, J., at p. 154, when an equitable defence is set up in a Court of common law for the rectification of a written instrument, such Court has, by virtue of the English Rule 3 of Order XIX., jurisdiction to decide it up to a certain point at all events, "so far as it arises incidentally by way of defence to the action." That, of course, is a very different state of affairs from an action such as the present, where the plaintiff asks to set aside a written instrument.

But we are told, while the argument was proceeding before us, that an amendment had been granted in Chambers by which the plaintiff has been allowed to amend her statement of claim by striking out from it that portion of the prayer for relief which relates to the said instrument, and we are asked to determine the remaining question on that basis.

MARTIN, J.

Now, assuming that the amendment is of such a nature as to exclude all claim for relief in regard to the agreement, the question then arises on the second branch, which is—Can there be a jury in a probate action? This also, in my opinion, must be decided solely by reference to rr. 81 and 330, and in the last paragraph of r. 81 "probate actions" are included. There is no corresponding rule or statute in England, but even if there were it could have no effect upon our own statutory rule, and the result is that this action, which so far as the second branch of it is concerned is admittedly a probate action, cannot be tried with a jury.

Appeal allowed with costs.

HOPPER v. DUNSMUIR (No. 2).

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Practice—Discovery—Examination for—Nature of—Rule 703.

The examination for discovery under r. 703 is a cross-examination both in form and in substance, and a party being examined must answer any question the answer to which may be relevant to the issues.

APPEAL from an order of DRAKE, J., refusing to strike out the defendant's defence on the ground of his refusal to answer certain questions on his examination for discovery.

The nature of the action is shewn in the report of another decision in the same cause, *ante* p. 17.

By paragraph 10 of the statement of claim the value and description of the estate left by Alexander Dunsmuir were set out, and these were not denied by the statement of defence.

Statement

On the examination for discovery of the defendant, he refused to answer questions in reference to the nature and extent of the subject-matter of the will, the business and personal relations that existed between him and his deceased brother, the history of their dealings with the property, the mode in which the deceased brother managed his affairs, and the circumstances leading up to and surrounding the execution of the will and the release.

The motion to strike out the defence was argued before DRAKE, J., who gave the following judgment:

6th July, 1903.

DRAKE, J.

The questions which the defendant has refused to answer are mainly relative to the value of Alexander Dunsmuir's property. These questions are not relevant to the first issue, which is that the testator was not of sound mind when he executed the will or if he was the will was obtained by undue influence; none of the questions refer to this issue. The other issue is that an agreement set out in the pleadings was obtained by fraud; that agreement purports to be a discharge of all claim to the testator's estate for a consideration therein expressed. The questions rela-

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tive to the estate are relevant, but none of those relating to the interest of the defendant or other persons in the various companies in which the testator was interested. Any questions relating to the income of the testator's estate in "R. Dunsmuir & Co.," a California Corporation, after payment of the existing liabilities, can be inquired into. I have marked with the letter "A" the questions I think should be answered, and the questions marked "N" I do not consider relevant to the issues and need not be answered. Costs in the cause.

The appeal was argued at a special Sitting of the Full Court (HUNTER, C.J., WALKEM and IRVING, JJ.), at Victoria on 13th and 14th July, 1903.

Duff, K.C. (*Helmcken, K.C.*, with him), for appellant: The means that Alexander Dunsmuir had are material, as one of the points in the plaintiff's case will be that he left his widow an amount (assuming that defendant's statement that the will was subject to the secret trust that he was to pay the widow an annuity of $12,000 is correct) altogether inadequate and disproportionate to the amount of his estate. He referred to the questions and the refusal to answer to shew that the questions were proper, and were such as should be answered on a cross-examination.

Argument

Davis, K.C. (*Luxton*, with him), for respondent: The rule now with the amendment of June, 1900, is not different from the rule as settled by the Full Court in *Bank of B. C.* v. *Trapp* (1900), 7 B.C. 354, the effect of which decision is that a question which is in the form of a cross-examining question may be put, but it must be straight on the issue, *e.g.*, a leading question may be put, and in a loud tone of voice; a question that would be irrelevant in examination in chief can't be put; oral discovery is only a little more elastic than interrogatories, and is treated as supplemental thereto: see *Marriott* v *Chamberlain* (1886), 17 Q.B.D. 154 at p. 162, where Lord Esher says it must be on a question about which there will be a dispute at the trial: see also *Attorney-General* v. *Gaskill* (1882), 20 Ch. D. 509 at p. 527; *In re Howel Morgan* (1888), 39 Ch. D. 316; *Kennedy* v. *Dod-*

son (1895), 1 Ch. 334 and *Hemery* v. *Worssam* (1882), 26 Sol. Jo. 296.

The amount of Alexander Dunsmuir's property is not in dispute, as the plaintiff's allegation as to its value and description is admitted, and they can't question about something which is admitted.

Under r. 160, where undue influence is alleged particulars must be set out: *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685.

[IRVING, J., referred to *In re Thomas Holloway* (1887), 12 P.D. 167.]

The facts are distinguishable, and *Kennedy* v. *Dodson* is the later decision and must govern.

Duff, in reply: The rule about interrogatories is that a question is good if it is shewn "that it may be relevant": *In re Thomas Holloway*, *supra*, at p. 175, and *Sheward* v. *Earl of Lonsdale* (1880), 42 L.T.N.S. 172.

One of the things alleged is that the will was prepared on the instructions of defendant, and as soon as that fact is established it is sufficient to put on defendant the onus of shewing the will was the act of a free and capable testator: *Barry* v. *Butlin* (1838), 2 Moo. P.C. 480 at p. 482.

Where a will is attacked on the ground of undue influence the Court will not order particulars: *Lord Salisbury* v. *Nugent* (1883), 9 P.D. 23, and *Hankinson* v. *Barningham*, *ib.* 62. One of the issues is, was Alexander Dunsmuir a free and capable testator, and all questions having a bearing on it should be answered. Must counsel stop after asking if he was sane? Can't he go on and find out what Alexander Dunsmuir did, what the nature of his property was, how he managed it, etc.?

Argument

The examination did disclose that there was property in San Francisco which is not mentioned in paragraph 10 of the statement of claim, and besides paragraph 10 is not inconsistent with the existence of property other than that which is mentioned.

The system of discovery by means of interrogatories is altogether different from our system of oral discovery, which is meant to be a cross-examination in substance as well as in name.

Cur. adv. vult.

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HUNTER, C.J.: This case raises an important question as to the scope of examinations for discovery under the present rules and practice of the Court.

In England the machinery provided to obtain discovery of facts within the knowledge of the adversary is by way of interrogatories only; in Ontario, by way of *viva voce* examination in the cause; while in British Columbia both methods are provided.

Under the system of interrogatories, the interrogating party may secure an order for further and better answers if those given are insufficient or evasive, which answers may be required to be given *viva voce* or on affidavit, but he has no right to cross-examine with a view to test the truth or value of the answers. Moreover, Lord Herschell says, in *Kennedy* v. *Dodson* (1895), 1 Ch. 334 at p. 338: "I entertain a strong opinion that interrogatories, unless strictly relevant to the question at issue in the action, ought to be rigorously excluded;" and A. L. Smith, L.J., says: "The legitimate use, and the only legitimate use, of interrogatories is to obtain from the party interrogated admissions of facts which it is necessary for the party interrogating to prove in order to establish his case; and if the party interrogating goes further, and seeks by his interrogatories to get from the other party matters which it is not incumbent on him to prove, al-

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though such matters may indirectly assist his case, the interrogatories ought not to be admitted."

In Ontario a party to an action or issue may be orally examined before the trial *touching the matters in question* by any party adverse in interest, and is compellable to testify in the same manner, upon the same terms, and subject to the same rules of examination as any witness, subject to certain provisions not here necessary to notice. It is also provided that he should be subject to cross-examination and re-examination, and that the examination, cross-examination and re-examination shall be conducted as nearly as may be in the mode in use on a trial; and it has been decided that the examination must be confined to matters which are relevant to the questions raised by the pleadings, that is, for example, that questions going only to the

character or credit of the party examined are not permissible: *Mack* v. *Dobie* (1892), 14 P.R. 465; although no doubt a question, the answer to which might be relevant to the issue, cannot be left unanswered merely because the answer might tend to shake the credit of the party. In British Columbia the rules bearing on this question (703 and 712) were practically identical with those in force in Ontario until June, 1900, when the following proviso was tacked on to r. 703: "And such examination shall be in the nature of a cross-examination, limited, however, to the issues raised by the pleadings."

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So far as I can see, this amendment really effected nothing, as it merely emphasizes the fact that the examination is to be a cross-examination, which was already provided for by r. 712, and interprets the expression "matters in question in the action" to mean "issues raised by the pleadings."

It is clear, on the one hand, that the decisions as to the latitude which may be allowed in the matter of administering interrogatories can throw little or no light on the question as to the latitude permissible in cross-examination, for, as already stated, cross-examination has no place in a system which provides only for interrogatories; and it is, I think, equally clear that in a cross-examination on the issues raised by the pleadings any question is permissible the answer to which may be relevant to the issues.

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The difference between the two systems is well marked, and may be illustrated by some remarks of the learned Judges in the case already cited of *Kennedy* v. *Dodson*. Thus Lord Herschell says, at p. 338, in deciding against the right to put certain interrogatories: "But because those questions might be put to the defendant in cross-examination, it by no means follows that evidence as to such transactions would be relevant evidence to be given in chief by the plaintiff." That is to say, the only evidence which can be forced from a party answering interrogatories is such as could be given by him in chief, whereas under the system of *viva voce* examination he may be required to give any evidence which would be admissible in cross-examination on the issues. Again, Lindley, L.J., says at p. 341: "Examining witnesses at a trial, and obtaining discovery before the trial are two

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totally different matters." Here, on the other hand, they are practically identical so far as concerns the right to examine on the issues. Again, A. L. Smith, L.J., says at p. 342: "But that is pure cross-examination and not the subject-matter for interrogatories."

Now, the facts alleged in this action are that the defendant procured his brother about a month before death, and on the day of his marriage with the mother of the plaintiff, to make a will under which he became the sole beneficiary; that the widow was induced by the undue influence of the defendant to sign a release of all her claims in consideration of an annuity to be paid by the defendant; and that the will was procured by the undue influence of the defendant when its maker was in a feeble condition of mind, and that, therefore, it was not the act of a free and capable testator.

The cardinal issues, then, raised by the pleadings are those of unsound mind and undue influence, and it does not require any argument to shew that the *facta probanda* in this class of case must necessarily be based upon a multitude of facts which taken singly may seem to have little or no relevancy to the issue, and that therefore any useful cross-examination in respect of such issues must necessarily range over a great variety of topics. The nature and extent of the subject-matter of the will, the business and personal relations that existed between the

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defendant and the deceased, the history of their dealings with the property, the mode in which the deceased managed his affairs, the circumstances leading up to and surrounding the execution of the will and the release, must all necessarily be examined into at length, both in order that the plaintiff may be able to judge as to whether it is worth while to proceed with the trial, and in order that, in the event of the trial being proceeded with, the Court may be aided in coming to a sound conclusion in respect of these issues.

No doubt some of the questions propounded and refused to be answered seem at first sight to be somewhat remote from the matter in hand, but I think it is impossible to say that the answers may not be relevant to the issues, and such being the case they are within the right given the cross-examining party

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by the rule. Even under the decisions on the English practice the Court could not disallow an interrogatory unless it was plain that the answer could not be relevant to the issue: *Sheward* v. *Earl of Lonsdale* (1880), 42 L.T.N.S. 172; *In re Thomas Holloway* (1887), 12 P.D. 167.

It is also obvious that useful or effective cross-examination would be impossible if counsel could only ask such questions as plainly revealed their purpose, and it is needless to labour the proposition that in many cases much preliminary skirmishing is necessary to make possible a successful assault upon the citadel, especially where the adversary is the chief repository of the information required.

It was argued by the learned counsel for the respondent that only a sort of cross-examination was allowed by the rule; that it consisted in asking leading questions bearing *directly* on the issues, and, if thought proper, in a loud tone of voice. I cannot agree. I think that the function of a cross-examiner is not to play the role of the ass in the lion's skin, but to extract information that will be of use in the decision of the issues, and by the most circuitous routes if it shall appear necessary to do so.

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I may add that, in my experience of the use of this procedure in Ontario, no one ever suggested that the cross-examination was not to be one in reality as well as in name.

I therefore think that the appeal should be allowed with costs, and that the defendant should attend when required for further cross-examination at his own expense, and, in default of so doing, that the defence be struck out.

WALKEM, J.: This is an appeal on behalf of the plaintiff from the refusal of Mr. Justice DRAKE to order the defendant to give further and better answers to certain interrogatories which he had been directed to answer.

WALKEM, J.

Rule 272, of our Rules of Court, under the heading of "Discovery and Inspection," is relied upon by Mr. *Davis*, counsel for the defendant, as it states that interrogatories which do not relate to any "question in the cause or matter shall be deemed irrelevant notwithstanding that they might be admissible on the oral cross-examination of a witness."

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But this rule has been so amended as to allow interrogatories in the nature of a cross-examination to be put to a party under examination for discovery; and, in my opinion, the amendment is particularly apposite to the present case, where, without going into particulars, the defendant is charged, in the first place, with having procured, by undue influence, a will, exclusively in his favour, from his brother, the late Mr. Alexander Dunsmuir, about five weeks before the latter's death—the widow of the deceased being unprovided for. In the next place, the defendant is charged with having afterwards obtained, by undue influence, from the widow, who, by the way, is the mother of the plaintiff, an agreement under seal which purports to settle all possible disputes between them with respect to the estate of the deceased, for a consideration, which, as it is in effect alleged, was considerably below the value of the interests she thereby parted with. Whether any of these allegations are true or not can only be determined at the trial. At all events, it appears to me, as a matter of common sense, that the range of investigation respecting all the incidents—even the most trivial—connected with the making of the impeached will must necessarily be almost illimitable, and the same may be said with respect to the making of the deed. Apart from this, the defendant has admitted that although the will is absolute in form there was an understanding between him and the testator that he should carry out certain provisions which were not inserted in it. This fact of itself might, or might not, be regarded at the trial as one of the results of undue influence. Without going further into the matter, I consider that the defendant should answer all the interrogatories that he has objected to answer.

WALKEM, J.

The appeal is, consequently, allowed with costs.

IRVING, J.

IRVING, J.: I concur with the Chief Justice.

Appeal allowed with costs.

CLARK v. THE CORPORATION OF THE CITY OF VANCOUVER.

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Deed—Condition subsequent—Breach of—Forfeiture—Assignment by vendor before re-vesting—Validity of.

On the grant of a fee simple defeasible on breach of a condition no estate is left in the grantor, but only a possibility of reverter, and, therefore, before breach there is nothing capable of assignment.

After breach, where the deed does not provide for *ipso facto* forfeiture, the fee does not revest automatically, and until re-vesting by suit or otherwise there is nothing capable of assignment.

Land was conveyed subject to certain conditions to be performed by the purchasers, and, in default of the performance of such conditions, the purchasers were to hold the land in trust for the grantor, and reconvey to him, notwithstanding that any prior breach may have been waived. The conditions were not performed.

In an action by the assignee under seal of the vendor for a declaration that the purchasers held the land in trust for him, and for an order for the conveyance thereof to him:—

Held, that after the conveyance there was no estate left in the grantor, but only a possibility of reverter, which was not assignable, and no action lay.

Decision of MARTIN, J., affirmed on different grounds.

APPEAL from the judgment of MARTIN, J.

Action against the Corporation of the City of Vancouver for a declaration that the defendants hold certain lands containing 6.858 acres, called Clark's Park, in trust for the plaintiff, and for an order for the conveyance thereof to the plaintiff.

On 26th February, 1889, one E. J. Clark, conveyed the land in question to the City to be used for the purposes of a public park, the clauses of the deed material for the purposes of this report being as follows: Statement

"(3.) And upon the further trust and condition that the said Corporation, its successors or limited assigns shall within twelve months from the first day of January, A.D. 1890, clear of stumps, roots, and plow, harrow and level off same according to the natural contour of said ground, and seed down same, and

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shall and will within twenty-four months from the said first day of January, A.D. 1890, build a road leading to said ground and shall forever thereafter while the said lands and premises shall remain vested in the said Corporation, its successors or limited assigns upon trust as aforesaid maintain the same in such fit, proper and good condition as aforesaid according to the true intent and meaning of these presents, and the said Corporation, their successors and limited assigns do hereby covenant and agree with the said grantor, his heirs and assigns, as follows, etc.

"(5.) That when and so soon as the said Corporation and their successors shall have carried out the trust and condition contained in paragraph three hereof he or they will forthwith thereafter pay to the said Corporation or its successors the sum of $1,000.

"Provided always and it is hereby declared that the grant and conveyance hereby made is so made upon the express trust and confidence that in the event of the said Corporation, its successors and limited assigns failing to comply with the trusts and provisions expressed and contained in the third paragraph hereof within the period thereby limited for that purpose, or in case of their due compliance therewith then afterwards in the event of any breach, non-performance or non-observance of any of the trusts and conditions herein contained for the space of twelve months, and notwithstanding any prior breach or breaches for the space of twelve months of any of the trusts and provisions on the part of the said Corporation, their successors or limited assigns to be by them observed and performed which may have been overlooked or waived by the said grantor, his heirs or assigns, then and immediately thereafter the said Corporation, its successors and limited assigns shall hold the said lands and premises in trust for the said grantor, his heirs and assigns, and to be reconveyed to him and them accordingly, but neither of the parties hereto nor their heirs, successors or assigns shall have any claim against the other of them for any loss, costs, damages or expenses arising out of the trust, provisoes and conditions herein contained, or in respect of any matter or thing arising out of the premises."

Statement

In June, 1891, the City Clerk wrote to E. J. Clark informing

him that the City had performed the conditions required by the agreement and requested payment of $1,000; Clark replied in the same month stating that the conditions had not been performed, and demanding a re-conveyance, and in July, 1893, he wrote the City Clerk reminding him he had not received a reply to his former letter, and again demanding a reconveyance.

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By deed bearing date 6th May, 1899, which recites the conveyance to the City and the agreement for the sale of his "reversionary interest" in the lands, E. J. Clark purported to convey to William C. Clark (the plaintiff in this action) the lands in question, and also all other the right, title and interest of the said grantor of and in the said land and premises comprised within the boundaries set forth in the said indenture, and all other the right, title and interest of the said grantor of and in the said land and premises . . . . . to have and to hold unto the said grantee, his heirs and assigns to and for his and their sole and only use forever subject nevertheless . . . . . and subject to the trusts, provisoes, conditions and agreements set forth in the said hereinbefore recited indenture, or such of them as are still subsisting and capable of taking effect, *excepting the ultimate trust in favour of the said grantor which is conveyed to the said grantee by these presents.*

Statement

On 16th May, 1899, the action was commenced.

The trial took place at Vancouver before MARTIN, J., who gave the following judgment:

MARTIN, J.: From the evidence, I am satisfied that the defendant Corporation has substantially complied with the trusts contained in the conveyance of the 26th of February, A.D. 1889, except in so far as that triangular portion of the Park is concerned, which portion contains 1.123 acres out of a total area of 6.858 acres. And I am further satisfied that the failure to clear and "stump" that relatively small portion of the property was because of a mistake in regard to the true boundary of the Park, which appears more plainly from the plan of a recent survey whereon it is shewn that a smaller triangular piece of Fifteenth Avenue was cleared, doubtless in the belief that it formed part of Clark's Park.

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Owing to the considerable lapse of time and the death of the then City Engineer, the defendant Corporation is unable to explain exactly how the mistake arose, but from the contour of the ground and surrounding natural features it is not hard to reasonably infer how the error in the boundary of the clearing was made. It is stated that even now there are scarcely any houses in the immediate vicinity of the Park.

On the 17th of June, 1891, the City Clerk notified E. J. Clark that the Corporation had performed the conditions; in answer to which Clark wrote complaining generally of non-performance, but not specifying in what particular or what he wished to be done, and again wrote to a similar effect on July 3rd, 1893; he did not commence this action till May 16th, 1899.

The question is, does the failure of the Corporation, under all the circumstances of the case, to clear and level to the natural contour of the ground, and seed the said triangular portion, operate so as to deprive it of the interest in said Park conveyed by said trust deed?

The condition relied upon here is a condition subsequent, and though I have carefully perused the authorities submitted by counsel since the trial I have not, doubtless owing to the unusual circumstances of this case, derived much assistance from them in regard to the manner in which such a condition should be construed, having regard to the facts before me. I may say the reference to sections 5,815-7, in Thompson on Corporations, Volume 5, is most in point. In the absence of such direct authority, I turn to the general principles of equity, and have come to the conclusion that in view of the honest intention of the Corporation to perform the conditions (as partly evidenced by the expenditure of a large sum of money), the mistake as to the boundary, the not altogether satisfactory attitude of Clark, the long and unreasonable delay, and the other circumstances, it would, taking all these together, be unconscionable to compel the Corporation to re-convey the property to the present plaintiff, the assignee of Clark. It will be noted that I have thought it desirable to deal with the matter on the merits, and so have not touched upon the objections that were raised to the form of the action.

MARTIN, J.

Judgment will be entered in favour of the defendant with costs.

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The plaintiff appealed, and the appeal was argued at Vancouver on 21st and 22nd April, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

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Wilson, K.C., for appellant: As soon as defendants made default in performing the conditions they became trustees; this is not a case in which the Court will relieve against a forfeiture; he cited *Bracebridge* v. *Buckley* (1816), 2 Price, 200 at p. 229; Story's Equity, Vol. 2, p. 551.

[IRVING, J.: See *Barrow* v. *Isaacs & Son* (1891), 1 Q.B. 417; (1899), 1 Q.B. 835.]

Jones v. *St. John's College* (1870), L.R. 6 Q.B. 115.

Hamersley, K.C., for respondents: It was not open to plaintiff to sue as assignee until the original grantor has taken possession or brought his action; the property in the land remains in the defendants until the original grantor has done something to cause it to re-vest in him; assuming there has been a breach of a condition, it is a condition subsequent. He cited *Prosser* v. *Edmonds* (1835), 41 R.R. 322; 1 Y. & C. 481; Thompson on Corporations, Vol. 5, pp. 4,504-8; *Thomas* v. *Hawkes* (1841), 9 M. & W. 53; *Allcard* v. *Skinner* (1887), 56 L.J., Ch. 1,052; Dillon, Vol. 2, p. 763; *Kennedy* v. *City of Toronto* (1886), 12 Ont. 211.

Argument

Wilson, in reply, referred to R.S.B.C. (1897), Vol. 1, p. liv., Sec. 6; *Jenkins* v. *Jones* (1882), 9 Q.B.D. 128; *Kennedy* v. *Lyell* (1885), 15 Q.B.D. 491; *In re Melville* (1886), 11 Ont. 626 and *Grant* v. *Armour* (1894), 25 Ont. 7.

Cur adv. vult.

29th July, 1903.

HUNTER, C.J.: This is an action against the City of Vancouver for a declaration that the defendants hold certain lands, styled Clark's Park, in trust for the plaintiff, and for an order for the conveyance thereof to the plaintiff.

HUNTER, C.J.

On Feb. 26th, 1889, E. J. Clark conveyed the land in question to the City to be used for the purposes of a public park, the

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clauses of the deed material for present purposes being as follows: [Setting them out as in statement.]

In June, 1891, he complained by letter to the City Clerk that the conditions of the grant had not been fulfilled, and demanded reconveyance of the property, and repeated this demand in June, 1893, after stating that he had received no reply to his former letter.

By deed bearing date May 6th, 1899, which recites the conveyance to the City and the agreement for the sale of his "reversionary interest" in the lands, E. J. Clark assumed to convey the lands in question to William C. Clark, who is the plaintiff in this action, as well as "the ultimate trust in favour of the said grantor," which would appear to be something new in conveyancing.

One ground of defence taken by the City is, that no cause of action passed to William C. Clark by this attempted assignment, and, in my opinion, it must be allowed to prevail.

The grant to the City reserves no right of entry for breach of its conditions, but says that, notwithstanding any prior breach which may have been overlooked or waived, the grantee, in the event of breach, is to hold the land in trust for the grantor, his heirs and assigns, to be reconveyed to him and them accordingly. It seems clear that such a stipulation can give no higher rights to the grantor or reserve to him any greater interest in the land

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than a right of entry would have done, as it cannot fairly be contended, in view of the clause about the waiver of any prior breach, that it was the intention of the parties that there should be an *ipso facto* forfeiture upon the happening of the breach, but rather that the City should be bound to reconvey at the option of the grantor. That being so, it would appear by analogy to the case of a right of entry for breach of a condition that the right reserved by this deed to call for a reconveyance is a right personal to the grantor and his heirs, and is not assignable.

There is no doubt that a right of entry for breach of a condition was not assignable at common law, and it seems clear, under the authorities, that it was not made assignable by the Statute 8 & 9 Vict., Cap. 106, being R.S.B.C. 1897, p. liv., Sec. 8.

In *Hunt* v. *Bishop* (1853), 8 Ex. 675, 22 L.J., Ex. 337, Pollock, C.B., says, in delivering the judgment of the Court, p. 339, "at all events, we think that the 8 & 9 Vict., Cap. 106, does not relate to a right to re-possess or re-enter for a condition broken, but only to an original right where there had been a disseisin, or where the party has a right of entry and nothing but that remains."

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In *Hunt* v. *Remnant* (1854), 9 Ex. 635, in the Exchequer Chamber, Maule, J., in argument, referring to the right of entry dealt with in the statute, says, at p. 640, "that does not mean a right of entry for a forfeiture, but a right of entry in the nature of an estate or interest, that is, where a person by lapse of time has lost everything except his right of entry," and this view is not dissented from in the judgment of the Court; and in 23 L.J., Ex. p. 136, the same learned Judge is thus reported: "the statute seems to contemplate a right of entry at the end of an estate or interest, not a right of entry for a condition broken, which is clearly a litigious right. It did not mean to assign a right of action." To the same effect in 2 W.R. at p. 278.

In *Jenkins* v. *Jones* (1882), 9 Q.B.D. 128, Jessel, M.R., says, in argument, p. 131, "the reason why a right of entry for condition broken was not assignable by virtue of 8 & 9 Vict., c. 106, s. 6, may be taken to be, that it was at the election of the person entitled to enter whether he would take advantage of the breach of the condition."

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In *Ruch* v. *Rock Island* (1878), 97 U.S. 693, Swayne, J., says, at p. 696: "It was not denied by the plaintiff that the title had passed, and that the estate had vested by the dedication. If the conditions subsequent were broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime, and after his death by those in privity of blood with him. In the meantime, only a right of action subsisted, and that could not be conveyed so as to vest the right to sue in a stranger. Conceding the facts to have been as claimed by the plaintiff in error, this was fatal to his right to recover, and the jury should have been so instructed."

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It is clear that in the case of a grant of the fee simple defeasible on breach of a condition, there is no estate, interest, or reversion whatever left in the grantor, but only a possibility of reverter, because the breach may never happen, and, therefore, there is nothing before breach which is capable of assignment. Nor is there after breach, where, as here, there is no *ipso facto* forfeiture, as the estate does not re-vest until the appropriate step is taken by the grantor, and until such re-vesting there is nothing to assign.

There is, therefore, nothing in the Statute 8 & 9 Vict., Cap. 106, or any other statute that I am aware of, which takes this case out of the operation of the rule of the common law that "nothing which lies in action, entry or re-entry can be granted over in order to discourage maintenance;" and there is nothing to prevent E. J. Clark, notwithstanding his conveyance to the plaintiff, from waiving or releasing his right of action against the city. I therefore think that the plaintiff took nothing by the assignment, and that the appeal should be dismissed.

DRAKE, J.

DRAKE, J.: The plaintiff seeks to recover a portion of a tract of land some six acres in extent, which was conveyed by him to the defendants on the 26th of February, 1889, upon trust to hold the same subject *inter alia* to the trust, provisoes and agreements therein declared; and certain restrictive trusts are then set out as to the premises being solely used for a recreation ground. The deed then proceeds: "And upon further trust and condition that the Corporation shall within twelve months from January, 1890, clear and level the ground and seed it down, and within two years build a road thereto, and maintain the ground in a fit and proper condition according to the true intent and meaning of the said indenture. Provided always that the said grant is made upon the express trust that if the said Corporation fail to comply with the trusts therein contained for the space of twelve months, notwithstanding any prior breach of trust, the said Corporation shall hold the said lands in trust for the grantor, his heirs and assigns." In 1892, and again in 1893, Mr. Clark, the original grantor, drew the Corporation's attention to the fact that they had not complied with the terms of the

trust deed, but did not seek to enforce his rights. An assignment having been made by E. J. Clark to W. C. Clark, the plaintiff, he commenced action in 1899.

The defendants spent some money in clearing part of the lot, and opened a road to it. They alleged in argument, but do not prove, that they have cleared as much land as was contained in the original grant. What they have done is to leave one and one-quarter acres in its natural wild state, and said they could not do more because there was a doubt about the correctness of the survey of section 264, New Westminster District. But this excuse will not help, because the deed clearly defines the land, and the metes and bounds given are those of streets appearing on the official registered plan. The defendants after the plaintiff's notice took no steps to ascertain the correct boundaries of the tract of land conveyed to them, if, in fact, the deed was incorrect, which is not shewn.

They further allege, but do not set it up in their defence, that the mistake of the contractor engaged in clearing and levelling the land ought to excuse them; in fact, that it was such a mistake as a Court of Equity would relieve against.

If the contractor was in fault, the defendants had ample time to correct his mistake, but they did not even condescend to reply to the letters they received from the plaintiff.

The defendants wish to invoke the power of the Court to relieve them from the result of their own negligence, and on the ground of laches of the plaintiff not prosecuting his action before; and also on the further ground that the defendants being in possession, the sale to W. C. Clark was an assignment solely of a pretended title, and therefore void under 32 Henry VIII., Cap. 34.

To deal with the last point, the defendants are now in possession not in their own rights but as trustees for the plaintiff, but the Act of 8 & 9 Vict., Cap. 106, by section 6, renders valid assignments of a contingent executory or future interest, or a possibility coupled with an interest. The plaintiff must prove not only that the title was bad, but that the buyer knew it was fictitious: *Kennedy* v. *Lyell* (1885), 15 Q.B.D. 491 and *Jenkins* v. *Jones* (1882), 9 Q.B.D. 128. On the point of laches, the

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plaintiff's predecessor in title made a demand under the deed in June, 1891, which was ignored, and renewed in July, 1893, to which, apparently, no attention was paid. After this notice, the defendants became the trustees for E. J. Clark and his assigns. The action was not begun until May, 1899. I do not think that the laches can be imputed to the plaintiff or to E. J. Clark. The other point is, that this is a case where equity should relieve on account of a mistake. No mistake is set up in the defence, and the defendants have not applied for any relief on that ground; but the case of *Bracebridge* v. *Buckley* (1816), 2 Price, 200, is an authority to shew that a Court of Equity will not relieve against a breach of covenant in a lease unless the parties can be placed in *statu quo*. Here there has been a delay by the defendants of ten years, and the property has been transferred.

DRAKE, J.

I think the appeal should be allowed with costs, and the defendants should be ordered to convey to the plaintiff or his assigns, as he may advise.

IRVING, J.

IRVING, J., agreed with the Chief Justice.

Appeal dismissed, Drake, J., dissenting.

HUNTER, C.J.
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IN RE
MCPHALEN

IN RE C. T. MCPHALEN.

Husband and wife—Application by husband by habeas corpus for custody of child—Costs.

Where a wife leaves her husband without justification she is not entitled to her costs of unsuccessfully resisting his application by *habeas corpus* for the custody of children.

APPLICATION for *habeas corpus* heard before HUNTER, C.J.

The parties were married in Vancouver in 1898. There is one child, Kathleen Margaret McPhalen, aged three. On May

21st the wife left her husband, taking the child with her, and went to live with her father. The ostensible reason was that the husband had invited his sister to stay at the house for a short time. The sister left the house with the husband's father, who had been living with the parties, and went to an hotel in Vancouver. The husband asked his wife to return, and on her refusal demanded the child. The wife refused to give up the child, claiming that she was justified in leaving, and that in view of the child's age she was entitled to its custody.

The husband applied for *habeas corpus*. On the return of the order *nisi* the wife asked for leave to answer by affidavits. Affidavits on both sides were filed, and the parties were cross-examined.

Statement

The matter came up before the Chief Justice on June 6th, 1903.

A. D. Taylor, for the husband, contended that on the evidence the wife had no justification or excuse for leaving her husband, and this being the case, and in view of the fact that she had refused to return, the husband was entitled of right to the custody of the child.

Hunt, for the wife, claimed that the wife was justified, and that in view of the age of the child she was entitled to retain its custody.

Argument

The Chief Justice stated that he was reluctant to make an order as between the parties, but, considering that the wife was not justified in leaving the house, if she did not see her way to return and settle the question amicably, he would make an order giving the husband the custody of the child. In order to enable the parties to come to an agreement he adjourned the hearing to June 10th.

On June 10th the matter came up again, when counsel for the husband stated that it had been agreed that the husband should have the custody of the child, and that the only question to be settled was that of costs. The wife claimed that the husband should pay the costs on both sides. He urged that the wife had left the house without any excuse, and this being the case she was not justified in resisting the application of her husband, and

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that the costs incurred by her were not in any sense necessaries for which she had a right to pledge her husband's credit.

He cited Lush on Husband and Wife at p. 368, and *Mecredy* v. *Taylor* (1873), 7 Ir. R.C.L. 256, where the costs of the wife who had been unsuccessful in resisting an application of the husband by *habeas corpus* for the custody of the child were refused. He also referred to *Bazeley* v. *Forder* (1868), L.R. 3 Q.B. 559, in which it was held that the husband was liable for necessaries supplied for the child on the order of the wife, who was living apart from her husband, and had obtained an order from the Chancery Division for the custody of the child. Even in that case there was a doubt expressed. In the present case, the wife had no justification for staying away.

Hunt, for the wife, submitted that the ordinary rule as to the wife's costs should apply, and that she was entitled to costs.

Judgment

HUNTER, C.J.: The wife left her husband without justification, and this being the case she should have returned to her husband, and she was not justified in resisting the application for the custody of the child. In these circumstances she was not entitled to her costs.

Order accordingly.

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MCLEOD v. WATERMAN (No. 2).

Tax sale—Assessment—Taxes—Assessment Act, R.S.B.C. 1897, Cap. 179, Secs. 3 (Sub-Sec. 24) and 49.

Agent, real estate—Purchaser at tax sale—Fiduciary relationship.

The City of Nelson was incorporated in March, 1897, and in September, 1898, land situated therein was sold by the Provincial Assessor for taxes for the years 1896 and 1897, levied under the provisions of the Assessment Act:—

Held, setting aside the tax deed, that there was no authority to hold the

tax sale as the Assessment Act does not apply to municipalities. In July, 1897, a real estate agent on behalf of the owner, negotiated with a prospective purchaser, but the attempted sale fell through and after that the agent and the owner ceased to have any dealings with each other. In September, 1898, the agent bought the property at a tax sale at a very low figure:—

Held, that at the time of the sale the agent was not in a fiduciary relation to the owner.

Decision of IRVING, J., reversed.

APPEAL from the judgment of IRVING, J.

This was an action to set aside a tax sale deed of lot 4, block 4, City of Nelson, tried before IRVING, J., at Nelson, on 16th February, 1903. The defendant, who was a real estate agent, purchased this lot at a tax sale, held by Provincial Assessor Keen, on 1st September, 1898, for the purpose of realizing arrears of taxes due the Provincial Government for the years 1896 and 1897. The City of Nelson was incorporated on 18th March, 1897, under the provisions of Cap. 16 of the Statutes of British Columbia, 1897, and the tax sale proceedings were all taken after incorporation. Mr. Keen was succeeded in the office of Assessor by Mr. Kirkup, who executed the tax sale deed. The arrears for which the sale was had on this property were $3 for 1896, and $3.60 for 1897; and the whole amount to be realized, including expenses, was $10.20, at which figure the property was knocked down to the defendant. In June, 1897, the defendant Waterman wrote the plaintiff, who was a resident of Kamloops, asking him to list the lot with his firm for sale and they would submit to him any offers for sale, and subsequently, in July, 1897, the firm entered into some negotiations with a prospective purchaser, but the attempted sale fell through, and after that the plaintiff and the defendant ceased to have any dealings with each other.

Statement

At the sale there was not any general competition in the bidding; nearly all those present were on friendly terms with each other, and the auctioneer would state the amount required, and if no one would give that much for a fraction they would settle among themselves who was to get the whole lot for the amount. Only in one or two instances was a fraction of a lot sold, the

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purchasers generally insisting on getting a whole lot or nothing.

At the trial IRVING, J., dismissed the action.

The plaintiff appealed, and the appeal was argued at Vancouver on 21st April, 1903, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Wilson, K.C., for appeal: The fiduciary relation of principal and agent existed between plaintiff and Waterman at the time of the tax sale: the authority of Waterman as agent had not been determined by any one of the ways in which an agent's authority may be determined: see Bowstead on Agency, 2nd Ed., 419. Waterman was not at liberty to use for his own benefit his knowledge of the value of the lot gained as agent.

There was no power to sell, as the provisions of the Assessment Act (R.S.B.C. 1897, Cap. 179) under which the land was sold have no application to lands within a municipality: see section 3, sub-section 24 and section 49. He referred also to section 116, and *Johnson* v. *Kirk* (1900), 30 S.C.R. 344 at p. 355, judgment of Gwynne, J. The sale was unfair. Section 110 of Cap. 179 was repealed by Cap. 38 of 1900, Sec. 12: see *Scott* v. *Imperial Loan Co.* (1896), 11 Man. 190 at p. 197. There is nothing in the statute allowing the Assessor's successor in office to carry on duties.

Argument

Sir C. H. Tupper, K.C., for respondent: Mr. Kirkup was the duly appointed successor to Mr. Keen, whose duties he became entitled to carry on: see section 10, sub-section 34 of the Interpretation Act. There was no fiduciary relationship between plaintiff and Waterman: they never met, and all that ever took place between them was an attempt to sell through Waterman a lot for plaintiff, but the sale fell through.

Johnson v. *Kirk* does not refer to the Acts in point here; it was decided before the Act of 1900 came into force.

As to power to levy and sell, he referred to R.S.B.C. 1897, Cap. 144, Secs. 114 and 168; Cap. 179, Secs. 43, 46, 49, 98, 99, 110, 112; B.C. Stat. 1897, Cap. 16, Secs. 16, 17, 18 and 19.

As to unfair sale, see *Rorke* v. *Errington* (1859), 7 H.L. Cas. 617 and *Ferguson* v. *Freeman* (1879), 27 Gr. 211.

Wilson, replied.

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HUNTER, C.J.: I agree with the learned trial Judge that it cannot be held on the evidence that the defendant was in a fiduciary relation to the plaintiff at the time of the sale, as there is nothing to shew that the plaintiff's property was in any sense committed to his care or management. The defendant was merely an agent to receive offers for sale, and it cannot be said that because a real estate agent once had a particular property listed with him for sale, he is thereby forever debarred from bidding on the property at a tax sale.

On the other ground, I think the plaintiff is entitled to succeed. There was no authority to hold the tax sale at all, as section 49 of the Assessment Act prohibits the levying or collection of any taxes under the Act in any municipality, but the taxes in question were assessed for the year in which the municipality was incorporated, and therefore their attempted collection by means of a tax sale after the incorporation was an illegal proceeding. Nor does section 16 of the Speedy Incorporation of Towns Act, 1897, invoked by *Sir Hibbert Tupper*, meet the difficulty, as all that section means is that the Government may pay over to the municipality a proportionate part of any taxes collected before the incorporation.

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As to the point that the curative provisions of section 12 of the Assessment Act Amendment Act, 1900, cured any irregularities in the proceedings leading up to the tax deed, there was nothing to cure as the deed was a nullity.

I therefore think that the appeal must be allowed and the deed declared void with costs here and below.

DRAKE, J.: The plaintiff is the appellant. The action is to set aside a tax sale deed made by the Collector of Taxes to the defendant Waterman. The plaintiff alleges that Waterman was his agent for the sale of the lot in question, and during such agency he was in a fiduciary position towards his employer, and ought not to benefit by purchasing a lot for $10 which he knew was worth $1,000.

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There is no dispute as to the law governing principal and agent, but the defendant denies that he was an agent at the time

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of the sale—there is no doubt he was acting as agent for the sale in the month of June, 1897. This I gather from the correspondence and from the defendant's act, but was he such an agent when he purchased the lot in question in September, 1898? An agency can be put an end to by either party to the contract; it can also be terminated by lapse of time. The defendant says he did no business for the plaintiff for some time before the sale; the defendant does not produce any of the plaintiff's letters to him which might have thrown some light on this question, and we have to rely on the evidence, which shews that the last dealing with this property was in July, 1897. When one considers what a land agent is and how often a person engages four or five land agents to try and find purchasers for a particular property they cannot all be debarred from buying at a tax sale, which is an open competition, and it is not obtaining an undue advantage from his principal based on knowledge acquired as agent, because his agency for sale does not extend to paying the taxes and protecting his principal therefrom, and unless it is shewn that he carefully concealed from his principal the fact that taxes were due or took steps to prevent him from ascertaining the truth, I do not think the facts shew any duty thrown upon the defendant sufficient to allow us to set aside the sale on that ground; but there is another point which Mr. *Wilson* pressed upon us, and that is that the tax sale was invalid *ab initio*, and he contends that under section 49 of the Tax Act, Cap. 179, R.S.B.C. 1897, which says that the provisions of the Act as regards the tax on real estate shall not apply, nor shall any taxes on real estate be assessed, levied or collected thereunder from any municipality. Nelson was established as a municipality on the 18th day of March, 1897. The tax in question was stated to be due in 1897, and was advertised for sale by the Crown officers on the 1st day of September, 1898, and sold to the defendant. This sale took place several months after the corporation was established. *Sir Charles Tupper* contends that the Incorporation Act, 1897, Cap. 16, Sec. 16, covers this ground, and in fact repeals by implication section 49 of the Assessment Act. This section authorizes the Lieutenant-Governor-in-Council to pay to the treasurer of the municipality the real estate tax collected upon

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property in the city. It does not refer to taxes due and uncollected, and does not repeal section 49 of the Tax Act. Tax Acts are to be construed in favour of the taxee, and nothing is to be left to intendment. Keeping this in view, I think the section merely means what it says. The result may be that some persons may escape taxation altogether if the taxes are due and unpaid when the corporation is established. It appears to me that this is a *casus omissus* by the Legislature, and such a result must be cured by that body. Such being the case, in my opinion, the tax sale was not lawful, and the appellant is entitled to judgment with costs here and below. The matter is not cured by the Act of 1900, Cap. 38, Sec. 110, which is a spoliation clause and does not repeal section 49 above referred to. The registration must be cancelled and the tax sale deed set aside.

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MARTIN, J.: It is clear that the effect of the statutes cited is that there was no authority whatever to sell the lot of land in question at the Crown tax sale relied upon held under the provisions of the Assessment Act, Cap. 179, R.S.B.C. 1897, because at the times in question the land was exempt from the operation of such Act as the result of section 3, sub-section 24, and section 49.

There has, it is apparent, been a legislative oversight, and the taxes in question are lost so far as this case is concerned, but that oversight cannot affect the plaintiff's rights.

MARTIN, J.

Reliance is placed by appellant's counsel upon the decision of the Supreme Court in *Johnson* v. *Kirk* (1900), 30 S.C.R. 344, attention being directed to the judgment of Mr. Justice Gwynne at p. 355, and also the Manitoba case of *Scott* v. *Imperial Loan Co.* (1896), 11 Man. 190, in support of the contention that such unauthorized proceedings are wholly void and so do not come within the scope of the curative provisions of the Assessment Act Amendment Act, 1900, Sec. 12.

In answer to this, it was suggested at the argument that the cases were distinguishable because one of the said curative sections was apparently of a more stringent nature than the corresponding one in the Manitoba Act, and that it might be, so far as could be gathered from the judgment in *Scott* v. *Imperial*

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Loan Co. that there was no section in the Manitoba Act relating to the *prima facie* effect of the tax deed similar to that which occurs in our said section 12, sub-section 2. The Manitoba Statutes were not before us on the argument, but I have since examined them and found that their provisions and language are in all essential respects identical as regards the point in question, which will be seen by a reference to the following sections: R.S. Man. Cap. 101, Secs. 190, 191; Man. Stat. 1892, Cap. 26, Sec. 7.

Such being the case, the authorities cited establish the plaintiff's contention, and I need only add that I find that *Scott* v. *Imperial Loan Co.* has been followed by *Tetrault* v. *Vaughan* (1899), 12 Man. 457 at p. 464, wherein it is laid down that "the effect of such legislation is to remedy only irregularities and not absolute nullities, and it will not validate sales made on the basis of absolutely void proceedings."

MARTIN, J.

The appeal should be allowed with costs.

Appeal allowed with costs.

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IN RE DOBERER AND MEGAW'S ARBITRATION.

Arbitration and award—Setting aside award—Misconduct of arbitrator—Waiver.

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A party to an arbitration does not waive his right to object to an award on the ground of misconduct on the part of an arbitrator by failing to object as soon as he becomes suspicious and before the award is made; he is entitled to wait until he gets such evidence as will justify him in impeaching the award.

Where two out of three arbitrators go on and hold a meeting and make an award at a time when the third arbitrator cannot attend, it amounts to an exclusion of the third arbitrator and the award is invalid. A party by attending at such a meeting and not objecting (although he knew of the third arbitrator's inability to attend) does not waive his right to object afterwards.

Per HUNTER, C.J.: It is not necessary that there should be absolute proof

of misconduct before an award will be set aside on that ground; it is enough if there is a reasonable doubt raised in the judicial mind that all was fair in the conduct of the arbitrators.

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APPEAL from the judgment of IRVING, J., setting aside an award on the ground of misconduct by an arbitrator.

On the 24th of October, 1902, Doberer and Megaw, both residents of Vernon, entered into an agreement (under the Arbitration Act) under seal whereby they referred and submitted certain disputes and causes of difference as to the amount of salary and percentage of profits due from Megaw to Doberer to the arbitration and determination of three arbitrators, one each to be appointed by the parties and the third to be appointed by the other two.

Megaw selected as his arbitrator F. Buscombe, a merchant of Vancouver, and Doberer selected J. A. Smith of Grand Forks, and H. T. Ceperley of Vancouver was afterwards selected as the third arbitrator.

The three arbitrators met at Vernon in December, and after going into the matters in dispute for several days they adjourned after it had been arranged that an accountant should make an audit of the books and make a report.

On the 29th of December, Mr. Buscombe wrote to the other arbitrators protesting against closing the arbitration until there had been an audit of Megaw's books of account of the Grand Forks business; the particulars of that account had apparently been obtained from copies furnished by Megaw's bookkeepers.

Statement

After the meeting in Vernon, IRVING, J., granted an extension of the time for the making of the award; the application was opposed by Megaw's solicitors.

On the 5th of January, Mr. Ceperley wrote to Mr. Buscombe proposing a meeting in Vernon on the 12th to conclude the hearing and publish the award, and stating in the letter that it would be necessary to have the meeting before the 15th, as Mr. Smith intended to leave for California on that date. Mr. Buscombe replied saying it would be impossible for him to attend as he was to leave for New York on the 11th. Mr. Ceperley then proposed a meeting on the 9th. Mr. Buscombe replied that his business engagements rendered it impossible for him to attend

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on that date, but that as soon as he returned from the East he would name a day.

On the 7th of January, Mr. Buscombe wrote to Mr. Megaw advising him that the other arbitrators proposed to meet on the 9th and enclosing a copy of the correspondence that had passed between him and Mr. Ceperley.

Messrs. Ceperley and Smith met on the 9th of January at Vernon, and the next day they published the award.

Megaw moved to set aside the award, and the following facts in addition to those already stated were brought to the attention of the Court:

Mr. Charles Wilson of Vancouver, appeared as counsel for Megaw before the arbitrators at Vernon at the hearing in December, and he and Mr. Smith stayed at the Kalamalka Hotel, their rooms being opposite to each other and separated only by a corridor.

Mr. Wilson in an affidavit stated "(3.) the arguments of counsel were concluded late at night on the third day and the arbitrators were to meet on the following morning for the purpose of discussion.

"(4.) When preparing to rise on the morning the arbitrators were to meet for the purpose of consultation, I heard a knock on the door of the room occupied by Mr. Smith, one of the arbitrators, and Mr. Doberer's voice said to him: 'Hurry up, Doc., Cep's gone down. I've had my breakfast and am going up to my room to prepare a few notes for you,' to which was answered, 'All right.'

Statement

"(5.) 'Doc.' is a nickname for the said Mr. Smith, and 'Cep.' is an abbreviation for Mr. Ceperley's name."

Mr. Smith in an affidavit in answer stated, "(18.) I have no recollection of any such conversation as is referred to in paragraph four of the affidavit of said Charles Wilson and I certainly never received any notes which would be the notes therein referred to, or any notes whatever from Mr. Doberer.

"(19.) At the meeting of the arbitrators on January 9th, 1903, Mr. Doberer and Mr. Megaw both attended and they had every opportunity to state anything which they desired to state to us in reference to the matters referred, or in regard to the conduct of the arbitrators and the signing of the award."

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On the return of the motion, IRVING, J., set aside the award.

Doberer appealed and the appeal came on for argument at Vancouver on the 23rd and 24th of April, 1903, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Sir C. H. Tupper, K.C. (*Griffin*, with him), for appellant: The respondent has waived any right he might have had to object on the ground of an arbitrator's misconduct; he should have objected at once after the occurrences referred to in Mr. Wilson's affidavit, but instead he stood by and took his chances; on our application on 5th January for an extension of time no objection was made, and again on 9th January he had an opportunity to object, but no objection was made; misconduct on the part of Mr. Smith is not clearly shewn; some arrangement between him and Doberer must be shewn; mere suspicion is not enough to justify the setting aside of an award; he referred to *Brown* v. *Brown* (1683), 23 Eng. Rep. 385; Russell, 7th Ed., 116; *Crossley* v. *Clay* (1848), 5 C.B. 581; *Wood* v. *Gold* (1894), 3 B.C. 281 at p. 284; Redman, 3rd Ed., 109; *Tullis* v. *Jacson* (1892), 3 Ch. 441; *Re Burnett and Town of Durham* (1899), 31 Ont. 262 and *In re Whiteley and Roberts' Arbitration* (1890), 1 Ch. 558.

J. H. Senkler, for respondent: The respondent was not called upon to object immediately he became suspicious; an objection then might have been fatal to his procuring enough evidence; as soon as it was thought the evidence was sufficient, the motion to set aside the award was made, but a seemingly long time was taken because Mr. Buscombe was in Ontario, and his affidavit had to be sent to him there to be sworn. The material clearly shews that what took place amounted to the exclusion of Mr. Buscombe from the proceedings.

Argument

The allegations in Mr. Wilson's affidavit are not satisfactorily answered. He cited *Hayward* v. *Phillips* (1837), 6 A. & E. 119; *Smith* v. *Sparrow* (1847), 16 L.J., Q.B. 139; *Re Maunder* (1883), 49 L.T.N.S. 535; *Re Templeman and Reed* (1841), 9 Dowl. P.C. 962-5 and *Harvey* v. *Shelton* (1844), 13 L.J., Ch. 466.

Sir C. H. Tupper, in reply, referred to *In re Hotchkiss and Hall* (1871), 5 P.R. 423; *Slack* v. *McEathron* (1847), 3 U.C.Q.B. 184; *Bignall* v. *Gale* (1841), 10 L.J., C.P. 169 at p. 171; *Ex*

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parte Wyld, In re Wyld (1861), 30 L.J., Bk. 10 at pp. 12 and 13 and Russell, 7th Ed., 686.

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HUNTER, C.J.: As to the contention that there was misconduct on the part of one of the arbitrators, I think that the allegations contained in Mr. Wilson's affidavit have not been satisfactorily answered. Paragraphs 4 and 5 of that affidavit are as follows: "(4.) When preparing to rise on the morning the arbitrators were to meet for the purpose of consultation, I heard a knock on the door of the room occupied by Mr. Smith, one of the arbitrators, and Mr. Doberer's voice said to him: 'Hurry up, Doc., Cep's gone down. I've had my breakfast and am going up to my room to prepare a few notes for you,' to which was answered, 'All right.'

"(5.) 'Doc.' is a nickname for the said Mr. Smith, and 'Cep.' is an abbreviation for Mr. Ceperley's name."

Paragraph 18 of the arbitrator's affidavit, in answer, is as follows: "I have no recollection of any such conversation as is referred to in paragraph 4 of the affidavit of said Charles Wilson, and I certainly never received any notes which would be the notes therein referred to, or any notes whatever from Mr. Doberer."

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I do not think that this denial covers the point of substance, which is that the arbitrator had a consultation with one of the parties about the subject-matter of the dispute behind the back of the other party. It is consistent with the arbitrator's statement that the notes were read over and explained to him by Doberer, or that verbal information was given without any notes being handed over or even prepared.

Similar remarks apply to the denial in Doberer's affidavit, which reads, "I have no recollection of telling Mr. Smith that I would prepare notes for him, and certainly never gave him any;" while Doberer does admit that the first part of the conversation detailed by Mr. Wilson did take place.

I think also that two of the arbitrators did not pay that due consideration to the convenience of the third which they ought to have paid, and that there was no good reason shewn why the

matter should not have been allowed to stand until after the latter's return from New York; in short, that what took place practically amounted to the exclusion of the third arbitrator from the proceedings.

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As to the argument that Megaw had waived any right to object by attending the meeting held by the two arbitrators and not objecting to them further proceeding, I do not think he ought to be held to have waived his rights.

I think Mr. Wilson was not called upon immediately after overhearing the conversation to suggest misconduct and to object to any award being made, as some good explanation might have been given to shew the innocency of the interview, which would have left him and his client in a very embarrassing position, and that he cannot be said to be wrong in waiting until he got additional information which would justify him in impeaching the award on this ground.

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Neither do I agree with the contention that there must be absolute proof of misconduct before an award can be set aside on this ground. It is enough that a reasonable doubt should be raised in the judicial mind that all was fair in the conduct of the arbitrators, as arbitrators, equally with Judges, should be above suspicion. I feel that doubt in this case, and I would, therefore, affirm the judgment with costs.

DRAKE, J.: Several questions are involved in this appeal, but I think there are only two questions which we need consider. The first is, has the plaintiff waived his right to object to the award by not objecting before the award was signed? The second question is whether one award made by two of three arbitrators is valid, the third arbitrator being unable to be present, and protesting against any award being made in his absence. On the first question, Mr. Wilson's affidavit disclosed a conversation between Doberer and Mr. Smith, one of the arbitrators. This conversation standing alone might be insufficient to make a successful application to remove the arbitrator for improper conduct. Other circumstances, however, having been brought to the notice of the plaintiff some time after the award was made, he was justified in taking the opinion of the Court

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thereon without being considered as having waived his right to do so. The affidavit of Frederick Buscombe was sworn on 27th January, 1903, at Toronto, and thus the application was made to set aside the award at a reasonably early date; and I don't think the plaintiff was guilty of laches, or that the other party was prejudiced.

The second question relates to the action of the other arbitrators in making this award at a time when they knew Mr. Buscombe would be unable to attend; the correspondence attached to the affidavit of Mr. Buscombe clearly shews this. Mr. Ceperley evidently thought that he was in sole charge of the arbitration, and could do as he liked. On the 5th of January he wrote proposing a meeting of the arbitrators, to be held at Vernon on the 12th, to conclude the accounts and publish the award. On the next day Mr. Buscombe informed Mr. Ceperley it was impossible to attend as he had to leave for New York the following day, and he pointed out some objections to certain views which they had expressed relating to the accounts, and wished for further information. In reply, Mr. Ceperley proposed a meeting in Vernon on the 9th, leaving two days only to get to Vernon. On the 7th, Mr. Buscombe stated he would name a day as soon as he returned. This did not suit Mr. Ceperley, and the arbitrators met on the 11th and made their award. I think this is quite sufficient to render the award bad. Here there are three arbitrators appointed, not two and an umpire. In the case of *Re Templeman and Reed* (1841), 9 Dowl. P.C. 962, in which case the two arbitrators disagreed and each furnished the umpire with his reasons, and the award was made, the umpire agreeing with one of the arbitrators without any formal meeting, the Court set aside the award because the three never consulted together. If they had there was a possibility of unanimity, and the Court stated that all the arbitrators should have an opportunity of discussing the matters together. If, however, one of three arbitrators refused to attend at the meeting which all had arranged, this refusal would have justified two of them in making an award in his absence. There is no such refusal here, but a request to postpone the matter for a short period. There was

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no special hurry to close the award, and I think this ground is quite sufficient to set aside an award thus given.

I think the appeal should be dismissed with costs.

MARTIN, J.: This is an application under section 12, subsection 2 of the Arbitration Act to set aside an award on the ground that one of the arbitrators, J. A. Smith, has misconducted himself.

In such case, it is laid down by Mr. Justice Gwynne that the "facts which are relied upon as establishing the charges should be clearly, unequivocally, and positively averred. Judges of the parties' own choice must not be permitted to be exposed to accusations of corruption based upon loose surmises, suspicions and conjectures of disappointed suitors, or upon insinuations of corrupt inuendoes attached to words innocent in themselves, and naturally capable of an honest interpretation": *In re Hotchkiss and Hall* (1871), 5 P.R. 423 at p. 427. And that case follows and approves the decisions in *Bedington* v. *Southall* (1817), 4 Price, 232 and *Slack* v. *McEathron* (1847), 3 U.C.Q.B. 184, that "the Court requires strong facts, and to be distinctly stated, in cases of setting aside awards, and that a denial of any such is conclusive."

Bearing in mind these observations, I do not think much difficulty will be encountered in dealing with the present case.

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The general principles on which this Court will act in setting aside an award are, for the purposes of this appeal, sufficiently stated in the case of *Wood* v. *Gold* (1894), 3 B.C. 281, and authorities there cited, to which may be added, *Crossley* v. *Clay* (1848), 5 C.B. 581 and *In re Whiteley and Roberts' Arbitration* (1890), 1 Ch. 558.

In the case at bar, the charges of misconduct relied upon are not sufficiently set out in the notice of motion, but, nevertheless, they appear to have been so treated on the argument below, consequently it is too late to raise that objection.

The first accusation is based on the affidavit of George Fraser, and alleges that the arbitrator, while on his way to attend the arbitration, made use of some very improper expressions regarding his proposed line of conduct in the hearing of the same. In

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answer to this charge, the arbitrator files an affidavit denying that any conversation of the kind or of a similar import took place, and, as has been seen, that denial is conclusive in his favour.

The second charge arises out of some remarks made by Doberer in the corridor of the hotel when Doberer knocked at Smith's door in the morning to awake him. I am of the opinion that it is not proved, as it must be, that Smith heard and understood the nature of Doberer's remarks, and, though the inference to be drawn from such remarks is unfavourable to Doberer, there is nothing whatever to shew that Smith, even if he heard and understood, became a party to Doberer's impropriety in offering to furnish notes on matters under discussion. On the contrary, Smith denies receiving any notes whatever from Doberer. This charge likewise fails.

The third charge is that Smith "did not allow the said Megaw an opportunity of proving his whole case in relation to the accounts" in question, and, in support of this, it is alleged that two of the arbitrators, Smith and Ceperley, latterly conducted the proceedings in a manner to suit themselves, and practically excluded the third arbitrator, Buscombe, from their meetings. After a consideration of the material on this accusation, I have come to the conclusion that there is very little if anything in it. In answer to it, counsel pointed out that the adjournment from Vernon to Vancouver was to meet Buscombe's convenience, and that the result of the special agreements in regard to the Grand Forks accounts resulted in reducing the further proceedings of the arbitrators to almost a formality. Ceperley's affidavit also shews that there was a difficulty in arranging the time of final meeting because Smith wished to go to California, while Buscombe wanted to go to New York, though, it is alleged, he did not inform them of this intention when the adjournment took place at Vernon. It is also contended that Buscombe was friendly to Megaw, and the fact of his sending to Megaw the correspondence between himself and Ceperley is relied upon in this relation, as also the following uncontradicted paragraph in Doberer's affidavit:

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"The said Frederick Buscombe has had dealings with the said

Megaw, who is a customer of his, to whom he supplies large quantities of goods."

I notice these points on both sides more to shew that they have not been overlooked than to act upon them, because, from what hereinafter follows, it will be seen that it is, in my opinion, not necessary to determine them. But it does seem desirable to state that when a business man is induced to assume the burden of the thankless office of arbitrator he must be prepared to accept the view of his colleagues that the matter should be determined with all due celerity, and, therefore, must also be prepared, if need be, to suffer some personal inconvenience pending such arbitration. In the exercise of judicial functions personal convenience necessarily becomes of secondary importance.

It is contended, however, that even assuming Buscombe had some ground of complaint, nevertheless Megaw, on whose behalf the objection was lodged, with full knowledge of it, deliberately elected to waive it.

On January the 7th Buscombe fully informed Megaw of all that had passed between him (Buscombe) and Ceperley, and sent him copies of the correspondence.

The reason why Buscombe (acting doubtless with the best of intentions from his point of view) notified Megaw of the proposed objectionable final meeting was, as stated in the letter, "in order that you may take steps to be properly represented thereat, or protest against the meeting being held, which I have already done."

So far, however, from Megaw acting upon the suggestion that he should protest against the meeting, it is admitted that he attended it on the 9th of January, when Doberer was also present. An opportunity was then given all concerned to say anything further they desired upon the reference, or in regard to the conduct of the arbitrators or otherwise, but no objection of any nature was taken, and, consequently, the two arbitrators then present proceeded to determine the matter, as they were authorized to do by the submission to arbitration.

Under such circumstances, it is contended that there was an election to waive Buscombe's objections, and that it would be wrong to allow a party to open an award after deliberately

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agreeing to take his chances simply because it went against him.

There is abundant authority in support of such a view, and it is only necessary to cite a leading case upon the point, that of *Drew* v. *Drew* (1855), 25 L.T.J. 282, wherein it was decided by the House of Lords that even if an arbitrator examine witnesses behind the back of one of the parties, yet if that party continue, after that fact has come to his knowledge, to attend the subsequent proceedings, it would be a waiver of the irregularity. The Lord Chancellor says: "the only question is . . . does it appear that Mr. Alexander Drew, knowing of the examination of these parties behind his back, nevertheless did not wish further to examine them, but did wish the proceedings, in spite of all that, to go on."

In my opinion, then, this third charge must also be determined in favour of the arbitrator on the ground of waiver.

MARTIN, J.

It seems opportune to note here that where waiver is relied upon, the onus of setting out all the facts and circumstances is, in some cases at least, upon the party attacking the award, *Re Burnett and Town of Durham* (1899), 31 Ont. 262, and I see no reason why it should not apply to every case of that nature, because the Court is entitled to know at the outset what the attitude of the complaining party has been from first to last.

It follows that the appeal should be allowed with costs.

Appeal dismissed with costs, Martin, J., dissenting.

GUNN v. LE ROI MINING COMPANY, LIMITED.

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Master and servant—Employers' Liability Act—Dangerous place—Duty to warn workmen of.

Where a workman is put to work in a place where there is an imminent danger of a kind not necessarily involved in the employment and of which he is not aware, but of which the employer is aware, it is the employer's duty to warn the workman of the danger.

G. had been working in the defendants' mine on the floors immediately below the 600 foot level, and on the night of the accident when he was going to work he was told by the shift whom he was relieving that the place was in pretty bad shape and to look out for it. He proceeded to make an examination, but while thus engaged the mine superintendent directed him to do some blasting, and while doing it a slide occurred and he was injured. The principal evidences of the likelihood of a slide were two floors beneath the 600 foot level, and of which the superintendent was aware and G. not aware. The jury found that the superintendent was negligent inasmuch as he did not advise G. of the probable danger.

Held, in an action under the Employers' Liability Act, that the defendants were liable.

THIS was an action under the "Employers' Liability Act." The plaintiff had been working in the Le Roi mine in Rossland on the floors immediately below the 600 foot level. On the night of the accident he went on shift at eleven o'clock, and when near the place where he was to work was told by the shift whom he was relieving that the place was in pretty bad shape and to look out for it; he then proceeded to make an examination of the timbers along the sill floor of the 600 foot level to ascertain the extent of the danger; while engaged in this examination the defendants' superintendent came along and directed him to blast away the lagging, which was sustaining a large amount of waste rock above the 600 foot level. It was shewn at the trial that some twelve hours before the plaintiff went to work the timbers in the stope underneath the 600 foot level had begun to crack and get out of position and give other evidences that a slide was inevitable.

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The defendants' superintendent was aware of all the evidences of the coming slide, but the plaintiff was unaware of the same except in so far as they could be observed on the sill floor of the 600 foot level. The principal evidences of the coming slide were two floors beneath the 600 foot level, and these were not visited by the plaintiff. The plaintiff and the man who was engaged with him had blasted twice in conformity with the order of the superintendent without bringing down the waste rock; while they were preparing the third shot the slide came and the plaintiff was severely injured. Dunkle, the superintendent, was killed.

The action was tried at Rossland in February, 1903, before IRVING, J., with a jury, who returned the following verdict:

(1.) Was the injury to the plaintiff caused by the negligence of any person in the service of the Company who had superintendence intrusted to him whilst in the exercise of such superintendence? Yes, inasmuch as Superintendent Dunkle did not advise the plaintiff of the probable danger.

(2.) If yes, who? Superintendent Dunkle.

(3.) Was the injury to the plaintiff caused by reason of the negligence of any person in the service of the Company to whose orders the plaintiff was bound to conform and did conform? No; we have no evidence to shew that such accident was caused by the order given for blasting.

Statement

(4.) Did the injury result from his having so conformed? We have no evidence to shew that it did.

(5.) Did the plaintiff, knowing the nature and the condition of the ground and fully appreciating the risk of accident he ran by working in the stope referred to, under the circumstances voluntarily assume to take such risk upon himself? No.

(6.) Was the injury of which the plaintiff complains caused by reason of any defect in the condition or arrangement in the premises by reason of any defect in the construction of the scaffolds or other erections erected by defendants or in the material used in the construction thereof? We do not think so.

(7.) If you say in answer to question 6 that there was any negligence in making the erection or in not discovering the defects or in not remedying the defects, in what did such negli-

gence consist? We believe the necessary precautions were taken to remedy the defects on the 11th and 12th floors.

(8.) Amount of damages? $2,000.

Judgment was entered for plaintiff accordingly.

The defendants appealed, and the appeal was argued at Vancouver on the 20th of April, 1903, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Davis, K.C., for appellants: Under the circumstances there are only three classes of negligence which the jury could find and on which the plaintiff could hold a verdict: (1.) they might find antecedent negligence in superintendence in allowing the mine to get in such a dangerous condition; (2.) they might find a negligent system of timbering; or (3.) they might find that the superintendent's order to go in and blast was a negligent order because the place was too dangerous.

There is no such finding; the whole finding is negligence because superintendent did not warn. It is no part of a superintendent's duties to warn workmen and thus give them a chance to decide for themselves: he is to decide whether it is safe or not, and then either send them in or keep them out. There is no answer to the question as to whether or not the order was a negligent one.

A. H. MacNeill, K.C., for respondent: Employers are bound to warn their workmen when they are sent into a dangerous place. The superintendent was a young man and he wanted to make a reputation by getting the mine out of its dangerous condition, and in consequence was reckless. That there is a duty to warn, see *Farrant* v. *Barnes* (1862), 11 C.B.N.S. 553; section 3 of the Employers' Liability Act; *Saxton* v. *Hawksworth* (1872), 26 L.T.N.S. 851; Beven, 746; *Aitken* v. *Newport Slipway Dry Dock* (1887), 3 T.L.R. 427; *Osborne* v. *Jackson* (1883), 11 Q.B.D. 619; *Smith* v. *Baker & Sons* (1891), A.C. 325 at p. 338, judgment of Lord Halsbury; *Davies* v. *England and Curtis* (1864), 33 L.J., Q.B. 321; *Roberts* v. *Smith* (1857), 26 L.J., Ex. 319 and *Cowley* v. *Mayor, &c., of Sunderland* (1861), 6 H. & N. 565.

Argument

Davis, replied.

Cur. adv. vult.

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HUNTER, C.J.: I think the appeal ought to be dismissed, and that there is nothing to be gained by sending the case to another jury. The evidence clearly shews that the plaintiff was put to work in a place where there was obviously imminent danger that he would be either killed or injured by falling rock. The cave-in, which the superintendent knew had begun several hours before he put the plaintiff to work, occurred an hour and a half afterwards, and the circumstances clearly raised a duty on his part to tell the plaintiff the nature of the risk, so that he would have an opportunity of saying whether or not he would take it.

HUNTER, C.J. In my opinion, the law is too clear for argument that the master cannot expose his servant to an obvious danger which is unknown to the latter, and which is of a kind not necessarily involved in the employment without warning him beforehand of its nature, and it is, perhaps, needless to add that the servant's life has a higher claim to preservation than the master's property.

DRAKE, J.: This is an action under the Employers' Liability Act, the claim under the common law having been abandoned by the plaintiff.

The facts are the plaintiff was working in a floor above the 600 foot level; the object was to bring the dirt which had accumulated above the 600 foot level down so as to make a solid foundation, and relieve the pressure on the timbering of the mine; there were thirteen floors above the 600 foot level, and the plaintiff was engaged in blasting above this level. While so doing, the floor on which he was working gave way and precipitated him below, whereby he was injured. The only point which Mr. *Davis*, for the defendants, argued, was whether the defendants could be held responsible without shewing that there was negligent superintendence in allowing the mine to get into a dangerous condition, which includes negligent timbering, and whether Dunkle's order, who was superintending the plaintiff's operations, was negligent in ordering the plaintiff to do the work he did. The blasting which was done was not the cause of the accident. The jury found that Dunkle did not advise the plaintiff when he gave the order of the probable danger existing. Mr.

DRAKE, J.

Davis' contention is that Dunkle could not leave the question of danger or no danger to the workmen; he must take the responsibility on himself, and he should refuse to send the men in where there was danger; if he knew there was danger and then sent them in, he gave a negligent order. The question is, was the order Dunkle gave a proper order or not? If it was an improper order the defendants are liable. The facts shew that there was evidence of great pressure in the timbering, and the previous shift considered the work dangerous from fear of a caving-in.

The plaintiff himself made a careful examination of a portion of the timber and saw signs of pressure; Dunkle also made examination, and after that he told the men to go on with the work, and remained with them looking after them. The reasonable deduction is that Dunkle did not think think there was any immediate danger, for it is not to be presumed that Dunkle, who was a competent man, would run a risk which caused his death as well as injury to others. This brings us to the question, whether it is the duty of a superintendent to notify the employees of any special danger; this involves the question of whether there was any special danger beyond the ordinary risk of a miner's employment. Dunkle thought there was none, at least that is the presumption, because he placed himself in such a position that any cave-in must have injured him if it took place. The cave-in occurred much sooner than was anticipated. The plaintiff obeyed the order to go to work at the place where the accident occurred, and Dunkle was the person to whose orders he was to conform. Such being the case, although Dunkle might have committed an error in judgment, the Company will be liable for an accident under section 3 of the Employers' Liability Act, if it is caused by some negligence of a person to whose orders the plaintiff is bound to conform, or by reason of any defect in the condition or arrangement of the plant, or by reason of a defect in the construction of any creation erected by or for the employer. Was there negligence in Dunkle giving the order to the plaintiff? Dunkle had satisfied himself there was danger of a cave-in. Such being the case, he should have warned the plaintiff. The evidence discloses that a great pres-

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sure was imposed on the timbering of the mine, so that the defendants thought it absolutely necessary to put more timbers to prevent a collapse; the mine was in reality dangerous owing to this pressure on the timbers, which were getting out of plumb. The defect was being remedied at the time of the accident.

In this case the jury have found that Dunkle was negligent because he did not advise the plaintiff of the probable danger; and they further find there was no defect in the construction of the scaffold and other erections, or in the material used. The jury having found negligence, not because Dunkle gave a negligent order, but because he did not advise the plaintiff of the probable danger, I think whether the order given was with a knowledge of the danger or not is not the question. I will suppose Dunkle thought there was no serious danger, but he was mistaken, and the plaintiff was bound to conform to his directions or lose his job. Under these circumstances, the plaintiff was doing that which he was ordered to do when the accident occurred, and he is, in my opinion, entitled to hold his verdict and the appeal should be dismissed.

DRAKE, J.

MARTIN, J.: A further consideration of this case confirms the opinion I formed during the argument, which was, that seeing it clearly appears by the evidence that the nature of the accident was such that after the plaintiff was ordered to go in and blast where he did a warning of the pending danger would have been useless to him, because by no additional caution or alertness could he have protected himself from it, therefore, in view of the other findings, the only remaining question was, and still is, was the order a negligent one under the circumstances? Until that question is answered no progress can be made in the determination of the real issue herein, nevertheless there was no finding thereon though much evidence was directed to it. Where the circumstances are such that a warning given after an order would enable the workman to avert an accident or even lessen its consequences, it would be negligent not to give it, but that is not the present case.

MARTIN, J.

It is plain that an employer cannot escape liability for the consequences of an improper order of his foreman directing work-

men to go into a place of known danger merely by the foreman adding, after giving the order, that there was danger there. In such case the mind of the workman would be oppressed by the fear of probable dismissal for disobedience, and also, most likely, fired by a spirit of bravado because of the disinclination of being laid open to a charge of cowardice.

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In the case at bar, what must be determined by the jury is, was the foreman in the exercise of the reasonable judgment of a competent man justified, under all the circumstances, in giving the order? That is the basis of this whole action, and the only point meriting consideration on this appeal. The learned trial Judge instructed the jury on the very point, but there is so far no finding on it. Consequently there should, I think, be a new trial, the costs of which and of the former trial will abide the event, and this appeal should be allowed with costs.

MARTIN, J.

Appeal dismissed, Martin, J., dissenting.

YORKSHIRE GUARANTEE & SECURITIES CORPORATION v. COOPER.

FULL COURT
1903
April 28.
YORKSHIRE
v.
COOPER

Execution—Exemption under Homestead Act—Thing seized of a value over $500.

Held, in an interpleader issue, that the execution debtor was entitled, as an exemption under the Homestead Act, to $500 out of $1,000 realized by the Sheriff on the sale of a steamship, the only exigible personalty of the debtor.

Vye v. *McNeill* (1893), 3 B.C. 24, approved.

Semble, notice of claim of exemption is necessary.

THIS was an appeal from a judgment of HENDERSON, Co. J., in an interpleader issue tried before him on the 3rd of January, 1903. The facts appear in the judgment.

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L. G. McPhillips, K.C., for plaintiffs.
Martin, K.C., for defendant.

HENDERSON, Co. J.: This is an issue in respect of the claim of an exemption by the defendant Cooper. The issue is briefly worded as follows: "The defendant, George H. Cooper, affirms and the plaintiff denies that the said defendant is entitled to an exemption of five hundred ($500.00) dollars out of the proceeds of sale of the steamer Courser under execution in this action."

The facts are as follows: On the 14th of May, 1902, the steamer Courser was seized by the Sheriff of New Westminster under an execution in this action, and on the 9th day of June following, the Sheriff sold her by public auction for $1,000. On the 29th of May, Cooper's solicitor wrote to the Sheriff claiming the statutory exemption of $500. On the 2nd of June, the day advertised for the sale, Cooper posted up on the steamer a notice of claim of ownership by the Glenora Steamship Company. This notice was signed by R. Martin, president, and George H. Cooper (defendant in issue), manager. The Sheriff adjourned the sale and took out an interpleader.

The Glenora Steamship Company subsequently abandoned its claim to the steamer, and, as already mentioned, the Sheriff sold her as Cooper's property, on the 9th of June, 1902, for $1,000.

HENDERSON, CO. J.

Cooper states that on the day of the seizure he informed H. P. McMartin, the Deputy Sheriff, who made the seizure, that he claimed his exemption, and among other things he said, "I have certain shares in the Company and am willing to hand them over. But I can't hand over other people's property. In any event, whether I hand it over or not, I am entitled to certain exemption. I want all the exemption that law allows to me."

Thomas Hembrough, one of Cooper's witnesses swears that he heard the word "exemption" used. The Deputy Sheriff, however, denies positively that Cooper said anything about exemption. The word was not mentioned, he states. I shall refer to this later.

Mr. *McPhillips*, counsel for the plaintiffs opposes the defendant's claim for exemption substantially on three grounds, *viz.*, first, that the evidence shews that exemption was not claimed

within the time limited by the Homestead Act; secondly, that, in any event, the statute does not apply to the present case, as such statute imports that only such goods and chattels as are capable of selection are the subject of exemption and, that the steamer being above the value of $500, is not divisible for the purposes of exemption, and, thirdly, the defendant is estopped from claiming his exemption, as at the time of the seizure he contended that the property in question *i.e.*, the steamer Courser was not his property, but the property of the Glenora Steamship Company.

Mr. *McPhillips* also contends that the statute should be construed strictly against the person claiming exemption.

Mr. *Martin*, on the other hand, contends with respect to the first ground or branch of Mr. *McPhillips*' argument that the statute does not require a claim for exemption to be made in formal terms, or at all, but that in any event the language of Cooper at the time of the seizure and his subsequent written claim, through his solicitor, for his exemption are sufficient to satisfy the statute.

With respect to the second branch of the argument, Mr. *Martin* cites *Vye* v. *McNeill* (1893), 3 B.C. 24.

As to the third branch, it is contended for the defendant that there is no estoppel here, and the cases cited in support of this contention are distinguishable.

Mr. *Martin* also contends that there is no evidence to shew that the value of the steamer exceeds $500.

With reference to the contention that there is no evidence of value, I am of opinion that *McMartin* v. *Hurlburt* (1877), 2 A.R. 146, is an authority against this contention. The price an article brings at a Bailiff's sale is one test of its value, although not a highly satisfactory test. The probability is, that the price that the steamer sold for at the Sheriff's sale would be less than its value.

As to the first and second contention by plaintiffs' counsel I am of the opinion that the statute does not require the debtor to make a claim for exemption. Section 17 of the Homestead Act, the statute governing the question, reads in part as follows: "The following personal property shall be exempt from forced

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seizure or sale by any process at law or in equity, that is to say: the goods and chattels of any debtor at the option of such debtor . . . . to the value of $500."

It seems to me that the clear intention of the Legislature was to give an exemption without specifically requiring the debtor to do anything in order to become entitled to it.

The construction contended for by Mr. *McPhillips*, is, I think, too narrow and not in accordance with the spirit of the section.

"Where there are two constructions, the one of which will do, as it seems to me, great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions": *per* Earl Cairns, in *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 454.

Section 18 provides that it shall be the duty of the Sheriff to allow the debtor to select goods and chattels to the value of $500 from the personal property seized, and the debtor whose personal property has been seized, "may, within two days after such seizure or notice thereof, which ever shall be the longest time, select goods and chattels to the value of $500 from the personal property so seized."

HENDERSON
CO. J.

Non-compliance with the provisions of section 18 by the debtor as to selection within the time mentioned does not, in my opinion, deprive him of the right to the exemption given by section 17, but might result in the Sheriff selling certain articles to which the debtor attached some peculiar or, perhaps sentimental value and which he might desire to retain.

It is argued on the authority of *McMartin* v. *Hurlburt, supra*, that the steamer being above the value $500, there can be no exemption, as only such articles as are capable of selection can be exempt.

I might point out that there is a material difference between the Ontario statute relating to exemption and the Homestead Act. In Ontario certain goods and chattels are named as exempt and these goods and chattels are divided into groups or classes. No such classification is made under the Homestead Act.

But without further discussion on this point, I think I am

bound to follow the decision in *Vye* v. *McNeill* already cited.

Mr. *McPhillips* argues that this case is practically overruled by *Hudson's Bay Co.* v. *Hazlett* (1896), 4 B.C. 450.

I am unable to accept this view. I think the point decided in the last mentioned case was substantially that "book debts" not being tangible property were not exempt under the Homestead Act. The case of *Vye* v. *McNeill* was cited by Mr. (now Mr. Justice) MARTIN, counsel for the appellant in *Hudson's Bay Co.* v. *Hazlett.*

Neither MCCREIGHT, J., nor DRAKE, J., who constituted the Appellate Court, in that case, gave any intimation that they doubted the soundness of the decision in *Vye* v. *McNeill,* and if I draw any conclusion at all it must be that they thought it right.

In the absence of an express and categorical authority on the point, I am not prepared to decide that the Legislature intended the exemption to apply to a chattel of the value of $500 and not to apply to one of the value of $501, or that a debtor owning two horses each worth $500 would be entitled to his exemption as to one horse, while a debtor owning one horse worth $1,000 would be entitled to no exemption at all.

There remains to be considered the third ground advanced by Mr. *McPhillips, i.e.,* the question of estoppel, in support of which he cited *Merchants' Bank* v. *McKenzie* (1900), 13 Man. 19. I think the conduct of Cooper can be readily differentiated from that of McLean in the case just cited. Cooper believed that the claim of the Glenora Steamship Company was of such a nature that the Company could claim ownership of the Courser.

In fact the Company did set up a claim of ownership, but afterwards abandoned it. Cooper said in effect "The Glenora Steamship Company have such a claim on the steamer that I think they are owners, but if they are not, I want my exemption in any event." Captain Cooper is an excitable and voluble man and in his conversation with the Sheriff and the Deputy Sheriff said much more than was necessary and than he ought to have said, so that it is not at all surprising that the Deputy Sheriff did not hear him say anything about the exemption.

For the foregoing reasons, I am of the opinion that the defend-

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ant, Cooper, is entitled to the exemption claimed by him, and I so order.

The appeal was argued at Vancouver on the 28th of April, 1903, before DRAKE, IRVING and MARTIN, JJ.

L. G. McPhillips, K.C., for appellants: The Homestead Act is in derogation of the common law and should be construed strictly; Beal, 129; *Rex* v. *Bishop of London* (1693), 1 Show. 455; *London & Canadian Loan & Agency Co.* v. *Connell* (1896), 11 Man. 115; *Warne* v. *Housely* (1886), 3 Man. 547 and *Harris* v. *Rankin* (1887), 4 Man. 115 at p. 127.

[DRAKE, J.: But the Interpretation Act* says that all statutes shall be deemed to be remedial and shall receive a liberal construction.]

Still, according to the decisions such a statute as this must be strictly construed; the interpretation section is only applicable where something is to be done or something is to be prevented from being done. In England where exemptions are allowed they must be first claimed; exemption is a personal privilege and the debtor to get the benefit of it must claim it; it may be waived or lost: see *Johnson* v. *Harris* (1878), 1 B.C. (Pt. 1) 93; *Sehl* v. *Humphreys* (1886), 1 B.C. (Pt. 2) 257 and *In re Ley et al* (1900), 7 B.C. 94; *Pilling* v. *Stewart et al* (1895), 4 B.C. 94, decided by Mr. Justice DRAKE, shews that under the section in question there, which was the same as section 17 of the Act now in force, it was imperative that the debtor make a list and selection of the goods which he desired to be exempt.

Argument

The statutory exemption does not apply in a case such as this

*Sub-section 49 of section 10 of the Interpretation Act, R.S.B.C. 1897, provides: "And every Act and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport be to direct the doing of any thing which the Legislature deems to be for the public good, or to prevent or punish the doing of any thing which it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning and spirit." The Interpretation Acts in the Revised Statutes of Ontario, 1897, 1887 and 1877, and the Interpretation Act in the Revised Statutes of Manitoba, 1891, all contained a like section.

where the thing seized is worth more than $500. See *McMartin* v. *Hurlburt et al* (1877), 2 A.R. 146; *Davidson et al* v. *Reynolds et al* (1865), 16 U.C.C.P. 140 and *Cox* v. *Schack* (1902), 14 Man. 174 at pp. 185-6. An exemption is given only where the goods are capable of selection—goods and chattels that may be physically taken hold of and moved: *Hudson's Bay Co.* v. *Hazlett* (1896), 4 B.C. 450.

The decision in *Vye* v. *McNeill* (1893), 3 B.C. 24 is wrong.

[IRVING, J.: The Act has been amended since then, so hasn't the judgment as to the part in which you say it is wrong had Legislative sanction?]

There are two points in the case, and the Legislature only deals with one. The statute requires the claim for exemption to be made within two days; the inference from the judgment is that Cooper did not make a claim within the required time; he insisted the steamer was somebody else's, so it is not likely that he would make a claim. In *Wilson* v. *McDonald* (action in New Westminster Registry, decided by WALKEM, J.) and in *Matheson* v. *Matheson* (action in Vancouver Registry decided by CREASE, J.) it has been held that the claim must be made within two days.

If the exemption was ever claimed it was afterwards waived by Cooper who at the time of seizure and afterwards insisted that the steamer was owned by the Glenora Steamship Company. On the trial of the issue in his sworn evidence he still insisted that the steamer belonged to the Company and Cooper cannot now ask the Court to disbelieve his evidence. See *Merchants' Bank* v. *McKenzie* (1900), 13 Man. 19 at p. 33; *Roberts* v. *Hartley* (1902), 14 Man. 284 and *Pourrier* v. *Harding* (1873), 15 N.B. 120.

Argument

Duncan, for respondent: The statute should be construed liberally and in such a way that the debtor may have something left: see *Ex parte Vine; In re Wilson* (1878), 8 Ch. D. 364. Section 17 must be read independently of sections 18 and 19.

[*Per curiam:* We are satisfied that respondent had in the first instance a right to the exemption and that the decision in *Vye* v. *McNeill* is right.]

The sale was held on the assumption that the steamer was the

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property of Cooper and the plaintiffs' whole case rests on that assumption.

He was stopped.

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DRAKE, J.: In this case we have come to the unanimous conclusion that the appeal should be dismissed. The points raised in the argument by Mr. *McPhillips* hardly apply to this statute and the interpretation of it. In none of the cases cited from the English Reports was the Court dealing with a statute similar in language to our own Act. Mr. *McPhillips*' contention was that goods and chattels meant a number of articles, and not an individual chattel—in other words, that the plural did not include the singular. That contention is disposed of by *Vye* v. *McNeill*, a decision which I think is correct when the language of the Act is considered.

The object of the statute is for the purpose of enabling persons who are honest debtors—I use that term "honest debtors" because it is provided in the further part of the section that a debtor cannot claim exemption in respect of goods that are not paid for. The object is to give the debtor something to go on with after the judgment against such debtor has been realized out of his estate in excess of $500. In a country like this it is a very necessary thing that a person should not be thrown upon his friends for the purpose of his support, and this provides a means of obviating it. It is a great deal larger exemption than obtains in any other country, but I think it is not less satisfactory for that reason. The question is, was a claim made before the property was converted by Sheriff's sale: *Pilling* v. *Stewart* (1895), 4 B.C. 94. Here a claim was made for exemption not only to the Sheriff verbally before the seizure but also after the seizure. The Sheriff knew perfectly well that a claim for exemption meant a claim for whatever the law allows. The seizure went on, and the property seized was realized, and Cooper having on interpleader substantiated his claim.

DRAKE, J.

The appeal should be dismissed with costs.

IRVING, J.: I concur. I should just like to say a word with reference to the contention raised by Mr. *McPhillips* that Cooper

IRVING, J.

was claiming, even during his cross-examination, that this vessel was the property of the Glenora Steamship Co. The whole case made out before the County Court Judge proceeded on the basis that this ship was the property of Cooper himself and not the property of any other person. Otherwise, it could not possibly be taken in satisfaction of his debt. In my opinion, a man who is of an excitable character, insisting upon an absurd proposition of law, should not lose his rights. And that is the way I regard the statement that he insists upon making, *viz.*, that the ship is the property of the Glenora Steamship Co. All you have to do is to put in a taunting way the question: "Oh, but this belongs to the Glenora Steamship Co.?" and he will at once insist upon it. That may be his view of the law, but it is not the fact.

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MARTIN, J.: I concur with what my learned brothers have said in disposing of this matter, that it should be decided upon the construction of our own statute; and I concur with them also that our judgment should be based upon the application of the statute to the peculiar requirements of this country, to which it is well suited.

MARTIN, J.

JACKSON v. CANNON.

MARTIN, J.
1902
Aug. 7.
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1903
April 9.
JACKSON v. CANNON

Company—Security taken bona fide—Holder of—Necessity to inquire as to regularity of proceedings—Liquidator suing in his own name—Liability for costs.

Where an action is brought by the liquidator of a company in liquidation in his own name he is personally liable for costs; the fact that he obtained leave from the Court to sue will not relieve him of his liability in this respect.

A person who *bona fide* takes a security in the ordinary course of business from an incorporated company is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly.

In this respect a shareholder stands on the same footing as a stranger.

MARTIN, J.
1902
Aug. 7.
FULL COURT
1903
April 9.
JACKSON
v.
CANNON

APPEAL from the judgment of MARTIN, J.

The action was brought by "Colin F. Jackson, Liquidator of the Vancouver Coast Line Steamship Company, Limited," against the defendant for a declaration that an assignment of certain moneys to become due under a mail contract and made by the Company in favour of the defendant, was null and void as being a fraud on the creditors of the Company. Leave to bring the action had been obtained from the Court. Cannon was a shareholder in the Company.

The assignment was as follows:

"Vancouver, April 10th, 1901.

"We herewith assign to Hubert Cannon all moneys as they may become due from the Postmaster-General of Canada under and by virtue of a certain mail contract between the said Postmaster-General and the Vancouver Coast Line S.S. Company for the sum of $1,175 per annum, dated the 10th day of April, 1901, which moneys we will pay over to him as soon as received.

"Vancouver Coast Line S. S. Co.
"J. H. DIAMOND, Sec.-Treas.
"H. L. GREENE, President."

Statement

Under this assignment Cannon had collected $126.

At the trial the Judge found the transaction was *bona fide*, that defendant had no knowledge that the Company was insolvent, and that having obtained the money *bona fide* he would not order him to deliver it up. As to the authority of the directors in making the assignment he held that they had either express or implied authority.

On the question of costs he delivered the following written judgment:

7th August, 1902.

MARTIN, J.: In this case the liquidator does not sue in the name of the Company, but in his own name, though there are additional descriptive words shewing the position he occupies in regard to that Company. For the practice on this point see Daniell's Chancery Forms (1901), 108, note (*m*). Under such circumstances I am of the opinion that whatever might be said if he had sued in the name of the Company, he is personally

MARTIN, J.

liable for the costs of this action. The subject is discussed and cases collected in Lindley on Companies, Vol. 2, pp. 1,160-5; and Buckley on Companies (1897), pp. 299-300, and the distinction I have mentioned is pointed out by Mr. Justice Kekewich in *Fraser* v. *The Province of Brescia Steam Tramways Co.* (1887), 56 L.T. N.S. 771. The proper order to make in the case at bar is that which was made in *In re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33, which is that the liquidator should personally pay the costs of this action with liberty to recoup himself out of the assets of the Company. This decision was not cited in *Fraser* v. *Brescia*, in which case also it must not be overlooked that the liquidator was in the position of a defendant: see Buckley at foot of p. 299. See also *In re Hounslow Brewery Co.* (1896), W.N. 45 and *In re W. Powell & Sons* (1896), 1 Ch. 681.

Counsel have not been able to find a precedent exactly in point, nor have I, but in order to avoid any doubt as to my intention I propose to settle the order by inserting a direction for personal payment with liberty to recoup as above mentioned.

The plaintiff appealed, the appeal being argued at Victoria on the 16th and 17th of January, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

Statement

On the argument the Court decided on the facts that no good reason was shewn to interfere with the learned trial Judge's findings, that the transaction was *bona fide*, but as the proceedings leading up to the defendant's security were irregular, judgment was reserved on the point as to whether or not the defendant being a shareholder at the time of his taking his security was in the same position as a stranger with regard to his duty to inquire into the internal management of the Company. The decision on the question of costs was also reserved.

Sir C. H. Tupper, K.C., and *Peters, K.C.*, for appellant.
Joseph Martin, K.C., for respondent.

9th April, 1903.

HUNTER, C.J.

HUNTER, C.J.: On the hearing of this appeal we were all agreed that no reason was shewn why we should interfere with the learned Judge's findings on the question of the *bona fides* of the transaction, but as the proceedings leading up to the defend-

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ant's security were manifestly irregular, the point which remained to be considered was whether or not the defendant, being a shareholder at the time of his taking the security, was in the same position as a stranger with regard to his duty to inquire into the "indoor management," there being nothing to shew that he was aware of the irregularities.

It would certainly be a very startling proposition to hold that a shareholder who might reside hundreds of miles away from the head office of the Company is bound to inquire into the proceedings at the directors' meetings before he could safely enter into a contract with the Company, and not only have I been unable to find any authority for such a proposition, but I find that there is authority the other way.

In *Hill* v. *Manchester and Salford Water Works Co.* (1833), 5 B. & Ad. 866, an action was brought by a member of the Company on a bond securing £100 to the plaintiff. In delivering the judgment of the Court (Denman, C.J., Parke, Taunton and Patteson, JJ.), Lord Denman says, at pp. 874-5:

"The defendants then contended that the bond was given for a purpose which required the sanction of a special general assembly; that such assembly was, by the Act, to be convened only by requisition by proprietors of a certain number and value, after fourteen days' public notice; and that such meeting should consist of a certain number; and they attempted to prove that all these important safeguards for the interest of the great body of proprietors had been neglected in this instance, and the bond executed by the resolution of a meeting at which all these requisites were wanting.

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"These points of fact, however, could only be established by the books kept by the clerk of the company; and the question now to be decided is whether they are evidence against the plaintiff? It was argued that they were, because he was a proprietor, and the books of a partnership are evidence against any one of the partners; and more particularly as the Act requires such books of the proceedings to be kept, and that all the proprietors shall have free access to them at all reasonable times.

"We are, however, of opinion, that the principle on which partnership books are evidence against the partners is, that they

are the acts and declaration of such partners, being kept by themselves, or, by their authority, by their servants, and under their direction and superintendence. But the clerk of the company, once appointed, is subject to the control of no individual member; and the free access provided for is only for the purpose of inspection. A proprietor entering into a contract with the company must be deemed a stranger, and can be affected by no entry made under orders from the entire body."

And at p. 876: " . . . . . We are clearly of opinion that the books of the company are not admissible in evidence for the purpose of establishing the facts therein mentioned against the plaintiff suing the body corporate."

In *Pearsall* v. *Western Union Telegraph Co.* (1891), 124 N.Y. 256; 21 Am. St. Rep. 662, the English case is cited in support of the proposition that a shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, and in *Rudd* v. *Robinson* (1891), 128 N. Y. 113; 22 Am. St. Rep. 816, the same rule is laid down with respect to the contents of books of account, even though the shareholder was a director, and the *ratio decidendi* of all the cases is that the persons making the entries are not the agents or employees of the shareholder, but of the Company. Therefore I think there is no doubt that, as it is not shewn that Cannon had actual knowledge of the irregularities leading up to his security, the action fails.

It was also objected that the liquidator should not have been ordered to pay costs. As to this, it is well settled that when, as here, the liquidator sues in his own name he is in the same position as any other litigant as regards the adverse party, and the fact that he got leave makes no difference, although, of course, if he gets leave he is generally entitled to be recouped out of the estate.

The appeal must be dismissed with costs.

DRAKE, J.: The plaintiff sues as liquidator and not in the name of the Company, for a sum paid to the defendant on account of an assignment to him by the Company of a contract for carrying mails. The total amount received by the defendant

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was $126. The ground taken by the plaintiff is that the assignment was void as it was not made by the Company acting in its corporate capacity, but by the president and two directors, and no minute appears in the minute book. The whole proceedings of the Company appear irregular, but as the irregularities are in connection with the internal management of the Company, they cannot prejudice third parties who have acted in good faith and without knowledge. The defendant first indorsed a note for the Company for $2,500, which he had to take up, and the security was one-third interest in a vessel, which eventually sold for $5,000 for the entirety. The other security given was an assignment of this contract for carriage of the mails. The plaintiff states that he knew nothing of the circumstances until a cheque from the Dominion Government was sent to satisfy the contract, and thereupon he commenced this action in his own name as liquidator, and not in the name of the Company. A little inquiry would have disclosed to the plaintiff the whole of the circumstances, and which our rules for the examination of parties would have enabled him to obtain. But instead of that he relies on the defendant's statement on a prior examination before the liquidator in which he does not mention this security. With regard to this evidence, the defendant's attention was not drawn to this security; he had received nothing under it at that time, and it might not unreasonably have escaped his memory.

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The plaintiff knew nothing about it, but no question was put to the defendant as to whether or not he had received any, and if any, what security for his advance beyond the assignment of the one-third of the vessel. He says he had no other transaction with the Company, and further on he says, "This is the whole transaction of the taking of this mortgage." It is to be remarked that there was only one transaction, this assignment of the Post Office contract was part of the same contract. The case was one of suspicion, and justified a further inquiry, but such further inquiry could have been had without an action. This appeal, though brought on various grounds, practically resolves itself into an appeal on the question of costs. The learned trial Judge has given the costs out of the estate, the liquidator to pay them in the first instance. It is strongly urged

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that the Court having sanctioned the action, the costs should be limited to the assets in the hands of the liquidator. I am not aware of any authority which lays down any rule that the Court in granting authority to a liquidator to bring one action is bound to protect the liquidator from the costs of unsuccessful litigation. If the liquidator had brought the action in the name of the Company, other considerations might arise, which it is not necessary to discuss.

In view of all the circumstances, I do not see that the order of the learned trial Judge is wrong. The appeal must therefore be dismissed with costs.

IRVING, J.: In the course of the argument we disposed of all the points raised but one, *viz.*, that as Cannon was a shareholder he must therefore be treated as knowing what the directors knew, and that therefore he could not take advantage of those authorities which make it unnecessary for the lender to see that the internal regulations of the Company have been duly observed.

No authority covering the exact point was cited, but on principle I can see no reason why a shareholder not being a director should stand in a worse position than an outsider.

IRVING, J.

The ratio of the decision in *Turquand's Case* was that the lender, who, if he had read the deed of settlement, would have found therein a permission to borrow on certain terms, had a right to infer that the necessary resolution had been passed.

In my opinion a shareholder who is not entitled to notice of all meetings of the directors stands in the same position as an outsider. I do not see how he can be taken as cognizant of all the proceedings of the directors' meetings, because there is no duty on him to attend or to know what is done at these meetings.

Appeal dismissed.

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GOLD v. ROSS.

Landlord and tenant—Eviction—Surrender of term by operation of law—Creditors' Trust Deeds Act, 1901, Cap. 15, Sec. 54, Sub-Sec. 5.

Plaintiff let a store to H. A. & Co., who afterwards executed an assignment for the benefit of creditors to defendant, who did not take possession of the premises. Plaintiff on the third day after the assignment, requested and obtained from H. A. & Co. the keys of the premises which she proceeded to clean up and put in repair, and she took down a sign board having on it the firm name of H. A. & Co. and painted the name out. Plaintiff afterwards sued for a declaration that she was entitled to a privileged claim against the estate for rent accruing due after the assignment:—

Held, affirming HENDERSON, Co. J., who dismissed plaintiff's action, that there had been a surrender of the premises to the landlord by act and operation of law.

Phene v. *Popplewell* (1862), 12 C.B.N.S. 334, applied.

APPEAL from the judgment of HENDERSON, Co. J.

Statement

This was an action against an assignee for the benefit of creditors for a declaration that the plaintiff was entitled to a privileged claim for rent against the assignor's estate under the Creditors' Trust Deeds Act, 1901. The facts are fully stated in the following judgment of

24th February, 1903.

HENDERSON, Co. J.: This is an action by a landlord against the assignee of Hood, Aldridge & Co., tenants of the premises known as the Imperial Hotel, 135 Water Street, Vancouver, to establish a claim for rent for the unexpired term of the lease under which the premises were demised.

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The defence is that there has been a surrrender of the lease by operation of law.

The plaintiff under an indenture of lease made in pursuance of the Leaseholds Act on the 28th of September, 1901, demised to W. B. Hood and M. L. Aldridge, fruit and produce merchants, the premises in question for a term of three years commencing on the 1st of October, 1901, at a monthly rental of $35 per

month for the first year, $40 per month for the second year and $45 per month for the third year, the said monthly payments to be made in advance on the first day of each month during the term.

On the 26th of September, 1902, the lessees, Hood, Aldridge & Co., made an assignment to the defendant for the benefit of creditors, in pursuance of the Creditors' Trust Deeds Act, 1901. Hood, Aldridge & Co. vacated the premises on the same date, *viz.*, 26th September, 1902, the rent having been previously paid up to the 1st of October, 1902. The assignee was not informed of the existence of the lease and did not become aware of it until 22nd October, 1902. He had not been on the premises since the assignment, having had no stock in trade to take over as assignee.

I find from the evidence that on the 29th of September, 1902, the plaintiff's son, as agent for the plaintiff, having incidentally heard of the assignment, called upon Clayton Aldridge, whose wife was a partner in the firm of Hood, Aldridge & Co., and after speaking of the assignment and the vacating of the premises, said, "By the way, I had better have the keys of the property." In compliance with this request Clayton Aldridge, for the lessees, delivered the keys on the same day, the 29th of September, to the plaintiff, enclosed in an envelope. The plaintiff remarked that she didn't know whether she ought to accept the keys or not, she ought to have some rent. The keys, however, were retained and the plaintiff proceeded to clear up the premises and to put them in repair, and took down a sign board or frame having on it the firm name of the lessees and painted the name out.

Mr. *Harris*, for the plaintiff, argued (1.) that there was no surrender by operation of law, and (2.) that there was no privity at the time of the delivery of the keys, between the assignors (lessees) and the landlord, the assignment for the benefit of creditors having been made three days before such delivery.

I am of the opinion that the case of *Phene* v. *Popplewell* (1862), 12 C.B.N.S. 334 cited by Mr. *Boak*, for the defendant, is a clear authority in the defendant's favour to establish that the evidence shewed a surrender by act and operation of law. The

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mere taking of the key is an equivocal act, but the other acts and surrounding circumstances generally, and particularly the painting out of the names of the former tenants from the sign are, to my mind, unequivocal acts and clearly shew that the plaintiff exercised her option to accept the surrender.

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Nor do I think the plaintiff can now succeed on the second branch of the argument. The defendant at the time of the delivery of the keys, it is true, was not aware of the existence of the lease, and gave no express authority to deliver them, but as soon as he became aware of the lease and of what had been done by the assignors with reference to it, he adopted their acts as his own, and is entitled to claim, as against the plaintiff, the benefit of what had been done by the assignors, the original lessees.

Judgment will, therefore, be entered for the defendant with costs.

From this judgment the plaintiff appealed to the Full Court and the appeal was argued at Vancouver on the 27th and 28th of April, 1903, before DRAKE, IRVING and MARTIN, JJ.

Argument

Harris, for appellant: There was no clause in the lease providing that it should be at an end on the tenants making an assignment for the benefit of their creditors and the assignee could have sold. Aldridge after the assignment had no authority to deal with the property in any way. For the purpose of preserving the premises plaintiff cleaned them out by moving some decayed fruit. The sign had been abandoned by the tenants. Where the landlord goes in for a particular purpose it is not a surrender by operation of law. He cited *In re Panther Lead Co.* (1896), 65 L.J., Ch. 500; *Oastler* v. *Henderson* (1877), 2 Q. B.D. 575; *Phene* v. *Popplewell* (1862), 12 C.B.N.S. 334; *Nixon* v. *Maltby* (1881), 7 A.R. 371 at p. 380; *Ontario Industrial Loan and Investment Co.* v. *O'Dea* (1895), 22 A.R. 349 and *Gault* v. *Shepard* (1888), 14 A.R. 203 at p. 211. The defendant was not a party to the dealings between plaintiff and the tenants and therefore cannot take advantage of any estoppel against plaintiff: see *Watson* v. *Swann* (1862), 11 C.B.N.S. 756; Bigelow on Estoppel, 5th Ed., 142. If after the assignment plaintiff had

rented the premises, the assignee would have had an action for damages against her.

Boak, for respondent, was not called on.

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DRAKE, J.: The facts here are much the same as in *Phene* v. *Popplewell*, although here there was no special consent by Mrs. Gold that the lease should be put an end to; the taking down of Hood, Aldridge & Co's sign board and painting their name out is almost equivalent to putting up a "to let" sign.

The plaintiff accepted the keys and took possession of the premises and shewed an intention inconsistent with the theory that it was only for the purpose of cleaning out the rotten or decayed fruit, but afterwards when it was discovered that she might have some remedy against the assignee she made her claim. I see no reason to differ from the learned County Court Judge who saw and heard the witnesses.

IRVING, J.: I agree.

IRVING, J.

MARTIN, J.: I concur.

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Appeal dismissed with costs.

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CARSON v. CARSON

Sheriff—Capias—Mileage.

A Sheriff is required to keep a person arrested on a capias safely, and as there is no common gaol in Vancouver the Sheriff of Vancouver is entitled to lodge such a person in New Westminster gaol and charge mileage therefor.

SUMMARY reference from Registrar on a taxation of a Sheriff's bill of costs.

The defendant was arrested in Vancouver on a writ of *ca. re.* by the Sheriff of Vancouver, who lodged him in gaol in New

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Westminster and charged mileage from Vancouver to New Westminster and return.

Heisterman, for plaintiff, objected to mileage on the ground that by the writ the Sheriff was only bound to keep the defendant and there being no direction in either writ or order for delivery into gaol, the Sheriff was not entitled to charge for removing him to New Westminster, as it was done for the Sheriff's convenience. New Westminster is outside the jurisdiction of the Sheriff of Vancouver, and as a Sheriff has no power outside his jurisdiction he cannot charge for taking a defendant outside his own County.

The Sheriff, in person.

HUNTER, C.J.: The law requires the Sheriff to keep the defendant safely and as there is no common gaol in Vancouver, he was entitled to lodge him in New Westminster and to charge mileage therefor.

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Garnishee issue—Entry of order on—Time for appeal.

Vendor and purchaser—Agreement for sale and purchase made subject to the happening of a contingent event as a condition precedent—Liability of purchaser on voluntary promise to pay a debt of the vendor, the contingent event not having happened.

Agreement—Failure to insert particulars to satisfy Statute of Frauds—Mutual misconception of existing facts—Impossibility of performance.

An order deciding a garnishee issue was dated the 26th of March, settled by the Judge on the 15th of July, and entered on the 25th of July. Notice of appeal was served on the 19th of July:—

Held, the appeal was brought in time.

Manley having recovered judgment for $542.50 against O'Brien, issued a garnishee order against Mackintosh and an issue having been ordered in which Manley was plaintiff and Mackintosh defendant, the trial

Judge, WALKEM, J., held that the agreements (set out in the judgment of IRVING, J., *post* pp. 88 and 90) between O'Brien and Mackintosh, by virtue whereof the alleged indebtedness arose, did not comply with the Statute of Frauds, inasmuch as the parties had omitted to state therein the terms actually agreed upon, and decided the issue in favour of the defendant.

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Upon appeal to a Full Court constituted, by consent of the parties, of two Judges, IRVING and MARTIN, JJ., the appeal was dismissed, the Court in delivering opinions sustaining the decision of the trial Judge holding (1.) That the promise made by defendant and now sought to be enforced against him was *nudum pactum;* (2.) That the defendant O'Brien in the original action and Mackintosh, the defendant in the issue, in reality came to an agreement in ignorance of the fact that its performance in view of the conditions it was contingent upon, was impossible.

APPEAL from the judgment of WALKEM, J., in a garnishee issue in which the question was whether the defendant was indebted to one O'Brien in the sum of $545.20, or any other sum, on the 1st of August, 1901, the date of the service of the garnishee order. The issue was tried at Rossland, on the 10th and 11th of October, 1901, before WALKEM, J. The facts are stated fully in the judgment of IRVING, J., on appeal.

Statement

Hamilton, and *J. A. Macdonald,* for plaintiff.

MacNeill, K.C., and *W. S. Deacon,* for defendant.

13th March, 1902.

WALKEM, J.: In a recent action of *Manley* v. *O'Brien* the plaintiff recovered a judgment against the defendant, and, afterwards, obtained a garnishee order against Mr. Mackintosh, on the alleged ground that the latter owed O'Brien $545.20. The indebtedness being denied, an issue in the usual form was drawn and directed to be tried, and the case came before me at the Fall Sittings of this Court at Rossland.

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Two agreements in writing were produced at the trial as the foundation for the alleged indebtedness. They were made at different times, and related to the same question, which was one respecting an interest in land. The evidence was most conflicting as to whether the second agreement was supplemental to the first one, or a wholly new agreement. Whether it was, or was not, is, in my opinion, immaterial, because no claim on the part of O'Brien, even if one existed, could be enforced as neither

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document complies with the Statute of Frauds, inasmuch as it omits to state all the terms that were actually agreed upon. If the documents are to be read together, as Mr. *Macdonald* contends, in effect, should be the case, this is still more palpable; for, if there was a stipulation to that effect, it should have been inserted in the second document, together with such an explanation as would clearly shew that its terms were merely supplemental provisions which had been agreed to for the purpose of carrying out the first agreement; for, on its face, the second agreement would seem to be a new and independent one.

This is, obviously, one of that class of cases whose occurrence the Statute of Frauds was designed to prevent.

The issue must, therefore, be decided in favour of the defendant, with costs.

The reasons for judgment were received in the Rossland Registry on the 13th of March, 1902, the formal order was dated the 26th of March, settled by WALKEM, J., the 15th of July, and entered on the 25th of July. The notice of appeal was served on the 19th of July.

The appeal came on for argument at Vancouver, on the 18th of November, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ., when

MacNeill, K.C., for the respondent, took the preliminary objection that the appeal was out of time, contending that a garnishee issue was an interlocutory proceeding, citing *Short* v. *Federation* (1899), 7 B.C. 35 and *McAndrew* v. *Barker* (1877), 7 Ch. D. 701; Y.P. 562, 574.

Argument

Hamilton, for appellant: We had eight days from the entry on the 25th of July, in which to give notice of appeal. He cited *Robinson* v. *Tucker* (1884), 14 Q.B.D. 371; *Dawson* v. *Fox* (1885), *ib.* 377; *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch. 307.

The objection was overruled and the appeal proceeded.

Owing to the fact that the Chief Justice had tried the action of *O'Brien* v. *Mackintosh* in which the same question arose, he withdrew, and by consent the appeal was argued before two Judges only, IRVING and MARTIN, JJ.

Hamilton, and *J. A. Macdonald*, for appellant: Between the date of the first and second agreements defendant found out that the survey and Crown grant fees would amount to $450, and that the Manley judgment could be bought for $500, so the second agreement was entered into, the price being reduced to $1,050 in consideration of the defendant assuming payment of those two amounts. Without explanation, it looks as though these two amounts were to come out of the $1,050, but evidence and parol admissions to the contrary are admissible: see *Newhall* v. *Holt* (1840), 6 M. & W. 662; *Slatterie* v. *Pooley* (1840), *ib.* 663; *Lindley* v. *Lacey* (1864), 17 C.B.N.S. 578 and *Erskine* v. *Adeane* (1873), 8 Chy. App. 756.

As to Statute of Frauds: In *Manley* v. *O'Brien*, on a motion to sell the land under the judgment, Mackintosh made an affidavit, dated the 25th of August, 1900, in which he stated that he accepted unconditionally O'Brien's offer to sell dated the 12th of December, 1899; that is sufficient to bind him: see *Barkworth* v. *Young* (1856), 26 L.J., Ch. 153.

As to Mackintosh's contention that he is entitled to the costs of opposing the sale under the judgment after admitting that he has broken his word of honour to pay the judgment, he will not now be allowed to make O'Brien pay the costs which were the result of his mis-statements to O'Brien; besides the costs were incurred by Mackintosh to protect his own interests. We want the written and the verbal agreement to be read together.

Argument

MacNeill, for respondent Mackintosh: At the time of the agreement it was in the mind of all parties that the Manley judgment was to be and could be obtained for $500; all depended on that; Mackintosh wished to help O'Brien, but as it was only a pre-empted claim he would not agree to pay the $500 before the Crown grant was issued.

Evidence should not be allowed to vary or contradict the written agreement: *Saults* v. *Eaket* (1897), 11 Man. 597; *Byers* v. *McMillan* (1887), 15 S.C.R. 194; *Mercantile Agency Company, Limited* v. *Flitwick Chalybeate Company* (1897), 14 T.L.R. 90; *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58 at p. 64; *Montacute* v. *Maxwell* (1720), 1 P. Wms. 620 and *Emmet* v. *Dewhurst* (1851), 3 Mac. & G. 581.

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As to costs of opposing sale under judgment, Mackintosh in *Manley* v. *O'Brien* (1901), 8 B.C. 280, was held to have an equitable interest in the land and so he would be entitled to defend it and should have his full costs: *Ramsden* v. *Langley* (1705), 2 Vern. 536; *Lomax* v. *Hide* (1690), *ib.* 185; *Wilkes* v. *Saunion* (1877), 7 Ch. D. 188 and *Wells* v. *Trust and Loan Co. of Canada* (1884), 9 Ont. 170.

Hamilton, replied.

9th April, 1903.

IRVING, J.: This is an appeal from the decision of Mr. Justice WALKEM on the hearing of an issue to determine whether Mackintosh was indebted to O'Brien in the sum of $545.20 or any other sum, on the 1st of August, 1901, the date of the service of the garnishee order. The garnishee's defence is that O'Brien is indebted to him.

The history of the case is somewhat involved.

On the 20th of April, 1898, Manley obtained judgment against O'Brien for $545.20 and costs. The judgment, after directing the payment of the money contained an injunction restraining O'Brien from parting with the timber upon the lot for six months from the date of the judgment, or until the plaintiff had been paid his debt and costs, and further, that the plaintiff was to have the right—without any limit as to time—to enter on the land and cut timber and remove the same thereof, crediting the proceeds to the defendant in satisfaction of the judgment debt.

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Judgment had been previously obtained by Hunter Bros., against O'Brien for $130.57 and costs. Both these judgments were registered and were therefore charges upon the land.

On the 12th of December, 1899, O'Brien wrote to Mackintosh, "I am prepared to sell you all the milling timber and cordwood on the ranch for the sum of $2,000 as soon as the title is complete, you to advance the sum of $250 to pay for survey when made. It is understood that out of the remaining sum you would pay for the Crown grant and deduct said sum from purchase price."

Mackintosh verbally accepted this offer, but within a day or two of so doing, learned of the existence of the Manley judgment which now amounted to the sum of $1,023.66. Mr. Burnett, the

land surveyor, who had been engaged to survey the land preliminary to obtaining a Crown grant and who, throughout the proceedings acted as Mr. O'Brien's agent, went to the solicitor for Manley, Mr. Hamilton, and learned that the judgment could be purchased for the amount of the debt, possibly less; he informed Mackintosh of what he had learned, and Mackintosh then in an interview with the solicitor, Mr. Hamilton, arranged that the judgment could be satisfied for the sum of $500. As to when that sum should be payable there is (or was) a dispute between Mr. Hamilton and Mackintosh.

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It may be convenient to state the condition of affairs at this period.

Mackintosh had agreed to buy the timber on the land for $2,000, $250 of which he was to advance without security.

The balance, $1,750, only being payable in the event of the Crown grant issuing, and also in the event of Manley not stripping the land of all the timber thereon. Under these circumstances Mackintosh was unwilling to advance the $500 then and there. He therefore arranged, as he thought, with Mr. Hamilton that the sum of $500 should be payable after the issue of the Crown grant. I think it is perfectly clear whatever Hamilton may have thought, that in the beginning of January, 1900, O'Brien and Mackintosh accepted as an assured fact that the sum of $500 would be received by Mr. Hamilton in satisfaction of the judgment if it was paid after the Crown grant was issued.

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The arrangement between O'Brien and Mackintosh for the payment of this sum was I think a *nudum pactum*, there being no consideration on the part of O'Brien for Mackintosh's promise to undertake the duty of getting rid of this judgment.

And it was apparently in contemplation of O'Brien and Mackintosh that the latter should by another *nudum pactum* with Hamilton arrange for the payment of the judgment at a future date and at a reduction of 50 per cent.

It is not by any means clear what was to become of the judgment when paid off, whether it was to be assigned to Mackintosh or simply marked as cancelled, but it is clear that the money was to be paid out of the balance of the $2,000 which Mackintosh was paying for the milling timber and cordwood on the ranch. I

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have no doubt that if Mackintosh had been able to obtain a release of the judgment for a less sum than $500 he could only have charged O'Brien with such smaller sum.

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On the 13th of January, 1900, matters being in the condition that I have just stated, the parties O'Brien and Mackintosh met, and the agreement of the 13th of January, 1900, was drawn up.

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"Articles of agreement made this thirteenth day of January, in the year of Our Lord one thousand nine hundred, Between Bartholomew O'Brien, of the City of Rossland, in the District of West Kootenay, rancher, of the first part, and the Honourable Charles Herbert Mackintosh, of the same place, gentleman, of the second part.

"Whereas the said party of the first part hath agreed to sell to the party of the second part, and the party of the second part hath agreed to purchase of and from said party of the first part the timber and cordwood standing, or cut upon the lands, hereditaments and premises, hereinafter mentioned, that is to say, all and singular that certain parcel or tract of land and premises, situated and being composed of lot number 4,664 in group (1) West Kootenay District, B.C., containing by admeasurement three hundred and twenty acres be the same more or less, together with all the privileges and appurtenances thereto belonging, at or for the sum or price of one thousand and fifty dollars

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of lawful money of Canada, payable in manner and on the days and times hereinafter mentioned, that is to say, the sum of three hundred dollars on the execution of this agreement, the amount of the fees payable to the Crown and expenses incidental thereto, to be approved of and certified by the solicitor of the party of the second part on the delivery to said party or his solicitor of the certificate of improvements to said lot; And the balance of said purchase money on the issue of the patent to said lot, always provided, however, that the said party of the second part may at any time within the above mentioned period pay the balance due and the interest thereon to the date thereof.

"Now it is hereby agreed by the parties hereto in manner following, that is to say, the said party of the second part for himself, his heirs, executors and administrators, doth covenant,

promise and agree, to and with the said party of the first part, his heirs, executors, administrators and assigns, that he or they shall or will well and truly pay, or cause to be paid to the said party of the first part his heirs, executors, administrators or assigns, the said sum of money above mentioned. In case the said party of the first part obtains in a reasonable time, not exceeding four months, the patent to the said lot at his own cost and expense, save as to the sum hereinbefore agreed to be paid by the party of second part out of said purchase money in consideration whereof and on payment of the said sum of money the said party of the first part doth for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, to convey and assure or cause to be conveyed and assured to the party of the second part, his heirs, all the cordwood and timber cut or uncut, standing, growing or otherwise being on all that the said piece or parcel of land above described, together with the appurtenances thereto belonging, or appertaining freed and discharged from all incumbrances; But subject to the conditions and reservations in the original grant thereof from the Crown, and such deed shall be prepared at the expense of the said party of the second part, and shall contain the usual statutory covenants. And it is agreed that in case the party of the first part shall not within the period hereinbefore mentioned, obtain a Crown grant to the said land, then and in such case the party of the first part, shall repay to the party of the second part all moneys advanced by him under this agreement. And also shall and will forthwith suffer and permit the said party of the second part, his heirs and assigns, to occupy and enjoy the same until default be made in the payment of the said sum of money or the interest thereof, or any part thereof, on the days and times, and in the manner above mentioned, subject nevertheless to impeachment for voluntary or permissive waste and shall have the right to cut, sell and carry away timber or cordwood off and from the said land, keeping a full and proper account of the same.

"In witness whereof the said parties to these presents have

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hereunto set their hands and seals the day and year first above written.

"Signed, and sealed in the presence of W. J. Nelson." "B. O'BRIEN." [SEAL.] "C. H. MACKINTOSH." [SEAL.]

Burnett, the surveyor who, as I have already said was acting for O'Brien, was anxious that the document should contain a covenant on the part of Mackintosh to satisfy the Manley judgment, this Mackintosh positively refused to have inserted, saying that he had already undertaken this matter and that he would carry it out; in his examination he made use of an ambiguous expression, *viz.*, "I have in fact arranged it with Hamilton." I think the proper meaning to be attached to that expression is that he had arranged with Mr. Hamilton to accept the $500, not that he had actually in fact settled the judgment by payment. It is perfectly clear from the evidence that no one ever understood that the judgment had been satisfied.

Apart from that ambiguous expression, there is nothing that can be construed into a representation in any way of his having done something; his language throughout is always a representation of what he intended to do.

The consideration money mentioned in the agreement of the 13th of January, 1900, was reached by deducting (*a.*) the $500 required for the Manley judgment and (*b.*) the $200 estimated for Crown grant fees and (*c.*) $250 estimated for survey fees.

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The agreement states that $300 was to be paid on the signing thereof, as a matter of fact only (*e.*) $50 was paid to O'Brien but (*c.*) $250 for survey fees was paid to Burnett.

Assuming that the total sum payable by Mackintosh was $2,000 (and on the evidence it is impossible to say that he was to pay any more) there is now (January, 1900), due from him after deducting the above items, $1,000. Shortly after this, he paid for additional Crown grant fees (*f.*) $145.66 and to O'Brien (*g.*) $194.65, bringing the total up to $1,340.31.

About this time (July, 1900), steps were taken by Manley under the Judgments Act, 1899, to sell the land, the contention being that as the sum of $500 was only to be accepted if paid in January, and as that sum had not been paid, the plaintiff was at liberty to proceed.

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Mr. Nelson was employed by O'Brien to oppose this application and did so. The motion was dismissed on the technical ground that the Crown grant had not yet issued, he (Mr. Nelson) made up a bill of costs in respect of these services amounting to $110; in his evidence he stated that O'Brien was solely liable for these costs, although Mackintosh guaranteed them.

In the early part of August, the Crown grant which had been issued on the 24th of July, 1900, was sent to Mr. Nelson, who, as Mackintosh's solicitor, was to hold it as security for advances made by him, and Mackintosh offered to pay Mr. Hamilton the $500. This offer was refused and a second application was made by Manley under the Judgments Act, 1899, to sell the land. This application was commenced on the 28th of August and lasted until the 10th of November. In connection with the costs of this or the former application O'Brien and Nelson went to the Bank and deposited the Crown grant to secure $150 required by Mr. Nelson in conducting the litigation. The second application by Manley to sell was resisted by both O'Brien and Mackintosh; by the former on the ground that Manley had not duly accounted to him for timber taken away under the terms of the judgment of the 20th of April, 1898, and by Mackintosh on the ground that Manley having agreed to accept the $500, and thereby having led Mackintosh into making advances to O'Brien, should not be allowed to cut Mackintosh out of his security, the joint opposition of O'Brien and Mackintosh was managed by Mr. Nelson.

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At this date, August, 1900, Mackintosh had out of the $2,000 only paid $742.66, leaving $1,257.34 in his hands, an ample protection to him against the Manley and Hunter judgments. Under these circumstances and having regard to the fact that O'Brien was to convey the timber free from incumbrances, can there be any doubt as to who was the person for whose benefit these costs were being incurred? As O'Brien had not contested them I think they must be taken, as between Manley and Mackintosh properly paid on O'Brien's account.

On the 17th of November, 1900, DRAKE, J., made an order to sell the property. From that decision O'Brien and Mackintosh appealed and the appeal was successful (see (1901), 8 B.C. 280) in

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respect of this second application and of the appeal, Mr. Nelson made out two other bills of costs, *viz.*, 501 and 596, his total bills amounting to $1,005.70, of which sum Mackintosh has paid $558.70.

On the 23rd of July, 1901, Manley undertook the present garnishee proceedings, out of which this issue arises.

To summarize, on the 13th of January, 1900, Mackintosh held (*a.*) $500 to satisfy the Manley judgment (*b.*) $200 for Crown grant fees (*c.*) $250 for survey fees, leaving $1,050.

He paid O'Brien	$ 50.00
To Lands and Works	145.66
To O'Brien personally	194.65
In October, to Nelson, on account costs	150.00
In January, 1901, to Nelson	150.00
On 14th February, 1901, to Nelson	258.70
	$949.01

On the 1st of April, 1901, at an interview held in the Allan Hotel, Mackintosh submitted these accounts to O'Brien, who then and there in the presence of Mr. Courtney, his solicitor, admitted them, and barring that he grumbled at the amount of Mr. Nelson's bills, he seems to have been satisfied with the statement presented to him. This shews that Mackintosh has out of the $2,000 actually paid the sum of $1,399.01 and that O'Brien acknowledged the correctness of the accounts.

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Before he can receive the property free from any incumbrances the Hunter judgment, $161.77 and the Manley judgment $1,023.66 must be satisfied, therefore Mackintosh's counsel contends that he is entitled to retain the amount of $600.99 in addition to these unsatisfied judgments, which will eat up the difference between $2,000 and $1,399.01, there is Mr. Nelson's claim for the balance of $447.

But it is said that it was all Mackintosh's mistake that the judgment was not bought for $500, that as it was he who made the arrangement he should now bear the consequences, that is to say, that he should bear all the costs, or at any rate not be allowed to charge them up to O'Brien, and that he should hand

over to O'Brien the $500 which he held back to satisfy the Manley judgment.

I have already pointed out that in my opinion there was no consideration for Mackintosh's promise to settle the judgment, and further, that long before the proceedings were commenced, *viz.*: in April, 1901, O'Brien accepted the accounts as correct.

But assuming that there was consideration for the promise by Mackintosh to satisfy the judgment, it seems to me perfectly clear that the state of things contemplated by Mackintosh and O'Brien at the time of entering into the agreement of the 13th of January, 1900, was that the judgment against Manley could be bought for $500, payable after the Crown grant issued. That is, I should say from the evidence was common ground when the second application to sell was resisted: see the agreement of the 13th of January, 1900, the conduct of Mackintosh resisting the judgment; the acquiescence of O'Brien in that matter.

The contract entered into was not to satisfy it at any price and under all circumstances but with $500 payable after Crown grant issued. It was never contemplated that Mackintosh should advance $500 without security, nor was he expected to bind himself by contract to purchase this judgment, irrespective of whether the Crown grant did or did not issue. Unfortunately there was no provision in the contract made in contemplation of the refusal of Mr. Hamilton to carry out the plan arranged by Burnett and Mackintosh. Hence the difficulty of this case.

Whether the defendant puts his defence on the ground that there was in the contract between O'Brien and himself an implied condition that the judgment should remain open to purchase on the arranged terms, or on the ground of impossibility of performance by reason of Mr. Hamilton's refusal to release on the arranged terms, he is in my opinion entitled to succeed.

I think the appeal should be dismissed.

MARTIN, J.: This is a peculiar and most perplexing case, and it is only after much consideration and considerable difficulty that I have been able to reach a conclusion upon which to found my judgment.

The situation in truth, is that without knowing it the parties

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entered into an agreement which it is impossible to apply to the facts as they then existed, and furthermore, not only is neither party not now content to stand upon the agreement alone, but each asks the Court to import something new and material into it based upon oral evidence. I am satisfied that the written agreement does not contain the whole arrangement from the point of view of either party, and that each is entitled to repudiate it in the form in which it now stands. Under all the circumstances the only practical solution of the problem is for the Court to deal with the matter strictly on the facts so far as they can be extracted from the record.

The following facts are established to my satisfaction:

O'Brien at no time expected that Mackintosh was to be called upon to pay or become liable for more than $2,000 under the earlier or later agreement for the sale of O'Brien's timber and cordwood to Mackintosh.

After the original offer of December 12th, 1899, the existence of the Manley judgment was discovered, and it became necessary to re-open the matter and come to a new arrangement.

O'Brien knew that this judgment must be got rid of or he could not sell to Mackintosh, and through his agent or representative Burnett, he learned that it could at that time be paid off or purchased from Hamilton for $500.

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But O'Brien also knew that Mackintosh would not pay off this judgment until after the issue of the Crown grant to O'Brien, nor did O'Brien ever expect that Mackintosh, having a proper regard for his own protection, would pay off the judgment until after that event.

Both parties at the time of the signing of the second agreement of the 13th of January, 1900, believed that it was then possible to purchase that judgment without paying for it till after the Crown grant had issued.

But at no time was it possible to have purchased that judgment on that condition. The success of Hamilton's contention in this Court on this point places this beyond argument.

Therefore the parties really came to an agreement in ignorance of the fact that its performance upon the conditions it was contingent upon was impossible; nevertheless, the whole arrange-

ment was conditional upon the possibility of such performance.

The result is that there is really no base whatever for the agreement, written or verbal, to rest upon; the bottom has fallen out of the whole transaction and all that can be done on a garnishee issue such as this (wherein the question to be tried is—was Mackintosh indebted to O'Brien at the time of the service of Manley's garnishee order on Mackintosh?) is to declare the rights and liabilities of the parties so far as is necessary to decide that issue.

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Strangely enough, neither party has formally, so far as has been made to appear to us, rescinded the agreement, but both have allowed matters to drift into further complications till the real turning point of the case has become obscured.

I have not overlooked the point that Mackintosh stated in effect at the meeting that he had settled the Manley judgment for $500 or thereabouts, and that O'Brien need not concern himself about it and would be protected against it. But, except so far as regards the costs of the subsequent proceedings, no harm whatever resulted to O'Brien from Mackintosh's mistake in this respect, because O'Brien clearly understood that Mackintosh was not to be called upon to make the payment for the judgment till after the issue of the Crown grant, and so, quite irrespective of Mackintosh's mistake, the sale would have then and there fallen through if it were known that it was impossible to purchase the judgment on that condition. And it has not even been suggested that any one would, at any time, have bought the timber at the price and upon the terms mentioned if one of the terms involved the assumption of the Manley judgment at its then full face value, *i.e.*, $1,023.66. It is plain that if the parties had known the real state of affairs the agreement would never have been drawn up in its present terms. O'Brien always was liable for the full amount of the Manley judgment, and he could not have sold his timber to anyone until he had satisfied it. Had he taken the stand that Mackintosh was to pay off the judgment before the Crown grant issued, the negotiations would have been at once declared off by Mackintosh, who was originally endeavouring, I am satisfied, to assist O'Brien in a friendly way. So far then as the judgment is concerned, O'Brien is liable

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for it to-day as he was on January 13th, 1900, and nothing Mackintosh has done has altered his position in this respect for better or worse. Nor was there any obligation imposed upon Mackintosh under the circumstances to alter O'Brien's position in this respect for the better. If this were an action to rescind the contract, that would be decreed, and an account if necessary, and Mackintosh would be ordered to deliver up to O'Brien the Crown grant upon O'Brien's recouping Mackintosh for all the payments he, Mackintosh, has made (except in regard to the costs) under the said inoperative and nugatory agreement.

It seems desirable to state in view of the comments that were made at the bar upon the unsatisfactory manner in which Mackintosh gave portions of his evidence, that I have arrived at the above conclusion very largely upon O'Brien's account of it, though that is none too clear.

Regarding the costs, they stand on quite a different footing. They were all practically incurred because of Mackintosh resisting the motions to sell O'Brien's lands under the Manley judgment, on the ground that he, Mackintosh, had already purchased or discharged that judgment by an arrangement he made with Hamilton. This contention Mackintosh failed to sustain, and on every principle of justice he should alone bear the costs of his failure to support the plea he set up. It is true that O'Brien's name was also used in the proceedings in conjunction with Mackintosh's, but the position of the parties was such that O'Brien was practically forced to support Mackintosh on the faith of Mackintosh's incorrect statements regarding the arrangement with Hamilton. It would not be just to compel O'Brien to pay for Mackintosh's carelessness in the matter of the attempts to purchase the judgment.

MARTIN, J.

It follows from the foregoing that the garnishee, Mackintosh, is not indebted to the judgment debtor, O'Brien, and the issue must be decided in favour of the defendant therein, Mackintosh.

The judgment below is affirmed, and the appeal dismissed with costs.

Appeal dismissed with costs.

MILLS v. THE CITY OF VANCOUVER *ET AL.*

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Health Act—Smallpox—Detention of person exposed to infection—Suspected case only.

Section 75 of the Health Act provides that when smallpox, scarlet fever, diphtheria, cholera or any other contagious or infectious disease dangerous to the public health is found to exist in a municipality, the health officers shall use all possible care to prevent the spreading of the infection or contagion:—

Held, that health officers were justified under this section in detaining a person who had been exposed to infection from a person suspected of having smallpox, but who in reality had measles.

APPEAL from the judgment of MARTIN, J.

This was an action by a resident of Vancouver against the Corporation of the City of Vancouver, Dr. McAlpine, the City Medical Health Officer and Robert Marrion, the City Health Inspector, for damages for alleged unlawful detention. The plaintiff and one Turnbull, were lodgers in the Miller block, Vancouver, in March, 1902. On the 15th of March, 1902, Turnbull was discovered to be ill, and Dr. Riggs who was first called in suspected that he was suffering from smallpox, and Dr. McAlpine was then called and he also suspected that Turnbull had smallpox. Plaintiff was quarantined on the 16th of March and in the evening Dr. McAlpine and Marrion came to the plaintiff's room and made him submit to vaccination. Plaintiff was detained in the building till about noon the next day, March 17th, when he was allowed to go. Turnbull did not have smallpox, but he did have measles. At the next meeting of the City Board of Health (which is a committee of the City Council) held after the occurrence, Dr. McAlpine reported the facts and the Board commended his action, but no resolution or minute of it was made, the City Clerk stating at the trial that there had been no record of it kept—"the smallpox business" as he stated, "is conducted on a basis that precludes any information being given on account of keeping it away from the public."

Statement

The action came on for trial at Vancouver on the 25th of July,

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1902, before MARTIN, J., and a special jury, but the learned Judge took the case away from the jury and dismissed the action.

The plaintiff appealed and the appeal was argued at Vancouver on the 22nd of April, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

A. D. Taylor, for appellant: The Health Act did not justify the defendants acting in a suspected case of smallpox the same as though it were a real case; by commending its officers the Board ratified or adopted their illegal act. Section 76 is the only provision authorizing detention and then only when there is a case of one of the specific diseases mentioned in the section. Section 87 is the only section in which any mention is made of measles, and express provision is made in regard to that disease. Section 75 is limited by section 76 and some distinction must be made between measles and smallpox. The regulations made by the Provincial Board of Health pursuant to section 10 of the Act, make a distinction between a suspected case and a real case of smallpox and it is only when a case actually exists that detention is authorized. See the regulations of the 15th of February, 1900, Secs. 12 and 13, and the supplementary regulations of the 14th of November, 1901.

Argument

Hamersley, K.C., for respondents, was not called on.

HUNTER, C.J.: I think the appeal must be dismissed. With regard to the discussions of the Board of Health when the actions of Dr. McAlpine and Marrion were commended, I do not assent to the proposition that the Corporation can be made liable for such a discussion not followed up by some corporate Act.

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There is no suggestion of malice or bad faith on the part of the officers and I think there was ample authority under section 75 of the Act to justify the detention of the plaintiff independently of any question about the regulations.

DRAKE, J.: I agree.

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IRVING, J.: I concur. Section 76 creates an offence which the particular person affected with the disease commits by mingling with the general public before certain prescribed sanitary

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precautions have been complied with; and section 78 is not confined to cases mentioned in section 76.

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Appeal dismissed with costs.

EMERSON v. ERWIN *ET AL.*

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Promissory note—Indorsement—Evidence to vary written contract—Bills of Exchange Act, Sec. 55, Sub-Sec. 2.

Parol evidence will not be received to shew that a person who indorsed a promissory note to another for valuable consideration stipulated at the time that he was not to be liable on the indorsement.

Smith v. *Squires* (1901), 13 Man. 360, followed.

APPEAL from the judgment of HENDERSON, Co. J.

The action was for the amount of a promissory note made by the Great Northern Canning Company payable to the order of the defendant Erwin and indorsed by him and the other defendants and taken by the plaintiff as a part payment for a piano sold by him to defendant Erwin.

At the time of the sale Emerson gave Erwin the following receipt:

"Vancouver, B.C., January 3rd, 1902.

"Received from Mr. W. Erwin the sum of $500 in full payment for one Chickering Bros. piano, No. 6,168, payment for which has been made in the following manner:

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"By note Great Northern Canning Co., Ltd., dated March 1st, 1901, and due January 4th, 1902, for.....	$475 00	
Interest on same at 6 per cent.....	23 50	
		498 50
Less discount	48 50	
Total price allowed for note.....	450 00	
Balance cash.....	50 00	
		$500 00"

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Erwin pleaded that he purchased a piano from the plaintiff for the sum of $500 and "that the plaintiff agreed to take and did take at a valuation of $450 the note in question from this defendant as part payment of the price of the said piano and agreed to release and did release this defendant from all liability thereon."

At the trial before HENDERSON, Co. J., and a jury the defendant was allowed to give evidence of the agreement that he was not to be liable on the indorsement and the jury found a verdict in his favour and judgment was entered accordingly.

The plaintiff appealed, the appeal being argued at Vancouver on the 28th of April, 1903, before DRAKE, IRVING and MARTIN, JJ.

Argument

A. D. Taylor, for appellant: The parol evidence to vary the written instrument should not have been allowed. He referred to Bills of Exchange Act, Sec. 61, Sub-Sec. 2; *Pike* v. *Street* (1828), Moo. & M. 226; *Castrique* v. *Buttigieg* (1855), 10 Moo. P.C. 108; *Gillespie, Brothers & Co.* v. *Cheney Eggar & Co.* (1896), 2 Q.B. 59; Maclaren, 339. The exact point has been determined in Manitoba in the appellant's favour in *Smith* v. *Squires* (1901), 13 Man. 360 (not cited at the trial).

The Court called on

Bowser, K.C., for respondent: The receipt given by plaintiff to defendant is a sufficient memorandum in writing to vary the written agreement. *Smith* v. *Squires* was wrongly decided. He relied on Byles, 15th Ed., 175, 179; *Pike* v. *Street, supra*; *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733 (language of Lord Watson) and *Foster* v. *Dawber* (1851), 20 L.J., Ex. 385.

DRAKE, J.

DRAKE, J.: Under section 61, sub-section 2 of the Bills of Exchange Act the rights of a holder of a note may be renounced, but the renunciation must be in writing. Mr. *Bowser* contends that the receipt given by Emerson to Erwin shews an agreement that Erwin should be freed from liability on the note, but I cannot read the receipt in that way; if it had intended that it would have said so. In *Smith* v. *Squires* the authorities are fully discussed and although the decision is not binding on this Court it

is according to my views. The appeal should be allowed with costs.

IRVING and MARTIN, JJ., agreed.

Appeal allowed with costs.

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McLEOD *ET AL* v. THE CROW'S NEST PASS COAL COMPANY, LIMITED.

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Practice—Test action—Substitution of another action as test action.

After one of a number of actions brought by different plaintiffs against the same defendants in respect of causes of action which are identical, has been ordered to be tried as a test action, the Court has power to substitute another action as a test action.

Twenty-nine actions were brought by different persons against defendants for damages caused by the death of relatives in an explosion in the defendants' coal mine, and on plaintiffs' application an order for a test action was made, the order providing that defendants, if dissatisfied with the result of the test action, might apply to have the other actions proceeded with and that they might apply to have any of the actions forthwith proceeded with if there existed any special ground of defence applicable to it, and not raised in the test action. After obtaining the order, plaintiffs' solicitor discovered that on account of the particular place in the mine at which McLeod was killed, a separate defence not applicable to the other cases might apply, and an application was made for the substitution of another action as the test action:—

Held, reversing WALKEM, J., who held that there was no jurisdiction to substitute another action, that the object of the order, which was provisional in its nature, was to have a fair test action, and as the one chosen would not be a fair one, another should be chosen.

APPEAL from the order of WALKEM, J., refusing plaintiffs' application to substitute the action of Leadbeater *et al* against the defendants for the action of McLeod *et al* against the defendants for trial as a test action. Statement

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Actions to the number of twenty-nine had been brought against the defendants by different plaintiffs for damages caused by the death of relatives in an explosion in defendants' coal mines numbers 2 and 3 at Fernie, and on the 20th of January, 1903, on the application of the plaintiffs an order for a test action was made by WALKEM, J., in the following terms:

It is ordered as follows:

(1.) That the further proceedings on the part of either the plaintiffs or the defendants in each and all of the above named actions, except the action in which Margaret McLeod, Phillip McLeod, John McLeod, Margaret McLeod, Donald McLeod, John R. McLeod, Murdock McLeod, George H. McLeod and Angus M. McLeod, infants, by Margaret McLeod, their next friend, are plaintiffs, and The Crow's Nest Pass Coal Company, Limited, are defendants (hereinafter styled the action of *McLeod et al* v. *The Crow's Nest Company*), shall be stayed pending the determination of the said action of *McLeod et al* v. *The Crow's Nest Company*, except in so far as it may be necessary for the plaintiffs in any of said actions to take evidence *de bene esse* of any plaintiff in any of said actions as to the damages sustained, or the relationship of such or any of the plaintiffs to the deceased by reason of whose death any one of said actions is brought; the plaintiffs in each and all of said actions respectively undertaking that the action of *McLeod et al* v. *The Crow's Nest Company* shall be treated as a test action and decisive of their respective rights, save as to the quantum of damages, if any, that the said respective plaintiffs may be entitled to receive, unless it should appear to the Court that the said test action has failed to be a real trial of the matter in issue therein, in which case the plaintiffs undertake to be bound by any order that the Court may think fit to make; the defendants to be at liberty to apply to the Court at any time after the determination of the said action of *McLeod et al* v. *The Crow's Nest Company* for an order requiring the plaintiffs to proceed with their respective actions if the defendants shall be dissatisfied with the result of the test action, and if such application is refused, then the said action of *McLeod et al* v. *The Crow's Nest Company* shall be deemed to have been decisive of the rights of the defendants as well as of

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the plaintiffs; and further, that the defendants shall be at liberty to apply for an order that any of said actions shall be forthwith proceeded with upon satisfying the Court, or a Judge, that there is a special ground of defence applicable to such particular action, which is not raised in the said test action.

(2.) That the costs of and incidental to this application and order shall be costs in the said action of *McLeod et al* v. *The Crow's Nest Company.*

Shortly afterwards an application was made by plaintiffs to substitute the Leadbeater action as the test action, the reasons for which are set out in a letter from *S. S. Taylor, K.C.*, counsel for plaintiffs, to *E. V. Bodwell, K.C.*, one of the counsel for defendants, and which letter was in part as follows:

"26th Jan., 1903.

"*Re Crow's Nest Pass Co. Suit.*

"Dear Sir:—

"This action was selected by myself, then being under the impression that Malcolm McLeod had not been killed in the vicinity of McDonald's level, and I was strongly under the impression that none of the actions brought were with respect to persons killed in or near McDonald's level.

"To my very great surprise, the matter having been referred to, subsequent to the granting of the above order, by Mr. Davis, I then learned that Malcolm McLeod had been killed at the end of Alder's level, which is within a few feet of McDonald's level and runs parallel thereto.

Statement

"I immediately consulted the Government report of the accident, which report I had not seen before, it having only very lately been issued, and there I confirmed the statement made by Mr. Davis. In addition I saw one of the plaintiffs in these actions namely, Hugh Dixon, and he, after consulting his son, confirmed the fact of the killing of said McLeod in said Alder's level.

"The result is, that through a mistake of mine in not having had prior thereto accurate information as to the place where said McLeod was killed, have chosen the action of *McLeod et al*

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as a test action, when in point of fact it would be a gross injustice to require all other plaintiffs in the other actions to be bound by the result of that action of *McLeod et al*, for the reason that a separate defence will apply to *McLeod et al* case which cannot be made as to the other cases, and this defence may be that if the explosion originated in McDonald's level through an initial explosion of gas and then spread from that level by dust as a conveying medium, it might be successfully contended that while all other persons were killed by a dust explosion ignited or initiated by gas, still as to McLeod, he alone was killed by the gas explosion, and then if the jury believed that such gas in the first instance was ignited by the carelessness of a fellow servant in the same locality, it would or might defeat the action of *McLeod et al*, and such defence would not prevail against any of the other plaintiffs in the other actions.

"I never intended to choose as a test action any with respect to men killed in or near McDonald's level and thought we had no actions for persons killed in that locality. The mistake was a *bona fide* one and one that I am in duty bound to rectify.

"The suit of *Leadbeater et al* will be a test action. The deceased was killed in the main haulage way and not near the machine rooms of McDonald's level, namely, not near either place where different parties contend that the explosion originated. This last named action is a representation of all others in every respect except as to *McLeod et al* in the feature above named.

Statement

"I desire to substitute *Leadbeater et al* for *McLeod et al* in the above named order made by Mr. Justice WALKEM, and will consent to the necessary substitution as to the *Wilson* appeal.

"This request is absolutely *bona fide* and there is no other reason than the above for making this request. I will take out an order if you will state you consent or will not object. . . ."

The application came on on the 27th of February, before WALKEM, J., who dismissed it on the ground that he had no jurisdiction to grant it.

On the return an affidavit of Mr. *Bodwell's* was read stating "that if it is held on this application that the Court has jurisdiction to alter the present order for a test action, it will be

necessary, and the Company are desirous of filing further material on the question of whether any, and if so, what change should be made in the order for a test action."

The appeal was argued at Vancouver on the 8th of April, 1903, before HUNTER, C.J., DRAKE and MARTIN, JJ.

S. S. Taylor, K.C., for appellants: The Court must have jurisdiction to substitute one action for another; a plaintiff might not go on or there might be collusion and in either of such cases gross injustice would result if there were no power of substitution. Amongst the actions there are two classes, one being those arising out of accidents in McDonald's level and the other being those arising out of accidents in other districts of the mines. Two test actions would answer the purpose. He cited *Amos* v. *Chadwick* (1878), 9 Ch. D. 459 at p. 464 and *Bennett* v. *Lord Bury* (1880), 5 C.P.D. 339.

Davis, K.C., for respondents: This is not merely a question of two test actions, but there is no power under the circumstances of this case to change the test action. At first Mr. *Taylor* made an affidavit that all the actions were practically identical and that the evidence in all would be identical, and he chose the *McLeod* case as a fair test action; he now says the *Leadbeater* case would be a fair test action including the *McLeod* case; on our appeal before the Full Court, in which we asked for particulars (the *Wilson* case) he said the cases were all the same and that the want of particulars would not worry us in preparing for trial. The cases referred to do not shew any jurisdiction for such a substitution: in *Amos* v. *Chadwick* the plaintiff refused to go on, so the Court made a new order. He cited *Preston Banking Company* v. *William Allsup & Sons* (1885), 1 Ch. 141.

Argument

The application is premature; if there had not been a fair trial of the test action they could apply for a new trial, but what they want now is a new test action which in some respects they think will be more favourable for them.

[HUNTER, C.J.: How are you prejudiced? The order for a test action protects you].

Until that test action is tried there is no jurisdiction to substitute another; it is unfair to bind us down; sweep away the

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order for a test action altogether; this is designated by the Court as a "test action" and the protection in the order is no real protection to us.

Taylor, was not heard in reply.

HUNTER, C.J.: The Court has jurisdiction to make the order asked for; the object of the order, which is provisional in its nature, was to have a fair test action, and if the Court is satisfied that the one chosen would not be a fair test, it has the power to and will substitute another. There would be no justice in binding the parties down to a choice made by their solicitor in mistake.

HUNTER, C.J.

The appeal should be allowed—costs in the cause.

DRAKE and MARTIN, JJ., agreed.

Appeal allowed—costs in the cause.

On the 23rd of April, *Davis, K.C.*, applied to the Full Court (HUNTER, C.J., IRVING and MARTIN, JJ.), for leave to appeal to the Privy Council and for a stay of proceedings pending appeal.

Sir C. H. Tupper, K.C., opposed the motion.

Leave to appeal was refused.

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v.
C. P. R.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA *EX REL.* THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Practice—Cause of action—Crown—Foreshore—Order XIX., r. 27 and Order XXV., rr. 2 and 4.

In an action for damages and an injunction the plaintiff alleged in the statement of claim that the defendant Company had wrongfully erected

an embankment on the foreshore of Burrard Inlet and thereby obstructed the outfall of sewers, to the damage and annoyance of the people of Vancouver:—

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Held, on an application to strike out the pleading as embarrassing and as disclosing no cause of action, that the pleading was good.

In such an action it is not necessary for the plaintiff to allege ownership in the foreshore.

Semble, a combined application may be made under Order XIX., r. 27 and Order XXV., r. 4 to strike out a statement of claim on the ground that it is embarrassing and discloses no reasonable cause of action and such procedure is not limited to cases which are plain and obvious.

APPEAL from an order of DRAKE, J.

Paragraph 3 of the statement of claim alleged that "the defendants in the year 1898, wrongfully erected and ever since maintained and still maintain an embankment on the foreshore of Burrard Inlet in the Province of British Columbia, and thereby obstructed and thenceforward continued and continue to obstruct the outfall of the sewers of the City of Vancouver to the damage and annoyance of the inhabitants of the said City," and the plaintiffs claimed damages and an injunction to restrain the defendants from continuing the obstruction complained of. The defendants applied on summons to have said paragraph 3 struck out on the ground that it tended to prejudice, embarrass and delay the fair trial of the action, and also on the ground that it disclosed no reasonable cause of action. The summons was dismissed by DRAKE, J., and the defendants appealed, the appeal being argued at Vancouver, on the 22nd of April, 1903, before HUNTER, C.J., IRVING and MARTIN, JJ.

Statement

Davis, K.C., for appellants: The facts on which the plaintiff relies should be set out; the word "wrongfully" under the present system of pleading means nothing; it is merely an epithet of abuse; it must be shewn that we have committed a legal wrong. If the foreshore belongs to the defendants they may put up an embankment and the plaintiff may be in the wrong in running sewers over it; it is not alleged that the plaintiff owns the foreshore, or has any right to run the sewers over the foreshore. He cited Bullen & Leake, 4th Ed., 7; Odgers, 4th Ed., 82, 83; *Hurdman* v. *North Eastern Railway Co.* (1878), 3 C.P.D.

Argument

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at p. 171; *Day* v. *Brownrigg* (1878), 10 Ch. D. 294 at p. 302; *Philipps* v. *Philipps* (1878), 4 Q.B.D. 127; *Turquand* v. *Fearon* (1879), 48 L.J., Q.B. 703; *Harris* v. *Jenkins* (1882), 22 Ch. D. 481 and *Lord Hanmer* v. *Flight* (1876), 35 L.T.N.S. 127.

Wilson, K.C., for respondent: This is an action by the Crown to suppress a public nuisance and it is sufficient to aver that a nuisance has been committed; *prima facie* property in the foreshore is in the Crown and so it is not necessary to aver ownership or that ownership has not been parted with; see *Brine* v. *Great Eastern Railway Co.* (1862), 31 L.J., Q.B. 101; Bullen & Leake, 5th Ed., 484; *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.* (1882), 21 Ch. D. 752.

The defendants have adopted a wrong practice: see Order XIX., r. 27 and Order XXV., rr. 2 and 4. The point should have been raised under Order XXV., r. 2, either by consent or by leave of the Court or a Judge; the summary procedure under Order XXV., r. 4 is only intended to be had recourse to in plain and obvious cases; see An. Pr. (1903), pp. 309-10 where cases are collected, and see particularly *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark* (1899), 1 Q.B. 86 at p. 91. Order XIX., r. 27 applies primarily to cases in which the pleadings are unnecessary or scandalous. It was never intended to revive pleadings by demurrer without leave.

Argument

Davis, in reply: The cases shew that the practice adopted here is the general practice.

[HUNTER, C.J.: You need not deal with that—come to the pleadings].

This case depends on our right to put up an embankment; it may be *damnum sine injuria;* the plaintiff may have caused the nuisance by running the sewer on our land.

As to the necessity for the plaintiff to allege ownership in the foreshore. Crown land may be granted away and so may the foreshore; under the B.N.A. Act the foreshore in all public harbours belongs to the Dominion, so the statement of claim must allege that the plaintiff owns the foreshore; he may have owned it once, but it does not follow that he still owns it. The Canadian Pacific Railway Act shews a grant of the foreshore in Vancouver harbour to the Canadian Pacific Railway.

HUNTER, C.J.: I do not think there can be any object in reserving judgment. For my part I must say I was inclined very much to think that the statement of claim was really nothing more than an indorsement on a writ, and it certainly is a very meagre statement of the facts constituting the cause of action. I cannot fail however to be impressed with the fact that the forms in the appendix clearly do not state in all cases all the material facts which are necessary to make a good cause of action.

As to the defendants' contention that the pleading is so framed that they may be taken by surprise, the rules providing for particulars may be invoked.

As to the status of the plaintiff there can be no doubt, as even if Vancouver harbour is vested in Canada the foreshore in question in this action includes land outside the limits of the harbour.

HUNTER, C.J.

IRVING, J.: I concur.

IRVING, J.

MARTIN, J.: The difficulty in the matter has arisen in a rather peculiar way. I quite agree that if this were a case which was being tried, say, in England where the right of the Crown exists territorially over the whole Kingdom, there could be no possible doubt that by the mere allegation that it was foreshore the point would be sufficiently raised. As Lord Herschell puts it in *Attorney-General* v. *Emerson* (1891), A.C. 649, the Crown is *prima facie* entitled to the foreshore and no further allegation is necessary. But the same question then arises here that arose in the *Attorney-General* v. *E. & N. Ry. Co.* (1900), 7 B.C. 221, *viz.*: where the title is *prima facie* vested in the Crown, the question is—because of the peculiar nature of our Constitution—if in the Crown, in what right, Federal or Provincial? Here, the statement of claim alleges the plaintiff to be His Majesty's Attorney-General for the Province of British Columbia. Now, if that be so, the B.N.A. Act comes into operation, and its effect is, without further allegation, to establish a distinct jurisdiction in certain cases over the foreshore and separate it in that respect from the ordinary lands of the Crown—*i.e.*, distinguishing the Crown Federal rights of foreshore from the Crown Pro-

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vincial rights in Crown Provincial lands, and rendering it impossible that the same inference from the same allegation should be drawn here which has been drawn in England. Therefore, I am of the opinion that the allegation herein is not sufficiently specific and is uncertain in that it does not shew by what right the Attorney-General for the Province of British Columbia claims the foreshore in question; on the facts so far disclosed on the record, by the operation of the B.N.A. Act, the sole inference is that it belongs to the Crown in the right of the Federal Government. And so I think that the appeal should be allowed.

Appeal dismissed, Martin, J., dissenting.

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Nov. 9.

MORGAN
v.
THE BRITISH YUKON NAVIGATION CO.

MORGAN v. THE BRITISH YUKON NAVIGATION COMPANY, LIMITED.

Medical attendance—Duty of ship owner to provide—Merchants Shipping Act, 1894, Sec. 207.

A ship owner is under no duty either at common law or under section 207 of the Merchants Shipping Act, 1894, to provide surgical or medical attendance for the ship's company.

APPEAL from an order of WALKEM, J.

This is an action by a seaman for damages for personal injuries sustained while in the discharge of his duties on the defendants' steamer, the Yukoner. After the statements of claim and defence had been delivered, the plaintiff applied for leave to amend his statement of claim by adding an allegation that "under the pro-

Statement

visions of the Merchants Shipping Act, 1894 (section 207), and section 209 of the Criminal Code, and otherwise at law the Company were under a legal duty, without undue delay, to provide necessary surgical and medical advice and attendance and medicine and to maintain the defendant, until cured, and to defray the expense of all necessary medical and surgical advice, attend-

ance and appliances," and a claim thereunder for additional damages. On the hearing of the summons, WALKEM, J., refused leave to make the proposed amendment, on the ground that it shewed no cause of action.

The plaintiff appealed and the appeal came on for argument at Vancouver, on the 9th of November, 1903, before HUNTER, C.J., IRVING and MARTIN, JJ.

A. D. Taylor, for appellant, opened and the Court called on

Cassidy, K.C. (*O'Brian*, with him), for respondent, who contended the proposed amendment disclosed no cause of action, citing *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441 and *Cowley* v. *Newmarket Local Board* (1892), A.C. 345 at p. 352.

Argument

The Court then called on

Taylor: The plaintiff could not withdraw himself from the charge of the captain; he should have been taken to Dawson for medical attendance, but instead, after a delay of five days, he was landed at White Horse, where the hospital was inadequately equipped.

Per curiam: A ship owner is under no duty, either at common law, or under section 207 of the Merchant Shipping Act, 1894, to provide surgical or medical attendance for the ship's company. The appeal is dismissed with costs.

Judgment

Appeal dismissed.

Note:—During the hearing of another appeal (*Arnold* v. *Vancouver*) at the same sitting, it appeared that the regulations in regard to the preparation of appeal books issued by the Judges on the 23rd of February, 1903, had been ignored. The Court announced that no costs would be allowed for the preparation of appeal books unless prepared in accordance with the regulations, and the Registrar was directed not to receive books in future, unless so prepared.

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IN RE PROVINCIAL ELECTIONS ACT.

Elections Act—Application for registration—Affidavit—Official to take.

IN RE PROVINCIAL ELECTIONS ACT

Under the Provincial Elections Act and amendments an affidavit or application to be placed on the Register of Voters for an Electoral District may be sworn outside the Province of British Columbia; and the venue and jurat of the affidavit, Form A., Provincial Elections Act Amendment Act, 1902, may be varied to conform to that fact.

The affidavit may be sworn before a Commissioner for taking affidavits in and for the Courts of the Province, or before any of the officers named in section 4 of the said Amending Act of 1902, provided they derive their power from Provincial authority, or ordinarily reside and perform their duties within the Province.

The Lieutenant-Governor in Council has power under the Elections Act and section 11 of the Redistribution Act to make regulations providing that affidavits sworn outside the Province may be received by Collectors of Voters and the applicants' names be placed upon the Register.

Per WALKEM and DRAKE, JJ.: Acts affecting the franchise should be construed liberally so as not to disfranchise persons having the necessary qualifications of voters.

QUESTIONS referred, under section 98 of the Supreme Court Act, by the Lieutenant-Governor of British Columbia by and with the advice of His Executive Council, to the Full Court for hearing and determination.

The following were the questions referred:

Statement

(1.) Under the Provincial Elections Act and Amendment Acts of the Province of British Columbia, can an application to be placed on the Register of Voters for an Electoral District in the Province be sworn or affirmed outside the limits of the Province; and can the venue and jurat of the affidavit, Form A., Provincial Elections Act Amendment Act, 1902, be varied to conform to that fact?

(2.) If the answer is in the affirmative, what official may administer the oath or affirmation?

(3.) If the Provincial Elections Act provides no machinery

for dealing with applications by persons temporarily outside the Province, has the Lieutenant-Governor in Council power under the Provincial Elections Act and Amendment Acts, and section 11 of Chapter 58 of the Statutes of 1902, being the Redistribution Act, 1902, to make regulations on this subject whereby any such affidavits or affirmations made without the Province may be received by the Collectors of Voters, and the applicants' names be placed upon the Register of Voters?

Section 3 of the Provincial Elections Act Amendment Act, 1902, provided a form of affidavit or application for registration as a voter, the form of jurat being given as follows:

Sworn (*or* affirmed) before me at in the Province of British Columbia, this day of A. D. 19 .

Section 4 of the Act provided that the affidavit may be sworn or affirmed before any Justice of the Peace, Mayor, Reeve, Alderman, Councillor, Commissioner for taking Affidavits in the Supreme Court, Registrar of Titles, Deputy Registrar of Titles, Notary Public, Collector of Voters, Provincial Constable, Special Provincial Constable, Government Agent, Government Assessor, Mining Recorder, Deputy Mining Recorder, Judge of any Court, Stipendiary Magistrate, Municipal Clerk, Municipal Assessor, Postmaster, Postmistress or Indian Agent.

Statement

The questions came on for argument at Victoria on the 24th of July, 1903, before HUNTER, C.J., WALKEM, DRAKE and IRVING, JJ.

Duff, K.C. (*Helmcken, K.C.*, with him), for applicants: The affidavits may be made before any of the officers named who derive their authority from the Province; some of these officers may be outside the Province, *e.g.*, Commissioners for taking affidavits.

The Legislature did not intend that applications could not be made outside the Province in view of the fact that it is notorious that large numbers of voters are outside during different portions of the year.

Argument

As to the third question, it is submitted that on the ground that a difficulty has arisen and because of the machinery for carrying out the provisions of the Act being defective, section 11 of the Redistribution Act of 1902, giving the Lieutenant-Gov-

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ernor in Council power to make regulations may be invoked.

Belyea, K.C., for Attorney-General: Originally the application to be placed on the Register of Voters was simply a signed statement of the name in full, residence and occupation of the party applying, unsworn and unwitnessed, Form A., Cap. 38, Consolidated Statutes of B.C. 1888, and R.S.B.C. 1897, Cap. 67. By Cap. 25, 1899, Sec. 40 this form was abolished and another substituted to which were attached certain interrogatories to be answered by the applicant, whose signature must be made in the presence of a witness.

Then in 1902 this form of application was abolished and a new form substituted. This Form "A." is under oath or affirmation; and by section 4 of the same Act this form, therein called an affidavit, may be sworn before the officers mentioned in the section. The officers mentioned all exercise authority as Provincial officers.

It is submitted that none of these officers can exercise their authority outside the limits of the Province, nor can it be that the Legislature intended that officers of other Provinces or countries of the same designation could take the affidavit in question.

Persons appointed by Provincial authority to take affidavits without the Province for use in the Supreme Court might do so, if within the designation "Commissioner for taking affidavits in the Supreme Court": section 4, Cap. 21, 1902. Strictly, there are no officers so designated: R.S.B.C. 1897, Cap. 3, Sec. 12.

Argument

It does not appear from the Elections Act or any of the amendments thereto, that it was intended this affidavit should be made without the Province. In the application before the Court the affidavit is sworn before a Notary Public "in and for the Province of Ontario." This is clearly bad, and the Collector is right in refusing to place the name of the applicant on the Register of Voters.

Chapter 21 of 1902, Secs. 11 and 12, it is submitted does not help, as in this case the subject-matter dealt with is redistribution.

Section 5 cancels the then existing Register of Voters, and section 6 makes it imperative that every person desiring to be

registered should apply as provided by Cap. 67, and section 7 preserves Cap. 67 as to preparation of the new Register of Voters.

It is submitted that therefore sections 11 and 12 will relate only to such regulations as are necessary to carry out redistribution. No person has an inherent right to vote, the franchise or right to vote is a creation of the statute and can only be acquired and exercised in conformity with the statute.

*28th July, 1903.

HUNTER, C.J.: Owing to the urgency of the case we think it is better to give our decision now rather than to reserve judgment.

Speaking for myself, I am of the opinion that it is quite clear, in the first place, that the Legislature did not intend to disfranchise any person simply because he might be temporarily absent from the Province, especially applicants in the position of Mr. Earle, who have public duties to perform elsewhere; I do not think that can be gainsaid. The sole question is whether the machinery has been provided in order to enable such persons to get on the list.

Now, dealing with section 11, sub-section (*b.*), the Collector is required not to insert the name of any person on the list unless the Form A. is furnished in accordance with the Act. Some meaning has to be given to the words "in accordance with the Act." And we have to look at what is in Form A. We find everything on page 71 of this edition of the Act which has been handed to me, is included in this Form A. And it is obvious at a glance that it was not the intention of the Legislature to have everything inserted in the application which is on that page. Included in it, for instance, is the title "Form A;" I do not think it could be seriously contended that the omission of that would affect it. And again, the presence of the note which is at the bottom of that page, which says:

"Any person applying for registration in any Electoral District while his name appears on the Register of any other District is liable to a penalty of fifty dollars. Any person who takes

*The decision was given at the conclusion of the argument and subsequently written opinions were handed down.

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any false affidavit (or affirmation), is guilty of perjury and liable to fourteen years' imprisonment,"

would not be essential to the validity of the application. That being the case, it is evident that the Legislature did not intend that all that appears there should appear in the application in order to constitute a good application.

Then the only question is as to whether that portion of the jurat in the form which mentions that the affidavit is taken in the Province of British Columbia, is a vital or essential part of the form. I do not think it is. In the first place, there is nothing in the Act which says that this affidavit is not to be sworn outside of the Province, or, affirmatively speaking, is to be sworn in the Province. The only place in which anything is said about that is in this form. I do not think it is an essential part of the form to say that the affidavit is sworn in British Columbia. It is essential according to *Archibald* v. *Hubley* (1890), 18 S.C.R. 116, that it shall be stated to be sworn before the Commissioner before whom it purports to have been sworn. But it is not essential to making it a good affidavit to mention the place mentioned in the form.

Now, that being the case, there being nothing in the body of the Act to say that the affidavit shall not be sworn outside of the Province, I do not think the affidavit is invalid merely because it is sworn outside the Province, as if it states where it is sworn it is "in accordance with the Act," and it is moreover plain that if we were to hold that the wording of the jurat had to be strictly followed we should reduce the expression "and shews such person to be entitled to be placed on the Register of Voters" to useless verbiage.

HUNTER, C.J.

With respect to the section providing for officers to take these affidavits, if it were necessary to so hold, I would be quite prepared to hold that such an affidavit could be taken before a Commissioner appointed to take affidavits outside the Province for use within the Province, because that officer is a Provincial officer just as much as a Commissioner for taking affidavits within the Province. I am inclined to think too that the other officers named in the section are *personæ designatæ*, *i.e.*, that all included in the list who derive their powers from Provincial

authority, or who ordinarily reside and perform their duties within the Province could take these affidavits outside as well as inside the Province. For instance, I think that the Mayor of Victoria could administer the oath in Seattle just as effectually as in Victoria.

But under all the circumstances, I think the best course for the proper authorities to take would be to avail themselves of the powers conferred by section 210 (*a.*) of the Elections Act, and section 11 of the Redistribution Act, and to provide a proper form for the use of persons temporarily residing outside of the Province, and, especially naming proper officers before whom the affidavit is to be sworn. And I think further, it may perhaps be a good plan to provide that such application should be put in a separate list, and that a separate list be made up of such voters, so that in any case of difficulty arising afterwards it will appear at once whether the application originated inside or outside the Province.

I would therefore answer the questions submitted to us as follows:

(1.) Under the Provincial Elections Act and Amendment Acts of the Province of British Columbia, can an application to be placed on the Register of Voters for an Electoral District in the Province be sworn or affirmed outside the limits of the Province; and can the venue and jurat of the affidavit, Form A., Provincial Elections Act Amendment Act, 1902, be varied to conform to that fact? Yes.

HUNTER, C.J.

(2.) If the answer is in the affirmative, what official may administer the oath or affirmation? A Commissioner for taking affidavits in and for the Courts of British Columbia, and any officer named in section 4 of the Provincial Elections Act Amendment Act, 1902, who derives his powers from Provincial authority, or who ordinarily resides and performs his duties within the Province.

(3.) If the Provincial Elections Act provides no machinery for dealing with the applications by persons temporarily outside the Province, has the Lieutenant-Governor in Council power, under the Provincial Elections Act and Amendment Acts, and section 11 of chapter 58 of the Statutes of 1902, being the

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Redistribution Act, 1902, to make regulations on this subject whereby any such affidavits or affirmations made without the Province may be received by the Collectors of Voters, and the applicants' names be placed on the Register of Voters? Yes.

WALKEM, J.: My answer to the first and second questions is as follows:

By section 4 of the Provincial Elections Act of 1902, the affidavit of an applicant to be registered as a voter may be taken before a Commissioner for taking affidavits in the Supreme Court, and also, amongst other officers, before a Notary. The Oaths' Act, Cap. 3, R.S.B.C. 1897, provides for the appointment of Commissioners within British Columbia, as well as without British Columbia, for the taking of affidavits for use in the Supreme Court, as well as other Courts of the Province. It is with the second class of Commissioners that we are concerned, namely, those appointed outside of the Province. The provisions relating to them appear in sections 11, 12 and 13 of the Act mentioned. Section 13 specifies who the Commissioners are to be, and, amongst them, names a Notary Public, who shall certify the affidavit under his hand and official seal.

Now, it is clear that any one of the persons named in section 13 has power as a Commissioner for taking affidavits in the Supreme Court to take the affidavit of an applicant for registration as a voter here who happens to be abroad. No commission would seem to be necessary, for the statute itself constitutes the persons named in section 13 as Commissioners "out of British Columbia."

WALKEM, J.

My answer to the third question is that rules and regulations may be made, provided they are not inconsistent with the provisions of the Provincial Elections Act, or of the Oaths' Act. This latter Act was not brought to our attention when the above questions were presented to us in Court.

It is a rule that franchise Acts should be liberally construed. The object of the Elections Act is to enfranchise and not disfranchise, persons who possess the necessary qualifications for being placed on the Voters' List; and hence the Act should, if

possible, be so construed as to forward that object: *Colquhoun v. Brooks* (1889), 14 App. Cas. 493.

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DRAKE, J.: In reply to the questions referred to the Full Court by His Honour the Lieutenant-Governor of British Columbia, I am of the opinion that question 1 should be answered in the affirmative.

The persons named in section 4 are entitled to take the affidavit mentioned in section 3 whether they are within or without the Province, provided that they are officers appointed by the Provincial Government, as there is no restriction in the Act limiting their powers to acts within the Province. The only restriction from which it is contended that the person before whom the affidavit is taken must be within the Province when the oath is taken is what appears in the jurat, "Sworn before me at.....in the Province of British Columbia." The affidavit is by section 2 of Cap. 21 to be in Form A. That form contains matters which are directory only, and the omission of which will not invalidate the affidavit. If the form varies from the statute, the statute will govern. The term "Commissioner for taking affidavits in the Supreme Court," for instance, is not restricted to Commissioners within the Province. There are numerous persons who hold commissions without the Province to take affidavits without the Province. If it had been intended to limit the officers to those within the Province, it was easy to insert restrictive words. The consequence is the language of the jurat must give way to the Act. I am also of opinion that under section 11 of Cap. 58, 1902, and section 20, Cap. 38, 1898 (which is an amendment to the Act of 1897, and the provisions of which by section 7 of Cap. 58, 1902, are made applicable to the last mentioned Act), it is within the powers of the Lieutenant-Governor in Council to make regulations deemed necessary for carrying out the provisions of the Act, or to meet any contingency not provided for, or make regulations in any proceedings for which express provision has not been made, or where partial provision only has been made, or when alterations of any forms may be found necessary. An Act affecting the franchise should have a liberal construction so as not to disfranchise persons

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otherwise entitled to vote. Such being the case, it would not be contrary to the Act for the Lieutenant-Governor in Council to make provisions for unforeseen contingencies such as might arise from persons temporarily absent at the time that registration was necessary in order to get their names on the Register of Voters, and to clear away any objections which might be taken at the polls to the forms in which any application to vote should be made. Any such additional regulations made by the Lieutenat-Governor in Council are equally as binding as if inserted in the Act itself.

IRVING, J.: I have only a few words to add. I agree with the answers given by My Lord, except that in my opinion the second question should be answered so as to include any Commissioner for taking affidavits without the Province for use in the Courts of British Columbia; also any Notary Public in a foreign province, country or state.

The following extract from Brooke on Notaries, p. 27, seems to me to be a conclusive authority for the proposition that if section 3 does not require the affidavits to be sworn within British Columbia, then a Notary Public without the Province has power to act under section 4: "A Notary Public being considered not merely as an officer of the country where he is admitted, but as an accredited officer in other countries, any affidavits sworn before, and instruments authenticated by him being respected and received as evidence in foreign Courts."

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Note:—The answers of the Full Court to the questions submitted were published in the British Columbia Gazette of 30th July, 1903, at p. 1,676. They are the same as those given by the Chief Justice in his opinion at p. 119 *ante*.

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Mining law—Location—Non-observance of formalities—No. 2 post planted in glacier—Mineral Act, Secs. 12-16.

The failure to write on the No. 2 post of a mineral claim, the date of the location and the name of the locator is a non-observance of formalities within the meaning of section 16 (*g.*) of the Mineral Act.

The fact that a No. 2 post of a mineral claim is planted in a moving glacier will not invalidate the location, provided the location line is well marked and the claim is otherwise properly marked out so as to be easily identified.

Decision of MARTIN, J., affirmed.

APPEAL from judgment of MARTIN, J., in an action of adverse claim. The facts are set out in the judgment of MARTIN, J. See particularly this page and p. 133 *post.*

In addition to the facts there stated it appeared that the No. 2 post of the Revenge claim did not have written on it the date of the location and the name of the locator.

S. S. Taylor, K.C., for plaintiff.

W. A. Macdonald, K.C., for defendant.

25th July, 1903.

MARTIN, J.: This is an adverse action to determine the title to two overlapping claims, the Glacier Fraction, the plaintiff's claim, and the Revenge, the defendant's. The Glacier Fraction is an over-location of the Revenge, which is the senior location, having been located on the 17th of July, 1900, and the Glacier Fraction, three days later, on the 20th of July. These claims are situate high up in the mountains, between 7,000 and 8,000 feet above sea level, about nine or ten miles from Ferguson, in the Trout Lake Mining Division, in an exceptionally rugged country, but open and not obstructed in that place by bush.

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Some objections were raised at the trial to the validity of the Glacier Fraction claim, which were decided in favour of that location as being answered by the curative sections of the Mineral Act, and similar objections were also raised against the

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Revenge claim, in regard to which, with one exception, all that I think is necessary, for the present at least to say, is that I see no reason to change the opinion I formed at the trial that where such objections were established they are likewise cured by said sections. Should it be desirable, however, I shall deal with them later at a more convenient time.

The exception mentioned raises a novel point, that is, shortly, is a No. 2 post which is planted in a glacier a legal post?

To answer this question satisfactorily, it is necessary to understand all the facts which will throw light on the point, which is not so clear as at first might be thought.

The location line of the Revenge claim is 1,423 feet nine inches in length. Starting from No. 1 post this line runs along a narrow ridge of rock or "hog-back" which is, comparatively speaking, more or less level for a distance stated by the most reliable witness to be between 500 and 700 feet, after which the solid ice edge of the glacier is encountered. One of the locators says that the edge of the glacier was solid ice with a few stones on top and no surface snow at that point. This edge it is stated, "rolled right up into the glacier, and from the rocky ridge where we were standing to the top of the edge of the glacier it would be about eight feet, like a wall." After that it rose gradually till it struck the flat, and then almost level to No. 2 post, rising from where the edge of it met the ridge a distance of 15 feet to where
MARTIN, J. that post was planted. They cut a whole in the ice about two feet deep and put the post in and packed the ice round it. This post stood out conspicuously and could be easily seen from No. 1 post. Roughly speaking, about one-half of the claim appears to be on or covered by the glacier. It would have been possible, as I understand it, for them to have proceeded along their location line across the glacier and put this No. 2 post in earth or rock, but they did not do so, because they knew that by so doing they would encroach or trespass upon the ground of the adjoining Morning Star claim (which is a partial continuation of both the Revenge and Glacier Fraction claims) and the Revenge claim would also then have been more than the statutory length, 1,500 feet. These objections they carefully avoided by measuring with a cord, with measurements marked on it, which they had brought

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with them for that purpose. The evidence regarding the extent, formation and situation of this glacier is indefinite and unsatisfactory, and I expressed myself to that effect at the trial, but piecing the testimony of the most reliable witness together, it appears to be one of some considerable size, with a surface frontage line of about 1,300 feet, and a fall of about 200 feet. It is on the slope of the mountain with its highest point apparently on the Morning Star ground and with a natural slope down the mountain, and towards and beyond the easterly side line of the Revenge claim, which is 100 feet to the left of the location line. There is no evidence as to the depth of it, except that one of the witnesses, Ward, said that about 200 feet from the No. 2 post of the Revenge claim there was a break in it, and it was about 70 feet deep there. He also says that the glacier is nearly flat at one place and rises up behind at an angle of 70 degrees to the mountain, and is cut off by a ridge of rock. Cummins, the surveyor, says that he calls the spot where the location line strikes the glacier the foot or lower end of it, and from that place it rose up steeply to a nearly level place beyond, and inclines up the mountain from that. He also says that for some distance the location line had the glacier on each side of it. No witness, however, could give any satisfactory evidence in regard to where the actual channel of the glacier was in which it flowed, if it flowed at all. Cummins says that he was of the opinion that the glacier was a slowly moving one, perhaps a few inches a day in summer, but he could not say, as he had not observed glaciers much, and he did not make any measurements, and in order to determine the velocity of this one it would be necessary to place pegs. He says that he understands all glaciers move slowly, and that like rivers they move faster in the centre, and vary in velocity. There was no evidence at all as to whether or not at this particular point, or any point, the glacier had or had not moved as a matter of fact, and there is evidence (Andrew Ferguson) that at such a great altitude, though warm in the daytime during summer, it freezes at night.

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The witness Elliott says that about three days after the No. 2 post of the Revenge claim was placed in the ground he noticed that it had fallen down because of the sun melting the ice, but

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as against that there is the statement of Peter Ferguson, who went up there with Cummins, the engineer, some two months after, that the post was then in the very place where he had planted it, and it had not moved, and there certainly was a No. 2 post at the time of the surveyor's visit, though it is unfortunate that the surveyor himself did not go along the whole length of the location line, and up to that post. In my opinion it is the duty of a surveyor to examine all the posts and the location line in surveying a mineral claim.

A glacier is defined in the Standard Dictionary (1894 Ed., 2 vols.), to be

"A field or stream of ice, formed in regions of perennial frost, from compacted snow, which moves slowly downward over slopes or through valleys until it either melts or breaks off in the form of icebergs on the borders of the sea. Glaciers are often much broken transversely by crevasses. They transport boulders and rock-debris in long lines called moraines which accumulate at the end as a terminal moraine. A glacier also grinds to "rock-flower" while it scratches grooves and polishes underlying rocks; and it furnishes streams of silt-bearing water from its constant melting, even in northern Greenland. The rate of movement of an Alpine glacier is from 10 to 20 inches daily in summer and half as much in winter; the maximum rates of some of the Greenland glaciers are said to be from 21 to 90 feet in 24 hours. The vast expanse of ice that sometimes (as in Greenland) furnishes glaciers is called an ice sheet, or glacial sheet."

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On the question of the velocity of glaciers I find the following interesting note by William H. Hall (Director of the Scientific Corps of the Western Union Telegraph Co. Expedition) in his valuable book "Alaska and its Resources" (London, 1870) at p. 464:

"But little has been learned so far in regard to the rate of motion, and other circumstances connected with the magnificent system of the coast ranges of British Columbia. A road built across one of the glaciers of Bute Inlet by Mr. Waddington, of Victoria, was noticed to have moved some ten feet out of line during the winter season when the road builders returned in the spring. No regular observations have been made, however."

There is, however, a great difference between true glaciers and deposits or beds of perennial ice and snow mentioned by Doctor Geo. W. Dawson, in his report on the Physical and Geological Features of a Portion of the Rocky Mountains (1886), p. 32B, wherein speaking of the Columbia-Kootenay Valley country he says:

"Throughout the whole of this mountain region large patches of perennial snow are frequently met with at elevations surpassing 6,000 feet, and on northward slopes, and in retired valleys at lower heights. There are even some rather extensive snow fields, but no large connected portion of the mountains rises to such a height as to show a well-marked snow-line. In the higher mountains near the forty-ninth parallel, masses of hard snow and ice exist which might be denominated glaciers, but further north true glaciers occur, with all the well-known characters of those of the Alps and other high mountain regions. Such glaciers may be seen on the north branch of the Kicking Horse, at the heads of the lakes forming the sources of the Bow, at the head-waters of the Red Deer and elsewhere, and are fed by snow fields, the areas of which have not been accurately mapped, but must in some cases be very extensive.

"At altitudes exceeding 6,000 feet, snow falls more or less frequently in every month in the year, and toward the first of October it may be expected to occur even in the lower valleys within the mountain region."

And see his remarks on p. 167B of the same report and his Preliminary Report on British Columbia (1877), pp. 133B *et seq.*; and also his further notes on "Glaciation and Superficial Deposits," at p. 40B *et seq.* of the Geological Survey Report for 1888-9 on the "West Kootenay District," where the slow southerly movement of the former great Cordillerran Glacier, over Toad Mountain, near Nelson, is noticed. The subject is also generally discussed by the same high authority in his report for 1894, pp. 248B *et seq.*

As I understand it, all true glaciers move in their channels more or less, but this may not apply to those portions of them which would correspond with eddies or backwaters of streams. MARTIN, J. As a local example of this movement, it may be noted that beyond all reasonable doubt, a stream of ice estimated at 700 feet deep, flowed over what is now Victoria, and the grooving and striation caused thereby are even now plainly visible in the high places of that city. This stream had its source in the great glacier in the Straits of Georgia, which in its turn formed part of that vast sheet of ice known to scientific men as the Cordillerran Glacier—*vide* Dr. Dawson's Report on Vancouver Island, 1887, p. 99B *et seq.*

In giving the above references to scientific authorities on glaciers, I have done so, not for the purpose of using their remarks as evidence in this case, but to shew the necessity of being in full possession of the facts in regard to each particular

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glacier before deciding the effect of a partial location upon it under our Mineral Acts. This Court of course has judicial knowledge of the forces of nature up to a certain extent, but the application of what may theoretically at least be supposed to be general knowledge is limited by the facts of each particular case.

It is contended by the plaintiff that the location now in question must be held to be invalid because section 16 of the Mineral Act says that a mineral claim shall be marked by two legal posts, and that by the interpretation section "legal post shall mean a stake standing not less than four feet above the ground, etc." The word "ground" twice occurs in section 15, as follows:

"Any free miner desiring to locate a mineral claim, shall, subject to the provisions of this Act with respect to land which may be used for mining, enter upon the same and locate a plot of ground measuring, where possible, but not exceeding 1,500 feet in length by 1,500 feet in breadth, in as nearly as possible a rectangular form, etc. . . . . In defining the size of a mineral claim, it shall be measured horizontally, irrespective of inequalities of the surface of the ground."

And it is also to be found in other places, *e.g.*, section 16, subsections (*c.*) and (*d.*) and section 18. The primary meaning of "ground" is defined by the Standard Dictionary to be:

"The firm, solid portion of the earth at and near its surface; the surface of the earth, as distinguished from the regions above; also, the disintegrated material of the surface."

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Plaintiff's counsel argues that a glacier is not "ground" in its primary or ordinary sense; that the statute requires the posts to be fixed in solid earth or rock, so that the location will begin and end in earth or rock; that the statute is imperative and is not satisfied by any substance intervening between the posts and the earth or rock beneath; and that the whole intent of the Act is permanency of location which is destroyed by any one of the posts being on a moving substance, if such should be found to be the case.

Now, it is first to be remarked that it is not "ground" so called, that a free miner is privileged to locate under section 12, but "waste lands of the Crown," and out of such waste lands he is entitled by section 15 to appropriate to himself "a plot of

ground " 1,500 feet square. For the purpose of such entry upon and appropriation of part of the public domain, the terms " lands " or " land," in sections 13 and 15, must include the waters upon them, the words being used in their ordinary legal signification, which is conveniently given in Wharton's Law Lexicon (10th Ed., 1902) at p. 440, as follows:

" Land, in its restrained sense, means soil, but in its legal acceptation it is a generic term, comprehending every species of ground on earth, as meadows, pastures, woods, moors, waters, marshes, furze, and heath; it includes also houses, mills, castles, and other buildings, for with the conveyance of the land, the structures upon it pass also. And besides an indefinite extent upwards, it extends downwards to the globe's centre, hence the maxim, *Cujus est solum ejus est usque ad coelum et ad inferos*, or more curtly expressed, *Cujus est solum ejus est altum.* See *per* Jessel, M.R., *In re Metropolitan District Railway Company and Cosh*, 13 Ch. D. at p. 620. . . . . Water, by a solecism, is held to be a species of land, *e.g.*, in order to recover possession of a pool or rivulet of water, the action must be brought for the land, *e.g.*, ten acres of land covered with water, and not for the water only."

And see also Williams on Real Property (1892), p. 33. The terms " land " and " ground " are therefore used in some sections of the Act, at least as having practically the same meaning, and even if the Act is to be construed in the sense that miners use, the terms therein employed, then " ground " as defined in the Glossary of Mining Terms (1 M.M.C. 864) means (1.) " Mining ground. The area covered by a mineral claim or mining location." Having then the right to locate a plot of " ground " out of such " lands," even when covered with water, and *a fortiori* with frozen water, it is not easy to perceive anything in the Act to prevent the locator from putting a legal post at the proper point on the location line, *i.e.*, 1,500 feet from the No. 1 post, within such plot of ground or land so long as it stands four feet above the ground or land, *i.e.*, above the surface of the same. The contention is doubtless correct that the element of permanency or fixity of position of the claim as located is contemplated by the Act and must so far as possible be preserved just as in the case of any other land homesteaded, or pre-empted, or purchased from the Crown or its subjects, there must, theoretically at least, be a solid and immovable substratum, though what would occur in the case of a mineral location made on what

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would admittedly be called "ground," yet is at the same time an enormous mass of slowly moving soil—a slide—such as was under consideration in the *Canadian Pacific Railway Co.* v. *Parke* (1897), 6 B.C. 6 at p. 9, and covered an area of 66 acres which was continually increasing, it is very difficult to foretell.

The language in question is not very definite; it merely provides that the post must be "above the ground," while section 16 containing directions for locating, simply says that the post shall be "placed" as near as possible on the line of the ledge or vein. In the original Gold Fields Act (1859), Rule ii. (1 M.M.C. 547) there was no uncertainty as regards the manner in which the pegs were to be fixed, for it was provided that claims should be rectangular as nearly as may be "and marked by four pegs at the least, each peg to be four inches square at the least, and one foot above the surface, and firmly fixed in the ground." These words, "firmly fixed in the ground," are repeated in the Gold Mining Ordinance of 1867, section 56 (1 M.M.C. 558), in the Mineral Act of 1884, section 58 (1 M.M.C. 579), and in the Consolidated Statutes of 1888, section 73 (1 M.M.C. 605), but in the Mineral Act of 1891, section 2 (1 M.M.C. 625), they have been changed to read as at present "above the ground." This is a significant alteration which affects materially the present case, because if "ground" means as is contended, earth or rock, the post in question certainly stood not less than four feet above it.

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The section does not say that the post must stand on the surface of the ground, but that it must be "standing not less than four feet above the ground," which it literally does. True it is that it probably stands much more than four feet and it is urged that it would render the statute ridiculous to give it such a literal meaning. But on the other hand, a very strict meaning is also contended for, and it is admitted that the post in question would have been a legal one had the locator chopped down through the glacier a depth of say 15 feet to the solid frozen earth below and put in a post four feet above such earth, even though were the glacier a true one, *i.e.*, a moving one, the post would be pushed out of place and submerged. This result is even more ridiculous than the former, because the admittedly legal post would, in addition to being moved, be eleven feet below the level of the

ice and invisible to other prospectors whom the statute aims at notifying and protecting; it would in fact be a trap for prospectors instead of a warning to them.

Under said Gold Fields Act of 1859, though the claims had to be rectangular, and marked by four pegs, I do not think it would have been seriously contended that, because one of these four corner pegs happened to be placed in a pool eternally frozen, or in a true glacier, or that a corner ran into a deep lake, so that no peg at all could be fixed there, therefore the location was invalid. And it is to be hoped that the Mineral Acts do not treat the free miners of 1903 more harshly than the free miners of 1859; on the contrary, the marked tendency of late years has been to remedy defects and irregularities in location.

Suppose under the present Act that in a very high altitude in marking the location line along the ledge, a locator encounters at a distance of 1,300 feet from No. 1 post a mountain pool which was perpetually frozen to the bottom with what I should call eternal ice, or, which Dr. Dawson more correctly doubtless would probably describe as consisting of a hard mass of perennial snow and ice, beneath which the ledge disappears. Is the locator in such case forced to stop at the edge of the ice and lose the remaining 200 feet of his claim which though covered with a thick or thin sheet of ice may, nevertheless, be the richest portion of it? Surely he would be entitled to put his post out on such eternal ice for the remaining distance of 200 feet and secure a full sized claim, and continue his mining operations on the ledge beneath the ice if need be. Unless he could do so he would lose that 200 feet, for section 18 which permits the planting of what the surveyors call "witness posts," does not apply to the placing of posts, but only to the marking of location lines; it says where "from the nature or shape of the ground it is impossible to mark the location line of the claim." But No. 2 post must be fixed before the location line can be accurately marked, because that line is defined to be "the straight line between posts No. 1 and 2." In my opinion, No. 2 post so placed in a perpetually frozen pool would satisfy the essential requirements of the Act, *i.e.*, fixity and notoriety. Eternal or perennial ice and hard snow should be deemed to be, in my opinion, "land" or "ground"

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within the true meaning of the said Act for the purpose of making a location.

A reasonable view to take of the sections affecting this point seems to me to be that if the posts and location line were so placed and marked that the original position thereof (and from them the whole location) could at any reasonable time thereafter be determined with the amount of accuracy which is sufficient in the case of other claims, the statute would in practice be satisfied, even though a true glacier flowed over any part of the claim.

Supposing further, to take another illustration, that the location line of a claim was duly marked for 1,475 feet, till it touched a side of a true glacier and that 25 feet thereupon, at the end of the location line, the No. 2 post was planted; in such case there would be no difficulty at any reasonable later date in determining the true course of the remaining 25 feet of the location line, and no danger of the claim shifting its position, which, I quite agree is something not to be permitted. On the other hand, a location made wholly on the surface of a true glacier would clearly be invalid, because its position never was and never could be fixed, assuming that it were possible that such a location could be made in view of the requirement that the discovery post must be put "at the point where he (locator) has found rock in place."

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It comes then to a question of degree between extreme cases and is one to be determined on the particular facts proved at the trial. In the case at bar no practical difficulty arises because the location line has been sufficiently marked, and a survey has been made along it, and there is no evidence to shew that the glacier has moved at all, or, if it moves, in what direction, which is important, because if it moves straight down the location line, end on, so to speak, towards No. 1 post, it would only shorten the line and not deflect it. Nor is it shewn whether or no the glacier is increasing or decreasing—for all that appears in evidence it may be, as is often the case, gradually wasting away and disappearing. All these are relevant matters of fact which require to be proved so that the Court may arrive at a sound judgment, but the proof is not forthcoming, though the onus lies upon the plaintiff, because the defendant's claim (the Revenge) is the

senior location—*Schomberg* v. *Holden* (1899), 6 B.C. 419; (1 M. M.C. 290) and notes thereto; *Dunlop* v. *Haney* (1899), 7 B.C. 305; (1 M.M.C. 369) and notes thereto.

From all the foregoing it would follow (1.) that the term "ground" in the sections in question, having regard to the sense in which it is used, has not the sole restricted meaning of fixed earth or rock, but a wider signification depending upon the circumstances of the location, and it will in some cases at least include ice and hard snow.

(2.) That the validity of the location in question does not depend upon the bare question—Was the No. 2 post placed upon the ground or not? (using the term "ground" in the restricted sense contended for)—but the real question is—Was such post so placed that the position of the claim as originally located can at any reasonable time thereafter be determined with the degree of accuracy which is sufficient in the case of other claims located in the usual manner under the Mineral Acts.

Applying then, this test to the facts herein, I have no hesitation in deciding the question in favour of the Revenge mineral claim.

The conclusion then, being arrived at that the locators of the Revenge have complied with the requirements of the Mineral Act, it becomes unnecessary to consider the alternative defence set up, *viz.*, that even if there were non-compliance, yet there had been a *bona fide* attempt to do so. Nevertheless, in case of a view contrary to mine being taken if there is an appeal, it is proper to state that I find as facts (1.) that mineral in place was discovered on the Revenge claim; and (2.) that the non-observance of the prescribed formalities was not of a character calculated to mislead other persons desiring to locate claims in that vicinity. And it is also due to the locators of the Revenge to say that they seem to have been animated by a very proper and unusual desire to avoid trespassing upon the Morning Star ground, and further, had they as was suggested, run their location line across the glacier and planted the No. 2 post on the other side of it, they would have placed themselves in a dangerous position, because then they would knowingly and deliberately have (1.) exceeded the statutory length of the claim, and (2.)

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trespassed upon ground lawfully occupied for mining purposes, with the result that in these two respects it would probably be urged against them that they had deliberately violated the statute, and so could not be said to have made a *bona fide* attempt to comply with it. In this relation it should not be overlooked that this Court casts a lenient eye upon irregularities in locations which are caused by a desire to avoid encroaching upon the rights of other free miners—*Waterhouse* v. *Liftchild* (1897), 6 B.C. 424; (1 M.M.C. 153) and note.

The result is that the Revenge mineral claim is hereby declared to be a valid location, and the Glacier Fractional mineral claim is declared to be an invalid location in so far as it overlaps or encroaches upon the Revenge mineral claim.

The action is dismissed with costs.

The plaintiff appealed and the appeal was argued at Vancouver on the 4th of November, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

S. S. Taylor, K.C., for appellant: The evidence shews that the glacier is a moving one. In staking, permanent monuments are necessary: see Lindley, Vol. 1, paragraph 371. If the No. 2 post is moving, the whole claim is continually shifting. He cited *Drummond* v. *Long* (1886), 15 Morr. 511-12. If the glacier is moving then the No. 2 post is bad, and even if the glacier is not moving it is bad, as it must enter the ground.

Argument

[IRVING, J.: See section 18.]

The privilege of locating is a qualified privilege; a locator has no privilege of locating everything; the Mineral Act is one dealing with minerals and earth and not with ice and snow; "ground" in the Act means actual earth.

The location line has not been marked properly; it was marked by mounds (for 500 or 600 feet) up to the edge of the glacier but after that the line was not marked; this is more than the non-observance of a formality within the meaning of section 16 (*g.*)

The No. 2 post does not contain the proper notice, the date of location and name of the locator not being given, and these are both essentials and not formalities: see judgment of Sedgewick, J., in *Collom* v. *Manley* (1902), 32 S.C.R. 371. These omissions

are calculated to mislead as there often are claims of the same name in the same locality.

W. A. Macdonald, K.C., for respondent (heard only on the question of the validity of a post set in ice): The locator did all he could in endeavouring to comply with the Act and the trial Judge holds he acted *bona fide*. He referred to *Eilers* v. *Boatman* (1883), 15 Morr. 462, 471; (1884), 111 U.S. 356 and *Waterhouse* v. *Liftchild* (1897), 6 B.C. 424 and cases cited in the judgment of the trial Judge.

HUNTER, C.J.: The facts in this case appear to be that No. 1 stake was set in solid earth and No 2 in glacial ice, and it is argued by Mr. *Taylor* that because No. 2 was set in ice, and because the date of the location and the name of the locator did not appear on No. 2, the claim is invalid.

Now, I do not propose to consider the question as to what conclusion we should arrive at had No. 1 been placed in ice or earth that was in a state of motion. I do not think in this case it makes any difference whether No. 2 was placed in firm or moving ice, because the location line was well defined by a series of mounds extending over a distance of 500 or 600 feet. I think therefore, on the particular facts of this case to which I propose to confine my attention, that the claim was sufficiently marked out and identified for all practical purposes, which is one of the cardinal matters which a prospector has to attend to. If he has marked out the claim so that it can be easily identified, having regard to all the local circumstances with which he is contending, then he has substantially complied with the provisions of the Act in that behalf, and his claim is good in law.

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So far as concerns the absence of the date of the location and of the name of the locator from the notice No. 2, that omission was not calculated to mislead, as they appeared on No. 1, and as the location line was well defined. The appeal should be dismissed.

DRAKE, J.: I agree. I think the locator did all that it was possible for him to do. He is not bound to do impossibilities, and it was a matter of impossibility to put a stake in the ground where No. 2 stake was to be—60 or 70 feet of ice to go through.

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He did the only thing possible for him to do, unless he put it at the edge of the glacier, in which case most probably he would have cut himself off from a great deal of mineral. This is one of those cases which I think falls distinctly within the purview of the Act, and I think he did all that he reasonably could do for the purpose of making a valid and *bona fide* location. The objection as to stake No. 2 is I think of no importance, as that is cured by one of the provisions of the Act; and no one could be misled, because from where one finds No. 1 anyone can see No. 2 and the direction of the location line. I think, under the circumstances, the appeal should be dismissed.

IRVING, J.

IRVING, J.: I think the saving clause of section 16 was most properly invoked by the learned trial Judge. In my opinion, this Court should be slow to interfere with the discretion of the trial Judge in that respect.

Appeal dismissed with costs.

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CENTRE STAR MINING CO., LIMITED v. ROSSLAND AND GREAT WESTERN MINES, LIMITED AND EAST LE ROI MINING CO., LIMITED.

Practice—Proceedings outside Victoria, Vancouver or New Westminster—Chamber summons returnable at one of these places—Must be issued at place returnable.

Where it is desired to make an application, under section 32 of the Supreme Court Act as amended in 1901, Cap. 14, section 13, to a Judge at Victoria, Vancouver or New Westminster, the summons must be issued at the place at which it is returnable.

SUMMONS to set aside writ of summons and subsequent proceedings.

Davis, K.C., for defendants.

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Sir C. H. Tupper, K.C., for plaintiff, took the preliminary objection that the summons was issued in Rossland and made returnable in Vancouver, and therefore could not be heard. By r. 52 proceedings must be carried on in the Registry where the writ was issued, unless otherwise directed by the Court or a Judge. Under r. 572 applications are by summons returnable by r. 587 the second day. He referred to R.S.B.C. 1897, Cap. 56, Sec. 22 as amended 1899, Cap. 20, Sec. 5; R.S.B.C. 1897, Cap. 56, Sec. 32, and further amended 1901, Cap. 14, Sec. 13.

Davis, in reply, said point had already been ruled on, but unable to find reported decision.

HUNTER, C.J.: As to the unreported decisions alluded to by Mr. *Davis*, they may have been *obiter dicta* or unargued, in which case they would not of course be binding on any other Judge. At any rate, I think I am bound to give effect to my own opinion, which is, that the summons must be dismissed. I am of the opinion that the section means that the Chamber summons must be issued in Victoria, Vancouver or New Westminster, if it is to be heard there. The language is, "the application may be made," etc., not "heard," etc. How is an application "made?" In Chamber matters by summons, in others by notice of motion, order *nisi*, petition or notice of appeal, as the case may be.

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I think also the expression, "all papers in connection with such application shall be filed at Victoria, Vancouver or New Westminster, as the case may be," points to the conclusion that the Chamber summons must be issued there, otherwise the more natural expression, "transmitted to," would have been used. Then again, as pointed out by *Sir Hibbert Tupper*, the rule that a Chamber summons must be returnable in two days, unless otherwise ordered by the Judge, would also point in the same direction, as it is impossible to issue a summons in Rossland returnable in Victoria in two days. The summons will be dismissed with costs.

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THE LE ROI COMPANY No. 2, LIMITED v. THE NORTHPORT SMELTING AND REFINING COMPANY, LIMITED AND THE LE ROI MINING COMPANY, LIMITED.

Smelting contract—Sampling ores—Automatic or hand sampling—Mine owner's representative at smelter—Authority of—Ores improperly sampled—Method of estimating values of.

A contract between mine owners and smelter owners provided *inter alia* that the ores supplied by the former to the latter should be sampled within one week after shipment. The evidence shewed that "automatic" or machine sampling had displaced the old method of "grab" or "shovel" sampling and had been in vogue for about twenty years:—

Held, per HUNTER, C.J., and WALKEM, J., that the contract was entered into on the footing that the sampling was to be done automatically.

Per DRAKE and IRVING, JJ.: The contract permitted any mode of sampling so long as it was done properly and the true value of the ore was arrived at.

A mine owner's representative at a smelter for the purpose of watching the weighing and sampling of ores so that the mine owner may be satisfied as to the correctness of the weight and sampling, has no authority to consent to a method of sampling not allowed by the contract.

Where the smelter returns of ore of average character sampled either negligently or in a manner not contemplated by contract, shew a value below the average, the probable value of the ore will be estimated by the Court by taking the average value of a certain number of lots immediately before and after the lots in dispute.

Statement

THIS was an appeal from a judgment of HUNTER, C.J., delivered 5th February, 1903, ordering that the plaintiffs should recover from the defendants, the Smelting Company, the sum of $3,974.70 and costs.

The action was tried at Rossland in October, 1902.

J. A. Macdonald, for plaintiffs.

Hamilton, for defendants.

5th February, 1903.

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HUNTER, C.J.: On the 16th of August, 1901, a contract was

drawn up between the plaintiff and the two defendants for the smelting of the plaintiffs' ores at the smelter of the defendant Company at Northport. The contract was drawn up by Bernard MacDonald, who was at that time general manager of all three Companies, but through inadvertence, as he says, was not executed on behalf of the Le Roi Mining Company, and they were therefore dismissed out of the suit as the action is brought on the contract. Notwithstanding this, they remain the real defendants in interest as they are the owners of 999,995 out of the 1,000,000 shares of the Northport Smelting Company.

The contract provides, *inter alia*, for the sale of the output of the plaintiffs' mines for two years, to the Smelting Company at certain figures for the constituent metals therein named, after deducting $6 per ton for freight and treatment, that weekly statements shall be furnished by the smelter shewing the weight and assays and amounts due to the mine, and provides for payment to be made within three days from date of statement. It further provides as follows: "That the ores shall be sampled within one week from date of shipment from the mine of the party of the second part. It is understood and agreed that the party of the second part (the mine), through its representative, shall have access at all times to the smelter of the parties of the first part, and the weighing and sampling of the ores to the end that they may satisfy themselves as to the correctness of the weights and sampling, and that they shall be allowed a control sample for assay purposes. A sample shall also be taken by the parties of the first part so that in the event of the assays made by the parties hereto not agreeing, an umpire assay can be made by a party mutually agreeable to the parties hereto. A final settlement shall be made by the parties of the first part on the umpire assay so determined; the cost of such umpire assay to be borne by the party whose assay is the farthest away from assays as shewn by said umpire."

The plaintiffs allege that in May last certain car-loads of ore composing lots 295, 296 and 297, were sampled in a manner not authorized or contemplated by the contract, that is to say, they were shovel or grab sampled without their consent or permission instead of being automatically sampled, with the result that they

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have been allowed an amount far short of their real value. While the defendants admit that part of the ore was so sampled, they say that it was done with the assent of the plaintiffs' representative, and contend that in any event the contract does not say that only automatic or mechanical sampling shall be resorted to.

First, as to the meaning of the contract. Taylor on Evidence, at p. 761, says, "It is, however, also a principle that, parol evidence may in all cases of doubt be adduced, to explain the written instrument; or, in other words, to enable the Court to discover the meaning of the terms employed, and to apply them to the facts. Such a 'doubt' as is here meant may arise from one or both of the following causes; either the language of the instrument may be unintelligible to the Court, or at least, be *susceptible of two or more meanings*," etc.

It was practically conceded on all hands that the old method of grab or shovel sampling has been displaced for about twenty years by automatic or mechanical sampling, and that every properly equipped smelter is provided with one or more mechanical samplers. Moreover, MacDonald, who drew up the contract and executed it on behalf of both signatories, and who was, as already stated, the general manager of all the companies concerned, testified that he had in his mind the mode in general use and which was in use at the smelter. Therefore, I have no difficulty in coming to the conclusion that this contract was entered into on the footing that the ores should be automatically or mechanically sampled.

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But the defendants say that even if this is so, Luce, the plaintiffs' representative, had authority to, and did, sanction the shovel sampling of the ore in question. I do not think so. All that Luce had authority to do under this contract was to watch the weighing and sampling, nor do I see anything in the contract itself which would warrant him in consenting to the mode of sampling being altered, and so far as any instructions to him are concerned, MacDonald and Thompson both testified that he had no authority to permit any deviation from the contract without first obtaining their instructions to do so. It cannot reasonably be held to have been in the minds of the parties that the smelter

could use any mode of sampling, no matter how perfunctory it might be, to suit its pleasure or convenience, subject only to the chances of it being discovered and objected to by the mine's representative, both because the ore was being smelted day and night, and of course the representative could not always be on hand, and because it is beyond controversy that to properly sample ore by the grab or shovel method is much more tedious and costly than by the mechanical method. Nor can I find as a fact that Luce did authorize the sampling complained of. He himself says that on the 21st of May he discovered that ore was being taken to the high line bunkers and thence to the roast heaps without being passed through the crusher to which the automatic sampler was attached; that he hunted up Gray, the yard foreman, and said to him, "I see you are running some No. 2 (*i.e.*, plaintiffs' ore) to the high line," to which Gray answered "Yes, the railroad company and the mines were hollering for cars and I couldn't see any other way to move them except to run part of it up here," that he (Luce) then said "I don't like this at all. I'm afraid it will not be satisfactory;" that Gray replied, "I don't know; I think we are getting a good sample of it, aren't we?" to which he said, "Possibly, so far as a grab sample goes, and as it has been done, I suppose it can't be helped now, and I suppose I will have to make the best of it, but I am afraid there may be trouble about it," and that he reported the matter by telephone to Thompson, who came down the next day and prohibited any more ore from being smelted unless put through the crusher in the usual way.

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Some time before this, in February, Thompson had given instructions to Luce to allow portions of a lot or lots, but not entire lots, to go through to the furnace without crushing when it became absolutely necessary by reason of the crusher getting out of order, and to see that a proper sample was taken, but obviously this would not warrant the smelter in adopting this course of their own motion, especially in a wholesale way, and without having secured Luce's permission, which it was admitted was not done on this occasion, nor would it warrant the smelter in running the ore direct from the bunkers to the roast heaps, which was admittedly done with a large portion of the ores in

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question. Luce's evidence is in part corroborated by Szontagh, the smelter manager, as he says that Luce said that "under the circumstances the lots could not have been sampled in any different way," that is that Luce conceded that, on account of the congestion in the yards and the disabled crusher, they could only be shovel sampled. But I do not see how this can be construed into a ratification by Luce of the perfunctory way in which the shovel sampling, as shewn by the evidence, was carried out, even if he had power to ratify, which I think it is clear he had not. He is also corroborated by Gray, the yard foreman, who admits that Luce did not know about the ore being taken up to the high line until he found part of the ore run out on the roast heaps, and he does not dispute that Luce said he was afraid it would not be satisfactory. Crist, the sampler, also corroborates Luce, because he says he remembers Luce saying to him that "this method was not satisfactory to his people."

I therefore find the facts to be that Luce was not asked for permission to shovel or grab sample any of these ores; that he discovered that this was being done only when it was too late to stop operations, and that he warned the smelter that this method was not likely to be accepted as satisfactory. I find further, that his authority extended only so far as to give permission when absolutely necessary by reason of the crusher being out of order, to shovel sample portions of lots, and not entire lots, and to take

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such portions to the furnaces to prevent them from "freezing," but not to put them on the roast heaps.

With respect to the lots themselves: according to the defendants' contention lot 295 was mechanically sampled, because it appears from Gray's yard book that this lot was all sent to the crusher. But it does not follow from this that it was all mechanically sampled, as it was admitted that although the sampler had been connected with the Blake crusher, the Comet crusher which was commonly used having broken down, the Blake crusher could not receive any piece of ore that was larger than eight inches in diameter, so that part of the coarser ore was not sent through the sampler, but was hand sampled if sampled at all, and it was proved to my satisfaction that the "coarse" ore of this mine ordinarily carries higher values than the "fines."

If, therefore, I am right in concluding that the plaintiffs' ores could only be shovel or grab sampled under this contract by express permission to be got from them or their representative, Luce, then there was an unauthorized mode of sampling adopted in connection with a portion of this lot, and therefore the true contract value of this lot has not been ascertained or accounted for.

As for lots 296 and 297, the defendants practically admit that these were not automatically sampled, and that parts of them were put on the roast heaps without the knowledge or permission of the plaintiffs or their representative.

The defendants sought to prove that between January 19th and March 6th, portions of a number of lots were hand sampled without objection by the plaintiffs, but even if this were so, this goes only to corroborate the contention of the plaintiffs, which is that the permission to hand sample, when given, extended only to portions of lots, and not to entire lots, and in the next place, even if no express permission was given in these instances the plaintiffs may have considered the results sufficiently fair so as not to make it worth while to object to the returns in respect of these lots. But even if the contract could be construed so as to allow shovel or grab sampling, I think it cannot be gainsaid that on the evidence the sampling of these lots was of a very perfunctory and careless character. It was shewn in the case of lots 296 and 297 that the proportion taken was not more than (three) pounds out of 1,000 pounds, indeed it was generally less, and that the larger pieces, which carried the higher values, formed no portion of that set aside for the sample, and the same thing occurred, although perhaps in a lesser degree, with that part of lot 295 which did not go through the sampler, assuming that what did not go through the sampler was sampled at all, as to which I feel very much doubt. It was also shewn as much by the candid evidence of the defendants' manager, McKenzie, as by any other, that the mode of sampling employed was far different from the standard mode in use in the days of sampling by hand or by shovel.

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My conclusion then is, even assuming that the defendants were empowered either under the contract or by permission to use the shovel or grab sample method (which I think they were not) that

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they did not sample the plaintiffs' ores in the manner which the plaintiffs had a right to expect, and that it would have been a miracle if anything like accurate results had been attained.

But Mr. *Hamilton* seeks to lessen the liability of the defendants by contending that there is no room for complaint as to one-half of the ore, as it was composed of "fines," and that the values returned might be adopted as the true value of the 'fines,' and because some of the ore was automatically sampled. It seems to me that this is obviously fallacious as a careless and insufficient sampling would clearly be just as unreliable in the case of the "fines" as of the "coarse."

Then what method should I adopt in order to estimate the probable value of this ore? I think that the fairest and most equitable way is to take the average value of say 10 lots immediately before and after the lots in question, especially as it has been sworn by the plaintiffs that so far as they know the ore was of the same character as that shipped immediately before and after, and no good reason has been suggested for supposing that there was any unusual difference, and it is quite impossible to suppose that the plaintiffs could have foreseen the breakdown, and taking it for granted that the ore would be improperly sampled, knowingly shipped practically worthless ore.

Then taking such average I find it to be $8.58 net per ton, so that the account would stand thus:

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Lot 295	219.888 tons at $8.58	$1,881.69	
	Less paid on account	508.75	
	Bal. due		$1,372.84
Lot 296	226.155 tons at $8.58	$1,940.41	
	Less paid on account	266.86	
	Bal. due		$1,673.55
Lot 297	215.574 tons at $8.58	$1,833.62	
	Less paid on account	905.41	
	Bal. due		$ 928.21
	Total amount due		$3,974.60

I think the plaintiffs are entitled to judgment for this amount with costs, subject to the correction of any errors in the calculation.

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The defendants appealed and the appeal was argued at Victoria on the 4th and 5th of June, 1903, before WALKEM, DRAKE and IRVING, JJ.

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Hamilton, for appellant: Lot 295 was sampled automatically; the Chief Justice in finding to the contrary confounded the two crushers, as the Blake crusher could receive larger pieces of ore than the Comet.

The contract does not require automatic sampling; under it the samples may be taken in any way; MacDonald's evidence of what sort of sampling he had in his mind at the time the contract was entered into should not have been admitted. A crusher was broken down and it became necessary to hand sample some of the ore; this had been done on previous occasions without objection: see *Harrison* v. *Barton* (1861), 30 L.J., Ch. 213. In any event, Luce, the plaintiffs' representative, had authority to sanction and did sanction hand sampling.

The measure of damages should be the difference between the value of the coarse and fine ores, and as half was fine and half coarse and the fine was satisfactorily sampled, the value of only half of the lots has to be settled.

Argument

J. A. Macdonald, for respondents: Extrinsic evidence is admissible to shew that the contract was made subject to the usage or custom of the business of smelting: see Leake on Contracts, 4th Ed., 127; automatic sampling has been in vogue for twenty years; it was what all the parties expected would be used and that on which we have a right to insist. Luce was not a skilled man; his duties were mechanical, and he had no authority to consent to any deviation from the contract; at any rate he did not consent to the hand sampling; before adopting another method of sampling, Luce, or the plaintiffs should have been notified. The defendants cannot escape liability for their wrongdoing by saying there was a breakdown. He referred to *Jorden* v. *Money* (1854), 5 H.L. Cas. 185 and *Chadwick* v. *Manning* (1896), A.C. 31.

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As to measure of damages, the rule should be that where a smelting company improperly samples ores it should be presumed as against the company that the ores improperly sampled were of the highest value: see *Armory* v. *Delamirie* (1821), 1 Str. 505; *Clunnes* v. *Pezzey* (1807), 1 Camp. 8 and *Duke of Leeds* v. *Earl of Amherst* (1850), 20 Beav. 239.

As to lot 295 there is doubt as to how it was sampled, and in estimating the values of lots 296 and 297 the value of 295 should not be taken as a basis of value.

Hamilton, replied.

22nd June, 1903.

WALKEM, J.: The Le Roi Company No. 1 has been dismissed from the action by the learned Chief Justice.

This is an appeal by the Smelting Company from his decision. I agree with him that the ore sent to the Smelting Company was to be automatically sampled, and not hand sampled. According to the evidence, the smelter was a "custom smelter" and its attraction for business was its automatic process for sampling ore instead of the process of hand sampling, which had been discarded for more than twenty years, as the new process was more expeditious and more productive to the owner of the ore. The written agreement between the parties to the action does not specify which kind of sampling was to be adopted, and this has occasioned the present litigation.

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As it happens, the Smelting Company's crusher broke down during the process of crushing. It has, therefore, been contended that as no special process of sampling has been provided for, the Smelting Company had the right to hand sample the plaintiff Company's ores as it did, and apparently from the figures before us, at a loss to the plaintiff Company.

But, it must be borne in mind that the Smelting Company held itself out to the mining community as being a Company that would give its customers the most profitable results by means of automatic smelting.

Usage in smelting is subject to the same rule that applies to usage in any other business. On this point Mr. *Macdonald* has referred us to the following passage in Leake on Contracts, page 127: "Extrinsic evidence is admissible to shew that a contract

in writing was made subject to a usage or custom of the trade or business to which the contract relates, impliedly binding the parties to certain usual or customary terms and conditions not mentioned in the writing. The contract in truth is partly express and partly in writing, partly implied or understood and unwritten. The effect of the terms introduced by usage is the same as if they were written in the contract. . . . . The intention of the parties to exclude a usage of trade, or to vary its effect, must appear in the writing; parol evidence is not admissible for that purpose." . . . .

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Consequently, if the Smelting Company had intended to resort to hand sampling in case of an accident to the Company's machinery, it should have had a provision inserted in the contract which would have enabled it to do so.

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This is, however, immaterial, as I think my brother Drake's figures with respect to what the plaintiff Company is entitled to are, for the reasons he gives, correct.

The appeal should be dismissed with costs.

DRAKE, J.: The only question in dispute herein is one of fact. The large crusher belonging to the defendant Company broke down, and the defendants sampled the ores in lots 296 and 297 by hand instead of automatically; that is, they took a sample either by shovel or hand out of each small ore car, which contained about three-quarters of a ton. The ore was then crushed, not automatically, and a sample taken, the result of which proceeding is that the fine or small ore is assayed, and not the lumps over three inches in diameter. The fine ores are not so rich in mineral as the larger pieces, which are all hand picked at the mine, and in consequence the general average is reduced. It was quite possible to take the larger pieces and break them up by hand and then put them through the crusher, but this was not done.

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It is admitted by Luce, the representative of the mine, that the fine ores were not improperly sampled, but the question is did this mode of sampling give a return equal to the return given by the automatic crusher? The evidence is clear that it did not. MacDonald says, at p. 32, that "ore sampled in this way would

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not be a representative sample." It would be impracticable to get a good sample unless all the coarse ore was broken up, and this apparently was not done.

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The defendants contend that under the contract made on the 16th of August, 1901, the term "sampling" includes any mode of sampling by which the value of the ore is arrived at, and is not limited to sampling automatically; and I think that is the true meaning of the contract. But if sampling is done otherwise than automatically, it should be done in such a manner as to give a similar or nearly similar result. The cars 296 and 297 shew a great falling off in values—$8.30 and $10.20 as against $14.20, the previous car 294, and $15.99 for car 298.

With regard to car 295, the evidence is conflicting whether it went to the crusher or not. Luce, whose duty it was to watch on behalf of the plaintiffs, was not apparently attending to his duties, and is unable to say what became of this lot, except what somebody told him. According to the yard book kept at the smelter, lot 295 went to the crusher; so did part of 296 and 297, but there is no evidence clearly shewing that the samples from the latter were taken from the automatic sampler, or from the shovel or hand samples; and in my opinion, as the defendants had the control of the sampling, and could have divided it, if they so pleased, the learned Chief Justice was justified in estimating the damage to the plaintiffs based on average returns, although it is not improbable that such an estimate might give an excess to the damage sustained by the plaintiffs. This is unavoidable, as it was not possible to make a check assay from other portions of the samples. Mr. *Hamilton*, in his careful analysis of the mode in which, from his point of view, the damage should be estimated, has lost sight of the fact that there is no evidence that lots 296 and 297 were assayed from other than hand samples. There is evidence from the yard book that some portion of these lots were crushed, and he therefrom deduces the fact that it is only the difference between the amounts that were automatically sampled and handsampled that can be looked at to ascertain the shortage. As to lot 296, consisting of 141.346 tons, 84.809 were automatically sampled; and as to lot 297, half hand sampled and half automatically. There ought in such case

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to be produced the assays from each class of samples. This was not done, and there is therefore no criterion of actual values. In my view I think I should give $14 a ton for 296 and 297, and as regards 295, the evidence I think is sufficient to shew that this lot went to the crusher in the ordinary way, and although the proceeds are low, I do not think that reason sufficient to overweigh the evidence produced by the yard book, which appears to have been kept in the ordinary way, and Luce, who apparently was not in the smelter at the time, cannot dispute the evidence adduced.

The result, in my opinion, varies but little from the amount which the Chief Justice has arrived at. He has added $8.58 to both lots, although lot 296 realized $8.30, while 297 realized $10.20. This would make the return for lot 296, $16.80 and 297, $18.78. I think the damages should be reduced to $2,550.98.

IRVING, J.: From the evidence, in particular from the entries in the yard book, it appears to me to be beyond question that lot 295 was passed through the crusher, so that we only have lots 296 and 297 to deal with.

In my opinion, the contract permitted samples to be selected in either way, but there was an implied term that by whichever way it was to be done, they were to be selected honestly and fairly, and a reasonable opportunity given the Le Roi Company to be present if not selected automatically. I agree with the Chief Justice that the defendants did not sample lots 296 and 297 in the manner in which the plaintiffs had a right to expect. I also agree with the Chief Justice that there was a breach on the part of the defendants of the concession granted by the plaintiffs that the defendants might (in the absence of the plaintiffs' officer) take ore when actually necessary to prevent the furnaces from freezing.

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Lot 296 consisted of eight cars, of which five cars were hand sampled and three cars automatically sampled; the total tonnage being 226 tons. Lot 297 consisted of eight cars, of which four were hand sampled and four automatically; the total tonnage being 215 tons. The plaintiffs contended that the proper system to be followed in adjusting the prices to be paid for these lots is

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to deduct the amount paid by the Smelter Company from the average values on all shipments made during the month of May, that is to say, $15.05 per ton. The Chief Justice thought it fairer to confine the average to the ten lots crushed automatically immediately before and immediately after the lots in question. The amount payable by the plaintiffs to the defendants would be, under the plaintiffs' contention, $2,825.38, according to the system approved by the Chief Justice, $2,601. But in selecting his method the learned Chief Justice had not accepted as a fact that lot 295 had been proved, by automatic sampling, to be only of the value of $9.65 per ton. I think that any method of striking an average of value in which that drop in value is not considered, would be misleading. I have come to the conclusion that by adding the values of say *two* undisputed lots immediately before, and after lot 295 to the known value of that lot, and dividing by five, would not be an unfair estimate of the probable value of the ore in lots 296 and 297.

Taking that average, which is $8.75, the account would stand thus:

Lot 296—226.155 tons at $8.75	$1,978.85	
Less paid on account	266.86	
		$1,711.99
Lot 297—215.574 tons at $8.75	$1,886.27	
Less paid on account	905.41	
		980.86
Total amount due to adjust....		$2,692.85

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This I see turns out more advantageous to the plaintiffs than the method adopted by the Chief Justice, but nevertheless, I think the method is as fair a system as can be devised. The defendants cannot complain, for in my opinion, the rule laid down in *Armory* v. *Delamirie* (1821), 1 Str. 505; *Clunnes* v. *Pezzey* (1807), 1 Camp. 8 and *Hammersmith, etc., Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171 at p. 224 is applicable to this case.

I think the judgment should be reduced as I have indicated to $2,692.85, but for the sake of uniformity I shall say $2,550.98. As the defendants have been successful to a certain extent, I think there should be no costs of this appeal to either side.

RE FERNIE ELECTION (PROVINCIAL) PETITION.

IRVING, J.

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RE FERNIE ELECTION

Elections Act—Recount—Ballots in custody of Deputy Provincial Secretary—Production for recount—Jurisdiction of Court or Judge to order—R.S. B.C. 1897, Cap. 67, Secs. 152, 154 and 211 and B.C. Stat. 1899, Cap. 25, Secs. 43 and 44.

The Court or a Judge thereof has no jurisdiction, under section 154 of the Provincial Elections Act, to order the Deputy Provincial Secretary to produce ballots for the purpose of a recount before a County Court Judge under section 43 of the amendment to the said Act in 1899.

THIS was an application made at Nelson before IRVING, J., on the 29th of October, 1903, for an order under section 154 of the Provincial Elections Act, R.S.B.C. 1897, Cap. 67, to compel the Deputy Provincial Secretary to produce the ballot papers for the purpose of a recount before the County Court Judge, under section 43 of the Provincial Elections Act Amendment Act, 1899. The facts were as follows: Upon the conclusion of the election, the Returning Officer for the Fernie Electoral District, declared Mr. Ross elected. Immediately thereafter the Returning Officer transmitted the boxes and papers to the Deputy Provincial Secretary, as required by section 152 of the Provincial Elections Act as amended in 1899. An application was made to the County Court Judge for a recount and the present application was made for production of the ballot papers for that purpose.

Statement

W. A. Macdonald, K.C., for the Deputy Provincial Secretary: There is no jurisdiction to make the order asked here. Where a statute gives to the Court or Judge jurisdiction in election matters, the jurisdiction is limited strictly to the powers contained in the statute: *In re Centre Wellington Election* (1879), 44 U.C.Q.B. 132; *McLeod* v. *Noble* (1897), 24 A.R. 459; 28 Ont. 528. Previous to 1899, there was no provision for a recount. The provisions now existing are no doubt defective in a number of matters. If, however, the Legislature has not provided this Court with jurisdiction to effectually aid in such recount the

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Court cannot assume jurisdiction. This principle is affirmed in section 211 of the Provincial Elections Act.

Section 154 of the Provincial Elections Act states for what purposes an order may be made on the Deputy Provincial Secretary for production of the papers. No petition is pending. Recount is not a petition. Petition is defined by the Act, and means that procedure by petition which existed at the time section 154 was passed, and which still exists. So far as a recount is concerned when the ballot boxes have been returned to the Deputy Provincial Secretary, the matter is at an end.

Argument

S. S. Taylor, K.C., in support of the application: Sections 153 and 154 of the Provincial Elections Act must be read in the light of the reasons for which they were passed. Section 154 covers every case in which the ballot papers might have been required, at the time these sections were passed. When the new procedure of recount was introduced, it must be assumed that the provisions of these sections shall apply thereto. The application for a recount is a petition questioning an election or return.

Judgment

IRVING, J.: I think it must be admitted that the onus is on the applicant of shewing his right to this order. The statutes seem to be certainly defective. Provision is made in the Act of 1899 for a recount before the County Court Judge, and section 44 contemplates that for the period of ten days within which the application for a recount may be made, the ballots will remain in the hands of the Returning Officer, while section 152, R.S.B.C. 1897, Cap. 67, provides that the officer shall *immediately* after the closing of the election transmit all the boxes and papers to the Deputy Provincial Secretary. In the present case the papers have passed out of the hands of the Returning Officer and into the custody of the Deputy Provincial Secretary. That officer says that he is only justified in parting with these papers upon an order under section 154. I can only make the order under that section when satisfied, on oath, that the ballots are required for the "purpose of instituting or maintaining "prosecution for an offence in relation to ballot papers, or ballots, or for the purpose of a petition questioning an election or return." The Legislature, in order to have made this section

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consistent, should have added to section 154 words which would have conferred power to order the return of the ballots, in the present case by adding words, "or for a recount." I cannot agree that the application for a recount is a petition within the meaning of section 154, as at the time that section was drawn, there was no such thing as a recount. The petition mentioned in section 154 is clearly such a petition as is mentioned in section 211 and subsequent sections of the Provincial Elections Act. I am of opinion that I have no jurisdiction to make this order

Application refused.

MARSHALL v. CATES.

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Master and servant—Negligence—Verdict—Inconsistent answers—Construction of.

In construing a jury's verdict consisting of a number of questions and answers the whole verdict must be taken together and construed reasonably, regard being had to the course of the trial.

In an action for damages for personal injuries from an accident happening because of plaintiff's failure to withdraw himself from danger in response to a signal, the jury found that the defendant was negligent and that the signal was given prematurely, and that the plaintiff should have heard the signal, but being busy may not have heard it. The answer to the question as to contributory negligence, to which the jury's attention was directed by the Judge, was "We do not consider that plaintiff was doing anything but his regular work." Judgment was entered for plaintiff.

Held, by the Full Court that the judgment must be affirmed.

APPEAL from judgment of MARTIN, J., in favour of the plaintiff in an action for damages for personal injuries received by the plaintiff while in the employ of the defendant. The plaintiff was engaged on defendant's piledriver on a scow about 45 feet long and 24 feet broad; the piledriver itself, a large iron weighing

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about 2,600 pounds, was situate at one end of the scow and was operated by means of a donkey engine situated at the other end. By the use of a friction brake and chain passing around a winze the "hammer" was lowered and raised. The plaintiff was working near the leads, which were two pieces of wood up and down next the piledriver, his duties being to unhook the chain that raised the pile from the water after it had been placed in position for being driven down. In the course of the operations the plaintiff's hand was caught under the hammer and injured; he said he was trying to adjust the chain and the defendant contended that he lost his balance and fell and hence the accident.

The action was tried with a common jury, who returned the following verdict:

(1.) Did the defendant, his servants or agents do anything in regard to the working of the piledriver which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances? Yes.

(2.) If so, what was it? And name the person or persons guilty of such act of commission or omission. Dougan, as foreman, had no right to be in such position on his knees as to hide the view of the top of the pile from the engineer, but should have been where he could give proper signals and see that all was clear.

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(3.) Did the defendant by such act of commission or omission cause injury to the plaintiff? Yes.

(4.) Was there any defect in the piledriver? If so, what was it? None.

(5.) Was the system of signals in use faulty? If so, in what respect? Yes, it is faulty, but commonly used.

(6.) Did the foreman give the order to the engineer to raise and lower the hammer? If so, was it heard and acted upon? We believe he got the order and acted on same.

(6*a*.) Did the plaintiff hear such order, or ought he to have heard it? He should have heard it, but being busy, may not have heard it.

(7.) What was the proximate cause of the accident? The order should not have been given to move the hammer off chock until they were positive the line was clear.

(8.) Did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances and thereby contribute to the accident? We do not consider that plaintiff was doing anything but his regular work.

(9.) If so, what was it?

(10.) Damages, if any? We allow plaintiff $1,000 damages.

On the motion for judgment the following judgment was given.

25th July, 1903.

MARTIN, J.: After further consideration of the findings of the jury in the light of the authorities cited on the argument I have reached the conclusion, with not a little hesitation, that judgment should be entered in favour of the plaintiff, with costs. Though I agree with the defendant's counsel that, having regard to the findings 6 and 6 (*a.*) there is much in the case of *O'Hearn* v. *Port Arthur* (1902), 4 O.L.R. 209, which supports his contention, nevertheless, there is in the present case that important finding on proximate cause which the Court regretted the absence of in the *O'Hearn* v. *Port Arthur* case. And there is this further circumstance in favour of the plaintiff, *viz.*, that at the defendant's request the jury visited the *locus in quo* and had a view of the piledriver in active operation. What they saw or heard and to what extent that which they did see or hear affected their verdict I do not know, but that it may very well have had a material effect I do not doubt, having regard to all the circumstances of the case. Personally, I do not think a view was necessary, but the defendant's counsel pressed for it and I hardly felt justified in refusing it after the majority of the jury had expressed the like wish, though I remarked upon the uncertain element which a view always introduces should it become necessary to consider or review the evidence upon which a jury has founded its verdict. A view is undoubtedly evidence of a certain kind, and according to circumstances it may justly be of much or little weight, but there is no method by which that weight may be weighed by the trial Judge or by a Court of Appeal.

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In the present case I do not hesitate to say that it embarrassed

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me in satisfactorily determining the cross-motions in a case which unquestionably is on a fine drawn line.

The appeal was argued at Vancouver on the 10th of November, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

Davis, K.C., for appellant: It appears that had it not been for the view the learned trial Judge would have found in our favour; a view cannot add anything to the evidence and the parties cannot be prejudiced by it: see *London General Omnibus Company* v. *Lavell* (1900), 17 T.L.R. 61. A system of warning was proved and there is no evidence that it was faulty. As to contributory negligence he cited *O'Hearn* v. *Port Arthur* (1902), 4 O.L.R. 209; *Reynold* v. *Tillings* (1903), 19 T.L.R. 539 and *The Bernina* (1887), 12 P.D. 58 at pp. 61-3.

As to question 2, it was no part of the engineer's duty to see the top of the pile; he was to take instructions from Dougan the foreman; there is no evidence to shew that Dougan was in such a place as not to be able to see the top of the pile. The answer to question 6 (*a.*) is a finding of contributory negligence: it shews the plaintiff should have heard the warning. Assuming that the answer to question 7 is justifiable, and it was Dougan's negligent order that caused the accident, still had the plaintiff been on the lookout and taken some steps for his own protection, he would have heard the warning and got out of the way.

Argument

J. A. Russell, for respondent: The plaintiff's case was that Dougan gave a negligent order; he should have followed the hammer down with his eye so that he could have stopped it by the proper signal if he saw an accident was likely to result. The plaintiff will not be charged with contributory negligence if in a moment of forgetfulness he missed hearing the order: see *Scriver* v. *Lowe* (1900), 32 Ont. 290. The answers to questions 1 and 7 are positive findings of negligence, but there is no positive finding of contributory negligence, and the Court will not infer it as the onus is on the defendant to shew it positively: he referred to *Smith* v. *Baker & Sons* (1891), A.C. at p. 353 and *Godwin* v. *Newcombe* (1901), 1 O.L.R. 525 at p. 529.

Davis, in reply: The answer to question 6 (*a.*) means that as against the plaintiff it must be assumed that he did hear the

order; if it is not a finding of contributory negligence then the jury have not answered the question and there must be a new trial.

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HUNTER, C.J.: We are all of opinion that the judgment must be affirmed. It has been contended by Mr. *Davis* that amongst these findings there is one of contributory negligence. With that contention I am unable to agree. Mr. *Davis* says that the answer to the question 6 (*a.*) "Did the plaintiff hear such order or ought he to have heard it," amounts to a finding of contributory negligence. Now, it is well settled that in examining the findings of a jury they ought not to be subjected to minute criticism, but the whole of the findings have to be taken together and construed reasonably. It seems to me, adopting that canon of construction, that we have to take 6 (*a.*) with No. 8, and in the last question it is distinctly put to the jury to find upon the question of contributory negligence. They do not find in terms that he was not guilty of contributory negligence, but do say that they do not think the plaintiff was doing anything beyond his regular work. There is no doubt the question of contributory negligence was brought directly before them, and they had an opportunity of passing upon it, and that is what they say about it.

With respect to 6 (*a.*) all I understand that finding to mean is this, that the plaintiff was in a position where naturally he would have heard the order, but they say the probability is that he was too busy and that it did not come to his ears. It seems to me that where a man is put in a position of danger, as this man was, inasmuch as his business and duty called upon him to work over the head of the pile, there was a constant and co-relative duty on the part of Dougan to see to it that he was not subjected to unnecessary risk of life or limb. It seems to me the position is analagous to that of the case of a conductor who knows that a brakesman has gone under a train. It is not sufficient for him to call out to the man before he signals to the engineer to go ahead. He must go farther, and first make sure that the man is out of danger. I see no reason for interfering with the judgment, and I think the appeal should be dismissed.

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DRAKE, J.: I concur.

IRVING, J.: It seems to me the point in this case is whether Dougan gave the signal prematurely, having regard to the plaintiff's employment, and the plaintiff took all reasonable and proper steps for his own protection. In answer to question 8 the jury have found that he did use all proper precautions; they have to a certain extent embarrassed everybody by their answer to question 6 (*a.*), but having regard to the answers to 7 and 8, and the language used by the learned Judge at the trial in charging them with respect to questions 7 and 8, I think it is clear that in the opinion of the jury the order was prematurely given, and that such premature order was the cause of the accident, and not any want of care on the part of the plaintiff. I do not think we can take the answers of the jury to questions and shut our eyes to what the Judge said at the trial. In dealing with question 8, he pointed out very fully the nature of contributory negligence: in particular, he is not entitled to recover from the defendant because of his own omissions. Now, having that charge with reference to question 8, I think that the answer on that point must be accepted, and the cross-examining question 6 (*a.*) in respect of which no charge was given, ignored.

IRVING, J.

Appeal dismissed with costs.

HOPPER v. DUNSMUIR. (No. 3).

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Nov. 17.

HOPPER v. DUNSMUIR

Practice—Undue influence—Particulars.

A party alleging undue influence will be required to give particulars of the acts thereof.

Lord Salisbury v. *Nugent* (1883), 9 P.D. 23, considered.

APPEAL from an order of DRAKE, J., whereby the plaintiff was ordered to give particulars of the undue influence alleged in paragraph 13 of the statement of claim. For the nature of the action see the report of another decision in the same cause, *ante* pp. 17 and 18. The 13th paragraph of the statement of claim was as follows:

"The said Josephine Dunsmuir, deceased, had previous to the execution of the said pretended agreement, undergone several surgical operations, and was in consequence in a weak and feeble condition, as the defendant well knew; and by virtue of the position she was placed in by the said pretended will of the said Alexander Dunsmuir, deceased, at the time of and previous to the execution of the said pretended agreement, the said Josephine Dunsmuir, deceased, was completely at the mercy of the defendant; and the defendant, well knowing the mental and physical condition of the said Josephine Dunsmuir, deceased, and in order to obtain the whole of the estate of the said deceased brother, obtained the signature of the said deceased Josephine Dunsmuir to the alleged agreement by means of undue influence."

Statement

The appeal was argued at Vancouver on the 16th of November, 1903, before HUNTER, C.J., IRVING and MARTIN, JJ.

Bodwell, K.C., for appellant: It is not the practice of the Courts to order particulars of undue influence except sometimes the names of the persons engaged in exerting the influence are ordered to be given: see *Lord Salisbury* v. *Nugent* (1883), 9 P.D. 23 and *Hankinson* v. *Barningham*, *ib.* 62. In this case it will be oppressive to compel the plaintiff to give particulars, because the facts are all within the knowledge of the defendant.

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Davis, K.C. (*Luxton*, with him), for respondent: Rule 160 is a statutory requirement of particulars of undue influence where it is alleged. The decisions cited shew the practice peculiar to the Probate Court in England; the Court there refused to interfere with their old established practice, but there is no such practice here and r. 160 is conclusive. The learned Judge below has exercised his discretion and it won't be interfered with unless it is shewn he was clearly wrong: *Gouraud* v. *Fitzgerald* (1889), 37 W.R. 265.

17th November, 1903.

HUNTER, C.J.: Speaking for myself, I think that the order of Mr. Justice DRAKE must be upheld. Our rules, particularly rule 160, give the defendant the absolute right to have particulars delivered of the pleadings of the plaintiff whenever a charge of undue influence is made. Now, it is quite true that, in this case, the probabilities are that very little more information can be given than is set forth in the pleadings, but on Mr. *Bodwell's* own admission, some additional information can be given, for instance, the names of the people through or by whom the alleged undue influence was exercised. In this case, in all probability, the particulars given will be that the defendant himself was the only person by whom such alleged undue influence was exercised. Then also the dates upon which or between which such undue influence was alleged to have taken place, may be given. Speaking generally, it will be a matter of no difficulty to state that the only particulars that can be given are those set forth in the pleadings. I think, moreover, that where the discretion is exercised in the way it has been by the learned Judge, we ought to be slow to interfere, unless it is shewn that the order is clearly wrong, or of such a nature as to unduly embarrass the party called on to comply with it. Appeals of this kind ought to be discouraged.

HUNTER, C.J.

IRVING, J.: I am of the same opinion. I think the real answer is, the Judge below having exercised his discretion, we should not interfere. The cases relied upon by Mr. *Bodwell*, according to all the text books that I was able to examine last evening, deal peculiarly with the practice of the Probate Division. With regard to the argument relied upon by Mr. *Bodwell*,

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that if James Dunsmuir was the party interested and the only party charged, particulars were not necessary, I do not think that is conclusive, because the person whose character is attacked is entitled to know what the attack will be. In *Marriner* v. *Bishop of Bath and Wells* (1893), P. 145, this principle is laid down.

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MARTIN, J.: I agree with my learned brothers. Whatever may be the practice of the Probate Division in England, it cannot override our statutory rule, 160. The present action so far as the agreement attacked in paragraph 13 is concerned, is in the nature of a bill in Chancery to set aside that agreement, and there is no good reason why, as a general rule, particulars should not be given. In the case at bar the learned Judge ordered particulars to be given, and it does not appear from the pleadings that in the circumstances his discretion was improperly exercised, and I think it therefore should not be interfered with by this Court.

MARTIN, J.

Appeal dismissed.

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OPPENHEIMER v. SPERLING

OPPENHEIMER v. SPERLING *ET AL.*

Practice—Pleading—Extension of claim as indorsed on writ—Some of defendants served under Order XI.—Order XX., r. 3.

Plaintiffs issued a writ against three defendants all resident in England and served it on one of the defendants while temporarily in British Columbia, and then under Order XI., served the other defendants in England. The claim indorsed on the writ was for damages for non-transfer to plaintiff of shares according to agreement and for failure to hold certain stock in trust. By the statement of claim the plaintiffs set up in effect a claim for damages against defendants for fraudulently manipulating certain companies so that the stock had become worthless:—

Held, that the matters alleged in the statement of claim were within the scope of the indorsement.

In deciding whether or not the cause of action indorsed on a writ has been unduly extended in the statement of claim, the fact that one of the defendants was served within the jurisdiction and the others were subsequently served without the jurisdiction under Order XI., is immaterial.

Statement

THIS was an action by the trustees of the estate of David Oppenheimer and the Bank of Montreal against H. R. Sperling, R. W. Garbutt and R. M. Horne-Payne. The defendants were all residents of and domiciled in England and members of the firm of Sperling & Co. The defendant Horne-Payne while on a trip to British Columbia was served with the writ, and then under Order XI. the other defendants were served. The indorsement on the writ was:

"The plaintiffs' claim is for damages for breach of an agreement made between the defendants and David Oppenheimer, late of the City of Vancouver, deceased, in the year 1895, whereby the defendants agreed to transfer to the said David Oppenheimer, his executors, administrators and assigns, $68,000 fully paid up ordinary stock in the Consolidated Railway and Light Company, and to hold in trust for the said David Oppenheimer $100,000 of fully paid up ordinary stock in the said Consolidated Railway and Light Company. The plaintiffs Isaac Oppenheimer, Solo-

mon Oppenheimer and Campbell Sweeney sue as executors of the last will and testament of David Oppenheimer, late of the City of Vancouver, British Columbia, deceased."

The statement of claim was composed of 27 paragraphs containing allegations as follows:

"(1, 2 and 3.) Particulars of the parties.

"(4.) That before June, 1894, the Vancouver Electric Ry. & Light Co., Ld., and the Westminster and Vancouver Tramway Co., became financially embarrassed, their debentures being held by the Bank of B. C. and the Yorkshire Guarantee & Securities Corporation.

"(5.) That the late David Oppenheimer was an enterprising citizen and had been Mayor of Vancouver.

"(6.) That on the Tramway Companies' creditors pressing for payment the said D. O. interested himself in the reconstruction of the Companies and the Consolidated Ry. & Light Co. was formed with power to acquire the tramway lines.

"(7.) That the defendants being desirous of acquiring the tramway lines and also one in Victoria, negotiations were carried on between them and the defendant Horne-Payne and said D. O.

"(8.) That the negotiations through D. O's skill culminated in an agreement dated 4th September, 1894, between the Bank of B. C., the Guarantee Co. and the defendants whereby the Bank and the Guarantee Co. agreed to transfer to defendants the two tramway lines.

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"(9.) That the defendants then entered into two several agreements with the Consolidated Ry. & Light Co. whereby the Company agreed to issue to defendants $50,000 worth of preference stock and $495,000 worth of ordinary stock and also to issue to defendants $100,000 worth of ordinary stock.

"(10.) That on 22nd September, 1894, the defendants and D. O. entered into an agreement whereby defendants agreed to hold in trust for D. O. $228,000 worth of ordinary stock.

"(11.) That by a contemporaneous agreement the defendants agreed that on the agreements mentioned in paragraph 9 being carried into effect they would transfer to D. O. $8,000 worth of stock in the said consolidated Co.

"(12.) That D. O. at the request or demand of the defendants

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surrendered the agreements of 22nd September, 1894, and accepted on 19th July, 1895, in lieu thereof an agreement whereby he was to receive no preference stock and only $168,000 worth of ordinary shares, of which $100,000 worth were to be held in trust by defendants and the balance delivered to D. O.

"(13.) That on 20th July, 1895, the defendants and D. O., to give effect to the agreement last mentioned, entered into an agreement under seal whereby the defendants (subject to the agreement between them and the said Consolidated Co. being carried out) agreed to hold upon certain trusts $100,000 worth of ordinary stock in the said Consolidated Co. and to transfer to D. O. $68,000 worth of ordinary stock.

"(14.) That D. O. consented to a reduction of the interest he was to receive in reliance upon defendants' promise to invest $350,000 in the said Consolidated Co.

"(15, 16 and 17.) That on 1st November, 1895, an agreement under seal was made between the Bank of B. C., the Guarantee Co. and F. S. Barnard, on behalf of defendants, which after reciting that the defendants in the name of the said Consolidated Co. had acquired the two tramway lines and that defendants had agreed to procure the investment of £70,000 in the said Consolidated Co., stipulated

"(*a.*) That the Bank and the Guarantee Co. should assign to the defendants all the interest in the two Tramway Companies then held by the said Consolidated Co., provided if the defendants elected that the said Company should remain the owners of the said property then the Bank and the Guarantee Co. were to cause to be transferred to defendants all the issued shares in the Consolidated Co. to the interest that the defendants should have all the property of the two Tramway Companies.

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"(*b.*) That defendants pay the Bank and the Guarantee Co. £115,525 cash and deliver £125,000 of 4½ per cent. debentures.

"(*c.*) That defendants also pay said Bank and Company £74,400 cash and deliver $93,000 preference shares out of a total issue of $500,000.

"(*d.*) That defendants procure the investment of £70,000 in the said Consolidated Co.

"(*e.*) That without the consent of the said Bank and Guaran-

tee Co. the issue of debentures should be limited to £125,000 and that of preference shares to $500,000.

"(*f* and *g*.) That the properties were to be delivered to defendants as of 1st July, 1895, and that the preference shares in excess of $93,000 be not sold, but might be pledged for the purpose of raising the £70,000 to be invested in the Company's undertaking.

"(*h*.) That defendants' liability to invest the £70,000 should be a continuing liability until the said sum had actually been invested and the defendants received the preference shares, stock or securities as aforesaid, but so as not to give any priority over the securities held by the said Bank and Guarantee Co., the intent being declared that they were to have the benefit of the improvements procured by the investment of the £70,000 or the liability of the defendants on any part of the said sum not being invested.

"(18.) That defendants elected to deliver to the said Bank the £125,000 worth of debentures secured by a trust deed covering all the said Consolidated Co's property, the Guarantee Co. being appointed trustees for the debenture holders.

"(19.) That defendants were holders of debentures of Victoria Electric Ry. & Light Co., which becoming embarrassed the defendants in March, 1896, sold its property to the said Consolidated Co., which was thereafter known as the Consolidated Railway Co.

Statement

"(20 and 21.) That on 26th May, 1896, one of the said Company's tram cars in Victoria broke through a bridge with the result that many passengers were killed and injured, in consequence of which many damage actions were commenced, and the Company becoming alarmed that it would be ruined and have to contribute the £70,000 for the purpose of preserving the Company as a going concern, deliberately allowed interest on debentures held by the Bank and the Guarantee Co. to fall into arrear and induced the trustees to enter into possession.

"(22.) That defendants who had control of the said Railway Co., for the purpose of relieving the Company from liability in respect of the said damage actions and also for the purpose of relieving themselves of responsibility in connection with the

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$168,000 worth of shares to be held in trust for and delivered to D. O., promoted a Company called the Colonial Railway & General Investment Co. to purchase from the trustees the property of the Consolidated Ry. Co., and on 14th December the sale was carried out.

"(23 and 24.) The defendants afterwards promoted the B. C. Tramway Co. for the purpose of acquiring the property of the Consolidated Ry. Co., and they further promoted the B. C. Electric Railway Co. for the same purpose, and the latter Company did acquire the property.

"(25.) That defendants never paid the £70,000 to the Consolidated Railway Co., but on the contrary fraudulently allowed interest to fall into arrear and induced the trustees to sell to another Company promoted by themselves as aforesaid.

"(26.) That although in the agreement of 20th July, 1895, the defendants promised to give D. O. shares in the Consolidated Ry. Co., the said D. O. 'accepted the said Consolidated Ry. & Light Co. in the belief and that the defendants intended that that Company should be a real Company and not a mere conduit pipe for the purpose of passing all the property that might be acquired through a series of companies until it reached the defendants untrammelled by any obligations.'

"(27.) That the said D. O. in his lifetime became indebted to the Bank of Montreal and the Bank had acquired an assignment of one-third of the shares and money due by defendants to D. O."

The plaintiffs claimed shares in the B. C. Electric Ry. Co. of the value of $168,000 or $168,000 damages.

The defendants applied to strike out the statement of claim on the ground that it tended to prejudice, delay and embarrass the fair trial of the action or in the alternative that such allegations which introduced or contained causes of action not included in the writ be struck out.

The summons was heard by IRVING, J., who dismissed the application holding that the action and remedy described in the statement of claim related to the matter referred to in the suit and that the extension was proper. He referred in giving judgment to *Kingdon* v. *Kirk* (1887), 37 Ch. D. 141; *Gibson* v. *Hieb* (1901), 1 O.L.R. 247 and *Smythe* v. *Martin* (1898), 18 P.R. 227.

The defendants appealed and the appeal was argued at Victoria on 15th and 16th January, 1903, before HUNTER, C.J., DRAKE and MARTIN, JJ.

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A.E. McPhillips, K.C., for appellants: In such a case as this where defendants are brought in under Order XI., the plaintiffs should be limited strictly to their cause of action as set out in the indorsement on the writ; the cause of action here as set out in the statement of claim is entirely different from that in the indorsement on the writ. The averments in the paragraphs before the 13th have nothing to do with this case; the 13th paragraph contains the only cause of action they can call upon us to meet; in paragraph 26 they admit that David Oppenheimer accepted shares; the claim on the writ has been extended into a claim for damages for fraudulent manipulation of the different companies; if plaintiffs wanted to set up a fraudulent breach of agreement it should have been alleged in the indorsement. He cited *Cave* v. *Crew* (1893), 62 L.J., Ch. 530; *Smythe* v. *Martin* (1898), 18 P.R. 227; *Brock* v. *Tew* (1897), *ib.* 30 at p. 33; *United Telephone Company Limited*, v. *Tasker, Sons, and Co.* (1888), 59 L.T.N.S. 852; *Hendriks* v. *Montagu* (1881), 17 Ch. D. 638 at pp. 647-8.

If fraud had been alleged in the indorsement the plaintiffs' claim might be justified, but an amendment cannot be allowed where it is sought to change the action into one entirely different from the one as launched; he cited *Moore* v. *Atwill* (1881), L.R. 8 Ir. 245; *Raleigh* v. *Goschen* (1898), 1 Ch. 73 at p. 81 and *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 701.

Argument

Davis, K.C., for respondent: As to expanding or amplifying in the statement of claim the cause of action indorsed on the writ the same principles apply in regard to writs for service without the jurisdiction as to those for service within the jurisdiction; when a statement of claim has once been delivered amendment of the indorsement on the writ is unnecessary; he cited *Large* v. *Large* (1877), W.N. 198; *Holland* v. *Leslie* (1894), 2 Q.B. 346 and 450; *Johnson* v. *Palmer* (1879), 4 C.P.D. 258. The appellants must shew by affidavit that there are different causes of action and that they cannot be tried together conveniently; all

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the allegations are necessary and proper as the intermediate agreements must be set out; some are material facts and some are matters of inducement—see *Smythe* v. *Martin* (1898), 18 P.R. 227. As to paragraph 26 "accepted" means that David Oppenheimer accepted it as a real company and not that he accepted shares. *McPhillips*, in reply, referred to *Henty* v. *Schroder* (1879), 12 Ch. D. 666 and *Smith* v. *Mitchell* (1894), 3 B. C. 450.

HUNTER, C.J.: We are of the opinion that since the matters set out in the statement of claim arise out of the contract mentioned in the indorsement on the writ, the statement of claim is not objectionable in that respect, but in view of the fact that it is so prolix, and, as regards paragraph 26, so ambiguous in an important matter, there will be no costs of the appeal which will be dismissed without costs.

HUNTER, C.J.

DRAKE, J.: I concur.

DRAKE, J.

MARTIN, J.: I agree with my learned brothers about the prolixity and ambiguity of the statement of claim, but go further, and say that the statement of claim is ambiguous and obscure in essentials; that it is unfair to the defendant that he should be called upon to plead to it and that part of his application should be given effect to, and the appeal allowed with costs. Where pleadings are ambiguous they will be construed against the pleader: see Odgers, 4th Ed., 72 and Stephen on Pleading (1866), 337. I wholly concur with the expressions of the four Judges in Ontario in *Brock* v. *Tew* (1897), 18 P.R. 30 at pp. 32 and 33 as to the necessity of the pendulum moving back in the shockingly bad state of irrelevant and prolix pleadings we have dropped into. As to the other branch, *i.e.*, the expansion of the statement of claim, I think it is premature to express an opinion before it is reformed, so that the Court may know exactly what the case of the plaintiff is. Speaking generally, I approve of the expressions in *Cave* v. *Crew*, but reserve the question of their application to present case.

MARTIN, J.

Appeal dismissed, Martin, J., dissenting.

After the determination of the above appeal the plaintiffs amended their statement of claim by striking out of it para-

graphs 5, 13, sub-sections (*c.*), (*e.*) and (*f.*) of 17, and 23 and substituting for paragraph 26 three paragraphs numbered 23, 24 and 25 which were as follows:

"(23.) The said David Oppenheimer when he agreed to accept the shares in the Consolidated Railway & Light Co. as hereinbefore mentioned, so agreed on the faith and in the belief (in common with all parties to the said contract) that that company would be a real company owning all the said tramway property and having a new and additional capital of $350,000 by virtue of the undertaking of the defendants set out above, and not a mere conduit pipe for the purpose of passing all the property that might be acquired through a series of companies until it reached a company controlled by the defendants untrammelled with any obligations.

"(24.) The defendants never gave the said D. O. any shares or held any shares in trust for him in accordance with the terms of the said agreement, but on the contrary retained the said shares in their own possession and for their own use and purposes until the 8th of July, 1896, when shares in the Consolidated Ry. Co. having by their own fraudulent acts as aforesaid become absolutely worthless, they offered the said D. O. 680 of the said worthless shares purporting to represent shares of the face value of $68,000, and the plaintiffs say that the said offer was no compliance with the said agreement by reason of the fraudulent acts of the defendants as aforesaid, and that there never was any compliance by the defendants or either of them with the true intent, meaning and spirit of the said agreement.

Statement

"(25.) The only shares in any company which would fulfil the terms of the said agreement in its true spirit, are shares in the British Columbia Electric Railway Company, Limited, and the defendants have refused and still refuse to give any of the said shares to the said D. O. or his representatives or to hold any of such shares in trust for him or them, and refuse to recognize that he or his representatives have any interest whatever in the said company."

The defendants again applied on summons to strike out the amended statement of claim and the summons was dismissed by HUNTER, C.J.

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The defendants appealed and the appeal was argued at Vancouver on 20th April, 1903, before DRAKE, IRVING and MARTIN, JJ.

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L. G. McPhillips, K.C. (*Heisterman* with him), for appellants: The plaintiffs sued for damages for the non-transfer to David Oppenheimer of certain stock and for failure to hold certain stock in trust for David Oppenheimer, but by the statement of claim the cause of action is in effect expanded so that damages are claimed for wrecking a Company. Plaintiffs sued for damages for the non-transfer of certain stock, but now in their statement of claim they admit the stock was tendered and set up a new cause of action. Where a defendant who is a resident of another country is served while temporarily in the Province with a writ indorsed with one cause of action the Court will not allow the plaintiff to set up a new cause of action in his statement of claim.

As to power of the Court over foreigners he cited Halleck's International Law, 3rd Ed., 209, 210; Dicey's Conflict of Laws (1896), 233; Piggott on Foreign Judgments, 129, 130, 131, 133; *Sirdar Gurdral Singh* v. *Rajah of Faridkote* (1894), A.C. 670; *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155; 5 Camp. R.C. 734, 745.

Argument

Order XI., does not apply at all to these proceedings. He cited also Piggott on Service out of the Jurisdiction, 133; *Diamond* v. *Sutton* (1866), L.R. 1 Ex. 130; *Roberts* v. *Worsley* (1794), 2 Cox, 389; *Lorton* v. *Kingston* (1850), 2 Mac. & G. 139; *Cave* v. *Crew* (1893), 62 L.J., Ch. 530; *United Telephone Co.* v. *Tasker, Sons, and Co.* (1888), 59 L.T.N.S. 852, Y. Pr. 280, An. Pr. 263; Odgers on Pleading, 5th Ed., 188; Holmsted & Langton, 419; *Ker* v. *Williams* (1886), 30 Sol. Jo. 238. There was a misunderstanding of the cases on the former appeal. Stress was there laid on *Holland* v. *Leslie* (1894), 2 Q.B. 450, but in that case an *ex juris* writ had been issued, but here an *ex juris* writ could not be issued as is shewn by the report in 7 B.C. 96.

The plaintiffs' claim may be barred by the Statute of Limitations and in such a case the Court will not allow an amendment which might cut out what might otherwise be a good ground of

defence: *Weldon* v. *Neal* (1887), 19 Q.B.D. 394; *Doyle* v. *Kaufman* (1877), 3 Q.B.D. 7; *Lancaster* v. *Moss* (1899), 15 T.L.R. 476 and *Indigo Company* v. *Ogilvy* (1891), 2 Ch. 31.

Davis, K.C. (*Wilson, K.C.*, with him), for respondents: On the former appeal the Court decided no new cause of action had been introduced and the cause of action now is the same as before, the only change being that some paragraphs of the statement of claim which were considered prolix have been cut out and paragraph 24 clears up what was intended in the original paragraph 26. He also referred to his former argument.

McPhillips, replied.

DRAKE, J.: When we look at the indorsement on the writ we see that the plaintiffs' claim is for damages for breach of a certain alleged agreement; all the facts leading up to the breach of that agreement are necessary in pleading so as to inform the defendants of the case they must be prepared to meet as otherwise they will be entitled to ask for particulars. Mr. *McPhillips* says there is a new cause of action set up in section 24 of the statement of claim but I cannot see it; this is a case in which the rules of equity apply rather than those of common law. The plaintiffs' claim is that the defendants have manipulated the companies so as to avoid Oppenheimer's claim and no new cause of action is set up but only a statement of the facts which are intimately connected with the cause of action.

DRAKE, J.

The arguments have been practically the same as on the hearing of the former appeal and I see no reason to change the view of the majority of the Court on that appeal.

The appeal should be dismissed with costs.

IRVING, J.: I agree. It seems to me that paragraph 24 of the statement of claim is merely a statement that the defendants did not by making a certain offer comply with the agreement in respect of which the action is brought. The paragraph merely states that this offer was a pretended compliance with the agreement. It does not set up a fresh cause of action.

IRVING, J.

MARTIN, J.: I agree. This Court has already held that the cause of action indorsed on the writ had not been unduly ex-

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panded in the statement of claim and that decision should be adhered to. Though at that time I was somewhat inclined to the view contended for by Mr. *A. E. McPhillips*, I am not now, in view of that decision, in favour of re-opening the matter. Since then what has, in effect, been done by the amended pleading now in question is to set up the cause of action then approved of, but in a manner devoid of that ambiguity and prolixity which the Court in general (and myself in particular) thought objectionable.

Appeal dismissed with costs.

Note:—On 23rd January, a motion for leave to appeal to the Privy Council from the first Full Court judgment was dismisssd, and on 20th April, after judgment was given dismissing the second appeal, a motion for leave to appeal to the Privy Council was made and dismissed.

FULL COURT
1903
Nov. 5.

JOWETT v. WATTS

JOWETT v. WATTS

JOWETT v. WATTS.

County Court—Garnishee summons based on default summons.

A garnishee summons may be issued based on a default summons as well as on an ordinary summons.

APPEAL from an order of FORIN, Co. J., setting aside a garnishee summons.

The facts for the purpose of this report are sufficiently set out in the following memorandum of judgment handed down by His Honour:

FORIN, CO. J.

The plaintiff issued a garnishee summons on a default summons. I held this was irregular as the only provision for issuing a garnishee summons was to make it returnable at the same Court as the ordinary summons was returnable. A default summons is not returnable at any fixed Court, and may never be called in Court.

I have been informed that Mr. Justice DRAKE has already considered this point, deciding that a garnishee summons before judgment can only be issued on an ordinary summons.*

On reading section 103 of the County Courts Act, Cap. 52, R.S.B.C. 1897, and the form of the garnishee summons used by the Registrars it appears to me that the matter becomes very plain.

The appeal was argued at Vancouver on 5th November, 1903, before HUNTER, C.J., IRVING and MARTIN, JJ.

S. S. Taylor, K. C., for appellant.

C. B. Macneill, for respondent. A default summons is not

*The judgment probably referred to was one delivered by DRAKE, J., in May, 1894, in an action in which the Queen City Building and Loan Association of Victoria, was plaintiff, Green, Worlock & Co., were defendants and Benjamin Williams was garnishee.

That part of the judgment having reference to the point in question here was as follows:

"In these cases the plaintiff issued default summonses and obtained judgment. By section 6 of the Act, 1892, the plaintiff may at the time of issuing a summons for debt or liquidated demand or thereafter on affidavit swearing to the debt, obtain a summons against anyone indebted to the defendant, and such summons shall be returnable at the same Court as the summons to the defendant, and the garnishee may file a dispute note as to his liability to the defendant, and in case of default the same consequences follow as in the case of an ordinary debtor.

"It is contended that as a default summons is not returnable at any Court, if no dispute note is filed, therefore this section 9 is not applicable to this form of proceeding; but the plaintiff must take out an ordinary plaint.

"If a dispute note is filed the Registrar gives notice to the defendant of the day of trial, which would be in ordinary cases at the first Court held after filing the dispute note. If no dispute note is filed the judgment is entered up without coming to Court.

"In my opinion, the objection is untenable. The plaintiff can use either form of plaint in the original action and in case there is no dispute note filed by defendant, the plaintiff obtains a default judgment and then brings his summons against the garnishee on to be heard at such Court as the Registrar fixes. If there is a dispute note filed in the original action then the garnishee plaint is heard at the same Court at which the original plaint is to be heard."

In the papers on file in the County Court Registry at Victoria there is a typewritten copy of the judgment, in which the learned Judge is quoted as saying, "In my opinion the objection is not untenable," whereas in the original judgment in the Judge's own handwriting and signed by him, the sentence is, "In my opinion the objection is untenable."

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returnable at any particular time; it is only after a dispute note is filed that a time of trial becomes definite, and of it the parties must have six days' notice. Until a day of trial is fixed a garnishee summons cannot be issued. He cited *The Queen* v. *Registrar of Leeds County Court* (1886), 55 L.J., Q.B. 365.

Per curiam: A garnishee summons may be issued based on a default summons as well as on an ordinary summons; the right is clearly given by the statute and the settling of the time of the holding of the Court is only a question of procedure, and if a plaintiff summons a garnishee too soon it will be at the peril of costs.

MARTIN, J.
(In Chambers)
1903
June 25.
DUNDAS v. MCKENZIE

DUNDAS *ET AL.* v. MCKENZIE.

Practice—Writ of summons—Indorsement of residence—Order IV., r. 1.

Where plaintiffs sue as trustees for a corporation it is not necessary to indorse on the writ the addresses of the individual plaintiffs.

Plaintiffs sued as trustees of the Standard Life Assurance Company, and their address was indorsed on the writ as "Edinburgh, Scotland."

Held, insufficient address, but as there was nothing misleading in the address leave was given to amend by stating the place of business of the Company.

Statement

APPLICATION by the defendants to set aside the writ of summons and service thereof upon the ground of irregularity. The plaintiffs sued as trustees of the Standard Life Assurance Company and their address was indorsed upon the writ as "City of Edinburgh, Scotland."

Argument

L. Crease, for defendants: The indorsement of address is insufficient under Order IV., r. 1. The actual place of residence should be given. See form of writ, appendix (a) No. 1, which is

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imperative: *McCready* v. *Hennessy* (1883), 9 P.R. 489; *Sherwood* v. *Goldman* (1886), 11 P.R. 433. Residence is defined in *Barlow* v. *Smith* (1892), 9 T.L.R. 57. Security for costs and stay of proceedings if amendment granted should be ordered: see *Stoy* v. *Rees* (1890), 24 Q.B.D. 748; *Mee* v. *Denbigh* (1883), 27 Sol. Jo. 617.

Langley, for plaintiffs, *contra*.

MARTIN, J.: The indorsement of address is insufficient; to merely give the name of the city or town is not enough, but upon the authority of *Hawkins* v. *Black* (1898), 14 T.L.R. 398, I will give leave to amend by stating the place of business of the Company, and as this is not a case of deliberately giving a misleading address, I will not order security for costs to be furnished. Proceedings to be stayed until re-service of amended writ. Costs to the plaintiffs in any event.

MARTIN, J.

Order accordingly.

DAVIES, SAYWARD MILL AND LAND COMPANY, LIMITED v. BUCHANAN *ET AL.*

DRAKE, J. (In Chambers)
1903
Nov. 26.
DAVIES, SAYWARD MILL CO. v. BUCHANAN

*Production of documents—Place of production—Rules 4 and 5 of Rules of 7th April, 1899.**

Where an order has been made for the production of documents, the documents should be produced in the city or town in which the writ was issued, but a Judge has a discretionary power to order production somewhere else to prevent inconvenience and prejudice to a party's business operations.

SUMMONS to produce for inspection certain documents referred

* These rules are published in the beginning of Vol. 6, B. C. Law Reports.

DRAKE, J. (In Chambers)
1903
Nov. 26.

DAVIES, SAYWARD MILL CO. v. BUCHANAN

to in defendants' affidavit of documents. The plaintiffs and their solicitors lived in Victoria and the writ was issued out of the Victoria Registry. The defendant Buchanan and his solicitor lived in Kaslo. Notice was given to plaintiffs' solicitors that the documents might be inspected at Kaslo. Plaintiffs contended that the documents should be produced for inspection in Victoria where the defendants' solicitor had a registered agent. The summons was argued at Victoria.

Fell, for plaintiffs.
Barnard, for defendants.

26th November, 1903.

DRAKE, J.: The plaintiffs ask for further and better particulars and to produce for inspection the various documents referred to in the affidavits of the defendants. The defendants are willing to give inspection of such documents as to which they do not claim privilege at Kaslo, where the defendants' solicitor resides. The plaintiffs ask to have production in this Registry where the action is pending. I see no reason why the documents should not be produced in the Registry here, except such of them as may be prejudicial to the defendants' business operations, such as books of account, etc. The case of *Prestney* v. *Corporation of Colchester* (1883), 24 Ch. D. 376, shews that the Judge has discretionary powers to make such an order. The defendants will have to make a further and better affidavit of documents as it is clear that there are other documents for which they have not accounted. The plaintiffs are entitled to the costs of this application in the cause.

DRAKE, J.

ROSS v. THOMPSON *ET AL.*

FULL COURT

1903

Nov. 4.

Ross
v.
Thompson

Water rights—Decision of Gold Commissioner—Appeal from—Evidence on—Practice.

The appeal under section 36 of the Water Clauses Consolidation Act from the decision of the Gold Commissioner is a trial *de novo*.

APPEAL to the Full Court from a decision of FORIN, Co. J., on an appeal under section 36 of the Water Clauses Consolidation Act, from a decision of the Gold Commissioner at Fort Steele, in respect to the validity of a water record. The learned County Court Judge held that the appeal must proceed on the evidence before the Gold Commissioner and was not a trial *de novo* and on the material before him dismissed the appeal.

Statement

The appeal came on for argument at Vancouver on the 4th of November, 1903, before DRAKE, IRVING and MARTIN, JJ.

The only ground of appeal argued by counsel for appellant was that the appeal to the County Court Judge was a trial *de novo*.

S. S. Taylor, K.C., for appellant.
Wilson, K.C., for respondent.

DRAKE, J.: I think the point taken by Mr. *Taylor* is a good one. I think when you look at that section 36, although it does not specify how the appeal is to be taken, still what is the good of having a petition, when all the facts may be denied by the respondent when he puts in his answer? How are you to arrive at the truth without you have evidence before you, and without evidence is to be taken? You may raise other points than those that came before the Water Commissioner, and on those evidence must be taken. I think the learned County Court Judge should not try these matters except in the ordinary way. My opinion is that, looking at the whole of that section there must be evidence to satisfy him that the grounds of appeal are substantial and well taken.

DRAKE, J.

FULL COURT

1903

NOV. 4.

ROSS
v.
THOMPSON

[*Wilson:* Do I understand your Lordship to say that the trial before the County Court Judge should be by parol evidence?]

The appeal comes up by petition and affidavit, these state the facts, and then an answer is put in which may be a bare denial of the facts stated in the petition, or of some of the facts. As soon as that is answered, how are you to arrive at which is correct without evidence is taken in the most convenient way, *i.e., viva voce;* but whether the County Court Judge takes evidence by affidavit or not, he will have to satisfy himself as to the correctness of the decision of the Water Commissioner.

DRAKE, J.

IRVING, J.: I think this must go back. When you compare the provisions of section 36 of the Water Clauses Act with the appeal given by section 95 of the Crown Lands Act, you find in the latter Act that the appeal is confined to questions of law only. I think, therefore, the Water Clauses Act does not limit the appeal to questions of law, but allows an appeal upon questions of law and fact. The whole matter ought to be taken *de novo.* I think the proper way to proceed is to take oral evidence, but I think it would be quite proper if affidavits were accepted, if the parties wish it.

IRVING, J.

MARTIN, J.: I concur with what my learned brothers have said. I only point out, after reading section 39, that section 36, when it says a straight appeal, means a straight appeal; there is nothing said about "petition" when it speaks of an appeal. I think the statute is perfectly simple and clear.

MARTIN, J.

Appeal allowed, with costs.

CARROLL v. THE CORPORATION OF THE CITY OF VANCOUVER.

DRAKE, J.
1903
Feb. 13.
FULL COURT
April 23.
CARROLL v. VANCOUVER

Tax sale—Certificate of title based on—Regularity of sale proceedings—Onus of proof—Land Registry Act, Secs. 18, 19 and 23.

In an action for the recovery of land, a plaintiff who relies on a certificate of title based on a tax deed, is not called upon to prove the regularity of the tax sale proceedings until the defendant shews some title to the land in question.

ACTION to recover possession of land in North Vancouver.

The action was tried before DRAKE, J., on the 13th of February, 1903. The facts appear in the judgment.

Macdonell, for plaintiff.
Hamersley, K.C., for defendants.

DRAKE, J.: The plaintiff brings this action for the recovery of certain land, on which part of the Capilano Water Works are situate. The defendants among other defences plead that the plaintiff purchased the land in question at a tax sale made by the Municipality of North Vancouver, and that the sale was invalid, not having been properly advertised, and no notice given to the defendants, and they further claimed that they were in possession, and any dispute as to land would have to be settled by arbitration, under the Water Works Act, Cap. 35 of 1886, and Amendment Acts.

DRAKE, J.

The plaintiff proved a paper title, and shewed a Crown grant to one Palmer, dated 25th April, 1891, and the title eventually passed to the Burrard Inlet Ferry Company, 9th March, 1892, who obtained a certificate of title 25th July, 1892.

The next document is a conveyance from the Municipality of North Vancouver for unpaid taxes to McQuillan, and from McQuillan to the plaintiff. Upon production of these documents the plaintiff rested his case. The defendant asked for judgment and relied on *Kirk* v. *Kirkland* (1899), 7 B.C. 12, affirmed by the

DRAKE, J.
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Feb. 13.
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Supreme Court of Canada (1900), 30 S.C.R. 344. That case decides that the onus of proof is on the plaintiff to shew that all the statutory provisions authorizing a sale for taxes have been complied with. The only difference between this case and *Kirk* v. *Kirkland*, is that in the latter case the land in question was Crown lands when taken up some five years before the Crown grant to Palmer.

The plaintiff therefore having failed to prove validity of the tax sale has failed to prove his case and under the law as it stood before the new rules came into operation would have been non-suited, but now judgment is to be entered for the defendants: *Fox* v. *Star Newspaper Company* (1898), W.N. 26.

The plaintiff asked for an adjournment to get further evidence. This I refused, as it was his duty to be prepared, particularly as his attention was directed by the pleadings to this very point, and there was no surprise.

Judgment for the defendants with costs.

The plaintiff appealed and the appeal was argued at Vancouver on the 22nd and 23rd of April, 1903, before HUNTER, C.J., IRVING and MARTIN, JJ.

Davis, K.C., for appellant.
Hamersley, K.C., for respondents.

The judgment of the Court was delivered by

HUNTER, C.J.: We are all of opinion that the learned trial Judge erred in ruling that the plaintiff had not made out a *prima facie* case as we think that the decision in *Kirk* v. *Kirkland* has no application to this case. All that that case decided was that a certificate of title based on a tax sale does not *ipso facto* oust a prior certificate of title, but that the holder of the tax title must affirmatively shew the regularity of the sale proceedings against such a title. It does not decide that a tax title holder has not a good *prima facie* case as against the defendant until the latter shews a better title.

Judgment

Appeal allowed with costs and costs below to abide result of new trial.

Appeal allowed.

WOODBURY MINES, LIMITED v. POYNTZ.

HUNTER, C.J.

1903

Oct. 13.

WOODBURY MINES v. POYNTZ

Mining law—Expiration of certificate—Special certificate—R.S.B.C. 1897, Cap. 135, Sec. 9 and B.C. Stat. 1901, Cap. 35, Sec. 2.

On the expiration of a free miner's certificate any mineral claim of which the holder thereof was the sole owner becomes open to location.

The obtaining of a special certificate under section 2 of the Mineral Act Amendment Act, 1901, does not revive the title if in the meantime the ground has been located as a mineral claim.

THIS was an action tried before HUNTER, C.J., at Rossland, on the 13th of October, 1903, in which the plaintiffs' adversed the defendant's application for a certificate of improvements to the Sunrise mineral claim, under the provisions for that purpose in the Mineral Act. The plaintiffs claimed the ground in dispute under two locations known respectively as the Sunset and Mayflower mineral claims. These locations of the plaintiffs were good and valid up to the 31st of May, 1901, upon which date the plaintiffs allowed their free miner's certificate to expire without renewal. The defendant's claim was located upon the 8th of July, 1901. On the 25th of October, 1901, the plaintiffs, by paying a fee of $300, obtained a special free miner's certificate in accordance with the provisions of section 2, Cap. 35 of the Statutes of 1901, and relied upon that section as reviving their rights, notwithstanding the intervening location of the defendant. The regularity of the locations, and all other facts were admitted.

Statement

MacNeill, K.C., for plaintiffs.

McAnn, K.C., and *P. E. Wilson*, for defendant.

HUNTER, C.J.: The effect of Mr. *MacNeill's* contention is that the property was locked up for six months after the lapse of the plaintiffs' certificate. That is not my view at all. The Legislature had no such intention, or it would have said that after the certificate had lapsed the property should not be open to location until after the six months had elapsed, just as it has provided that in the event of the owner's death his claim should

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not be locatable within twelve months without the permission of the Gold Commissioner.

Judgment for the defendant with costs.

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Oct. 29.

SNYDER v. RANSOM
RANSOM v. SNYDER

SNYDER v. RANSOM: RANSOM v. SNYDER.

Mining law—Fractional claim—Location line of—Necessity for blazing—Relocation by another person at instance of first holder—Permission of Gold Commissioner.

Where the holder of a mineral claim which is the subject of an adverse action causes the ground to be relocated by someone else from whom he purchases it for a small consideration, the provisions of section 32 of the Mineral Act, requiring permission to relocate, do not apply.

The location line of a fractional mineral claim must be marked by the blazing of trees or the setting of posts in the same manner as that of a full sized claim.

THESE were two adverse actions under the Mineral Act consolidated and tried at Nelson during the October Sittings of the Supreme Court, before IRVING, J.

The defendants, Ransom *et al.* advertised, pursuant to the Mineral Act and amendments thereto, for a certificate of improvements of the Bellevue fractional mineral claim, located by Ransom on the 9th of July, 1901, and the plaintiffs Snyder *et al.* brought their action to adverse such application, claiming to own the same ground under location known as the Parrott mineral claim, located on the 29th of September, 1898.

Statement

The defendants, Ransom *et al.* thereupon caused the same ground to be located as the Redress fractional No. 2 on the 13th of January, 1903, by one Nelson, from whom they the same day purchased it for a small consideration. The plaintiffs, Snyder *et al.* had in the meantime advertised for a certificate of improvements for the Parrott mineral claim, and the defendants, Ransom *et al.*, commenced action to adverse that application. In the latter

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action the defendants, Ransom *et al.*, claimed the ground covered by the Parrott under the Bellevue fractional mineral claim, and in the alternative under the Redress fractional mineral claim.

Whealler and *Wragge*, for the plaintiffs, Snyder *et al.*, contended that the Bellevue fractional mineral claim was invalid, because its location was not blazed, and that the Redress fractional mineral claim was invalid because the owners of the Bellevue had the ground relocated without the sanction or permission of the Gold Commissioner, as required by section 32 of the Mineral Act.

S. S. Taylor, K.C., for the defendants, Ransom *et al.*, contended that the Bellevue fractional mineral claim, being a fractional mineral claim, blazing of the location line is not necessary under either sub-section (*c.*) or sub-section (*d.*) of section 16 of the Mineral Act as amended in Chapter 33 of 1898, and in this particular a fractional mineral claim differs from a full claim. That, in the alternative, the ground could be held by Ransom *et al.* under the Redress fractional mineral claim, and that Ransom *et al.* could procure Nelson to locate the same for them, particularly when it is held that the Bellevue fractional is invalid.

Argument

IRVING, J. (After referring to the evidence regarding the location of the Parrott and finding on the facts, that that claim was invalid, proceeded:) I find that the Bellevue, located the 9th of July, 1901, by Ransom was in all respects a proper location, except no blazing was done. This, I think, was necessary. Although blazing is not mentioned in sub-section (*c.*) or (*d.*) of section 16 of the Mineral Act as amended in 1898, it is mentioned in the Form T, referred to in that section.

IRVING, J.

The Redress No. 2, located on the 13th of January, by Nelson, I find is good in all respects.

With reference to the argument raised by Mr. *Whealler* against the Redress No. 2, namely, that there was no permission to relocate it as provided in section 32 of the Act, I do not think that that section deprives the present owners of the Redress No. 2 of their title, because it was located by Nelson and afterwards transferred to them. In my opinion, a person may escape from

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the provisions of section 32 in the way these owners have done. There will be a declaration that the Redress No. 2 is a proper claim in all respects and that the others are invalid.

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(The following order was made as to costs: prior to consolidation, no costs to either party, subsequent to consolidation, defendants Ransom *et al.* to be paid two-thirds of their taxed costs.)

FULL COURT

1903

April 24.

ATTORNEY-GENERAL v. C. P. R.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA *EX REL.* THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY. (No. 2.)

Practice—Pleadings—Particulars.

In an action by the Provincial Attorney-General for a declaration that the public had a right of access to the sea over the embankment of the C.P.R. *via* certain streets in Vancouver, it was alleged that in 1870, Her Majesty by the officers of Her Colony of British Columbia, laid out and planned a townsite on Burrard Inlet and dedicated certain parts of the townsite to public uses:—

Held, that plaintiff must give (1.) particulars of the authority under which the townsite was laid out; (2.) of the nature and dates of dedication and by whom made and (3.) of what portions of the townsite were dedicated.

APPEAL from an order of HUNTER, J., for particulars.

This was an action for a declaration that the public have a right of access to the sea over and through the embankment of the defendants *via* Cambie, Abbott and Carroll streets in the City of Vancouver. The plaintiff alleged in paragraphs 3, 4 and 5 of the statement of claim

Statement

"(3.) In the month of March, 1870, all the lands of the then Colony of British Columbia were lands held by Her Majesty in right of Her Crown, save and except those lands which Her

Majesty had been graciously pleased to convey to her subjects.

"(4.) In the said month of March, 1870, Her Majesty by the officers of Her Colony of British Columbia laid out and planned a townsite on the shores of an arm of the sea called Burrard Inlet in the said Colony and called the same Granville.

"(5.) In and by the said plan Her Majesty divided the said townsite into convenient sized lots, and dedicated certain parts of the said townsite to public uses and streets as a means whereby Her subjects and other people residing in the said Colony might for the future have full and free access and regress to and from the waters of the said Inlet and to the seashore and beach as their business and pleasure might require."

On the defendants' application an order was made by HUNTER, C.J., that the plaintiff give, *inter alia*, the following particulars:

"1. Particulars of paragraph 4 of the said statement of claim.

"(*a.*) Authority under which said townsite was alleged to have been laid out and planned.

Statement

"2. Particulars of paragraph 5 of said statement of claim.

"(*a.*) If the plaintiff relies on any specific acts of dedication or specific declarations of intention to dedicate whether alone or jointly with evidence of user, then particulars of the nature and dates of the said acts or declarations and the names of the persons by whom the same were done or made.

"(*b.*) What portions of said townsite were alleged to have been so dedicated."

The plaintiff appealed and the appeal was argued at Vancouver on the 24th of April, 1903, before DRAKE, IRVING and MARTIN, JJ.

Wilson, K.C., for appellant: It is not open to ask the Crown by what authority it laid out the townsite; it would not be proper as an interrogatory and will not be allowed under the guise of particulars. The order for particulars for paragraph 5 is founded on *Spedding* v. *Fitzpatrick* (1888), 38 Ch. D. 410, but that case is the reverse of ours. He cited *Niagara Falls Park Commissioners* v. *Howard* (1889), 13 P.R. 14.

Argument

[IRVING, J.: *Spedding* v. *Fitzpatrick* held that you have to shew what you intend to prove.] Yes, but the evidence need not be given.

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Davis, K.C., for respondents.

DRAKE, J.: As to second point raised here with reference to paragraph 5, I think the appeal should be dismissed. My own opinion with regard to the first point of the particulars in paragraph 4 is that it is one of those questions as to which we ought not to order particulars, because it is practically, as Mr. *Wilson* states, asking a question more than anything else, and I think it falls very much within the case of *Niagara Falls Park Commissioners* v. *Howard* (1889), 13 P.R. 14. There they asked for particulars of title and here they ask for something almost equivalent to it. The principle in that case is very much at one with this case, and I think the appeal should be allowed with regard to that.

DRAKE, J.

IRVING, J.: With regard to the particulars of paragraph 5, I think the order made by the Chief Justice is correct. I do not know that I can add anything to what I have said during the course of the argument. I think that the order can be supported and ought to be supported on the ground laid down in *Spedding* v. *Fitzpatrick* that it is the duty of the pleader to state what case he intends to put forward, so that the opposite side may know what he is required to meet.

IRVING, J.

With regard to the particulars ordered by paragraph 4, I am not so confident, but I do not feel confident that the Chief Justice was wrong, and therefore I propose not to interfere with the order that he has made.

With regard to the suggestion made by Mr. *Wilson* that he was willing to strike out that the townsite was laid out by Her Majesty's officers of the Colony, I do not think that we ought at this time to be called upon to express an opinion as to whether that would be right or not. If that offer had been made before this argument came up before us, or before the Chief Justice, during the argument before him, then we might have discussed it. I think the appeal ought to be dismissed.

MARTIN, J.: I take the same view of the matter as my learned brother DRAKE in regard to the 5th paragraph, and as to the 4th I agree with my learned brother IRVING in the point mentioned

MARTIN, J.

by him, that the learned Chief Justice having taken that view it is difficult to say he is wrong in the way the appeal now stands, though I am not prepared to say that if, as Mr. *Wilson* has stated, the words "officers of Her Colony" had been omitted particulars would have been necessary, but since the pleading stands there is mention of the officers of the Colony, and as it leaves some uncertainty as to what officer might have acted, and something may turn on that, I do not see how the learned Chief Justice could have dealt with the application in any other way than he did.

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I might also mention that I understand by the word "authority" in regard to paragraph 4, it is not meant to question the general right of the Crown to dispose of the lands in so far as the Royal pleasure directs, but simply in regard to the particular official who purported to exercise the pleasure of the Crown.

MARTIN, J.

HICKEY v. SCIUTTO.

HUNTER, C.J.
1903
April 8.
HICKEY
v.
SCIUTTO

Landlord and tenant—Lease of premises for hotel—Premises not fulfilling requirements of by-law—Illegal lease.

Premises in Vancouver leased for use as a hotel did not fulfil the requirements of a by-law in regard to the number of bedrooms, and of this both the lessor and lessee were aware at the time the lease was entered into. The lessee was stopped using the premises as a hotel by the authorities.

Held, in an action by the lessor on covenants for rent and repair, that the lease was void *ab initio* and the maxim *In pari delicto potior est conditio defendentis* applied.

Even if the lease were not void *ab initio* it became void by the action of the authorities in stopping the further use of the premises as a hotel.

THE plaintiff had demised certain premises situate in Vancouver to the defendant for twelve months, with covenants by the defendant to pay the monthly rent of $75; to keep the premises in

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good and sufficient repair and so deliver them up; not to use the premises otherwise than as a hotel, and to maintain the hotel license.

It appeared that the defendant had, during the currency of the demise, applied for and obtained a transfer of the license to other premises. The plaintiff claimed damages under the covenant to pay rent, to keep the premises in repair and so deliver them up, and to maintain the hotel license.

The defendant set up that the premises did not contain sixteen bedrooms; that, by by-law 50 of the City of Vancouver, it was enacted, under powers given by the Vancouver Incorporation Act, 1900, that every hotel authorised to be licensed in the city shall contain and continue to contain, in addition to what is needed for the family of the hotel-keeper, not less than sixteen bedrooms, each containing at least 384 cubic feet of space for each person occupying the same. That, at the time of demise, the deficiency of rooms was known to the plaintiff's agent, that the intention was to use the premises as a hotel, and that the lease was void for illegality. Alternatively, that the license was transferred by the consent of the plaintiff's agent, who was himself a license commissioner, and further, that notice had been received by the defendant from the licensing authorities to the effect that the license would not be renewed and that performance of the covenant to maintain the license had become impossible in law; also that the performance of the covenants was dependent, as a condition precedent, upon the premises being fit for use as a licensed hotel.

Statement

The breach of the covenant to maintain license was also denied, but was admitted in evidence. The action was tried in Vancouver, on the 15th of December, 1902, before HUNTER, C.J.

Bond, for the plaintiff, argued that the defendant having undertaken to perform a thing which could have been performed legally, by alteration of the building or by addition thereto, was bound so to perform it, though it might be at great trouble and expense: *Shedlinsky* v. *Budweiser Brewing Co.* (1900), 57 N.E. 620; *Waugh* v. *Morris* (1873), L.R. 8 Q.B. 202 and *Hills* v. *Sughrue* (1846), 5 M. & W. 252. That a contract will not be

Argument

held to be illegal if it can in any way be taken to intend a legal performance: *Sewell* v. *Royal Exchange Assurance Co.* (1813), 4 Taunt. 586; *Armstrong* v. *Lewis* (1833), 2 Cromp. & M. 274; *Edgeware Highway Board* v. *Harrow Gas Co.* (1874), L.R. 10 Q.B. 92.

That no covenant was inserted in the lease in question to the effect that the hotel should be carried on in an illegal manner, that therefore illegality should not be presumed: *Owen* v. *Body* (1836), 5 A. & E. 28.

That the true meaning of the by-law in question was to the effect that the licensing authorities should refuse to renew the license of a hotel deficient in the particulars required by the by-law, but not that a hotel deficient in any one of them should, while licensed become illegal or contracts in respect of it void.

Argument

Cowan, and *Kappele*, for the defendant, cited *Gas Light and Coke Co.* v. *Turner* (1839), 5 Bing. N.C. 666, and argued that the contract of the lease, having been entered into with knowledge on both sides of the state of the law, and of the fact of the deficiency of rooms was illegal and void; that since the transfer of the license, the defendant had abandoned the lease and only let the premises at the request of the plaintiff and received the profits on her behalf. That the breach of the covenant to repair and leave in repair was not sufficiently proved. In further support were cited *Brown* v. *Moore* (1902), 32 S.C.R. 93; *Walker* v. *McMillan* (1881), 6 S.C.R. 241 and *Spears* v. *Walker* (1884), 11 S.C.R. 113.

Cur. adv. vult.

8th April, 1903.

HUNTER, C.J.

HUNTER, C.J.: This is an action on covenants for rent and repair in a lease. The subject-matter of the lease was a building which had been used as a hotel, and it was the agreed purpose of both parties that it should continue to be so used, and there are covenants in the lease that the defendant shall use the premises only as a hotel and keep up the license.

At the time of the execution of the lease, *i.e.*, January 31st, 1902, the building contained only thirteen bedrooms available for hotel purposes; and there was in force a by-law to the effect that in order to qualify for a hotel license such buildings

HUNTER, C.J. must contain not less than sixteen bedrooms available for hotel purposes in addition to those needed for the use of the family of the hotel-keeper. The by-law, which originally required twenty bedrooms instead of sixteen, came in force in December, 1900.

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Sciutto's predecessor had managed to satisfy the authorities that he sufficiently complied with the spirit of the by-law by renting additional rooms in an adjoining building, and so was permitted to hold a hotel license; but a few days after Sciutto executed the lease he found he could not obtain the extra rooms, with the result that shortly afterwards he was notified by the License Inspector that he would have to move as the place was not properly qualified for a hotel license.

He then informed Morgan, the plaintiff's agent, of the circumstance, and says that Morgan did not object to his endeavouring to secure a transfer to another place, which in fact he did with the cognizance and tacit consent of Morgan, who was one of the license commissioners, (having been appointed a month before the execution of the lease), and who was present at the time the transfer was granted, but did not take part in the decision.

After the removal they had another interview in which Morgan stated it was his intention to hold Sciutto to the lease, and asked him in the meantime to try to rent it, which Sciutto did, as he claims, as an accommodation to Morgan, and turned over

HUNTER, C.J. the monies received on Morgan's refusal to accept them to his solicitor, Mr. Cowan, in trust for Morgan.

There is no doubt that Morgan knew that Sciutto's purpose in taking the lease was to use the place as a hotel; in fact he had the lease drawn up and witnessed it. There is also no doubt that Morgan knew all the circumstances at the time of the execution of the lease, and in particular that the house was not qualified under the by-law to be used for the purposes of a hotel, and that the makeshift of renting rooms in an adjoining building was resorted to by the former tenant in order to appease the authorities. But he contends that the house is capable of being divided up into the necessary number of rooms, and that it was Sciutto's business to do this at his own expense if necessary, and so keep his covenant. But the evidence shewed that in order to

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get the necessary number of rooms three of them would have to be rooms with only a skylight in them, but no window. It would be absurd to contend that such rooms would be within the spirit of the by-law, as the ordinary meaning of the word window is an opening designed to admit light or air through the wall, and not through the ceiling or roof, and I see nothing in the by-law to indicate that the word is used in any other than its ordinary meaning, and one object of the by-law doubtless is to prevent the carrying on of groggeries under the guise of hotels. I may here remark that in setting up this contention Morgan's duty and interest evidently conflict, as it was and is his duty as license commissioner to see to it that the by-law is properly carried out, while his interest impels him to suggest any mode of evading its spirit in order both to hold Sciutto to the lease, and to get as high a rent as possible for the property, with the result, as one might expect, that his evidence was not given as frankly as it ought to have been. Therefore, I prefer, where there is a conflict, to give credence to Sciutto rather than Morgan, especially as Sciutto would have been quite content to remain on if he had been allowed to do so by the authorities.

Now, the facts being, as I find, that both parties when entering into the lease were aware of the requirements of the by-law and that the building did not fulfil them, I think the lease was illegal in its inception as it was intended to take effect *in presenti* and not *in futuro* either after addition to, or alteration of, the building to conform to the provisions of the by-law, assuming it was capable of being so altered, which I think it was not. The lease, then, being illegal, the maxim *In pari delicto potior est conditio defendentis* applies and the action fails. If it is necessary to cite authorities for this conclusion I may refer to the cases cited by Mr. *Cowan* of *Gas Light and Coke Co.* v. *Turner* (1849), 9 L.J., Exch. 336; *Brown* v. *Moore* (1902), 32 S.C.R. 93; *Walker* v. *McMillan* (1881), 6 S.C.R. 241 and *Spears* v. *Walker* (1884), 11 S.C.R. 113.

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Mr. *Bond* argued that there is a strong presumption that parties do not intend to violate the law when they make their agreements, and no doubt that is so. But in this case, although Morgan was one of the persons appointed to carry out the provi-

HUNTER, C.J. sions of the by-law before he gave the lease, I think he was more concerned about the rent than he was about the by-law. He was for a long time agent for the property, and although he said he did not know how many rooms there were, he was at last constrained to admit that Sciutto informed him at the time of the negotiations for the lease that the house was too small to qualify under the by-law. But he evidently knew it before Sciutto told him, as he says one reason for reducing the rent which Fraser, the former tenant, had been paying, was that the difference might be applied either to renting other rooms, as Fraser had done, or to reconstructing the rooms of the house. I think the real reason was that both parties were in doubt as to whether continued violation of the by-law would be permitted by the authorities.

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HICKEY *v.* SCIUTTO

But assuming that the lease was not void *ab initio*, it certainly became void by reason of the action of the authorities in putting a stop to the use of the premises as a hotel by the tenant, and there is nothing in the contention, as I have already shewn, that the place could have been altered so as to conform to the by-law, and even if there were I do not think it can reasonably be said that it was the intention of the parties that either should be bound to make extensive structural alterations in the building in order to qualify the building under the by-law. Then when further user of the place as a licensed hotel was stopped by the

HUNTER, C.J. authorities the basis of the agreement was swept away and both parties became exonerated from further performance of their obligations under the lease, or to put it shortly, "as the tree falls so it lies"; see *e.g.*, *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; *Blakeley* v. *Muller & Co.* (1903), 19 T.L.R. 186; and therefore the claim for subsequent rent must fail.

As to the claim for damages for breach of the covenant as to repairs. Assuming that the lease was not void *ab initio*, but became void by the intervention of the authorities, and that the breach took place before the intervention, an action would of course lie for such breach. But there is no satisfactory proof of such breach. In the first place, Morgan does not say that he inspected the premises before the entry of the next occupier; and in the next place, he was unable to state with any

degree of accuracy what the damage was, but "roughly estimates" it, to use his own words, at $250. I do not think that Morgan meant seriously to put forward this claim. If he had he would have had an architect or house-builder examine the place carefully and come prepared to give details; in fact I do not think there would have been any action at all if it had not been on account of the rent. But I need not pursue this question any further, as I am of opinion that the lease was entered into in disregard of the by-law.

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1903
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Judgment for the defendant with costs.

ESQUIMALT WATER WORKS COMPANY v. THE CORPORATION OF THE CITY OF VICTORIA.

DRAKE, J.
1903
March 27.
FULL COURT
1904
Jan. 7.
ESQUIMALT WATER WORKS CO. v. VICTORIA

By-law—Illegality—Insensible—Rules of construction.

In a by-law passed by the Corporation of the City of Victoria having for its object the closing of a portion of the Craigflower Road, the word "by" was omitted inadvertently, with the result that by the strict grammatical construction of the by-law a former by-law dealing with the same road was declared closed, instead of the road itself.

Held, that certain words in the enacting clause should be regarded as a parenthetical expression and as descriptive of the portion of the road referred to, thus giving the by-law a sensible meaning and the one intended.

The Court will not hold any legislation to be meaningless or absurd unless the language is absolutely intractable.

Decision of DRAKE, J., reversed, IRVING, J., dissenting.

THIS was an appeal by the defendant Corporation from a judgment of DRAKE, J., quashing a by-law on the ground that it was

Note:—The by-law was as follows:

"1. That portion of the Craigflower Road ('by' omitted) By-law No. 327, being the 'Craigflower Road Reopening By-law, 1900,' declared to be a public highway, is hereby stopped up and closed to public traffic, and

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insensible and meaningless. The facts are fully set out in the judgment appealed from which was as follows:

27th March, 1903.

FULL COURT
1904
Jan. 7.

ESQUIMALT WATER WORKS CO. v. VICTORIA

DRAKE, J: A rule *nisi* was granted on Thursday, the 12th of June, 1902, calling upon the Corporation to shew cause why the Craigflower Road Closing By-law, 1902, should not be quashed on various grounds. The Water Works Company, the applicants, had laid their pipes, under the authority of the Act, under the roads and streets long prior to the time when Victoria West was first included within the city limits. The first four grounds of the rule all relate to the questions which were argued before the Full Court in September, 1899, in *Styles* v. *Victoria* (1899), 8 B.C. 406, and I am bound by that judgment. I therefore decide these grounds adversely to the applicants.

The fifth ground is that the by-law was not passed in the public interest or in good faith, but for the benefit of certain property holders, with the intention of remedying a private grievance. This and the next ground both relate to the same cause. It can hardly be said that because certain persons are benefited by a particular by-law, that therefore the by-law should be quashed. If a by-law is within the authority of the Municipal Clauses Act it is no ground for quashing it that some member of the Council is benefited, unless it is clearly shewn that the benefit thus obtained is prejudicial to the public good, or that some fraudulent or other improper means were put in operation for obtaining the passage thereof. Nothing of the sort appears here. It may be, and possibly is, quite true, that some persons are benefited by the closing of this road, but that is not sufficient ground to declare the by-law bad.

DRAKE, J.

The seventh ground is that the statutory rights of the applicants are interfered with by this by-law. The by-law, No. 387, enacts (1.) "That portion of the Craigflower Road By-law, No. 327, being the Craigflower Road Re-opening By-law, 1900,

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Catherine Street, Langford Street and Russell Street are substituted therefor.

"2. By-law No. 327 aforesaid is hereby repealed.

"3. This By-law may for all purposes be cited as 'The Craigflower Road Closing By-law, 1902.'"

declared to be a public highway, is hereby stopped up and closed to public traffic." What is it that is stopped up? The Craigflower Road By-law. There is a clear omission of something here; the road is not stopped up, but the Craigflower Road By-law. The by-law is insensible and meaningless. A by-law has the force of a statutory enactment, and I am not at liberty to read language into it which is not there, for the purpose of making it effective. In my opinion, this by-law effects nothing, and has neither closed the road nor opened any other means of communication; but it has effectually repealed by-law No. 327. The effect of this is that the Craigflower Road is in the same position as it was before the passage of By-law No. 327, but the repeal of that by-law does not revive the provisions of the by-law which was thereby repealed. But apart from this, the applicants contend that even if the by-law was valid, no provision is made for compensating the applicants for the injury they would sustain by being excluded from the road through which their line of pipes for supplying Victoria West with water now runs. In my opinion, the Corporation are bound to make compensation to the occupiers of land entered upon or taken by the Corporation in the exercise of its powers, and the amount is to be ascertained by arbitration. There is nothing in this section which makes it a condition precedent before entering upon land to render compensation, neither is it necessarily a part of any by-law that such compensation and the mode of assessing it, should be inserted therein. If the by-law was valid, the Corporation are bound to make compensation under the Act, but as in my opinion the by-law as to section 1 thereof being invalid, the applicants are entitled to the use of the road as heretofore. Every by-law must be reasonably clear and unequivocal: *Crowe* v. *Steeper et al.* (1881), 46 U.C.Q.B. 87. If it is ambiguous or of doubtful import, it will be quashed, but the Court should always endeavour to give a reasonable effect to a by-law. If that is impossible the by-law is bad. I therefore hold that section 1 of this by-law is bad because a reasonable effect cannot be given to it, and the Corporation will have to pay the costs.

DRAKE, J.

The appeal came on for argument at Victoria on the 7th of January, 1904, before HUNTER, C.J., IRVING and MARTIN, JJ.

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ESQUIMALT WATER WORKS CO. v. VICTORIA

W. J. Taylor, K.C. (*Bradburn*, with him), for appellants: The word "by" has been omitted inadvertently from between the words "Road" and "By-law," where they first occur in section 1. Even if it is insensible, that is not a ground for quashing it: *In re Smith and the City of Toronto* (1859), 10 U.C.C.P. 225. Unless the language is absolutely intractable a meaning must be given to it; mere want of skill on the part of a draftsman will not be allowed to prejudice the rights of parties: he cited *Kruse* v. *Johnson* (1898), 2 Q.B. 91; *In re Arkell and the Town of St. Thomas* (1876), 38 U.C.Q.B. 594; *Mersey Steel and Iron Co.* v. *Naylor* (1882), 9 Q.B.D. 648; *Curtis* v. *Stovin* (1889), 22 Q.B.D. 513 at p. 517; *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627 and *Ex parte Walton: In re Levy* (1881), 17 Ch. D. 746 at p. 751.

Argument

Luxton (*R. H. Pooley*, with him), for respondents: Under the Act (B.C. Stat. 1885, Cap. 30), the Water Works Company had the right to lay and did lay water pipes on the Craigflower Road and if the road is closed our rights are interfered with; in such a case different principles of construction apply; where the rights of parties are interfered with the intention to do so must appear in clear and explicit language. The Corporation has a qualified right of stopping up streets on making compensation: see Municipal Clauses Act, Sec. 50, Sub-Sec. 127 and Secs. 239, 240 and 241; the Company would be entitled to compensation and in Ontario it has been held that in a by-law opening a street compensation must also be provided; the providing of compensation may have been left out in this by-law. He cited *Corporation of St. Vincent* v. *Greenfield* (1886), 12 Ont. 297, affirmed (1887), 15 A.R. 567; *Wannamaker* v. *Green* (1886), 10 Ont. 457; *In re Thompson and the Corporation of Bedford, &c.* (1862), 21 U.C.Q.B. 545 and *Dennis* v. *Hughes* (1851), 8 U.C.Q.B. 444.

He also took the point that *Styles* v. *Victoria* (1899), 8 B.C. 406 was wrongly decided.

HUNTER, C.J.

HUNTER, C.J.: I think the appeal must be allowed. As it stands, taking the ordinary grammatical construction of the language, the by-law is nonsensical; but we must construe it if possible so as to prevent this result, as we are not to hold any legislation to be meaningless or absurd unless the language used

is absolutely unmanageable. If we regard the words "By-law No. 327, being the Craigflower Road Re-opening By-law, 1900," as a parenthetical expression and as descriptive of the portion of the road referred to then nothing is required to give the by-law a sensible meaning, and moreover, the meaning which it was obviously intended to have.

If we were unable to give the by-law a sensible meaning without inserting words not to be found in it, then I should agree with the learned Judge that the difficulty was insurmountable, but in my opinion it is not necessary to insert anything, and the by-law is sufficiently intelligible and unambiguous if read in the way pointed out.

IRVING, J.: I agree with the judgment appealed from.

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MARTIN, J.: I agree with His Lordship the Chief Justice that this appeal should be allowed. The learned Judge appealed from considered that the by-law in question is "insensible and meaningless," but this is a conclusion only open to us when it has been found impossible to attach any reasonable meaning to it. As was pointed out by my Lord, if there had been brackets before the word "by-law" and after the figures "1900," it would have been abundantly clear that the words inclosed within the brackets were a parenthetical expression But I am prepared to go a little farther, and say that since a parenthesis may be expressed by commas as well as brackets, and as there is already one comma after "1900," it follows that all that is necessary to make the section perfectly sensible is to supply one more comma before the said word "by-law." Now, I think it is too much to say that the validity of this by-law depends on a comma, especially when it is a general rule of construction that punctuation should be very little, if at all, regarded in construing a statute: Maxwell on Statutes (1896), p. 58. I should hesitate a long time before I would be prepared to hold that a suitor's rights depended upon a comma.

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Then as to the point regarding the omission of the by-law to provide for compensation. No case has been cited which shews that this is necessary in these circumstances at least. Interested parties derive what rights for compensation they have (if any)

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from appropriate sections of the statute irrespective of the by-law, which cannot subtract from or add to them even if it is purported to do so. The by-law is the declaration of the will and intention of the Corporation, and, generally speaking, the time to raise the question of compensation is when the Corporation does some overt act to effectuate that declaration.

Appeal allowed, Irving, J., dissenting.

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ARNOLD v. THE CORPORATION OF THE CITY OF VANCOUVER.

Vancouver Incorporation Act, 1900, Sec. 133, Sub-Sec. 16—Laying sewer through private property—Compensation—Condition precedent.

Before entering on land for the purpose of putting a sewer through it the City of Vancouver must compensate the owner of the land through which it is proposed to lay the sewer.

THIS was an appeal from the judgment of IRVING, J., awarding the plaintiff $50 damages done to his lands by the city in running a sewer through them.

Note:—By section 133 of the Act the city was given power to take or use such land as might be necessary for, *inter alia*, the construction of sewers, etc.

Sub-section 16 of section 133 was as follows:

"Upon payment or legal tender of the amount so awarded or agreed upon to the person entitled to receive the same, or upon payment into the Supreme Court of British Columbia of the amount of such compensation the award or agreement shall vest in the Corporation power forthwith to take possession of the lands, the subject of the award or agreement, and if any resistance or forcible opposition is made by any person to its so doing, a Judge of the Supreme Court of British Columbia may, on proof to his satisfaction of such award or agreement, issue his warrant to the Sheriff of the district to cut down such resistance and to put the Corporation in possession."

The facts are fully set out in the judgment appealed from which was as follows:

19th June, 1903.

IRVING, J.: The facts in this case are not in dispute.

The plaintiff owns a strip of land some nine feet wide facing on Gore Street and twenty-eight feet deep; it was originally the rear portion of lot No. 1 in block 104.

In 1901 the defendants laid a sewer across block 104, from Dunlevy to Gore Streets; the sewer which is some ten feet below the surface is under the strip of land in question.

No notice whatever was given to the plaintiff prior to the taking possession of this piece of land, nor were any expropriation proceedings taken by the city, and the matter was only discovered by the plaintiff after the sewer had been laid, he now brings his action for damages and injunction against the city. The question I have to determine is, are the city authorities at liberty to take possession of land for sewer purposes without first complying with the formalities prescribed in section 133 of the Vancouver Incorporation Act, 1900.

The City Solicitor contends that under the authority of a by-law passed under sub-section 52, section 125, land may be taken by the city, and that by operation of the by-law and the Vancouver Incorporation Act, the plaintiff is deprived of his right of action.

By sub-section 43, of section 125, it is provided that the city may pass by-laws for the construction of sewerage works and all connections therewith and for arranging and settling with any owners of real property the terms and conditions under which the sewerage may be constructed through their lands, and to construct and lay under such land as the Council may deem necessary drains or sewers, but it is provided that the power to lay and construct in that sub-section is only conferred and can only be exercised by the Council in the event of there not being a street or road allowance in the vicinity which the Council could use for the purpose of constructing or laying such sewer.

Reading that provision, and having regard to the language used in sub-section 16 of section 133 by which it is enacted as follows: "that upon payment or tender of the amount awarded

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or agreed upon to be accepted, the award or agreement shall vest in the Corporation power forthwith to take possession of the lands," it seems to me that the city is not at liberty to take possession of any piece of property without first making compensation. Very large powers are intrusted to the Corporation, it is therefore necessary that it should strictly pursue the condition precedent laid down by the statute. Under the circumstances I think the plaintiff is entitled to maintain the action; I fix his damage at $50 and award costs of the action. In fixing that sum I am to some extent guided by the fact that the city paid $100 for 53 feet immediately adjoining the piece of land in question in the case on the other side of the lane.

The appeal was argued at Vancouver on the 12th and 13th of November, 1903, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Hamersley, K.C., for appellants: The making use of land for sewerage purposes is different altogether from ordinary expropriation proceedings; for sewerage purposes no land vests in the Corporation; it was not the policy of the Act that the public business of laying sewers should be stopped by numerous arbitrations: he cited *Harding* v. *Corporation of Cardiff* (1881), 29 Gr. 308; *Stonehouse* v. *Corporation of Enniskillen* (1872), 32 U.C.Q.B. 562; *Mason* v. *South Norfolk Railway Co.* (1889), 19 Ont. 132 at p. 138 and section 12, sub-section 52 of the Act.

Argument

A. D. Taylor, for respondent: The plaintiff's lands are being used and injuriously affected; rights have been invaded and the city must shew in the clearest manner that it has the rights claimed as they are in derogation of the common law: he cited Biggar's Municipal Manual, 465, 469 and *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602 at p. 614.

Hamersley, in reply, cited *Pratt* v. *Corporation of Stratford* (1887), 14 Ont. 260.

Cur. adv. vult.

25th January, 1904.

HUNTER, C.J.

HUNTER, C.J.: The facts and the question to be decided are fully stated in the judgment appealed from.

It is clear on the Ontario cases, which were not cited to the

learned Judge, that if it were not for the introduction of sub-section 16 into section 133, the city would not be obliged to bring on the arbitration proceedings before it began building the sewer.

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It is argued, however, that this sub-section, which is evidently taken from section 162 of the Railway Act of Canada, omitting, *inter alia*, the words "or to exercise the right, or to do the thing," etc., requires the award to be made and paid before the city can proceed to exercise any of the powers conferred by the section. I think not. Had the omitted words been left in, it might well be that the conditions imposed by the sub-section were annexed to all the powers conferred, but as it stands, I think it applies only to the case where the owner's land is being expropriated in the ordinary sense of that phrase.

How, for example, can the expression "to take possession of the lands the subject of the award or agreement" apply to the case where the city proposes to establish a septic tank on a particular spot, and the owner of the adjoining property, alleging that it will be "injuriously affected" within the meaning of sub-section 5, demands compensation? The city does not want to take possession of the adjoining property, but nevertheless would have to compensate its owner for the depreciation.

Again, if the arbitration is to be held before the sewer is built, how can any one say in advance how much damage will be done to the freehold? That, surely, depends on the degree of care that is used in the work.

HUNTER, C.J.

In conclusion, I cannot think it was the intention of the Legislature in the case of a rapidly growing city like Vancouver, to hamper the construction of a public necessity, such as a system of sewers, by requiring a large number of arbitrations to be held and the amounts finally paid over before such a power could be exercised, nor is there anything unreasonable, so far as I can see, in the city building the sewer first and paying afterwards.

I would allow the appeal.

DRAKE, J.: The plaintiff was owner of lot 1, block 104, subdivision of district lot 196, City of Vancouver. On the 28th of

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May, the Corporation passed a by-law authorizing the Council to break into and open up lands for the purpose of putting down sewers and for repairing the same. The lands are those described by their block numbers only. No notice was given to the lot owners whose lands might be thus taken, and the only knowledge they could have is that of a plan filed in the City Clerk's office, mentioned in the by-law. The defendants entered on the plaintiff's lot and placed their sewer pipes in a trench they constructed for that purpose. The section of the Municipal Act relating to this subject is section 133. By that section the Council have authority to take or use real property as may be required for constructing sewers, etc., and to purchase, acquire, take or enter into land by private agreement, by complying with all the formalities thereinafter prescribed. As the Corporation made no arrangement with the plaintiff, but entered without notice to him, they have to comply with the formalities mentioned in section 133, sub-section 5, make an offer for the damage that may be sustained, and if refused, then proceed to arbitration. They did not make any offer of compensation; they gave the plaintiff no opportunity of coming to terms, but proceeded to enter upon the plaintiff's lands, and then left the plaintiff no remedy but by action. The argument has greatly gone on the question whether compensation should be offered before entry or after, as under sub-section 16. If the attempted settlement resulted in arbitration, then under sub-section 16 entry cannot be made until award made. I do not think it necessary to express any opinion on sub-section 16, or the object which is sought to be accomplished thereby, as in this case no arbitration could arise under sub-section 5 until after a failure by the Corporation to come to terms. This sub-section clearly imports the necessity of bringing to the owner's notice the intention of the Corporation to use the land, and to make an offer for compensation. This was not done, and the owner could not go to arbitration until the Corporation had declined his valuation. If the owner was absent, and the Corporation had executed the works without any notice, they are still bound to offer compensation. The arbitration here is solely for the purpose of ascertaining whether the amount offered in satisfaction is sufficient or

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not. The plaintiff is entitled to treat the Corporation as trespassers until this is done. The by-law as to sewerage works does not do away with section 133 of the Act, it is merely ancillary thereto.

I am therefore of the opinion that this appeal should be dismissed with costs.

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MARTIN, J.: Were it not for sub-section 16 of section 133 of the Vancouver Incorporation Act, 1900, this case would present no difficulty. That sub-section is substantially taken from section 162 of the Railway Act, Can. Stat. 1888, but is not precisely the same, because certain words (after the words in our Act, "take possession of the lands") are omitted, *i.e.*, the words "or to exercise the right or to do the thing for which," etc. It is urged on behalf of the defendant Corporation that the construction of the sewer on the plaintiff's premises is not taking "possession of the lands" within the meaning of the sub-section, and that all the Corporation is doing is to exercise its right of entry upon the lands and lay the sewer under the surface thereof, as permitted by the first paragraph of section 133. On the other hand it is contended that said paragraph by employing words and language such as "using real property," and "acquire, take and enter into any land, ground or real property . . . either by private agreement, amicable arrangement . . . or by complying with all the formalities hereinafter prescribed" (*i.e.*, arbitration), clearly contemplates that entry and user, apart from possession, should be the subject of arbitration, and, further, that to enter upon lands and permanently use a portion of the subsoil thereof for a sewer is to "take possession of the lands" within the meaning of sub-section 16. This latter view is borne out by sub-section 5, which says that the Corporation shall make to the owners, occupiers, etc., of the "real property entered upon, taken or used by the Corporation in the exercise of any of its powers, or injuriously affected (thereby) due compensation for any damages . . . necessarily resulting" therefrom, to be determined by arbitration as directed, failing mutual agreement. "Lands" is a word which is used in the Railway Act, from which our section is taken, in a very wide sense, and is defined

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as follows: "The expression 'lands' means the lands, the acquiring, taking, or using of which is incident to the exercise of the powers given by the special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure."

To appropriate, for example, a portion of a man's garden for the purpose of constructing a little beneath the surface a large sewer may be and often is a serious interference with his rights, and he is forced to give up possession of so much of his land as is occupied by that sewer—this may be a very considerable area in the case of a large sewer which might very well be from two feet, as here, to six feet in diameter, or more, according to public requirements. That, to my mind, is to "take possession of lands" within the meaning of said sub-section, and the fact of possession is not altered because it takes place beneath the surface.

It follows then, that since there has been a taking possession, that it should have been preceded by the statutory formalities, and the judgment of the learned trial Judge should be affirmed, and the appeal dismissed with costs.

Appeal dismissed, Hunter, C.J., dissenting.

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MILLER v. AVERILL

Specific performance—Contract to accept part payment for services in stock—Failure to deliver stock.

Plaintiff contracted with defendant to do work at a certain price per day and to take in part payment stock in a mining company. On completion of the work defendant failed to deliver the stock:—

Held, that on defendant's failure to deliver the stock plaintiff was entitled to damages for breach of contract and could not be compelled to accept stock.

APPEAL from the judgment of LEAMY, Co. J.

This was an action in which the plaintiff claimed $324.75, being balance for work done on defendant's land by plaintiff and his team of horses; he claimed in the alternative damages for breach of contract. The contract between the plaintiff and defendant was that the plaintiff should be paid at the rate of $7 per day, whereof $1.50 should be paid in cash and the balance of $5.50 in stock of the Sunset Copper Company, Limited, at fifteen cents a share.

Statement

At the trial the learned County Judge handed down the following memorandum of his judgment:

"Find preponderance of evidence shews that contract was for $1.50 a day in cash and balance of $7 ($5.50) in stock of Sunset Company. That the stock should have been delivered by Averill as soon as the work was completed by Miller. Order that the stock representing $324.75 at 15 cents a share be delivered forthwith. As there is no satisfactory evidence of the damages suffered by Miller by reason of the breach, damages placed at $1. Defendant to pay plaintiff's costs of action."

The appeal was argued at Victoria on the 8th of January, 1904, before HUNTER, C.J., IRVING and MARTIN, JJ.

Argument

Clement, for appellant: The learned Judge should not have compelled us to accept specific performance; in an action on a breach of contract the defence does not pretend that there has

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been satisfaction: he cited *Biggerstaff* v. *Rowatt's Wharf, Limited* (1896), 2 Ch. 93; *De Waal* v. *Alder* (1886), 12 App. Cas. 141 and section 62 of the Sale of Goods Act.

Even if he had power to direct specific performance the action must go back to take evidence as to the present value of the stock.

J. H. Lawson, Jr., for respondent: The Court has power to enforce specific performance of a contract for the transfer of shares: *Shaw* v. *Fisher* (1855), 5 De G. M. & G. 607.

HUNTER, C.J.: On the failure of the defendant to deliver the stock within a reasonable time a cause of action for liquidated damages accrued to the plaintiff by virtue of the agreement, and it is clear that he could not afterwards be compelled to take the stock unless he became bound to do so by some new agreement or by estoppel of which there is no sign in the evidence.

HUNTER, C.J.

The appeal must be allowed with costs.

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IRVING and MARTIN, JJ., agreed.

Appeal allowed.

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LEADBEATER *ET AL.* v. CROW'S NEST PASS COAL COMPANY, LIMITED.

Practice—Examination of solicitor—Order for—Summons—Affidavit in support—"Professional confidence"—Rule 383.

A subpœna under r. 383 cannot be issued without an order therefor.

In actions for damages brought against colliery owners by relatives of miners killed in an explosion, the defendants applied to add the plaintiffs' solicitors as parties, and while the summons was pending they obtained under r. 383 an order on summons, in support of which no affidavit was filed, for the examination of the solicitors as to what interest they had in the subject-matter of the action:—

Held, that the summons should have been supported by an affidavit shewing that it was probable that the solicitors had some interest in the subject-matter of the litigation and the order should not have been made as of course.

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LEADBEATER *v.* CROW'S NEST

APPEAL from an order of IRVING, J., requiring the plaintiffs' solicitors, S. S. Taylor and W. R. Ross, to attend before the District Registrar at Nelson for examination "touching their knowledge of the matters in question herein," and as to whether either of them has any interest in the subject-matter of the action. The defendants took out a summons to add the solicitors as parties, and then while that summons was pending, they took out another summons for the examination of the solicitors for use on the first summons, and on this second summons in support of which no affidavit was filed or used, the order under appeal was made, the learned Judge holding that as the proposed examiner was the Registrar, no affidavit was necessary, and that any question of privilege should be raised before the examiner.

Statement

The appeal was argued at Victoria on the 13th of January, 1904, before HUNTER, C.J., DRAKE and MARTIN, JJ.

S. S. Taylor, K.C., for himself and co-appellant: Rule 383 under which this order was made has no application to Chamber or other applications; it refers only to getting evidence for purposes of trial: see *Raymond* v. *Tapson* (1882), 22 Ch. D. 431 and notes to English rule 502 in the Annual Practice.

The order was based on a summons only; the summons should have been supported by affidavit: *In re Mundell* (1883), 52 L.J., Ch. 756.

The order is for examination on the issues; an examination of solicitors on privileged communications.

The action is one under Lord Campbell's Act and the solicitors not being relatives can't be joined as plaintiffs without consent: see *Jackson* v. *Kruger* (1885), 54 L.J., K.B. 446; *Tyron* v. *National Provident Institution* (1886), 16 Q.B.D. 678 and r. 101.

Argument

Davis, K.C., for respondents: Our practice is the old chancery practice, the effect of which is that an examination may be had on any Chamber application and the examination in question is on a summons to add parties; if a person refuses to make an affidavit this practice provides a means of getting his evidence.

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As to the wording of the order, "herein" means as to the matters in the summons and notice was given that nothing more was intended.

Taylor, in reply, referred to *May* v. *Lane* (1894), 64 L.J., Q.B. 236.

Cur. adv. vult.

25th January, 1904.

HUNTER, C.J.: This is an appeal from an order in Chambers requiring the plaintiffs' solicitors to attend before the District Registrar at Nelson for examination "touching their knowledge of the matters in question herein" and as to what interest, if any, either of them has in the subject-matter of the action. The order was made, as I understand, pending the hearing of a summons to add the solicitors as parties and the depositions have been taken under protest.

As to the portion of the order requiring the solicitors to attend for examination "touching their knowledge of the matters in question herein," if it is to be taken as applying to the matters in issue, then it would be *prima facie* wrong as violating the fundamental principle that a solicitor is not to be questioned as to matters disclosed to him in professional confidence. If however, it is to be considered as qualified by the specific part of the order, which I think is the proper interpretation to be put upon it, then there is no difficulty on that score, especially as the examination was admittedly confined to the question of the solicitors' interest in the suit.

HUNTER, C.J.

It is objected that the order should not have been made on the ground that it infringes the principle mentioned, but it would be a mere misuse of language to say that the "professional confidence" would necessarily be violated by a solicitor who merely states what interest he has in the subject-matter of the litigation; that term applies to communications passing as to the mode in which the suit is to be conducted but not, *ex necessitate rei*, to any bargain as to how the solicitor is to be remunerated; and, as has often been said, the privilege is that of the client and not that of the solicitor.

But while the order can not be objected to on this ground, or rather this assumption, I think the appeal must be allowed on the ground that there was no material on which the order could

be made, and it was not disputed that the order was necessary before the subpœna could issue: see notes to Order XXXVII., r. 20 (1904), An. Pr. 516; (1903), Y. Pr. 413.

No affidavit was filed by the defendants which would shew either by admission or by reasonable inference from undisputed documents or facts, or from information given by some credible person, that it was reasonable to suppose that the solicitors, or either of them, have any interest, lawful or unlawful, in the suit, but the order was made on the bare suggestion of the defendants' solicitors.

In my opinion, speaking generally, an order of this kind ought not to be made except for good reasons founded on affidavits or other competent evidence; as, if such an order could be made on the unsupported suggestion of the other party, then any solicitor could be daily subjected to uncalled for oppression and annoyance and hindered in the conduct of his lawful business and without, so far as I can see, any adequate means of redress.

If the real object of the examination was to find out if the solicitors have an unlawful interest in the suit, then there ought to have been some definite charge or allegation made on the oath of some credible person, and it could then have been determined whether or not the solicitors were examinable in the circumstances; and afterwards, if ordered to attend, whether they could refuse to answer any particular question. If, on the other hand, the object was simply to aid the application to add them as parties, with a view to securing their personal responsibility for costs, then it would seem as if such application must fail under *De Hart* v. *Stevenson* (1876), 1 Q.B.D. 313.

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However, I am not called upon to express any final opinion as to this latter point as it was not argued, and as I prefer, in either view, to rest my judgment on the broad ground that the order ought not to have been made as of course, or as on a *præcipe*, but only for good cause shewn.

I would, therefore, allow the appeal with costs here and below.

DRAKE, J.: The question is what construction is to be placed on rule 383. The plaintiffs contend that it is not applicable for the examination of parties, as it conflicts with the discovery

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rules. When the rule is examined it has reference to applications in causes or matters which would seem to exclude actions; but the interpretation section of the Supreme Court Act does away practically with the distinction between causes, matters and actions. By that clause, matter includes every proceeding in the Court not in a cause; and cause includes any action or suit. Such being the case, rule 383 can be applied to any and all proceedings in an action. This proceeding is one which is distinct from the examination of parties to any action, but there is nothing to exclude the application of the rule to any person who can give evidence in the cause or matter. Solicitors to either party have the protection of the law and cannot be compelled to answer any questions which relate to the advice given by them to their clients. In other matters they are subject to the ordinary rules of evidence.

DRAKE, J.

Appeal should be dismissed.

MARTIN, J.: The first contention of the appellant is that rule 383 relates only to trials and not to Chamber or other applications, and that before said rule can be resorted to the case must be ready for trial, and in support of this contention, and in addition to the cases cited, we are referred to the heading to the group of sections of Order XXXVII., entitled, "2. Examination of Witnesses." The best way to ascertain the intention is to read all the rules, and after having done so it is *e.g.*, as plain to me that rule 4 and rule 370 relate, as the latter says, to "any cause or matter at any stage of the proceedings," *i.e.*, before or after trial, as that rule 384 relates to proceedings subsequent thereto. A consideration of rule 383 shews that it deals with two different matters; the first relating to the oral examination of a witness who has not made an affidavit, and the second to the case of any person who has. I am unable to see any indication in the rule of any intention that the examinations it provides for are restricted to any stage of the cause, and such being the case, it must apply to any interlocutory proceeding where it can be properly and conveniently, but not oppressively invoked. None of the cases cited contravenes this view.

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Then, as to the objection that the witnesses sought to be ex-

amined happen to be the solicitors for the plaintiffs, or stand in that relation, and therefore should not be examined, the answer is that the right to examine a witness cannot be defeated by the mere fact that such witness happens also to be a solicitor for one of the parties, though no doubt this fact would be borne in mind on the examination if ordered, so as not to leave ground for the objection that such process was being used as a means to improperly pry into confidential relations foreign to the application in support of which the witness was subpœnaed.

But a further ground of appeal is that there is no reason shewn for the making of the order, and the order itself shews that the application was made without material in support thereof. It was not disputed that the examination cannot be had without the order and that as a matter of practice it is necessary, as appears from *Stuart* v. *Balkis Co.* (1884), 32 W.R. 676, and the notes in the Yearly Practice, the Annual Practice, and Chitty's Forms (1902), 293. Such being the practice, the order should not be made unless upon good cause shewn, and I agree with my Lord that in such a case as the present the necessity for the order should clearly appear by affidavit, and as it does not so appear the order should not have been made, and the appeal should be allowed with costs.

MARTIN, J.

Appeal allowed, Drake, J., dissenting.

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Land Registry—Registered plan—Unregistered plan—Description of land by reference to plan—Boundaries—Mistake—C.S.B.C. 1877, Cap. 102, Secs. 25, 64 and 67 and R.S.B.C. 1897, Cap. 111, Sec. 65.

The owner of a district lot registered in 1885 a plan of it drawn to scale, but not shewing the sub-divisions, and afterwards had another plan made from a survey and which differed from the registered one; from an inspection of the ground and the unregistered plan, one Kilby, who was unaware of the registered plan, bought in 1889, lot 16 and registered the deed which did not refer to the plan. On 11th July, 1889, the defendant bought from the same vendor lot 15. In 1890, the plaintiff bought from Kilby lot 16, the deed shewing the purchase to be according to the registered plan, but before purchase she inspected the property and saw the boundaries which were then according to the unregistered plan. Lot 16 according to registered plan overlapped lot 15 according to the unregistered plan:—

Held, in an action for possession by the owner of lot 16 (1.) That both plaintiff and defendant must be deemed to be holders of their respective parcels according to the registered plan and to have registered their conveyances in conformity with the Land Registry Act.

(2.) It was not open to defendant who had accepted and registered a conveyance of land according to a registered plan to afterwards object, in an action respecting the title to the same land, to the validity of that plan.

Decision of DRAKE, J., affirmed.

APPEAL from the judgment of DRAKE, J., in an action for the possession of land.

Statement

In 1885, one Edmonds, being the owner of district lot 301 in New Westminster District, caused a plan thereof (No. 187) to be registered in the Land Registry Office at Vancouver; the plan did not shew in figures the length and width of the sub-divisions but was to scale. There had been no actual survey of the ground before plan 187 was filed, nor were the lots staked off according to that plan. Afterwards, about the end of the year 1887 or the beginning of 1888, another plan (differing from the registered plan) was made from an actual survey of the land, and from this and an inspection of the ground one Kilby (who was not aware of the registered plan) picked out lot 16 and took a deed which described his land as "lot 16 in block 117, sub-

division of lot 301," and being dated 21st October, 1889. The next person to occupy a lot in the block was one Ole Oleson, who cleared up lot 15 and put a house on it; he remained on the lot about two years and used Kilby's fence as the boundary. The defendant bought Oleson out, and on the 11th of July, 1889, received from Edmonds a deed of lot 15, which was registered on the 7th of October, 1889.

The plaintiff having seen a "for sale" notice on Kilby's fence went and looked at the property, saw where the fences were and where the defendant's house was situated and bought from Kilby, the deed dated the 30th of August, 1890, describing her lot as "16 . . . . according to a map or plan . . . . numbered 187."

Lot 16 according to the registered plan overlapped lot 15 according to the unregistered plan and the plaintiff sued for possession, *mesne* profits and an injunction.

The trial took place at Vancouver on the 30th of May, 1902, before DRAKE, J.

Brydone-Jack, for plaintiff.
L. G. McPhillips, K.C., for defendant.

5th June, 1902.

DRAKE, J.: The plaintiff claims lot 16, block 117, sub-division of district lot 301, group 1, New Westminster District; the defendant claims lot 15, in the same block. The defendant bought from Edmonds, a registered owner, in July, 1889, the lot 15, and Edmonds sold lot 16 to one Kilby on 21st October, 1889, who conveyed to the plaintiff on 30th August, 1890; both plaintiff and defendant duly registered their deeds.

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The plaintiff finding a short time ago that there was some error with regard to the position of the lot, purchased lot 17, according to the registered plan, immediately adjoining the lot she occupied.

The difficulty here has arisen from the original vendor having altered the plan of this property after having deposited a map in the Land Registry Office, and not having informed the purchasers that there was any other plan, and he sold some lots in this block according to the registered plan and other lots according to a non-registered plan.

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Edmonds, the vendor, filed his first plan on 2nd June, 1885, and it is numbered 187. This plan was not strictly in accordance with the Land Registry Act, 1873, under which it was registered; section 64 of the Consolidated Acts, 1877, enacts that where an original section has been sub-divided a plan of such sub-division shall be deposited on a scale of not less than an inch to four chains shewing the range, group and number of original section and the number of each sub-division, names of the streets with magnetic bearings. All this has been correctly done in the plan in question, but the width and length of lot has not been given, but as the map has been drawn to scale these dimensions can be ascertained, and the Act goes on to say that all instruments affecting the land executed after such map shall conform thereto, otherwise the same shall not be registered. Edmonds' conveyance makes no reference to the lot 16 being in accordance with the registered map, but the conveyance from Kilby to the plaintiff does. I think the Registrar was entitled to register the plaintiff's title in accordance with the registered plan, and I must assume it was so registered.

After this plan was registered (but when, is not exactly known) either in 1887 or 1888, the whole frontage of this block was thrown back some ten feet from the Westminster Road, but this alteration in no way affected the lateral lines of the lot in the block—the alley in the rear of these lots was also thrown back—

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this alteration had no bearing on the actual question in dispute, further than to shew that the posts which were discovered in the block when used by the purchaser as defining their lines were put in when the alteration in the block was made.

After the plan 187 was registered another plan was made by Mr. Turner, who made the registered plan, which was lithographed and distributed among the land agents—this plan on its face says it does not guarantee accuracy; there is a great and important difference between the registered plan and the lithograph, in the lithograph, lot 12, the southern lot in the block, takes in something more than half of lot 13 of the registered plan, and approximately the same amount is cut off each lot in this block which consists of six lots. The owners of the lots, including the defendants, erected fences according to the lithograph plan and

the posts they found on the ground and have occupied their respective lots ever since, but they are all purchasers subsequent in date to the parties in this action. The defendant purchased through McMorran, one of her predecessors in title, who sold according to the registered plan 187, her title therefore rests on the registered plan, thus in my opinion, both titles rest on the same plan, but owing to the re-posting of this block in accordance with the lithographic plan every one has been misled and improvements have been made and houses built under this mistake, a mistake which is the fault of the original vendor in altering the description of the lots after he had sold the lots in question and not of the lot owners.

The effect of registration is to give to registered owners a title to the land registered for such an estate of freehold as he legally possesses therein. The plaintiff therefore is entitled to lot 16 in fee simple as defined on the registered plan; this takes in a considerable portion of the lot which the defendant is in possession of under the erroneous idea that she is entitled to rely on the non-registered lithographic plan, and her registered lot extends over the greater part of lot 14 as defined by lithographic plan.

Mr. *McPhillips* contends that plan 187 should be set aside and that the Registrar was in fault in registering according to the plan, and cited section 65 of Chapter 111, Revised Statutes—this section which enacts that every deed executed after a map has been registered shall conform thereto otherwise it shall not be registered, and therefore he says as the plan did not shew the dimensions of the lot it should be set aside, but by section 25 the Registrar has power to call for evidence of identity before effecting registration, and it is to be presumed that he did his duty and satisfied himself before he issued the certificates of title and as I have pointed out he was bound to register according to the registered plan, and that plan is complete with the exception of figures of the width and depth of the lot, and this can be ascertained by scale on the plan. I do not therefore consider that the plan should be cancelled as property of very great value has been sold according to it. Both plaintiff and defendant bought according to this plan, and their titles depend on it. There will be judgment therefore for the plaintiff for possession of lot 16.

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There was evidence that both parties were under mistake as to the legal boundaries, and improvements have been made by the defendant on the plaintiff's lot 16. I shall therefore direct that the defendant have three months in which to remove the buildings and improvements which are not attached to the freehold.

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Under the circumstances I shall make no order as to *mesne* profits. The plaintiff is entitled to her costs.

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The appeal was argued at Vancouver, on the 28th of November, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ.

L. G. McPhillips, K.C. (*Heisterman*, with him), for appellant: Kilby, the plaintiff's predecessor in title having bought according to the lithographic copy of the unregistered plan, his grantee cannot get more than he took on his purchase; the original plan, No. 187, only defined the outer boundaries; it should not have been registered, as it did not comply with the requirements of the Act (Sec. 6 of No. 21, 1873), and shew the length and width of the lots, and it is not binding unless a sale has been made according thereto; Kilby was the first purchaser, but he did not buy according to the plan.

The Registry Act provides that whenever any land has been surveyed or sub-divided into town lots, the owner having his property "surveyed or sub-divided" shall within three months after so doing deposit a map or plan of such survey or sub-division in the Land Registry Office. In this case, as there was no survey or sub-division of the land, *i.e.*, no actual staking off or measurements taken of the ground, the plan 187 was merely a plan of a proposed survey or sub-division which has never taken place, and is accordingly a nullity, not being such a map or plan as is contemplated by the Act.

Argument

A certificate of title in favour of Kilby should never have been granted and his deed should never have been registered; bad registration is no registration. He cited *Robson* v. *Waddell* (1865), 24 U.C. Q.B. 574; *Ferguson* v. *Winsor* (1885), 10 Ont. 13 at p. 23, reversed in (1886), 11 Ont. 88, but not on this point, and *Renwick* v. *Berryman* (1886), 3 Man. 387 at p. 400. Even if the plan were properly filed it does not assist the plaintiff because the parties made an agreement outside of it: see *In*

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re Morton and Corporation of St. Thomas (1881), 6 A.R. 323, at p. 329.

As to conventional lines see *Davison* v. *Kinsman* (1853), 2 N.S. 1; *McLean* v. *Jacobs* (1834), 1 N.S. 9 and *Grasett* v. *Carter* (1883), 10 S.C.R. 105.

The evidence shews that there is no doubt that Edmonds sold to Kilby lot 16 according to the stakes on the ground; Kilby saw in the land agent's office the lithographic copy of the unregistered plan and didn't know that there was a registered plan, or that there were two different plans; he went on the ground and picked out lot 16 and put up his fences according to the stakes; Edmonds could not have ejected Kilby from any of the land included within his fences, nor could Kilby have got anything else from Edmonds; there was a mutual mistake, the lot being sold according to the stakes on the ground and not according to the plan, and all the parties have built and acted on the assumption that the stakes and fences marked the true boundaries.

Brydone-Jack, for respondent: The plan substantially complied with the provisions of the Act; the interior part of the survey need not be filled in; the magnetic bearings are given at the principal corners and from these surveyors can tell the angle of every lot; it is drawn to scale and so the size of the lots can be determined.

Argument

By sections 25 and 67 of Cap. 102, C.S.B.C. 1877, the Registrar had a discretionary power to call for more evidence as to identification, etc., and as he has adjudicated on the matter it must be taken as settled; it was a question of identification for the Registrar, and having satisfied himself by the reference in the deed to the sub-division that it was a sale according to the registered plan, he issued a certificate of title. Our certificate of title must hold good: see sections 19, 20 and 23 of Cap. 102 and Form J. Performance of all formalities will be presumed in favour of it, following the maxim "*Omnia rite acta praesumuntur.*"

Evidence to shew where the stakes were planted should not have been received as controverting the registered plan: see *Smith* v. *Millions* (1889), 16 A.R. 140 at p. 146.

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McPhillips, in reply: There is no authority for the proposition that the act of the Registrar is final; the act of an official is always open to review. A party filing a plan is not bound to sell by it only. He cited *Israel* v. *Leith* (1890), 20 Ont. 361 at p. 369.

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HUNTER, C.J.: The plaintiff and the defendant are registered owners in fee simple of lots 16 and 15 respectively, in block 117 of sub-division of district lot 301, group 1, New Westminster District, according to a registered plan No. 187 in the Land Registry Office at New Westminster. The plaintiff's predecessor in title, Kilby, purchased his lot on October 1st, 1899, from Edmonds, the description in the deed, however, not referring to the plan which was registered on June 2nd, 1885, but the Registrar satisfied himself as to its identity. There can be no doubt that this deed did convey lot 16 according to such plan, and Kilby's deed to the plaintiff does convey according to the plan. The defendant bought her lot from Edmonds on July 11th, 1889, and her deed describes the lot as lot 15 according to the said registered plan. Thus the plaintiff and defendant claim their respective lots under conveyances from a common owner according to a registered plan, and are, as already stated, the registered holders of the respective parcels according to the said plan.

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At the time of purchase by Kilby he was pointed out certain ground by Edmonds' agent as the lot he was buying which had been surveyed and staked off, not in accordance with the registered plan, but in accordance with an un-registered plan, lithograph copies of which were used by the agent in making the sales. Kilby fenced and occupied this ground, and the plaintiff continued the occupancy until she was threatened by her other neighbour with a suit to recover possession of that part of it not included in lot 16 according to the registered plan. This suit was compromised and she in turn brings this action to recover that part of the land covered by the registered plan as lot 16, of which the defendant is in possession.

We have not in this suit to deal with any question arising be-

tween grantor and grantee out of any misunderstanding as to the parcel intended to be conveyed, but have only to say what are the rights of two grantees claiming under a common grantor under conveyance according to a registered plan.

It seems to me that either can claim as against the other, only the parcel covered by the description in his deed, unless some equity has arisen between them, or unless the plaintiff is barred by the Statute of Limitations. In this case there is admittedly no defence by way of adverse possession, nor on the facts proved do I see any equity arising in favour of the defendant such as was contended for, but held not to have been created, in *Ramsden* v. *Dyson* (1865), L.R. 1 H.L. 129, nor any settlement of boundaries accepted and acted upon such as was held to have taken place in *Grasett* v. *Carter* (1883), 10 S.C.R. 105. All that can be said is that both parties were mistaken as to their boundaries, and there is nothing disclosed by the evidence to prevent either from asserting her title to the property included in her conveyance.

Both parties must be deemed to have known of the requirements of the Land Registry Act, and to have registered their conveyances in conformity therewith, and the mere fact that a registered owner has been under a wrong impression as to what he was getting by his deed, raises no equity against another registered owner upon whose land he is found to be trespassing. One of the chief objects of the Land Registry Act was to compel the transfer of sub-divided land according to registered plans in order to prevent the uncertainty and confusion that would ensue by such loose methods of alienation as are sought to be supported here, and which depend for their proof on recollections of oral negotiations of distant date.

As to the objection that the plan should not have been registered inasmuch as it does not comply with the requirement as to shewing the width and length of the lots. It seems to me in the first place that this objection does not lie in the mouth of a person who has accepted and registered a conveyance which incorporates the plan, and in the next place that it does shew the width and length of the land, inasmuch as it is drawn to scale. It is not necessary in order to shew the width of a lot on a plan

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drawn to scale that the width should be stated in figures on the lot itself, although no doubt this is the proper and preferable course to adopt.

I may add that this case signalizes the need of some such remedial legislation with regard to improvements made under mistake of title as exists in Ontario, which was lately considered and applied in *Chandler* v. *Gibson* (1901), 2 O.L.R. 442.

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I agree with the judgment appealed from, and think it should be affirmed with costs.

IRVING, J.: I agree with the decision of the trial Judge, and also with that of the Chief Justice, dismissing the appeal. If we were to accede to the argument of the defendant's counsel, the Land Registry Act might just as well as not be torn up.

The point for decision is one which, when dissociated from the question of hardship, with which it has been somewhat clouded, is a simple one.

The defendant's counsel contended that a map (No. 187) filed by the Registrar of Titles was not duly or properly filed, and that therefore the description of the plaintiff's lot was to be governed either by some fence on the ground, or by the lines laid down on some plan exposed (I care not how conspicuously) in some real estate agent's office. It seems only necessary to state the contention to establish its futility.

IRVING, J.

The facts are not in dispute. Edmonds, admittedly the original owner, deposited, 2nd June, 1885, a plan (No. 187) certified by a surveyor. The Registrar received it. The plaintiff's predecessor, Kilby, bought a lot (No. 16) from Edmonds, the deed (21st October, 1889) contained no reference to the plan No. 187, by name.

Kilby, on 30th August, 1890, sold to Fowler lot No. 16, according to plan No. 187. There can be no doubt but that these were one and the same lot.

Then it is clear that the plaintiff has only to go on the ground and have his lot identified and take possession.

He finds the defendant there, and asks him to move. The defendant says "No; you must prove your title."

I think the plaintiff has done so, and that is an end of the

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matter; but the defendant says more. His argument is that the plaintiff did not, when he first took possession, take up all the land he was entitled to, and that he, the defendant, was thereby misled; and that as he, the defendant, had bought the adjoining lot from Edmonds, he is now entitled to hold that portion of the plaintiff's lot which was not taken up by him. In the absence of some equity raised in his favour, this cannot be maintained.

Without doubt there was a mistake, as well on the part of the plaintiff as on the part of the defendant, but the plaintiff did not thereby lose his property.

People buying a lot described by reference to a deposited plan should take the precaution of having their boundaries defined by a surveyor. The defendant is not the first person who has suffered by reason of his own negligence in this respect.

MARTIN, J., concurred with the learned Chief Justice.

Appeal dismissed.

ELLYN v. THE CROW'S NEST PASS COAL COMPANY, LIMITED.

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Practice—Test action.

Forty-four actions were brought by different persons against defendants for damages caused by the death of relatives in an explosion extending over a large area of defendants' coal mine, and plaintiffs applied to consolidate these actions with twenty-nine other actions, one of which had been chosen as a test action. On account of the workmen who were killed not all being of the same class and also on account of the different conditions in the different parts of the mine where deaths occurred, the defendants contended that one action would not be a fair test of all the others:—

Held, that the defendants should have the right to select four actions as test actions for those of the same class.

Order of FORIN, LO. J., set aside.

APPEAL from an order of FORIN, LO. J., consolidating this

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action and forty-three others with the *Leadbeater* action for trial as a test action.

In addition to the twenty-nine actions brought in or about August, 1902, against the defendants for damages caused by the death of relatives in an explosion in the defendants' coal mine, forty-four other actions were subsequently in May, 1903, brought in respect of the same cause of action, and after the decision of the Full Court in *McLeod* v. *Crow's Nest* (*ante* p. 103) the plaintiffs in the forty-four actions applied to have their actions consolidated with the *Leadbeater* action which had been selected as the test action.

Statement

The application was argued at Nelson before FORIN, Lo. J., who ordered that proceedings in the forty-four actions be stayed pending the determination of the *Leadbeater* action which should be a test action for all the others. The order taken out was the same as that in the *McLeod* action set out in full *ante* p. 104.

The defendants appealed, the appeal being argued at Vancouver on 6th November, 1903, before HUNTER, C.J., DRAKE, IRVING and MARTIN, JJ.

Bodwell, K.C. (*Davis, K.C.*, with him) for appellants: If the *Leadbeater* action is taken as a test of all the others it will result in an improper trial as the defendants will be prejudiced by the plaintiffs being allowed to choose their most favourable case as a test of all the others: *Williams* v. *Township of Raleigh* (1890), 14 P. R. 50: the case of a rope rider cannot be decisive of that of a fire-boss whose duty it was to report as to the state of gas. There should be a classification of actions and we suggest that four be selected.

Argument

S. S. Taylor, K.C., for respondents.

Per curiam: Set aside order of Judge FORIN. Defendants to have the right to select four out of forty-four actions as test actions for the purpose of trial. By consent, the four actions and the *Leadbeater* action to be tried at the same sittings. Notice of actions selected to be given on or before November 15th. Costs of the appeal to the successful party in this action. The Company, by their counsel, undertake to abide by any order

Judgment

made by the trial judge as to the costs occasioned by the extra three actions.

Appeal allowed.

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Note:—As the order taken out in the above appeal is an unusual one and as its exact terms are material for the report of the next case (*Silla* v. *Crow's Nest, post*), it is set out below in full.

(1.) This Court doth order that the said appeal be and the same is hereby allowed.

(2.) And this Court doth further order that the order made by His Honour Judge FORIN, on the 4th day of July, 1903, be and the same is hereby set aside.

(3.) And this Court doth further order that the defendants shall be at liberty on or before the 17th day of November, 1903, to select from among the actions referred to in the said order the names of four plaintiffs and communicate the names so selected to the plaintiff's solicitor or to his agent at Vancouver, and thereupon the pleadings in the said actions so selected shall be delivered, and the said actions shall be brought on for trial by the plaintiffs.

(4.) And this Court doth further order, all parties by their counsel hereto consenting, that the said actions shall be tried at the same time and place and as a part of the trial of the action in which Maud Leadbeater and others are plaintiffs and the above named defendants are defendants.

(5.) And it is further ordered that proceedings on the part of either the plaintiffs or the defendants in all the actions referred to in the said order of the 6th of July, except such selected actions shall be stayed except in so far as it may be necessary for the plaintiffs in any of the said actions to take evidence *de bene esse* of any plaintiff in any of said actions as to the damages sustained or the relationship of such or any of the plaintiffs to the deceased by reason of whose death any one of the said actions is brought, the plaintiffs in each and all of the said actions respectively undertaking that the trial of any one of the said actions so ordered to be tried together shall be treated as a test action and decisive of the respective rights of the plaintiffs in such of the said actions referred to in the said order made by His Honour Judge FORIN, in which in the opinion of the Court the legal rights of the plaintiffs are the same as those of the plaintiff in such test action, save as to the quantum of damages (if any) that the said respective plaintiffs may be entitled to receive, unless it shall appear to the Court that the said test action has failed to be a real trial of the matter in issue therein, in which case the plaintiffs undertake to be bound by any order that the Court may think fit to make, the defendants to be at liberty to apply to the Court at any time after the determination of the said actions so ordered to be tried together or any one of them, for an order requiring the plaintiffs to proceed with any other action if the defendants shall be dissatisfied with the result of the said test action, and if such application is refused, then the said test action shall be deemed to have

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been decisive of the rights of the defendants as well as of the plaintiffs in the other actions referred to in the said order of 6th July; and further, that the defendants shall be at liberty to apply for an order that any of the said actions referred to herein, except such actions so ordered to be tried together, shall be forthwith proceeded with upon satisfying the Court that there is a special ground of defence applicable to such particular action which is not raised in any one of the said actions so ordered to be tried together.

(6.) And this Court doth further order that the costs of and incidental to this appeal and the summons in the Court below herein appealed from be costs in the cause.

(7.) This order is made upon the defendants undertaking to abide by any order that the trial Judge may make as to the payment of the extra costs occasioned by the trial of three additional actions to the *Leadbeater* and another chosen by the defendants.

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

Practice—Test actions—Consolidation of—Plaintiffs in some actions outside jurisdiction—Security for costs—Waiver.

Twenty-nine actions by different plaintiffs were commenced against defendants at one time, and subsequently forty-four similar actions were commenced. One action known as the *Leadbeater* action was ordered to be tried as a test action for the twenty-nine, and afterwards by consent four actions out of the forty-four were consolidated by order of the Full Court with the *Leadbeater* action and ordered to be tried as test actions for the whole seventy-three. In the *Leadbeater* action and in one of the four remaining test actions the plaintiffs resided in the jurisdiction and in the other three they resided outside the jurisdiction:—

Held, by the Full Court, reversing IRVING, J., that the plaintiffs outside the jurisdiction should not be required to give security for costs.

Statement

APPEAL from an order of IRVING, J., whereby the plaintiffs were ordered to give security to answer the defendants' costs in the action in the sum of $500.

After the decision in *Ellyn* v. *Crow's Nest*, reported *ante*

p. 221, the defendants served notice on plaintiffs that they selected pursuant to the leave granted by the Full Court, the following four actions as test actions, *viz.: Lamb* v. *Crow's Nest, Silla* v. *Crow's Nest, Frederico* v. *Crow's Nest* and *Tuka* v. *Crow's Nest.*

The plaintiffs in the *Leadbeater* action (with which these four actions were now consolidated for trial as test actions) and in the *Lamb* action were resident in the jurisdiction, and in the three other actions the plaintiffs were resident out of the jurisdiction in Hungary and Italy.

In the *Silla* action the defendants demanded in May, 1903, security for costs, and in December, after the order of the Full Court in *Ellyn* v. *Crow's Nest,* they applied on summons for security.

Statement

The summons was heard in Vancouver, before IRVING, J., who ordered security in the sum of $500.

The plaintiffs appealed, the appeal being argued at Victoria on the 13th of January, 1904, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Of the seventy-three actions it was assumed for the purpose of the argument that the plaintiffs in half of them were outside the jurisdiction.

S. S. Taylor, K.C., for appellant, cited *Martano* v. *Mann* (1880), 14 Ch. D. 419 at p. 421 and *D'Hormusgee* v. *Grey* (1882), 10 Q.B.D. 13.

Argument

Davis, K.C., for respondents, referred to *Crozat* v. *Brogden* (1894), 2 Q.B. 30 at pp. 34 and 36.

Cur. adv. vult.

25th January, 1904.

HUNTER, C.J.: I think the appeal must be allowed.

By consent of all parties this and three other test actions were consolidated by the Full Court with the action of *Leadbeater et al.* against the defendants, and are, by the express terms of the order, to be tried as part of that action. Therefore, as the plaintiffs in that action reside within the jurisdiction, the case falls within the principle laid down in *D'Hormusgee* v. *Grey* (1882), 10 Q.B.D. 13, that if there are two plaintiffs, one of whom is within, and the other without the jurisdiction, security

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will not be ordered against the one without on the ground that the one within is liable, in any event, for the costs which the presence of the other, if unsuccessful, may occasion the defendant.

A demand for security was made before the order was made by the Full Court and a summons taken out after the order to enforce the demand.

I think the effect of the consent was to waive the demand and that the Court cannot now be asked to make an order which may result in undoing what was done with the express object of stopping a flood of unnecessary litigation.

DRAKE, J.

DRAKE, J.: I concur.

MARTIN, J.

MARTIN, J.: Having regard to the very unusual position of this case brought about by consent of parties by the order of this Court, dated the 6th day of November, 1903, and having further regard to the very exceptional concomitant circumstances, I am of the opinion that this is a case wherein security for costs should not be required.

Appeal allowed.

HUNTER, C.J.
(In Chambers)
1904
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WILES v. THE TIMES PRINTING AND PUBLISHING COMPANY, LIMITED LIABILITY.

Practice—Notice of trial—Rule 340.

WILES
v.
THE TIMES

In January, plaintiff's solicitors gave notice of trial at the Civil Sittings to be held in July in Victoria, where, according to statute, Civil Sittings are also held in February, March and May:—

Held, on a summons to dismiss for want of prosecution, that plaintiff must give notice of trial for the March Sittings, otherwise the action will stand dismissed.

SUMMONS to dismiss action for want of prosecution or in the alternative that the trial be fixed for February, 1904.

HUNTER, C.J. (In Chambers)

1904

Jan. 29.

WILES v. THE TIMES

This was a libel action in which the plaintiff was an organizer of theatrical entertainments and a resident outside the jurisdiction. The action was commenced in July, 1903, and the statement of defence was delivered 10th October, 1903. On 5th August, an application on behalf of the plaintiff to have her evidence taken *de bene esse* was refused, and on 24th November, another application on her behalf for a commission to take her evidence at Pittsburgh, Penn., U. S. A., was refused.

On 28th December, defendants' solicitors wrote plaintiff's solicitors asking them to give notice of trial for the February Sittings, or they would apply to dismiss for want of prosecution, and on 13th January, 1904, plaintiff's solicitors served notice of trial for the July Sittings at Victoria. By statute Civil Sittings at Victoria are held in February, March, May, July, October and December.

Statement

The defendants then applied to have the action dismissed for want of prosecution, and on the return of the summons at Victoria before HUNTER, C.J., on 29th January, 1904, an affidavit by A. F. W. Solomon was read on behalf of the plaintiff; the affidavit stated that the plaintiff was an organizer of theatrical entertainments and was engaged in that work in Pennsylvania; that her mother was very ill in Pennsylvania and she had made her engagements there so as to be near her and that to come to Victoria for the trial before July would result in her having to give up her engagements and entail great pecuniary loss.

J. H. Lawson, Jr., for the summons.
Cassidy, K.C., contra.

Judgment

HUNTER, C.J.: To give a notice of trial for the fourth Sitting thereafter is not giving the notice contemplated by the rules; it is merely playing with the process. Give notice for March, otherwise dismissal without further order.

HUNTER, C.J.
1903
Aug. 28.

CANADIAN PACIFIC RAILWAY COMPANY v. VANCOUVER, WESTMINSTER AND YUKON RAILWAY COMPANY.

C. P. RY. CO. v. V. W. & Y. RY. CO.

Practice—Short notice of motion.

Railways—Crossings—Permission of Railway Committee—Appeal from to Cabinet—Injunction—Notice of intention to lay crossing—Costs.

Where a party applies for special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party.

The defendant Company had obtained from the Railway Committee of the Privy Council an order permitting it to cross the C. P. R. track. Pending an appeal by the C. P. R. Company from the order to the full Cabinet, the defendant Company proceeded to lay the crossing and the C. P. R. Company applied for an injunction:—

Held, that defendant Company was not exceeding the terms of the order, which was binding on the Court until reversed on appeal to a competent authority, and therefore an injunction could not be granted.

Before laying a crossing notice should be given of the time at which it is intended to commence the work.

Failure by a Company to give such notice constitutes good cause for depriving it of the costs of successfully resisting a motion for an injunction.

Statement

MOTION on behalf of the plaintiffs for an injunction to restrain the defendants from proceeding with the laying of a crossing over the plaintiffs' railway at New Westminster. The defendants had already got an order of the Railway Committee of the Privy Council of Canada to permit said crossing, and had given the plaintiff Company notice that they intended to proceed with the crossing, but had not given them notice of the time at which they intended to do so.

The defendants proceeded to the point of crossing at 3 a.m., and succeeded in laying the diamond before they were stopped by plaintiffs' workmen.

The notice of motion, which was dated the 27th of August, and returnable the next day, read, "Take notice that by special leave of the Chief Justice this Court will be moved, etc."

HUNTER, C.J.

1903

Aug. 28.

C. P. RY. Co. v. V. W. & Y. RY. Co.

The motion was argued at Vancouver before the Chief Justice, on August 28th, 1903.

Davis, K.C., for the plaintiffs.

McCaul, K.C., for the defendants, took the preliminary objection that the notice of motion did not shew specifically on its face that the provisions of rr. 541-545 had been complied with and exactly what special leave had been granted: An. Pr. 721 and cases cited there; B.C. Stats. 1903, Cap. 10; *Dawson* v. *Beeson* (1882), 22 Ch. D. 504 and *Mander* v. *Falcke* (1891), 3 Ch. 488.

Davis, in reply. If necessary the notice can be amended: see *Dawson* v. *Beeson*, *supra* and *Williams* v. *De Boinville* (1886), 17 Q.B.D. 180.

Judgment on the preliminary objections was reserved and argument on the merits was proceeded with by

Davis: Plaintiffs are appealing from order of Railway Committee to the full Cabinet. Defendants have obtained nothing but a mere right to cross tracks under this order, and must comply with section 102 of Railway Act where land is owned by other Company.

Section 173 is section under which permission to cross is given. Three things must be done: (1.) Get place and mode of crossing approved; (2.) Then under section 102 application to interfere with plaintiffs' rights; (3.) Then take necessary steps for expropriation.

Argument

McCaul: We justify under order of Railway Committee, pursuant to section 173 as amended by 56 Vict., Cap. 27, Sec. 1.

The Railway Committee must be presumed to have had section 102 in contemplation also when they made the order. It purports to be made generally in pursuance of the Railway Act.

Compare section 187 and *Canada Atlantic Railway* v. *City of Ottawa* (1901), 2 O.L.R. 336 and *Montreal and Ottawa Railway* v. *City of Ottawa* (1901), 2 O.L.R. 336; (1902), 4 O.L.R. 56.

The real object of motion is to secure a stay of proceedings pending appeal to Cabinet, but Courts have no power to interfere on this ground.

HUNTER, C.J.

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C. P. RY. CO. v. V. W. & Y. RY. CO.

As to powers of Railway Committee see section 11 Railway Act, sub-sections (*d.*), (*f.*) and (*h.*)

In any case an interim injunction will not be granted to restrain trespass except in case of actual spoliation: see *Lowndes* v. *Bettle* (1864), 33 L.J., Ch. 451; *Leeds and Liverpool Navigation Co.* v. *Horsfall* (1889), 33 Sol. Jo. 183 and An. Pr. 678-679; nor will an injunction be granted where there is a remedy in damages, and here they have protection under the Act: Seton on Decrees, 556, 604; An. Pr. (1903), 678-9.

In any case Court can direct security to be given under B.C. Stat. 1903, Cap. 10, Sec. 3.

Davis, in reply:

HUNTER, C.J.: I think that the preliminary objection taken by Mr. *McCaul* is one impossible for me to get over, in view of the decision of the Court of Appeal in *Dawson* v. *Beeson* (1882), 22 Ch. D. 504.

Even on the merits no case has been made out for an injunction. The case involves the power of the V. W. & Y. Ry. to cross the track of the C. P. R. It is not a case of expropriation, and the order of the Railway Committee is binding as far as I am concerned until upset on appeal to a competent authority and I cannot interfere with it. That order empowers the Company to cross the track at a point near Sapperton, and the notice of motion complains that the land of the C. P. R. right of way at that point has been interfered with. That is exactly what the order of the Railway Committee empowers the Company to do.

Judgment

At the same time I think that the motion ought to be dismissed without costs. I think the defendants have gone to work in a very clandestine way to do the work, and did not give due notice of their intention, which they should have done. I think it calls for very strong comment that a railway company proposing to cross the track of another company, should choose to go and tear up the track in the dead of night without giving any notice whatever. There is no reason why proper notice should not have been given. Under the circumstances the injunction motion will be dismissed without costs.

DAVIDGE v. KIRBY.

WALKEM, J.

1903

Dec. 1.

DAVIDGE v. KIRBY

Practice—Equitable relief—Appointment of receiver—Return of nulla bona.

A receiver for the purpose of giving a judgment creditor equitable relief will not be appointed until the judgment creditor has exhausted his legal (as distinguished from equitable) remedies.

MOTION for the appointment of a receiver, argued at Victoria in November, 1903, before WALKEM, J. The facts appear in the judgment.

Harold Robertson, for the motion.
S. Perry Mills, K.C., contra.

1st December, 1903.

WALKEM, J.: In this action the plaintiffs recently recovered a judgment against the defendant, for the sum of $982.23, for debt and costs, and registered a certificate of it in the Land Registry Office of Victoria, so as to bind the defendant's land which consists of a pre-emption that has been paid for, and for which a certificate of improvements has been issued. The defendant is therefore entitled to a Crown grant on payment of the usual fee of $10. As nothing has been paid on the judgment, the plaintiffs' counsel now moves for the appointment of a receiver, in order "to obtain equitable execution" against the land; and for that purpose he asks that the receiver be authorized to collect any rents and profits; apply for as well as obtain the Crown grant for the land, which he proposes shall be issued in the defendant's name; and thereafter sell the land and apply the purchase money and any rents and profits, or a competent part thereof, in satisfaction of the judgment. He also undertakes, on behalf of the plaintiffs, to pay the fee for the Crown grant. The interest of the defendant in the pre-emption is obviously only an equitable interest. Under such circumstances the appointment of a receiver would, according to the decision given by Jessel, M.R., in the case of the *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275, be equivalent to execution under a writ of

Judgment

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elegit. This writ was part of our procedure until a *fi. fa.* against lands was substituted for it by section 1 of the Execution Act, 1874, which section appears in Cap. 72 of our Revised Statutes of 1897, as section 25. This substituted writ has, in turn, been abolished by the Execution Act Amendment Act, 1899, Cap. 27, Sec. 2, without any provision being made in that Act for any process in lieu of it. Such a provision has, however, been made in section 8 of the Judgments Act, 1899, and is as follows:

"Where any judgment creditor in an action has registered a certificate of such judgment and alleges that the debtor or person to pay is entitled to or has an interest in any land, a motion may be made to the Supreme Court, or to a Judge thereof in Chambers, by the creditor calling upon the debtor, and upon any trustee or other person having the legal estate in the land in question, to shew cause why any land in the Land Registry District or Land Titles District (*sic*) in which such certificate is registered, or the interest therein of the debtor, or a competent part of said land, should not be sold to realize the amount payable under the judgment."

The obvious effect of this enactment is, in common with that of the Execution Act Amendment Act, to do away with writs of execution against lands, and hence to repeal all sections in Cap. 72 of the Revised Statutes of 1897, which relate to that subject, and more particularly sections 25-30, as they are grouped under the heading, in the body of the Act, of "Execution against Lands"—such headings in a statute being regarded as part of it, and as preambles to the clauses respectively grouped under them: see *Bryan* v. *Child* (1850), 5 Ex. 368; *Hammersmith, &c., Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171. This disposes of the contention of the defendant's counsel that section 26 (one of the above mentioned group) is in force as it has not been specifically repealed.

Judgment

Now, while section 8 indicates the remedies which a judgment creditor shall be entitled to as against his debtor's lands, it in no way impairs the effect of section 26 of the Land Act, which is as follows:

"No transfer of any surveyed or unsurveyed land pre-empted

under this Act shall be valid until after a Crown grant of the same shall have been issued."

This language is, in my opinion, an insuperable obstacle to the granting of any order, whether by way of so-called "equitable execution" or not, that would have the effect of authorizing or permitting the plaintiffs to sell, or alienate the defendant's pre-emption, as the Crown grant for it has not been issued. The plaintiffs' counsel seems to have so fully realized this fact that he has applied, as I have stated, for authority to be given to the receiver to personally obtain the Crown grant on paying the fee for it.

The next question is, "What is Equitable Execution?" During the argument I referred both counsel to the explanation given of it by Cotton, L.J., in the well-known case of *In re Shephard* (1889), 43 Ch. D. 131 at pp. 135-6, where he says that

"Confusion of ideas has arisen from the use of the term 'equitable execution.' The expression tends to error. It has often been used by Judges, and occurs in some orders, as a short expression indicating that the person who obtains the order gets the same benefit as he would have got from legal execution. But what he gets by the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law. Until recently nobody ever thought that an order for a receiver could be obtained in aid of a legal judgment, unless there was a hindrance to obtaining execution at law."

Judgment

And Fry, L.J., said in that case at p. 138:

"The idea that a receivership order is a form of execution is in my opinion erroneous. A receiver was appointed by the Court of Chancery in aid of a judgment at law when the plaintiff shewed that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for a legal debt. Relief by the appointment of a receiver went on the ground that execution could not be had, and therefore it was not execution."

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Both of these opinions were afterwards adopted, *verbatim*, by the Court of Appeal in its judgment in *Harris* v. *Beauchamp* (1894), 1 Q.B. 808, where all the decisions given with respect to "equitable execution," both before and after the passing, in England, of the Judicature Act of 1873, which, in its main features, has been adopted here, are reviewed. The substance of that judgment is that sub-section 8 of section 25 of that Act (which is section 14 of our Supreme Court Act) gives no jurisdiction to appoint a receiver by way of "equitable execution" in cases where prior to that Act no Court had such jurisdiction; next, that in order to justify the making of an order for the appointment of a receiver at the instance of a judgment creditor, the circumstances of the case must be such as would have enabled the Court of Chancery to make such an order before the Judicature Act; and, consequently, that no Court had jurisdiction to appoint a receiver merely because, under the circumstances of the case, it would be a more convenient mode of obtaining satisfaction of a judgment than the mode of execution prescribed by Order XLII., r. 3 (No. 458 of our Rules of Court), which cannot be extended except by legislation; and lastly, that in order to procure relief in equity the creditor must shew, as stated in Mitford's Chancery Pleadings, 9th Ed., p. 126, that he has proceeded at law to the extent necessary to give him relief.

Judgment

In the present case, the plaintiffs' solicitor states on affidavit that no writ of *fi. fa.* against the goods of the debtor has been issued, because, as he alleges, such a proceeding would "be very costly and highly inconvenient," as the defendant resides at Port Essington—a distant part of the Province. The term "very costly and highly inconvenient" is a relative one, and I have no information that would enable me to say what it means under the circumstances. Counsel for the defendant, however, remarked, during the discussion that took place about it, that the Sheriff of the County in which Port Essington is situated could have employed a deputy, months ago, at an expense of about $10 to levy execution on any goods that the defendant might have had; and this was not denied. In any event, the authorities that I have cited are to the effect that a judgment creditor must shew that there is a substantial legal impediment in the way of his realiz-

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ing his judgment at law before he will be entitled to such equitable relief as is now claimed. In *Harris* v. *Beauchamp, supra*, it was contended, amongst other things, on behalf of the defendants, that they had book debts to a large amount which could be reached by garnishee proceedings; and, hence, that there was no legal impediment to their being realized by execution at law. On the other hand, it was said that such proceedings would cost more than the aggregate of the book debts was worth; but it was held that this was no valid excuse for the garnishee proceedings not having been taken; and hence a similar motion to the present one was refused.

The result is that the plaintiffs' application must be dismissed with costs.

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

HUNTER, C.J.

1903

March 11.

FULL COURT

June 22.

TRACY v. NORTH VANCOUVER

Municipal law—Tax sale—Land bid in by Municipality—Redemption by original owner—Sale by Council by resolution—Necessity for contract under seal—R.S.B.C. 1897, Cap. 144, Sec. 26 and B.C. Stat. 1898, Cap. 35, Sub-Secs. 15 and 16.

At a tax sale in November, 1899, as the price offered for a lot owned by one Beatty was less than the arrears of taxes, it was bid in by the Corporation.

In September, 1902, plaintiff wrote the Corporation asking if they would accept "the taxes and costs" for the property, and the next day the Council passed a resolution reciting plaintiff's offer and resolving to accept for the property the amount of "taxes, costs and interest," amounting to $88, and the Reeve and Clerk were authorized to issue a deed for that price, and a deed in the statutory form of conveyance by the officers upon a sale for taxes was prepared and signed and the corporate seal attached, but was not delivered to plaintiff, who then demanded the deed and tendered his cheque for $88.

Subsequently the Clerk received from the agent of Beatty $88, and returned plaintiff his cheque, informing him that Beatty had redeemed his property. Plaintiff sued for specific performance.

Held, per HUNTER, C.J., at the trial, that no cause of action existed against the Corporation, and that the action lay, if at all, only against the Reeve and Clerk as *personæ designatæ*.

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Held, on appeal, reversing the decision of HUNTER, C.J. (IRVING, J., dissenting), that a contract had been made out and that plaintiff had a good cause of action against the Corporation, but that as the land had been redeemed by the original owner specific performance could not be granted, and it was therefore referred to the Registrar to assess the damages.

Per IRVING, J. (dissenting): The resolution of 3rd September, did not satisfy the requirements of section 26 of the Municipal Clauses Act, which requires all contracts to be made under seal; a resolution to sell must be followed up by a contract under the corporate seal, placed there by order of the Council.

APPEAL by plaintiff from judgment of HUNTER, C.J.

In 1899, one Beatty, owned district lot 1,483 in the Municipality of North Vancouver, and having allowed the taxes to be in arrear, the Council for the district passed a by-law for the sale for taxes of the lot and others, the by-law also providing that if the price offered should be less than the amount of the arrears of taxes "it may be lawful for the Reeve, or any member of the Council for the said Corporation, to purchase the said . . . . real property, for and in the name of the said Corporation. Provided also, that in case of any property so purchased by the Corporation and not redeemed within the time provided by the . . . . Municipal Clauses Act and amendments, the Council may by a resolution sanctioned by the vote of two-thirds of the Council sell such property or any of it for such price as the resolution may specify."

Statement

The sale took place on the 1st of November, 1899, and as the price offered was less than the amount of arrears, the lot was bid in on behalf of the Municipality.

Subsequently, on the 3rd of January, 1900, on petition by the Collector to the Supreme Court, an order was obtained under section 14, Cap. 35, B.C. Stat. 1898, confirming the sale. No deed of the lot thus sold was made, nor was any demand for one made by the Municipality.

On the 2nd of September, 1902, plaintiff wrote defendants as follows:

"I understand that lot No. 1,483 was sold for taxes at the last sale and is now held by the Municipality.

"I would like to know the lowest cash price for it or if you

will accept the taxes and costs to date. I will pay that amount for the property," and on the next day the Council passed the following resolution:

"Letter from Col. T. H. Tracy offering to purchase district lot number 1,483, was received, and on motion of Councillor May, seconded by Councillor Erwin, it was resolved to accept for this property the amount of taxes, costs and interest to this date against it, amounting to $88, and the Reeve and Clerk were authorized to issue a deed for that price."

On the 5th of November, the Council received a letter from A. B. Diplock offering to purchase the lot, and it was resolved to intimate to him that the lot had been sold to the plaintiff.

A deed of the lot dated the 12th of November, 1902, from the Reeve and Clerk to the plaintiff was prepared and signed on the 15th of November by the Reeve and Clerk and the corporate seal attached, but was not delivered. This deed was in the statutory form of conveyance by the officers upon a sale for taxes and recited the resolution authorizing the sale to plaintiff.

On the 15th of November the plaintiff wrote defendants enclosing a certified cheque for $88 and demanding a deed of the lot. On the 15th of November, the Clerk received from the agent of Beatty the following letter:

"I beg to inform you that on behalf of Mr. T. Carlyle Beatty, owner of the above district lot, I intend to redeem same. Kindly advise me as soon as possible amount due, and oblige," and he thereupon wrote plaintiff as follows: Statement

"Your favour came duly to hand with cheque for $88. I am sorry to have to return the cheque herewith, as the owner, Mr. Beatty, through his agent, Mr. A. P. Horne, has tendered payment of the taxes to redeem his property, and this is all we can reasonably expect from him."

On the 20th of November, Beatty's agent paid the Clerk, who was also the Collector, $88.

Plaintiff through his solicitors then tendered a cheque to the Clerk, and also a conveyance of the lot for signature, and on his demand being refused he sued for specific performance.

The trial took place at Vancouver, before HUNTER, C.J., on the 17th of February, 1903.

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Davis, K.C., and *Marshall*, for plaintiff.

L. G. McPhillips, K.C., and *Heisterman*, for defendants.

On the 11th of March, judgment was delivered as follows:

HUNTER, C.J.: I think this action fails on the ground taken by Mr. *McPhillips*, that it does not lie against the defendants, and that if there is a good cause of action at all it lies against the Reeve and the Clerk of the Council, and not against the Corporation.

The legislation in question is based on that in force in Ontario. Section 6 (*a.*) of the Amendment Act, 1898, Cap. 35, corresponds to section 184 (3) of the Assessment Act, Ontario, R.S. 1897, Cap. 224, *i.e.*, section 170 (3) of R.S. 1887, Cap. 193; section 15 corresponds to section 200 of the Ontario Act of 1897, *i.e.*, section 180 of the Act of 1887; sections 16 and 17 are evidently transcripts with verbal modifications of sections 201 and 203 of the Ontario Act of 1897, *i.e.*, sections 181 and 183 of the Act of 1887.

We thus observe that power is given in all these statutes to the Municipality to buy in at the sale, but that the transfer to the purchaser is not to be made by the Corporation, *qua* Corporation, but by named officers and in a prescribed form.

HUNTER, C.J.

The matter is out of the hands of the Corporation, and it has done all it can do when the Council passes the resolution to sell. The Clerk has the custody of the seal, and if he and the Reeve fail to carry out the resolution in the prescribed manner, they may be compelled to do so at the instance of the party aggrieved, if he has complied with the prescribed conditions; but in the absence of statutory liability it is difficult to see why the ratepayers of the Municipality should be mulcted in damages for the non-feasance of their statutory duty by the persons whom the statute, and not the Corporation, selects to perform the duty.

The rule of *respondeat superior* is based on the presumption that the master chooses his servants, that he gives them orders which they are bound to obey, and that he may discharge or remove them if incompetent, and has no application here as the Corporation has no voice in the selection of those who are to

carry out the resolution: see *The Halley* (1868), L.R. 2 P.C. 193 at pp. 201-203; *Maxmilian* v. *Mayor, &c., of New York* (1875), 62 N.Y. 160; *McLellan* v. *Assiniboia* (1888), 5 Man. 127; also the notes to pages 848-49 of Harrison's Municipal Manual, 5th edition.

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It was argued by Mr. *Davis* that section 16 did not apply to this transaction as it was the case of a purchase from the Municipality, and not at a tax sale. But it seems to me that although the Municipality has intervened as a purchaser, it was none the less a tax sale, as the Municipality was bound to give up the property on redemption within the prescribed time, and there is no reason for supposing that the Legislature intended that there should be any different mode of transferring the property to the purchaser merely because the Municipality has had to take over the property in the interim in order to hold it liable for the full amount of the taxes.

HUNTER, C.J.

In the view that I take it is unnecessary for me to discuss any other points. I must dismiss the action with costs.

The plaintiff appealed and the appeal was argued at Vancouver on the 24th and 25th of April, 1903, before DRAKE, IRVING and MARTIN, JJ.

Davis, K.C., for appellant: The judgment went on the ground that the action lay against the officers and not the Corporation, but that doctrine does not apply where a municipality sells its own land; after having made a binding agreement to sell, the defendants are liable; a tax sale is different, as it is a statutory sale; there must be a by-law authorizing the tax sale, but there is no necessity for a by-law authorizing the sale of land bought at a tax sale. The plaintiff is entitled to recover damages and is not limited to the expenses of investigating title, because defendants were in a position to give title but wilfully abstained from doing so: see *Engel* v. *Fitch* (1867), L.R. 3 Q.B. 314; *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158 and *Hopkins* v. *Grazebrook* (1826), 6 B. & C. 31.

Argument

Where a municipality buys at a tax sale itself the provision as to a demand for a deed does not apply.

The Court called on

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L. G. McPhillips, K.C. (*Heisterman*, with him), for respondents: The plaintiff must first make out a contract. The resolution of September 3rd, does not accept the plaintiff's offer in his letter of September 2nd, but varies it, and there is no evidence of any acceptance of this variation by Tracy, nor can subsequent resolutions or the deed be of any help to the plaintiff as they do not refer to each other, and consequently cannot be joined by parol evidence: see *Potter* v. *Peters* (1895), 72 L.T.N.S. 624 and *Birkmyr* v. *Darnell*, 1 Sm. L.C. 299 and notes thereto.

The resolution of the 3rd of September is not a contract, but merely an expression of opinion, and is not binding on the Corporation.

Even if it should be held that the plaintiff has proved a contract, he has not proved any contract under seal, which is the only way in which a corporation may bind itself in transactions of this nature: see *Jennett* v. *Sinclair* (1876), 10 N.S. 392; *Houck* v. *Town of Whitby* (1868), 14 Gr. 671; Lindley on Companies, 6th Ed., Vol. 1, p. 426 (*c.*) and 270 (*c.*), (*d.*) and (*e.*); *Dunstan* v. *Imperial Gas Light Co.* (1832), 3 B. & Ad. 125; *Mayor of Ludlow* v. *Charlton* (1840), 6 M. & W. 815 at p. 823 and *Mayor, &c. of Oxford* v. *Crow* (1893), 3 Ch. 535.

Apart from the common law, contracts are required by the Municipal Clauses Act to be under seal: see sections 25 and 26. section 6 was passed to do away with the necessity of obtaining the assent of the ratepayers required by sub-section 89, section 50 of the Act, and does not do away with the necessity of the corporate seal: see *Waterous* v. *Palmerston* (1892), 19 A.R. 47 and 21 S.C.R. 556.

Argument

The alleged deed is not the deed of the Municipality, and the Municipality had nothing to do with it. It is the incompleted deed of persons appointed by statute to convey tax lands, and sealed in pursuance of the statutes, and over its grantors while in the exercise of their statutory duties the defendants have no control.

The action (if any) lay against the Reeve and Clerk; subsection 153 (1898) provides that the Clerk shall prepare and the Reeve and Clerk shall execute a deed, etc. They are the persons who have the sole control and the defendants are not responsible

for their acts: see *Canadian Bank of Commerce* v. *Toronto Junction* (1902), 3 O.L.R. 309; *Warwick* v. *County of Simcoe* (1900), 36 C.L.J. 461; *Hesketh* v. *Toronto* (1898), 25 A.R. 449; *McLellan* v. *Assiniboia* (1888), 5 Man. 127 and 265; *Wallis* v. *Assiniboia* (1886), 4 Man. 89; *The Halley* (1868), L.R. 2 P.C. 193 at pp. 201-2; *Maxmilian* v. *Mayor, &c., of New York* (1875), 62 N.Y. 160.

The Municipality by their purchase acquired the right only to protect its taxes against the land, and it can only assign its certificate. It is not entitled to conveyance of the land: *Martin* v. *Barbour* (1888), 34 Fed. 701; (1891), 140 U.S. 634 and *Neal* v. *Andrews* (1890), 14 S.W. 646.

There was no power in the Corporation to sell at the time the resolution was passed. Unless the period of redemption had expired the Council had no power to sell and the defendants would not be liable. No demand for the deed was ever made by the Municipality on the Reeve and Clerk and therefore the period of redemption had not expired. If a demand is not necessary the period of redemption does not expire in case of purchase by the Municipality until the actual delivery of the conveyance: see Dillon on Corporations, 4th Ed., Sec. 447 and *British Mutual Banking Co* v. *Charnwood Forest Railway Co.* (1887), 18 Q.B.D. 714 at p. 719.

As fraud is not alleged or proved, if damages are awarded the amount thereof should be limited to the expenses incurred in the investigation of the title: *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158, which overrules *Hopkins* v. *Grazebrook* (1826), 6 B. & C. 31.

Argument

Davis, in reply: There was no necessity for the Municipality to make a demand on itself for a deed, and even if there was necessity, the resolution of the 3rd of September was sufficient as it is notice to the Clerk. The deed (which was not delivered) is an admission of a contract under seal.

As to damages. Where a vendor is in a position to give title and wilfully abstains from doing so, as was the case here, damages for loss of bargain will be given: see *Bain* v. *Fothergill*, *supra*, pp. 201 and 208.

Cur. adv. vult.

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DRAKE, J.: The defendant Corporation held a tax sale of lots within their Municipality, the property in question, being lot 1,483, group 1, New Westminster, was put up for sale, but a sufficient amount to pay the taxes was not offered, and the Corporation therefore purchased the land under section 6 of Cap. 35, 1898, amending section 135 of the Municipal Clauses Act. The section says that after purchase by the Corporation if the land is not redeemed in the time provided by the Municipal Clauses Act, the Municipality may sell on a vote by two-thirds of the Council.

On the 3rd of January, 1900, an order was made by the Chief Justice confirming, *inter alia*, the sale of this property to the Municipality. On September 2nd, 1902, an application was made by the plaintiff to know the lowest price the Council would take for the lot, or if they would accept taxes and costs. On September 3rd, 1902, the Council passed a resolution whereby it was resolved to accept the taxes, costs and interest amounting to $88, the Reeve and Clerk to issue a deed for that price. This resolution must have been communicated to Tracy, for on November 13th he sent to the Clerk of the Corporation a certified cheque for $88, and asked for the deed. A deed was prepared to the plaintiff, which was duly executed on 12th November, but not issued. On 14th November, 1902, Mr. Horne, an agent of T. C. Beatty, the original taxee of the lot in question, gave the Corporation notice of his intention to redeem on 17th November. The plaintiff's cheque was returned on the ground that Mr. Beatty had tendered the payment of the taxes, and eventually the lot was conveyed to him.

DRAKE, J.

The first point to be considered is whether or not there is a sufficient contract in writing to be gathered from these documents to satisfy the Statute of Frauds. I think there is. The name of the intended purchaser and the description of the property appear in the letter of September 2nd. On September 3rd a resolution was passed, stating the amount they would accept and authorizing the issuing of a deed therefor, and on November 13th the money was paid. Objection was taken that the resolution was not under seal, and therefore did not bind the Corpora-

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tion. The answer to this appears to me to be that by sub-section (*a.*) of section 6 of the Amendment Act, 1898, the Corporation are authorized to sell by resolution of the Council sanctioned by two-thirds of the members thereof; and if a seal should be necessary to complete the contract the execution of the conveyance to the plaintiff under the seal of the Corporation is sufficient compliance with the law that a Corporation must contract under its seal. The deed was not delivered to the plaintiff, but notwithstanding that the plaintiff is entitled to look at it to ascertain if the resolution to sell has been confirmed under the seal. The defendants raise the further objection that the deed should be executed by the Mayor or Reeve and Clerk, as provided by section 16 of the Amendment Act, 1898, Cap. 35, but that form only applies to a tax sale of property sold for unpaid taxes, and does not affect a sale of land which had been bought at a tax sale. As to this land, the Corporation are the purchasers, and as such are the owners of such an estate as the taxee had. The Corporation are also vendors under the tax sale. There is no difficulty in the way of preparing a purchase deed with the intervention of a trustee to user, but in the present case the Corporation have not taken any steps to clothe themselves with the title of the taxee in the land. They have obtained no tax sale deed from the Clerk and Reeve of the Council, neither have they received a collector's certificate under sub-section 2 of section 14 of Cap. 35, 1898. The result is that the land so purchased at the tax sale still remains in the same position as if the Corporation had no title to the land. All that the Corporation have done is to obtain an order confirming the sale, but they have not clothed themselves with any title under the tax sale clauses, and the deed mentioned in section 16 of the Act of 1898 has never been executed. The parties to execute are *personæ delegatæ*, the Reeve and Clerk. I think that sub-section (*a.*) of section 6 was never intended to apply until the Municipality had clothed themselves with the rights of purchasers at a tax sale.

DRAKE, J.

The taxee whose land has been sold may, under section 15 redeem the land within one year after the confirmation order is made by the Judge, or before a demand in writing shall be left at the office of the Clerk of the Corporation by the purchaser at

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the tax sale for the delivery of a conveyance. No demand has been made by the Municipal Council for a conveyance to them of this property by the Mayor and Clerk, therefore the time has not arrived to exclude the taxee from his right of redemption under section 15.

It may be that the Corporation purchasing at their tax sale relieves the land of taxes as long as it is in their possession, but that is a question to be settled by the Legislature, and does not affect the questions raised here.

The plaintiff is asking for specific performance, but cannot obtain it as the land is not, and never has been, in the defendants' hands as purchasers under a tax sale. It therefore becomes necessary to refer the question as to damages, which I think should be to a Judge in Chambers in order to save expense.

DRAKE, J.

The appeal should be allowed with costs.

IRVING, J.: By section 26 of the Municipal Clauses Act, Cap. 144, it is provided that the Municipality shall enter into all contracts under the seal of the Corporation, which shall be fixed on all contracts by virtue of an order of the Council.

By a resolution of the Council on the 3rd of September it was resolved to accept for the property in question, the amount of taxes, costs and interest to the 3rd of September, and the Reeve and Clerk were thereby authorized to issue a deed for that price.

It is contended on behalf of the plaintiff that this resolution confirmed as it was on the first day of October following, satisfies the requirements of section 26 of the Municipal Clauses Act. I am unable to agree to that. The resolution in itself was not a contract of sale, nor was it the unconditional acceptance of an offer.

IRVING, J.

In my opinion, the resolution to sell must be followed up by a contract under the corporate seal placed there by order of the Council. Until such contract is sealed the Corporation, in my opinion, is not committed to such an extent that the original owner of the property is deprived of his right of redemption.

For these reasons I think the appeal should be dismissed.

MARTIN, J.: This case turns on sections 6 (*a.*) and 15 of the Municipal Clauses Amendment Act, 1898.

MARTIN, J.

If the land in question were the property of the Municipality, then the sale, or proposed sale, stands on exactly the same footing as a similar transaction between private persons.

Pursuant to section 6 of said amendment of 1898, the Municipality purchased said land at its own tax sale.

If the result of that purchase were to vest the land in the Municipality, the fact that the plaintiff knew it had been so purchased does not in any way affect the principles which govern the transaction now under consideration. The question is not—Whence did the vendor acquire a good title? but—Did it acquire such title, or could it have done so if it desired?

Section 16 has, in my opinion, nothing to do with this case, because it deals with tax sale deeds to outside purchasers, while here the sale was made, if made at all, by the Council itself of its own land under said sub-section (*a.*) and therefore the question in *McLellan* v. *Assiniboia* (1888), 5 Man. 127 and 265, does not herein arise.

It is first objected that there was no sale by the defendant to the plaintiff because there was no contract under seal as required by section 26 of the Municipal Clauses Act, and it is submitted that the resolution relied upon is not a substitute for the contract, though it is for the by-law required in ordinary cases by section 50, sub-section 89. In support of this view the cases of *Jennett* v. *Sinclair* (1876), 10 N.S. 392, and *Waterous* v. *Palmerston* (1892), 19 A.R. 47, 21 S.C.R. 556 were mainly relied upon. MARTIN, J. But in neither of them was there statutory authority for such a resolution as there is here, and it may be remarked that in the former case (at p. 397), the learned trial Judge lays stress on the fact that there was no lawful communication of the resolution to the would-be purchaser, while in the case at bar not only was there such communication, but an unanimous ratification by the whole Council at a subsequent meeting on the 1st of October, though I do not base my judgment on the ground of any necessity for ratification. The broad effect of the latter decision is that where a by-law is necessary a contract under seal not based on such by-law is invalid. The section on which the case turned provided that "the powers of the Council shall be exercised by by-law when not otherwise authorized or provided for." And

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it was held on the various statutes then under consideration that a resolution could not be regarded as an equivalent for a by-law.

But in the case at bar it is contended that section 6 (*a.*) has expressly "otherwise authorized and provided for" such a situation as arises here, and since it is admitted that the resolution is a substitute for the by-law which would otherwise be necessary, therefore the reduction of that which has already been concluded into the formality of a contract under seal is on the face of it a mere superfluity which the statute expressly aims at avoiding, and especially so in this case since the resolution itself directed the proper officials to "issue" a deed to the purchaser.

I am of the opinion that this is the correct view of the matter and that if there had been a section in Ontario similar to ours, the decision in *Waterous* v. *Palmerston* would have been the other way. The legislative act, so to speak, was the passing of the resolution, and the entering into a contract under seal, seeing that such resolution was to be followed up by a deed, would have been a wholly superfluous and useless executive act. Supposing this was the ordinary case of a by-law submitted to the ratepayers reciting the acceptance of the plaintiff's offer and directing execution and delivery of a conveyance to him, and that such by-law had been duly ratified, can it be seriously contended that nevertheless the Corporation could avoid specific performance because the by-law had not been followed up by a contract under seal? There can I think be but one answer to such a question, and it must be in the negative. Assuming in the present case that the resolution had been—"Resolved that the offer of Thomas H. Tracy be accepted and the land is hereby sold him," and that immediately upon the passing of the resolution the conveyance had been executed and delivered, could the defendant then have repudiated it on the ground that there had been no intervening contract under seal? Assuredly not, and the lapse of time consequent upon defendant's unexplained tardiness or the use of slightly different, but still apt words, cannot deprive the plaintiff of his rights.

MARTIN, J.

In my opinion, the contract for sale was concluded when the resolution was passed; once that was done the plaintiff could call upon the defendant to perform that contract, and there was no

occasion for again expressing that contract in writing and under seal which had already been reduced into writing and determined by resolution. This method of sale by resolution is a special form of procedure and an exception from the general application of section 26.

What the defendant really did was after selling its lands to one person it undertook to sell the same parcel to another. I do not think this Court should be astute to find reasons to support a course of conduct which in ordinary business dealings would not be regarded as creditable.

Second, it is objected that because the defendant had not obtained a collector's certificate under section 14, sub-section 2 of 1898, its title was defective. But this sub-section does not affect the question now under consideration because it merely deals with the intermediate right to protect the property conferred upon the tax purchaser after receipt of such certificate, and exempts him from liability for damages done thereto without his knowledge.

Third, it is urged that the defendant had no title to the land because the period of redemption had not expired since "no demand in writing" had been "left at the office of the clerk of the Corporation by the purchaser at the tax sale, or his assigns," though a year had elapsed since the order confirming the sale. It is contended that even if the year had elapsed, yet unless said demand has been made the land is still open for redemption, the words being "within one year from the day on which the order . . . . is made, exclusive of that day, or before a demand in writing, etc.," and it is submitted that the word "or" gives the original owner the alternative and optional right above claimed.

The language used in this section is not at all clear, and I find it difficult to say exactly what was intended, and the difficulty is increased by comparing said section with the expressions "period of time so allowed" in section 16, and "expiration of the term," in section 15. And it also calls for remark that though the demand is to be left at the office of the clerk by "the purchaser, or his assigns," yet there is no provision directing that notice of such demand should be sent to the original owner, and so far as he is concerned it is valueless for all practical purposes because it

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might lie in the clerk's office for days, weeks or months unknown to such owner. The inference, consequently, to my mind is that such demand is not intended as an additional safeguard to such owner but by way of a protection to the Municipality as evidence of the tax purchaser's desire to put the corporate machinery in motion and obtain the deed which he is entitled to; otherwise the Municipality might appear in the light of being too eager to oust the original owner by voluntarily handing over unsought for conveyances at the end of the year. It is clear, to me at least, that this provision regarding the demand has no application to a case where the Municipality is itself the vendor and so puts itself in motion. It is not reasonable to hold, unless no other construction is fairly open, that the Legislature intended the Municipality to serve notice of its own wishes upon itself. The intention of the Corporation as manifested by its acts is to be gathered from its minute book and that book shews the plaintiff's offer and the acceptance and no "demand" by the Municipality upon itself was necessary to set itself in motion or for any other purpose of the Act.

Finally, it was suggested that before contracting to sell to the plaintiff the defendant should have obtained a deed in its own favour under section 16; to which it is replied that even if it were necessary to go through that formality it was open to the defendant to do so at any time, and "on demand . . . . and on payment of one dollar," this defect which it now raises against its own title could have been remedied of its own motion.

MARTIN, J.

Here the defendant is not in the position of a vendor who is desirous of giving title, but has no means of acquiring it, and so is unable to perform, as was the case in *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158; and see also *Rowe* v. *School Board for London* (1887), 36 Ch. D. 619. On the contrary what the defendant did was to intentionally delay the performance of its contract, ignoring week after week repeated demands, though practically all the time it was in a position to have remedied all the formal objections it now seeks to set up against itself, and finally it deliberately and designedly put itself in such a position that it could not convey the property to the plaintiff by conveying it beforehand to another. Under such circumstances the

plaintiff is entitled to recover damages on the principle laid down in *Simons* v. *Patchett* (1857), 7 E. & B. 568 at p. 572 and *Engel* v. *Fitch* (1869), L.R. 4 Q.B. 659.

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In the former case, Lord Campbell says, p. 572, "It is a custom long established, supposed to be incorporated in all contracts for sale of real estate as being universally known, that when the sale goes off for want of title in the vendor, the damages shall be limited to the actual expenses. If the sale goes off because the vendor changes his mind, or otherwise by his fault, the custom does not apply, and full compensation is given."

In the latter case, Chief Baron Kelly points out that the measure of damages is the difference between the contract price and the market value at the time of the breach.

MARTIN, J.

We are informed that at the trial it was arranged that if judgment should go in the plaintiff's favour a reference to the Registrar to ascertain damages would follow, and that course should now be pursued. The appeal should be allowed with costs.

Appeal allowed, Irving, J., dissenting.

Note:—This judgment was appealed to the Supreme Court of Canada, and on 10th November, 1903, judgment was given allowing the appeal and restoring the order dismissing the action.

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HOPKINS v. GOODERHAM *ET AL.*

Master and servant—Dismissal of servant—Breach of contract—Damages—Action tried before expiration of term for which engagement was made.

Practice—Pleading—Condition precedent—Rule 168.

Evidence—Wrongful rejection of—Duty of counsel to put evidence squarely before Judge—New trial.

The plaintiff who had been engaged for one year from August, 1902, by defendants at a monthly salary, was dismissed wrongfully in December. He sued for damages for breach of contract, and the action was tried in May, 1903:—

Held, by the Full Court, affirming the judgment entered at the trial, that plaintiff was entitled to recover damages covering the unexpired term of his engagement.

The statement of claim alleged a contract of hiring plaintiff as superintendent of a mill, arising from two letters, without setting them out, and without alleging the continuance of the construction of the mill, which was one of the conditions stated by defendants in their second letter. The defence denied the allegations in the statement of claim and alleged the contract was contained in the second letter:—

Held, that it was not necessary for the plaintiff to prove the continuance of the construction of the mill.

Where a party seeks a new trial on the ground of wrongful rejection of evidence, he should shew that the evidence sought to be adduced was put squarely before the Judge so that his mind was applied to the point.

APPEAL from judgment of MARTIN, J., in favour of the plaintiff in an action in which the plaintiff claimed damages for wrongful dismissal, the jury having found a verdict for plaintiff for $1,600 and judgment being entered accordingly.

The trial took place at Rossland in May, 1903.

Statement

The following statement of facts is taken from the judgment of HUNTER, C.J.:

"This is an action for breach of a contract for service evidenced by the following documents:

"'Rossland, British Columbia, Aug. 4–02.

"'Mr. Gerald V. Hopkins,

"'Rossland, B. C.

"'Dear Sir:—We herewith engage your services for a period of

one year from date to act under the direction of our general manager as superintendent of the mill at Silica, B. C., which we are about to improve and operate. It is agreed between us that your salary shall be one hundred dollars per month, and that you are not to leave our employ during this period.

"'If during the year we should transfer the possession and operation of the mill to third parties, it is understood that this contract of employment shall then hold good between yourself and these third parties, your rights under this contract being guaranteed by us.

"'George Gooderham,
"'T. G. Blackstock,
"'By their agent,
"'Edmund B. Kirby.'"

"'I accept the above,
"'Gerald V. Hopkins.'"

"'Rossland, British Columbia, Aug. 4–02.

"'Mr. Gerald V. Hopkins,
"'Rossland, B. C.

"'Dear Sir:—In engaging you to-day as superintendent of the Silica mill for one year at $100 per month, we wish to say that we will pay an additional $100 making your total salary $200 per month. We will not, however, be bound for a year to pay this additional $100, and if obliged to stop the construction or operation of the mill will discontinue its payment.

Statement

"'George Gooderham,
"'T. G. Blackstock,
"'By their agent,
"'Edmund B. Kirby.'"

"'I accept the above,
"'Gerald V. Hopkins.'"

"The plaintiff was dismissed for incompetence on the 23rd of December, 1902, and although the defendants offered him $900 in settlement of any claims he had (being $200 for the month of December, and $700 at the rate of $100 per month until August 4th, 1903), he rejected this offer and brought suit for $1,626.60, being salary at the rate of $200 to the said date, as well as $200 damages. The jury found that the dismissal was wrongful, and awarded $1,600 for which the plaintiff got judgment.

"The statement of claim alleges a contract arising from the two letters above quoted, without setting them out, whereby the

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plaintiff was to be paid a salary of $200 per month, and without alleging the continuance of the conditions implied in the latter part of the second letter; the defence merely denies the allegations in the statement of claim, and alleges that the contract was contained in the first letter, nor is there any plea of tender with payment into Court."

It was also alleged in the defence that the plaintiff was not as he had represented at the time the agreement was made, reasonably competent to perform the services for which he was engaged and therefore he had been dismissed and the agreement had been rescinded. Amongst the particulars of incompetency alleged was a charge that the plaintiff was "abnormally absent minded, apathetic and devoid of energy," and the following extract from the cross-examination of the defendants' master mechanic is given as illustrating the contention of appellant's counsel on the appeal, that the prejudices of the jury were improperly appealed to:

Statement

"How did he shew it? (*i.e.*, the want of energy). In his manner of speaking.

"Well, now, illustrate it if you can? Well, I am afraid I could not do justice to Mr. Hopkins' drawl.

"That is being devoid of energy in conversation, is it? Yes.

"Because he has a drawl you say he is devoid of energy? Yes.

"Mr. Hopkins is an Englishman and you are an American? Yes.

"And you think it right to put that in the particulars that he is incompetent because he has a drawl? Yes, sir."

The appeal was argued before the Full Court, consisting of HUNTER, C.J., DRAKE and IRVING, JJ., at Vancouver, on the 3rd of November, 1903.

Argument

Galt, for appellants: The damages awarded are too great; the jury allowed for no contingencies; the plaintiff might have got work in June or July; the damages awarded had not yet accrued at the time of the trial. Plaintiff on being dismissed went to England and made no efforts to get other employment; he should shew the efforts he made to get other employment. He cited *Goodman* v. *Pocock* (1850), 15 Q.B. 576; *Hochster* v. *De La Tour*

(1853), 2 El. & Bl. 678; *Danube, &c., Harbour Co.* v. *Xenos* (1862), 31 L.J., C.P. 284; *Hartland* v. *General Exchange Bank* (1866), 14 L.T.N.S. 863; *Frost* v. *Knight* (1872), L.R. 7 Ex. 111 at p. 115; *Roper* v. *Johnson* (1873), L.R. 8 C.P. 167; *Brace* v. *Calder* (1895), 2 Q.B. 253 and *Ogdens, Limited* v. *Nelson* (1903), 2 K.B. 287.

A new trial should be granted because the sympathy and prejudices of the jury were improperly appealed to by counsel for plaintiff, who drew attention to the fact that plaintiff was an Englishman and that most if not all of the defendants' witnesses were Americans; see *Coster* v. *Merest* (1822), 24 R.R. 667.

We are entitled to succeed on the issue of incompetency notwithstanding the verdict. There has been a mis-trial; evidence was wrongfully rejected at the trial as to the meaning of construction;* *Bray* v. *Ford* (1896), A.C. 44.

[*Per curiam:* It is the duty of counsel to put squarely before the Court what evidence he wants to put in; here the mind of the Court was not applied to the point at all.] Argument

The onus of shewing that construction had not stopped was on the plaintiff.

Hamilton (*Harold Daly*, with him), for respondent: It was not for us to prove that construction had not stopped; the defence by r. 168 admits it, as there is no specific denial; the result is that the burden of proving it was not on us till the question was raised by the defendants.

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*At the conclusion of the examination of the last witness for the plaintiff, the stenographer made the following note which was printed in the appeal book:

Mr. *Galt* reads an extract from the contract and desires to explain the phrase "during construction" relative to the giving of an extra $100 in salary.

The Court thinks this is not the time for introducing new evidence.

Mr. *Galt* cites precedent and desires to throw a little light on the meaning of the word "construction."

The Court: My experience is that an attempt to throw a little light in these cases often results in shedding darkness and frequently causes the action to be carried to a higher Court with additional expenses.

The Court rules that the construction of the word "construction" as used in the contract cannot be gone into.

Mr. *Galt:* That is the defendant's case, my Lord.

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As to damages. Damages may be awarded covering the period up to the end of the stipulated term, notwithstanding the trial takes place before the end of the term; as soon as the contract was broken the plaintiff became entitled to damages and any circumstances in mitigation of damages should have been shewn by defendants: see *Laishley* v. *Goold Bicycle Co.* (1902), 4 O.L.R. 350 and *Roper* v. *Johnson, supra.*

At the trial the sole question was as to the competency of the plaintiff and the jury found in his favour, and there was ample evidence to support the finding.

In regard to the contention that the prejudices of the jury were improperly appealed to, the objection should have been taken at the trial: see *Sornberger* v. *Canadian Pacific R. W. Co.* (1897), 24 A.R. 263.

Argument

Galt, in reply, cited Odgers on Pleading, 100, 101; *Fletcher* v. *London and North Western Railway Co.* (1892), 1 Q.B. 122 and *Aitken* v. *McMeckan* (1895), A.C. 310.

Cur. adv. vult.

25th January, 1904.

HUNTER, C.J. (after stating the facts as above, proceeded): I think there can be no doubt that the two letters constituted the contract, and that in effect the agreement was that the plaintiff should get $100 per month in any event, and another $100 per month conditional on the continued construction and operation of the mill. That being so, on whom was the onus of proof? Was it for the plaintiff to prove that the mill operated during the contract time, or was it for the defence to shew that it stopped?

HUNTER, C.J.

By rule 168 (English r. 210):

"Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent, necessary for the case of the plaintiff or defendant, shall be implied in his pleading."

The effect of this rule was to render it unnecessary for the plaintiff to specifically allege the continued operation of the mill during the time of service, and there being no specific denial, the

allegation, being implied in the plaintiff's statement of claim by virtue of the rule, was not put in issue, and therefore there was no necessity for the plaintiff to prove it unless it was an essential part of his cause of action. This, I think, is clear it was not, because, to apply the language of Collins, J., in *Bradley* v. *Chamberlyn* (1893), 1 Q.B. 439 at p. 441, "this is a case in which, before the Judicature Acts, the sum due might be recovered under the money counts if the condition had been performed in fact."

It may be that upon these pleadings as framed under the system in force in Ontario the plaintiff would have had to prove the continued operation of the mill, but I think it is clear that the contrary is the case under the system of pleading in force in England and British Columbia.

There being, then, no application at the trial for leave to amend the defence, or to give evidence as to this which would have entailed an amendment the defence must fail on this branch of the appeal.

Another ground of appeal was that the verdict was against the weight of evidence on the question of incompetency or misconduct, but it is impossible to say that it was not open to the jury to find as they did in view of the evidence of Hinden and Roberts, who were both competent witnesses.

Another ground of appeal was that the plaintiff recovered too much, inasmuch as the trial took place before the lapse of the stipulated term, and *non constat* the plaintiff might have secured employment immediately after the trial. Whatever weight there may be in the argument that to allow the plaintiff to recover for the unexpired period might prove unjust on account of the numerous possible contingencies, such as illness, death, or the procuring of other employment, it is too late to raise that question since the decision in *Roper* v. *Johnson* (1873), L.R. 8 C.P. 167. There is, moreover little, if any, hardship in this, as the jury is, or ought to be, instructed that they are to take these contingencies into account in estimating what they will give on account of the future portion of the term, and it also seems contrary to legal principle to allow the same cause of action to be agitated anew in a fresh action, and a second recovery to be had upon it.

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Although the report of the learned Judge's charge on this

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point is not complete, still enough appears to shew that he told them it was not necessary to give the full amount, nor, as a matter of fact, did they give as large a sum as they might have given.

Lastly, it was urged that the prejudices of the jury were improperly appealed to by the respondent's counsel, but even if this were so, they were specifically admonished to pay no attention to the remarks in question, and even if the learned Judge had made no reference to them in his charge, I think they were of too innocuous a type to suppose that they could prejudice the minds of any intelligent jury.

HUNTER, C.J.

DRAKE, J.: The plaintiff sued for damages sustained by reason of the defendants discharging him before the year was out for which he was engaged. The first agreement was for twelve months certain at $100 a month; the second and collateral agreement was for a further payment of $100 a month to be determined when the mill, which the plaintiff was engaged to superintend and construct, was stopped either as to construction or operations, and without any notice in such a case, the extra payment ceased. The defendants gave the plaintiff notice in December, 1902, to discharge him, although his year's employment was not up until the 4th of August, 1903. The defendants gave no evidence to shew that the mill had stopped running, and, if so, when?

DRAKE, J.

The plaintiff brought his action in January, and the verdict was rendered in May, and the jury found a verdict giving the plaintiff the full amount of his wages to 4th August, as well as for the additional $100 a month on the conditional agreement up to the same date. The grounds of discharge alleged by the defendants were the plaintiff's incompetency. On this they failed.

I think the amount of damages given by the jury is excessive. In *French* v. *Brookes* (1830), 6 Bing. 354, where the contract of employment was three years, and one year's notice, the plaintiff was discharged after eighteen months service without notice, and it was held he could not recover for the whole term of three years for which he was engaged, but he was entitled as damages to his salary to the end of the then current year. As the collat-

eral contract was not to retain and employ the plaintiff for twelve months, but only to employ him if the mill was running, I do not consider he was entitled to claim the full amount which might be due if the mill was running the whole period. His action was commenced and concluded before the time had expired.

The learned trial Judge drew the jury's attention to the limited nature of the second agreement, but left it for them to say what damages the plaintiff had sustained. I think the jury have given a greater sum than was justified, but as the matter was referred to them in the learned Judge's summing up, the amount is not so grossly over-estimated as to enable us to say the verdict is perverse.

DRAKE, J.

The appeal will be dismissed with costs.

IRVING, J.: Having regard to the language of the second document, namely, "we will not, however, be bound for a year to pay this additional $100, and if obliged to stop the construction or operation of the mill, will discontinue its payment," the onus, in my opinion, was on the defendants to plead and at the trial to shew either that an event had occurred or was likely to occur, upon the happening of which they were to be at liberty to stop the payment of this additional $100. They omitted to give any evidence on this point, and the jury inferred, as they had a right to do, that the mill had not stopped, nor was there any likelihood of its stopping.

The learned Judge having cautioned the jury that they were to take into consideration the chances of the operation of the mill being discontinued from the date of the trial (16th May, 1903), until the expiration of the year (4th August, 1903), gave a sufficient direction, and therefore the defendants have no cause of complaint.

IRVING, J.

As to the rule that a person seeking damages for wrongful dismissal must shew that he has made reasonable efforts to find employment, that principle is not confined to this class of cases, it is just an application of the general principle of the assessment of damages that the plaintiff must shew that he has acted reasonably.

No exception was taken to the charge at the trial.

Appeal dismissed with costs.

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Jan. 25.

HARRY *v.* PACKERS

HARRY *ET AL.* v. THE PACKERS STEAMSHIP COMPANY.

New trial—Misdirection—Judge's comments on evidence.

It is not misdirection for the Judge to tell the jury his own opinion on the evidence before them.

In his charge to the jury the Judge stated that he himself would pay very little attention to certain corroborative evidence adduced by defendants, but he also told them that the matter was entirely for them to decide:—

Held, not misdirection.

APPEAL from a judgment in plaintiffs' favour in an action tried at Vancouver on 11th March, 1903, before IRVING, J., and a jury. The plaintiffs, who were Indians, claimed the return of a boom of logs or its value and damages for its detention.

The facts are stated in the judgment of the learned Chief Justice:

The following are extracts from the Judge's charge to the jury:

"Now, with regard to the men who were called to corroborate Capt. Fraser, I point out to you that they are all practically in the same employ. I do not mean to say they are corrupt on that account, but they have had an opportunity of discussing this matter between themselves, and we know that when a number of men very often get together, they occasionally refresh their memory, or they think they refresh their memory when perhaps originally they had not a very clear idea about it. . . . .

Statement

"I must tell you this, it is entirely a matter for you to decide; it is a very nice question, and no person in the world, whatever conclusion you may come to, can say you were wrong, but what I would do—I am telling you this—you can take advantage of it or not, as you like—I would pay very little attention to what those gentlemen say in corroboration of the evidence of the Captain, and the Indian, for the reason that they had no particular duty cast upon them to take notice of what took place at that time, and therefore if I were a juror I would not discuss in this case which of those two men we are going to believe, the Indian or the Captain. . . . .

"Now, then, which of those men has got the right story? It is the duty of the Captain of the Tyee to satisfy you that the Indian understood him and acquiesced in his conduct; if he fails to satisfy you on that ground, then you ought to find a verdict for the plaintiff. . . . .

"What you have to do is to determine which of these two men, or which of these two sides is telling the truth? Does the Indian or does the white

man tell you the correct story? You had better decide the case exactly on the evidence that was put in before you."

The jury found in plaintiffs' favour on all counts and judgment was entered in their favour and an account ordered.

Defendants appealed and the appeal was argued at Vancouver on the 20th of November, 1903, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Wilson, K.C., A.-G., for appellants: There should be a new trial or else the action should be dismissed. The evidence was insufficient to support a verdict for plaintiff. There was misdirection; the fact that witnesses are in the same employment should not weaken their evidence unless there is something to indicate bias. The burden of proof was on the plaintiff to shew defendants were in the wrong.

In reference to the charge as to corroborative evidence, the Court called on

Macdonell (*McLellan*, with him), for respondents: It is not misdirection for the Judge to tell the jury his own opinion on the issue before them; even a wrong observation on a matter of fact which is left as a question of fact for the jury, is no ground for granting a new trial; the whole charge must be read together; the jury were clearly told that the question of fact was for them to decide; he referred to *Taylor* v. *Ashton* (1843), 12 L.J., Ex. 363; *Smith* v. *Dart* (1884), 54 L.J., Q.B. 121 and *Davidson* v. *Stanley* (1841), 2 M. & G. 721.

Argument

Wilson, in reply: When once the Judge has told the jury to disregard certain evidence the mischief has been done and it is then useless for him to tell them they must find on the whole evidence.

Cur. adv. vult.

25th January, 1904.

HUNTER, C.J.: Action for the tortious conversion of a boom of logs which belonged to the plaintiff.

At the trial the jury found for the plaintiff, and the learned Judge ordered an inquiry into the amount of damages. The only grounds of appeal argued before us were that the learned Judge misdirected the jury, and that the verdict was against the weight of evidence.

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The plaintiff's case was that he had made a contract for the towage of his boom to Vancouver with the captain of the tug Ruth, that he so informed the captain of the Tyee who had come to see if he could make a bargain for this towage; that in his absence the captain of the Muriel, by instruction of the captain of the Tyee, took it upon himself to tow away the logs, and they were lost by the Muriel in a storm; that he never authorized either the Tyee or the Muriel to remove them. The defendants' contention was that the plaintiff had agreed to let them tow the logs through the captain of the Tyee; that no particular tug was agreed on; that the Muriel, a larger tug than the Tyee, was assigned the duty; and that in the course of the voyage the logs were lost by *vis major*; and that even if the Muriel had not been authorized to remove them that the plaintiff, who was coming back with the Ruth, hailed the Muriel, and finally assented to that tug going on with the towing. The plaintiff said, on the contrary, that he asked the captain of the Muriel, who told him to take the logs from the camp in his absence, and that the only answer he got was that that was not his boom.

The plaintiff called no other witnesses; the defendants called one of the tug-hands in corroboration of the story about the bargain, but he admitted that he did not hear all that took place at that interview. They also called a deck-hand of the Muriel, who stated that he informed the plaintiff in answer to his query as to who told them to take the logs, that the captain of the Tyee had made the arrangement, to which the plaintiff replied all right, and went away; and the engineer of the Ruth was called, who corroborated this account. This, however, hardly squares with the account of the captain of the Muriel, who testified that the Muriel's engineer came to him in his bunk and told him that the Ruth was alongside and wanted the boom, or some information, and that all he said was that he did not know anything about the Ruth and to hold on to the boom. This of course was a distinct refusal by the defendants' *de facto* agent in possession of the boom to give it up.

HUNTER, C.J.

It also appeared by the evidence of the Ruth's engineer that the plaintiff returned to his camp with the Ruth expecting to find his boom still there, but found it had gone. This fact,

together with the hailing of the Muriel by the Ruth, the Muriel captain's order to hold on to the boom, was strong evidence to shew that the plaintiff had not authorized the captain of the Tyee to take away the boom, and it is impossible therefore to say that there was no evidence on which the jury could reasonably find in favour of the plaintiff.

With regard to the alleged misdirection, it was argued that the learned Judge practically withdrew the corroborative evidence adduced by the defendants altogether from the consideration of the jury. I do not so read his charge. It is true that he stated that he would pay very little attention to it, but he was also careful to tell them in the clearest terms that the matter was entirely for them to decide, and that no one could say they were wrong whatever conclusion they came to. It is well settled that it is wholly in the Judge's discretion to comment as he may see fit on any evidence, or class of evidence, adduced, and to assist the jury if he thinks proper by giving his opinion of its relevancy or value, provided, of course, he does not completely withdraw any admissible evidence from their consideration.

HUNTER, C.J.

It may be that a more debatable question would have arisen if the learned Judge had expressed himself as strongly to the jury as he did to counsel after their retirement, but that does not concern us at present.

I would dismiss the appeal with costs.

DRAKE, J.: The defendants appeal against the verdict entered for the plaintiffs on the ground that the verdict is against the weight of evidence, and misdirection. These were the only two points argued. There is no question of the correctness of the judgment entered on the verdict. The point of misdirection urged was that the jury were charged to pay very little attention to the corroborative evidence of the defendants' witnesses. This, however, was subject to the expressed opinion that it was entirely a matter for them to decide. The whole of the summing up is to be read and not isolated expressions. The learned Judge was entitled to tell the jury what opinion he had formed of any portion of the evidence, or of the witnesses, but not to take out of their hands the duty of acting for themselves. In

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Clark v. *Molyneux* (1877), 3 Q.B.D. 237 at p. 243, the subject of the Judge's summing up is discussed, and the language is not to be too nicely criticized as long as it places before the jury the issue on which they are to find. There is undoubtedly quite sufficient evidence here for the jury to find as they did, and I think the appeal should be dismissed.

MARTIN, J.

MARTIN, J.: I concur with my learned brothers, and add a reference to the decision in *Lowenberg, Harris & Co.* v. *Wolley* (1895), 25 S.C.R. 51, which supports their conclusions.

Appeal dismissed.

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Jan. 25.

CENTRE STAR MINING COMPANY, LIMITED v. ROSSLAND GREAT WESTERN MINES, LIMITED, *ET AL.* (No. 2.)

CENTRE STAR v. ROSSLAND GREAT WESTERN

Practice—Substituted service—Order for—Extra-provincial Company—Affidavit leading to order—New material on application to discharge order—Judge's discretion.

An affidavit leading to an order for substituted service is a jurisdictional affidavit.

An affidavit leading to an order for substituted service under section 130 of the Companies Act on an extra-provincial Company licensed to do business in British Columbia, should shew clearly that the Company is an extra-provincial one licensed to do business in the Province.

On an application to set aside an order for substituted service it is discretional with the Judge to allow plaintiffs to read further affidavits setting out facts omitted in the affidavit on which the order was made, and where in the exercise of his discretion he refused leave, the Court on appeal will not interfere.

Judgment of IRVING, J., affirmed, HUNTER, C.J., dissenting.

Statement

APPEAL from an order of IRVING, J., setting aside an order for substituted service of a writ of summons and also the service effected under the order.

On 29th October, 1903, plaintiffs applied to IRVING, J., for an order for substituted service of the writ and read on the application the affidavit of A. C. Galt, the solicitor for the plaintiffs, which after verifying the cause of action, stated that Bernard Macdonald, then resident in Spokane, Wash., was the registered attorney for both defendant Companies, and that so far as deponent was aware there was no one resident in British Columbia authorized to accept service for either defendant Company; and that deponent had no doubt that if service were directed to be made by mailing or otherwise upon Bernard Macdonald, and by mailing a copy of the writ to the defendant Companies in London, England, they would be duly notified of the action.

The learned Judge made an order for substituted service and after service as thereby directed had been effected, the defendant, the Rossland Great Western Mines, Limited, applied to him to set aside his former order and the service effected thereunder. His Lordship set aside the order on the ground that it did not appear in Mr. Galt's affidavit that the defendants were a foreign Company registered or licensed to do business in the Province.

Statement

On the application to set aside the order, plaintiffs tendered affidavits shewing that defendants were licensed to do business in the Province, but his Lordship refused to allow them to be read.

The plaintiffs appealed and the appeal was argued at Victoria on 13th January, 1904, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Galt, for appellants: Under section 127 of the Companies Act, Bernard Macdonald, the registered attorney, was the only person that could have been served if he had been in the Province, and section 130 provides for substituted service if the attorney is absent. On the application to discharge his former order the Judge should have allowed the additional affidavits to be read; the omission to state definitely that the Company was a foreign one licensed to do business in the Province was a mere slip and no one has been misled. He cited *Jay* v. *Budd* (1898), 1 Q. B. 12; *Damer* v. *Busby* (1871), 5 P. R. 356 at pp. 366-7; *Fowler* v. *Barstow* (1881), 20 Ch. D. 240; *Dickson* v. *Law*

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and Davidson (1895), 2 Ch. 62; *In re St. Nazaire Company* (1879), 12 Ch. D. 88 and *In re Equitable Loan Co.* (1903), 6 O. L. R. 26 at pp. 30 and 31.

Davis, K.C., for respondents: To allow a party to bolster up his case after a mistake has been made is contrary to all principles of practice: *Molling* v. *Buckholtz* (1814), 2 M. & S. 563. A supplemental affidavit cannot be put in to hold to bail: an affidavit leading to an order for substituted service is a jurisdictional affidavit the same as is the affidavit required under order XIV., or leading to a capias: see *Jacks* v. *Pemberton* (1794), 5 Term Rep. 552. Plaintiffs must shew before the order can be made that defendant Company is one to which section 130 applies, *i.e.*, that it is an extra-provincial company licensed in this Province and having an attorney here on whom service cannot be effected.

Galt, in reply: Extra-provincial companies licensed to do business in the Province are the only companies that have registered attorneys, and it follows from the statements in the affidavit that the Company is an extra-provincial one licensed here.

Cur. adv. vult.

25th January, 1904.

HUNTER, C.J.: This is an appeal from an order of my brother IRVING setting aside an order made by him for substituted service on the ground that it did not appear on the affidavit that the defendants were a foreign Company registered or licensed to do business in the Province.

HUNTER, C.J.

There does not appear to be any case directly in point, but the decisions on Order XI., the working of which is always jealously watched, shew that the Courts do not set aside orders for service out of the jurisdiction merely because the affidavits do not contain all that is called for by the rules. For instance, in *Fowler* v. *Barstow* (1881), 20 Ch. D. 240, the Court of Appeal considered that the order should not be set aside merely because the affidavit omitted to state whether or not the defendant was a British subject. Jessel, M.R., says, at p. 245, "It was said that rule 3 (now rule 4) required an affidavit to shew whether the defendant was a British subject or not, and there was no such affidavit

made by the plaintiff. That is quite true; but rule 3 does not say that the order is to be discharged if it is not complied with. That is discretionary in the Court, and always was. Though the affidavit is required, if it turns out that that which is omitted is wholly immaterial there is no obligation on the Court to discharge the orders." So again in *Dickson* v. *Law and Davidson* (1895), 2 Ch. 62, North, J., refused to set aside an order which he had made for service of an amended writ upon a new defendant out of the jurisdiction, although no affidavit had been filed stating that the plaintiff had a good cause of action. He says, at p. 65, "I think, when there is enough to satisfy the Court that the plaintiff has a good cause of action, the absence of a formal affidavit to that effect is not a matter of substance; and though, if my attention had been directed to the point when I made the order, I should have required such an affidavit to be made, I do not think I am bound by reason of its absence now to set aside the service of the writ."

The effect of these decisions is that the affidavit in the case of Order XI., is not a jurisdictional affidavit in the sense, for instance, of an affidavit leading to an order for a capias, and that it does not follow that because the affidavit does not strictly comply with the rules the Judge has no jurisdiction to make the order; and there is the express decision of the Court of Appeal in *Fry* v. *Moore* (1889), 23 Q.B.D. 395, that an order for substituted service of a writ which could not properly have been served at all was merely irregular and not a nullity. Therefore, if it is proper for the Judge to overlook the omission to state in the affidavit the matter required by the rules in the case of orders for service out of the jurisdiction, *a fortiori* he may do so in the case of orders for substituted service. And this assuming that the affidavit in question was insufficient: but while it does not state categorically, as it should have done, that the defendant Company was a foreign Company, licensed or registered to do business in British Columbia, still it does, I think, sufficiently appear that it is a Company with its head office in London; that it had been doing business in and about Rossland, and had a registered attorney in the Province who was then without the jurisdiction, and that there was no one else authorized in British

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Columbia to accept service. But I do not think it necessary to decide whether this was a sufficient affidavit or not, as even if it was in strictness insufficient, I think the affidavits tendered by the plaintiffs on the application to discharge which put the matter beyond doubt were admissible, and should have been received. In *Fowler* v. *Barstow, supra,* affidavits were admitted *pro* and *con* to contest the question whether the cause of action arose within the jurisdiction; in other words, whether the order was rightly made in fact, and the general deduction to be drawn from the decisions is that on the application to discharge the Judge is not called upon to consider the purely academic question as to whether or not the affidavit complied in all respects with the rules, and to decide the matter on that footing, but is rather to determine in the light of any additional material that may be filed, whether under all the circumstances the order was rightly made in fact. Here the order was rightly made in fact, and therefore should have been allowed to stand, there being no suggestion of concealment or of intention to mislead, or that the defendants have been legally prejudiced.

HUNTER, C.J.

The attitude generally of the Court towards orders for substituted service may be collected from the remarks of Lord Cranworth, L.C., in *Hope* v. *Hope* (1854), 4 De G.M. & G. 328 at p. 342, where he says in affirming such an order, "The object of all service is of course only to give notice to the party on whom it is made, so that he may be made aware of and able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required." The best evidence that that is so in this case is that the defendants have come in and objected to the service, and if, as I gathered during the argument, the defendants have since withdrawn from the jurisdiction, then the remark of Brett, L.J., in *Hunt* v. *Austin* (1882), 9 Q.B.D. 599 that "a rule of practice ought not to be allowed to defeat a legal and proper claim," would seem in point.

I think the appeal should be allowed with costs here and below.

DRAKE, J.

DRAKE, J.: Mr. Justice IRVING granted an order for substi-

tuted service, and the writ was duly served. After service the defendant applied to set aside the order as improperly made, and the learned Judge reversed his own order. I do not think it necessary to discuss the power of a Judge to reverse an order made by himself *ex parte* where the defendant brings evidence sufficient to satisfy him that if he had knowledge of the whole facts he would not have made the order. If the objection were of a class that goes to the root of the application, I should say his judgment was right. But it appears to me that this is a question of discretion, and the Court does not lightly set aside on order founded on a Judge's discretion, unless it is quite clear he has not exercised that discretion discreetly. The defendants' contention before the learned Judge was of a purely technical character, and he refused to allow the plaintiffs to read their affidavits in reply, probably acceding to the view that the plaintiffs were bound by the evidence on which the application was originally made. It has been decided that the want of an affidavit itself is an irregularity and not a nullity, and the omission of a statement that the defendant is a British subject also; that is to say, they are objections which can be cured. The plaintiff could have made a fresh application at small cost; instead of that he appeals, and asks for a reversal of the order setting aside the order for substituted service.

DRAKE, J.

Under the circumstances, I am in favour of dismissing the appeal.

MARTIN, J.: In my opinion, the defendant followed the proper practice in applying to the Judge who made this *ex parte* order to rescind it: *Hudson's Bay Co.* v. *Hazlett* (1895), 4 B.C. 351; *Brigman* v. *McKenzie* (1897), 6 B.C. 56; and *Biggar* v. *Victoria* (1898), 6 B.C. 130.

The order complained of, made under section 130 of the Companies Act, is as much a jurisdictional one as those, *e.g.*, made under orders XI. and XIV., and I do not see that this is a case where we are justified in interfering with the discretion of the learned Judge below in refusing to receive further affidavits to make out a *nunc pro tunc* case (if that apt expression is allowable), though personally I might have done so.

MARTIN, J.

Appeal dismissed, Hunter, C.J., dissenting.

DRAKE, J.

1903

April 3.

IN RE THE MEDICAL ACT: *EX PARTE* INVERARITY.

Medical Act, 1898—Registered practitioner—Charge of unprofessional conduct —Inquiry by Council—Mandamus.

IN RE THE MEDICAL ACT: EX PARTE INVERARITY

Under section 36 of the Medical Act, 1898 (previous to its amendment in 1903) the Council may hold an inquiry into a charge of unprofessional conduct made against a registered medical practitioner:—

Held, that mandamus did not lie to compel the Council to hold an inquiry. Charges of unprofessional conduct may be investigated by the Council notwithstanding the acts complained of may be the subject-matter of an action at law.

Statement

MOTION for a rule *nisi* for mandamus to compel the College of Physicians and Surgeons of British Columbia and the Council thereof to inquire into charges made against a registered medical practitioner.

The motion was argued at Victoria on the 3rd of April, 1903, before DRAKE, J.

W. J. Taylor, K.C., for the motion.
A. E. McPhillips, K.C., contra.

Judgment

DRAKE, J.: The rule *nisi* was granted in this case upon the facts stated in Mr. Inverarity's affidavit, in which he makes certain definite charges against a medical man for malpractice and want of care and skill owing to intoxication while attending the wife of complainant, and for cutting up the body of Mrs. Inverarity after death, without obtaining the leave of her husband. The charges are sufficiently serious to call for inquiry, but on this application I have to deal with the question whether or not the remedy asked for, that of a mandamus, is one which the Court should grant to compel an inquiry by the Committee of the Medical and Surgical Society into the charges made. A mandamus is a prerogative writ issued for the purpose of compelling a subordinate tribunal to do that which the law compels them to do, and which they have neglected or refused to perform. If this tribunal has merely the power given to them to do an act

which implies a discretion to do it or not, a mandamus will not be granted, as that would be overriding the statute, and would in fact be compelling the performance of an act which the Legislature has not seen fit to make compulsory.

Mr. Inverarity, on the 8th of July, 1902, asked the Medical Council to investigate the circumstances detailed by him. To this no answer was given until November 20th, when the Council stated that they had referred the matter to their solicitors, who suggested that it was not the province of the Council to deal with that which might be the subject-matter of a suit at law, and they refused inquiry.

There is nothing in the Act which confines inquiries to matters which are capable of being investigated in a Court of law. The charges of infamous or unprofessional conduct, to use the language of the Act, can be dealt with independent of any legal rights the complainant may have. The remedy given by the Act is one which cannot be given by a Court of law. Section 61 of the Act protects professional men from any action of negligence or malpractice, unless brought within a year. This protecting section has no bearing on sections 35 and 36, which are not in the nature of actions, but deal with criminal convictions and unprofessional conduct by a practitioner. These sections give power to the Council to refuse registration or to erase the name of a person from the register after due inquiry made. However, the Medical Association made use of this opinion of their legal advisers to avoid the inquiry asked for, and the question is, can this Court compel them now to hold an inquiry? I am of the opinion it cannot. The Act draws a sharp distinction between the permissive "may" and the compulsory "shall" in section 36. "The Council may and upon the application of three registered medical practitioners shall hold an inquiry." Thus the Council have the power, but they need not exercise it, and in this case they have refused to exercise it; and such being the case this Court will not compel the exercise of a power which is in the discretion of the Council; neither will the Court inquire into the merits of the case submitted to them. If the Council hesitate to clear a professional man of serious charges made against him, or to make an inquiry in the interest of those who have to rely

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on the members of the profession, they can, as they have done in this case, decline to make any inquiry into charges which, whether well or ill founded, must have a most prejudicial effect on the professional reputation of a member of their Society. I must, however, refuse the mandamus asked for with costs.

BOLE, LO. J.
1904
Jan. 14.

IN RE LEE SAN

IN RE LEE SAN.

Chinese Immigration Act, 1900—Deportation of Chinaman refused admittance to United States—Habeas corpus.

Where a Chinaman, who contracts with a transportation company for his passage from China through Canada to the United States on the understanding that if he is refused admittance to the States he will be deported to China by the Company, is refused admittance to the States and is being deported, he will not be granted his discharge on *habeas corpus* proceedings as the contract is not illegal and under the Chinese Immigration Act, 1900, deportation is proper.

Statement

THIS was an application on behalf of Lee San, a Chinaman, for the issuance of a writ of *habeas corpus* directed to the Canadian Pacific Railway Company and J. M. Bowell, Controller (under the Chinese Immigration Act, 1900) at the Port of Vancouver. The application was made upon affidavits of the applicant and others shewing that he had carried on business at Washington, D.C., as a merchant, and that after making a visit to China, upon his return *via* the Canadian Pacific Railway, he was refused admission into the United States, and was then being deported to China by the Canadian Pacific Railway on a deportation order made by the United States customs authorities. After the returns of the Canadian Pacific Railway and Controller were read,

Jenns, moved for the issuance of the writ and cited *Re Besset* (1844), 14 L.J., M.C. 17; *In re Slater and Wells* (1862), 9 C.L.J. 21 and *In re Beebe* (1863), 3 P.R. 270. He contended upon these authorities that the detention of the applicant was not justified by the Chinese Immigration Act, 1900.

Reid, for the United States Government: Applicant's rights in Canada are governed by the agreement made by him with the Canadian Pacific Railway in China: see *Griffiths* v. *Earl of Dudley* (1882), 9 Q.B.D. 357; *Hamlyn & Co.* v. *Talisker Distillery* (1894), A.C. 202; Dicey's Conflict of Laws, pp. 555 and 568: by section 17 of the Chinese Immigration Act, 1900, Canada is a mere conduit pipe and upon rejection at the United States frontier Lee San must be deported. He also cited *Leonard Watson's Case* (1839), 9 A. & E. 731.

Howay, for the Controller: The applicant never entered Canada: see meaning of "Entry" in Customs Act, R.S. Canada, Cap. 32, Secs. 97 and 101. If he has entered Canada, then the question of his status as a merchant is one for the Controller alone: see section 6 sub-section (*c.*) Chinese Immigration Act, 1900, and Addison on Contracts, 394. Argument

The transit through Canada is a complete transit each way and the person submitting to such transit under section 17 of the Immigration Act, 1900, and the regulation becomes mere bonded goods.

Marshall, for the Company, stated that it is under contract with the United States Government to deport the applicant to China, and that it has given bonds to the Canadian Government for the safe custody of the applicant. He cited *Joe Chew* v. *C. P. R.* (1903), 5 Que. P.R. 453, affirmed on appeal, 6 Que. P.R. 14.

Jenns, in reply, contended that the applicant is a merchant, the Controller having refused to decide his status, that question was open to the Court and section 6, sub-section (*c.*) of the Immigration Act, 1900, does not apply. The United States order of deportation is of no force in this country.

14th January, 1904.

BOLE, Lo. J.: The applicant asks to be set at liberty in British Columbia under the following circumstances as I gather them Judgment

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from the affidavits and returns to the writ before the Court. Lee San was from 1887 to 1897, engaged in business as a merchant at Seattle, Washington; that in 1897 Lee San went to Washington, D.C., where he continued to do business as a grocer till 1902, in that year he went to China, and before going obtained the necessary certificate to enable him to return to the United States. It also appears that in July, 1903, Lee San engaged his passage on the Canadian Pacific Railway steamer Empress of Japan for the purpose of being forwarded by the Company from Hong Kong to Malone, U. S. A., a port of entry for Chinese immigrants, he representing himself to be a citizen of the United States, on the understanding that if the United States authorities denied him admittance into the States he would be deported to China by the Canadian Pacific Railway Co. Upon applicant's arrival at Malone, N. Y., the American authorities there refused to admit him on the ground that he was not a merchant as he represented himself to be, and therefore not a person coming within the class of Chinese persons entitled by law to enter the United States. This decision appears to have been appealed from to the proper appellate authority, who after consideration of the facts of the case, dismissed applicant's appeal and confirmed the ruling of the Malone authorities. I cannot deal with that decision, though I may say I think, having regard to the materials produced, it was sound and reasonable. Thereupon, as contemplated in the original contract of conveyance with the Canadian Pacific Railway Co., and the rules and regulations applying to such cases, Lee San was re-shipped in bond to Vancouver *en route* for Hong Kong, and he had safely arrived on board the steamer Empress of Japan, about to start on his home voyage, when in obedience to the writ of *habeas corpus* issued herein, applicant was held over to abide the decision of the Court upon the legality or otherwise of his detention.

Judgment

I have had the advantage of hearing the case ably and fully argued at great length by counsel representing the applicant, the Dominion Government, the United States Government and the Canadian Pacific Railway Co., but it seems to me that upon the answers to be given to a few questions largely depend the solution of the entire matter. In the first place, let me ask, was such

a contract as that made between Lee San and the Canadian Pacific Railway Co. illegal, and if legal, is he bound by its terms? I think the answer to the first question must be in favour of the legality of the whole contract. In *Griffiths* v. *Earl of Dudley* (1882), 51 L.J., Q.B. 543 at p. 546, Field, J., says: "as a general rule the law of this country imposes no restriction upon freedom of contract, except to prevent great public injustice." See also *Leather Cloth Co.* v. *Lorsont* (1869), 39 L.J., Ch. 86.

Now, it seems to me that Lee San, who is described in the ship's manifest as a grocer who can read and write, and therefore, presumably a person of intelligence, must be taken to have made his contract with the Canadian Pacific Railway Company with his eyes open and full knowledge of all the incidents attached to such a contract by Canadian and American law and regulations, and that he was well aware that if he failed to satisfy the American authorities of his rights to enter the States as a Chinese merchant he must expect to be returned to Hong Kong; he must, I think, have been well aware that the ship that brought him here had on board 118 Chinese immigrants, her full complement, and that he would not have been accepted as a passenger except as a person in transit through Canada, entitled to enter the States, as he did not then attempt to claim the right to enter Canada as a merchant; this happy thought does not seem to have occurred to him till his attempt to enter the States had failed. With respect to persons who enter into such contracts as the one under consideration and how far we are bound by them, it may not be amiss to quote from a well known decision of the House of Lords, *Hamlyn & Co.* v. *Talisker Distillery* (1894), A.C. 202 at p. 207, where Lord Herschell, L.C., says:

Judgment

"Where a contract is entered . . . . of the rights arising out of it." See also *In re Missouri Steamship Co.* (1889), 42 Ch. D. 321 at p. 341, *per* Fry, L.J.

Whatever right Lee San might have upon his arrival at Vancouver in August last to claim admittance to Canada as being a merchant, it is clear he did not then seek to avail himself thereof, if he then had any right of election. I am not now deciding that he had any, he elected to go to the United States and abide by the decision of the American authorities as to his right of entry

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there, and in case of a refusal, accept the consequences, *i.e.*, deportation to China, and this course appears to be the only line of action that the Canadian Pacific Railway Co. could in such a case safely adopt, having regard to section 17 of the Chinese Immigration Act, 1900.

In a word, the contract herein was intended, I think, by Lee San and the Canadian Pacific Railway Co. to be partly governed by Canadian and partly governed by American law. Lee San's rights thereunder have already been the subject of an adverse American decision, and he has failed to convince me that under Canadian law he has acquired any right to be set at large in British Columbia, or that he is in anywise illegally detained.

The decision of Loranger, J., in *Joe Chew* v. *C.P.R.* (1903), 5 Que. P.R. 453, affirmed on appeal 6 Que. P.R. 14, and of Lavergne, J., Superior Court, Montreal, in *Moy Hen* v. *C. P. R. Co.*, rendered 14th December, 1903, go far towards sustaining the view I have taken of this case. I may add, that in my opinion, the Controller of Chinese at Vancouver, Mr. J. M. Bowell, was entirely right when he refused to discuss the status of Lee San as an alleged merchant with applicant's counsel, especially having regard to the 13th section of the Chinese Immigration Act, 1900. But as no certificate of the Controller under sub-section (*c.*) of section 6 is before me, nor any suggestion of wrong doing on his part, *cadit quæstio.*

Judgment

I think after careful consideration of all the circumstances of the case, I must dismiss the application, quash the writ of *habeas corpus*, and remand Lee San to the custody from whence he was produced.

Each party will bear his or their own costs.

IN RE PORTER ESTATE.

DRAKE, J. (In Chambers)

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IN RE PORTER ESTATE

Probate fees—Supreme Court Rules, Appendix M. (cxiii).

By r. 1,065, the Appendices to the Supreme Court Rules form part thereof, and by section 94 of the Supreme Court Act (R. S. B. C. 1897, Cap. 56) the Rules are declared to be valid and binding, therefore probate fees as set out in Appendix M of the Rules may be collected as being imposed by statutory enactment.

BEFORE delivering the probate of the will of Arthur Porter, deceased, the Registrar at Victoria demanded probate fees as set out in the Appendix M to the Supreme Court Rules (cxiii). Payment of fees was objected to and the question was argued before DRAKE, J., in July, 1902.

Gregory, for certain legatees.
Maclean, D. A.-G., for the Crown.
Moresby, for the executors.

DRAKE, J.: Mr. *Gregory* objects to the payment of probate fees which are set out in the Appendix to the Supreme Court Rules. The fees there charged are on a sliding scale according to the value of the estate and the status of the persons entitled with reference to their kinship to the deceased. His contention is that there is no statutory enactment imposing these fees which are in fact equal to a legacy duty.

These fees have been in force since 1870, and have been included in every scale of Court fees since that time. They now form part of the Supreme Court Rules under rule 1,065. Judgment

By the Supreme Court Act, Cap. 56 of the Revised Statutes the Rules of 1890, from 1 to 1,071 are declared to be valid and binding as from the 1st of January, 1893.

As the Appendices to the Rules are made part thereof by the above mentioned rule 1,065, it follows hat when the Legisla-

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ture confirmed the Rules and made them statutory, that the Appendices were also confirmed, and such being the case I am of opinion that the probate fees are confirmed by the Legislature and have to be enforced.

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THE MUNICIPALITY OF THE DISTRICT OF NORTH VANCOUVER v. KEENE.

Municipal corporation—Officer of—Tenure of office—Removal of officer—Tax sale—Commission.

Under section 45 of the Municipal Clauses Act a municipal officer holds office "during the pleasure of the Mayor or Council," and so may be removed at any time without notice or cause shewn therefor.

A tax sale by-law provided that the Collector should be entitled to a commission on all arrears of taxes collected:—

Held, that where lands were bid in by the Municipality because the amount offered at the sale was less than the arrears of taxes and costs owing on the lands, the Collector was not entitled to a commission on the price of lands so bid in.

Statement

THIS was an appeal by the plaintiffs from a judgment of HENDERSON, Co. J., dismissing the plaintiffs' action and giving the defendant judgment for $73.90 on his counter-claim. The defendant previous to the action was Clerk, Treasurer and Collector for the plaintiff Municipality. In 1897 and 1899, plaintiffs passed by-laws for the sale of lands for taxes, section 11 of each by-law providing "the Collector shall be entitled to a commission of five per cent. on all arrears of taxes collected by him." Pursuant to the by-laws lands were offered for sale, some being

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sold to outside persons and others being bid in by the Municipality because the amount bid was not sufficient to cover the arrears of taxes and costs.

Defendant charged a commission on the purchase price of the lands bought in as well as on those sold, and when his account for $507 came before the Council on the 2nd of April, 1900, it was ordered paid, and on the 4th of April a cheque for the full amount and payable to defendant was drawn and signed by the Reeve, but as the amount was large the Reeve asked the defendant to wait and defendant did not take the cheque, but was paid on the 28th of April, 1900, $296 being for commission on sales to outside parties. On the 21st of July, 1902, the Reeve wrote to the Clerk notifying him "not to take down any cash in payment of your salaries as Treasurer or otherwise, without my signature upon a cheque for the amount." At a meeting of the Council in August, 1902, defendant made an application for payment of the commission and the matter was referred to the auditor.

Statement

In August, the Reeve asked defendant to refund cash he had taken from the funds of the Municipality to cover his claims; defendant refused, whereupon, on the 6th of August he was suspended by the Reeve, and the Council at a meeting held the same day confirmed the Reeve's action and declared the suspension permanent. Plaintiffs then sued defendant for sums kept or taken by him without authority, amounting to $292.74. Defendant disputed the claim and counter-claimed for $73.90, including in his account commission and salary for the months of August and September, 1902.

The action was tried at Vancouver, before HENDERSON, Co. J.

Bowser, K.C., for plaintiffs.

J. H. Senkler, for defendant.

17th July, 1903.

HENDERSON, Co. J.: The defendant previous to action was Clerk, Treasurer and Collector of the plaintiff Municipality. In the month of August, 1902, differences arose between the defendant and the Council, and on the 6th or 7th day of that month the Reeve suspended the defendant, his action being confirmed by the Council. The differences, as I gather from the evidence, are the matters in dispute in the present action.

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The plaintiff Municipality sues the defendant for $292.74 for moneys alleged to have been overpaid him as Clerk, Treasurer and Collector, and for moneys received by him and not paid over to the Municipality.

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The defendant denies the alleged indebtedness and counter-claims for $73.90.

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According to my view of the case, the contention between the parties is narrowed down to the question of an item of $507, which the defendant claims as commission on sales of land for taxes. The evidence discloses, and I find as a fact that the Council agreed by resolution under seal to pay this amount to the defendant, and a cheque was actually drawn and signed by the then Reeve for this sum, but at the request of the Reeve the defendant agreed to accept part payment and wait for the balance; the Reeve stating that there was no talk of the defendant waiving anything. The Reeve added "we (the Council) thought he had earned the amount."

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Counsel for the Municipality contends that the Council has no power to pay commission on sales of land for taxes with respect to these lands which were purchased at the tax sale by the Municipality.

I cannot see my way clear to give effect to this contention as the Municipal Clauses Act, Sec. 50, Sub-Sec. 135, specifically confers upon Municipalities the power to pass by-laws to purchase lands at tax sales.

Holding this view, I am unable to see that there was justification for the suspension of the defendant, and I think he was entitled to notice. He should therefore recover salary to the end of September, as claimed by him.

The action must be dismissed with costs and judgment will be entered for the defendant on his counter-claim for $73.90 with costs.

The plaintiffs appealed and the appeal was argued at Vancouver on the 20th of November, 1903, before the Full Court, consisting of HUNTER, C.J., DRAKE and MARTIN, JJ.

Argument

Williams, K.C. (*Heisterman*, with him), for appellants: Of the $507 claimed as commission defendant was only entitled to

$296 as the remaining $211 was charged on purchases by the Municipality itself: under the by-law he was only entitled to commission on taxes collected.

The defendant held office during the pleasure of the Council and could be dismissed by resolution at any time without notice: see R. S. B. C. 1897, Cap. 144, Sec. 45; *London West* v. *Bartram* (1895), 26 Ont. 161; *Hellems* v. *Corporation of the City of St. Catharines* (1894), 25 Ont. 583 and cases there cited and Biggar, 322. Defendant's dismissal was justified on account of his disobedience.

Wilson, K.C., A.-G., for respondent: Proper grounds must be shewn for the dismissal of an officer of a corporation: the defendant was the Treasurer, and the only possible wrong he committed was that of paying himself and that was the only way he could have been paid.

Under section 45 of the Municipal Clauses Act, Municipal officers hold office "during the pleasure of the Mayor or Council;" "Reeve" is left out and it was not intended that he should have the power of dismissing, therefore the Council ratified an *ultra vires* act and their resolution is of no effect. Plaintiffs by resolution ordered defendant's account to be paid and the cheque was issued and they are now estopped from disputing defendant's claim.

Argument

HUNTER, C.J.: I think the appeal must be allowed. As far as concerns the question of salary it is quite clear under the statute and the decisions which have been referred to that the defendant was not entitled to notice and could be dismissed at any time by the Council.

With respect to the $211, that item is distinctly mentioned in the plaint and action is brought against defendant for recovery of the money. The defendant admits that he took the money out of the till. He attempts to justify that by reason of the fact that the Municipality had issued the $507 cheque, but the cheque being issued under a mistake was re-called and the complaint is that the Municipality did not complete its blunder. Had the money been paid over it may very well be that it could not be recovered. It is also admitted that under section 11 of the

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by-law the defendant could not claim commission on the sale of lands bought by the Municipality at its tax sales.

I think there should be judgment for $287.20 with costs here and below.

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DRAKE, J.: I concur. I only wish to add one remark with reference to it, and that is, that the idea that a servant whose debt is not paid, can appropriate money from his master is contrary to law, and little better than misappropriation of money. If he has an account against his employer, he has a remedy, but he cannot get his remedy in that way.

MARTIN, J.: In view of the fact that Mr. *Williams* has shewn this by-law was in evidence there is no reason why I should not agree with the decision of my learned brothers. That is what at first gave some difficulty, but it is quite cleared up now.

Appeal allowed with costs.

IN RE PEARSE ESTATE.

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Mortmain Act (9 Geo. II., Cap. 36)—Introduction of English law—Probate duty.

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The Statute, 9 Geo. II., Cap. 36, relating to charitable uses and commonly known as the Mortmain Act, is not in force in British Columbia.

Probate duty is in the nature of a legacy duty and is payable in the first instance out of the estate.

Statement

THIS was a petition by the trustees and executors of the will of Benjamin William Pearse, deceased, to obtain the opinion of the Court on a number of questions which arose under the will. The facts are not material to this report which deals only with these two questions, *viz.*:

(1.) Does the Statute of Mortmain apply to devises in this Province?

(2.) Should probate duty fall on the legatees or is it payable out of the estate?

The questions were argued before DRAKE, J., at Victoria, on 9th February, 1903.

Duff, K. C., and *Oliver*, for the executors.
L. Crease, for the widow.
Helmcken, K. C., and *Bradburn*, for the legatees.
Maclean, D. A.-G., for residuary legatees.

17th February, 1903.

DRAKE, J. (after dealing with other points proceeded:) Then comes the question of the applicability of the Statute of Mortmain to this Province, and on this point *Jex* v. *McKinney* (1889), 14 App. Cas. 77, was cited. This case appears to me to be conclusive on the point, but we have a decision of our own Court *In re The Petition of August Brabant*, May 28th, 1889, but not reported. In that case Mr. Justice Gray examines all the cases bearing on the subject, and decides against the Statute of Mortmain being applicable to this Province. I am therefore of opinion that the legacies given to the charities are valid.

Judgment

The last question is whether the probate duty should be paid by the legatees, or out of the residue. In my opinion the executors have to pay the probate duties out of the estate in the first instance. What in our rules is called probate duty is in part a legacy duty, because its incidence varies with the kinship of the person who ultimately takes the beneficial interest, and should be deducted from the legacies when they are paid over to the recipients.

Note:—The judgment of GRAY, J., in the case referred to is published below. The same point also came up for decision before WALKEM J., in *Sweetman* v. *Durieu*. The argument took place at New Westminster on the 24th of March, 1897, counsel for the plaintiffs contending that the statute was in force and counsel for the defendants contending it was not in force.

Corbould, Q.C., for plaintiffs.
L. G. McPhillips, Q.C., for defendants.

The following authorities were cited during the argument: *Doe Anderson* v. *Todd* (1845), 2 U.C.Q.B. 82; *Macdonell* v. *Purcell* (1894), 23 S.C.R. 101 at p. 113; *Attorney-General* v. *Stewart* (1817), 2 Mer. 143 and 16 R.R.

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162; *Mayor of Lyons* v. *East India Co.* (1836), 1 Moo. P.C. 175; *Whicker* v. *Hume* (1858), 7 H.L. Cas. 124; *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381 at p. 394; *Jex* v. *McKinney* (1889), 14 App. Cas. 77; *Cooper* v. *Stuart* (1889), *ib.* 286; Clement on Canadian Constitution, 77, 79, 93 and 101 *et seq.*, and cases there cited.

His Lordship gave judgment in favour of the defendants, holding that the statute was not in force.

IN RE THE LAND REGISTRY ACT, 1870, AND *IN RE* THE PETITION OF AUGUST BRABANT, A PRIEST OF THE ROMAN CATHOLIC CHURCH.

THIS was a petition to compel the Registrar-General of Titles to effect registration. The argument took place before GRAY, J., at Victoria.

Walker, for the petitioner.

Leggatt, the Registrar-General, in person.

28th May, 1889.

GRAY, J. (after stating the facts, which are not material for the purposes of this report, proceeded): As to the trust, the question therefore broadly comes up, whether the statutes of Mortmain are in force in British Columbia, and consequently the devise in the will of Bishop Demers illegal and void? And what are the statutes of Mortmain? Blackstone briefly gives their history. Mortmain—*in mortua manu*. In the old feudal times in England, many centuries back, the King as the ulterior lord of the fee, had certain rights of escheat, feudal profits, and pecuniary interests on change of tenure, by death of the tenant or otherwise. By the common law a corporation, sole or aggregate, ecclesiastical or lay, could hold lands descendable to successors instead of heirs, but as a corporation never dies, the King by alienation to a corporation would lose his feudal profits and privileges, the lands being in dead hands, in mortmain.

To settle the matter, Edward I. passed a statute called "*De Religiosis*" forfeiting all gifts or conveyances of lands in mortmain. Then commenced a fight between the ecclesiastics and the Kings, which lasted for centuries. The ecclesiastics, with great ability, evading the statutes by the doctrine of uses and trusts and other ingenious modes.

In 1746 by 19 Geo. II., Cap. 36, a statute was passed requiring that all gifts or conveyances for charitable uses must be by deed indented before two witnesses twelve months before death and enrolled six months after its execution.

These statutes have been modified by later legislation in the present reign, but not on points affecting the present question.

This short summary is useful to understand the question which now comes up.

That depends upon two points, first, whether the Mortmain Acts, and particularly the 19 Geo. II., Cap. 36, were brought into the colony as part of the common and statute law at the time of its settlement as applicable to the Colony or, second, whether the Colony has by any legislation, direct or incidental, introduced or adopted them since.

On the first point two cases, one in October, 1858, and the other in the present year, 1889, have relieved the Court of both trouble and responsibility.

The first case is *Whicker* v. *Hume* (1858), 4 Jur. N.S. 933. This was a case where a gentleman in Scotland, *inter alia*, by his will devised certain lands he possessed in New South Wales "for the benefit, advancement and propagation of learning in every part of the world, as far as circumstances would permit." The next of kin claimed the property on the ground that the devise was void under the Statute of Mortmain. The Master of the Rolls had decided that it was not void—his decision was affirmed by the Lords Justices of Appeal, see 15 Jur. 567, and it was then carried to the House of Lords. In July, 1858, the Lord Chancellor (Chelmsford) delivered judgment on that point, bearing on the particular question here raised. He said, "As to the second question which is as to the effect of the Statute of Mortmain upon a devise of lands in New South Wales, your Lordships in the argument expressed a strong opinion that the Mortmain Act did not apply to the Colonies, at all events not to New South Wales. I consider that this question is almost determined by the opinion of the Master of the Rolls in the *Attorney-General* v. *Stewart* (1817), 2 Mer. 143." After referring to the distinction pointed out by Sir Wm. Grant, that in that case Grenada was a conquered country, and that the inhabitants of a conquered country have those laws only which are established by the sovereign of the country, whereas the colonists of a planted colony carry with them such laws of the mother country as are adapted to their new situation.

After then shewing that section 24 of 9 Geo. IV., Cap. 83, was an Act simply to regulate the administration of Justice, and as to the point under discussion had no bearing, he continues: "Neither by common law nor by Act of Parliament, is the Mortmain Act applicable to a devise of lands in New South Wales."

In following up the judgment of the Lord Chancellor, Lord Cranworth remarks: "With regard to the question of the application of the statute of Geo. II., to the Colonies, I think the decision of Sir William Grant upon that subject is perfectly conclusive. . . . With regard to this Statute of Mortmain, ordinarily so called, I cannot have the least doubt that that cannot be regarded as applicable to the Colonies, etc., etc. . . . ."

The other case is that of *Jex* v. *McKinney*, before the Judicial Committee of the Privy Council, reported in the Times Law Reports for the week ending 13th February, 1889, No. 13, Vol. 5, p. 258. It was an appeal from a judgment of a Chief Justice of the Supreme Court of Honduras, of the 24th of January, 1888.

His Lordship here quotes Lord Hobhouse's judgment at p. 258.

Such was the law of England on the 19th of November, 1858, the date given by the local statutes of British Columbia as the date from which English law, if not inapplicable, was to prevail in British Columbia. It had at that time been declared by the highest Court in the realm that the

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Mortmain Acts were not applicable to a Colony, and such in 1889 is surely held to be the law.

This brings us to the second question.

Has British Columbia by any legislative action, direct or incidental, introduced the Mortmain Acts into this Province? Historically. The first action we find is a proclamation by the late Sir James Douglas, the then Governor, on 10th May, 1861 (C.S.B.C. 1877, Cap. 5), reciting his appointment and authority to make laws, institutions and ordinances for the peace, order and good government of the Colony, and further reciting that certain pieces of ground have been set apart for the use of the Roman Catholic Church in British Columbia, and that it was necessary to grant the said pieces of land. He did thereby proclaim and enact:

"(1.) That all conveyances made by the Crown to the Roman Catholic Bishop of Vancouver Island shall vest the same in the R. C. Bishop of Vancouver Island, for the time being, and his successors in office, from time to time, upon trust for the Roman Catholic Church in B. C.

"(2.) That in the interval between the appointment of the successive Bishops, the person who shall for the time being be appointed to administer the affairs of the Roman Catholic Church in B. C. shall have entire control over the rents, issues and profits of the same pieces of land until the appointment aforesaid.

"(3.) This proclamation may be cited as the "Roman Catholic Land Act, 1861."

Then, in 1869, we have the Religious Institutions Ordinance, 1869, reciting that it is desirous to amalgamate the local laws respecting the property of religious institutions in the Colony of British Columbia, and enacting that whenever a religious society or congregation of christians in the Colony of British Columbia desire to take a conveyance of lands for (describing them—religious purposes), etc., such society or congregation may appoint trustees, to whom and their successors, etc., the land may be conveyed, and by whom and their successors in perpetual succession it may be held in the names and for the purposes specified in the conveyance. There are then other provisions in that Act as to the accountability of trustees to the congregations which may or may not be in accordance with the trusts of the R. C. Church as giving more or less a joint control, but for some reason, perhaps to meet objections of that nature, in 1879, by Cap. 6 the former Act is amended by a distinct section, *viz.*, section 12, by which it is enacted, that all the rights and privileges conferred upon any religious body, society or congregation (by the first section hereinbefore recited) shall extend in every respect to every church, to be exercised according to the government of the said church, and in the Consolidated Acts, 1888, Vol. 1, Cap. 100, we find the same Religious Institutions Act re-enacted with the amendment of 1869.

In 1864, Cap. 46, we find a congregation of Israelites incorporated under the style of The Emmanuel of Victoria, Vancouver Island, for the purposes of fulfilling the ordinances of their religion, with the power of holding

lands, succession, etc., with all the rights, powers and privileges as by common or statute law or in equity, appertain and relate to a corporation aggregate. Again, in 1871, the Charitable Associations Act, having continued succession, and by an Amending Act passed in 1889, extended to religious associations. Here is a continuous legislation from the year after the founding of the Colony down to the present day, not only not introducing into the Colony, but absolutely inconsistent with Edward's Statute, *De Religiosis*, the Mortmain Acts and the Act of Geo. II., and the reasons given for their adoption, thus negativing by positive legislation, if it may be so said, any possible inference of their being applicable.

It must therefore, in my opinion, be legally held that the Mortmain Acts are not in force in this Province, and the objection taken by the Registrar-General is not valid.

REX v. COOTE.

Criminal law—Evidence—Perjury committed in civil action—Admissibility of depositions taken in civil action—Indictment for perjury—Form of—Surplusage.

A person charged with perjury committed in a civil action is entitled to have put in evidence those parts of his testimony in the civil action which may be explanatory of the statements in respect of which the perjury is charged.

IN the Supreme Court of British Columbia *in banc:* Crown case reserved. The following case was stated by DRAKE, J., the trial Judge:

In this case the defendant was tried before me at the last Assizes for the County of Vancouver, upon an indictment containing two counts for perjury, alleged to have been committed by him during the trial of a civil action before the Chief Justice, in which action the accused was defendant and one John Borland, plaintiff.

Statement

On the trial of the defendant before me, the prosecution called as its first witness the official stenographer, F. Evans, who pro-

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duced a copy in long hand of the stenographic note taken by him on the trial before the Chief Justice.

Upon the close of the case for the Crown, Mr. *Cane* said:

"Now, my Lord, in reference to the evidence taken in the civil action, in which the accused is stated to have sworn to these statements in the indictment, I submitted in evidence the other day the statement of Mr. Evans, the stenographer at the Court at this time, that this was a correct copy. I now ask that the statement of Mr. Coote, the accused, as transcribed in this statement be put in.

Court: "I understand that Mr. *Wilson* admits the correctness with which it was taken.

Mr. *Wilson*: "Yes, if your Lorship takes that, I am quite content.

Mr. *Cane*: "I understand Mr. *Wilson* to make that acknowledgment. I just call it to the attention of the Court.

Court: "Mr. *Wilson* admits that the words mentioned in the indictment were spoken by the prisoner. That is correct, Mr. *Wilson*?

Mr. *Wilson*: "Certainly, my Lord, the words in inverted commas. There is a certain innuendo alleged here though which of course we do not indorse."

The defendant's counsel, Mr. *Wilson*, during the conduct of the defence tendered in evidence the testimony of the accused given at the civil trial before the Chief Justice, other than that contained in the words mentioned in the indictment, and on this being objected to, and the objection sustained, then proposed to call the said Mr. Evans, and question him as to other statements made by the accused at the civil trial before the Chief Justice, and not included in the indictment. This also was objected to and I sustained the objection. Mr. *Wilson*, defendant's counsel, then asked me to reserve the point of the admissibility of the evidence, which I declined to do.

Statement

The jury brought in a verdict of "guilty" on the first count, and "not guilty" on the second count.

The prisoner's counsel then moved in arrest of judgment upon the ground of the insufficiency of the first count, and I reserved the point for the consideration of the Court, and refrained from

sentencing the defendant, and admitted him to bail, until after the consideration of the questions to be submitted to the Court, the Court having given leave to appeal.

The questions for the consideration of the Court are:

(1.) Was the evidence given by the defendant at the trial of the civil action before the Chief Justice, rightly rejected?

(2.). Is the first count in the indictment good and sufficient?

If these two questions be answered in the affirmative, then the conviction should stand.

If the second question be answered in the negative, then the indictment and verdict should be quashed, and the defendant discharged.

If the first question be answered in the negative, then such order and direction should be made, as to the Court may seem just.

The first count of the indictment was as follows:

IN THE COURT OF OYER AND TERMINER AND GENERAL GAOL DELIVERY.

CANADA, PROVINCE OF BRITISH COLUMBIA, COUNTY OF VANCOUVER, CITY OF VANCOUVER. } The jurors of our Lord the King present that heretofore, to wit at the Sittings of the Supreme Court of British Columbia, holden for the trial of civil causes, issues and matters at the City of Vancouver, in the County of Vancouver, in the Province of British Columbia, on the fifth, sixth and seventh days of November, in the year of our Lord one thousand nine hundred and two, before the Honourable GORDON HUNTER, one of the Judges of our Lord the King, certain issues were tried in an action wherein one James Borland was plaintiff, and one Josias Coote was defendant, which action, amongst other things, was for the specific performance by said Coote of an agreement for the sale of certain land, and for the reformation of a certain written receipt for money containing the terms of said agreement, upon which trial the said Coote appeared as a witness for and on his own behalf, and was then and there duly sworn before the said the Honourable GORDON HUNTER, and did then and there upon his oath aforesaid, falsely, wilfully and corruptly depose and swear in substance and to the effect following:

Statement

"On the 28th of June, Borland" (meaning thereby the said James Borland) "came to see me. He asked me if I still wanted to sell the property" (meaning thereby lots numbered nine and ten, in block number nine, district lot one hundred and ninety-six in said City of Vancouver, situate on the north-west corner of Hastings street and Westminster avenue in said City). "I told him, yes; if I got my price. He asked me what

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was the price, I told him $20,000, clear of the mortgage, and he made an offer of nineteen, and I think nineteen five hundred. I told him it was no use, that I would not take less than $20,000 clear of the mortgage. So he said that would not suit his client at all. So then I said, what is the matter with the other corner" (meaning thereby lots nine and ten in block ten in said district lot, situate on the north-east corner of Hastings street and Westminster avenue in said City). "Do you think you could get that, he said, I think I can, I said for $20,000. So he said then that he would go and see his client about whether he would take it. In a short time he come back and presented a document for me to fill in, and I filled in lot 9 and 10, block 10, that was the property that I was selling," whereas in truth, at the first interview above referred to between the said Borland and Coote, on the said twenty-eighth day of June, in the year of our Lord one thousand nine hundred and two, the said Coote stated that he would accept twenty thousand dollars for his property situate on the north-west corner of Hastings street and Westminster avenue aforesaid, being said lots nine and ten in block nine, free from all encumbrances, whereupon the said Borland went and consulted his principal and returned to the said Coote and informed him that he would give twenty thousand dollars for the said property free from encumbrances, which the said Coote thereupon agreed to accept, whereupon the said Borland paid the said Coote, and the said Coote received ten dollars as a deposit on the purchase of said lots nine and ten in block nine, and the said Coote signed a receipt for said money in which receipt he the said Coote, through mistake or fraud, filled in the description of the said lots as being in block ten, and whereas in truth at the said interviews above mentioned, nothing was said by the said Borland or the said Coote about lots nine and ten in block ten, or about property situate on the north-east corner of Hastings street and Westminster avenue aforesaid, and the property sold by the said Coote at the said last mentioned interview was said lots nine and ten in block nine, and the said Coote did thereby commit wilful and corrupt perjury, against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his crown and dignity.

Statement

The questions were argued at Victoria on the 8th of June, 1903, before WALKEM, IRVING and MARTIN, JJ.

Wilson, K.C., for accused: The averment as to how accused was sworn and what he swore to is insufficient; as the form in the Code has not been followed, all material facts must be set out, but as it is it discloses no offence.

Argument

As to the evidence. The rest of the accused's evidence or parts of it were relevant to the issue and should have been admitted: see *The Queen* v. *Douglas* (1896), 1 C.C.C. 221; *The Queen* v. *Hammond* (1898), 29 Ont. 211.

If the evidence was wrongly rejected the conviction should be quashed: *Reg.* v. *Gibson* (1887), 56 L.T.N.S. 367 and 18 Q.B.D. 537.

Maclean, D.A.-G., for the Crown: Section 611 of the Code provides that a count of an indictment is sufficient if it contains in substance a statement that the accused has committed the offence specified; the indictment gives more particulars than are required by the form, but that was done so as to prevent the necessity of a demand for particulars.

As to the evidence.

[MARTIN, J., referred to *Rex* v. *Jones* (1791), Peake 51; *Rex* v. *Dowlin* (1792), *ib.* 227 and *Reg.* v. *Britton* (1893), 17 Cox, C.C. 627, as shewing that the whole of the accused's evidence should be laid before the jury].

Argument

The accused could call a witness to prove he explained his words; the rest of his evidence is to shew that the evidence in respect of which the indictment was laid was true and he can't shew what he said was true by the stenographer, because that would be hearsay. The rest of the evidence was only admissible to explain that the words were spoken in mistake, but not to shew that they were true.

Per curiam: We are all of the opinion that there was evidence in the depositions of the accused at the civil trial which were explanatory of the criminal charge and which might well have influenced the jury in their verdict and which consequently the accused was entitled to have had placed before them; there should be a new trial.

Judgment

As to the first count of the indictment, WALKEM and IRVING, JJ., were of the opinion that it was good. MARTIN, J., desired further time for consideration and subsequently handed down the following written opinion:

6th July, 1903.

MARTIN, J.: As to the first question reserved for the consideration of this Court, it should, in my opinion, be answered in the affirmative, because it is clearly established by the authorities I referred to during the argument that on such a charge the accused is entitled to have laid before the jury at least any

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portion of his evidence at the former trial out of which the accusation arose which would explain or qualify the statement alleged to be a perjury: *Rex* v. *Carr* (1669), 1 Siderfin 418-9; *Rex* v. *Jones* (1791), Peake 51; *Rex* v. *Dowlin* (1792), *ib.* 227; *Reg.* v. *Britton* (1893), 17 Cox, C.C. 627; 1 Russell on Crimes (1896), 378-9; Roscoe's Criminal Evidence (1898), 727; Archbold's Criminal Pleading (1900), 1,008-9.

Here there was evidence of that nature which may well have had weight with the jury, and the failure to lay it before them is a "substantial wrong" within the meaning of section 746 of the Criminal Code: *Reg.* v. *Hamilton* (1898), 2 C.C.C. 390.

As to the second question concerning the sufficiency of the first count. The statutory forms of indictments on such a charge will be conveniently found at pages 589-90 and 769-70 of Crankshaw's Criminal Code, 2nd Ed., and it is objected that they have not been followed, nor have the older and lengthier precedents. It is true that the charge is laid in a somewhat involved manner and I am unable to say why the Crown Officers have not adhered to the convenient statutory precedents, as should be done, but nevertheless, after a further consideration of the indictment, I have come to the conclusion that an offence is disclosed therein. It contains more than is required by the statute, but the essential averments are there, and the unnecessary matter may be considered as mere surplusage not invalidating the count.

MARTIN, J.

The second question also should be answered in the affirmative.

There should be a new trial.

CHRISTIE v. FRASER *ET AL.*

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CHRISTIE v. FRASER

Injunction—Sale of property—Rescission of contract—Misrepresentation—Action for damages.

Where a party contracts to purchase property and pays an instalment and afterwards repudiates the contract and sues for rescission, the Court has no jurisdiction to restrain by *interim* injunction the vendor who accepted the repudiation and re-took his property from dealing with it as he sees fit.

APPEAL from an order of IRVING, J., whereby plaintiff's application to continue an injunction was dismissed.

In July, 1903, the plaintiff met the defendant, Fraser, who represented that he was an experienced lumberman and that he knew of certain timber limits for sale. Plaintiff and Fraser then entered into negotiations with the defendants, J. W. Hunter and W. H. Hunter, who represented that they had valuable timber limits on Guildford Island, with camp outfit and supplies, and also that they had an advantageous contract with the Pacific Coast Lumber Company of Vancouver for the sale of logs to that Company. Plaintiff and Fraser then obtained an option on said limits from the Erie Mill Company, which was represented by one of the Hunters, and then Fraser, who proposed to go into partnership with plaintiff and put his experience against plaintiff's capital, went to the limits for the purpose of examining them, and subsequently, on the 25th of July, 1903, an agreement was entered into between the Hunters of the first part, the Erie Mill Company of the second part and the plaintiff and Fraser of the third part, which agreement, after reciting that the Hunters were the holders of certain timber limits and that the Erie Mill Company were the owners of a logging outfit and the holders of a profitable contract for the supply of logs to the Pacific Coast Lumber Company, witnessed that the Hunters and the Erie Mill Company agreed to sell and plaintiff and Fraser agreed to purchase the timber limits, logging outfit and the contract for $14,000, payable as follows: $2,500 in cash on the execution of the agreement, $1,000 in thirty days, $5,250 in sixty days and

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$5,250 in four months. The agreement contained, *inter alia*, covenants by plaintiff and Fraser that they would not remove the logging outfit from the timber limits until the purchase price was fully paid; that they would keep it in good order until such payment; that they should be let into possession of the said outfit but no property therein should pass until the purchase money was fully paid; that time should be of the essence of the contract; and that in the event of default by plaintiff and Fraser of any payment, the vendors might re-take the outfit and other assets sold and keep any moneys paid, which should be absolutely forfeited to the Hunters and the Erie Mill Company. The $2,500 cash was paid by plaintiff, who then entered into partnership with Fraser.

Plaintiff subsequently became of the opinion that the property bought was not so valuable as represented to him and that he had been defrauded, and on the 11th of September, the solicitors for Christie and Fraser wrote the solicitors for the vendors repudiating the contract and demanding a return of the cash payment already made, and damages.

Statement

The vendors resumed possession of the property sold.

In October, plaintiff commenced an action against the Hunters, the Erie Mill Company and his partner, Fraser, for rescission of the agreement and for a return of the $2,500; an injunction was also claimed, together with damages for deceit.

On the 22nd of October, plaintiff obtained an *interim* injunction order restraining the Hunters and the Erie Mill Company from further interfering with the plaintiff's occupation and possession of the logging camp and lumbering outfit. This injunction was continued on several subsequent dates until the 22nd of December, when an application to further continue it was dismissed by IRVING, J.

The appeal was argued at Victoria on the 13th of January, 1904, before HUNTER, C.J., DRAKE and MARTIN, JJ.

McCaul, K.C., for appellant: The Court should preserve our possessory security, as on the faith of getting possession $2,500 was paid; where a man has by his conduct encouraged another to expend monies on property or deal in a matter of interest, the

Argument

Court will restrain him from derogating from the interest in which that other has been induced to deal. He cited Kerr on Fraud, 3rd Ed., 378; Kerr on Receivers, 4th Ed., 70 and 100 and *Huguenin* v. *Baseley* (1806), 13 Ves. 105. It is not a pre-requisite to rescission that there should be a previous tender or offer of return: *Star Kidney Pad Co.* v. *Greenwood* (1884), 5 Ont. 28 and *Kerr* v. *Hillman* (1860), 8 Gr. 285.

Kappele, for respondents: This is not a case for an injunction as damages are the proper remedy; defendants have gone into possession and accepted repudiation, and therefore we can't raise the point that the plaintiff can be compelled to carry out the contract. Unless the plaintiff claims an interest in the property he is not entitled to an injunction.

McCaul, in reply: If it is not a proper case for an injunction then a receiver should he appointed; defendants have always claimed they resumed possession because of breach of contract and not because of the repudiation.

Cur. adv. vult.

25th January, 1904.

HUNTER, C.J.: This is an appeal from the refusal of Mr. Justice IRVING to continue an *interim* injunction granted on October 22nd, 1903. The action, in which no statement of claim has yet been delivered, is for the rescission of an agreement, dated July 25th, 1903, for the purchase of timber limits and logging plant, etc., and for the return of $2,500 paid on account; the ground alleged being fraud *dans locum contractui*, while damages are also claimed for deceit. The consideration monies to be paid under the agreement amount to $14,000 and interest; of which only $2,500 has been paid, and the balance is long since over due, the last payment being due sixty days after date.

HUNTER, C.J.

The agreement contains, *inter alia*, covenants by the purchasers that they will not remove the plant until the purchase price shall have been fully paid and satisfied, and that they will keep it in as good order as at present until such payment and satisfaction; and also provides that the purchasers are to be let into possession of the plant but that no property therein shall pass until such payment and satisfaction; that time is to be of

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the essence of the agreement and that, in the event of default in any payment, the vendors may re-take the plant and other assets sold and keep any monies paid.

The injunction restrained the defendants from interfering with the plaintiff's occupation and possession of the plant, or from removing the same from the limits.

It seems to me that the learned Judge was right in refusing to continue this injunction, as by the express terms of the agreement, the vendors were entitled in the event of default to re-take possession of the plant which was all the while and still is their property. Here there has not only been default, but repudiation of the agreement, and the plaintiff has no legal or equitable interest in the property whatever, but only a claim for damages and for the return of his deposit.

There is no jurisdiction in the Court, that I am aware of, to prevent by *interim* injunction a man from dealing with his own property as he sees fit and in which the plaintiff has or can have no interest, or to which he makes no claim. This is really an attempt to place the defendants' assets *in medio* pending the determination of a suit for damages in order to hold them for the benefit of the plaintiff in the event of the latter's success. I know of no authority for such a proposition, nor was Mr. *McCaul* able to produce any; all the cases to which he referred being cases in which the plaintiff claimed some specific interest in the property.

HUNTER, C.J.

The appeal should be dismissed.

DRAKE, J.: The appeal by the plaintiff is to continue the *interim* injunction until the hearing. The plaintiff charged fraud and misrepresentation, which the defendants admit with regard to the contract for purchase of certain timber rights. The plaintiff asks that the contract be rescinded and the money paid be returned. The defendants contend that the Court does not grant an injunction to recover a mere money demand, and that is right. But whenever fraud is charged, the Court has a most extensive jurisdiction, and continually acts by way of injunction or receiver to restrain the parting with property or from negotiating securities. Every transfer of property, every contract,

DRAKE, J.

and every investment is vitiated by fraud, and the Court will set aside all such contracts.

The defendants contend that the Court does not interfere where there is only a money demand, and the case of *Newton* v. *Newton* (1885), 11 P.D. 11 was cited. But this case has no bearing, as it is not based on fraud or misrepresentation, but merely an injunction asked to prevent a person parting with property in order to avoid an anticipated claim.

There is a question here to be tried as to whether the sale of the real and personal property is valid or not, and until that question is determined the Court is entitled to interfere for preservation of the property, and it can do so by injunction or by appointment of a receiver.

DRAKE, J.

There is little doubt, if the evidence is true, that the plaintiff may be entitled to a judgment at the trial, and if so, he is entitled to have the property in question protected until the rights are settled; and as the Legislature has said an injunction may be granted whenever it is just or convenient that the order should be, if an injunction is more convenient than a receiver, the order will be made.

I think the appeal should be allowed, and the injunction continued until the trial.

MARTIN, J.

MARTIN, J., concurred with the Chief Justice.

Appeal dismissed, Drake, J., dissenting.

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v.
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MILTON v. THE CORPORATION OF THE DISTRICT OF SURREY.

Evidence—Finding based on positive evidence.

Where the trial Judge accepts positive in preference to the negative testimony, the Full Court will not interfere unless he is clearly wrong.

APPEAL by the defendant Corporation from judgment of MARTIN, J.

The plaintiff claimed damages for injury to his land caused by water cast thereon by reason of the defendants' having built a culvert across the Hall's Prairie Road and through which water was discharged on to plaintiff's land.

Statement

At the trial the contention between the parties was as to whether or not the construction of the ditch had increased the flow of water over the plaintiff's lands; the plaintiff, who lived on the land, and his witnesses swore that the flow was increased; some of the witnesses for the Corporation swore that it was impossible, while others swore that it was not likely.

The learned Judge found in favour of the plaintiff, and gave him judgment for $150 damages.

The defendants appealed and the appeal was argued at Vancouver on the 19th and 20th of November, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

Morrison, K.C. (*W. J. Whiteside*, with him), for appellants.
Reid (*Davis, K.C.*, with him), for respondent.

HUNTER, C.J.

HUNTER, C.J.: *Prima facie* the Municipality has increased the natural servitude to which Milton's land is subject by building a culvert across the Hall's Prairie Road, and it was their business to see to it that the water collected and delivered through that culvert did not in any way increase the servitude.

As to the evidence, the learned Judge has found, with some doubt apparently, that water has been delivered by means of that culvert along an old road into the Shannon ditch. It is

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true there is a mass of testimony which goes to shew that this was impossible, but the learned Judge has accepted the positive rather than the negative testimony on the subject, and that being the state of affairs, I think it is impossible for us to say he is clearly wrong. Therefore the appeal must be dismissed.

DRAKE and IRVING, JJ., agreed.

Appeal dismissed.

REX v. TANGHE.

FULL COURT
1904
Jan. 5.

REX
v.
TANGHE

Certiorari—Rule nisi to quash conviction—Motion for—Jurisdiction of single Judge to hear—Practice.

The Full Court will not hear a motion for a rule *nisi* to quash a conviction; the motion should be made to a single Judge.

MOTION for a rule *nisi* to quash a conviction.

The applicant had been convicted by two Justices of the Peace for refusing to obey an order of the Gold Commissioner given to him to remove mining posts marking the boundary of a placer mineral claim. A writ of *certiorari* had been granted and issued.

Statement

The motion came on for hearing at Victoria on the 5th of January, 1904, before the Full Court, consisting of HUNTER, C.J., IRVING and MARTIN, JJ.

McCaul, K.C., for the motion.

[HUNTER, C.J.: Why didn't you move before a single Judge? This Court will not hear a motion which a single Judge has jurisdiction to hear.]

A single Judge has no jurisdiction to hear this motion; the Full Court has original jurisdiction. He cited *Attorney-General* v. *E. & N. Ry. Co.* (1900), 7 B.C. 221 at p. 234; *S.*——v. *S.*—— (1877), 1 B.C., Pt. 1, 25; Short and Mellor, 128, 129, 131 and 138 and sections 4, 5 and 13, sub-sections 3 (*d.*) and 6 of the Supreme Court Act.

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A single Judge when acting within his jurisdiction can exercise all the powers of the Court, but when the Full Court is actually sitting the motion to quash cannot be made to a single Judge.

HUNTER, C.J.: I have no doubt that the Court is normally represented for the purposes of such a motion as this by one Judge, and that being so there is no need to go into the question as to whether the Full Court has jurisdiction, as even if it has, it does not entertain motions which may be heard by a single Judge.

HUNTER, C.J.

IRVING, J.: Section 5 gives a single Judge authority to sit as the Court, but having regard to the old practice under which more than one Judge sat in *certiorari* proceedings, I think we should not now refuse to hear the motion, having regard to the importance of the question at issue. We sit here now as a Full Court, but there is nothing in a name, and if counsel can catch us at any time sitting together in Court, I do not see why he should not make his application to us to entertain his motion.

IRVING, J.

MARTIN, J.: I wholly agree with what the Chief Justice has said, and even assuming this Full Court has original jurisdiction, which I do not assume, the applicant should conform to the established practice as I have always known it, and apply to the Court as it is ordinarily constituted, *i.e.*, by a single Judge, though there is nothing to prevent more than one Judge sitting together, section 5 saying "before any one or more of the Judges."

I entirely dissent from the view that this Court when sitting as a Full Court, under section 72, can be resorted to, or any or all of its members be appropriated for any other purpose; it is as impossible to apply to it for other purposes when so sitting as a Full Court as it would be to apply to it when sitting as a Court of Crown Cases Reserved, though the Judges composing it might be the same. There is in fact everything in the name of the Court as regards its jurisdiction.

MARTIN, J.

Motion refused, Irving, J., dissenting.

PLATH AND BALLARD v. THE GRAND FORKS AND KETTLE RIVER VALLEY RAILWAY COMPANY.

FULL COURT

1904

April 18.

PLATH v. GRAND FORKS

Railways—Barbed wire fence—Injury to horse therefrom.

The Company maintained along its line of railway a barbed wire boundary fence, without any pole, board or other capping connecting the posts; plaintiffs' horse, picketed in their field adjoining, became frightened from some cause unexplained, and ran into the fence, receiving injuries on account of which it had to be killed:—

Held, that the fence was not inherently dangerous, and therefore the Company was not liable.

The test is whether the fence is dangerous to ordinary stock under ordinary conditions, and not whether it is dangerous to a bolting horse.

Judgment of LEAMY, Co. J., reversed, IRVING, J., dissenting.

APPEAL from the judgment of LEAMY, Co. J., awarding the plaintiffs $100 damages for injuries to their horse caused by it running against a barbed wire fence, which had been erected and maintained by defendant Company, and which divided plaintiffs' field from the line of railway.

Statement

The plaintiffs placed the value of the horse at $75, and apparently the sum of $25 was added in the judgment to cover costs of burying the horse.

At the trial the learned County Judge delivered judgment as follows:

From the evidence in the case I am of the opinion that the fence in question is a dangerous one, and that the injuries to the horse were caused by it, and that in consequence of the serious nature of the injuries it was necessary to kill him.

LEAMY, CO. J.

Judgment will be for $75, the value of the horse, and $25 for other incidental expenses incurred by reason thereof.

The facts appear in the judgments on appeal.

The defendants appealed, the appeal being argued at Victoria on the 8th of January, 1904, before the Full Court, consisting of HUNTER, C.J., IRVING and MARTIN, JJ.

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J. A. Macdonald, for appellant: The fence was of a kind permitted by statute, and therefore lawful; it was not the proximate cause of the injury, as the horse was in a frenzy, and the evidence shews that the injury might have happened if there had been a board on the top; if it had been a picket fence it is likely that the injury would have been greater. He cited *Hillyard* v. *Grand Trunk Railway Co.* (1885), 8 Ont. 583, at p. 592 and *Butterfield* v. *Forrester* (1809), 11 East 60.

Clement, for respondents: We put our case on the doctrine of *sic utere tuo alienum non lædas*: the Company must maintain a fence that is not dangerous in itself; the fence in question was dangerous in its nature, and the evidence shews that the fences generally in that locality have a pole or board at the top; a horse leaning or rubbing against this fence would be injured. He cited *Jones* v. *Festiniog Railway Co.* (1868), L.R. 3 Q.B. 733; *Vaughan* v. *Taff Vale Railway Co.* (1860), 5 H. & N. 679; *Crewe* v. *Mottershaw* (1902), 9 B.C. 246, *Groucott* v. *Williams* (1863), 32 L.J., Q.B. 237; *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5; *Dunsford* v. *Michigan Central Railway Co.* (1893), 20 A.R. 577; *Lawrence* v. *Jenkins* (1873), L.R. 8 Q.B. 274 and *Firth* v. *Bowling Iron Co.* (1878), 3 C.P.D. 254.

Argument

Macdonald, replied.

Cur. adv. vult.

18th April, 1904.

HUNTER, C.J.: Action by the plaintiff for damages for the loss of a horse. The horse, which had been picketed in the plaintiffs' field, having got frightened from some cause not explained, freed itself from the stake and bolted into a barbed wire fence which divides the field from the defendants' line of railway. This fence was erected and maintained by the defendants, presumably because of the provisions of the B. C. Railway Act, which requires railways to fence against cattle. It consisted of posts connected by several strands of barbed wire, but had no boards or rails connecting the posts; and the plaintiffs contend that for want of the latter the fence was dangerous to cattle as not being sufficiently visible to warn them of its presence when rushing towards it.

HUNTER, C.J.

We have not to consider whether or not the fence was a suffi-

cient compliance with the Fence Act incorporated into the Railway Act, but only whether it is such a fence as can, under any circumstances, be lawfully erected by one proprietor as against another, and I am of the opinion that, having regard to the *locus in quo*, the plaintiff has failed to shew that it is not a lawful fence. The test is not whether it is dangerous to a bolting horse, for, indeed, all fences are more or less dangerous to such animals, but whether it is dangerous to ordinary stock under ordinary conditions. There was no evidence to shew that it is not reasonably safe under ordinary conditions, and it was incumbent on the plaintiffs to prove that this was the case. All that Plath says is that the fence is dangerous for cattle, but he does not say under what conditions. Ballard, the other plaintiff, goes so far as to say that such a fence is extremely dangerous to all kinds of stock under all circumstances, but he admits that there are other such fences in the valley without boards or poles, nor does he give any instances of damage by which the value of his opinion might be tested. Pierce and Cooper say that the fence is dangerous, but do not state under what conditions, while Hughes says it is dangerous for horses, but not for cattle or sheep, nor does he mention any conditions.

It is impossible on this evidence to say that the plaintiffs have satisfied the onus which is on them to shew that the fence was dangerous to ordinary horses under ordinary conditions, especially in view of the fact that such fences are in common use over the whole country.

HUNTER, C.J.

It may be conceded that the fence might be made less dangerous to stock by having a board or rail connecting the posts, but, on the other hand, such a fence would be much more liable to spread fires in wooded districts; and as Wilson, C.J., says in the course of an elaborate judgment in *Hillyard* v. *Grand Trunk Railway Co.* (1885), 8 Ont. 583 at p. 595: "The capping is very frequently not used, and although the fence without the capping has been in use for some years it is not known to have been found specially dangerous." However, this may be, I do not think that a proprietor is bound to insure his neighbor's stock against injury by his fence under extraordinary circumstances. It is enough if the fence is not dangerous to ordinary horses under ordinary

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circumstances; and as this fence has not been shewn to be otherwise, the appeal must be allowed, and the action dismissed with costs.

Perhaps it is unnecessary to add that I do not intend to decide that a barbed wire fence may be established on any part of his domain by a rural proprietor. It is obvious that if a farmer were to set up such a fence close to his neighbour's cottage where young children were running about, he might be erecting a highly dangerous nuisance. The fact is that every case of this kind must stand on its own circumstances.

IRVING, J.: The Fence Act contemplates the erection of something plainly visible and stationary. It requires the fence to be of a certain height to prevent animals jumping over it; to be substantially constructed so as to prevent animals forcing their way through it. In short, the Legislature in prescribing the requirements of a fence took into consideration the known habits of animals, each after their kind. There was to be a barrier visible, stationary and securely constructed.

The fence under consideration consisted of horizontal barbed wires strung on posts sixteen feet apart. Constructed in this way, it was (in the intervals between the posts at any rate) difficult to see and of great elasticity, so that when a horse pushed or ran against it, as the horse in this case, after the manner of horses, did, the wires would yield to the pressure, then break, and finally entrap the horse, as in a net, the barbed points cutting him in his struggles to free himself. It was a concealed trap.

IRVING, J.

The learned County Court Judge was of opinion that this was a dangerous fence; and it being admitted that it was erected on the boundary of the plaintiffs' land, I think the judgment was right. The animal injured had a right to be where he was when he received the hurt.

In a case where the plaintiff's horse died from eating of the leaves of a yew tree, a branch of which overhung the plaintiff's land, the plaintiff recovered damages. The defendant had a right to grow a yew tree, that was lawful and usual; but as he permitted it to overhang the plaintiff's land, he was held responsible; the plaintiffs' horse not being a trespasser.

In my opinion, the erection on the boundary line of your

neighbour's field of a structure from which it is reasonably manifest that danger may be anticipated to the animals in that neighbour's field gives a right of action if the animals are injured by such fence and if they are not trespassing.

In *Ponting* v. *Noakes* (1894), 2 Q.B. 281, the case turned on the fact that the plaintiff's horse had no right to be where he was when he ate of the leaves (p. 286). The hurt was received owing to its wrongful intrusion. It was because of the plaintiff's neglect to keep his horse up that the defendant in that case was not liable.

The Common Law of England requires the owner of horses and oxen to keep his animals from straying on the lands of others at his peril: see *Cox* v. *Burbidge* (1863), 32 L.J., C.P. 89, where it was said the general law is that if I am the owner of an animal (in which by law the right of property can exist), I am bound to take care that it does not stray into the land of my neighbour, and if it does so, I am liable for the trespass; and it is perfectly immaterial whether the animal escapes by reason of the negligence of the owner, or in spite of his most diligent care. In each case I am liable for the trespass, and the ordinary consequences of it (subject to a distinction which is to be found in the earliest books, that the animal is one in which the owner can have property). If, therefore, a man's cattle or poultry stray on to his neighbour's land, and do such damage there as they from their nature may be expected to do, the owner is liable for it. And in *Lee* v. *Riley* (1865), 34 L.J., C.P. 212, where there was a kicking match between the defendant's mare and the plaintiff's horse, it was held that the plaintiff could recover as the accident occurred through the defendant's neglect to fence.

In *Ellis* v. *Loftus Iron Co.* (1874), L.R. 10 C.P. 10, where the defendant's stallion injured the plaintiff's mare by biting and kicking her through the wire fence separating the plaintiff's land from the defendant's, it was held that as there was a duty on a man to keep his cattle in, the defendant's horse had committed a trespass by biting through the fence.

But the Common Law of England in relation to cattle running at large has been broken in upon by the Fence Act originally

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passed in 1869 R.L.B.C. 1870, Cap. 113, amended in 1879 and 1881, now Revised Statutes, 1897, Cap. 77.

The statute lays down with great particularity the kind of fence which every person must erect to protect his lands from cattle running at large and declares that unless the lands are protected by a fence, as prescribed by the Act, no action can be maintained for the trespass; nay more, no trespass shall be deemed to have been committed.

This statute makes the cases of *Ponting* v. *Noakes* and *Ellis* v. *Loftus Iron Co.* inapplicable to any case in this Province, except where the existence of a lawful fence is established. I am dealing with cases outside of Municipalities.

In *Fenna* v. *Clare & Co.* (1895), 1 Q.B. 199, a fence even less dangerous than this barbed wire fence was held to be a nuisance.

MARTIN, J.: I concur with the learned Chief Justice. On the argument the respondent's counsel took, as he was forced to take, the ground that this fence was in its nature dangerous, but the evidence does not satisfy me that it was. The defence called no witnesses, so no question arises here as to a conflict between witnesses or their credibility. It would have been of some assistance, to me at least, in determining the point, to know for what cause and how the horse in question (which was picketed with a 50 foot rope to a stake driven deep, two feet, into the ground) managed to break loose, and also how far he was picketed from the fence in question. These facts are material because some horses, like some men, are of such a reckless, fractious and intractable disposition that they would without cause get into difficulty with a fence of any description. In addition to the evidence cited by My Lord, I point out that even the plaintiff Ballard only goes so far as to say that "nearly all" the boundary fences in the valley are barbed wire with poles, and he admits that there are "some internal fences of barbed wire without boards or poles." There is no evidence to shew that a boundary fence between, say, an owner and a highway should be of different construction from one between two owners, which, I presume, would come within what the witness meant by an "internal" fence.

MARTIN, J.

I notice the case of *Turner* v. *Stallibrass* (1898), 1 Q.B. 56, on which the respondents rely for the purpose of pointing out that it turned on the fact that there was a low wire fence in the field, and it was alleged that the defendants had "negligently permitted the grass to grow so as to hide the said wire fence whereby the plaintiff's horse was injured." The case turned on the question of concealment; there is no such element in the case at bar.

A further point taken on the argument and in the notice of appeal was that the damages allowed were excessive, particularly as regards the sum of $25 allowed for burying the horse. The evidence in support of such a charge, which is on the face of it exorbitant, is that of William Pierce and of Alfred Cooper, who give no particulars, but the former states on cross-examination: "I think $10 not too much for burying the horse." Another witness, Hughes, admits he did "not know what it was worth to bury a horse." Neither of the plaintiffs, who ought to know, gives any evidence on the point; and in such circumstances I am of the opinion that the most that should have been allowed on that head (and no other item of expense was mentioned) is $10, and so in any event the judgment would have been reduced by $15.

The appeal should be allowed with costs.

Appeal allowed, Irving, J., dissenting.

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CENTRE STAR v. ROSSLAND MINERS UNION

CENTRE STAR MINING COMPANY, LIMITED v. ROSSLAND MINERS UNION *ET AL.*

Venue—Change of—Convenience—Fair trial.

Where a plaintiff has selected his place of trial, the venue will not be changed on the ground of greater convenience unless it is clear that a fair trial can be had at the place proposed by defendant.

APPEAL from an order of FORIN, Lo. J., changing the place of the trial from Victoria to Nelson.

This was an action against the Rossland Miners Union, No. 38, Western Federation of Miners, and the executive officers of said Union, and also against several other labour unions of Rossland and their executive officers, in which the plaintiff Company claimed damages in respect to a strike which it was alleged the defendants wrongfully and maliciously brought about amongst the miners and others employed by the plaintiff Company. The statement of claim contained many allegations of overt acts of intimidation, violence, etc., by defendants directed against workmen whom plaintiff Company endeavoured to put to work.

Statement

The writ was issued in Rossland and by the operation of r. 185 the venue was laid at Victoria, the statement of claim not mentioning any place of trial.

The defendants applied for a jury and to have the place of trial changed from Victoria to Rossland on the ground of convenience and expense.

Affidavits were filed on behalf of the plaintiffs to the effect that the defendant unions were very powerful in Rossland, their members and families constituting a considerable portion of the customers of the business men and merchants; that one of the methods of exerting their influence was to boycott merchants and others who happened to incur their enmity; that many of the facts which would be brought out in evidence in the action had already been published and commented upon in a Rossland newspaper with a view of inciting hostility to the

plaintiff Company; and in view of said acts it would be impossible to secure a Rossland jury who could act without fear or favour, and consequently the venue had been laid in Victoria as being beyond the sphere of influence exerted by any of the parties.

In answer to these affidavits an affidavit by defendants' solicitor was filed denying that a fair trial could not be had in Rossland, and stating that a strong prejudice existed against defendants in Victoria and for that reason it would be unfair to compel the trial to take place there.

The summons was heard at Nelson on 16th November, before FORIN, Lo. J., who dismissed the application, holding that there would be a grave danger of a miscarriage of justice if the trial took place at Rossland owing to the state of feeling there among the mining classes, but he stated that on the ground of convenience the venue should be changed from Victoria.

Counsel for defendants then agreed to accept a change to Nelson, but His Honour held that he could not on the application then before him make a change to Nelson although he believed a perfectly impartial trial could be had there.

Defendants then applied on summons to change the venue from Victoria to Nelson, using the same material as before and an additional affidavit of their solicitor stating that the Miners Union in Nelson was very weak; that matters concerning the strike had not been much discussed in Nelson by the public who understood but little about them and that a fair trial could be had there.

Statement

Plaintiffs replied by affidavits stating that the allegations in the affidavits used by plaintiffs on the former application respecting Rossland, applied also to Nelson, which was situated in the centre of a mining region, and from the Miners Union there the defendants during the strike in respect of which the action was brought received assistance.

On behalf of defendants affidavits were filed contradicting statements in plaintiffs' affidavits and stating that the defendants' influence in Nelson was small; that the miners living there were very few in number and that a fair trial could be had there.

The summons was heard at Rossland on the 15th of December, 1903, before FORIN, Lo. J., who ordered that the action be tried with a jury at Nelson.

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The plaintiffs appealed and the appeal was argued at Victoria on the 6th of January, 1904, before HUNTER, C.J., IRVING and MARTIN, JJ.

Galt, for appellants: The plaintiffs have the right to select the place of trial and the venue will not be changed to some place where there is any question about a fair trial even though more convenient: a fair trial overrides all other considerations. He cited *Penhallow* v. *Mersey Dock and Harbour Board* (1859), 29 L. J., Ex. 21; *Blackburn* v. *Cameron* (1871), 5 P. R. 341; *Diamond* v. *Gray* (1869), *ib.* 33 and *Davis* v. *Murray* (1882), 9 P. R. 222.

S. S. Taylor, K. C., for respondents, contended that a fair trial could be had in Nelson, and that it would be a denial of justice to defendants to have the trial in Victoria as the expenses of coming there themselves and bringing their witnesses would be too great. The Judge below found that a fair trial could be had in Nelson and his discretion should not be interfered with on appeal: see *Foxwell* v. *Van Grutten* (1897), 14 T. L. R. 145; *Soley and Co., Limited* v. *Lage* (1896), 12 T.L.R. 191; *The Assyrian* (1888), 4 T. L. R. 694 and *Benyon* v. *Lamb* (1890), 6 T. L. R. 146.

Argument

HUNTER, C.J.: We are all agreed that the order appealed from must be reversed and the venue restored to Victoria. The Rules give the plaintiff the right to select his place of trial, subject to the right of the Court to order a change and *Campbell* v. *Doherty* (1898), 18 P.R. 243, shews that the Court will not interfere with the place he selects, except on substantial grounds. Here Rossland is admittedly unfit on account of the prejudices of a very large proportion of the population there and that being the case, the only justification to make the proposed change would be on condition that an absolutely fair trial could be had in Nelson, but we are not satisfied that a fair trial could be had there. The question of expense is of small consideration compared with the question of having a fair trial.

HUNTER, C.J.

IRVING and MARTIN, JJ., agreed.

Appeal allowed.

BRIGGS AND GIEGERICH v. FLEUTOT.

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BRIGGS v. FLEUTOT

Champerty and maintenance—Void agreement—Parties entitled to take advantage of—Res judicata—Litigation over specific property—Person not a party but supplying funds for litigation—Estoppel by conduct—Costs.

The laws of maintenance and champerty as they existed in England on 19th November, 1858, are in force in British Columbia, and an agreement for a champertous consideration is absolutely null and void.

The defence that an agreement is champertous and therefore void is open to others than those who are parties to the agreement.

Per HUNTER, C.J.: It is not open to a man to stand by and assist another to fight the battle for specific property to which he himself claims to be entitled and in the event of the latter's defeat, claim to fight the battle over again himself. He is not bound to intervene, but if he does not he must accept the result so far as concerns the title to the property.

At the trial plaintiff obtained judgment declaring that defendant was a trustee for him of an undivided one-quarter interest in two mineral claims; on appeal by defendant, plaintiff's interest was reduced to one-fortieth:

The Court allowed defendant the costs of the appeal, but allowed no costs of the trial to either side.

APPEAL by defendant from judgment of MARTIN, J., declaring that the defendant is a trustee for plaintiff Giegerich of an undivided one-fourth share in the Cork and Dublin mineral claims. The facts are stated in the judgments, and the agreements are set out in full in the judgment of the Chief Justice. For the facts of the *Briggs* v. *Newswander* action, see 8 B.C. 402 and 32 S.C.R. 405.

Statement

On 12th May, 1900, Newswander wrote to Fleutot as follows:

"I hereby confirm our understanding in regard to the claims Cork and Dublin on which you have done a certain amount of prospecting work at your own cost, that is to say, I agree to hand you a bill of sale for the above claims as soon as I have obtained Crown grants for them, and if there is value in the claims I leave it entirely to you to give me a suitable recompense therefor."

On 3rd January, 1901, Doras and Darginac conveyed through Newswander, their attorney-in-fact, the Cork and Dublin claims to Fleutot. On 18th December, 1902, Briggs assigned to Fleutot

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the *Briggs* v. *Newswander* judgment together with his interest in the said mineral claims.

The trial took place at Nelson in March, 1903, before MARTIN, J.

The appeal was argued at Vancouver on the 6th, 7th and 9th of November, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

Davis, K.C., for appellant: Giegerich's title to the nine-tenth's interest depends on a champertous agreement which is absolutely void; the agreements are saturated with maintenance and champerty, and are *mala in se*, and so Giegerich's title is invalid; see *Alabaster* v. *Harness* (1895), 1 Q.B. 339; *O'Connor* v. *Gemmill* (1899), 26 A.R. 27; *Hopkins* v. *Smith* (1901), 1 O.L.R. 659; *Meloche* v. *Deguire* (1903), 34 S.C.R. 24. Champerty is an offence against public policy and the Court will not allow an invalid and illegal agreement to be enforced; see *Hilton* v. *Woods* (1867), L.R. 4 Eq. 432; Broom's Legal Maxims, 5th Am. Ed., 650, 658; *Simpson* v. *Lamb* (1857), 7 El. & Bl. 84; *Davis* v. *Freethy* (1890), 24 Q.B.D. 519; *Scott* v. *Brown, Doering, McNab & Co.* (1892), 2 Q.B. 724 at p. 728 and *Hutley* v. *Hutley* (1873), L.R. 8 Q.B. 112.

As to the one-tenth, it is a most suspicious circumstance that the first assignment is absolute, and is followed by another agreement which says the one-tenth was reserved; it is so suspicious that the plaintiff should not be allowed to found title on it.

Argument

Fleutot agreed to purchase the claims from Newswander before the action of *Briggs* v. *Newswander* was commenced, and was justified in obtaining from him a deed notwithstanding the *lis pendens;* Fleutot is not bound by the judgment in the Supreme Court of Canada; he was not a party to that action, and was not a witness.

[IRVING, J., referred to *Young* v. *Holloway* (1895), P. 87 and *In re Lart: Wilkinson* v. *Blades* (1896), 2 Ch. 788.]

Those cases are distinguishable. He cited *Fry* v. *Botsford* (1902), 9 B.C. 234; *Doughty* v. *Lomagunda Reefs, Limited,* (1903), 1 Ch. 673 and 23 Am. & Eng. Encyclopædia of Law, 2nd Ed., 486.

S. S. Taylor, K.C., for respondents: The objection to cham-

perty is that it stirs up strife; the rigorous rules which obtained in earlier days in England are not to be imported here without some modification; the doctrines of maintenance and champerty are largely modified by the modern cases; see *Findon* v. *Parker* (1843) 11 M. & W. 675; *Welbourne* v. *Canadian Pacific R. W. Co.* (1894), 16 P.R. 343 at p. 345; *Allan* v. *McHeffey* (1861), 5 N.S. 120 and *Ram Coomar Coondo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186.

Outside of the law relating to solicitors, the law respecting champerty is only applicable to the old conditions in England; it has not been introduced into British Columbia; unless the Court should come to the conclusion that Giegerich was simply gambling in litigation, the plaintiff must succeed. The agreements are not *per se* invalid; if champertous, they are not void, but voidable, and a third party cannot take advantage of them; see *Stanley* v. *Jones* (1831), 7 Bing. 369; *Knight* v. *Bowyer* (1858), 27 L.J., Ch. 520 at p. 521 and Legal Professions Act Amendment Act, 1901.

The agreement of 9th August superseded all the others, and it shews no illegality on its face; some of the considerations in the agreement are good, and that is sufficient.

Fleutot's purchase on 18th December, 1902, of the Briggs judgment was part of a wrongful scheme; while the transactions were carried out in the name of Newswander, they were really in the interest of Fleutot, and Fleutot is bound by the judgment in the Supreme Court of Canada, and is estopped from taking advantage of any new defence; see Bigelow on Estoppel, 5th Ed., 42, 45 and 52; Ewart, 196-8; *Fry* v. *Botsford* (1902), 9 B.C. 234; *In re Lart: Wilkinson* v. *Blades, supra* and *Young* v. *Holloway* (1895), P. 87.

Argument

Davis, in reply: Fleutot had expended considerable money on the faith of his agreement with Newswander, so he had to see that the *Briggs* v. *Newswander* action was fought; he wasn't the owner, but he had an equity by virtue of his agreement.

The criminal law of England was brought into force in British Columbia: R.S.C. 1886, Cap. 144. He cited Pollock on Contracts, 6th Ed., 324; *Commercial Bank* v. *Wilson* (1866), 3

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E. & A. 257 and *Leggatt* v. *Brown* (1898), 29 Ont. 530.

Cur. adv. vult.

25th January, 1904.

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HUNTER, C.J.: On July 3rd, 1899, the plaintiff Briggs located and on the 17th of July recorded the Two Kids and Monarch mineral claims. On December 9th, 1899, one Newswander located the same ground in the names of Charley Doras and Jean Darginac, as the Cork and Dublin mineral claims, and recorded them on December 23rd, 1899.

In order to avoid the litigation about to arise by reason of both parties proceeding to obtain Crown grants of their conflicting claims, they entered into an agreement evidenced by two writings, dated June 12th, 1900, by which Briggs sold out his interest in the ground first named, Two Kids and Monarch, to Newswander for $500, and Newswander undertook to form a British Columbia Company to take over the claims and that Briggs should "have a reasonable amount of the stock according to the value thereof." No company being formed in pursuance of the agreement, and Crown grants of the land having issued in the meantime to Doras and Darginac under the name of the Cork and Dublin mineral claims, Briggs commenced an action against Newswander, Doras and Darginac on November 10th, 1900, for the determination of his rights in the premises, which resulted in the Supreme Court of Canada giving judgment on the 15th day of May, 1902, declaring Briggs to be entitled to a conveyance of an undivided one-quarter interest in the Cork and Dublin claims and costs in all the Courts, less the sum of $500, which he had already been paid.

HUNTER, C.J.

The present action is brought by Briggs and one Giegerich who claims as assignee of the whole of Briggs' interest, against the defendant Fleutot for a declaration that Giegerich is the owner of an undivided one-quarter interest in the said claims, and that a transfer of the remaining three-quarter interest by Doras and Darginac, dated January 3rd, 1901, is void as having been made to defeat the recovery of the taxed costs in first mentioned action; or in the alternative that it be declared that Fleutot was the real defendant in interest and that he be ordered to pay said costs.

According to Fleutot, before the location of the Cork and Dublin, Newswander had verbally agreed to sell him the claims as soon as Crown granted and this agreement was reduced to writing on the 12th of May, 1900, a month before the agreement already mentioned between Briggs and Newswander. The claims were Crown granted to the locators, Doras and Darginac, on November 5th, 1900, and five days later the suit of *Briggs* v. *Newswander* was commenced, as already stated, and a *lis pendens* filed.

I think the evidence is conclusive to shew that Newswander was the *alter ego* of Fleutot in that litigation. On behalf of foreign principals, he, Fleutot, furnished large sums of money for the development of the claims without having secured any *prima facie* enforceable agreement for their sale to him or his principal, *i.e.* if Newswander was a stranger; he was privy and witness to the agreement between Newswander and Briggs which was entered into after consultation with himself; the re-staking of the claims as the Cork and Dublin was for the purpose of enabling him to get a clear title to the ground and "Newswander did the work"; Newswander was his interpreter in this and other transactions and paid out large sums of money on his behalf in connection with the claims; in fact, throughout the whole affair Newswander was his confidential agent. He furnished Newswander with the $500 to pay Briggs; he had consultations with Newswander's solicitors about the suit; was present at the trial; provided Newswander with the money to carry on the litigation; took counsel's advice about appealing to the Privy Council; was advised by the solicitors for Newswander that they had better not act for him in the present action; in some instances gave cheques on account of costs direct to the solicitors instead of to Newswander; and he admits that Newswander had no real interest in the claims, but only a promise from him that he would get paid something.

Therefore, even assuming that Newswander's promise to sell him the claims (being prior to Newswander's agreement with Briggs) was an enforceable promise and amounted to a sale in equity, he cannot be heard to allege that he is not bound by the judgment of the Supreme Court of Canada, at any rate, to the

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extent that Briggs was entitled to an undivided one-quarter interest in the claims.

As I understand the law, it is not open to a man to stand by and assist another to fight the battle for specific property to which he himself claims to be entitled, all the while supplying the sinews of war, and, in the event of the latter's defeat, claim to fight the battle over again himself. It is true he is not bound to intervene; but, if he does not, he must accept the result so far, at any rate, as concerns the title to the property for he has in fact fought out the title in another's name.

But while it is not open to Fleutot to contest Briggs' title, it is open to him to contest Giegerich's title by assignment; which he does upon the ground that it is founded on a champertous bargain and, therefore, void.

On the 12th of September, 1901, Briggs entered into the following agreement with Giegerich:

"This agreement made this 12th day of September, A.D. 1901, between Robinson P. Briggs of Kaslo, B. C., miner, of the first part, and Henry Giegerich, of the same place, merchant, of the second part;

"Whereas, the said party hereto of the first part is the owner of an interest now in litigation in the Cork and Dublin mineral claims situate on the South Fork of Kaslo Creek in the Ainsworth Mining Division of British Columbia; and whereas, he is indebted to the party of the second part in the sum of about $1,850, for moneys advanced and agreed to be advanced by the said party of the second part for the purpose of paying the law costs of Messrs. Taylor and Hannington, in connection with the suit of *Briggs* v. *Newswander et al.* and the appeal from the judgment of the trial Court to the Full Court of British Columbia and to the Supreme Court of Canada, and in consideration of such advances the said Briggs has agreed to enter into this assignment;

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"Now this agreement witnesseth, that the said party of the first part hereby assigns, transfers and sets over absolutely to the party of the second part an undivided nine-tenth's (9-10) share or interest of all his right, title or interest in the said Cork and Dublin mineral claims and in and to every judgment, settlement, compromise or otherwise that the said party of the first part may obtain with regard to the said suit of *Briggs* v. *Newswander et al.* for him the said party of the second part to have and to hold as his sole and absolute property.

"In witness whereof, the party hereto of the first part has hereunto set his hand and seal on the day and year first above written.

"Signed, sealed and delivered in the presence of
"Charles Dickson."
"Robt. Hendricks."
} "Robinson P. Briggs."

This was followed up by a deed from Briggs to Giegerich under date of 23rd May, 1902, by which Briggs, "in consideration of one dollar, etc., and of moneys advanced to and paid for the said Briggs from time to time and for other valuable consideration," transferred the whole one-quarter interest to Giegerich. On the 9th of August, 1902, Briggs assigned all his interest to Giegerich by instrument under seal, which, after reciting the proceedings in the action, continues as follows:

"And whereas the plaintiff was and is indebted to the said Giegerich for moneys advanced to him and for him at divers times and has deeded to the said Giegerich the said undivided one-quarter interest in the said mineral claims;

"And whereas, the said Giegerich has agreed to pay the taxed costs of the solicitors of the said Briggs as well as their solicitor and client costs in connection with the said action, and also in connection with an action of the said Briggs against The Trust Mining Company the said Giegerich has agreed to pay the solicitor and client costs of the said Briggs to his own solicitor in the said action;

"Now this assignment witnesseth, that for and in consideration of the premises and in further consideration of the said Giegerich paying to the said Briggs the sum of ten dollars ($10) of lawful money of Canada upon the execution hereof, the receipt whereof is hereby acknowledged, he the said Briggs hereby grants, bargains, sells, assigns and sets over, and by these presents doth grant, bargain, sell, assign, transfer, and set over unto the said Giegerich, his executors, administrators and assigns and all the said hereinbefore judgment," etc.

This instrument, which *quoad* the one-quarter interest was a mere ratification of the deed, was in turn followed by a document under seal, called an agreement and assignment, which, after reciting the said proceedings and the said assignment of the 9th of August, continues as follows:

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"And whereas, that notwithstanding that the said assignment of the 9th day of August, 1902, was absolute on its face, the said party hereto of the first part retained an interest to the extent of an undivided one-tenth in the said undivided one-quarter in the Cork and Dublin mineral claims, which the party hereto of the second part undertook to convey to the party hereto of the first part, or to such other person or persons for him as he might nominate;

"And whereas, the said party hereto of the first part did nominate pursuant to the foregoing recital Maud K. Briggs, of Northport, U.S.A., to act as his trustee in the holding of the said undivided one-tenth interest in the said undivided one-quarter interest;

And whereas, the said party hereto of the first part has cancelled and revoked his said nomination of the said Maud K. Briggs to act as his said

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trustee and has communicated the said revocation to the party hereto of the second part and has agreed for the considerations hereinafter mentioned to absolutely sell and dispose of to the party hereto of the second part his said undivided one-tenth interest of the said undivided one-quarter interest in the said Cork and Dublin mineral claims and to confirm in every other respect the said assignment of the said 9th day of August, 1902;

"Now this agreement and assignment witnesseth that the said party hereto of the first part for and in consideration of the sum of five hundred dollars ($500) payable as follows by the party hereto of the second part—the sum of one hundred dollars ($100) upon the execution of this agreement; And the balance in equal payments of $200 each in three months and six months respectively after the date of the execution of this agreement, without interest, promissory notes payable to the said party of the first part for the said amounts on the terms aforesaid to be given by the party hereto of the second part. And for and in consideration of the premises hereby absolutely assigns, transfers, conveys and sets over to the said party hereto of the second part his said undivided one-tenth of the said undivided one-quarter interest in the said Cork and Dublin mineral claims, and hereby absolutely confirms and makes absolute in every respect each and every term, condition, covenant, agreement, transfer, power and authority contained in the said assignment of the said 9th day of August, 1902, and hereby declares the party hereto of the second part is now the absolute owner at law and in equity without any reservations whatsoever of the said judgment and of every part of the same and of all interest, right, powers, privileges and benefits therein contained or affected thereby; for him the said party hereto of the second part to have and to hold as his sole and absolute estate forever;

"It is hereby understood and agreed that the party hereto of the second part is given all the powers and privileges with regard to the said undivided one-tenth of the said undivided one-quarter as fully as the same is stated in the said assignment of the 9th day of August, 1902."

HUNTER, C.J.

It is quite obvious on the face of these documents that all except the last take their root in a champertous bargain; but, if confirmation of this is necessary, the admissions of Giegerich in discovery and at the trial put the matter beyond doubt. That being so, the authorities shew that Giegerich's title to Briggs' interest, except the tenth dealt with by the last instrument, is void.

It is well settled that champerty, *i.e.*, a bargain by which A, a stranger to B, having no interest recognized by law in a given property, agrees to help B to recover such property in a Court of Justice in consideration of getting a portion of the fruits of the suit, is an indictable offence by the

common law of England and that such a bargain, being *malum in se*, is null and void, and is barren of all civil rights whatever. Sir E. Taschereau, C.J., says in a recent decision of the Supreme Court of Canada, in **Meloche* v. *Deguire*, as yet unreported, but of which we have received a copy for our perusal: "Now it is as undeniable, I take it, that every contract into which champerty enters as a consideration is null and void, *a nullite d'ordre public*, and that an action founded upon such a contract cannot be maintained." And he also says, in effect, that the criminal law of England on this subject was introduced into the several Provinces of Canada by the various English Law Introduction Acts (in this case R.S.C. 1886, Cap. 144, Sec. 2) which conclusion had already been arrived at by a Divisional Court in *Hopkins* v. *Smith* (1901), 1 O.L.R. 659.

As to the one-tenth, however, I think that the transfer was valid, as, whatever doubt might arise on the earlier instruments as to the nature of the consideration for the transfer of this portion of the interest, I see no reason for thinking that the real nature of the transaction is misrepresented by the assignment of August 16th, and, if this is so, then this document shews that the one-tenth was the subject of an independent and legitimate bargain.

HUNTER, C.J.

I, therefore, think that as to the one-tenth part of Briggs' interest in the claims, Giegerich's title thereto is valid; but that the remainder of the subject-matter of the litigation, including the judgment, passed to Fleutot by Briggs' assignment to him of the 18th of December, 1902.

As to the costs, the appellant ought to have the costs of the appeal, having succeeded as to most of the subject-matter; but each party should pay his own costs of the action, the plaintiff having sued for at least ten times too much and having brought charges of fraud which were not substantiated.

DRAKE, J.: The facts of this case are rather complicated. A plot of mining ground was located by Briggs on 17th July, 1899, as the Monarch and Two Kids. On the 9th of December, following, Newswander bought these claims as agent for Doras and

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* Since reported (1903), 34 S.C.R. 24.

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Darginac for $500, and if the purchaser formed a joint stock company, Newswander might allot shares to Briggs; but Briggs was to have no right of action to demand any shares, it being optional with Newswander to allot or not as he pleased. On the 9th of December, 1899, in order to clear the titles to these claims, the locations were allowed to run out, and they were re-staked by Doras and Darginac as Cork and Dublin; and these gentlemen verbally agreed through Newswander to sell to Fleutot as soon as Crown grants were obtained; and on the 12th of May, 1900, this agreement for sale was confirmed by Newswander, the price to be left to Fleutot.

On the 12th of June, 1900, another agreement was made between Briggs and Newswander, whereby Newswander agreed to form a company to take over these claims, and Briggs was to have a reasonable amount of stock in the company, the amount to be amicably arranged between them.

According to the evidence, the defendant when buying from Doras and Darginac through Newswander had no notice of any claim by Briggs, in fact at that time Newswander had not negotiated with Briggs. The second document under which the action was brought and decided by the Supreme Court was not shewn to the defendant, and no intimation of its contents given; in fact the document itself is nearly illegible, and was stated to the defendant to be a private arrangement between Newswander and Briggs, and was made long subsequent to the agreement to sell to the defendant. Even if the defendant had notice of it, it was not binding on him, as his equity to the claims was long anterior to the claim now set up by Briggs.

DRAKE, J.

In January, 1901, Fleutot agreed to give Newswander $2,000 for the purchase money of the claims in pursuance of the letter of May 12th, 1900, which was satisfactory to Newswander. The conveyances to Fleutot were completed on 3rd January, 1901.

Newswander not having carried out his agreement with Briggs, the latter brought an action against Newswander, Doras and Darginac on the 10th of November, 1900, and the Supreme Court of Canada adjudged that Briggs was entitled to a quarter of these two claims. This judgment was recovered 15th May, 1902.

Fleutot was not made a party to this action.

This present action was commenced in November, 1902, by Briggs and a man named Giegerich against Fleutot, and a *lis pendens* filed, and the claim put forward is that Giegerich was the owner of the quarter interest adjudged to Briggs, and asking for a direction that the transfer by Doras and Darginac of these claims, Cork and Dublin, was fraudulent and void, and made for the purpose of defeating the plaintiffs from realizing their costs of the action of *Briggs* v. *Newswander and others.* Giegerich appears from the evidence to have financed Briggs in the suit against Newswander, Doras and Darginac on the condition that he was to have half of the amount Briggs might recover in that action, and by a subsequent agreement, 12th September, 1901, as the expenses of an appeal to the Supreme Court being considerable, he increased his demand to nine-tenths of whatever was recovered; and this arrangement was reduced into writing pending the litigation and prior to the judgment of the Supreme Court, and was duly executed by Briggs. Fleutot, as I have pointed out, was no party to this action, and is not bound by the judgment therein obtained.

On 23rd May, 1902, Briggs assigned the whole of his quarter interest given him by the judgment of the Supreme Court to Giegerich, in pursuance of his agreement, and also assigned the judgment and all benefit and advantage thereof. Yet on the 9th of August, 1902, Briggs issued execution against Newswander to recover the amount due under the said judgment for costs, although he had parted with his judgment and all interest thereunder.

DRAKE, J.

The defendant sets up in his defence that the agreements between Briggs and Giegerich are void for maintenance and champerty, and the facts shew that Giegerich was maintaining this action, and such an agreement is void as being contrary to public policy. Fleutot has, in my opinion, such an interest in the subject-matter of the action that he is entitled to set up this defence. His equitable right to the claims arose before the agreement of the 12th of July, 1901, under which Briggs claims, and in pursuance of which agreement he had a clear title subsequently conveyed to him. A person entitled to dispute a

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champertous agreement is one who has an interest in the subject-matter of the litigation. In *Harrington and Milligan* v. *Long* (1833), 2 Myl. & K. 590, the defendant was executrix of the deceased testator. The plaintiff Milligan had obtained a decree for £95 in the original action. This he assigned to Harrington in consideration of £60, who gave an indemnity to Milligan against the expenses incurred, or to be incurred, in prosecution of the suit. The defendant took an objection that this was maintenance, and the Master of the Rolls dismissed the bill on this ground, and that order was confirmed by the Lord Chancellor; and in *Reynell* v. *Sprye* (1852), 1 De G. M. & G. 660, where A. having an uncertain right, B. undertook the ascertaining of that right on the terms of the expenditure being his, he was to have the benefit of what should be so obtained, held (whether such an agreement amounted strictly to champerty or maintenance so as to constitute a punishable offence or not) this contract must be considered against the policy of the law, and such as a Court of Equity ought to discourage and relieve against.

The plaintiff relied on the case of *Ram Coomar Coondo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186, at p. 208, where it was held that the English laws of maintenance and champerty are not in force as specific laws of India unless they were plainly appropriate to the condition of things in India, and introduced there as specific laws. Under our law, the laws of England, both civil and criminal, were introduced into this Province as such existed in 1858 as far as applicable, and it can hardly be denied that the same reasons which existed in England for the laws against champerty and maintenance exist here.

DRAKE, J.

In *Alabaster* v. *Harness* (1894), 2 Q.B. 897, Mr. Justice Hawkins elaborately discusses the law of maintenance, and his judgment was affirmed and approved on appeal: (1895), 1 Q.B. 339; and he says that to allow a person to assist another in litigation upon matters which do not directly concern him would lead to more strife and inconvenience than could possibly result from the present law, which is that no man may intermeddle to support or defend a suit which in the result can determine nothing which he has an interest in.

With regard to the other one-tenth of Briggs' interest, as this

has been dealt with by Briggs himself, no question arises on this appeal, the defendant not contesting the claim.

The result is, in my opinion, that the agreements between Briggs and Giegerich are void as against public policy, and the appeal should be allowed with costs.

IRVING, J.: I think the appeal should be allowed. It is unnecessary for me to again recite the facts.

The evidence discloses, beyond question, that Briggs and Giegerich entered into an arrangement under which Giegerich was to provide funds for carrying on the action of *Briggs* v. *Newswander* and the appeal in that case to the Supreme Court of Canada, and in the result he obtained, as the price of his support, nine-tenths of the property in dispute in that action.

Briggs and Giegerich then brought this action against Fleutot and obtained from the learned trial Judge a decree that defendant Fleutot was a trustee for the plaintiff of an undivided one-quarter share in the Cork and Dublin mineral claims. By the decree it was ordered that the one-quarter interest in two said claims should vest in the plaintiff as his sole property and estate.

The point taken on the appeal by the defence was that the assignment under which Giegerich is claiming was and is null and void as being champertous, and that Fleutot can take advantage of this illegality so as to defeat the plaintiff's claim.

Now, it may be convenient, having regard to some provincial legislation referred to during the course of the argument to draw attention to the subject of maintenance and in particular to the species of maintenance known as champerty.

"Maintenance, *manutenentia*, is derived of the verbe *manutenere*, and fignifieth in law a taking in hand, bearing up or upholding of quarrels and fides to the difturbance or hindrance of common right; *Culpa eft rei fe immifcere ad fe non pertinenti;* and it is twofold, one in the countrey, and another in the court. For quarrels and fides in the court the ftatutes have inflicted grievous punifhments. But this kinde of maintenance of quarrels and fides in the countrey is punifhable only at the fuit of the king, as it hath beene refolved. And this maintenance is called *manutenentia*, or *manutentio ruralis*, for example, as to take poffeffions, or keepe poffeffions, whereof Littleton here fpeaketh, or the like.

"The other is called *curialis*, becaufe it is done *pendente placito*, in the courts of juftice; and this was an offence at the common law, and is threefold.

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"Firft, to maintaine to have part of the land, or any thing out of the land, or part of the debt, or other thing in plea or fuit; and this is called *cambipartia*, champertie.

"The fecond is, when one maintaineth the one fide, without having any part of the thing in plea, or fuit; and this maintenance is twofold, generall maintenance, and fpeciall maintenance; whereof you fhall reade at large in our bookes, which were too long here to be inferted.

"The third is when one laboureth the jury, if it be but to appeare, or if he inftruct them, or put them in feare, or the like, he is a maintainer, and he is in law called an embraceor, and an action of maintenance lyeth againft him; and if he take money, a *decies tantum* may be brought againft him. And whether the jury paffe for his fide or no, or whether the jurie give any verdict at all, yet fhall he be punifhed as a maintainer or embraceor either at the fuit of the kind or partie."

From this we find that champerty was an offence at Common Law.

A number of statutes against maintenance have been passed; these were merely declaratory of the common law, adding additional penalties. See *Pechell* v. *Watson* (1841), 8 M. & W. 691.

As to champerty, that offence was recognized in England as a criminal offence by statute as late as 1879 (see 42 & 43 Vict., Cap. 59) where the section (5) of 31 Elizabeth permitting the offence of champerty to be laid in any county, was repealed except as to criminal proceedings. In Ontario it is an indictable offence: *Hopkins* v. *Smith* (1901), 1 O.L.R. 659.

Since the argument of this appeal, the Supreme Court of Canada had delivered a judgment in which champerty is pro-

IRVING, J.

nounced to be an offence against the Criminal Law of Canada; (and see Russell on Crimes, 5th Ed., Vol. 1, p. 356).

On the civil side of the Courts we find that a number of decisions have been given.

In *Stevens* v. *Bagwell* (1808), 15 Ves. 139; 10 R.R. 46; where on bill filed to set aside an agreement made by a Lieutenant in the Navy for the sale of prize money, or rather, his chance of prize money, Sir Wm. Grant, M.R., expressed his opinion that the agreement was void from the beginning as amounting to that species of maintenance which is called champerty, *viz.*: the unlawful maintenance of a suit in consideration of a bargain for part of the thing or some part out of it.

And he referred to a case of *Wallis* v. *The Duke of Portland* (1797), 3 Ves. 494, where Lord Loughborough, then Lord

Chancellor, said all the books state the offence to be, not upon the statutes, but it is repeatedly said to be *malum in se*, and those acts that are acts of maintenance in a suit not subject to particular provisions of the statutes, are punishable by indictment at the King's suit.

And later on, at p. 502:

"The case disclosed is of this nature; an undertaking supposed between the plaintiff and the defendant, that the latter would contribute to the expense of a petition against the return of a member of Parliament in the whole or a given extent. That is an engagement between two parties to the injury and oppression of a third; in short, it is maintenance; for maintenance is not confined to supporting suits at common law. In the first book you open upon the subject (one naturally looks into Hawkins) it is stated to be either *in pais* or by prosecuting suits. Maintenance *in pais* is punishable by indictment. Maintenance by prosecuting suits, without distinguishing what suits, is punishable by an action by the party grieved also; and that is an action at common law. Statutes prohibiting particular species of maintenance add penalties; but it is laid down as a fundamental authority, that maintenance is not *malum prohibitum*, but *malum in se;* that parties shall not by their countenance aid the prosecution of suits of any kind; which every person must bring upon his own bottom and at his own expense. There is no case in contradiction to this."

IRVING, J.

In *James* v. *Kerr* (1889), 40 Ch. D. 449 at pp. 456 to 458, Kay, J., has collected a number of cases and authorities.

I think these authorities establish that this agreement is champertous and *malum in se*. Then, the question is, can Fleutot take advantage of its illegality?

In 1775, Lord Mansfield said, * "The objection that a contract is immoral or illegal as between plaintiff and defendant, founds at all times very ill in the mouth of the defendant. It is not for his fake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real juftice, as between him and the plaintiff, by accident, if I may fo fay. The principle of

* *Holman* v. *Johnson*, 1 Cowp. 341 at p. 343.

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public policy is this: *ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his caufe of action upon an immoral or an illegal act. If, from the plaintiff's own ftating or otherwife, the caufe of action appears to arife *ex turpi caufa*, or the tranfgreffion of a pofitive law of this country, there the Court fays he has no right to be affifted. It is upon that ground the Court goes; not for the fake of the defendant, but becaufe they will not lend their aid to fuch a plaintiff."

In 1892, Lindley, L.J., made use of very much the same language in *Scott* v. *Brown, Doering, McNab & Co.* (1892), 2 Q.B. 724.

Mr. *Taylor* relies on *Knight* v. *Bowyer* (1858), 27 L.J., Ch. 520, as an authority against Fleutot's defence. In that case the Lord Justice Turner points out that the matter does not hinge upon a question of the mere interests of the parties; that if the appellants who were objecting that the title of some of the plaintiffs was illegal and invalid as being affected by the laws relating to champerty, had shewn that the purchase was illegal and void upon principles of public policy, the objection would have been an answer to the suit (p. 528). This case seems to be an authority in favour of the defendant in my view of the facts.

IRVING, J.

I agree that the costs should go in the terms of the Chief Justice's judgment.

Appeal allowed with costs, and judgment appealed from set aside except as to a one-fortieth interest in the claims, and of it defendant was declared a trustee for plaintiff: each party to pay his own costs of the trial.

MILTON v. THE CORPORATION OF THE DISTRICT OF SURREY. (No. 2).

IRVING, J. (In Chambers)

1904

Feb. 17.

MILTON v. SURREY

Costs—Appeal stood over for settlement at suggestion of the Court—Counsel fee—Costs of negotiations.

After an appeal was opened, it was stood over at the suggestion of the Court in order to give the parties an opportunity to settle; the negotiations for settlement were unsuccessful, and the appeal was ultimately dismissed with costs:—

Held, that the successful party was entitled (1.) to a counsel fee (under item 224 of the Tariff of Costs) on the first day's hearing and

(2) to an allowance for costs of the negotiations for settlement under item 81 of Schedule No. 4.

APPLICATION to a Judge in Chambers to review the taxation of certain items of the bill of costs of the appeal herein, disallowed by the District Registrar at Vancouver.

The appeal had come up for hearing in April, 1903, and argument had been heard in part when, owing to alleged errors in the stenographer's notes, the Court adjourned the hearing and advised the parties to endeavour to arrive at a settlement. Negotiations for a settlement were carried on between the parties to the action, but a settlement was not arrived at and the appeal came on for hearing at the November, 1903, sittings of the Court at Vancouver, and was dismissed with costs.

Statement

On taxation, the Registrar allowed $25 counsel fee on the April hearing as "costs of the day," under item 234 of schedule 1 of the Tariff of Costs, and refused to allow any costs of the negotiations for settlement.

Reid, for the application.

W. J. Whiteside, contra.

IRVING, J.: The successful party should have been allowed a counsel fee under item 224 of the Tariff of Costs, on the first day's hearing in April, and he also should have been allowed costs of the negotiations for settlement under item 81 of Schedule 4 of the Tariff.

Judgment

Order accordingly.

HENDERSON CO. J. (In Chambers)

1904

April 22.

MACDONELL v. PERRY

MACDONELL v. PERRY.

County Court—Costs—Of adjournment when no Court room available.

No costs of an adjournment of trial will be allowed to the successful party where the adjournment was caused by reason of there being no Court room available.

APPEAL from the Registrar on a taxation of a bill of costs heard at Vancouver on the 23rd of April, 1904.

Judgment was entered for the plaintiff after the trial of the action; on one occasion the trial had been postponed as no Court room was available, though both plaintiff and defendant were ready to go on and a Judge was in attendance.

Statement

The plaintiff having succeeded in the action, asked for the costs of this adjournment, which were allowed by the Registrar.

Walsh, for the appeal.
Brydone-Jack, contra.

HENDERSON, Co. J.: Where for some reason, beyond the control of counsel, as in the present case, the trial does not go on, no costs are to be allowed. In the present case, it is not materially different from the case of a Judge being absent. No costs of the adjournment will therefore be allowed.

Judgment

DUFF, J.

1904

May 26.

RUSSELL v. BLACK

RUSSELL v. BLACK.

Costs—On County Court scale—Jurisdiction to order—Supreme Court Act, 1903-4, Sec. 100.

In a Supreme Court action, the Judge has no jurisdiction to order costs on the County Court scale on the ground that the action might or should have been brought in the County Court.

TRIAL at Vancouver on 26th May, 1904.

Judgment was recovered by the plaintiff for the sum of $227.

DUFF, J.

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May 26.

RUSSELL v. BLACK

Counsel for defendant asked that as the County Court would have had jurisdiction in the matter, that costs should only be allowed on the County Court scale, citing sections 100 and 110 of the Supreme Court Act.

For plaintiff it was contended that the Judge had no jurisdiction to so order.

F. R. McD. Russell, for plaintiff.
Higgins, for defendant.

DUFF, J.: I have no jurisdiction in the matter, and costs must follow the event on the Supreme Court scale. Judgment

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IN THE MATTER OF THE WINDING UP ACT AND IN THE MATTER OF THE GIANT MINING COMPANY, LIMITED.

FULL COURT

1904

April 25.

IN RE GIANT MINING CO.

Winding up—Leave to proceed with action—Debenture holder—Judgments registered prior to winding up—Effect of.

The fact that prior to a winding-up order judgments against the Company being wound up were registered, will not disentitle a mortgagee or a debenture holder of his right to obtain leave to proceed with an action to enforce his security.

APPEAL from an order of MARTIN, J., dismissing an application by the South African Venture Syndicate, Limited, Laura N. Cumberland and Phyllis Bentley, holders of debentures issued by the Giant Mining Company, Limited, for leave to proceed with an action against the said Company. Statement

The appellants who sued on behalf of themselves and of all the debenture holders of the Giant Mining Company, Limited, claimed, in the indorsement on the writ as amended on 23rd February, 1904, payment of the amount due on the debentures,

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a receiver and foreclosure or sale: the writ was issued 31st December, 1903.

The debentures were issued subject amongst others to the following conditions:

"The debentures of this series shall rank *pari passu* as a first charge upon the property hereby charged without any preference or priority one over another, and such charge shall be a floating security, but so that so long as any of the said debentures shall be outstanding the Company shall not in any way charge or mortgage or purport to charge or mortgage the said property or any part thereof so as to rank or purport to rank *pari passu* with or in priority to the charge hereby created.

"Notwithstanding the charge hereby created, the Company shall be at liberty in the course of the business and for the purpose of continuing and carrying on the same to use, employ, sell, exchange or otherwise deal with all or any of the personal chattels of the Company."

Statement

On 29th December, 1903, a judgment by the Bank of Montreal was recovered against the Company, and an execution was issued the same day, and the judgment was registered in the Land Registry Office the next day. Subsequently three other judgments were obtained against the Company.

On 9th January, 1904, a receiver on behalf of the plaintiffs and other debenture holders was appointed, and on 3rd March the Company was ordered to be wound up.

The application for leave to proceed with the action was heard on 18th March, 1904, before MARTIN, J.

J. H. Lawson, Jr., for the applicants.
A. E. McPhillips, K.C., contra.

MARTIN, J.

MARTIN, J.: Putting aside for the present all questions of insufficiency of material and dealing with the matter on the merits, I am, in the special circumstances of this case and following the principle laid down in the very similar case of *Andrew* v. *Swansea, &c., Building Society* (1880), 50 L.J., Q.B. 428, of the opinion that to allow the applicants to proceed with their action would be to largely defeat the spirit of the Winding Up Act. If one of the 500 debenture holders is to be allowed to

proceed, all the others would be entitled to do so. Further, it has not been shewn that the applicants can not have full recognition of their claim before the liquidator, and by my refusal they suffer no loss.

The appeal was argued at Vancouver on 25th April, 1904, before HUNTER, C.J., IRVING and DUFF, JJ.

A. H. MacNeill, K.C., for appellants: A mortgagee or a debenture holder will have leave to proceed with his action to realize his security, except under special circumstances, or unless the same relief could be obtained in the winding up as in the action: see Emden's Winding Up, 6th Ed., 126, and cases there cited. Here there are no special circumstances to oust the ordinary rule.

Davis, K.C., for respondents: There are special circumstances here against the general rule, and besides the debentures can be dealt with in the winding up: see *In re St. Cuthbert Lead Smelting Co.* (1866), 35 Beav. 384 and *Re The Essex Land and Timber Co.* (1891), 21 Ont. 367. A debenture holder is not a mortgagee in the ordinary sense; he holds a floating charge as to the nature of which see Lindley's Law of Companies, 6th Ed., 324.

Argument

There are four execution creditors, all of whom are in favour of the liquidator conducting the Company's affairs.

The effect of the mortgagee being allowed to proceed would be that the Bank of Montreal whose judgment was prior to any intervention should be allowed to proceed.

[DUFF, J.: Doesn't section 66 of the Winding Up Act cut out a judgment creditor's priority ?]

Section 2 of the Land Registry Act and the Judgments Act put an execution creditor who has registered his judgment in the same position as a mortgagee.

Per curiam: The appeal is allowed.

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April 18.

LOVE v. THE NEW FAIRVIEW CORPORATION, LIMITED.

LOVE v. FAIRVIEW

Fire Escape Act—Neglect of statutory duty—Injury caused thereby—Injury to guest while rescuing fellow-guest from fire—Contributory negligence—Volenti non fit injuria—Misdirection—New trial.

Where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor, notwithstanding that a penalty is imposed for breach of the statutory duty.

Groves v. *Lord Wimborne* (1898), 2 Q.B. 402, applied.

The defence arising from the maxim *volenti non fit injuria* (the guest being aware of the lack of means of fire escape and having made no objection) is not applicable where the injury arises from a breach of a statutory duty.

Baddeley v. *Earl Granville* (1887), 19 Q.B.D. 423, applied.

The fact that the guest delayed his exit in order to rescue a fellow-guest and thereby lost his own chance of getting out safely is not as a matter of law "contributory negligence;" whether the plaintiff did anything which a person of ordinary care and skill would not have done under the circumstances or omitted to do anything which a person of ordinary care and skill would have done, and thereby contribute to the accident, was for the jury to decide.

Judgment of HUNTER, C.J., set aside and new trial ordered, IRVING, J., dissenting.

APPEAL from judgment of HUNTER, C.J., at the trial before him with a special jury.

Statement

The plaintiff lived at the Fairview Hotel in Fairview, and had lived there for a year; for four years previously he had got his meals there, but had not lodged there. The defendants were the proprietors of the hotel, the bedrooms on the third story of which were not supplied with ropes or any other means of escape from fire as required by the Fire Escape Act. In October, 1902, a fire occurred in the hotel; the plaintiff, whose room was on the third floor, was roused, and on going into the passage way outside his room saw fire at the bottom of the stair shaft; he went back into his room and threw his trousers containing some

money out of the window; he then came back to the passage and went to the room of a Miss Hunt, with whom he had been "keeping company," and dragged her to a window in a passage way where there was a fire escape ladder and dropped her out and got out himself. In getting out, the plaintiff was burned, and for his injuries he sued for damages.

The action was tried at Vancouver in March, 1903, before HUNTER, C.J., and a special jury.

The following are extracts from the learned Chief Justice's charge to the jury:

"If I saw some person's child playing in front of an express train, and, considering the child's life in danger, and using my own judgment as to whether or not I could save the child, and attempted to save it, and in attempting to save it I got injured, I would have no action against the company, because it was my own recklessness or daring, if you choose to call it so, that caused it. Of course it would be a very praiseworthy act, but the law does not recognize heroism as a set off to what is really negligence, or a willingness to incur danger. The real fact of the matter is I have voluntarily incurred the risk, and if I did that I have my own judgment or daring to thank for the result, and I cannot complain of the other party's negligence.

"It is also suggested that in Love's case his injury was due to the absence of a rope. Now, it is clear that on the hypothesis that he went to rescue Miss Hunt, and that he intended to bring Miss Hunt to that fire escape, the absence of a rope had nothing absolutely to do with this man's injuries of which he complains . . . . It is absolutely of no consequence and is utterly irrelevant in the suit between Love and this Corporation, because Love intended to head for this fire escape and did so, and as a matter of fact, he actually reached the ground by means of it, and the only injuries proved to have occurred to him were injuries from fire and not injuries caused by being dropped out of window.

Statement

"It all comes down to this—whether it was Love's intention when he found this place on fire, first of all, to throw his property out of window, and then do all he could to rescue Miss Hunt,

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or whether his rescue of Miss Hunt was a mere unforeseen incident in making his egress from the building."

The questions put to the jury and the answers were as follows:

"(1.) Did the plaintiff receive the injuries complained of while a lodger in the defendant's hotel? Yes.

"(2) What were the injuries received, and how caused? Burns by fire.

"(3.) Did plaintiff know before fire the position of the fire escape? Yes.

"(4.) Was the fire escape a reasonably safe and convenient means of egress from the rooms on the third floor? No.

"(5.) If not, in what respect was it not so? No platform or hand rail.

"(6.) If not, was the plaintiff injured by means of such defect, and how? He was not injured through such defect.

"(7.) Was there a rope provided in the plaintiff's room which could be used as a means of escape from fire? No.

"(8.) Was the plaintiff aware that the building was on fire before he threw his trousers out of the window? Yes.

"(9.) Did the plaintiff delay his exit from the building in order to throw his trousers out of the window and to rescue Miss Hunt? Yes.

"(10.) If yes, could the plaintiff have reached the fire escape in safety if he had not so delayed his exit? Yes.

Statement

"Damages, if any? None."

Counsel for plaintiff took exception to the charge that the absence of a rope was immaterial, and asked that the questions put in the *Bridges* v. *Directors, &c. of North London Railway Co.* (1874), L.R. 7 H.L. 213, be put, and especially the question "Did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances and thereby contribute to the accident?"

His Lordship refused to put the question.

Judgment was entered for the defendants, and the plaintiff appealed, the appeal being argued on the 14th and 16th of

November, 1903, at Vancouver, before DRAKE, IRVING and MARTIN, JJ.

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Davis, K.C., for appellant: The jury should have been asked whether the plaintiff acted as a reasonable man would and should have acted under the circumstances; a third party is entitled to try to save human life, and the law is not so inhuman and unjust as not to afford him some protection or relief; the case put in the charge is altogether different, as here plaintiff was in danger; there was a common danger.

The jury were misdirected as to the absence of ropes; the plaintiff's case is founded on the absence of ropes; the only place he could head for was the fire escape; if there had been a rope in Miss Hunt's room he could have lowered her and then got down himself, as there was no flame on that side. The jury should have been asked if the neglect to have ropes was negligent, and whether such negligence was the cause of the accident. The only ground on which defendants can resist a new trial is whether or not the answers to questions 9 and 10 entitle them to judgment, *i. e.*, whether as a matter of law delay to save life is contributory negligence. A similar case is *Anderson* v. *The Northern Railway of Canada* (1875), 25 U.C.C.P. 301, but in it the rescuer who was held not entitled to recover was in no danger himself and voluntarily undertook the risk. That case was wrongly decided; it is largely overruled by *Connell* v. *Town of Prescott* (1892), 20 A.R. 49; (1893), 22 S.C.R. 147. There is no authority binding on this Court shewing that such delay as a matter of law is contributory negligence; it is a question for the jury to decide according to the circumstances of each case. There is a duty on the strong to help those who are not able to protect themselves. He cited *Woods* v. *Caledonia Railway Co.* (1886), 23 Sc.L.R. 798; *Roebuck* v. *Norwegian Titanic Co.* (1884), 1 T.L.R. 117; *Jenoure* v. *Delmege* (1891), A.C. 73 at p. 77; *Thorn* v. *James* (1903), 14 Man. 373; *Scaramanga* v. *Stamp* (1880), 5 C.P.D. 295 at p. 304 and Beven's Employer's Liability, 2nd Ed., 77.

Argument

Bodwell, K.C., for respondents: It is a well settled principle that the law does not reward heroism however praiseworthy;

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where a person acts instinctively and impulsively without time for deliberation, he cannot be charged with contributory negligence, but if there is an instant for deliberation he acts consciously, and the case is different; the real question is was it the instinctive act of a reasonable man or the deliberate act of a reasonable man. That is the principle in the cases cited. The fact that plaintiff went back for his trousers and threw them out of the window to save the money that was in the pockets shews that he had time for reflection.

We have given notice of cross appeal; the plaintiff did not make out a case, and it should not have been left to the jury. The plaintiff's injuries consisted of burns in getting to the fire escape; an innkeeper is not an insurer of his guests, and to make him liable the injury must be traced directly to the lack of a fire escape; here plaintiff reached the fire escape without injury. He cited *Sewell* v. *Moore* (1895), 31 Atl. 370 at p. 373; *Huda* v. *American Glucose Co.* (1897), 48 N.E. 897 at p. 899; *Pauley* v. *Steam-Gauge & Lantern Co.* (1892), 29 N.E. 999; *Weeks* v. *McNulty* (1898), 48 S.W. 809 at p. 810; *Willy* v. *Mulledy* (1879), 78 N. Y. 314.

As to waiver. Plaintiff knew all about the lack of ropes, and so waived any right of action he might otherwise have had: see *Armaindo* v. *Ferguson* (1899), 37 N.Y. App. Div. 160.

Argument

In any case there is no cause of action on the statute; some statutes give a civil action for damages where the provisions of the statute are not complied with, but the Fire Escape Act does not; where a penalty is provided (see section 7) the presumption is that there is no right of action; it is always a question on the construction of the statute. He cited *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441 at p. 447, questioning *Couch* v. *Steel* (1854), 3 El. & Bl. 402; *Hayes* v. *Michigan Central R. R. Co.* (1883), 111 U. S. 228; *Vallance* v. *Falle* (1884), 13 Q.B. D. 110; *Cowley* v. *Newmarket Local Board* (1892), A.C. 345 at p. 352; *Saunders* v. *Holborn District Board of Works* (1895), 1 Q.B. 64 at p. 68 and *Ross* v. *Rugge-Price* (1876), 1 Ex. D. 269.

Davis, in reply: Plaintiff was injured by the flames at the window; if there had been a rope in his room or in Miss Hunt's room he could have got out safely. The defendants' point that

the statute gives no right of action is not open since the decision in *Groves* v. *Lord Wimborne* (1898), 2 Q.B. 402; see also *Fahey* v. *Jephcott* (1901), 2 O.L.R. 449.

As to waiver. That must be a question for the jury; it does not apply where there is a breach of statutory duty. The question of whether plaintiff's act was impulsive or deliberate is for the jury. He cited *Eckert* v. *The Long Island Railroad Co.* (1871), 43 N.Y. 502.

Cur. adv. vult.

18th April, 1904.

DRAKE, J.: The plaintiff applies for a new trial on the grounds of non-direction and mis-direction of the learned trial Judge.

The facts are not in dispute. It appears that the plaintiff was living at the Fairview Hotel on the third story, and he had resided there for upwards of twelve months. A fire occurred in October, 1902. The plaintiff was roused, and on going into the passage way he found fire at the bottom of the stair shaft. He returned to his room, opened his window and threw his trousers containing his money out. He then went next door where a Miss Hunt was sleeping, and endeavoured to save her. He dragged her to a fire escape at the end of a passage, and in doing so got burnt. Having got Miss Hunt out of the window, he went down himself, being further burnt in so doing.

The Fire Escape Act, Cap. 8, R.S.B.C. 1897, makes it compulsory for the owners of hotels or other public buildings to have fire escapes in every room in the shape of ropes properly fastened. There were no such ropes provided, and the only escape provided was a ladder at the end of the passage to which the plaintiff went.

The learned Judge in his summing up instructed the jury that the attempt to save life might be an act of heroism, but it was a risk voluntarily incurred, and therefore negligence; and the jury found that the plaintiff was delayed by returning to his room, throwing his trousers out and attempting to save Miss Hunt; and if he had not done so he could have escaped in safety. The plaintiff objects that the question that ought to have been put as to contributory negligence is the one that was stated in

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Bridges v. *North London Railway Co.* (1874), 43 L.J., Q.B. 160; that is, "did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances, and thereby contribute to the accident?" This question would, when explained, have brought home to the jury the fact whether under the circumstances the plaintiff had been guilty of contributory negligence. The attempt to save life is not necessarily contributory negligence where both persons are equally in danger. The case of *Anderson* v. *The Northern Railway of Canada* (1875), 25 U.C.C.P. 301, relied on by the defendants has been questioned, and I think is distinguishable from the present. There the man was killed in attempting to save a woman who was in danger of being run over by a train, and no negligence shewn by the railway company. Here there was negligence in the defendants in not providing the statutory ropes for each room which the evidence shews would have afforded a means of safety, as there was no fire on that side of the building. In the *Anderson* case there was no breach of duty in the railway which contributed to the accident; it was a praiseworthy volunteer attempt to rescue one in great danger. In the Scotch case, *Woods* v. *Caledonia Railway Co.* (1886), 23 Sc. L.R. 798, where the keeper at a gate at a level crossing, contrary to his duty, allowed some persons to cross a line when a train was expected, whereby one was killed, it was held that whether or not the woman was killed in attempting to save her companion, the company was liable. *Mr. Bodwell* in his argument contended that when a person acted instinctively on the spur of the moment in attempting to save life it would not be contributory negligence as distinguished from the case of a man who has time to think the matter over before he acts, and cited cases in support of his view; but we have to judge by the circumstances of the case before us. A fire in an inflammable wooden building rapidly gaining on the upper floors, what time has a man to reflect. He acts on impulse at the time. He might have saved himself and left Miss Hunt to perish, but in so doing he would have disgraced his manhood, and his act was certainly one of impulse although it exposed him to danger. In

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Scaramanga v. *Stamp* (1880), 5 C.P.D. 295, the learned Judge said the impulsive desire to save human life is one of the most beneficial instincts of humanity.

His further contention is that he knew there was no rope in the bedrooms, and therefore must be taken to have waived its absence. I do not think that the mere fact of knowledge of a violation by the defendants of a statutory duty can be held to be a waiver, and make the plaintiff responsible for the neglect of the defendants: *Groves* v. *Lord Wimborne* (1898), 2 Q.B. 402; *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 416, where it was held that an action will lie for an injury occasioned to a workman by the breach of a statutory duty. That case disposes of the argument that the statute gave no right of action to a person injured, and therefore the plaintiff could not recover; but it is a question for the jury whether or not the neglect of the defendants in not providing a rope in the bedroom was the cause of the injury the plaintiff sustained. This was not left to the jury.

DRAKE, J.

The principle laid down by Lord Ellenborough in *Jones* v. *Boyce* (1816), 1 Stark. 493, is, if one places another in such a situation that he must adopt a perilous alternative, the party so acting is responsible for the consequences.

The question of contributory negligence implies some act of omission or commission which assisted in causing the accident. When both parties are in equal danger and one endeavours to save the other, and thereby is injured, it is not contributory negligence. The case is singularly bare of authority, but in the American reports the point has been frequently discussed.

In my opinion a new trial should be allowed; costs of the first trial to abide the result.

IRVING, J.: This is an application on the part of the plaintiff for a new trial, and a cross-appeal by the defendants from the refusal of the learned Chief Justice to non-suit the plaintiff, and to enter judgment for the defendants notwithstanding the findings.

IRVING, J.

The plaintiff sues for damages for injuries alleged to have been sustained by him through the negligence of the defendants

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in omitting to comply with that provision of the Fire Escape Act which requires that each bedroom in a hotel should be provided with a suitable fire escape. The other acts of omission complained of in the statement of claim were dropped.

The plaintiff was the only witness as to what took place on the day in question. His story in the box was to this effect: That after going down the west corridor some eight or ten feet, he was driven back by the flames; that he went to his window where a rope should have been placed as a means of escape; that he threw out of the window his clothes; that without knowing how or why (it is suggested on account of the excitement natural to a man in these circumstances) he turned back again into the corridor, and after going down the corridor some eight or ten feet he was again knocked down by the flames. Then remembering that he could reach the hall leading to the outside iron fire escape by passing through a bedroom, he broke open the door of that room for that purpose only, and not with any idea of saving Miss Hunt; but seeing her there in her room he gave her assistance by carrying her along to the outside iron fire escape. That when carrying her down the eastern corridor he stooped to avoid the flames that were coming up by the stairway, but nevertheless he was then burnt by the flames.

IRVING, J.

The plaintiff was cross-examined at great length, but denied that his delay in leaving the building was on account of his determination to save Miss Hunt. He denied that he had formed the idea of saving Miss Hunt. He denied that he broke open her door with the idea of rescuing her. He knew there was no fire escape in his own room, but he did know where the outside ladder was situate, and it was in trying to get to it by going through Miss Hunt's room that he found her.

Evidence was called for the defence, and some five persons to whom the plaintiff had, immediately after the fire, made statements concerning the matter, were examined. According to the story then told by the plaintiff, he was not driven back by the flames immediately after leaving his room, but was able to reach and look down the well; but, remembering he had some money in his clothes, he turned back from that position for the purpose of throwing them out of the window. He then formed the resolu-

tion of saving Miss Hunt's life, and he went to her room deliberately with the intention of rescuing her. That he had some difficulty in awakening her; that he pulled her along towards the outside iron fire escape; that as they went down the east corridor she broke away from him twice before he was able to get her away. That in his excitement he omitted to stoop when passing close to the well.

The position of the burns on the right side of his body and the left side of Miss Hunt's body tended to confirm these earlier statements. From these contradictions, it is plain that the plaintiff wished the jury to believe that his sole aim and object was to escape. That his way to the outside ladder was barred by the flames coming up the well. That if the rope had been at the bedroom window he could have made good his escape. That in the agony of his excitement he may have done a stupid thing in attempting to reach the outside iron fire escape by the west corridor. But after a few minutes of unconsciousness he remembers that the east corridor leading to the outside iron fire escape can be reached by passing through Miss Hunt's room, and he corrects this error in judgment and goes that way. According to his story in the box, there was no abandoning a safe position and returning to one of danger, no delay to speak of, no contributory negligence on his part, and all this followed naturally and continuously as the consequence of the defendants' neglect to have ropes, and therefore says the plaintiff, the absence of these ropes was the proximate cause.

The defendants' contention was that the plaintiff had, after he had reached a place of safety, deliberately delayed his exit from the building to throw his clothes out of the window, and to rescue Miss Hunt, and that if he had not so delayed his exit he could have reached the fire escape in safety. The jury were invited to decide which of these two stories was the true story, and the following questions were submitted to them:

"(9.) Did the plaintiff delay his exit from the building in order to throw his trousers out of the window and to rescue Miss Hunt?

"(10.) If yes, could the plaintiff have reached the fire escape in safety, if he had not so delayed his exit?"

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The jury answered the two questions in the affirmative.

In connection with these questions, I call attention to the following portion of the learned Chief Justice's charge to the jury:

"It all comes down to this—whether it was Love's intention when he found this place was on fire, first of all, to throw his property out of the window, and then do all he could to rescue Miss Hunt, or whether his rescue of Miss Hunt was a mere unforeseen incident in making his egress from the building.

"I think, if you consider the evidence carefully, you cannot help coming to the conclusion that he sized the whole situation up, and after seeing the fire on the second story, a fact which was to a certain extent corroborated by Stewart, he made up his mind that in the short space of time allowed him, that he had time to throw his property out of window and to rescue Miss Hunt. If those are the facts, it will be then for me to say what the consequence of your finding will be upon Love's legal position.

"I therefore propose to submit a number of special questions to you, which I think will cover all the ground, subject to what counsel will have to say; and as a number of these questions are really formal questions, they will require very little, if any, deliberation."

Groves v. *Lord Wimborne* (1898), 2 Q.B. 402, shews that this action lies.

IRVING, J.

Whether the plaintiff was *volens*, or whether he could displace the application of the doctrine *volenti non fit injuria* by shewing what he did was, under the circumstances, reasonable, were questions for the jury, so also was the question of contributory negligence; but the question of *proxima causa* was a question for the Judge.

At the close of the plaintiff's case, had the evidence given by him—he was the sole witness—disclosed that his own negligence was the *proxima causa* of the injuries received, it would have been the duty of the trial Judge to have non-suited him, but as the evidence given by him, if believed, established his cause of action, the case had to go to the jury.

But as soon as the jury returned answers to questions 9 and 10, the whole of the plaintiff's evidence vanished. His case was

at an end, because the facts, as proved to the jury's satisfaction, fail to establish that his injuries were the direct and immediate result of the defendants' negligence. The wrong and the damage are not sufficiently conjoined as cause and effect to support the action.

We must read the answers given by the jury with reference to the evidence given, and with reference to the issues contested during the course of the trial. Read by themselves, the answers are hardly sufficient, but taken with the testimony, and particularly with the cross-examination, the plain answer of the jury is that the plaintiff, being in a place of safety, elected to turn back in order to recover his clothes, and intentionally exposed himself to danger in order to assist Miss Hunt. In these circumstances, I think it is established by answers 9 and 10 that what occurred was not done continuously, but that what happened after this turning back was the result of a new *causa*, and so not the direct consequence of the defendants' original negligence.

This case differs in some respects from *Anderson* v. *The Northern Railway of Canada* (1875), 25 U.C.C.P. 301, but on the whole I think that the principle laid down in that decision, *viz.*: that in considering the question of *proxima causa*, the worthiness of the motive of the plaintiff in endeavouring to save human life must not influence us, should be adopted as a correct exposition of the law. In considering the question of *volens*, the jury would be at liberty to proceed on a different principle.

IRVING, J.

The judgment should be upheld on another ground. The plaintiff was the sole witness as to the manner in which he received his injuries and as to what action he took after the fire broke out. When the jury by the answer to the 9th and 10th questions declared that his evidence was not to be believed, it would have been proper for the Judge to have told them that if that was their view of the plaintiff's evidence, they would not find against the defendants. The plaintiff's evidence struck out, it was, like the *Wakelin* case, a case of a mere conjecture.

I have not discussed the question of mis-direction or non-direction, as my judgment proceeds on the answer to questions 9 and 10. I think what was said as to the law is of no im-

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portance so far as the answer to these specific questions are concerned.

The charge of the learned Chief Justice might have influenced the jury in answering the question as to damages, but I do not regard that answer as a general verdict. It is an every-day practice to take the opinion of the jury as to the amount of damage suffered, leaving it for the Court to say whether on all the facts of the case the plaintiff can recover it from the defendant. If the findings do not establish the requisite connection between the plaintiff's injury and the defendant's negligence, no damage can be recovered.

In the course of the trial some discussion arose as to the practice of leaving questions to the jury. It was suggested that every issue raised in the pleadings should be put to the jury and their opinion taken thereon. In my opinion that is not the practice. During the trial, a case of many issues on the pleadings is often reduced to a single issue. In such a case it is not the duty of the Judge to submit any issue of fact to the jury except the one raised on the evidence. An issue which is not fairly raised in the evidence should not be submitted. If there is no evidence on the point, the jury should not be consulted as the question would only tend to confuse the jury : see *Allen* v. *Flood* (1898), A.C. 1 at p. 147. If facts are admitted or assumed the Judge should not ask the opinion of the jury : see *per* IRVING, J. Bramwell, L.J., in *Smith* v. *Baker & Sons* (1891), A.C. 325 at p. 345. If it is thought that the questions proposed by the Judge do not settle the issues, application should be made to the Judge, otherwise the counsel will be regarded as having acquiesced in the questions submitted : *Lax* v. *Corporation of Darlington* (1879), 6 Ex. D., 28 ; *Macdougall* v. *Knight* (1899), 14 App. Cas. 194 at pp. 199, 201 ; *Clifford* v. *Thames Ironworks and Shipbuilding Co.* (1898), 1 Q.B. 314 ; *Nevill* v. *Fine Arts and General Insurance Co.* (1897), A.C. 68 at p. 76 ; *Manners* v. *Boulton* (1844), 6 U.C.Q.B., O.S. 668 ; and *Eades* v. *McGregor* (1859), 8 U.C.C.P. 262. As to the form of the question, I agree with the Chief Justice that this is a matter for the Judge to determine having regard to the circumstances of the case. If authority is wanted for that proposition, it will be found in the judgment

of Bowen, L.J., in *Abrath* v. *North Eastern Railway Co.* (1883), 11 Q.B.D. 441 at pp. 456, 458, 459.

The counsel for the plaintiff asked the Judge to leave to the jury the question in the form mentioned by Brett, M.R., in *Bridges* v. *Directors, &c., of North London Railway Co.* (1874), L.R. 7 H.L. 213 at p. 232, as the proper form for obtaining from the jury a decision as to contributory negligence. I think the Chief Justice was wise in not adopting that form for this reason, that the facts relating to the application of the doctrine of *volenti non fit injuria* are so closely connected with the facts relating to the question of contributory negligence that the jury would have been confused had the question been left in that particular form.

The question of what a reasonable man would do under the circumstances is involved in three ways in this case. In the first place, as I have already pointed out, it may be discussed but it does not arise in connection with the question of *proxima causa,* but it does arise in determining whether the plaintiff was *volens.* In that connection, and particularly where the plaintiff desires to displace the idea of *volens,* by shewing that he acted on an impulse natural to a man under the circumstances, the whole situation, his state of mind and his conduct before turning back would come under review.

In the third case it arises in connection with contributory negligence, where his actions after as well as before he turned back must be taken into consideration. IRVING, J.

I venture to think that there has been some little confusion in this case on account of this threefold aspect of the conduct of the ideal man.

Under the circumstances of this case, I think the proper way of putting the question of contributory negligence is in what Lord Blackburn (*Dublin, Wicklow and Wexford Railwy Co.* v. *Slattery* (1878), 3 App. Cas. 1,155 at p. 1,207) calls the "received and usual way," namely, to ask if the plaintiff could by the exercise of such care and skill as he was bound to exercise have avoided the consequence of the defendants' negligence? I wish, however, to avoid entering into a criticism of the charge of the learned Chief Justice as I know how difficult it is to explain to

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juries matters of law. I sometimes doubt if any person is thoroughly competent to criticize a charge to a jury unless he has heard the arguments put forward by counsel.

In *Gray* v. *Macallum* (1892), 2 B.C. 104, at pp. 106-7, are to be found some remarks as to the way in which the charge of a trial Judge should be looked at.

In my opinion the plaintiff's appeal should be dismissed, and the judgment affirmed.

MARTIN, J.: Before entering upon the question of the plaintiff's contributory negligence, two contentions of the defendants must be disposed of. The first of them is that the breach of the statutory obligation imposed upon innkeepers by section 4 of the Fire Escape Act confers no right of action upon one who may be injured thereby. In support of this view, certain American cases have been cited, but where direct authority is to be found in English and Canadian reports, it is desirable to confine our attention thereto, for not seldom there is a very confusing conflict of authority between the Courts of the various States, and it is often impossible to know what weight should be attached to the judgment of any particular Court. In England the leading case on the subject is *Groves* v. *Lord Wimborne* (1898), 2 Q.B. 402, and the effect of that decision is that where the obligation imposed by the statute is for the protection of a particular class of persons and from the whole scope of the statute it is not reasonable to suppose that the Legislature intended the penalty to be the only remedy, then a right of action accrues to one injured by reason of such breach.

MARTIN, J.

The general object of the Fire Escape Act is sufficiently indicated by its title, which states that it is "An Act for the Prevention of Accidents by Fire in Hotels and other Public Buildings." A perusal of its provisions shews that travellers are, as might be expected, the class primarily protected, though other classes also partake of its benefits. What is principally aimed at is the safeguarding of travellers sleeping in strange hotels, and this is shewn by section four, which is probably the section of the greatest practical importance, and relates only to bedrooms in hotels, and requires a rope to be kept in each room of a specified

length, size, strength, etc. In considering the question, I, like Lord Justice Smith did in *Groves* v. *Lord Wimborne*, "ask myself whether the object of the statute is to confer a benefit on individuals and to protect them against the evil consequences?" I have little difficulty in answering the question in the affirmative. Nothing, it seems to me, could confer a greater benefit on an individual traveller, roused in the middle of the night in a strange hotel by an alarm of fire, than to find that rope ready in his bedroom which the Legislature has directed should be there, and by means of which he may save his life, or have at least a chance of so doing.

Actions based upon statutory obligation are not uncommon in this Court in the case of miners injured by reason of employers having failed to observe the rules promulgated under the Inspection of Metalliferous Mines Act, as may be seen by referring *e.g.*, to the cases of *Stamer* v. *Hall Mines* (1899), 6 B.C. 579, 1 M.M.C. 314; *McDonald* v. *C. P. Exploration Co.* (1899), 7 B.C. 39, 1 M.M.C. 379; *McKelvey* v. *Le Roi Mining Co.* (1902), 9 B.C. 62, 1 M.M. C. 477, Supplt. p. 2.

And the duty of the employer under such rules was lately recognized by the Supreme Court of Canada in the case of *Grant* v. *Acadia Coal Co.* (1902), 32 S.C.R. 427.

Under the Ontario Factories Act, there are numerous recent decisions to the same effect. I need only cite *Fahey* v. *Jethcote* (1901), 2 O.L.R. 449; *Moore* v. *Moore* (1902), 4 O.L.R. 167 and *Myers* v. *Sault St. Marie Pulp and Paper Co.* (1902), 3 O.L.R. 600, 33 S.C.R. 23. In *Moore v. Moore* the judgment of the Court of Appeal shews the manner in which these breaches of duty are regarded:

MARTIN, J.

"The defendants neglected their duty in this respect (to guard dangerous machines), and were guilty of what might properly be called deliberate negligence, and this negligence was the effective cause of the injury to the plaintiff . . . . A person may be exercising reasonable care, and in a moment of thoughtlessness, forgetfulness or inattention, may meet with an injury caused by the deliberate negligence of another, and it cannot be said that such momentary thoughtlessness, forgetfulness or inattention will, as a matter of law, deprive him of his remedy for his injury caused by the deliberate negligence of the other, but it must in all such cases be a question of fact for the jury to determine."

In the second place it is contended that the plaintiff waived

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his right to this statutory protection by continuing to reside in the hotel for some considerable time after he knew there was no rope in his bedroom and yet made no request for one to be put in nor complained about the absence thereof, and consequently it was sought to invoke the maxim *volenti non fit injuria*. But the answer to this is that against a breach of statutory authority that maxim cannot be invoked: *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423. And the same remark applies to the defence of common employment in like circumstances: *Myers* v. *Sault St. Marie Pulp and Paper Co., supra*, p. 28.

On behalf of the plaintiff a new trial is asked for on the grounds of non-direction and mis-direction. So far as mis-direction is concerned, what is principally complained of is the direction to the jury (objected to at the proper time) that "the absence of the rope had nothing absolutely to do with this man's injuries of which he complains." And further that: "It all comes down to this, whether it was Love's intention when he found this place was on fire, first of all, to throw his property out of the window, and then do all he could to rescue Miss Hunt, or whether his rescue of Miss Hunt was a mere unforeseen incident in making his egress from the building."

MARTIN, J.

The non-direction substantially complained of is that the learned Judge refused to instruct the jury by including among the questions put one on the point of contributory negligence, and thereby instruct them in the manner laid down in *Bridges* v. *Directors, &c., of North London Railway Co.* (1874), L.R. 7 H.L. 213 at p. 231. The plaintiff's counsel were anxious to have this question left to the jury because of some passages in the charge wherein the law was laid down as to the voluntary incurring of risk by a person in attempting to rescue one who is placed in a position of danger by the negligence of a third person. The learned trial Judge in effect, as I understand it, charged the jury broadly that one who so attempts a rescue and suffers injury has no cause of action against the negligent party, "because it was (his) own recklessness or daring, if you choose to call it so, that caused it. Of course it would be a very praiseworthy act, but the law does not recognize heroism as a set off to what is really negligence or a willingness to incur danger."

Plaintiff's counsel on this point asked that a question should be put framed as it was in the similar case of *Connell* v. *Town of Prescott* (1892), 20 A.R. 49, (1893), 22 S.C.R. 147, but this application was refused, and consequently it becomes necessary to consider the authorities on the subject.

The earliest that was cited is *Anderson* v. *The Northern Railway of Canada* (1875), 25 U.C.C.P. 301. That case, which is advanced in support of the defendants' contention, may be quickly disposed of, first, because there was such a marked conflict of opinion, the Court of Appeal being evenly divided; and, second, because the circumstances were essentially different from those of the case at bar in that, as stated (on p. 319) the deceased "being at the time in a place of safety voluntarily threw himself in the way of danger;" and, second, that the Judges of Appeal who upheld the defence were of the opinion that the woman whose life the deceased had sought to save was herself guilty of contributory negligence, and the Chief Justice took the view that there was no evidence that the defendants were negligent. Based on such grounds, that case is of little assistance in the determination of the present one, even if it had not been much shaken, if not largely overruled by *Connell* v. *Town of Prescott*. Turning to that case, it is there laid down by the Court of Appeal confirming the Chancery Division and the direction of the learned trial Judge to the jury on contributory negligence, and after noticing nearly all the principal cases theretofore decided and cited to us, that one who being at the time in a position of safety voluntarily exposes himself to danger in an attempt to save his property which has been placed in a position of peril by the negligent act of a third party is entitled to recover damages from such party for injuries received in such attempt if he acts as a reasonable man should in the circumstances. This decision was affirmed on appeal to the Supreme Court of Canada, (1893), 22 S.C.R. 147, though the action of the plaintiff was by that Court largely justified on the ground of obedience to a natural impulse. In the judgment of the majority of the learned Judges it is laid down:

MARTIN, J.

"But in the present case it was the negligent act of the defendants that immediately produced in the plaintiff that state of mind which instinct-

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ively, as I believe, impelled him towards his horses; he did no more than any reasonable man, under the circumstances, would have done; his attempt was futile; it may have been a rash thing for him to attempt, but he did what any other man, reasonable or otherwise, situated as he was and in the same state of mind in which he was, might have been expected to do, that situation and that state of mind having been immediately and directly caused by the defendant's act . . . . Persons who in sudden emergency are distracted by terror, and thus between two causes choose the wrong one, are not disentitled to recover. The very state of incapacity to judge calmly is produced by the defendant's negligent act. To hold that a plaintiff is disentitled to recover in such a case would be to hold that the defendant having aggravated his negligence by those circumstances of terror which deprived the plaintiff of his power to avoid the consequences, or which, irresistibly, by the plaintiff, drove him upon the danger, could set up a state of terror produced by his wrongful act as a protection against the consequences."

In the case of *Thorn* v. *James* (1903), 14 Man. 373, the principles above laid down were applied by the Full Court of Manitoba to another case of injury to horses, and it was held that negligence on the part of the defendant being established, the plaintiff was entitled to recover unless he had failed to act in a natural or reasonable manner; in other words, had been guilty of contributory negligence. The above cases alone, in my opinion, support the appellant's contention in the case at bar, which is indeed stronger than either of them for two reasons: first, because herein the plaintiff was placed originally in a position of danger by the negligent act of the defendants in neglecting to provide the statutory appliance in his room (the rope) by means of which he could readily have lowered his partner in the common peril to the ground and let himself down thereafter without having to resort to the fire escape and exposing himself to the flames; and, second, because this was an act on a higher plane, for it was an attempt to save human life and not merely property, and as Lord Macnaghten said in *Jenoure* v. *Delmege* (1891), A.C. 73 at p. 77, "to protect those who are not able to protect themselves is a duty which every one owes to society;" and in *Scaramanga* v. *Stamp* (1880), 5 C.P.D. 295 at p. 304, Lord Chief Justice Cockburn says, "the impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity." And see also to the same effect *Roebuck* v. *Norwegian Titanic Co.* (1884), 1 T.L.R. 117, where it was held not

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to be contributory negligence on the part of one who attempted to rescue a fellow servant in a coal mine that he had gone to a part thereof to which he had not been sent for that purpose.

Finally, the point was fully considered by the Scotch Court of Session, second division, in the case of *Woods* v. *Caledonian Railway Co.* (1886), 23 Sc. L.R. 798, where a father was held entitled to recover damages for the death of his daughter who had been killed in an attempt to assist her "somewhat tipsy sweetheart" who in company with her had got upon a line of railway which the company had neglected to close by a gate, pursuant to Act of Parliament; and it was held that the reasonable conduct of the deceased under the circumstances was not a matter of law, but one for the consideration of the jury on the question of contributory negligence. Lord Young, in giving the judgment of the Court, says:

> "It was a simple question for the jury—a question of fact in this sense, that it was a question for their judgment upon the facts proved before them, whether they would impute such negligence as would bar recovery or not, and there is no law to interfere with them in the exercise of their judgment upon that question."

Here there was conflicting evidence, to an appreciable extent at least, to go to the jury regarding the plaintiff's actions, and it follows, in my opinion, from the foregoing that there should be a new trial, and the question of contributory negligence left to the jury.

MARTIN, J.

Some discussion arose before us on the form of the questions in this case, and as that is a matter of importance it should be briefly noticed. It was contended by the defendants' counsel that the majority of the ten questions were really superfluous and not directed to the facts in issue, and that they were so framed that even if they had been answered in the appellant's favour, judgment could not as a matter of law on the undisputed facts of the case have been entered for him upon them. Without going so far as to express an unnecessary opinion on this latter broad contention, I nevertheless am disposed to partially agree with it to this extent that there was no dispute about the facts sought to be ascertained by at least six of the questions, and that they do not bring out the real point at issue. Bearing in mind that the true function of questions is to decide

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disputed facts only, I venture to think that in cases of this nature (*i.e.*, negligence) it is desirable to adhere as closely as possible to the usual form of questions as laid down in *Bridges* v. *Directors, &c., of North London Railway Co.* (1874), L.R. 7 H. L. 213 at p. 231; and *Radley* v. *London and Northwestern Railway Co.* (1876) 1 App. Cas. 754 at p. 760. The main questions there given may of course be supplemented by others to meet particular circumstances, but the result of my experience both at trial and on appeal is that to omit such main questions in negligence cases introduces an additional element of uncertainty into a branch of the law already sufficiently uncertain.

MARTIN, J.

There should, in my opinion, be a new trial—the appellant to have the costs of the appeal, and the costs of the former trial to abide the event of the new.

I think it is desirable to chronicle the case of *McDonald* v. *Thibaudeau* (1899), 8 Que. Q.B. 449, which is one of the few in Canada on negligence arising out of loss of life by fire, more to shew that it has not been overlooked than as an authority in support of my view, since it really turns on another point.

Appeal allowed and a new trial ordered, Irving, J., dissenting.

IN THE MATTER OF THE WINDING UP ACT AND IN THE MATTER OF THE ALBION IRON WORKS COMPANY, LIMITED.

IRVING, J.

1904

June 7.

IN RE ALBION IRON WORKS CO.

Winding-up petition—Appearance thereto to be filed in Registry—Costs—Waiver—Rule 56 of Winding Up Rules.

Held, that creditors and debenture holders who neglected to enter an appearance to a winding-up petition as required by r. 56 of the Winding Up Rules passed by the Judges on 1st October, 1896, but who appeared by counsel on the return of the petition which was dismissed with costs, were not entitled to costs.

The fact that their counsel was heard without objection by petitioner's counsel makes no difference.

QUESTION as to costs argued on the settlement of the minutes of a winding-up order. The facts appear in the judgment.

Helmcken, K.C., for petitioner.

A. D. Crease and *J. H. Lawson, Jr.*, for creditors.

7th June, 1904.

IRVING, J.: Some days ago an order was made by me dismissing a petition filed by a shareholder against the Company for winding up, with costs, without specifying who were entitled to receive the costs. The petition was filed under the Dominion Winding Up Act and also under the Provincial Winding Up Act of 1898 and Amending Acts.

On the hearing of the petition, Mr. *Helmcken* appeared for the petitioner, Mr. *Luxton* for the Company, Mr. *Bodwell* for debenture holders and certain creditors, and Mr. *Arthur Crease* for certain other creditors. Judgment

Application is now made to me to settle by whom the costs may be recovered under the order. The usual rule as to costs seems to be that where a petition is dismissed with costs, the shareholders and creditors who appear to oppose the petition are entitled to one set of costs respectively among them, that is, one set to the creditors and one set to the shareholders:

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In re European Banking Co. (1866), L.R. 2 Eq., 521 at p. 523. But the rule is not inflexible; *In re Anglo-Egyptian Navigation Co.* (1869), L.R. 8 Eq. 660; and there must be shewn by the persons opposing a reasonable ground for appearing (*In re Hull and County Bank* (1878), 10 Ch. D. 130) as the creditor or shareholder appearing is not entitled to his costs as of right.

In the particular matter before me, no appearance was filed by or on behalf of the shareholders or debenture holders. It seems to me, on the principles of natural justice, the persons who neglect to enter an appearance and thereby formally submit to the jurisdiction of the Court to answer to any order that may be made against them for the payment of costs, are not entitled to receive costs.

It is said that there is no rule requiring an appearance to be entered under our Winding Up Rules, and in any event that the petitioner has waived this point. Rules have been formulated by the Judges under the Dominion Statute, but none have been made by the Lieutenant-Governor-in-Council under the Provincial Act.

Rule 56 of the Winding Up Rules established under the Dominion Act provides that "No contributory or creditor shall be entitled to attend any proceedings before the Court unless and until he is entered in a book" (called the "Appearance Book"): see Form No. 47 in the 3rd Schedule to the Rules, p. 34. It was said that this requirement applies only to proceedings after the petition has been dealt with and order made. I think that this is not so, because in the old Chancery Practice an Appearance Book was always kept; see Rule 2, Order III., Consolidated Chancery Orders, February, 1860 (referred to in the Revised Laws of British Columbia, Cap. 120, and C.S.B.C. 1888, Cap. 31, Sec. 81), and made applicable to winding up by English Rules 1862, Rule 74.

Judgment

Moreover, there is a marked difference between our Rule 56 and the English Rule 62, from which our rule is taken. The English rule did apply to subsequent proceedings only. Our Rule 56 deals with any proceedings before the Court. The meaning of this change of language is quite plain; it was intended that an appearance should be entered in all cases.

The consequence of not entering an appearance is stated by Mr. E. Manson, author of Trading Companies and of Debentures and Debenture Stock in his article in the Encyclopædia of English Law entitled "Company;" see vol. 3, pp. 211, 212, where, dealing with the English Rule of 1892 which requires the person to state in his appearance whether he intends to oppose or support the petition, he goes on to say a creditor or contributory appearing without having given notice of intention to appear is not to be heard, "and is never allowed any costs."

From a case reported at p. 410 of Vol. 92 of the Law Times, it would seem that these appearances are scrutinized very closely. In that case a petition was presented for the winding up of the company, and shortly before, a meeting of the creditors of the company had been held, at which a committee of seven creditors had been appointed. The solicitors for this committee gave the petitioners' solicitor a notice in the following form: "Take notice that Messrs. . . . . (naming the seven) the committee of creditors appointed at the meeting of the creditors of the above company intend to attend on the hearing of the petition and to oppose such petition." *Held*, that this notice was only sufficient for the individual creditors who were named in it as members of the committee, and the Court could not treat the creditors whom the committee represented as appearing on the petition.

Judgment

Now, it is said that Mr. *Helmcken* waived this objection by not raising it on the hearing of the petition.

In my opinion, the doctrine of waiver is hardly applicable to the facts in a winding-up petition where many persons are accorded a hearing on the application although, strictly speaking, they have no *locus standi*; see *per* James, L.J., *In re Bradford Navigation Co.* (1870), 5 Chy. App. 600, at p. 603. In addition to that reason and having regard to the fact that the shareholders and debenture holders appeared voluntarily and not in obedience to any process, those who neglected to formally file an appearance are not entitled to their costs.

Order accordingly.

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April 27.

IN RE KANAMURA.

Mandamus—Wholesale liquor license—Refusal of to Japanese—Vancouver Incorporation Act, 1900.

IN RE KANAMURA

The Vancouver Licensing Board refused to consider an application for a wholesale liquor license because the applicant was a Japanese. An application for a *mandamus* was refused by IRVING, J. Applicant appealed to the Full Court, and at the time of the hearing of the appeal the personnel of the Board had been changed:—

Held, that the Board should have considered the application regardless of the fact that he was a Japanese, but as the personnel of the Board had been changed, no order would be made.

APPEAL from an order of IRVING, J., refusing a writ of *mandamus* requiring the licensing board for the City of Vancouver to consider an application for a wholesale liquor license for premises in Vancouver.

As provided by section 162 of the Vancouver Incorporation Act, 1900, the Licensing Board had passed a by-law which provided that all applications for a license should be in writing signed by the applicant and giving particulars as to the location and character of the premises sought to be licensed and the class of license required; that the fee should accompany the application; that on receipt of the application the license inspector should inspect the premises and report to the Board a description of the premises, character of the applicant, etc. The number of wholesale liquor licenses was not limited by the by-law, section 16 of which provided "Every application for a license shall be heard and determined by the commissioners in a summary manner."

Statement

The applicant was a Japanese. Without going into the merits of the application, the Board refused it because the applicant was a Japanese, the Board holding that they had an absolute right to grant or refuse a license, and stating that their policy was not to grant licenses to Orientals. Affidavits by some of the Board were filed stating that there were other grounds of refusal:

on cross-examination, one member said the premises were unfit; but it appeared that he had not seen the premises until after the application had been refused, and that the license inspector had reported that the premises were all right for the business.

The application for a *mandamus* came first before IRVING, J., who dismissed it, giving the following judgment:

"Application must be refused. It is too late. License refused in March. Boards have been held since and are being held monthly."

If the Board continued to maintain the attitude which the applicant says they took up and which the members of the Board say they did not take up, it might be proper to grant the application; but having regard to the statement made by them during their cross-examination, I think I should not grant the application on the ground I have stated, *viz.*, other opportunities have and will present themselves when Kanamura can make his application."

Statement

The appeal was argued at Vancouver on 27th April, 1904, before HUNTER, C.J., MARTIN and DUFF, JJ.

Since the judgment under appeal, the personnel of the Board had changed, only one of the five members of the old Board being a member of the new Board.

Cassidy, K.C., for appellant: The Board have a discretion only to examine facts, and when we shewed that we had performed the requisites, it was their duty to find out whether we had paid the fees, etc., and if we had, then grant the license. The material shews that the application was refused merely because the applicant was a Japanese.

Per curiam: We are satisfied the application was not entertained.

Argument

Hamersley, K.C., for the Board: The Licensing Board is not a continuing body, and since the application in the Court below the personnel of the Board has changed and the present Commissioners are not now parties to these proceedings. He cited *Reg.* v. *Justices of Wilts* (1840), 8 Dowl. P.C. 717 and *East* v. *O'Connor* (1901), 2 O.L.R. 355.

Cassidy: The Court has power to issue a *mandamus*

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ordering the present Board to deal with the application: see High on Extraordinary Remedies, Ed. of 1874, p. 35, and *Re Derby and the Local Board of Health of South Plantagenet* (1890), 19 Ont. 51.

HUNTER, C.J.: We think that we ought not to grant a *mandamus* against the present Licensing Board because of the refusal of their predecessors in office to hear the appellant's application. At the same time, the Court is of the opinion that every person in the country is entitled to have his application heard; and in view of what Mr. *Hamersley* has said, that the Board will do that, the matter should be allowed to drop.

No order.

HUNTER, C.J.
1904
Feb. 12.
RE WATER CLAUSES ACT

IN RE WATER CLAUSES CONSOLIDATION ACT.

Water Clauses Consolidation Act, Secs. 22, 27, 85, 87 and 89—Power company—Consolidation of records—Alteration of points of diversion—Effect of certificate of Lieutenant-Governor in Council.

When a power company has submitted the documents specified in section 85 to the Lieutenant-Governor in Council, one of the purposes set forth in the documents being to alter the points of diversion mentioned in water records purchased by the company, and when a certificate has duly issued under section 87, approving the proposed undertaking, the power company is entitled, under section 89, to have the said records amended, and is not bound to give fresh notices or submit to such terms as the Commissioner might impose, in ordinary cases, under section 27.

Statement

In September, 1903, the Rossland Power Company, Limited, purchased certain water records held by the War Eagle Consolidated Mining and Development Company, Limited, and certain other water records held by the Centre Star Mining Company, Limited, for water from the three upper forks of Murphy Creek, the points of diversion being at six different points.

In October, 1903, the Power Company filed the various documents specified in section 85 and proposed among other things to alter said points of diversion and fix them at a single point lower down the main stream of Murphy Creek.

On November 5th, the Lieutenant-Governor in Council approved of the undertaking, and a certificate was issued to the Power Company accordingly.

On November 16th, 1903, the Power Company applied to the Commissioner at Nelson to consolidate the said records and to alter the points of diversion as aforesaid. On December 3rd, the Commissioner refused the application on the ground that the Water Clauses Consolidation Act, 1897, did not authorize a consolidation of records in such a case, and that before the points of diversion could be altered a fresh application, by posting notices, etc., would be necessary.

The Power Company appealed, and the appeal was heard before HUNTER, C.J., at Nelson on 12th February, 1904.

Galt, for the appellants.

John Elliot, for the respondents.

The Chief Justice held that the Act did not appear to provide for the consolidation of the records in the mode requested; but that appellants were clearly entitled, under section 89, to have their records amended by altering the points of diversion in the manner applied for.

Judgment

Section 27 could not be invoked to impose terms upon a Power Company whose purposes included an alteration of the points of diversion, when those purposes were approved by the Lieutenant-Governor in Council, and when a certificate to that effect had issued.

Judgment accordingly.

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April 29.

MACADAM v. KICKBUSH.

Trial—Jury—Verdict—Fact in issue—Failure to submit to jury—New trial.

MACADAM v. KICKBUSH

On the trial with a jury of a replevin action, the fact in issue was whether an annual rent, the amount whereof was fixed by an award, was agreed prior to the submission to arbitration to be paid in advance, or whether both the amount of the rent and the time of payment were included in the submission. The ascertainment of this fact was not left to the jury, and pursuant to a general verdict judgment was entered for defendant:—

Held, on appeal that in consequence of the non-submission of this question of fact to the jury, there must be a new trial.

APPEAL from judgment in favour of the plaintiff in a replevin action tried in the County Court of New Westminster before BOLE, Co. J., and a jury.

The plaintiff made a verbal agreement with one Greyell to purchase the latter's farm of 140 acres situated near Chilliwack, and he went into possession on 15th March, 1903, before final arrangements between them had been made. After negotiations, the sale went off, as Greyell could not give title, and in June the plaintiff agreed to rent the farm and pay a fair rental. On 17th June, they entered into the following arbitration agreement:

Statement

"Know all men by these presents that we, Robert MacAdam and David Greyell, both of Chilliwack, District of New Westminster, and Province of British Columbia, do hereby promise and agree, to and with each other to submit, and do hereby submit the question and claim between us, respecting the rent of lot 424, group 2, in the above mentioned district and Province, from the said David Greyell, to the said Robert MacAdam, to the arbitrament and determination of J. Howe Bent and James Armstrong, of Chilliwack, whose determination and award shall be final, binding and conclusive on us;

"And in the case of disagreement between the said arbitrators, they may choose an umpire whose award shall be final and conclusive; and in the case of disagreement, the decision and

award of a majority of said arbitrators shall be final and conclusive.

"In witness whereof, we have hereunto set our hands, this seventeenth day of June, 1903."

The two arbitrators disagreed, and appointed James Scott, clerk of the Chilliwack Municipal Council as umpire. On 23rd July, the umpire and arbitrator Bent delivered a written award as follows:

"In the matter of rent to be paid by R. MacAdam to D. Greyell, we find the following:

"Rent for one year, $487.50; tenant to pay Municipal taxes on the property for year 1903, cut thistles and noxious weeds, and to do statute labour.

"The above rent of $487.50 included the fall wheat."

On 29th September, 1903, defendant, acting as bailiff for Greyell, distrained plaintiff's goods and chattels on the premises for $507, rent alleged to be due.

In March, 1903, defendant, acting for one Ewen, who held a chattel mortgage, seized plaintiff's goods and chattels on the same premises; at that time, defendant in his evidence at the trial swore that plaintiff told him that Greyell's rent was due in advance. On his cross-examination, plaintiff denied ever having made any such statement. There was no other evidence directed to the question as to when the rent was due.

In the course of his charge to the jury, the learned Judge said: "The question is was the rent due on September 29th? You must decide that; I am unable to assist you there. What is the meaning of the arbitration? Was that rent to be paid in advance or not? That is the question."

The jury found in favour of the defendant, and judgment was entered accordingly.

The appeal was argued at Vancouver on 28th April, 1904, before HUNTER, C.J., MARTIN and DUFF, JJ.

Macdonell, for appellant.

Howay, for respondent.

Judgment was reserved until the next day when the following judgment of the Court was delivered by

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MACADAM v. KICKBUSH

HUNTER, C.J.

HUNTER, C.J.: The Court has come to the conclusion that this case must go back for a new trial. There was really but one matter which was in issue, and which should have been but was not submitted to the jury, and that is the question as to whether or not it had already been agreed that the rent should be paid in advance—in other words, whether that question was within the scope of the submission. Of course, it is obvious if the jury find that the question as to the time when the rent was payable was not within the scope of the submission, they may find as they did; if they find otherwise, the verdict would be the other way. The question as to the construction of the document, if it were unambiguous, would be clearly a matter for the Judge himself; but the difficulty arises from the fact that the document appears to be ambiguous in its terms—that is to say, it is not certain on the face of the submission as to whether the question when the rent was to be payable was in difference, or had already been agreed upon. It being a question what the intention of the parties was on that point, the jury should have been specifically directed to consider that point. The costs of the appeal and of the former trial ought to follow the result of the new trial.

New trial ordered.

THE BYRON N. WHITE COMPANY v. THE SANDON WATER WORKS AND LIGHT COMPANY, LIMITED.

IRVING, J.
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WHITE v. SANDON

Sandon Water Works Act, B. C. Stat. 1896, Cap. 62—Permission to divert water—Condition precedent—Trespass—Laches—Acquiescence—Costs—Appeal successful on point of law not taken below.

By section 9 of the Sandon Water Works and Light Company Act (B.C. Stat. 1896, Cap. 62) the Company was authorized to divert water from certain creeks and to use so much of the water of the creeks as the Lieutenant-Governor in Council might allow, with power to construct such works as might be necessary for making the water power available, but the powers were not to be exercised until the plans and sites of the works had been approved by the Lieutenant-Governor in Council. The Company got their plans and sites approved, and proceeded with the construction of a tank and a flume on plaintiffs' lands for the purpose of diverting water:—

Held, that the authority of the Lieutenant-Governor in Council to divert was a condition precedent to the Company's right to interfere with the plaintiffs' soil, and that plaintiffs were entitled to damages and a mandatory injunction.

Mere submission to an injury, such as the erection of a building by another on one's land, for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right: to amount to laches raising equities against the person on whose land the erection was placed, there must have been some equivocal conduct on his part inducing the expenditure by the person erecting it.

Where an appeal is allowed on a point of law not taken at the trial or in the notice of appeal but open on the pleadings, it is not in strictness successful, and no costs of the appeal will be allowed; but as the appellant should have succeeded at the trial, he will be allowed the costs of it.

APPEAL from judgment of IRVING, J., dismissing the plaintiffs' action which was for damages for trespass and for a mandatory injunction compelling defendants to remove from plaintiffs' premises a water tank and pipe line.

Statement

The defendants were incorporated by private Act (B.C. Stat. 1896, Cap. 62) in 1896, and installed a water works and electric light system for the town of Sandon. Their works were constructed over lots 754 and 590, group 1, Kootenay District. Lot

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754 (otherwise known as the Wyoming mineral claim) was Crown-granted on 26th January, 1898. Before this the ground was covered by conflicting claims, the Wyoming and La Planta locations, the latter being the plaintiffs' location. By agreement made between the plaintiffs and the owners of the Wyoming on 1st June, 1897, it was agreed that the Crown grant should be issued for the Wyoming location, and the ground divided between the claimants, the plaintiffs getting the portion subsequently occupied by the defendants' works. In pursuance of this agreement, the plaintiffs' interest under the La Planta location was allowed to expire on 27th October, 1897. Lot 590 was held by the plaintiffs under Crown grant as a mill site, and part of the defendants' works was on this ground. In 1897 the defendants were engaged in constructing their works, and in September of that year were building a flume which Bruce White, who was the general manager of plaintiffs, thought they would probably continue on to plaintiffs' lands, and as he was going away he left instructions with a bookkeeper to inform defendants, if they did come on to plaintiffs' ground, that they were trespassers. At the trial White testified as to these instructions, and that when he came back in December the bookkeeper reported to him that defendants had come on to plaintiffs' ground, and when they did so he told them they were trespassers. This warning was probably given in October; and in December when White returned the works had been completed. Defendants' superintendent of construction stated in his evidence that when the pipe line was laid he was aware it had crossed on to plaintiffs' ground.

Statement

For the purposes of their undertaking, the defendants diverted water from Sandon Creek, and it did not appear that they had obtained permission from the Lieutenant-Governor in Council to do so, although they did get the plans and sites of the works approved on 25th March, 1902.

In December, 1901, plaintiffs made a claim against defendants for rent, and in February, 1902, their solicitors gave defendants notice of intention to bring an action, and the writ was issued in July, 1902.

The action was tried at Nelson on 27th October, 1903, before IRVING, J.

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John Elliot and *Lennie*, for plaintiffs.

S. S. Taylor, K.C., for defendants.

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28th October, 1903.

WHITE v. SANDON

IRVING, J.: The defendants were incorporated by private Act on the 17th of April, 1896, to construct an electric light works and a water works. By their Act, section 9, they were not at liberty to exercise the powers conferred by the Act or proceed thereunder until the plans and sites of said work had been approved by the Lieutenant-Governor in Council. Notwithstanding this provision in their Act, they did proceed with the works, taking possession of the property in dispute in the fall of 1897, and erecting an electric light plant in the town of Sandon to supply that place.

Prior to the date of March, 1902—25th March, 1902—when they took possession of the land in dispute, the plaintiffs had no title to that part which is now called the Wyoming property. Their interest under the La Planta record had expired on the 22nd of October, 1897. Apparently it was after this that Mr. Bruce White left the camp and the defendants went on and took possession. No proof is furnished me that there was any objection raised to their going there, although Mr. Bruce White says he received a report from his manager that he had objected. If there was any objection made I have no idea what its nature was; it certainly was not followed up with any correspondence, nor was it renewed by Mr. Bruce White on his return, or by Mr. Oscar White when he became superintendent. In fact no objection was taken until the spring of 1902. In the meantime the defendants had incurred very great expense, and I think the plaintiffs are guilty of laches. I think they stood by and permitted the defendants to go on and incur expense.

IRVING, J.

Now the plaintiffs bring this action for an injunction and damages. It is quite apparent that what they wish to do is to remove the defendants off this ground in order to take advantage of its favourable situation—to enable them to erect there a mill of their own. That injunction cannot be granted, because

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the defendants are now in a position by virtue of the permission obtained from the Lieutenant-Governor in Council to take possession of that property. Since that date, the 25th of March, I mean, they are rightly in possession of this property.

I am unable to find that the plaintiffs suffered any real damage prior to the 24th of March, 1902.

In my opinion the action has been misconceived; the plaintiffs should have appointed an arbitrator and have proceeded in that way to determine the value of the property taken away from them. The action is dismissed with costs.

The plaintiffs appealed to the Full Court, and the appeal was argued at Vancouver on 19th April, 1904, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Bodwell, K.C. (*Lennie*, with him), for appellants: The onus of shewing that they had complied with the provisions of the statute was on defendants; until they obtain permission to divert water, they are trespassers: see *The Mayor, &c., of Liverpool* v. *Chorley Water-Works Co.* (1852), 2 De G. M. & G. 852 at p. 859. [*Taylor:* This point was not taken at the trial or in the notice of appeal.]

The evidence shews defendants were notified they were trespassers when they ran the pipe line on to plaintiffs' ground; apart from the warning, they knew they had crossed to plaintiffs' ground as appears from the evidence of defendants' superintendent in charge of the construction.

Argument

The trial Judge overlooks the fact that the work defendants were about had all been accomplished before plaintiffs head officers were aware of it; there had been no such acquiescence or laches on the part of plaintiffs as to disentitle them to relief: see *De Bussche* v. *Alt* (1878), 8 Ch. D. 286 at p. 314; *Willmott* v. *Barber* (1880), 15 Ch. D. 96 at p. 105; *Fullwood* v. *Fullwood* (1878), 9 Ch. D. 176 at p. 179, and *Archbold* v. *Scully* (1861), 9 H.L. Cas. 360 at p. 387.

S. S. Taylor, K.C., for respondents: The Water Works Company is a *quasi* public institution; by the Act the Company is empowered to get a certain amount of water from certain creeks as a matter of right, subject only to the right of the Lieutenant-

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Governor to restrict it to the use of what is necessary and proper. Before going on with the works it was not necessary to get the permission to divert. The plaintiffs did not take the position at the trial that we had not obtained permission to divert water, and they should not be allowed to take it now. Plaintiffs were aware our works were going on; they stood by and allowed us to expend money, and under such circumstances a Court of Equity will not lend its assistance by granting a mandatory injunction. As to acquiescence, see Ewart on Estoppel, 34; Bigelow, 660; Addison on Torts, 7th Ed., 91 and 92; *Parrott* v. *Palmer* (1834), 3 Myl. & K. 640; *Birmingham Canal Co.* v. *Lloyd* (1812), 18 Ves. 515.

Bodwell, in reply: As to our right to a mandatory injunction see *Smith* v. *Smith* (1875), L.R. 20 Eq. 500 at p. 504; Kerr on Injunctions, 4th Ed., 733; *The Directors, &c. of the Imperial Gas Light and Coke Co.* v. *Broadbent* (1859), 7 H.L. Cas. 600 at p. 612; *Cowper* v. *Laidler* (1903), 2 Ch. 337; *Goodson* v. *Richardson* (1874), 9 Chy. App. 221 at p. 224; *Baxter* v. *Bower* (1875), 44 L.J., Ch. 625, and *Durell* v. *Pritchard* (1865), 1 Chy. App. 244 at p. 250.

HUNTER, C.J.: The Court is unanimously of the opinion that the appeal should be allowed. This is a common law action of trespass by the Byron N. White Co. against the Sandon Water Works and Light Co. The Water Works Company were entitled to go upon the lands and do what they did under the powers given by their Act, provided they complied strictly with the conditions imposed, because that was their only authority for interfering as they did with the property of the plaintiffs. It was not shewn at the trial that the Lieutenant-Governor in Council had authorized the diversion of the water, and that in my opinion was a preliminary essential or a condition precedent to the exercise of the power of interfering with the soil of the plaintiffs. HUNTER, C.J.

It is not necessary to decide on this occasion whether the authority of the Lieutenant-Governor to divert the water was a condition precedent to the right of entry, but it certainly was a condition precedent to the right of interference with the soil of

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the plaintiffs. It was open on the pleadings to the plaintiffs to take advantage of any failure of proof by the defendants of their case, and although the attention of the learned Judge was not directed to the fact that there was no proof that the authority of the Lieutenant-Governor in Council to divert the water had been obtained, I do not think that precluded the plaintiffs from taking advantage of the point of law, especially as this is a Court of re-hearing.

As to the defence raised on the ground of laches, it is quite clear that there was no laches which would raise any equity on behalf of the defendants. If we were to hold on the facts which are before us on this occasion that there was laches which precludes the plaintiffs from enforcing their legal rights, we would wipe out the Statute of Limitations. To raise an equity in favour of the defendants in such circumstances as appear here, it would have to be shewn that they were induced to make the expenditure they did by some equivocal conduct on the part of the plaintiffs. It is quite clear they were not in any way misled when they entered on the property, and they have only themselves to thank for the consequences. I think only nominal damages ought to be allowed—say $10—and I think the right ought to be further aided by the issue of a mandatory injunction, not to be drawn up however for six months, in order to enable the parties if possible to come to some understanding.

HUNTER, C.J.

As to the costs: the appeal, in strictness, is not successful, as the defendants are defeated on a ground not taken at the trial or in the notice of appeal. Therefore, while the plaintiffs should have succeeded at the trial and therefore should have the costs of the action, there should be no costs of the appeal.

DRAKE and MARTIN, JJ., concurred.

Appeal allowed without costs—Appellants to have costs of the trial.

DOWNIE v. VANCOUVER ENGINEERING WORKS, LIMITED.

DUFF, J.

1904

May 17.

DOWNIE v. VANCOUVER ENGINEERING WORKS

Alien Labour Act, 60 & 61 Vict., Cap. 11 and 1 Edw. VII., Cap. 13—Advertisement for labourers—Whether promise of employment.

The Company published in a Seattle newspaper this advertisement: "Wanted. First-class machinists. Apply Vancouver Engineering Works, Limited, Vancouver, B.C.":—

Held, the advertisement did not contain a promise of employment within the meaning of the Alien Labour Act as amended by 1 Edw. VII., Cap. 13, Sec. 4.

Case stated. The facts appear in the judgment.

Bird, for plaintiff.

Macneill, for defendants.

May 17th, 1904.

DUFF, J.: This is a case stated for the opinion of the Court by Mr. Williams, the Police Magistrate of Vancouver, on the hearing of an information charging the Vancouver Engineering Works Co., Limited, with an infraction of the first section of Cap. 11 of 60 & 61 Vict., Statutes of Canada, which section reads as follows: "From and after the passing of this Act it shall be unlawful for any person, company, partnership or corporation, in any manner to prepay the transportation, or in any way to assist or encourage the importation or immigration of any alien or foreigner into Canada, under contract or agreement, parole or special, express or implied, made previous to the importation or immigration of such alien or foreigner, to perform labour or service of any kind in Canada."

Judgment

In support of the charge, it was proved that the accused had caused to be inserted in a newspaper published in Seattle, in the State of Washington, an advertisement in the following terms: "Wanted. First-class machinists. Apply Vancouver Engineering Works, Limited, Vancouver, B.C."

The magistrate has found as a fact that the accused Company was responsible for the publication of this advertisement. Chap-

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ter 13 of 1 Edw. VII., Statutes of Canada, Sec. 4 amended the eighth section of the last mentioned Act by substituting therefor the following provision: "It shall be deemed a violation of this Act for any person, partnership, company or corporation to assist or encourage the importation or immigration of any person who resides in, or is a citizen of, any foreign country to which this act applies, by promise of employment through advertisement printed or published in such foreign country; and any such person coming to this country in consequence of such advertisement shall be treated as coming under a contract as contemplated by this Act, and the penalties by this Act imposed shall be applicable in such case;" and then follows a proviso which is not here material.

The question submitted for the opinion of the Court is: "Does the advertisement, the terms of which I have read, contain a promise of employment within the amendment of 1901?" I have come to the conclusion that the advertisement does not contain a promise of employment. It is, I think, an invitation to apply for employment and nothing more. It was urged on behalf of the prosecution that the second clause of the eighth section of the Act as amended, in effect, declares that where you have an advertisement published in a newspaper in a foreign country which induces a citizen or resident of that country to come into Canada with the expectation of obtaining employment here, you have a contract within the meaning of the Act, but the advertisement referred to in the second clause of that section is plainly, I think, an advertisement of the character dealt with in the first clause of the same section, and obviously an advertisement dealt with in the first clause of the section is an advertisement containing a promise of employment. That argument, therefore, I think, begs the question. It is said that the enactment must be construed with reference to the practice of persons desiring to obtain employees by means of a notice published in the newspapers, and that it is not in accordance with such practice that such notice should contain either an express promise of employment or any words implying or suggesting such a promise more forcibly than the words in question here. Now I have not before me the materials to form a judgment

Judgment

upon the point of fact, but assuming the fact, am I also to set up an assumed policy of the Legislature, namely, the intention to prohibit invitations to apply for employment as well as promises to employ, and in conformity with this assumed policy to assign a forced or unusual meaning to the terms which the Legislature itself has selected to set forth its design? Parliament, not usually parsimonious of language, has in this case employed a precise phrase, and I must look to the words themselves for the policy of the Legislature, not elsewhere. Nor can I agree with the argument of Mr. *Bird* that on this construction the amendment of 1901 adds nothing to the Act of 1897. Obviously the Act of 1897 reached those cases only in which the immigration was preceded by a completed contract of service. Before the passing of that Act, the Federal Courts of the United States had more than once held that an enactment of Congress framed in similar terms did not prohibit an agreement arising from offer and acceptance, where the immigration of the employee itself constituted or was an essential ingredient in the acceptance of the offer of employment. It is plain that the principle of these decisions would have no application to the limited class of cases embraced within the scope of the amendment of 1901, and to that extent that amendment has enlarged the restrictive provisions of the Act.

It was strongly impressed upon me that the legislation thus construed imposes no effective restraint upon the importation of foreign labour in times of industrial stress or emergency, and that this result is altogether alien to the spirit and to the design which prompted these enactments. If so, the remedy must, I think, be sought elsewhere. In no case, least of all in a penal proceeding, can I press the words of the Legislature beyond their fair and natural sense. The question submitted by the case will be answered in accordance with this opinion. With regard to costs, as the point now raised for the first time is not without difficulty, I think it is not a case for costs.

Judgment

FULL COURT

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April 25.

IN RE THE LAND REGISTRY ACT.

Land Registry Act—Debentures creating a charge—No description of land—Whether capable of registration.

IN RE THE LAND REGISTRY ACT

A company issued debentures which created a charge upon all its property without describing the property:—

Held, that the debentures were capable of registration under the Land Registry Act.

APPEAL from an order of MARTIN, J., refusing applications made on behalf of the South African Venture Syndicate, Limited, Laura N. Cumberland and Phyllis Bentley, respectively, to register as charges in the Land Registry Office at Nelson debentures of the Giant Mining Company, Limited.

The applicants were holders of debentures issued by the said Giant Mining Company, Limited, which Company owned lot 997, group 1, Kootenay District, being the Giant mineral claim. One of the conditions subject to which the debentures were issued was as follows:

"The debentures of this series shall rank *pari passu* as a first charge upon the property hereby charged without any preference or priority one over another, and such charge shall be a floating security; but so that so long as any of the said debentures shall be outstanding, the Company shall not in any way charge or mortgage or purport to charge or mortgage the said property or any part thereof so as to rank or purport to rank *pari passu* with or in priority to the charge hereby created."

Statement

The District Registrar at Nelson held that the charge sought to be registered was in the nature of a mortgage, and must contain within itself such a full and sufficient description of the lands sought to be charged thereby that they may be easily identified; and where such an instrument does not contain a proper and sufficient description, it may not be supplemented by outside evidence as to what lands may have been intended to be encumbered or charged thereby.

A case was stated by the District Registrar, and on the matter

coming on for hearing before MARTIN, J., he held "that the registration of a floating security of the nature of this debenture is no more contemplated by the Land Registry Act than it was by the Company which issued it or the person who bought it subject to the conditions indorsed thereupon, and in the absence of any decision in support of the application it must be dismissed."

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The applicants appealed, and the appeal was argued at Vancouver on 25th April, 1904, before HUNTER, C.J., IRVING and DUFF, JJ.

A. H. MacNeill, K.C., for appellants, referred to sections 24, 25 and 29 of the Land Registry Act.

Argument

Harris, for the Crown, referred to sections 40, 41 and 65 of the Act.

Per curiam: The appeal is allowed.

Judgment

SEMISCH v. GUENTHER AND KEITH.

DRAKE, J.
1903
Nov. 4.

Principal and agent—Undisclosed principal—Action against agent—Election—Purchase of judgment—Conditions and equities affecting—Notice.

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SEMISCH v. GUENTHER

The plaintiff, Clara Semisch, sold a judgment of over $9,000 against K. to G. who was acting as agent for Mrs. K. to whom he at once assigned the judgment and received $1,000 from her therefor; G. by his instructions from Mrs. K. was limited to $1,000 as the purchase price of the judgment, but as he was interested in the architect's commission which he expected to receive out of the erection of a building proposed to be erected on the land against which the judgment was registered, he agreed to pay plaintiff $1,000 in cash and $500 when the roof of the building was completed or at the latest on 1st January, 1903, and he also agreed to enforce the judgment against K. and pay plaintiff half the proceeds he received; his agreement with plaintiff was contained

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in two writings, one being an assignment from plaintiff to G. of all her rights under the judgment for $1,000 and the other containing the additional terms of which Mrs. K. was not aware when she bought from G.; G. failed to pay plaintiff the additional $500 and plaintiff sued for it in the County Court and although the fact came out in evidence during the trial that G. in buying the judgment had been acting as Mrs. K's agent the plaintiff took judgment against G. Subsequently plaintiff sued G. and Mrs. K. to have the assignment set aside or to have Mrs. K. declared a trustee for plaintiff:—

Held, (1.) That plaintiff by taking judgment against G. founded upon his promise contained in one of the documents which made up the transaction elected to treat him as the sole principal; and

(2.) That Mrs. K. bought the judgment without any knowledge of the agreement between plaintiff and G. and so was not bound by its terms.

THIS was an appeal from a judgment of DRAKE, J., dismissing the plaintiff's action as against the defendant Keith. In addition to the facts stated in the judgment of the learned trial Judge, it appeared that the plaintiff had sued Guenther in the County Court for the $500 due under the agreement of 11th August, and during the progress of that trial the fact came out in evidence that Guenther was acting as the agent of Mrs. Keith in the transaction of buying the judgment. In that action the plaintiff recovered judgment against Guenther for the full amount claimed and costs.

Statement

Subsequently, the plaintiff, Clara Semisch, commenced an action in the Supreme Court against Guenther and Mrs. Keith alleging that Guenther by fraudulent representations had procured from plaintiff the assignment of the judgment and that Mrs. Keith at the time of taking her assignment was aware that the original assignment was obtained by fraudulent representations of the defendant Guenther, and was a party to same, and was also aware of the conditions attaching to said assignment. The plaintiff claimed that the assignments should both be set aside, or alternatively, that the defendant, Mrs. Keith, be declared a trustee of the interest in the judgment and the payment of $500 subject to which it was originally assigned to defendant Guenther.

The statement of defence of Mrs. Keith denied the allegations of fact respecting her knowledge of the alleged fraudulent representations, and also denied that Guenther was at any time

acting for her in reference thereto, and set up that the plaintiff after having recovered judgment against Guenther in respect of his agreements and promises, had no cause of action against Mrs. Keith in respect thereof.

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At the trial which took place at Vancouver in October, 1903, judgment was given as follows by

DRAKE, J.: Mr. Guenther, an architect, desirous of doing business in Vancouver discussed with Mr. Keith the advisability of erecting a hotel on Hastings street, where Mr. Keith had a lot, but in order to have sufficient room it would be necessary to buy or get an option on the adjoining lot, Keith informed Guenther that he could not deal with his lot until a judgment for $9,428.82, which was registered against him was removed, he also told him that he thought his scheme was a good one, and that he had a relative in New York whom he thought would advance the necessary funds for building, at the same time he informed Guenther that it was useless for him to see the plaintiff (Mrs. Semisch) himself or mention his name, as she was unfriendly, and he said if he could buy the judgment for $1,000 he could get the money, but that was his outside limit. Guenther thereupon saw Mr. Semisch, who was the plaintiff's agent and managed her affairs, and offered $500 for the judgment, this was refused and after some further negotiation, during which Mr. Guenther told Mr. Semisch that he was representing some New York capital and that it was the intention to put up a good building on the lot in question, if the judgment was cancelled. The plaintiff eventually agreed to sell the judgment to Guenther for $1,000 to be paid down and $500 when the roof of the building to be constructed by Guenther was completed, or, at the latest, on the 1st of January, 1903, and Guenther agreed that he would institute proceedings against J. C. Keith for the satisfaction of the judgment and to pay to the plaintiff one-half of all moneys received on behalf thereof. Keith on his part says that he always absolutely refused to pay more than $1,000 for the judgment and knew nothing of any other agreement, except the $500 to be paid by Guenther on 1st January. Guenther hoped that if he could get rid of the judgment this building proposition

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would go forward and he would make some $3,000 out of it as architect. Guenther knowing that he was limited to $1,000 by Keith, agreed to pay the additional $500 personally, as it would be to his advantage to do so if the building went on. The building did not go on owing to the difficulty of getting sufficient ground and the moneyed New York man had left for Scotland. On August 11th, 1902, the transfer of the judgment was carried out, but instead of the assignment disclosing the terms of the alleged contract with Semisch, which Guenther admits he made, he had two documents prepared, one being a clean assignment of the judgment, the other containing the contract for payment of the $500 and for suing Keith and for payment of half of whatever he recovered on the judgment. The plaintiff signed the two documents, and the presumption is that if the whole agreement was disclosed to Keith he would never have paid the $1,000 for the burden of the judgment would not have been removed, he would still be responsible and his property also, and it is unreasonable to suppose he would borrow $1,000 to release a judgment which was not to be released.

The assignment of the judgment is under seal and the language used is as follows: "That in consideration of $1,000 Clara Semisch hath granted, sold and assigned and by these presents doth grant, sell and assign all the hereinbefore mentioned judgment and all and every sum or sums of money now due or hereafter to grow due by virtue thereof for principal, interest or costs, and all benefit to be derived therefrom unto the party of the second part (Guenther) his heirs, executors, administrators and assigns absolutely, together with all and every right whatsoever appertaining to her the party of the first part to obtain execution or executions, or other lawful process to secure satisfaction of the said judgment;" and Otto Semisch by a memorandum indorsed on the said assignment approves of the said deed and confirms the same.

DRAKE, J.

The object of buying the judgment was to clear the title and that was the sole object Keith had in view. Semisch knew that the object Guenther had in view in buying the judgment was to clear the title and enable the lot to be utilized and at the same time to receive a substantial sum for the judgment, yet the

result of her agreement with Guenther would preclude the lot from being dealt with.

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It was not disputed that Keith was acting as agent for his wife, who was anxious to assist her husband, and it was her money that supplied the $1,000; and it is also admitted that Guenther was Keith's agent to buy, but his authority was limited to $1,000, and as Keith says he had nothing to do with any other arrangement which Guenther might make or had made in his own interest, and never heard of this agreement to which Guenther entered into as to collecting the judgment. Guenther was not authorized to make any further or other agreement than merely to buy for $1,000. I don't see how Keith or his wife can be held liable for Guenther's act. Guenther and Semisch were assisted by professional advice in what they did, and they must have known that giving a clean assignment of this judgment, was placing in Guenther's hands the right to deal with this judgment as he pleased. The other document was a personal covenant by Guenther to pay $500 and to collect what he could on the judgment—that this was the view taken by the plaintiff is apparent by the action brought by her to recover the $500 agreed to be paid on 1st January, 1903, and for which she obtained judgment.

It is true that Guenther has placed it out of his power to recover anything on the judgment, as he has assigned it to Mrs. Keith, and this he did on the same day that it was assigned to him, and it was for this that Mrs. Keith paid $1,000. This is a further reason for considering that Guenther all along intended to make use of the judgment and ignore the rest of his agreement with the plaintiff. If this agreement of Guenther's was brought home to the Keiths they would be responsible for Guenther's action—there is no evidence that such is the case. Mr. *Russell* admits that there is no direct evidence, but claims that because Johnston, said to be clerk in Messrs. Bowser & Wallbridge's office, must have known the contents of this second agreement, therefore his knowledge becomes the knowledge of his employers, but this is only surmise. Mr. Johnston was not called, neither were Messrs. Bowser & Wallbridge. I am unable to adopt any such surmise. Messrs. Bowser & Co. were Mrs.

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Keith's legal advisers, but there is no scrap of evidence shewing what their knowledge, if any, was; all that is alleged is that when the second document was signed by the plaintiff Guenther took it out of Mr. Russell's office and returned in a few minutes with $1,000 and Mr. Johnston—this is not evidence of knowledge of the contents of a document in Guenther's pocket.

Mr. Guenther in his evidence put in by the plaintiff, says that it was about December, 1892, when the lot was being sold that Keith first got notice from him that the plaintiff still had an interest in the judgment. Guenther further says that before the assignment of the judgment was made he told Keith that Semisch wanted $500 more than the $1,000. Keith told him distinctly that he limited the amount he was to pay to $1,000, if Guenther chose to pay an additional $500 he would have nothing to do with it. Guenther evidently did not mind risking $500 on the chance of the building going on. I must say that it is apparent that Guenther's conduct is dishonest, he cheated both his employer and the plaintiff, but his dishonesty cannot make Mrs. Keith liable for acts not warranted by the mandate he received and of which she had no knowledge. I have very little reliance in Guenther's evidence, for he says in December he gave Keith a release of the lot he calls it, I suppose he means the judgment, at this time the judgment had been assigned to Mrs. Keith and nothing else required to be done.

DRAKE, J.

There will be judgment for the plaintiff against Guenther with costs for an amount equivalent to what she has lost, but as that would be impossible to ascertain, I think it should be fixed at $3,857, one-half of the amount then due on the judgment. The action should be dismissed against Mrs. Keith with costs.

The plaintiff appealed, and the appeal was argued at Vancouver on the 26th and 27th of April, 1904, before HUNTER, C.J., MARTIN and DUFF, JJ.

Argument

J. A. Russell, for appellant: The trial Judge's finding is that respondent employed Guenther to bring about the assignment in question, and that while so employed he was dishonest and cheated appellant during the negotiations and at the time of the assignment. Respondent benefited by the misrepresentations

and fraud of her agent. The case is therefore the ordinary one of principal and agent.

In appointing Guenther to procure this assignment respondent undertook the absence of fraud on his part: *Wilson* v. *Hotchkiss* (1901), 2 O.L.R. 261 at p. 271.

It is not necessary to establish respondent's privity or authority to agent to make misrepresentations if for her benefit: *Barwick* v. *English Joint Stock Bank* (1867), L.R. 5 P.C. 394 at p. 410 and *Milburn* v. *Wilson* (1901), 31 S.C.R. 481.

There is evidence that respondent was aware of her agent's misrepresentations. She had assignment made to her by her agent before judgment actually assigned to him. This assignment was kept in background and agent was induced to release judgment in Land Registry Office many months later.

In County Court action appellant first learned of assignment to respondent, but it was not until the judgment that we learned the full facts, to establish fraud and misrepresentation, from Guenther. Our action in County Court was to recover $500 only, not for specific performance of agreement.

[HUNTER, C.J.: You have sued and recovered judgment for part of the consideration in the agreement, and now you ask to have the whole agreement set aside.

DUFF, J.: It is stated in Pollock on Contracts that if a party affirms a contract he must affirm it in all its terms.]

Argument

We do not necessarily ask to have agreement set aside, we want it carried out either by agent or principal.

We are willing to abide by agreement with Guenther, but he is not in a position to carry out one of its terms, *viz.:* to enforce satisfaction of judgment against Keith and account to us for one half proceeds over $1,500, having assigned judgment to respondent. In any case, "the assignee of an equity is bound by all the equities affecting it," and the respondent cannot take any better position than her predecessor in title. She should therefore be declared a trustee for the plaintiff to the extent that Guenther was a trustee: see *Cockell* v. *Taylor* (1851), 15 Beav. 103; *Smart* v. *McEwan* (1871), 18 Gr. 623; *Martin* v. *Bearman* (1880), 45 U.C.Q.B. 205 and *Gould* v. *Close* (1874), 21 Gr. 273 at p. 275.

The effect of judgment as against Guenther is that plaintiff is

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entitled as against him to cancellation of assignment or damages in compensation, the result must therefore be that the assignment is cancelled as against those claiming under him.

On the effect of misrepresentations on contracts induced thereby, see *Smith* v. *Kay* (1859), 30 L.J., Ch. 45.

Cassidy, K.C. (*Griffin*, with him), for respondent: Fraud is not brought home to Mrs. Keith; there was no misrepresentation by her; Guenther formed the whole idea himself and carried it out.

All the elements of the alleged fraud were before the plaintiff in the County Court, and yet she took judgment; she is now estopped by her election and any cause of action she had became merged in the judgment: see *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504 at p. 514. He also cited *Toronto Dental Manufacturing Co.* v. *McLaren* (1890), 14 P.R. 89; *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26 and Moncreiff on Fraud, 264, 271-8.

Argument

Russell, in reply, referred to *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459.

HUNTER, C.J.: The Court is unanimously of the opinion that the appeal must be dismissed. If this action had been brought for breach of trust, that is to say, if it had been shewn that the transfer of this judgment had been made to Guenther upon certain conditions which he had not carried out, and of which Mrs. Keith had knowledge or could be said to be affected with knowledge, I should be slow to believe that this Court could not have afforded some relief. That is not the case before us—the action is against an undisclosed principal and that principal's agent. It would appear very plainly from the evidence that the so called fraud—assuming that there was fraud—came to the knowledge of the vendor while suing upon the agreement in the County Court; and there is no doubt on the authorities that if a man sues the agent to judgment, knowing who the principal is, he has no action against the principal, upon the ground that he has elected to treat the agent as principal. He must elect whether he will sue the real or the supposed principal, and the judgment is conclusive proof of the fact that the election has

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taken place. Moreover, I do not see what unmistakable evidence there has been of any misrepresentation upon which the plaintiff relied in entering into this arrangement. It is true there was a statement by Guenther that he was representing New York capitalists, but there appears to be no satisfactory evidence to shew that the agreement was entered into on the faith of that statement; so on that ground also it seems to me the action must fail.

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MARTIN, J.: I concur. In regard to the power of agents generally there are two late cases in the Supreme Court, *Murray* v. *Jenkins* (1898), 28 S.C.R. 565, and *Clergue* v. *Murray* (1902), 32 S.C.R. 450.

MARTIN, J.

DUFF, J.: I agree that the appeal should be dismissed. The only doubt I have had was whether the fact being that Guenther was acting as the agent of Mrs. Keith she might not be affected by all the equities available against Guenther in favour of the plaintiff, but I have come to the conclusion that it is quite sufficiently established on the evidence that although the plaintiff at the time of the transaction believed that Guenther was the principal in the purchase of the judgment and dealt with him on that footing, she became aware during the County Court proceedings which were referred to, of the true state of the facts, and with that knowledge she took a judgment against Guenther founded upon a promise contained in one of the documents which made up the transaction. This was clearly a conclusive election on her part to treat Guenther as the sole principal. The plaintiff thereby precluded herself from claiming any relief against Mrs. Keith, as principal, in respect of this transaction. That being the case, I do not think Mr. *Russell's* contention that the trust alleged to have arisen out of the agreement of the defendant—assuming a trust established—was so impressed upon the judgment as to run with the assignment of it after it had passed into Mrs. Keith's hands, can be maintained; and in the absence of any satisfactory evidence to shew that she was aware of the existence of this agreement, and in the face of the finding of the learned Judge that she had no notice or knowledge of it, I do not think she is bound by its terms.

DUFF, J.

Appeal dismissed.

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1904

Jan. 16.

VERMONT STEAMSHIP CO. v. ABBY PALMER

IN THE EXCHEQUER COURT: IN ADMIRALTY.

VERMONT STEAMSHIP CO. v. THE ABBY PALMER. (No. 1).

Admiralty Law—Assessors—Application for—When to be made.

Assessors will be appointed in salvage cases where necessary.

The proper time to apply for assessors is on the application to fix date of trial.

SALVAGE action. Motion in Chambers to appoint nautical assessors under rule 112.

J. H. Lawson, Jr., for plaintiff, applicant, cited rule 112 and referred to two salvage cases in which assessors had sat, and asked that two be appointed herein—*Bird* v. *Gibb* (1883), 8 App. Cas. 559; *The Princess Alice* (1849), 3 W. Rob. 138.

W. J. Taylor, K.C., contra: I do not particularly oppose the application but see no necessity for it; the case is one of salvage, and the only question is what we should pay; we were in danger but nothing more.

Argument

Lawson: There are upon the record questions of seamanship in the conduct of the salvage operations which the Court will have to consider and pass upon, and for that purpose the services of the assessors will be necessary to advise the Court; the cases above cited shew that.

Per curiam: In view of the issues raised and of counsel's statement of the necessity therefor, an order will be made for two assessors.

As a matter of practice and for future guidance of litigants in this Admiralty District it is opportune to state that application for assessors should be made as early as possible so that there may be ample time to make the necessary arrangements with the Commander-in-Chief of the Royal Navy for this Pacific Station for their attendance. A convenient time to apply, and that at which such applications have generally heretofore been made, is upon the motion to fix the date of trial.

Judgment

VERMONT STEAMSHIP CO. v. THE ABBY PALMER. (No. 2).

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1904

Jan. 22.

VERMONT STEAMSHIP CO. v. ABBY PALMER

Admiralty law—Practice—Civic time of place in which Court is sitting adopted.

In the service of process, as well as in its sittings and in the public hours of its registry, the Court will be guided by the civic time in use in the town where the Court sits, unless it is shewn that such time is in fact incorrect.

TRIAL of a salvage action before Mr. Justice MARTIN, Local Judge in Admiralty, with Commander John F. Parry, R.N., H.M.S. "Egeria," and Commander Henry G. G. Sandeman, R.N., H.M.S. "Grafton," as nautical assessors.

Bodwell, K.C. (with him, *J. H. Lawson, Jr.*), for the plaintiff, during the course of the trial proposed to read evidence of certain witnesses taken *de bene esse*, and read affidavit proving that they were *ex juris*.

W. J. Taylor, K.C., for defendant: I object; we have no notice of this application.

Bodwell: The order for it, dated November 30th, 1903, stands and has never been objected to. By that order, evidence taken under it may be used at the trial on an affidavit of the solicitor stating his belief that the witnesses are absent from the Province.

Argument

Taylor: But even supposing the order has been made regularly, it has not been properly served. It provides that the plaintiff's witnesses should be examined at 12 o'clock noon, but the defendants had no notice of this till after that hour; at that time no appearance had been entered for the defendants.

Bodwell: Notice of application was served before order on the master of the Abby Palmer and upon Messrs. Eberts & Taylor. The appointment was duly obtained, and was served on defendant's Master and Messrs. Eberts & Taylor before 12, though I was not aware of the service having been effected, and so on attending at 12 I took an adjournment till 2:30 as a matter of

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precaution, and though we could not serve him personally we did serve the solicitors as they now appear to be, though I admit no solicitor was then on the record and none appeared on the examination.

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Taylor: The service upon Eberts & Taylor before appearance is an absolute nullity, and they are not now and never were the solicitors upon the record. As regards service on our Captain, that was too late; I read affidavit of our Master, Johnson, and of Capt. Cox to prove this. (Reads affidavits).

Bodwell, requests that this issue of fact as to the service be now disposed of and asks that the various witnesses on each side be examined on the point, and offers for examination in support of his contention one Charles McDougall, who was examined and cross-examined, as were likewise, on behalf of the defendants, their Master (Johnson) and Captain Cox.

After hearing these witnesses it was held

Per curiam: On the evidence it is found as a fact that the service was effected before twelve o'clock. McDougall is positive that he heard the City Hall clock strike the hour after he served Johnson, and though Johnson (whose evidence is not of a satisfactory nature) and Cox say that by their watches this was not done till a few minutes after twelve, yet neither of them states that his watch agrees with the civic time, and therefore there is no real contradiction of McDougall's statement. In such case, as between the time kept by private individuals and that kept by the civic corporation, I shall in the absence of evidence to the contrary presume the latter to be correct, for it is that which generally regulates public and private affairs within the corporate limits, and is and has long been in practice accepted by this Court as correct in the holding of its sittings, and in keeping open its registry. If on any particular day the civic time were shewn as a fact to be incorrect, that would be another matter, but there is no such suggestion as regards the day in question. Therefore let the evidence be read.

Judgment

Objection overruled.

VERMONT STEAMSHIP CO. v. THE ABBY PALMER. (No. 3).

MARTIN, LO. J.A.

1904

April 13.

VERMONT STEAMSHIP CO. v. ABBY PALMER

Admiralty law—Bail—Cash deposit—Retention of pending appeal to increase salvage award—Arrest of property to answer extravagant claims.

An application by defendant to pay money out of Court which was paid in by him to obtain the release of his ship arrested to answer a claim for salvage will, if the defendant be a foreign resident, be stayed, wholly or partially, pending an appeal to the Exchequer Court to increase the salvage award.

Observations upon the scope of bail bonds and the retention of security pending appeal.

It is an improper practice, and one which the Court will discourage, to arrest property to answer extravagant claims.

MOTION to pay out of Court to defendant the excess of security paid into Court, $25,000, over and above the amount of the judgment, $4,200, and costs to be taxed.

W. J. Taylor, K.C., for the motion: Judgment has been recovered against us for $4,200 and costs, and the balance of our $25,000 now in Court should be paid out.

J. H. Lawson, Jr., contra: We are appealing to the Exchequer Court, and the hearing is fixed for the 27th of April. The security, or a large proportion of it, should be retained in Court to answer whatever final judgment may be given. We do not appeal from the portion of the judgment determining the principle of valuation, or the valuation itself, but we say that the award is inadequate for the services rendered.

Argument

See section 33 of Admiralty Courts Act, 1861, in Howell's Prac., p. 201, and Roscoe's Prac., p. 506; Wms. & Bruce's Prac., p. 544; Browne's Prac., 1,145; the form of our bond in our Rules, p. 62, No. 17; *The St. Olaf* (1869), L.R. 2 Ad. & Ec. 360: If the ship here had put up bonds, the bail would have stood to answer the judgment; these defendants are resident out of the jurisdiction, and we cannot recover against them without delay and extra

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expense if we succeed in the appeal; the security in Court might be reduced, as it is apparent now that the bail is too high.

[*Per curiam:* Your claim of $25,000 has turned out to be a preposterous one, and there are some very strong remarks by the Judges to the effect that the process of this Court must not be used as an engine of oppression by arresting ships for extravagant claims; in future this course must not be followed.]

Lawson: I assure your Lordship that the claim was made *bona fide*, though mistakenly at such a high figure.

Taylor: We are entitled to payment out of the surplus as asked. See the remarks in Wms. & Bruce, p. 544, which shew the practice. The security here is given under an order, 30th December, 1903, for the release from arrest on filing bond to satisfaction of Registrar, and the cash was deposited as bail for the ship instead of a bond. See *The Helene* (1865), Br. & Lush.,

Argument

425, at p. 428, on form of bond, which shews that its form has never been altered despite the Act of 1861; the authority given to make new a form has not been exercised. An appeal is not a stay of proceedings—see rr. 158 and 173, Wms. & Bruce, p. 544; Roscoe, p. 391, Order LVIII., r. 16; *Marsh* v. *Webb* (1892), 15 P. R. 64; *The Berlin*, Pritch. Ad. Dig. Vol. 1., p. 368.

Lawson, in reply cited *Sheffield* v. *Ball* (1756), 2 Lee Ecc. 291.

[*Per curiam*: See the *Annot Lyle* (1886), 11 P.D. 114, which says that exceptional facts should be shewn for a stay. And see *The Ratata* (1897), P. 131.]

Taylor: See Bowen, L.J., at p. 116 of *Annot Lyle.* We are successful parties to the extent of the balance of our security.

Per curiam: The form of bond authorized by form 17 in our Rules is in its operative parts practically identical with that given in *The Helene* (p. 426), and the Lords of the Privy Council there say that it "must be construed as it always has been." The judgment is on the question of costs; and if the *Olaf Case*

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conflicts on this point, the former must prevail. And in this respect section 33 is stated never to have been acted upon: Williams & Bruce, p. 544, nor in fact does Sir Robert Phillimore say it has been acted on, but merely gives his *obiter dictum* on what the object of it was, *i.e.*, to allow the scope of the bail bond

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to be widened if the Court saw fit to take advantage of the power given it by the statute. The fact is, however, that the bond has not been materially altered, either in England or in Canada.

It is argued that the appeal, under section 14 of the Admiralty Act, 1891, is still in this Court, and therefore the bail bond (or its substitute here, the money in Court) is wide enough, since it is conditional to pay "what may be adjudged . . . . in the action," and that the adjudication in appeal is part of the action. But though the present appeal is to the Exchequer Court and not, as it might be, direct to the Supreme Court, it is in essence an appeal to another tribunal as appears by the discriminating language of Rule 158—"Any person who desires to appeal to the Exchequer Court from any judgment or order of a Local Judge in Admiralty of the said Court, shall give security," etc. And by section 9 of the said Admiralty Act "Every Local Judge in Admiralty shall, within the Admiralty district for which he is appointed, have and exercise the jurisdiction and the powers and authority relating thereto of the Judge of the Exchequer Court, in respect of the Admiralty jurisdiction of that Court." And though the jurisdiction of the old Colonial Courts of Admiralty is for the convenient administration of justice conferred upon the Exchequer Court which is (sec. 3) constituted a Colonial Court of Admiralty, just as there is in England a Probate, Divorce and Admiralty Division of the High Court of Justice, yet the Admiralty principles, procedure and practice are, as might be expected from the history of the Court, quite distinct from the jurisdiction in Exchequer, which indeed primarily appears by the Rules and Orders specially relating to Admiralty procedure. One tribunal may well possess and exercise two distinct jurisdictions without in any way merging them; a striking example of which is to be found in this Province wherein the Supreme Court thereof exercises the, in Canada, unusual jurisdiction of the old Court of Divorce and Matrimonial causes. In all the circumstances I should feel disposed to hold that while in a strictly technical sense it may be said that the present appeal to the Exchequer Court, and not to the Supreme Court of Canada, is still in this Court, nevertheless there is no essential differ-

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ence between such an appeal and the usual appeal in England from the High Court of Admiralty. But no case has been cited as to what the practice should be in regard to the retention in Court, pending appeal, of more than the sum for which judgment has been given, and doubtless this arises from the fact that an appeal to increase a salvage award is a very rare thing; the plaintiffs' counsel admits he has not been able to find a precedent, but simply bases his application on the broad principle that as the practice of this Court is singular in seizing the *rem* at the beginning of the action to answer the claim, that distinctive feature should be maintained by preserving the *rem* till all litigation is at an end.

The point is a nice one, and I feel some difficulty about it, though inclined to hold, should I be forced to give a ruling on it, that in the special circumstances of this case, at least, the application should not prevail on this ground.

But it may be entertained on another and safer ground, which is that a stay of proceedings may be ordered under Rule 173 pending appeal, and the ordering of a stay "is a pure matter of discretion depending on the particular circumstances of each case"—*The Ratata, supra.* And it was said by the Court of Appeal in the *Annot Lyle, supra,* that though a stay of proceedings should not be granted in the absence of special circumstances, yet "if in any particular case there is a danger of the appellants not being repaid their appeal if successful, either because the defendants are foreigners, or for other good reason, this must be shewn by affidavit, and may form a ground for ordering a stay."

Judgment

It being admitted in the case at bar that the defendants are foreigners and resident out of the jurisdiction, in the exercise of my discretion I think the proceeding to pay out would have to be stayed, if the plaintiffs make substantive application therefor, though if there is no objection I shall proceed to deal with this application on the basis of its including a counter request to stay. (This having been agreed to, his Lordship proceeded). The stay should be a partial one only, and not extend to more than the additional sum which may appear proper to retain in Court pending the appeal, but in fixing any amount I wish it to be

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clearly understood that I only intend to retain in Court any excess over the judgment simply from abundance of caution and as evidencing a wish not to consider myself infallible, and not as in any way meaning that I think the judgment should be increased. I feel bound to say that I find myself placed in an unusual position, and one of some delicacy, by reason of the appeal from me being to a single Judge only, for the Exchequer Court is at present so constituted. (After some discussion on the amount). In view of what has been said, the order will be that the sum of $6,000 be retained in Court pending the appeal, and the balance will be paid out to the defendant's solicitor; costs of this motion will be reserved till after the appeal is disposed of.

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Yukon Law—Order of reference—Jurisdiction of Court to make—Question of law and fact—Extra cursum curiae—Co. Or. N.-W. T., 1898, Cap. 21.

In an action in the Yukon Territory in which the question in issue was as to the true boundary between a creek and a hill claim, a reference to ascertain the boundary was ordered on the application of the plaintiff; the referee adopted a line run by a surveyor named Gibbons under instructions from the Gold Commissioner (after the location of plaintiff's claim) for the purpose of establishing an official boundary between the hill and creek claims, and which cut off part of plaintiff's claim. On motion to the Court the report was confirmed and judgment entered accordingly:—

Held, on appeal, *per* WALKEM, J. (1.), that the Gibbons line was a nullity, and as the Court below adopted it and based its judgment upon it, that judgment must be set aside;

(2.) The reference was a nullity, as it involved the determination of a mixed question of law and fact and was not a matter of "practice and procedure," but of jurisdiction; and it was beyond the power of the Court to order the reference even by consent.

Per IRVING, J., allowing the appeal (following *Williams* v. *Faulkner and Kroenert* (1901), 8 B.C. 197), that the Yukon Court has no power to make an order of reference, and as the whole proceedings before the referee were founded on a mistaken idea of the jurisdiction to refer the doctrine of *extra cursum curiae* did not apply.

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Per MARTIN, J., dissenting, that on the motion, to vary or refer back the report, which was dismissed, the substantial question in the action was disposed of and there was nothing properly open for the consideration of the Appeal Court.

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THIS was an appeal to the Full Court of the Supreme Court of British Columbia from the judgment of CRAIG, J., in the Territorial Court of the Yukon Territory, whereby it was ordered that the report of the referee, E. C. Senkler, Gold Commissioner of the Yukon Territory, made on 13th July, 1900, be confirmed and the boundary line established by such referee declared to be the true and correct boundary line between the mining claims of the plaintiffs and defendants; that the sum of $500 in gold dust at $16 per ounce paid into Court by the receiver be paid out to the defendants or their advocates; that the damages sustained by the defendants through the *interim* injunction granted by DUGAS, J., on 10th May, 1900, be assessed by Charles Macdonald, Clerk of the Territorial Court; and that upon the report of the said Charles Macdonald the assessment of damages and adjustment of receiver's expenses, the defendants be at liberty to enter judgment against the plaintiffs for the amount found to be due to the defendants as damages, to which should be added the amount found to be due the receiver, together with the costs of the action, the reference to E. C. Senkler under the order of DUGAS, J., dated 25th June, 1900, and costs of the motion for judgment and such assessment of damages and adjustment of receiver's fees and of such report.

Statement

The decision of the referee was as follows:

"The plaintiffs are the owners of the Creek claim in question. The defendants are the owners of the Hillside claim.

"The Creek claim being the prior location, I must determine its boundary on the left limit.

"Under instructions from the Commissioner, Hunker Creek was surveyed in the summer of 1899. On the faith of that survey, the Hillside claim in question was located and recorded. The owners thereof subsequently working the property to a considerable extent, on reaching bedrock it was found that the bedrock was on about the same level as the bedrock in the Creek. An action was then commenced in the Territorial Court by the

owners of the Creek claim to move back their boundary line to the left limit.

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"The case is substantially the same as *Leak* v. *Keys*, heard on appeal by the Minister of the Interior. I must follow his decision and hold that the boundary line as fixed by Mr. Gibbons must stand.

"The plaintiffs' case is dismissed."

The formal report was issued in accordance with the decision.

The appeal was argued at Victoria on 19th, 20th and 21st June, 1901, before WALKEM, IRVING and MARTIN, JJ.

Cassidy, K.C., for the appeal.
Duff, K.C., contra.

Cur. adv. vult.

21st April, 1903.

WALKEM, J.: This is an appeal from the Yukon Territorial Court.

The plaintiff, Stevenson, is the recorded owner of Creek claim, No. 44, on Hunker Creek, in the Yukon Territory; and his co-plaintiffs are equitable owners of part of it under an agreement of purchase made between them and Stevenson.

The location of the claim was made on the 21st of May, 1897, under No. 4 of the then mining regulations, which had the force of statutory enactments—an important circumstance that would seem to have been overlooked throughout the proceedings in the Court below. The defendants' adjoining hill claim, as appears by affidavit—for they deny in the first paragraph of their pleadings that they have any hill claim—was located on the 31st of May, 1899, and hence, two years later than the plaintiff's location. The plaintiffs allege that it illegally overlaps the "left limit" of their ground, and that the defendants are mining in the overlap and taking gold from it. This being denied, the Territorial Court had to primarily decide—for it is at the root of this case—whether the plaintiffs' left limit, where the alleged overlap occurs, fairly conformed, or not, to the provision of Regulation No. 4, for if it did, they would, in my opinion, have been entitled to judgment. I have purposely used the words

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"fairly conformed," because mining regulations are meant as a guide to all classes of prospectors, including those who are illiterate. Hence, accuracy in any of their measurements or bearings is not expected; and if errors occur, as they often do, they are generally rectified with the consent of the proper officer, and in cases of litigation, such as this, by order of the Court.

The sole question in dispute is—What is the true boundary between the claims of the litigants? This is a mixed question of law and fact. As a matter of law, it is either the plaintiffs' left limit, or, according to the regulation mentioned, the base line of the hill to the left of their claim; provided that in either case the alternative line mentioned had been, in point of fact, defined by "legal posts," as that term is explained in the code of Regulations. In any event, the boundary in question is not, as a matter of law, a so called "Gibbons' line" that has been held by the Court below to be the true boundary. The Gibbons' line means one that was run through the Hunker Creek Valley, by a surveyor of that name, in June, 1899, that is to say, thirteen months after the plaintiffs' location had been made, under instructions of the then Gold Commissioner, for the avowed purpose of establishing it as an official dividing line, that should not be open to question, between the hill and the creek claims, antecedently or subsequently located on that creek. When it reached the plaintiffs' claim it was projected through it from end to end

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in a diagonal and mathematically straight course, regardless of the bearings of their left limit, and of the windings of the base of the hill mentioned, and, thereby, cut off a piece of their claim 500 feet in length by a varying and serious width, and added it to the defendants' location. The piece cut off was evidently valuable, for ore worth $500 was taken out of a very small fraction of it by the defendants, as appears by Mr. Justice CRAIG'S order of the 27th of August, 1900, which directed them to pay that sum into Court. One would naturally expect that there was some legislative authority for this action on the part of the Gold Commissioner, as it not only arbitrarily deprived the plaintiffs, without a hearing, of a large section of their ground, to which they had a *prima facie* title, but substituted new rules for the then statutory ones contained in the code relative to the

location of the base line of a hill claim and of the limit of a creek claim that happened to be adjacent to it, or to border upon it. After a careful examination of the code and of all previous statutory mining provisions that were in force in the Territory, I have come to the conclusion that there was no such authority. Hence, "Gibbons' line" was a nullity, and as the Court below adopted it, and based its judgment upon it, that judgment must be set aside. In coming to this conclusion, I have not overlooked Mr. *Duff's* contention, to the effect, that, according to his view of Mr. Jephson's evidence, it shewed that Gibbons' line followed the base line of the hill mentioned, and, therefore, satisfied the requirements of Regulation No. 4. But this is a mistake, for when Mr. Jephson was being examined before the referee, with a plan of the plaintiffs' claim (No. 44) before him, he was asked, "What have you to say with regard to this post, the upper limit post of 44 placed by Mr. Gibbons; is that the base of the hill in your opinion? It is not, it is lower down . . . . somewhere about 50 feet lower down." As a foot, or even less, of mineral land has often proved to be very valuable, this difference of opinion between the surveyors as to what was the base of the hill at the place mentioned might turn out to be a serious matter. There are other passages in Mr. Jephson's evidence which shew that had he not been of opinion, as he expressed it, that "Gibbons' line is the unalterable boundary of the (plaintiffs') creek claim . . . . because it is the official survey," his answers to questions put to him respecting the natural base of the hill would have been different from those that he gave. When asked if there was "anything to pick between Mr. Gibbons' line and Mr. Barwell's as to what is the base of the hill?" his reply was "Not, except that Mr. Gibbons' line is put here under instructions, I presume of the Surveyor-General." In any event, it is clear from his evidence that Mr. Gibbons' line is neither the boundary in question nor the base line of the hill. So far, I have dealt with the case on its merits, and shall now consider an objection that has been taken to the procedure in this case. After the delivery of the statement of defence, the plaintiffs' solicitor applied to Mr. Justice DUGAS for an order to submit the question as to the dividing line to Mr. Senkler, as a referee.

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The order was made on the authority, as alleged by counsel, of section 56 of the English Judicature Act of 1873—the learned Judge being under the mistaken impression that the whole of that Act had been made part of the Judicature system of the Territory by virtue of a declaration in one of its Ordinances that the "practice and procedure" in force in the Supreme Court of England, in January, 1899, should be in force in the Territorial Court. It is contended, and I consider rightly so, that the reference was not a matter of "practice and procedure," but of jurisdiction, as the effect of it was to create a new and unauthorized tribunal for enquiry with respect to issues of fact. It is, however, said that as the plaintiffs applied for it they are bound by it as consenting parties. This might have been so if the question that was referred had been exclusively one of fact; but as it was one of law and fact, as I have shewn, it was beyond the power of the Court to refer it even by consent of the parties: *per* Brett and Cotton, L.JJ., in *Longman* v. *East; Pontifex* v. *Severn; Mellin* v. *Monico* (1877), 3 C.P.D. 142 at pp. 154, 160 and 161; and, hence, the only effect of the order was, as Cotton, L.J., has expressed it, at p. 161, to substitute a referee for the Court as Judge of law, which, of course, could not be done, as the Court could not thus abdicate its functions. In *Mellin* v. *Monico*, Bramwell, L.J., at p. 149, explains the object and scope of section 56. The referee, he observes, "is not to dispose of the action . . . . or even to determine any matter in issue between the parties; if there are facts disputed—for instance, if one of the parties asserts that a building is 20 feet high, and the other that it is 25 feet—the referee, in such a case as that, must determine the fact and report it; his duty is, instead of determining issues of fact or of law, to find the materials upon which the Court is to act. Clearly, under section 56, an action cannot be referred to him to decide facts and law." According to this, the reference in this case was a nullity, as it involved questions of law and fact; hence the referee's report was inoperative, and the subsequent judgment of the Court, which was based upon it, groundless. If Mr. Senkler had been directed, by consent, to examine and describe the plaintiffs' left limit, its boundary posts, their height above ground, the manner in which their upper ends were

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blazed, the contents of the notices placed upon them, and also the actual, or natural, course of the base of the hill to the left of their claim, his report on these matters would have supplied the Court below with proper materials for determining the issue between the parties.

From what has been said it must be obvious that, in a legal sense, no trial of this action has taken place; hence, the judgment appealed from should, as I have said, be set aside, and the case remitted for trial.

The plaintiffs should have their costs of this appeal; and all costs incurred prior to the appeal should be reserved to abide the event.

WALKEM, J.

We have been asked to treat the reference, as was done in *Mellin* v. *Monico*, as a reference to an arbitrator, under the English Arbitration Act of 1889; but there is no resemblance between the order of reference made in that case and in this. In that case, a question of fact was referred for trial under section 57 of the Judicature Act; whereas in this case, the question that was referred was one of mixed law and fact and was referred, under section 56 of the same Act, and, as it happens, illegally so, merely for enquiry and report. Independently of this, as the reference in this action was a nullity, it cannot be made available for any other proceeding; for as a nullity can not be cured, it can not be acted upon. Moreover, no such reference of a question of law and fact could be ordered in any event, as the phrase "practice and procedure," as I have previously said, does not include such a reference, whether to referees or to arbitrators.

IRVING, J.

IRVING, J.: *This is an appeal from a decree pronounced by the Honourable Mr. Justice CRAIG, on Monday, the 27th of August, wherein, after referring to a report made by the referee, Mr. E. C. Senkler, on the 13th of July, 1900, adjudged that the report should be and the same was thereby confirmed, and that the boundary line established by the referee in such report was thereby declared to be the true and correct boundary line between the mining claims of the plaintiffs and defendants. By the same decree it was pronounced that the 61.95 ounces of gold

*Filed in Victoria Registry 2nd December, 1901.

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dust paid into Court was the property of the defendants, and that the damages be referred to the Clerk of the Court to be assessed.

The action was brought by the owners of a creek claim against the owners of a hill claim, and the dispute between them was as to the true boundary of the creek claim, that is to say, whether certain ground belonged to the plaintiff as creek owner, or was the property of the defendants, as part of their hill claim.

On the 25th of June, 1900, Mr. Justice DUGAS made an order in the action directing that it be referred to E. C. Senkler, Esq., to ascertain the boundary line between the claims in question. Mr. Senkler thereupon proceeded to hold his inquiry and made a report deciding as a question of law where the boundary was. But whether he decided as a question of law or fact seems to me immaterial.

Application was then made to Mr. Justice CRAIG for judgment, and he thereupon pronounced the decree confirming the report.

IRVING, J.

We have recently decided in the case of *Williams* v. *Faulkner* (1901), 8 B.C. 197, that the right to refer in this manner does not exist, and the whole proceeding before Mr. Senkler was founded on a mistaken idea of the jurisdiction to refer. In these circumstances I do not see how there can be any report to confirm. In fact, to my mind there has been no judicial decision into the matter in dispute between the plaintiff and defendant at all.

It has been said in argument that the doctrine of *extra cursum curiae* should be applied. I do not think that principle should be applied where there is a fundamental error existing. That doctrine I have always understood rested on the assumption that parties had more or less agreed to submit their rights to the extraordinary tribunal. Here the reference was made in consequence of the generally prevailing opinion that the referee was a properly constituted officer of the Court.

I think the matter should be referred back to the Court of the Yukon for trial.

MARTIN, J.

MARTIN, J.: *Objection is primarily taken to the report of the referee on the ground that he, it is contended, did not decide the

*Filed in Victoria Registry 11th November, 1901.

question between the parties—the disputed boundary—as a matter of fact, but purported to decide it as a matter of law in accordance with a previous decision of the Minister of the Interior in *Leak* v. *Keys*. It is admitted that if the referee had purported to ascertain what the boundary as a matter of fact was, then the appellants would be bound by it, because in such case the evidence cannot be canvassed.

The order for reference "to ascertain the boundary between the claims in question herein," was made on June 25th, 1900, on the application of the plaintiffs (appellants); the report was made on July 13th; on the same day the defendants (respondents), gave notice of motion for judgment thereon, and on August 27th the report was confirmed, and, to quote the order, "the boundary line established by such reference is hereby declared to be the true and correct boundary line between the said claims." But before the confirmation of the report, and on the return of the defendants' said motion, the plaintiffs applied, to quote the affidavit of one of the plaintiffs' solicitors,

"To vary or refer back the said report, and the whole matter was thereupon argued and judgment reserved on the questions raised," and "On the 27th day of August the whole matter was again argued, and Mr. Justice CRAIG gave judgment confirming the referee's report, and gave judgment for the defendants, with costs, and for damages to be assessed.

MARTIN, J.

"(5.) No objection was taken by the said Mr. Gwillim on either of said arguments that cross notice of motion to vary or refer back the said report had not been given, but the matter was argued on its merits."

There has not been any appeal from the judgment refusing the interlocutory motion to refer back or vary the report, and it is consequently contended by the respondents that the questions raised by that motion are finally settled—because if the report stood judgment would, as it did, follow as a matter of course—*Cummins* v. *Herron* (1877), 4 Ch. D. 787; *White* v. *Witt* (1877), 5 Ch. D. 589; *Larkin* v. *Lloyd* (1891), 64 L.T.N.S. 507; *Baroness Wenlock* v. *River Dee Company* (1887), 19 Q.B.D. 155; *Walker* v. *Bunkell* (1883), 22 Ch. D. 722 at pp. 724 and 726; *In re Fitton* (1893), 63 L.J., Ch. 164. The corresponding practice in

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Ontario is laid down in *Freeborn* v. *Vandusen* (1893), 15 P.R. 264, affirmed in *The Township of Colchester South* v. *Valad* (1895), 24 S.C.R. 622, though in the latter case I take the precaution to remark that the observations of the learned Chief Justice at p. 626, on the English practice, are scarcely exact, in so far as going behind the report is concerned, *cf. In re Fitton, supra.*

It was suggested that the learned Judge below fell into the same error as, it is alleged, the referee did, but in view of the facts set out in the affidavit, and the judgment in *Stiles* v. *Galpin*, delivered by the same Judge on November 2nd, following the judgment herein, it is to me inconceivable that he could have done so. He might very well have taken the view that even if the referee's reasons were erroneous his finding of fact in his report was correct. We would not for a moment be justified in assuming that where it is open to a Court to base its judgment on a sound or on an absurd ground, it should choose the latter.

MARTIN, J.

In my opinion, the substantial question in this case was disposed of on the application to refer back, and there is now nothing properly open for our consideration.

In regard to the question of jurisdiction, all I have to say is that according to the recent decision of this Court in *Gelinas* v. *Clark* (1901), 8 B.C. 42, that point is not now open to the appellants.

The appeal should be dismissed with costs.

Appeal allowed, Martin, J., dissenting.

ATTORNEY-GENERAL v. WELLINGTON COLLIERY CO.

IRVING, J.

1903

Sept. 16.

ATTORNEY-GENERAL v. WELLINGTON COLLIERY CO.

Coal Mines Regulation Act—Rule prohibiting employment of Chinamen below ground—Colliery Company infringing rule—Injunction to restrain—Practice.

Held, on a motion by the Attorney-General for an injunction to restrain a colliery company from employing Chinamen below ground in contravention of r. 34, section 82 of the Act, that the matter was not one affecting the public or likely to affect the public to such an extent as to call for the granting of an injunction.

MOTION for an injunction to restrain the defendant Company from employing Chinamen below ground at their mines at Union.

By the Coal Mines Regulation Act Further Amendment Act, 1903 (Cap. 17, Sec. 2), Rule 34 of Section 82 of Cap. 138 R.S. B.C. was repealed, and the following substituted therefor:

"No Chinaman or person unable to speak English shall be appointed to or shall occupy any position of trust or responsibility in or about a mine subject to this Act, whereby through his ignorance, carelessness or negligence he might endanger the life or limb of any person employed in or about a mine, *viz.*: As banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or be employed below ground or at the windlass of a sinking-pit."

Statement

On the return of the motion the affidavit of Thomas Morgan, Inspector of Coal Mines, was read, in which he deposed as follows:

(1.) and (2.) That he had been inspector since 1898, and that one of his duties was to investigate all mine accidents on Vancouver Island.

"(3.) At the time I received the above mentioned appointment I had had twenty-nine years experience as a miner in the coal mines at Nanaimo, in this Province.

"(4.) The defendant Company at the present time is operating three coal mines at Union aforesaid, known respectively as No. 4 Slope, No. 5 Shaft and No. 6 Shaft.

"(5.) The defendant Company at the present time employs

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below ground in No. 4 Slope, 95 white men and 92 Chinamen; in No. 5 Shaft, 36 white men and 86 Chinamen; in No. 6 Shaft, 6 white men and 43 Chinamen.

"(6.) The defendant Company always employ below ground in No. 6 Shaft more Chinamen than white men."

(7.) On 15th July, 1903, an explosion occurred in No. 6 Shaft, resulting in the death of 16 Chinamen; the cause of the explosion he was unable to determine, but he was inclined to think it must be attributed to the negligence or ignorance of the Chinese miners.

"(8.) On 17th April, 1879, an explosion of gas occurred in the Wellington Colliery, by which 7 white men and four Chinamen lost their lives. An inquest was held upon the bodies recovered, and the verdict of the coroner's jury was that the explosion was caused by a Chinaman passing towards the face of No. 10 level. If the accident was caused in this way, in my opinion, it was due to the gross ignorance or carelessness of the said Chinaman.

"(9.) My experience gained as inspector and miner has led me to the firm conviction that the employment of Chinese below ground in coal mines endangers in a high degree the lives and limbs of the other miners employed in such mines. While many Chinese miners can speak some English, one never can be sure that, at the time of danger, they will clearly understand orders given to them, which need to be exactly carried out in order to avert a catastrophe.

Statement

"(10.) My experience also is that Chinese miners, as a class, stubbornly adhere to their own ways of working in coal mines notwithstanding all efforts to convince them of their danger, of which I will give some examples":

(*a.*) In 1897, a Chinaman was killed in No. 4 Slope by the cars, he persisting in walking between the rails.

(*b.*) In 1902, a Chinaman was killed in No. 5 Shaft by stupidly knocking away a post supporting a rock overhead.

(*c.*) In 1900, while a white fireman in No. 6 Shaft was putting up some brattice which had been knocked down by a shot in a stall, a Chinaman, through ignorance or carelessness, took his light to the return side of the brattice where gas had accumu-

lated, the result being an explosion, by which both fireman and Chinaman were burned.

(*d.*) In 1902, in No. 5 Shaft, a Chinaman although warned not to use a naked light in a certain place, did so, with the result that he was so badly burned that he died.

(11.) and (12.) After the passing of the Act he notified (on 18th July) the Company to cease employing Chinamen below ground, but notwithstanding his notice the Company persisted in so employing them.

(13.) On an information laid by him against the Company's manager, charging him with employing Chinamen below ground contrary to the Act, the manager was convicted and fined, but notwithstanding said conviction the Company persists in employing in its mines the number of Chinamen mentioned in paragraph 5.

"(14.) In my opinion, based upon my experience as inspector and miner, unless the defendant Company is restrained from employing Chinamen below ground in said mines, there is imminent danger of accidents occurring which may cause the loss of many lives." Statement

The motion was argued at Victoria on the 16th of September, 1903, before IRVING, J.

A. E. McPhillips, Attorney-General (*D. M. Rogers,* with him), in support of the motion: The rule is intended for the protection of life and enacts that a Chinaman *per se,* should not be employed below ground in coal mines; the Legislature—and it is the paramount authority in this case—has undertaken to say that Chinamen are not to be employed below ground palpably for the reason that they are dangerous workmen as such—from their very nationality they are dangerous workmen—and hence any analysis as to whether they are as good miners as white men is not a matter for investigation. Argument

[IRVING, J.: You have an injunction from the highest Court in the land now standing in the books forbidding these people from employing Chinamen underground. When you have got that, why do you come to this Court for a further injunction?]

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Because of the non-respect and non-observance of this defendant Company of the law of the land.

[IRVING, J.: But the highest Court in the land has provided a remedy, and a penalty for refusing to obey their mandate; there may be an indictment, fine and imprisonment.]

But I have a right as Attorney-General to come to this Court and ask the Court to see that the law is observed.

[IRVING, J.: It is laid down in the case of the *Emperor of Austria* v. *Day* and *Kossuth* (1861), 3 De G. F. & J. 217 that a Court will not grant an injunction to enforce moral obligations, or to prevent people from breaking the criminal law.]

There is no evidence of the infraction of the criminal law here; this is a law passed which is passed within the rights that exist in this Province with regard to property and civil rights. We have passed a certain law or regulation, which we say must be observed; and I submit to your Lordship that when my learned friend's clients are entitled to mine coal in this Province, they are only entitled to do so under the laws of this Province; and if they transcend those laws, transgress them in any respect, I am entitled to come here in the public interest and ask that they should be compelled to live within those laws: see Kerr on Injunctions, 531 and *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501 at p. 506.

[IRVING, J.: That judgment speaks of protecting a right: does it say what kind of a right?]

Argument

Well, a right of the public; the Company employs both white men and Chinamen and the protection to the white men is that no Chinamen shall be employed underground.

[IRVING, J.: That is not a protection to the public; it is designed for the prevention of accident and the protection of those persons who go down to work there.]

It is a protection for a portion of the public; I am not confined necessarily to the whole of the public: see *Attorney-General* v. *London and North-Western Railway* (1899), 1 Q.B. 72. Surely somebody has a right to protect the miners in such a case as this; they could come here themselves and ask the Court to restrain the Company; I come here in equally as strong a position if not stronger.

[IRVING, J.: I think probably stronger. I do not think any Court in the world would listen to an employee of a company asking for an injunction to restrain the Company from working their coal with Chinamen. And the reason of it is just what I have been trying to point out, it is not a public matter. The answer to them would be, if you do not like to incur the risk, you need not go there; you have got no right nor are you compelled to go there.]

Take the case of a white miner working under contract, who finds out that in contravention of the Act the Company is employing Chinamen, and thus endangering his life; he would have the right to move to restrain the Company from carrying on its operations in such a way that he could not safely carry out his contract.

[IRVING, J.: He never would get an injunction. He would be told at once, if you have any remedy it is in damages.]

But damages would not be the only remedy. These particular mines are situated in the Town of Cumberland, and the effect of an explosion might be to destroy life to a very great extent: See *Bonner* v. *Great Western Railway Co.* (1883), 24 Ch. D. 1 at p. 8; *Mayor, &c., of Liverpool* v. *Chorley Water-Works Co.* (1852), 2 De G.M. & G. 852 at p. 860 and *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212, in which the Lord Chancellor at p. 228 says, "Where there has been an excess of the powers given by an Act of Parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but the Attorney-General, on behalf of the public, has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers confided to him by the Legislatures." If a number of persons is endangered, it is an injury to the public. It is not necessary for me to shew any actual injury to the public: see *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.* (1882), 21 Ch. D. 752 at p. 754; *Attorney-General* v. *Oxford, Worcester and Wolverhampton Railway Co.* (1854), 2 W.R. 330, and *Attorney-General* v. *Cockermouth Local Board* (1874), L.R. 18 Eq. 172, where an injunction was granted to restrain defendants from polluting the water of a river because it was expressly prohibited

Argument

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by Act of Parliament: *Attorney-General* v. *Great Eastern Railway Co.* (1879), 11 Ch. D. 449 and (1880), 5 App. Cas. 443; *Attorney-General* v. *Ely, Haddenham and Sutton Railway Co.* (1869), 4 Chy. App. 194 at p. 199, where Lord Hatherley says, "The question is, whether what has been done has been done in accordance with the law; if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed."

[IRVING, J.: This affidavit of Mr. Morgan does not suggest any danger to the people above ground by the employment of Chinese underground; it does not suggest as you mentioned just now in argument, that this mine is situated in the heart of Cumberland and that an explosion in the mine was likely to cause an eruption which would destroy the whole town. I think you must shew that the public are affected. As long as your affidavit is confined to the question of employing Chinese below, your material is insufficient. I have no doubt if you, as Attorney-General, were to come here and make an application that parties be restrained from blasting in the streets of, say, this city, they could be restrained, because it was likely to cause injury to the public.]

Argument

All I am obliged to shew is that there is a contravention of the law; the Company has been seized upon by the general law of the Province as being a public Company which must carry on its works according to law; the Court has the inherent power to compel it to stop its illegal acts; if in the labour market there should be employment for white miners who can fulfill the provisions of the law, why should they be deprived of that right? This affects the public.

The right to labour is the highest form and highest class of property.

[IRVING, J.: I do not think that is a property at all in any sense.]

Where the Legislature says Chinamen shall not be employed below ground surely there is the right in others to object if they are so employed.

The decision of the Judicial Committee in *Cunningham* v. *Tomey Homma* (1903), A.C. 151 is in our favour; if the Legis-

lature can take away from a man the right to vote, surely it can prohibit him from working below ground.

If the Company thinks the legislation is *ultra vires* then it is a matter for agitation in the Courts, but the law as it stands must be obeyed. He cited *Stevens* v. *Chown* (1901), 1 Ch. 894; *Attorney-General* v. *Ashborne Recreation Ground Co.* (1903), 1 Ch. 101, and *Attorney-General* v. *Great Eastern Railway Co.* (1879), 11 Ch. D. 449, and particularly the judgment of Lord Justice James at p. 484 dealing with the question of transgression of statute law.

Luxton, for the Company, was not called on to argue.

IRVING, J.: In the affidavit before me there is no statement as to where this mine is situated, beyond at Union; there is nothing to shew, nor is it suggested in the affidavit, that there is any danger to the public by reason of the proximity of the mine to that settlement, or by reason of the mining operations being conducted so close to the surface as to become a nuisance or likely to injure people in the neighbourhood. The case rests simply on this, that a statute prohibiting the employment of Chinese underground is being violated. And there is a suggestion contained in the affidavit that the lives of other people employed underground are endangered.

In granting injunctions, especially where there is a going concern, such as a colliery, the Court has to proceed carefully. It is a very serious matter to interfere with any person's business. There are cases over and over again where the Court has refused to grant an injunction against a colliery on that ground. In that sense, the public are interested in seeing that the thing is carried on. But that does not by any manner of means make the system of carrying on the mine a matter of public concern. Now the *Attorney-General* contends that the system on which this mine is carried on is a matter of public concern. I am not able to see that it concerns the public in any way whatever. It is not a public question. Certainly it is not a question affecting the public or likely to affect the public to such an extent as to call for the allowance of an injunction—which is a very extraordinary remedy. This Court does not grant an injunction

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for the purpose of enforcing moral obligations, nor for keeping people without the range of the criminal law. There usually must be some right—a right of property, or some right at any rate—infringed or likely to be infringed. The miner who is employed in that mine has no right to come here and ask for an injunction, because he has no right of property, he has no proprietary right which is being infringed. The *Attorney-General* is not entitled to obtain an injunction from this Court, because there is no public right being infringed or likely to be infringed. The public are not concerned in this particular matter. To use the language that is referred to in some of the cases—the affidavit does not shew that the public interests are so damnified as to warrant the issuing of an injunction in this case. The motion will be dismissed.

FULL COURT
1903
Nov. 9.
LEADBEATER v. CROW'S NEST

LEADBEATER *ET AL.* v. CROW'S NEST PASS COAL COMPANY, LIMITED. (No. 2.)

Practice — Test action — Pleadings — Particulars — Substituted test action— Full Court order—Interference with by Chamber order.

Where particulars of the statement of claim in a test action are struck out on an appeal to the Full Court and full and true particulars ordered to be given, the plaintiffs may deliver their particulars in another action which has since been settled on as the test action; and an order obtained in Chambers which has the effect of nullifying in part the Full Court order will be set aside.

APPEAL from an order of FORIN, Lo.J., giving the plaintiffs liberty to amend their statement of claim.

Statement

On 9th April, the judgment of the Full Court was given in the *Wilson* v. *Crow's Nest* appeal (not reported) whereby the particulars stated in the plaintiffs' statement of claim were struck out and full and true particulars ordered to be given within one

month; the defendants to have a month thereafter within which to amend defence. The order taken out on this appeal was served on 8th June.

After the argument and before judgment in the *Wilson Case*, the *Leadbeater* action had been ordered to be tried as the test action for the whole twenty-nine actions of which the *Wilson* action was one: see *ante* p. 103. Before judgment in the *Wilson* appeal, counsel for plaintiffs and defendants had entered into an agreement as follows:

"It is agreed between *Davis, K.C.*, counsel for defendants, and *Taylor, K.C.*, counsel for plaintiffs, in the above and twenty-eight other similar appeals as follows:

"That the interlocutory appeal in the above action be considered an appeal not in said action, but in the action of *McLeod et al.* v. the above defendants.

"(2.) That all other similar appeals in the other actions above named be understood to be stayed under the order of 20th January, 1903, made by his Lordship Mr. Justice WALKEM.

"(3) That if the appeal in *Wilson et al.* be allowed or dismissed, that the order on appeal be taken out in said action of *McLeod et al.* and not in said action of *Wilson et al.*

"(4.) If the said appeal is successful, the plaintiffs in all other actions shall not be at liberty to tax costs of said other appeals or said other matter out of which such appeals arise, provided the order on appeal in *McLeod et al.* so directs as to such appeals."

Statement

On 26th June, plaintiffs delivered a statement of claim in *Leadbeater* v. *Crow's Nest* with amended particulars, and on 13th July, on plaintiffs' application an order was made by FORIN, Lo.J., giving plaintiffs leave to amend their statement of claim as they might be advised, and serve it within two days; and liberty was given defendants to amend their defence on or before 31st July; the costs of the application were ordered to be costs in the cause. Plaintiffs' solicitors thereupon delivered and served a statement of claim identical to that served on 26th June.

The defendants appealed, and the appeal was argued at Vancouver on 5th November, 1903, before HUNTER, C.J., IRVING and MARTIN, JJ.

Davis, K.C. (*Bodwell, K.C.*, with him), for appellants: The

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plaintiffs got no power to deliver a new statement of claim by the Full Court order; by it particulars should have been given within one month, but the order appealed from extends the time. This order conflicts with the Full Court order, and is an evasion of it.

S. S. Taylor, K.C., for respondents: The point is whether or not we could deliver particulars in this action without an order.

[HUNTER, C.J.: Why did you deliver an amended statement of claim?]

There are no material amendments. The order was obtained for the purpose of carrying out the Full Court order and not for interfering with it or varying it. The appeal is vexatious.

Davis, in reply: If the order is allowed to stand we would be precluded from contesting the statement of claim on the ground that it is not a compliance with the Full Court order.

Cur adv. vult.

On 9th November, the judgment of the Court was delivered by

HUNTER, C.J.: I think there was a plain and obvious course open to Mr. *Taylor* to take, which was to comply with the order of the Full Court which required particulars to be delivered by a certain time. The statement of claim had already been delivered, and it was not necessary as far as that order was concerned to redeliver a new statement of claim, but to deliver particulars in conformity with the order. It was not necessary for him to get the order which he did get from Judge FORIN. If that order had been issued in terms of the summons, I do not suppose the Company would have thought it worth while to appeal; nor do I suppose there would have been very much objection to it, but the difficulty about it is that it is drawn up in general terms and purports to give *carte blanche* to the plaintiff to amend his pleadings as he may be advised, and it is quite obvious that if it were allowed to stand it might cause embarrassment at the trial, as it might be contended that its effect was to displace the order of the Full Court, or at any rate to nullify that part of it which confines the plaintiff at the trial to the particulars delivered. Therefore discharge the order with costs here and below, but allow the pleading to stand as delivered.

HUNTER, C.J.

REX v. ROYDS.

IRVING, J.

1904

March 31.

REX v. ROYDS

Criminal law—Confession—Voluntary—Person in authority—Rector.

The Rector of a Cathedral held an inquiry into the circumstances of an assault in which several of the choir boys were implicated:—

Held, that the Rector was a person in authority and that a statement made to him by one of the boys who was told to speak the truth and that the statement was for the purpose of that inquiry only, was not voluntary.

TRIAL before IRVING, J., in the County Court Judge's Criminal Court of the prisoner who was charged with assault.

The prisoner was a choir boy of Christ Church Cathedral, Victoria, and along with several other of the choir boys was implicated in an alleged assault on another boy. The assault took place on the way to a choir re-union to be held in the choir master's house.

On the third day after the occurrence, the Rector of the Cathedral detained the boys after choir practice and sent them into the Church under the charge of the verger and seated at a distance from one another so that they could not converse; the choir master then called each of them separately into the vestry and the Rector questioned them in the presence of the Bishop, the assistant Curate and the choir master, and took their statements in writing. He told them they were to speak the truth, and that their statements were to be used for the purposes of that inquiry only.

Statement

The boys were summoned for assault, and in the Police Court the Rector testified as to the statements made to him, and the prisoner Royds was committed for trial.

On the trial the statement made by the prisoner was offered in evidence by the Crown and objected to.

Eberts, K.C., and *R. H. Pooley*, for the Crown.

J. H. Lawson, Jr., for the prisoner.

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IRVING, J.: Under the circumstances of this case, in my opinion, the Rector was a person in authority, and as the Crown has not satisfied me that the statement was voluntary, I cannot admit the evidence.

FULL COURT

1904

April 18.

RE COAL MINES REGULATION ACT

IN RE THE COAL MINES REGULATION ACT AND AMENDMENT ACT, 1903.

Coal Mines Regulation Act—Employment of Chinamen—Rule prohibiting—Constitutionality of—B.N.A. Act, Sec. 91, Sub-Sec. 25 and Sec. 92, Sub-Secs. 10, 13—Naturalization and aliens—R.S.B.C. 1897, Cap. 138, Sec. 82, r. 34, and B.C. Stat. 1903, Cap. 17, Sec. 2.

Rule 34 of section 82 of the Coal Mines Regulation Act as enacted by the Legislature in 1903, and which prohibits Chinamen from employment below ground and also in certain other positions in and around coal mines is in that respect *ultra vires*.

So *held*, *per* HUNTER, C.J., and IRVING, J., MARTIN, J., dissenting.

Union Colliery Co. v. *Bryden* (1899), A.C. 580, applied and distinguished from *Cunningham* v. *Tomey Homma* (1903), A.C. 151.

Statement

THIS was a question referred under section 98 of the Supreme Court Act by the Lieutenant-Governor of British Columbia by and with the advice of His Executive Council to the Full Court for hearing and determination. The question which was referred by Order in Council dated 9th December, 1903, was "whether Rule 34 of section 82 of Chapter 138 of the Revised Statutes, 1897, being the Coal Mines Regulation Act, as enacted by section 2 of Chapter 17 of the Statutes of 1903, was within the competence of the Legislature of British Columbia to enact, in so far as it provides that no Chinaman shall be appointed to, or shall occupy, any position of trust or responsibility in or about a mine subject to the Coal Mines Regulation Act, whereby through his ignorance, carelessness or negligence he might endanger the life or limb of any person employed in or about such mine, namely,

as banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or be employed below ground or at the windlass of a sinking pit."

The question came up for argument at Victoria on 23rd December, 1903, before HUNTER, C.J., IRVING and MARTIN, JJ.

Wilson, A.-G., for the Crown: This legislation has stood with some few modifications since 1873, and although the fact of its so standing does not conclude the question, it is significant.

The principal cases to be considered on this argument are *Union Colliery Co.* v. *Bryden* (1899), A.C. 580 and *Cunningham* v. *Tomey Homma* (1903), A.C. 151. *Bryden's Case* is distinguishable, as there the facts were different, the persons affected all being aliens, and besides it was a civil action; the decision in it is only binding when a precisely similar state of facts is shewn to exist; the judgments in the *Homma Case* (besides the judgments in the case itself) shew that the *Bryden Case* went on the ground that the legislation there under review was aimed against aliens.

The rule (34) is one intended solely for regulating the working of coal mines; it is one which deals with local undertakings; all Chinamen irrespectively of their nationality or residence or state rights are under the ban; it is an exclusion against them as a race, and that is what was held to be lawful in the *Homma Case* so far as the franchise is concerned.

Argument

The Lords of the Privy Council inclined to the opinion in the *Bryden Case* that the leading feature of the then enactment was the exclusion of aliens. It is submitted that the clear intention of the Legislature in the rule now in question was the regulation of the coal mines irrespectively of race or nationality.

The Court will require very strong reasons before it will come to the conclusion that this is not a regulation, but is rather an attempt by the Legislature to do circuitously what it had no power to do otherwise.

A. E. McPhillips, K.C., on the same side: In B.C. Stat. 1902, Cap. 32, the same rule was enacted, except that the word "Japanese" followed after "Chinamen;" but that legislation

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was disallowed on 5th December, 1902: see the report in Sessional Papers, B.C., 1903.

There is no recital of the obnoxious features of Chinamen or of the disasters resulting from their employment, but that does not detract from the force of the enactment if it really is a rule for the regulation of the mines: Cooley's Constitutional Limitations, 5th Ed., 38: the regulation is for the protection of life and limb, and is peculiarly within the province of the local Legislature: two classes are classified as dangerous, *viz.*: Chinamen and people who do not speak English: the Chinaman *per se* has a verdict against him by the Legislature which says he is a menace to life and limb in a coal mine; it is not a question of whether he can or cannot speak English. The Legislature has as against the Chinaman made the finding which is without appeal that the Chinaman is ignorant, careless and negligent, and by reason thereof is a source of danger to those employed in or about a mine, and is, therefore, expressly legislated against, and there is absolute inhibition against his employment in the stated capacities or below ground.

Coal mines are local works and undertakings and subject to legislative control by the Province (B.N.A. Act, Sec. 92, Sub-Secs. 10 and 13) and even if the Legislature fell into error on the facts, and the class legislated against are not a menace to life or limb, the matter is concluded by the legislation—the Court cannot rectify it; it would amount to legislation upon the part of the Court, and an appeal to the Court from the express pronouncement and enactment of the Legislature.

Argument

It is on the face of it only a regulation because the Chinaman is not prevented from working above ground in some capacities: by other statutes of the Province we see that Chinamen and Indians are absolutely prohibited from holding a liquor license.

The decision of the Privy Council in *Bryden's Case* is qualified to a large extent by that in *Homma's Case:* in the former there was a total inhibition against Chinamen, but not by way of regulation; further, *Bryden's Case* proceeded largely upon admissions and that the legislation in its application affected persons as aliens or naturalized subjects, and was not of general application: the latter decided that once you get beyond alienage and

naturalization you are within the powers of the Provincial Parliament: the judgment of Lord Halsbury in the latter and that of Lord Watson in the former can't be reconciled.

He referred particularly to *Cunningham* v. *Tomey Homma* (1903), A.C. 151 at pp. 154, 156, 157; *Union Colliery Co.* v. *Bryden* (1899), A.C. 580; and distinguished the one case from the other and shewed how some of the text of Lord Watson's judgment could only be reconciled upon the view that it proceeded upon admissions allowing of certain conclusions being drawn, but that the judgment could not be construed as determining the question involved in this reference, and, further, the Lord Chancellor's judgment in the *Homma Case* was a clear exposition of the line of demarcation between the Federal and Provincial powers, *i. e.*, the Federal authorities dealt with alienage and naturalization—but legislation not aimed at any interference with such authority could not be reasonably said to contravene Federal powers, and, therefore, was *intra vires* legislation when in respect to a matter of legislation within the classes of subjects of exclusive Provincial legislation as set forth in section 92 of the B.N.A. Act: *Hull Electric Co.* v. *Ottawa Electric Co.* (1902), A.C. 237, and Am. & Eng. Encyclopædia of Law, 2nd Ed., Vol. 6, p. 1,080, were also referred to.

Argument

Cur. adv. vult.

18th April, 1904.

HUNTER, C.J.: In *Bryden* v. *Union Colliery Co.* (1899), A. C. 580, the question as to the competence of the Provincial Legislature to enact section 4 of the Coal Mines Regulation Act, being R.S.B.C. (1897), Cap. 138, by which it was provided *inter alia* that no Chinaman should be employed below ground in any coal mine to which the Act applied, came up for decision, and their Lordships answered the question adversely to the Province.

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By Rule 34 enacted in section 82 of the same Act, as amended by 1903, Cap. 17, Sec. 2, it is provided as follows:

"Rule 34: No Chinaman or person unable to speak English shall be appointed to or shall occupy any position of trust or responsibility in or about a mine subject to this Act, whereby through his ignorance, carelessness or negligence he might en-

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danger the life or limb of any person employed in or about a mine, viz.: As banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or be employed below ground or at the windlass of a sinking-pit."

Acting under the authority of this rule and of the penalizing sections of the Act, the Provincial Government caused informations to be laid against the manager of the Wellington Colliery Company, Limited, which owns and operates a coal mine within the meaning of the Act, situate at Comox, with the result that some 74 convictions have been recorded, and a large aggregate of fines imposed for employing Chinamen below ground contrary to the provisions of the rule.

The Company has taken out rules *nisi* to quash the convictions, but His Honour the Lieutenant-Governor considering under the advice of his Ministers, that the constitutionality of this enactment should be decided as quickly as possible, has, under the authority of the Supreme Court Act, referred the question to the Full Court in the following terms:

"Whether the said rule as re-enacted as aforesaid was within the competence of the Legislature of British Columbia to enact in so far as it provides that no Chinaman shall be appointed to or shall occupy any position of trust or responsibility in or about a mine subject to the "Coal Mines Regulation Act," whereby through his ignorance, carelessness or negligence he might en-

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danger the life or limb of any person employed in or about such mine, viz.: As banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or be employed below ground or at the windlass of a sinking-pit."

A special sittings of the Full Court was accordingly held, and at the opening of the proceedings the learned *Attorney-General* and Mr. *A. E. McPhillips* appeared for the Crown, and Messrs. *Cassidy* and *O'Brian* for the Company.

It was made apparent to us at the outset that the learned counsel had failed to agree upon the terms in which the question should be stated for our opinion, and a suggestion that the order of reference should be amended by setting out some of the convictions and requesting the opinion of the Court as to their validity was not accepted by the learned Crown counsel, with

the result that the counsel for the Company withdrew from the proceedings. This of course is unfortunate, as although we are bound to consider the question submitted in conformity with the request of His Honour, we labour under the disadvantage of not hearing what there is to be said against the legislation.

However, after hearing the elaborate arguments of the learned counsel for the Crown, I am of the opinion that the decision in the case of *Bryden* v. *Union Colliery Co.*, already referred to, concludes the matter, and that we should answer His Honour's question in the negative. That case expressly decided that the enactment that no Chinaman shall be employed below ground was *ultra vires* of the Legislature of the Province on the ground that the leading feature of the legislation is to debar all persons belonging to a named nationality from engaging in a particular employment or class of labour, and that power to pass legislation of this character resides in the Parliament of Canada to the exclusion of the Legislatures of the Provinces.

Rule 34 is, *quoad* this question, an identical re-enactment of the legislation thus reviewed, and is therefore to such an extent null and void.

It was strenuously pressed upon us by the learned counsel that the rule was a mere regulation affecting the mode in which coal mining below ground is to be carried on, and that the expression "No Chinaman" has no reference to the question of nationality or alienage (just as would have been the case had the expression been, for example, "No Indian," "No Mormon," or "No Jew," terms which do not connote the idea of nationality), but is merely descriptive of a race or class which, wherever resident or born, is unsuited by certain idiosyncracies from being safely employed below ground. But, granting all this, and that legislation which did not purport to shut the door against a given nationality would be competent to the Province, the short answer is that the identical expression was used in the legislation passed upon by the Judicial Committee, and it is impossible to suppose that the expression is used in any other sense in the rule.

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If the Legislature intended to make a regulation prohibiting a particular class from being employed below ground which would not necessarily be open to the interpretation placed upon

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the enactment before the Judicial Committee it would have been a simple matter to do so, but to re-enact legislation which has already been declared within the exclusive jurisdiction of the Parliament of Canada without taking care to exclude such interpretation is merely to invite the same decision.

It was however contended by the learned counsel that the authority of *Bryden* v. *Union Colliery Co.* is impaired by the later decision in *Cunningham* v. *Tomey Homma* (1903), A.C. 151. For my part I do not see what the one decision has to do with the other. The questions raised in the two cases are not in the same plane. The one case decided that the power to exclude a particular nationality from a given employment was vested in the Parliament of Canada, and the other that each Legislature in the exercise of its power to regulate the provincial franchise could exclude any particular nationality from the right to vote. Indeed with great respect for the learned Judges who held otherwise, I should have thought that the right to pass the legislation reviewed in the *Tomey Homma Case* followed as a self-evident corollary from the grant of the power to amend the constitution of the Province. If the Legislature under such a power could not from time to time enact who should constitute the electorate, it is difficult to see the use of the power or why it was conferred. However, it is not necessary to pursue the matter any further; suffice it to say that if we were to hold that the present case is not the case of *Union Colliery Co.* v. *Bryden* over again, we should virtually say that that decision is *brutum fulmen.*

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In my opinion His Honour's question must be answered in the negative.

IRVING, J.: In the reasons for judgment in the *Bryden Case* Lord Watson narrows the case down to this single question whether the enactments of the fourth section of the Coal Mines Regulation Act, in so far as they related to Chinamen, were within the competency of the Provincial Legislature.

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He then proceeds as follows: "The leading feature of the enactments consists in this—that they have, and can have, no application except as to Chinamen who are aliens or naturalized

subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia."

The judgment then declares that as the legislation then under consideration was a matter which directly concerned the rights, privileges and disabilities of aliens or naturalized subjects it was *ultra vires* of the Provincial Parliament.

It is stated by counsel for the Crown that in the course of argument of the *Bryden Case* before the Judicial Committee an admission or a concession was made by counsel that enabled that body to decide as they did. I am unable to find any trace of such an admission in the reasons for judgment to which we have been referred; on the contrary, I see a distinct statement that the only point for consideration was the constitutional question as to whether section 4 was or was not *ultra vires*. Moreover, I do not think any admission of counsel could affect a decision touching the construction of a constitutional statute.

Then we were referred by counsel for the Crown to the *Tomey Homma Case*. It was said that the decision in that case explained away the decision in the *Bryden Case* and left us free to deal with the enactment contained in rule 34 untrammelled by the decision given on section 4 of the Statute of 1890.

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The dictum in the *Tomey Homma Case*, as I understand it, reaffirms the decision in the *Bryden Case*.

In *Tomey Homma's Case* the question involved in the appeal was the constitutionality of the Provincial Act which prevented a Japanese from obtaining electoral privileges in Provincial elections.

In delivering the judgment in that case the Lord Chancellor drew a distinction between privileges and rights, that is to say, privileges which might or might not follow as a consequence of naturalization and the right of protection (which as the correlative of the obligation of allegiance) was necessarily involved in the nationality conferred by naturalization.

The protection to which he referred was " that general protection of the King (whereof Littleton here, s. 199, speaketh) which

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extends generally to all the King's loyal subjects, denizens and aliens within the realme."

He then stated that the *Bryden Case* was decided on this ground—that the Provincial Legislature could not deprive the Chinese in this Province, whether naturalized or not, of those ordinary rights which belong to every inhabitant of British territory. (1898, A.C. 73, 155).

I understand him to mean that the Provincial Parliament while at liberty to refuse to accord to a naturalized subject a privilege cannot deprive an alien of those fundamental rights to which every person living under the ægis of the British Sovereign is entitled. The power to legislate as to these rights is reserved to the Dominion Parliament by sub-section 25 of section 91, and the proviso at the end of that section.

The point submitted to us is as to the constitutionality of an enactment which declares that no Chinaman shall be "appointed to or shall occupy any position of trust or responsibility in or about a mine subject to this Act, whereby through his ignorance, carelessness or negligence he might endanger the life or limb of any person employed in or about a mine, viz.: As banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or be employed below ground or at the windlass of a sinking-pit."

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Now, in what respect does this differ from the legislation considered in the *Bryden Case?* The calling of the enactment in question a rule or regulation can not affect its constitutionality, nor can the enactment derive any greater validity by reason of its insertion in the middle of a rule which in other respects may be *intra vires.* Is not the pith and substance of this so-called rule to prevent Chinamen from working underground, regardless of their individual fitness or capacity to properly perform the work?

In the paragraph quoted, I can see no rule or regulation, established or sought to be established, by which the fitness of a Chinaman to properly perform the work of an underground miner can be tested. He may speak the English language perfectly; he may be a skilled mining engineer; but these points are immaterial. He is debarred by reason of the fact that he is

a Chinaman. I refer to these matters not because I wish to discuss the policy or impolicy of the enactment, but in order to shew, by the absence of these tests, that there is in truth no real difference between this Statute of 1903 and the Statute of 1890 considered in the case of *Bryden* v. *Union Colliery Co.*

For these reasons I think the decision in the *Bryden Case* should govern our answer to the question submitted to us.

MARTIN, J.: What has to be decided on this reference is whether the Legislature of this Province has exceeded the power it admittedly possesses to regulate the working of coal mines.

Now on the face of it, the rule in question does purport to do more than that, and the full title of the statute by virtue of which it is passed declares that it is "An Act to make Regulations with respect to Coal Mines." And the particular section, 82, which sets out the rules, 35 in number, calls them "general rules," and says they "shall be observed so far as is reasonably practical in every mine to which this Act applies." And that as a group they are necessary rules for the regulation of coal mines in fact as well as in name appears by a perusal of them. They deal with various subjects of the first importance to the safety of miners, such as ventilation, fencing, safety lamps, explosives, water, signals, inspection and similar matters. The last one, 35, creates the offence for contravention; and No. 34 is that under consideration.

It deals with two classes of persons—Chinamen and "persons unable to speak English," and debars them from being employed in certain specified "positions of trust or responsibility in or about a mine." The said prohibited positions are banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or at the windlass of a sinking-pit, or below ground. Some reasons for this proscription of a Chinaman or other person as mentioned are given, and they are that "through his ignorance, carelessness or negligence he might endanger the life or limb of any person employed in or about a mine." From this language, it is apparent that the Legislature, rightly or wrongly, entertains the belief that the presence of said proscribed persons in or about a mine is fraught with danger to others. Now it is abundantly

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clear that if the Legislature has constitutional control over a certain matter it need give no reasons for the exercise of it, and, further, that if it had or gave reasons which it thought were sufficient, but which in reality were grounded upon erroneous beliefs or ideas, nevertheless its acts cannot be successfully impeached on that ground. It is the possession of the requisite power, and not the assignment of reasons for its exercise, that determines the constitutionality of a legislative enactment. Given the power, it may lawfully be exercised on bad or no reasons and in pursuance of a mistaken policy, but the discretion so exercised is not open to review, because within its constitutional jurisdiction the Legislature is supreme, and if, to apply that principle to the present case, no part of the Federal jurisdiction can be found to apply to this matter, then the Provincial Legislature is the absolute master of the situation. If, in support of such a proposition, it were necessary to cite authority it will be found in the case of *Bryden* v. *Union Colliery Co.* (1899), A.C. 580; and in *Tomey Homma's Case* (1900), 7 B.C. 368, (1903), A.C. 151. In the former of which at pp. 584-5 it is stated:

"But the question raised directly concerns the legislative authority of the Legislature of British Columbia, which depends upon the construction of ss. 91 and 92 of the British North America Act, 1867. These clauses distribute all subjects of legislation between the Parliament of the Dominion and the several legislatures of the provinces. In assigning legislatative power to the one or the other of these parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but, when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not. There are various considerations discussed in the judgments of the Courts below which, in the opinion of their Lordships, have as little relevancy to the ques-

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tion which they had to decide as the evidence upon which these considerations are founded."

And in the latter, at p. 155:

"The policy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider."

Doubtless if the circumstances were such that it plainly appeared that the Legislature under the guise of adopting an otherwise legal course, was indirectly attempting to do something which was *ultra vires* and thus *mala fide* break the bounds of its constitutional limitation, the Court would not hesitate to put the proper construction upon such methods (see *Tomey Homma's Case*, p. 157), but an intention of that kind should not be lightly imputed, and I see no ground on the whole facts for inferring it here.

Seeing that, as has been noticed, some reasons are given for the present enactment, it may not be out of place to remark that, as regards one of the two classes aimed at, those unable to speak English, any one who has any knowledge of mining operations knows that the reason given is a vaild one, for the presence of such persons in a coal mine is plainly undesirable because their ignorance of the language of the country involves the failure to readily understand and obey orders which would be an additional source of danger to their fellow-workmen, and it could not be seriously contended that the Legislature had not the right to exclude such "ignorant" and consequently dangerous persons from mines. On this ground a Chinaman who could not speak English would, in common with all others likewise deficient, be properly excluded quite apart from the question of his race or origin. That disqualification, in short, is linguistic—not racial or national—and in this respect there is no difference in treatment between Chinese and others, and consequently no possible ground of complaint. For example, there are many natural born British subjects in Canada, particularly those of French origin, who cannot speak English, but no one would suggest that their exclusion for that reason would not be within the powers of the Legislature, and to that extent at least the enactment is undoubtedly *intra vires*. But, it may be said, the real differ-

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ence is that, as regards a Chinaman, he is barred as such, even though he possesses the linguistic qualification, that is to say, he is also barred simply because he is a Chinaman racially or nationally, as well as linguistically, hence a dual bar. I pause here to say that though it has been seen that it is unnecessary to give reasons for exclusion, and that it is immaterial even if such reasons are invalid on the face of them, nevertheless I do not wish it to be understood that I consider further reasons (and at least plausible ones) could not have been given or may not have been present to the mind of the legislators in framing this portion of the rule regarding Chinese. It may well be that the members of the House believed, rightly or wrongly, in the existence of several racial peculiarities in that people which have in this Province been largely attributed to them, such as fatalistic tendencies, light estimation of the value of human life and consequent carelessness and neglect in the taking of necessary precautions in a hazardous occupation, apathy to suffering, liability to panic in presence of danger, and absence of that *esprit de corps* which affords such great assistance to fellow workmen when called upon without warning to face a sudden peril, particularly when underground. I do not for a moment say that any or all of such beliefs as regards Chinese in British Columbia is or are well founded, or that I share them, or that if they exist they may not in other occupations be more than compensated for by the possession of admirable qualities such as patience, industry and thrift, but undoubtedly there are very many in this Province who do entertain some or all of such beliefs to a greater or less extent.

The extent to which qualities so undesirable in an employment already sufficiently hazardous exist in the general body of Chinese residents in British Columbia is one which would not only be a legitimate but most proper subject for consideration by the Legislature of this Province in regulating the employment of such residents in mines. The fact that the exclusion is only partial, and that they are permitted, generally speaking, to engage in those numerous branches of labour "in or about mines" which are being carried on above ground shews on the face of it a willingness to allow them to earn their bread in coal

mining so long as they do not endanger the safety of others. And be it further remarked that simply because a resident of British Columbia of any race is prevented from working underground he has no just cause of complaint. The rule might properly have provided that no person under age, and no woman should be so employed, though the effect would be to bar considerably more than half the whole population of Canada from that employment. It happens that it is not the custom in Canada for women to work in coal mines, and so that illustration would not possibly without reflection appeal to some; but it must be remembered that it is, or till very lately was, the custom in some highly civilized countries in Europe, and that, for example, great numbers of women were so employed in France, and to such an extent that the employment was made the subject of a well-known book by one of the greatest authors of that country: I refer to "Germinal" by M. Zola.

To take another striking illustration in this country of the power of Parliament to wholly exclude a large body of its citizens, being natural-born British subjects—Canadians—from a great and lucrative branch of business, I refer to the case of the Indians throughout Canada, who, according to the last census (1901) amount to 93,460 of pure blood and 34,481 half-breeds. Not only is it declared by the Federal Legislature (which has the control of Indian affairs) to be a crime to supply liquor to one of these aboriginal natives of our country, but it is also a crime for him to have even a glass of intoxicating liquor in his possession (Indian Act, R.S.C. 1886, Cap. 43, Secs. 94, 96), the consequence of which is that he is shut out from several very important and lucrative branches of trade and commerce, such as distilling, brewing, the wine, spirit and saloon trade, and, almost wholly, inn-keeping. This is a sweeping proscription, but it is considered, rightly or wrongly, that the North American Indian is so inherently constituted that indulgence in intoxicating liquor has such an exceptionally inflammatory effect upon him that the public safety demands he should so far as possible be removed from temptation to indulgence therein. Now, supposing that the inherent defect in the Indian took a different form, and was of such a nature that the Legislature of British

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Columbia deemed it unsafe to others to allow him to work underground in a mine, or that the 17,437 persons of the negro race resident in Canada should be deemed to labour under a like infirmity, and that the rule in question had read "no Indian and no Negro," instead of "no Chinaman," can there be any doubt at all about the constitutionality of such a provision? In my opinion, clearly not. And what greater rights in this country have, or should have the Chinese as a race than the Indians of Canada, almost all of whom are natural born British subjects, or than the Negro natural born subjects of the Crown? The term "Indian" or "Negro" would clearly be used in a racial and descriptive sense, and hence unassailable.

Assuming, for the moment, the fact to be that the presence of Chinese underground was a real danger to other workmen, and that the Legislature expressly dealing with them as a race and and not as a nation passed a regulation prohibiting their employment underground, it must, in my opinion, be admitted that this would be within its powers. To contend otherwise would be to assert that the power does not exist, though it admittedly does exist somewhere. Now it cannot repose in the Federal Parliament; for that body can only, in this relation, deal with Chinese on their national basis as aliens or naturalized persons, therefore it must be in the Provincial Legislature.

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It becomes necessary, then, to consider carefully in what sense the word "Chinaman" is employed in the section in question; for if it is used in a sense which is racial or descriptive, very different results may follow from the use of it in a national sense, which latter is that in which it has hitherto been regarded and considered. How necessary it is to definitely establish as a matter of fact the way in which this word is and has been used in this Province appears from *Bryden's Case*, wherein at p. 586, Lord Watson says, "the words 'no Chinaman,' as they are used in s. 4 of the Provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not been naturalized." This not unnatural assumption of His Lordship, as based on the statements of counsel before him and the facts as then presented, of the "probable" narrow and re-

stricted meaning of the words will be found to be very far from the fact.

Illustrations in addition to those already given of the way in which words in this country are used racially and descriptively, though originating in nationality, are not wanting. Thus we have the term "French Canadians" as applied to our very numerous fellow citizens of French origin, though for over 140 years they and their fathers have been subjects of the British Crown; and also the term "Jews" as applied to our fellow subjects, and others, in Canada of Hebraic origin who no longer have a country or government of their own, and therefore are not now a nation but a race dispersed among and the subjects of many and various nations, and whose designation is properly preserved only by adherence to their ancient religion.

Bearing then in mind the distinction between a term used racially and descriptively and one used nationally, and turning to the statute in question, it may at first sight and to one not familar with the history of this branch of legislation appear strange that it does not contain any definition of the word "Chinaman." In such circumstances it is only fair to assume that the word was used by the Legislature in the same or a similar sense as that in which it had theretofore ordinarily employed it for many years in its various enactments dealing with that race, which must be taken to be the way in which it is ordinarily understood in this Province. The rule of construction is that "intelligible words . . . . must be construed according to their natural and ordinary signification"—*Attorney-General for Ontario* v. *Hamilton Street Railway* (1903), A.C. 524 at p. 528, and probably the best method of ascertaining that signification in the present circumstances is to find out the sense in which it has been used by the Legislature itself; this method was resorted to in the *Precious Metals Case*: *Bainbridge* v. *Esquimalt and Nanaimo Railway* (1895), 1 M.M.C. 98; 4 B.C. 181; (1896) A.C. 561; wherein Mr. Justice McCREIGHT says: "Not merely do these contemporaneous Acts of the Province shew this, but antecedent legislation is in the same direction."

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Referring then to the statutes of this Legislature, and beginning twenty years ago with the important "Act to Prevent

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Chinese from Acquiring Crown Lands," Cap. 2, 1884, it is first enacted that it is unlawful for Crown land to be pre-empted by or sold "to any Chinese," or for "any Chinese," to divert water or obtain a water record; and then comes the following definition:

"3. The term Chinese in this Act shall mean any native of the Chinese Empire or its dependencies, and shall include any person of the Chinese race."

This is clearly aimed at the Chinese as a race as well as a nation inhabiting a particular locality. And the same feature is brought out in another Act passed in the same year—Cap. 3, entitled An Act to Prevent the Immigration of Chinese, wherein it was enacted:

"2. It shall be unlawful for any Chinese to come into the Province of British Columbia, or any part thereof."

This statute was held to be *ultra vires*, but it is important as shewing the scope in which the word "Chinese" was employed, the definition thereof being as follows:

"1. The word 'Chinese' in this Act shall mean and include any native of China or its dependencies, or of any islands in the Chinese seas, not born of British parents or any person born of Chinese parents."

This shews very plainly that it is the race and not the nationality or locality of birth that is objected to, for a natural born

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subject of the Chinese Empire was not excluded if he were born of British parents, though in law, fact and name he was, accurately speaking, a Chinaman. On the other hand, the child of Chinese parents domiciled in England and born there, or even in other Provinces of Canada, and therefore a natural born British subject, was excluded. Undoubtedly the word was not intended to be employed in a narrow and restrictive sense as regards this continent, for there are and were then many thousands of the Chinese race in United States territory on this Pacific Coast to the south of us, who, according to United States laws were natural born subjects of that country, and it is incredible to believe that the Legislature did not object to Chinese who were born on one side of the Pacific ocean under one flag and did object to the same race born on the other side of the

same ocean under another flag. To a resident of this Province, such a contention would sound preposterous; and I do not think anyone who knows this country would be bold enough to advance it seriously.

In the Chinese Regulation Act, Cap. 4, passed in the same year, a similar definition in section 2 is found with a like prohibition against "any person of the Chinese race."

That the same feature is constantly kept in view appears by all subsequent legislation dealing with the subject, of which the following may be taken as illustrative:

1885, Cap. 13, Sec. 1: An Act to Prevent the Immigration of Chinese.

1886, Cap. 25, Sec. 29: Vancouver Electric Light Company's Incorporation Act.

1886, Cap. 26, Sec. 13: Findlay Creek Mining Company's Incorporation Act.

1886, Cap. 27, Sec. 18: Vancouver Gas Company Act.

1886, Cap. 29, Sec. 21: Victoria and Saanich Railway Company's Act.

1886, Cap. 30, Sec. 12: New Westminster and Port Moody Telephone Company's Act.

1886, Cap. 31, Sec. 18: Vancouver Street Railway Company's Act.

1886, Cap. 33, Sec. 37: Coquitlam Water Works Company's Act.

1886, Cap. 34, Secs. 3, 4, 5: Nanaimo Water Works Amendment Act.

1886, Cap. 35, Sec. 38: Vancouver Water Works Act.

1890, Cap. 50, Sec. 29: New Westminster Electric Light and Motor Power Company's Act.

1891, Cap. 48, Sec. 60: British Columbia Dyking and Improvement Company's Act.

1891, Cap. 69, Sec. 22: Nanaimo Electric Tramway Company's Act.

1895, Cap. 59, Sec. 5: Burrard Inlet Railway and Ferry Company's Incorporation Act.

1897, Cap. 1, Secs. 2, 3, 4: Alien Labour Act.

1898, Cap. 28, Sec. 2: Labour Regulation Act.

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1899, Cap. 29, Sec. 36: Liquor Licence Act.
R.S.B.C., 1897, Cap. 113, Secs. 2, 5, 114: Land Act.
R.S.B.C., 1897, Cap. 67, Sec. 8: Provincial Elections Act.

These Acts shew a very remarkable adherence by the Legislature to the view that the Chinese are objected to not so much on the ground of nationality as on that of race. This is particularly brought home by the fact that the term "No Chinese" followed by the definition including the race is employed in the two statutes relating to labour matters above cited. The significance of this will be readily understood by the people of this Province who realize how carefully legislation relating to labour is watched because of its exceptionally broad application; and such terms therein employed may be safely taken as shewing how they are there used and understood not only by the Legislature but the people at large. The Land Act also, as being a public statute of the first importance, is likewise a safe guide, and it is noticeable that though by section 5 thereof an alien, generally speaking, after taking a declaration of intention to become a British subject may pre-empt Crown lands, yet if he be "a Chinese" or of "the Chinese race" he cannot do so, although he may be a natural born British subject. Further, in the Liquor Licence Act, Sec. 36, there is a very apt illustration of the way in which three classes of citizens are racially described and grouped as follows:

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"36. No licence under this Act shall be issued or transferred to any person of the Indian, Chinese or Japanese race."

And the same thing occurs in the Provincial Elections Act, R.S.B.C. 1897, Cap. 67, only brought out more clearly in section 3 by inserting in full the said standard definition, and apparently with the intention of making it clearer and wider (though in my opinion not really accomplishing that end) in the case of Chinese and Japanese, three words—"naturalized or not"—are added.

This section has been the subject of a judicial decision already noted and to which I shall refer later—*Tomey Homma's Case, supra.*

Having regard to the foregoing, it is abundantly clear to my mind that when the Legislature in 1903 passed the Act in ques-

tion it then used the words "No Chinaman" in the sense in which it had so long and so often used them before, *i.e.*, racially and descriptively, as distinguished from the narrow local and national one. And a final test to apply to the language is, could it be even plausibly contended in case the Empire of China were broken up and distributed among other powers and its present Government wholly abolished, that the words in question "No Chinaman" had no longer any application? Clearly it could not; and indeed the operation of the Treaty of Nankin, 1842, whereby the Chinese Island of Hong Kong became British territory, shews how groundless such a view would be, because in 1901 there were almost 275,000 Chinese in that Colony, and does any one suppose that they would not come within the said prohibition even if every one of them was a natural born British subject? Therefore it is manifest that the true construction of the said words depends not upon a nation which may lose its government and its territory, but upon a race which has within itself certain marked characteristics which appear to defy place and even time itself.

Even if the words are considered as applicable to a wider field than British Columbia, the same conception of their meaning officially prevails as may perhaps be best illustrated by the Instructions to Officers taking the last Dominion Census, which will be found in the Introduction to the Census Report of Canada for 1901, Vol. 1, Secs. 47-54, pp. xvii., xix., wherein the matter is fully gone into. I extract, for example, portions of No. 47 and No. 53:

"47. The races of men will be designated by the use of "w" for white, "r" for red, "b" for black, and "y" for yellow. The whites are, of course," the Caucasian race, the reds are the American Indian, the blacks are the African or Negro, and the yellows are the Mongolian (Japanese and Chinese). But only pure whites will be classed as whites; the children begotten of marriages between whites and any one of the other races will be classed as red, black or yellow, as the case may be, irrespective of the degree of colour."

"53. Among whites, the racial or tribal origin is traced through the father, as in English, Scotch, Irish, Welsh, French,

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German, Italian, Scandinavian, etc. Care must be taken, however, not to apply the terms 'American' or 'Canadian' in a racial sense, as there are not races of men so-called. 'Japanese,' 'Chinese' and 'Negro' are proper racial terms; but in the case of Indians, the names of their tribes should be given, 'Chippewa,' 'Cree,' etc."

Moreover, the Federal Parliament itself has for many years used the word in the sense contended for. This appears from the various Chinese Immigration Restriction Acts. Taking the existing one, Cap. 8 of 1903, by section 6 it imposes an immigration tax of $500 on "Every person of Chinese origin, irrespective of allegiance." And the definition is:

"4 (*d.*) The expression "Chinese immigrant" means any person of Chinese origin (including any person whose father was of Chinese origin) entering Canada and not entitled to the privilege of exemption provided for by section 6 of this Act."

And it was found necessary to exempt from the operation of the Act (*b.*):

"(*b.*) The children born in Canada of parents of Chinese origin who have left Canada for educational or other purposes on substantiating their identity to the satisfaction of the controller at the port or place where they seek to enter on their return."

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There is not even a reference here to a "native of the Chinese Empire or its dependencies" as there was in the B.C. Statutes, and the sole test is a racial one, *i.e.*, that of origin and not of locality, nationality or allegiance. Nor am I without the highest authority in support of this racial view. I refer to the judgment of the Lords of the Privy Council in the case of the Japanese *Tomey Homma, supra*, wherein the words in question were:

"The expression 'Japanese' shall mean any native of the Japanese Empire or its dependencies not born of British parents, and shall include any person of the Japanese race naturalized or not."

And it was argued (p. 154) that it was "attempted to impose on naturalized aliens of the Japanese race, on the score of their alien origin alone, a perpetual exclusion from the electoral fran-

chise." But the Lord Chancellor in delivering their Lordships' judgment, after pointing out (p. 155) that it was an enactment dealing with the exclusion of a particular "race," goes on to say, p. 156:

"The first observation which arises is that the enactment, supposed to be *ultra vires* and to be impeached upon the ground of its dealing with alienage and naturalization, had not necessarily anything to do with either. A child of Japanese parentage born in Vancouver city is a natural-born subject of the King, and would be equally excluded from the possession of the franchise."

And he further pointed out that because there was a mere mention of the word "naturalized" in the definition, which had been seized upon to curtail the section and bring it within the scope of Federal authority, yet it would be an "absurdity" to hold that the law was thereby made *ultra vires*, for, he says, in language singularly applicable to the case at bar, "The truth is that the language of the section does not purport to deal with the consequences of either alienage or naturalization."

If therefore their Lordships had no difficulty in arriving at the conclusion that *Homma's Case* did not, under the language in question, depend upon nationality or one of its consequences and attributes, alienage, or a secondary consequence when the old nationality and alienage became changed into naturalization, which is a new nationality, still less should this Court have difficulty in arriving at a like conclusion when there is no mention of naturalization in what I have styled the "standard" definition of the word "Chinese" as employed by the Legislature.

I feel therefore that I am fully justified in proceeding on the assumption that the word is used in that sense, and that only.

In view of the pregnant suggestion of the Lord Chancellor above quoted, that there are Japanese in this Province who are not either aliens or naturalized persons, it becomes expedient to apply that suggestion to this case, because it involves consideration of a fact of much importance and of which the Court in its common knowledge of the people and affairs of this country will take judicial notice. It is, that there is a considerable and ever increasing third class of Chinese residents of this Province who are neither aliens nor naturalized persons, but natural-born Bri-

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tish subjects, under the well known rule laid down in Dicey's Conflict of Laws (1896), 175:

"Rule 22.—Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British Dominions, is a natural-born British subject."

This third class is composed of the children or grand children of Chinese parents domiciled here. It should be borne in mind, though often overlooked, that with the exception hereinafter mentioned, the first Chinese settlers who came to the then Colonies of Vancouver Island and British Columbia arrived at least as early as 1858. Their presence in British Columbia as placer gold miners on the Fraser River is first recorded by Governor Douglas is his despatch of August 19th, 1858, to the Secretary of State for the Colonies (Papers Relating to the Affairs of British Columbia, 1859, Vol. 1, p. 27) and they had increased in numbers to such an extent that in his despatch of October 9th, 1860, the Governor incloses an address of the Grand Jury of Cayoosh (now Lillooet) to him which contains this statement—(Pt. iv., p. 27): "The Grand Jury desire to call Your Excellency's attention more particularly to the great number of Chinamen now residing in and flocking to this Colony," etc., and that body asked that they receive protection as useful additions to the population. Historically, and as being the exception above mentioned, it may not be out of place to note that the first Chinese, some 70 in number, who came to what is now British Columbia, were brought to Nootka Sound from Canton so long ago as 1789 by Lieut. John Meares, R.N., and his associates who had embarked in the North West Coast Fur trade. In that officer's Memorial presented to the House of Commons on May 13th, 1790, he states that the two ships which arrived at Nootka in June and July, 1789,

"Had also on board, in addition to their crews, several artificers of different professions, and near 70 Chinese, who intended to become settlers on the American Coast in the service and under the protection of the Associated Company."

On the seizure of these British ships and property by the Spaniards, these Chinese were detained at Nootka, and, as Meares says, (p. 11) were compelled to enter the service of Spain,

and (strangely coincidently) " were employed in the mines which had then been opened on the lands which your Memorialists had purchased." (And see the information of William Grubb accompanying the Memorial.) They were shortly thereafter transported to Mexico by order of the Spanish Viceroy thereof (Authentic Statement relative to Nootka Sound, London, 1890, p. 15), so as a factor in the population of this Province they need not be further considered, and the year 1858 may be taken as that of their introduction to an appreciable extent.

According to the report of the Royal Commission on Chinese and Japanese Immigration, 1902, p. 7, there were in 1901, 16,792 Chinese in Canada, distributed as therein mentioned throughout the various provinces of Canada; but the great majority of them, 14,376, reside in this Province. Quebec comes next with 1,044, and Ontario 712. In this city, Victoria, the number was then 2,715. These people have considerably increased during the last two years; and in the case of their younger children the providing of suitable accommodation for them in the public schools has become, in Victoria at least, a public question of concern requiring special consideration by the educational authorities.

I have been careful to go into these facts because heretofore they have been overlooked, and it is essential that there should be no further misapprehension about the true situation, for unless it is correctly presented to the Court decisions based on partial and insufficient facts can have no real application.

Now it must be admitted that as regards these Chinese who are natural-born British subjects, the children or grand-children of the Chinese pioneers, the enactment in question cannot be successfully impeached, and so far at least must be held to be *intra vires*.

Seeing then that the facts established are (1.) that there does exist a third class of Chinese in this Province who are natural-born British subjects to whom the principles of the decisions respecting aliens and naturalized persons have no application; and (2.) that the Legislature deals and intends to deal with Chinese as a race only, what is there that prevents this Court from advising His Honour the Lieutenant-Governor in Council

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that the enactment in question is *intra vires?* The answer is nothing, unless it be the judgment of the Privy Council in *Bryden's Case.* In considering that case, it is of the first importance that the following rule on the construction and application of a judicial decision be borne in mind. I refer to *Quinn* v. *Leatham* (1901), A.C. 495, wherein the Lord Chancellor says, in the House of Lords:

"Now, before discussing the case of *Allen* v. *Flood* in this House, and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. My Lords, I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision of the case of *Allen* v. *Flood.*"

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It was this principle that the Lord Chancellor doubtless had in mind when in distinguishing *Tomey Homma's Case* from that of the *Union Colliery Co.* v. *Bryden,* he said, referring to the fact that this Court thought it understood and was following *Bryden's Case,* that

"This, indeed, seems to have been the opinion of the learned Judges below; but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of *Union Colliery Co.* v. *Bryden.* That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordi-

nary rights of the inhabitants of British Columbia, and, in effect, to prohibit their continued residence in that Province, since it prohibited their earning their living in that Province."

By the words "naturalized or not" it is clear from the whole context that His Lordship had reference to naturalized Chinese or alien Chinese.

Seeing, therefore, that the decision in *Bryden's Case* must be restricted to "the particular facts" thereof, it is essential to bear in mind exactly what the facts were upon which that decision was given.

On turning to the report, it appears that when the appeal came before the Privy Council it was presented to their Lordships on the assumption that there were only two classes of Chinese in this Province who were affected by the legislation in question, that is to say, aliens and naturalized persons. That the whole case turns on that point, and that only, plainly appears by a perusal of the argument of counsel, as well as the judgment of their Lordships. Counsel for the appellant took the ground that it was an attempt to restrict the settlement of Chinese aliens in British Columbia, which it was argued, was a violation of the spirit of treaties, was opposed to the comity of nations, was calculated to create complications between the British and Chinese Governments, and conflict with the exclusive authority of the Dominion Parliament. Strangely enough, the counsel representing this Province, as intervenant, never, according to the report, intimated that there was a third class which might be affected, suggesting only that naturalized persons, as well as aliens, might come within the scope of the enactment. At p. 582, the argument on this point appears as follows:

"But Chinamen are not necessarily aliens. The term Chinese or Chinaman is one which is perfectly well understood in Canadian legislation, and means persons of Chinese habits and origin. It may include aliens within its meaning; but most of the Chinese who are affected by this legislation have been naturalized."

It is remarkable that there is not a word here, nor in the judgment, about natural-born Chinese subjects of the Crown

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apart from naturalization, and the fact of their existence had evidently never been suspected by counsel or they would not have failed to have drawn their Lordships' attention to it. This is strikingly brought out by the language of Lord Watson, p. 587, as follows:

"But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.

"Their Lordships see no reason to doubt that, by virtue of s. 91, sub-s. 25, the Legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the Provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant Company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada."

The foregoing extracts shew clearly that while the decision must be taken as the law on the incomplete facts as presented to their Lordships, yet, as pointed out by the Lord Chancellor in

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Tomey Homma's Case, it can have no application to the present case where an additional fact of the first and last importance is now made to clearly appear, that is, the existence of the said third class of Chinese residents of this Province in regard to whom the power of the Legislature is not doubted, and to that class the enactment can have and does have full application. A leading result of *Homma's Case* is that if one class of a race so affected is beyond the scope of the Federal power because not partaking of alienage or naturalization, then legislation affecting it is within the scope of the Provincial authority in "Local Works and Undertakings," or "Civil Rights," and in so dealing with a race over which it has authority the impeached enactment is not invalidated because it affects other classes of the same race over which it has not authority, provided it applies to them all

alike, places them on the same footing, and does not discriminate between them. This is apparent from the Federal Naturalization Act itself (R.S.C., Cap. 113) for section 15, which while providing that an alien who has been naturalized shall have within Canada "all political and other rights, powers and privileges" of a natural-born British subject, at the same time declares that he "shall be subject to all obligations" to which such natural-born person is subject. No naturalized Chinaman, and much less an alien, can therefore have greater rights in British Columbia than one who is a natural-born British subject.

Then there is that other fact, already set out, of scarcely secondary importance which also serves to distinguish this case from *Bryden's, i.e.*, that the Legislature uses the word "Chinese" in the broad racial and descriptive sense hereinbefore defined. In fact this case, as now properly understood, has arrived at the stage which was foreseen by the Lord Chancellor when he pointed out in *Tomey Homma's Case* that this question of the rights of Japanese (and consequently Chinese) did not necessarily depend upon alienage and naturalization at all, and that the introduction of a third element, *i.e.*, the natural-born subject, gave the case a widely different complexion.

On the whole matter, therefore, the conclusion I have come to, after a very careful, and, I may say, almost anxious consideration, is that on the particular facts the present case is as clearly distinguishable from *Bryden's Case* as was *Tomey Homma's;* to hold otherwise would result in the conclusion that the rights of the natural-born subjects of the King in British Columbia are less than those of aliens or naturalized Chinese. Such a result is not only directly in the teeth of the Naturalization Act, but is so repugnant to common sense and natural justice that I could not force myself to accept it unless I was compelled to do so by the clearest judicial precedent.

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In the foregoing necessarily full expression of my opinion, I am fortified and encouraged by the remarks of the Lord Chancellor in *Tomey Homma's Case* above quoted, who, in effect, pointed out that this Court had surrendered its own judgment in the fancied following of what it believed to be their Lordships' decision in *Bryden's Case* without appreciating the essential dis-

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tinction created by the difference in the facts. This, I cannot now help feeling, was unfortunate, because in questions of such gravity it seems most desirable that all the salient local circumstances and facts should be brought forward and fully considered (and particularly so in the case at bar because no counsel has appeared in opposition to those representing the Crown) to the end that should the matter go higher, every circumstance this time will be fully submitted to the appellate tribunal which would be likely to be of assistance to it, whereby the danger of further misapprehension of the real state of affairs in this Province may be avoided.

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Finally, and in formal answer to the question submitted to us, and on the particular facts, I do, pursuant to section 12 of the Supreme Court Act, 1904, certify to His Honour the Lieutenant-Governor in Council that in my opinion said rule 34 should be regarded as essentially a regulation for the working of coal mines, and therefore is within the powers of the Legislature of British Columbia.

NOTE:—In *Rex* v. *Priest* on an application to quash a conviction, the same point came up before DRAKE, J., who on 18th January, 1904, gave judgment as follows:

The defendant was convicted of employing below ground a Chinaman named Wing Shine contrary to Rule 34 of section 2 of Cap. 17, 1903. The rule is not easy to construe. What it is intended to mean is, in effect, that no Chinaman, or person unable to speak English, shall occupy a position of trust in a mine whereby he might endanger the life of a person employed about a mine, as banksman, etc., or be employed below ground or at a windlass of a sinking-pit. In other words, he is not to be appointed to a position where he will endanger certain specified individuals, nor is he to be engaged below ground. The reason for this rule is not obvious. A person working below ground in ordinary manual labour can hardly be said to endanger the life or limb of any of the designated persons. It is a clause to exclude all persons, whether British subjects or not, who cannot speak English from earning their living by working in a coal mine; in other words, it is directed against aliens.

The question appears to be limited to this: is this regulation one which falls within the purview of section 93 of the B.N.A. Act, or does it belong exclusively to the class of subjects assigned to the Dominion Legislature by section 92? The question has already been ventilated in the Privy Council.

In *Union Colliery* v. *Bryden* (1899), A.C. 580, Lord Watson says that

there is no doubt that if section 92 of the B.N.A. Act stood alone, not qualified by the provisions of the clause which precedes it, the Legislature of British Columbia would have ample power under section 4 of the Coal Mines Regulation Act, and also under sub-sections 10 and 13 of section 92 of the B.N.A. Act dealing with property and civil rights; but section 91, sub-section 25 extends the exclusive legislative authority of the Parliament of Canada to naturalization and aliens, and concludes with a proviso that any matter coming within the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes assigned exclusively to the Legislatures of the Provinces, and the Privy Council found that the provisions of section 4 of the B.C. Coal Mines Act, 1897, were *ultra vires* the B.C. Legislature.

The Legislature has amended the section which was declared *ultra vires*, and has included Chinamen and all persons unable to speak English, thus including a large class of aliens; hoping thus to obviate the effect of the Privy Council's judgment. It is reasonable to suppose that the people unable to speak English are aliens, or at all events that the Legislature aimed at these persons, although there are many, both Canadian and native-born English subjects, who cannot speak English to which the test of language is equally applicable. If these persons are aliens, the case is governed by the *Union Colliery Co.* v. *Bryden* above quoted. If they are British subjects, it affects trade and commerce. Under sub-section 2 of section 91 of the B.N.A. Act, freedom to trade with Canada includes freedom to engage in occupations in Canada for the purpose of earning a livelihood. Although the Province may make laws relating to property and civil rights, I do not think the latter can be treated as enabling the Legislature to exclude a large number of persons from earning a living in the manner they were brought up to. If the Legislature can prevent the employment below ground, they can equally do so above, and this would be an interference with trade and commerce, and not within the Provincial powers.

I think the rule should be made absolute.

Cassidy, K.C., appeared in support of the application, and *Maclean, D. A.-G., contra.*

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TRETHEWAY

LASHER v. TRETHEWAY AND THE TOWNSHIP OF RICHMOND.

Practice—Parties—Joinder of joint wrong-doers as defendants—Action to set aside tax sale deed and for damages against the Municipality.

In an action to set aside a tax sale deed obtained by defendant Tretheway and for an account and damages against the Municipality, the tax sale was impeached on the grounds, amongst others, that there were no taxes due, that there was no proper assessor's roll or collector's roll and that the provisions of the Municipal Clauses Act respecting tax sales had not been observed:—

Held, affirming an order of IRVING, J., that the Municipality was not improperly joined as a party defendant.

APPEAL from an order of IRVING, J., dismissing an application by the defendant Corporation for an order that the action be dismissed as against it on the ground that the statement of claim disclosed no reasonable cause of action against it, or in the alternative that the said defendant be struck out of the proceedings as being improperly joined on the ground that separate and distinct causes of action against the defendant Tretheway, and separate and distinct causes of action against the defendant Corporation have been improperly joined.

Statement

The statement of claim in the action alleged that the plaintiff was seized of an estate in fee simple in certain lands in New Westminster District, of which the defendant Tretheway had made application to be registered as the owner under a tax sale deed from the Reeve and Clerk of the defendant Corporation; that the said deed was void and that the tax sale in pursuance of which the deed purported to be made was invalid and void for the reasons, amongst others, that there were no taxes due; that the provisions of the Municipal Clauses Act respecting tax sales had not been observed; that there was no proper or legal assessment roll or collector's roll, etc.

The plaintiff claimed a declaration that the tax sale and the deed issued in pursuance thereof were null and void, an account

by the Corporation of arrears of taxes due by him and damages from the Corporation.

The appeal was argued at Vancouver on the 26th of April, 1904, before HUNTER, C.J., MARTIN and DUFF, JJ.

L. G. McPhillips, K.C., for appellants: There are two separate and distinct causes of action. The fact that the same evidence would apply to both causes of action is not sufficient to keep both causes of action in the one suit.

The Municipality is not a proper party to an action impeaching a tax sale; it did not give the deed and was not privy to any mistakes (if any) made: see *Black* v. *Harrington* (1865), 12 Gr. 175 and *Mills* v. *McKay* (1868), 14 Gr. 602. The Reeve and Clerk perform their duties apart from the Municipality and are not its servants in this, though they may be in other respects; the purchaser at the tax sale could not recover back his purchase money from the Corporation: see *Austin* v. *Corporation of Simcoe* (1862), 22 U.C.Q.B. 73. Because two distinct causes of action arise out of the same set of facts, a plaintiff is not entitled to set up both in the same action: *Sadler* v. *Great Western Railway Co.* (1896), A.C. 450 and *Gower* v. *Couldridge* (1898), 1 Q.B. 348.

[HUNTER, C.J.: The action is all founded on the same wrong, *viz.*: an unlawful sale of the property in consequence of which the plaintiff sues the purchaser to get back his property and the Corporation for damages for improperly selling it.

Argument

MARTIN, J.: You say the proceedings were beyond your control, but is it not a fact that the sale could not have been held unless you had so ordered?]

The Corporation does not issue the deed: the officers are *personae designatae*: see *Warwick* v. *County of Simcoe* (1900), 36 C.L.J. 461 and *Bank of Commerce* v. *Toronto Junction* (1902), 3 O.L.R. 309 at p. 312.

[*McCaul*: See *Frankenburg* v. *Great Horseless Carriage Co.* (1900), 1 Q.B. 504.]

As to proper and necessary parties see *Clemons* v. *St. Andrews* (1896), 11 Man. 111; *Schwartz* v. *Winkler* (1901), 14 Man. 197 and *Weise* v. *Wardell* (1874), L.R. 19 Eq. 171.

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McCaul, K.C., for respondent, was not called on.

HUNTER, C.J.: I think the appeal must be dismissed. The cases referred to by Mr. *McPhillips* are cases where there were separate torts committed by separate defendants, although perhaps identical in character, or where there have been separate torts committed by separate sets of defendants. In such cases the decisions in England have laid it down that the defendants cannot be joined in one action, but while those decisions seem to have been displaced by the rules lately passed in England, it is needless to say our rules stand as they were in England in 1883. To my mind, the case here is perfectly clear. The charge is that the Municipality and Tretheway were implicated in a common wrongful interference with the plaintiff's property. It is quite true a different relief is claimed against both, but that, it has been pointed out in several decisions in England, has no relevancy in determining the question whether one action can be brought against the two. If two people simultaneously attack my house, one of them breaking in the windows and the other the doors, it would be idle to say I could not bring an action against the two, the ground of the action being the common wrongful interference with my house. If I chose to bring an action against the man who broke in the windows (for that particular tort) I could not join that particular cause of action with an action against the man who broke in the door, because in that case the claim would be laid for separate torts. It seems to me to be quite clear that, here the two defendants have been involved in a common wrong and therefore there is a right to join them. The question as to whether or not it will turn out that the Municipality has been made by the law in any degree responsible is not now in debate. All that we now decide is that they may be joined in the same action.

HUNTER, C.J.

MARTIN, J.: I agree. This tax sale would not have taken place unless the defendant Corporation had ordered it under their by-law, under section 50, sub-section 125 of their Act. Relief is asked against the defendant Tretheway and an injunction to restrain him from applying for registration of the land, and a declaration as against the Municipality that the tax sale deed is

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void as against both of them, and a declaration is also asked that the plaintiff is seized of an estate in fee simple in the said lands, and there is a claim for such general relief as the facts would entitle the plaintiff to ask, and also for an account by the Municipality of all arrears of taxes.

Now, I think the situation is here as in *Frankenburg* v. *Great Horseless Carriage Co.*, wherein the Master of the Rolls says the right to relief is really in respect of one and the same thing. In that case it was the issue of a prospectus; here the relief sought is also in consequence of one and the same thing, that is to say, the alleged pretended and illegal sale, and the deed under it is attacked in section 3 as being utterly void. In so far as regards the particular matters complained of in paragraphs 6 and 7, they set up special grounds of complaint apart from the plaintiff's other alleged grievances and do not affect the statement of claim if it is otherwise a good one, and it may possibly be that Mr. *McPhillips* having regard to the various decisions in this Court did not contemplate that the plaintiff's action would be framed as it is now, or, rather, that it would assume the present somewhat unusual aspect. Of course, the answer to that is this, that if there are sufficient facts set up to ground a cause of action, the fact that counsel anticipated a different result or failed to appreciate their exact and full effect, is immaterial. We are really asked here to do what is a very serious thing, *viz.*, that though a cause of action may be sustained on the facts as shewn on these pleadings, nevertheless to hold they should be rejected. As Mr. Justice Romer says in the same case, "I do not think that this action should be peremptorily cut short on the present application." I think it would be a great hardship, and I notice the Court seems to have been expanding its ideas in these matters. In a case which does not seem to me to go, in principle, any further than this one, the Master of the Rolls said by taking another course substantial justice would be sacrificed to a technicality. Unless I could have received the assurance of counsel that the sections in the Municipal Clauses Act are the same in Ontario as here, I would not for one moment feel justified in giving the effect to the Ontario cases which we are asked to give. I refer, among others, to sections 142, 143 and 147 of the

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Municipal Clauses Act, as shewing that the Collector is to an important extent, at least, under the control of the Municipality.

DUFF, J.: I agree, and I only wish to guard myself against being supposed to decide that this statement of claim does disclose a cause of action against the Municipality. The case, in my opinion, is not sufficiently clear to justify its disposition on a summary application.

Appeal dismissed.

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TRADERS NATIONAL BANK OF SPOKANE
v.
INGRAM

TRADERS NATIONAL BANK OF SPOKANE v. INGRAM *ET AL.*

Appeal—Notice of—Court at which appeal should be brought on—Supreme Court Act, Secs. 76 and 79—Preliminary objection—Costs.

A final judgment was pronounced and entered on 27th July; notice of appeal to the January sitting of the Full Court was given on 24th October. A sitting of the Full Court commenced according to statute on 3rd November:—

Held, per IRVING and MARTIN, JJ. (HUNTER, C.J., dissenting), overruling a preliminary objection with costs, that the appeal was brought in time.

APPEAL from judgment of LEAMY, Co. J., in the County Court of Yale whereby plaintiffs recovered judgment against the defendant Covert for $740 and costs.

The judgment was pronounced in Court on 27th July, 1903, and entered the same day. On 24th October, the solicitors for the defendant Covert served plaintiffs' solicitors with a notice of appeal from the said judgment for the Full Court sittings to be held in Victoria on 5th January, 1904. By section 74 of the Supreme Court Act as amended in 1901 (Cap. 14), there was a sitting of the Full Court at Vancouver beginning the first Tuesday in November, 1903.

Statement

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The appeal came on for hearing at Victoria on 5th January, 1904, before HUNTER, C.J., IRVING and MARTIN, JJ., when

Clement, for respondents, moved to quash the appeal. He contended the appellant was out of time as the effect of sections 76 and 79 of the Supreme Court Act was that an appellant must bring on his appeal for hearing within the three months or else at the first Court held after the expiration of the three months.

S. S. Taylor, K.C., for appellant: Under section 76 an appellant has three months within which to give notice of appeal, and that period is not limited in any way by section 79. On the 24th of October, the appellant had yet the right to appeal, and the notice of appeal could not have been given for the Vancouver Court, as less than fourteen days intervened.

Argument

Clement replied.

HUNTER, C.J.: I think the appeal should be quashed for want of jurisdiction.

Sections 76 and 79 must be read together. Section 76 does not say that an appellant shall have up to the end of the three months within which to appeal, but merely that the appeal may be brought within the three months, and section 79 gives him the choice of any sittings within the three months or the next one thereafter conditioned on the other side receiving fourteen days' notice.

HUNTER, C.J.

IRVING, J.: Section 76 gives in the plainest language a period of three months' time within which the notice of appeal may be given, and section 79 must be read subject to the provisions of section 76. The intention of the first part of section 79 is to hasten the appellant, and of the second part to prevent a respondent from being taken by surprise.

IRVING, J.

MARTIN, J.: The language of the sections is not so clear as it might be, but I am of the opinion that section 79 merely provides the method of the working out of the absolute right conferred by section 76 and does not limit the time given thereby. If there is any error about this view the error should be exercised in favour of the validity of the notice.

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Objection overruled, with costs, Hunter, C.J., dissenting.

FULL COURT

1903

June 17.

CANE v. MACDONALD.

Dominion official—Salary—Receiver—Appointment—Partnership in—Right to share in salary ceases on dissolution.

CANE v. MACDONALD

While C. and M. were in partnership as architects, M. received an appointment from the Dominion Government as supervising architect and clerk of the works in connection with a Government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end and thereafter refused to account for the salary. C. sued for a declaration that he was entitled to half the salary since the dissolution:—

Held, that even if it were agreed that the appointment should be for the benefit of the firm, the plaintiff would not have any right to share in the salary after dissolution unless there was a special agreement to that effect.

Judgment of HUNTER, C.J. (9 B. C. 297), affirmed.

APPEAL from judgment of HUNTER, C.J., reported in 9 B. C. 297.

The appeal was argued at Victoria in June, 1903, before WALKEM, DRAKE and MARTIN, JJ.

Argument

Cassidy, K.C., and *Solomon*, for appellant: The office itself was an asset of the partnership even though there was privity only between one of the partners and the employers; every species of work got by one partner becomes a partnership asset and all work in hand unfinished at the time of dissolution must be finished up and the proceeds divided; there may be a lawful partnership in the emoluments of offices, although a sale of the offices themselves or a complete assignment of the emoluments would be unlawful: see Pollock on Contracts (1902), 328; *Sterry* v. *Clifton* (1855), 9 C. B. 110; *Palmer* v. *Bate* (1821), 6 Moore, 28 at p. 42 and 2 Br. & B. 673; *Hobbs* v. *McLean* (1885), 117 U.S. 567 and *Bailey* v. *The United States* (1883), 109 U.S. 432 at p. 437. We contend that this appointment was made and treated as belonging to the partnership, and once a partnership asset always a partnership asset: see *Ambler* v. *Bolton* (1872),

41 L. J., Ch. 783; *James* v. *Ellis* (1870), 19 W. R. 319; *Collins* v. *Jackson* (1862), 31 Beav. 645; and *Smith* v. *Mules* (1852), 9 Hare 556.

For the purposes of winding up the partnership business the firm is deemed to continue; the partners separate and don't offer for new business, but the unfinished business must be wound up: see Lindley, 5th Ed., pp. 414 and 588; *Crawshay* v. *Collins* (1808), 15 Ves. 227; *Clegg* v. *Edmondson* (1857), 26 L. J., Ch. 673; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504 at p. 517; Collier on Partnership, 120; *Featherstonhaugh* v. *Fenwick* (1810-11), 17 Ves. 298; *Johnson's Appeal* (1887), 8 Atl. 36; *Osment* v. *McElrath* (1886), 9 Pac. 731; *Steel* v. *Dixon* (1881), 17 Ch. D. 825 at p. 831, (shewing that weight might be given to American decisions); Partnership Act, Sec. 39; *McClean* v. *Kennard* (1874), 9 Chy. App. 347; *Howell* v. *Harvey* (1843), 39 Am. Dec. 376 at p. 382.

As to the remedy: while money in the hands of the Government cannot be attached, still the Court can declare the rights of the two parties as between themselves and make a declaration that the plaintiff is entitled to share the salary, and that defendant execute an irrevocable power of attorney in favour of plaintiff, authorizing him to receive the money from the Government.

Argument

Duff, K.C., for respondent: Plaintiff never acquired a right to a part of the salary; he did get a share but he never could have enforced his claim to get a share; the principle is that the law will not allow the salary of an officer paid out of the national as distinguished from the local funds to be impounded: see *Aston* v. *Gwinnell* (1829), 3 Y. & J. 136 at p. 148; *Ex parte Killam* (1898), 34 N. B. 530 at p. 535-6; *Hill* v. *Paul* (1841), 8 Cl. & F. 295 at p. 307; *Ex parte Harnden* (1859), 28 L. J., Bk. 18 at p. 20; *In re Mirams* (1891), 1 Q. B. 595-6 and *Ackman* v. *Town of Moncton* (1884), 24 N. B. 103. *Sterry* v. *Clifton* is not against me; the weight of the argument there was as to maintaining the validity of a deed so far as it could be maintained as legal in respect to some of the offices in which undoubtedly there could be a partnership.

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Cassidy, in reply, referred to Chitty on Contracts, 573 and 602, dealing with *Sterry* v. *Clifton*.

At the conclusion of the argument, the Court delivered the following judgments orally:

WALKEM, J.: We are all in favour of dismissing the appeal. Speaking for myself, I agree with the judgment of the Chief Justice.

DRAKE, J.: I have come to the same conclusion. On reading the authorities, of which we have had a very large number cited to us, it is perfectly clear that so far as regards the partnership, while it is quite open of course to partners as between themselves to agree to share the proceeds of their business, if it is of such a character that it is desirable to do so, in this case it is an appointment of a person of skill and ability of a particular character, which the Government require. And the contention that Mr. *Cassidy* puts forward is that the agreement between the partners is valid, and they are to share the profits of this appointment after a dissolution. I do not think so. I think as long as they concluded to make that arrangement between themselves while in partnership it was perfectly valid. But the question is whether after the dissolution of the partnership the Government then is to accept an officer who gets a half or a third, or may be less of the remuneration for the services that he performs for the Government, and the balance is to be paid over to the winding up of the partnership. I do not agree with that proposition. I think the authorities are against it.

DRAKE, J.

With regard to *Sterry* v. *Clifton*, it is not a case, when carefully looked at, which decides that point at all. That was a case in which there was a question asked of the Judges, and the Judges give no reason, they only give a certificate on that particular question. And when we come to examine the argument, in connection with the facts, it appears that that case is wholly distinct from this, in that case the partnership being unlawful. It does not carry out Mr. *Cassidy's* contention at all.

MARTIN, J.: I agree with my learned brothers. There is no doubt about this matter. The issues are simple. There has

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been a discussion of a number of features which have nothing to do with the determination of the real point, and when a lot of irrelevant matters are embarked upon, the real question is likely to become obscured both as regards those to whom the argument is addressed and by those addressing it.

The sole authority that can be considered an authority dealing with this question on which the appellant relies is the case of *Sterry* v. *Clifton*; and a careful perusal of that case from the source where it is reported, the Law Journal,* shews that it is not a case which really substantiates the contention of the appellant, at least to the material particular which is contended for in this appeal. It is a strange thing about that case, that although there is one reference to it in Pollock on Contracts, which I see here, yet in Broom on the Common Law, 8th Ed. 339, quite a different view is come to of the case, and one tending to sustain the argument of Mr. *Duff:* page 339 is authority for this proposition. "So, a written agreement may be single and entire, founded on one entire consideration—it may be severable in its nature, and deal with matters which are unconnected with and independent of each other." Apparently the opinion of appellant's counsel that all the text-writers take the view of that case which he contends for is not borne out, because here an eminent one takes a contrary view. The mere answer to a special case stated affords no ground for going to such lengths as is here contended for.

I only have to add the remarks that I drew attention to, of the Lord Chief Justice in *Arbuckle* v. *Cowtan* (1803), 3 Bos. & P. 321 at p. 328, in which he states: "It is now clearly established, that the half pay of an officer is not assignable, and unquestionably any salary, paid for the performance of a public duty, ought not to be perverted to other uses than those for which it is intended." And these remarks were quoted by Mr. Justice Park in *Palmer* v. *Bate*, at page 676 in 3 Broderip & Bingham's report of the case.

Appeal dismissed.

*19 L.J., C.P. 237.

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July 14.

BLACQUIERE v. CORR.

Evidence—Corroboration—Action against executor—Evidence Act Amendment Act, 1900, Cap. 9, Sec. 4.

BLACQUIERE v. CORR

The corroboration required by section 50 of the Evidence Act (B.C. Stat. 1900, Cap. 9, Sec. 4) must refer specifically to the contract on which action is based, and not to some part of it, so as to leave the effect of the whole unascertained.

ACTION by a nephew who had served his deceased uncle as driver of a bakery cart, against his uncle's executor to recover arrears of wages alleged to be due to him. The plaintiff had never been paid his wages regularly while in his uncle's employ, but the facts shewed that before his death he had paid the plaintiff in full at the rate of $30 per month. The plaintiff claimed that although originally hired at $30, he had on the day following the contract of hiring been promised $10 per month more on account of extra work to be done. There was this corroborative evidence that the uncle had some time after his nephew was in his employ stated to another of his employees that he was paying his nephew an extra $10 per month, but no statement was made as to the wages paid, nor was the amount of wages known to the witness who gave this evidence.

Statement

The action was tried at Victoria on the 14th of July, 1904.

Walls, for plaintiff.

A. E. McPhillips, K.C., for the executor, referred to *Thompson* v. *Coulter* (1903), 34 S.C.R., 261, and urged that the corroboration had to be material corroboration, *i.e*, of the hiring and the wages agreed upon and referable to the contract of hiring claimed to exist and sued upon; that there was no such corroboration, and in so far as it went was not referable to any established contract.

Argument

IRVING, J.: In this case the nephew is suing his uncle for wages contracted between 8th April, 1893, and 30th June, 1898. He says that he was employed at $40 per month. Originally, his employment, he says, was at $30 per month, and

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in consequence of the difficulty of the position it was raised $10 per month. The Statute in force in this Province requires corroborative evidence to be given when an action is brought against the estate of a deceased person. Otherwise, the plaintiff cannot recover judgment. Corroborative evidence has been given that the plaintiff's wages were raised from whatever sum he originally got by $10 per month, and if there was any proof that the plaintiff had been employed at $30 a month, corroborated in any way in the slightest, I would, under the circumstances, feel that the plaintiff ought to recover, but there is no corroboration in respect to that sum. For aught the corroboration is concerned the man may have been originally employed at $20 per month or $30 per month. I have only corroboration as to an extra of $10 per month, but I have no corroboration as to the original terms of the contract, except the plaintiff's own statement. Under the circumstances, the action must be dismissed.

Judgment

GUILBAULT *ET AL.* v. BROTHIER *ET AL.*

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Illegality—Action involving indecent matter—Striking out objectionable causes of action—Judgment—Form of—Dismissal of action—Res judicata—Costs.

On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment and a third for damages for procuring the plaintiff to enter a house of prostitution, the Judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion, the formal judgment stating that "this Court doth of its own motion and without adjudicating as between the plaintiff and defendants on the matters in dispute between them, order that this action be dismissed out of this Court, with costs:—"

Held, by the Full Court, that the order dismissing the action would have

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precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. Judgment of IRVING, J., set aside.

THIS was an appeal from the judgment of IRVING, J., at the trial dismissing the actions.

Four different actions (*Guilbault* v. *Brothier*, *Morel* v. *Brothier*, *Guilliard* v. *Brothier* and *Le Large* v. *Brothier*) were brought against the defendant and his wife, and the statements of claim alleged that defendants were the keepers of a house of ill-fame in Vancouver, and that they had by various fraudulent misrepresentations persuaded the plaintiffs to go with them from France to New York, where they were put in a house of ill-fame and by duress compelled to enter upon and lead a life of prostitution; that defendants had from time to time assaulted and imprisoned them; and that they by duress and terrorism had been compelled to put in the hands of defendants various sums of money under the pretence that the same was so deposited for safe keeping.

The plaintiffs Guilbault and Le Large were examined for discovery previous to trial.

Statement

The plaintiff Le Large in her examination said what money she had made was made by prostitution, and that she had handed to defendants about $8,000. The following are some extracts from her examination:

"Did she agree to give it back to you? Well, he told me he give me my money back, certainly.

"All of it? All of it, any what belonged to me.

"What part belonged to you? I don't know, I never got an account.

"I know, but you do not perhaps understand me. How much did you expect would belong to you? I don't know.

"You were not to get it all? I know I make $8,000, and I don't know how much belonged to me of that.

"Did you never hear about how much belonged to you? Did you never hear of this arrangement that you were to get half

of it, after paying for your board and anything paid out for you? About two or three months after we been in the house he say we have to leave half to the house.

"Did you ever hear anything about a dollar a day? Oh, no sir; but he said that to me, half coming to the house and a dollar a day, but I don't know if he ever do it, or not.

"But that is what he said? Yes.

"And if he got anything for you, that was to be kept out of your half? I don't know.

"He never told you that? Never told me anything."

The plaintiff Guilbault in her examination for discovery stated that she had deposited $4,000 with defendant Brothier. The following are some extracts from her examination:

"What did he say? Well, he say when you get money from the fellows, as soon as you have taken, you have to give the money to the landlady and she keep it for you; she give you back. . . . When I talk to him he tell me: 'but you don't want to be afraid for your money; you are my sister and I don't need to treat you like other girls.' He tell me lot of story. He say, 'when you stay in the business five or six years, after a little while you make good money and after I take you back to France I give you $1,000 for your dot and fix you nice and find you one husband,' and he was found already.

"You heard these other girls swear in Court on their oath they understood the arrangement to be—? Which one?

Statement

"Every one of them? I don't know.

"Yes, you did. You were there and heard them say they understood the arrangement to be you were to get half your money after paying your board and everything that was paid up? No, I don't remember. I don't remember what the girls say.

"Do you mean to tell me you never heard of any such arrangement as that? No, I can't tell you. I never heard that.

"How were you to pay for your board? How much? Sometimes he say one dollar; sometimes a dollar and a half; we never knew very well the price because the landlady say you don't know what you pay board cost too much.

"He never agreed to give you any money back, what he

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agreed to do was to get you a husband? Yes, he want to find me one husband he was find already; he got his picture."

The Le Large action came on for trial before IRVING, J., at Vancouver on the 14th of March, 1904.

Brydone-Jack and *Bird*, for plaintiff.
Joseph Martin, K.C., for defendant.

IRVING, J.: This case has been mentioned to me in Chambers on three several occasions. It first of all came up before me on 15th January, or about that time, on an application by the plaintiff for an attaching order before judgment, attaching certain moneys in the Canadian Bank of Commerce. In an affidavit filed 15th January, the plaintiff states the cause of action for which the action is brought is for the return of $3,000, money entrusted to the defendant for safe-keeping. "In the said cause of action the defendants are justly and truly indebted to me in the sum of $3,000, after making all just accounts."

Upon that, knowing nothing of the character of the action, I gave a garnishee order against the Bank before judgment. About 20th February, application was made to set aside that garnishee proceeding, and in the course of that application the character of the action was brought to my notice. Apart from that particular fact that was then brought to my notice I would not be justified in taking judicial notice of these matters, but when the matter is once brought to my notice it is my duty to do so. At the time the matter came up before me in Chambers, I was somewhat in doubt as to what course I ought to pursue, but I came to the conclusion on the spur of the moment that the best course I could adopt was to leave the matter alone and not touch it until it came into Court, where beyond a doubt, I would know what my powers were.

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The statement of claim contains a statement that the defendants were keepers of a house of ill-fame in this city—that the defendants in or about September, 1903, by various fraudulent representations made to the plaintiff, induced her to come to this country, and that they forced the plaintiff from time to time to commit criminal offences by various schemes and compelled her

to continue to lead an improper life to the pecuniary advantage of the defendants. I now come to the 7th clause: The plaintiff at various times and various places between 22nd September, 1901, and 9th March, 1903—that is, just two days before this writ was issued—under the said system of duress and by terrorism, compelled the plaintiff to deposit into the hands of the defendants, under the pretence that the same was so deposited for safe-keeping, various sums of money, aggregating in all $8,000, the full amount of which the defendants have in their possession, they having by threats, beatings and by such system of terrorism compelled the plaintiff to refrain from keeping any books of record. The plaintiff therefore claims from the defendants, and each of them, damages for the fraud and deceit practised, $2,000, and damages for the beatings and assaults, and the sum of $8,000 for moneys received by the defendants for the use of the plaintiff.

Bird: With your Lordship's permission we will withdraw that part of the claim which may seem to be in the nature of a claim for an account.

IRVING, J.: Since 20th February to this date there has been an opportunity for the plaintiff to withdraw that part of the pleadings that is so objectionable. That statement of claim that I have just read seems to be, in reading it, for an account between the plaintiff, an inmate, and the defendants, keepers of a house of prostitution, in respect of the moneys earned in that house. The evidence of the plaintiff, Le Large, who was examined for discovery under appointment by the examiner on 17th February, bears out the idea that I formed upon hearing the statement of claim read. I think it is unnecessary for me to read this in detail—I think it is sufficient for the purposes of justice—and that is what I am endeavoring to do here, in the interests of the public, to state that she says the sum of $8,000 was earned in that house of prostitution, and that she made it and that she does not know how much belonged to her, and that she was not able to get from him an account.

Now, the rule of law is very plain. In *Scott* v. *Brown, Doering, McNab & Co.* (1892), 2 Q.B. 724, decided by the Court of Appeal, Lord Justice Smith, at p. 734, says:

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"If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309, where the illegality was pleaded, and also in *Begbie* v. *The Phosphate Sewage Co.* (1875), L.R. 10 Q.B. 491, where it was not pleaded."

In *Taylor* v. *Chester*, the plaintiff had deposited with the defendant half a fifty pound bank note to secure payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch. The plaintiff having brought an action to recover the half note it was held that the maxim *in pari delicto potior est conditio defendentis*, applied, and that the plaintiff could not recover without shewing the true character of the deposit, and that being an illegal consideration to which he himself was a party, he was precluded from obtaining the assistance of the law to recover it back.

Another instance that is very often cited is the well known case of the highwayman—one highwayman coming into equity for an account against his partner. The report of that case is to be found in the July number of the Law Quarterly Review for 1893, Vol. 9, p. 197, and the title of the case is *Everet* v. *Williams*. It was filed before 1725, and the bill recited an

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"oral partnership between the defendant and the plaintiff who was 'skilled in dealing in several sorts of commodities;' and that the parties had 'proceeded jointly in the said dealings with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch;' and that defendant had informed plaintiff that Finchley 'was a good and convenient place to deal in, and that the said commodities were very plenty at Finchley aforesaid,' and that if they were to deal there 'it would be almost all gain to them.' Further recitals shew how the parties accordingly 'dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles and other things to the value of 200 pounds and upwards;' and how there was a gentleman at Blackheath who had several things of this sort to dispose of which defendant represented 'might be had for little or no money in case they could prevail on the said gentleman to part with the said things;' and how, 'after some small discourse with the said gentleman,' the said things were dealt for 'at a very cheap rate.' The bill further recites that the parties' joint dealings were carried on at Bagshot, Salisbury, Hampstead, and elsewhere to the amount of 2,000 pounds and upwards; and that the defendant would not come to a

fair account with the plaintiff touching and concerning the said partnership. The bill, which concludes with a prayer for discovery, an account, and general relief, purports to be signed at the foot by counsel, one Jonathan Collins. Upon the motion of Mr. Sergeant Girdler, of counsel with the defendant, praying that the report of John Harding, Esq., deputy remembrancer of this court made in this case the 24th November, inst., whereby the said bill is reported as both scandalous and impertinent might be confirmed, and on the 29th November the bill was dismissed with costs."

The course I propose to take is to dismiss this action out of Court. The matter does not come up on the application of the defendant as in the case of *Scott* v. *Browne, Doering, McNab & Co.*, at p. 728. There the Court took judicial notice that the evidence adduced by the plaintiff appeared to disclose a criminal conspiracy of which they ought to take judicial notice, and they would take time to consider their judgment. It is not a question of whether the defendant pleads to it or not; the point should be taken by the Court and acted upon, as the plaintiff cannot in this case any more than in that, present her case to the Court without necessarily disclosing the unlawful purpose in furtherance of which the contract was entered into.

Bird: We say there was no contract, my Lord.

IRVING, J.: Furthermore, on the subject of the Court dealing with the matter in the interests of the public on grounds of public policy and not at the instance of the parties: see *Cracknall* v. *Janson* (1879), 11 Ch. D. 13; *Ex parte Simpson* (1809), 15 Ves. 476; and *Christie* v. *Christie* (1873), 8 Chy. App. 499 at p. 507. IRVING, J.

Counsel for the plaintiff has now agreed or suggested that he should be at liberty to amend these pleadings with the right, should he think it expedient in the interests of his client so to do, to bring this action by bringing this particular part of it by a separate action. I think the time has gone for that. It was open to him from 20th February to adopt that course, and I propose to purge this Court of these improper proceedings and will dismiss the whole action. The costs, of course, will follow the event.

A similar course was taken in the other actions.

The formal judgment taken out was as follows:

"This action coming on for trial this day before the Honour-

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able Mr. Justice IRVING, in the presence of counsel for the plaintiff and the defendants, and this Court having read the writ issued herein, the order of the Honourable Mr. Justice IRVING, made the 29th day of January, 1904, the affidavit of the plaintiff sworn the 14th day of January, 1904, and filed herein, and three affidavits of the plaintiff sworn the 15th day of January, 1904, and filed herein, the pleadings filed herein and the examination on discovery of the plaintiff, and being of opinion that the matter referred to in the said writ and in parts of the subsequent proceedings was of an indecent character and unfit to be dealt with by this Court, doth of its own motion and without adjudicating as between the plaintiff and the defendants on the matters in dispute between them, order that this action be and the same is hereby dismissed out of this Court with costs.

"And this Court doth further order that the costs of this action be taxed and paid by the plaintiff to the defendants forthwith after taxation thereof."

The plaintiffs appealed and the appeals were consolidated and argued at Vancouver on the 29th of April, 1904, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Argument

Bird (*Brydone-Jack*, with him), for appellant: The statement of claim sets up three different causes of action which may be summarized as (1.) an action for damages for deceit in procuring plaintiff to enter a brothel under the pretence that she was to be a teacher of French; (2.) another for damages for assault and false imprisonment and (3.) for moneys had and received. Indecency of evidence is no objection to its being received if it is necessary to decide a right. By the judgment all our causes of action are struck out, although some of them are undoubtedly good; we had evidence to prove there was duress and then the contention as to the immoral contract being against public policy would be futile. He cited *Da Costa* v. *Jones* (1778), Cowp. 729; 12 Camp. R.C. 377; *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309; *Farmer* v. *Russell* (1798), 1 Bos. & P. 296 and *De Mattos* v. *Benjamin* (1894), 63 L.J., Q.B. 248.

Joseph Martin, K.C., for respondents: The evidence is that the girls had only the money earned by prostitution, and it was

part of the agreement that they were to pay this money over to the defendant, who was to pay them back one-half of the amount earned, less board and moneys paid out on their account; defendant's position is quite distinct from that of a banker; the different causes of action are so mixed up that the Judge came to the conclusion that they could not be tried without going into the illegal contract. The Court will not assist a plaintiff who has to prove an illegal contract in order to make a case. The effect of the judgment is the same as a non-suit; the plaintiffs could bring a fresh action; what was done was no more than a discontinuance, as the judgment expressly states that there was no adjudication: see r. 237; *Fox* v. *Star Newspaper Co.* (1898), 1 Q.B. 636; *Armour* v. *Bate* (1891), 2 Q.B. 233; *Sykes* v. *Beadon* (1879), 11 Ch. D. 170; *Massam* v. *Thorley's Cattle Food Co.* (1880), 14 Ch. D. 478 and *Christie* v. *Christie* (1873), 8 Chy. App. 499 at p. 507.

HUNTER, C.J.: I think the appeals ought to be allowed. When the matter is sifted down, the statement of claim develops three different causes of action, one, which may shortly be stated as an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a brothel or house of prostitution under misrepresentation.

HUNTER, C.J.

Whether there is such a cause of action as the last known to the law I do not think it is necessary now to discuss, but certainly the other two causes of action are good causes of action, and well known to the law.

When the case was called on for trial, the learned Judge came to the conclusion, after examining the evidence given in discovery by some of these plaintiffs, that it would be impossible for them to succeed, at all events, on the first cause of action on the ground that the evidence disclosed admissions of the plaintiffs that an illegal contract had been entered into with the defendant under which he was to receive a certain portion of the money obtained by them when engaged in prostitution; and for that reason he came to the conclusion that the action was *contra bonos mores* and that he was justified in ordering it to be dis-

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continued, but the judgment, as drawn up, dismisses the action in terms.

Now if that cause of action had been the sole cause of action brought by these plaintiffs, and it had appeared beyond any doubt that it was in reality for an account of moneys obtained by the defendant under such a contract as that, I should be very slow to differ from the learned Judge; but I must say in examining the evidence which led the learned Judge to that conclusion, that I am unable to draw the same inference from such evidence as is given in the examination of the plaintiff Guilbault. For instance, the following passage occurs:

"You heard these other girls swear in Court on their oath they understood the arrangement to be——? Which one?

"Everyone of them? I don't know.

"Yes, you did. You were there and heard them say they understood the arrangement to be you were to get half your money, after paying your board and everything was paid up? No, I don't remember. I don't remember what the girls say.

"Do you mean to tell me you never heard of any such arrangement as that? No, I can't tell you. I never heard that.

"How were you to pay for your board, how much? Sometimes he say one dollar, sometimes a dollar and a half; we never knew very well the price."

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Now, I should say, on such evidence as that, not only was it not admitted there was any contract of the kind entered into, but that the inference rather is that the contract alleged to have been entered into with the defendant was not in reality any contract at all, but that he was obtaining money from the plaintiff by extortion.

With respect to the evidence of the plaintiff Le Large, it is perhaps not quite so clear as in the case of the Guilbault action; although I think even in that a wrong inference has been drawn by the learned Judge:

"Did you never hear about how much belonged to you? Did you never hear of this arrangement that you were to get half of it after paying for your board and anything paid out for you? About two or three month after we been in the house he say we have to leave half to the house."

Surely, that is not only not evidence of a contract as alleged by Mr. *Martin*, but very good evidence on which to base an inference that there had been duress and extortion.

Now, the inference not being a necessary one that there was an illegal contract, I think the plaintiffs ought to have been allowed due opportunity to prove their case in the usual way, especially as there was undoubtedly a cause of action perfectly well known to the law—assault and false imprisonment—which was not tried at all. I do not think the circumstances warranted the dismissal of the actions *in toto*, and I should think, even if it had appeared plainly that the first cause of action was based on an illegal contract, the right course would have been to have struck that out of the pleadings, and not to have subjected the plaintiffs to needless expense by compelling them to bring a new action.

On the whole case, I think all the appeals ought to be allowed, and the actions remitted for trial, with liberty to each party to amend as advised.

DRAKE, J.: I agree with what has fallen from the learned Chief Justice, and I only wish to make one remark with regard to the form of the judgment which was passed in this action. The form of that judgment is not, as Mr. *Martin* argued very strenuously, equivalent to a dismissal of the action, or rather equivalent to a judgment of non-suit. It is not equivalent to a judgment of non-suit at all. The judgment here is an absolute judgment dismissing the action out of Court with costs. That, he suggested, might have been error. An error of this character cannot be amended by the learned Judge who made the judgment; it would have to go to some other Court to be amended. After judgment is entered it is not amendable by the learned Judge who tried the case at all. This judgment, I think I must say, carried out what was in the mind of the learned trial Judge; I think it was his intention to dismiss the action absolutely. The result of that is no other action can be brought, because *res judicata* would be pleaded, which would dispose of any fresh action which might be brought. If there were anything equivalent to a non-suit, then another action could be

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brought, for an action of that character cannot be pleaded as *res judicata*, and would simply leave the parties in this position, that they could bring a fresh action after having paid the costs incurred in the prior action. I think the suggestion of Mr. *Martin* is hardly one that would commend itself to this Court. I think it has been decided over and over again that judgments when once entered are final, and can only be corrected by appeal. I think the appeal should be allowed in all cases with costs, and also with the costs of the Court below.

MARTIN, J.: I agree with what has been said by my learned brother DRAKE, in regard to the form of the order dismissing the action; yet I must say I have come to the conclusion, with due respect to my learned brothers, that the Le Large case is one which should never have been brought in this Court, and should not stand on the record, for the reason that it discloses a cause of action which this Court cannot, having regard to the preservation of its own dignity, entertain. But at the same time, I do not wish these remarks to extend to the Guilbault case. I understand there are five cases. These remarks extend to four of those cases, and not to the fifth, Guilbault's case, for that is one of a somewhat different complexion, and I think that possibly it would be safer to let that action proceed.

MARTIN, J.

In regard to the other four, I have, as I have said, no doubt that they should be dismissed, and also not only in regard to the particular objectionable and immoral contract, but also in regard to every cause of action set up before the learned Judge in the same action, because, as I understand it, an opportunity was offered by him to the parties to amend their action by withdrawing their claim, but they did not do so.

There are several causes of action, combined in the one action —I am speaking now generally—and one of them is of so scandalous a nature that the Court cannot entertain it, and it should be placed on record that distinct causes of action so combined which are otherwise legal in themselves, become by such association with scandalous issues, tainted with that scandal,

from which, however, they and the records of this Court should be kept wholly free.

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Appeals allowed, Martin, J., dissenting, except as to the Guilbault case.

Martin: With regard to the costs, should there be any costs of the appeal, this judgment is the action of the Judge? His Lordship shews by the judgment that it was of his own accord, given without being called upon by the parties.

HUNTER, C.J.: You are in the same position as if you had moved for judgment—you came here to support it.

MARTIN, J.: I entirely concur with the learned Chief Justice as to costs. You cannot be allowed to contradict yourself by supporting the judgment given below and repudiating it if set aside here.

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Contract for fire insurance—"Valid in Canada"—Meaning of—Policy in company not licensed in Canada—Premium paid to—R.S. Canada, 1886, Cap. 124, Sec. 4.

A contract to procure fire insurance in some office valid in Canada means in some company licensed to do business in Canada, and a premium paid under such a contract may be recovered back, as upon a failure of consideration, if the insurance is effected without the knowledge of the insured in a company not so licensed.

APPEAL by plaintiffs from judgment of DRAKE, J., dismissing the action with costs. The trial took place at Victoria on the 3rd of May, 1904, and on the 9th of May, the following judgment was given by

Statement

DRAKE, J.: The defendant Holland, in August, 1900, applied to the plaintiffs to take an insurance on their premises at White

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Horse, and the plaintiffs agreed to take $12,400 insurance in some office valid in Canada.

The defendant Holland was not an insurance agent, but he had arranged with the other defendant, Elliott, that if he got any insurance he would communicate with him and get him to place them with insurance companies, and Elliott was to have a portion of the commission earned. Elliott had difficulty in effecting the insurance and communicated with a broker in New York, who obtained the policies from three different companies, and duly forwarded them.

The plaintiffs paid Holland $217 on account of the premium on the contemplated insurance, and agreed to pay the remainder, $651, on receipt of the policies. In September, 1900, three policies were sent up to the Bank of Commerce for collection of the premiums, and the plaintiffs having examined them, paid the balance of the premium, which was remitted in due course to the respective offices. The policies would all expire on 22nd August, 1901, and during the currency of the policies the plaintiffs obtained a written license to use acetyline gas in their premises, and also obtained a license to transfer the policies to the plaintiff, Turner, on 15th April, 1901, which assignment is indorsed on the policies and approved by the several offices in which the insurances were effected. It is admitted that the offices from which these policies were issued were not authorized to do business in Canada under the Fire Insurance Act, but there is no evidence to shew that at the time the policies were issued either the plaintiffs or defendants were aware that the Companies were not authorized to effect policies in Canada.

The plaintiffs, on the 18th of June, 1903, brought this action to recover back the premium paid for the insurances which expired 22nd August, 1901, but it is not shewn when they first became aware of the illegality of the policies and that they were not valid in Canada. Mr. *Higgins'* contention is that the policies in their inception being unlawful policies in Canada under the Fire Insurance Act, Cap. 124, Rev. Stats. Sec. 4, the plaintiffs are entitled to recover back the premiums, although the contract has been fulfilled by the Companies who issued the policies, and the time limit has expired.

The defendants contend that if the contract was illegal in its inception, the money paid as premiums cannot be recovered, the contract having been executed: *Lowry* v. *Bourdieu* (1780), 2 Doug. 468. The cases in which money is recoverable though paid on illegal contracts are:

First. Where the contract remains executory though the parties are *in pari delicto*.

Second. Money which has been paid to a stakeholder, and which is still in his hands.

Third. If the plaintiff be not *in pari delicto* with the defendant, as where the money has been extorted by threats or fraud.

The case of *Harse* v. *Pearl Life Assurance Co.* (1904), 1 K.B. 558, is very much in point. In that case the plaintiff effected an insurance on the life of his mother, relying on the agent's statement that such an assurance would be valid. The agent made such a representation in good faith. In an action to recover the premiums paid, held, that they could not be recovered.

In this case the plaintiffs asked for a valid insurance in Canada. There is no evidence that the defendants were aware that these policies were not valid in Canada. Such being the case the parties are *in pari delicto* and the action fails. Further than this the contract was completely fulfilled many months before the action was brought, and money paid on an executed contract cannot be recovered: see *Wilson* v. *Strugnell* (1881), 7 Q.B.D. 548, where the law is clearly enunciated by Mr. Justice Stephen, as follows: "Where money has actually been paid upon an immoral or illegal consideration fully executed and carried out, it cannot be recovered by the person who paid it from the person to whom it was paid; but that where money has been paid to a person in order to effect an illegal purpose with it, the person making the payment may recover the money back before the purpose is effected."

I therefore give judgment for the defendants with costs.

The appeal was argued at Victoria on the 20th of June, 1904, before HUNTER, C.J., IRVING and DUFF, JJ.

Higgins, for appellants.

Helmcken, K.C., and *Belyea, K.C.*, for respondents.

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On the 29th of July, the judgment of the Court was delivered by

IRVING, J.: This is an appeal from Mr. Justice DRAKE, who gave judgment for the defendants.

The action was brought to recover $868 for moneys had and received by the defendants for the use of the plaintiffs.

The defendants being associated together as insurance brokers, in the month of August, 1900, agreed with the plaintiffs in consideration of the payment of $868 to procure for them insurance on certain buildings in the Yukon Territory, the companies effecting the insurance to be authorized to do business in Canada.

The plaintiffs paid down $217—one-fourth of the premium—and it was arranged that the balance should not be paid until the policies were received and after the plaintiffs had examined the policies.

At the time of the making of this agreement no companies had been selected; the insurance was to be arranged by the defendant, Elliott, who was at Victoria, the agreement to procure the insurance being made by Holland, who was then at White Horse. Elliott had difficulty in effecting the insurance with any company licensed to do business in Canada, but finally obtained three policies from three different companies, none of them being licensed to do business in Canada. The policies were forwarded to the plaintiffs, who examined them, and on the 28th of September, 1900, paid the balance of the agreed sum. No complaint was made by the plaintiffs, or at any rate, if made, the policies were never surrendered.

Judgment

On the 22nd of October, 1901, the policies expired. No fire occurred during the year.

On the 18th of January, 1903, the plaintiffs brought this action.

The plaintiffs proved, and the learned trial Judge found that the agreement between the plaintiffs and Holland was that the plaintiffs should be insured in some office valid in Canada. I assume that to mean in some office of some company licensed under the Dominion Statute. It is admitted that these three companies were not so licensed.

The learned trial Judge found that there was no evidence to shew when the plaintiffs first became aware of the illegality of the policies, or that they were not policies within the terms of the original agreement.

The action for money had and received, is maintainable where it is against equity and good conscience that the defendant should be allowed to retain the money. In the case of *Begbie* v. *Phosphate Sewage Co.* (1875), L.R. 10 Q.B. 491; (1876), 1 Q.B.D. 679, the plaintiff sued to recover £15,000 paid by him to the company, on the ground of failure of consideration, as it was shewn that the company had no exclusive right to use the patent in the City of Berlin. The Court in giving judgment expressed the opinion that the knowledge of the parties at the time of the payment of the money was a most material element in considering the case.

In the case we are now discussing, no evidence was given that the plaintiffs were ever informed by the defendants that the policies were not issued by a company doing business in Canada. Had it been shewn that they knew at the time they parted with the money the Companies issuing the policies were not authorized to do business in Canada they certainly ought not to be able to maintain this action, but this evidence was not given. The transmitting of the policies to the plaintiffs without informing them of the true state of affairs was a representation on the part of the defendants that the Companies issuing the policies were duly licensed. The case is then reduced to this: The defendants have received the plaintiffs' money, and did not obtain for them the insurance they (plaintiffs) wanted. The defendants have only themselves to thank for the result. When they found they could not obtain insurance in the companies stipulated for, they should have notified the plaintiffs that they were unable to carry out the contract.

Judgment

At the trial and before us, the case was argued as if the contract entered into was illegal. The contract made between the parties to the action was perfectly legal, the essence of the agreement between them was that the insurance should be effected in companies duly authorized to transact business in Canada. The fact that the defendants in their efforts to fulfil their engage-

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ment resorted to unlicensed companies cannot affect the legality of the original contract in any way.

As the plaintiffs have not received any consideration for their money they are entitled to recover it back from the defendants. The case is something like *Bostock* v. *Jardine* (1865), 3 H. & C. 700; and *Compertz* v. *Bartlett* (1853), 2 El. & Bl. 849; *Gurney* v. *Womersley* (1954), 4 El. & Bl. 132 and *Kennedy* v. *Panama, &c., Mail Co.* (1867), L.R. 2 Q.B. 580 at p. 586 may be referred to.

Appeal allowed.

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ROBINSON v. EMPEY *ET AL.*

Bill of sale—Sale of business as a going concern—Chattel mortgage by new firm covering book debts due to it—Whether debts due old firm included.

V. and C. sold their grocery business including all their stock in trade and book debts to H. & B., who shortly afterwards gave a chattel mortgage to E. covering the stock-in-trade of the grocery business and also all book debts due to H. & B. in the business carried on by them as grocers:—

Held, reversing HUNTER, C.J., that the book debts originally due to V. & C. and assigned by them to H. & B. were covered by the chattel mortgage.

APPEAL from judgment of HUNTER, C. J.

This was an action by the assignee for the benefit of creditors of the estate of Hamon & Bisson against the defendant Empey for an account of all sums received by him while acting as assignee of the firm of Hamon & Bisson and for payment of the same. Hamon & Bisson were joined as defendants.

Statement

The firm of Vaughan & Cook, which had been carrying on a grocery business in Rossland, sold out their business as a going concern on 17th June, 1903, to Hamon & Bisson, who took over all accounts owing to the old firm and agreed to assume and

pay the old firm's debts, the bill of sale providing that "the said parties of the first part hereby assign, transfer and set over unto the said parties of the second part all debts due or accruing due to them."

The new firm of Hamon & Bisson found itself in financial difficulties at once and applied to Empey (who held Vaughan & Cook's note for $1,965.37) for a loan, and on 20th June Empey loaned them $1,034.65 and took a chattel mortgage to secure $3,000, being the amount of the Vaughan & Cook note and the additional loan.

In the chattel mortgage the mortgagors were described as carrying on business as grocers as successors to Vaughan & Cook, and the clause mainly material for the purposes of this report was as follows:

"And as further security for the repayment of the moneys secured hereby, the mortgagors do sell, assign, transfer and set over unto the mortgagee all their right, title and interest in and to all book debts, bills of exchange, promissory notes and other evidences of debt which may be now due or which may hereafter become due to the mortgagors in the business carried on by them as grocers as aforesaid, and all the books of account used or that may hereafter be used in said business."

Statement

On 27th June Hamon & Bisson made an assignment pursuant to the Creditors' Trust Deeds Act, 1901, to Empey for the benefit of their creditors.

At a meeting of the creditors on 13th July at which Empey was present, a resolution was passed removing Empey as assignee and requiring him to transfer the estate to the plaintiff, Robinson, as assignee.

While he had been acting as assignee Empey had collected many of the accounts owing to the old firm of Vaughan & Cook, and out of the moneys so realized, after paying some wages of employees, he had $1,245.71, which on 14th July he applied in part payment of his own mortgage, and on the same day he put a bailiff in possession under his mortgage. In addition to the $1,245.71 Empey had also retained other moneys, so that on 30th June there was a balance owing to him of $860, which the

HUNTER, C.J. plaintiff, Robinson, in order to obtain possession and stop a proposed sale, paid to him under protest.

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May 12. Plaintiff sued for an account and also claimed to have the chattel mortgage declared null and void, as having been made and given with the intent to defeat and delay creditors and to give defendant, Empey, a preference over other creditors.

FULL COURT

June 15.

ROBINSON v. EMPEY The trial took place at Rossland in May, 1904, before the Chief Justice, who at its conclusion gave judgment as follows:

HUNTER, C. J.: I think that the book debts, which are the chief subject of contention, are not within the scope of the security; they are not the debts of Hamon & Bisson but of Vaughan & Cook, incurred in the course of business with their customers.

The chattel mortgage passes over to the mortgagee, Empey, "All the right, title and interest in and to all the book debts, etc., which may be now due or which may hereafter become due to the mortgagors in the business carried on by them as grocers as aforesaid."

I think it is quite clear that the book debts in question were book debts which had been incurred in the business of Vaughan & Cook and did not form part of this security.

That being the case Empey must account for the book debts in full.

HUNTER, C.J. So far as the mortgage is concerned, the facts appear to be that on the 17th of June Vaughan & Cook sold out to Hamon & Bisson—the chattel mortgage is taken by Empey on the 20th, followed by the assignment for the benefit of creditors to Empey on the 27th.

At or about that time certain goods were clandestinely removed to Holland's house by Vaughan and others removed to Cluett's place.

On the 13th of July the assignee was deposed by resolution of creditors and Robinson appointed.

On the 29th or 30th possession was given of the assets by Empey to Robinson upon payment by the latter of $860 under protest, Empey having applied the book debts referred to in liquidation of the balance.

I think it cannot be too often borne in mind that a radical distinction exists between certain classes of conveyances. There is a class of conveyance which is made in fraud of creditors generally and which is *malum in se*, and is also struck at by 13 Eliz. Cap. 5, which was only declaratory of the common law. There is another class by which a particular creditor is benefited at the expense of other creditors, which is merely *malum prohibitum* under the "Fraudulent Preference Act."

Now, a charge given to secure a past indebtedness is always more or less difficult to attack, and the difficulty becomes the greater when the charge is also given to secure fresh advances which have been applied in reduction of debts, as admittedly was the case here, and where—as I have just held—the charge does not cover all the assets, but a considerable portion is left unaffected by the security.

Now, the facts which it is alleged avoid this mortgage are as follows:

That the assignment took place seven days after the mortgage had been taken.

To hold that the mere fact of an assignment for the benefit of creditors following closely on a chattel mortgage is sufficient to put the onus on the mortgagee would be obviously wrong, as it is quite possible either that the mortgagor gave the security for ulterior purposes of his own of which the mortgagee knew nothing, or that both the mortgagor and mortgagee were *bona fide* of opinion that the mortgagor would be able to carry on.

HUNTER, C.J.

Then it is said that because the bill of sale to the new firm of Hamon & Bisson from the old firm of Vaughan & Cook has a list of debts owing by the old firm, and it appears on the surface of that list that the liabilities owing to Empey were maturing later than the liabilities to other creditors, that this is a fact which casts suspicion on the conveyance, but it is not shewn anywhere that this fact was known to Empey at the time of the giving of the mortgage.

The fact of the bill of sale to Hamon & Bisson having come into his possession amounts to nothing in itself, as of course he would be entitled to its possession on being appointed assignee. Neither does the fact that goods were clandestinely removed

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assist, as it is not shewn that Empey was cognizant of this, or that it was done with his privity—and, moreover, it took place subsequent to the giving of this security.

So far as I can gather from the evidence of Bisson—the only one of the debtors called—it appears that he knew absolutely nothing about the condition of affairs when he and his partner took over the business; he made no inquiry as to what arrangements had been made by Hamon, but left everything in Hamon's hands and trusted entirely to Hamon. It does seem somewhat singular that, having accumulated some $500 for the first time in his life, he should choose to put that sum, with some more that he had borrowed, into a venture about which he knew nothing, relying solely on the representations and trustworthiness of Hamon; nevertheless, men do such things occasionally, and I see nothing in the evidence to compel me to conclude that he was a mere tool of Empey or Hamon for the purpose of creating a fraudulent security.

There is therefore not sufficient evidence adduced on behalf of the plaintiff which, if unanswered, would lead necessarily to the inference that this mortgage is a fraudulent preference under the Act.

At the same time, as I have already said, I consider that the book debts in question have not passed by the mortgage, and therefore I think the defendant must account for them.

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(Counsel for defendant here asked to be allowed to put in evidence shewing what the parties intended should pass by the chattel mortgage, and after argument as to the meaning of the clause in question in the chattel mortgage his Lordship continued.)

I don't think that it is admissible. I hold that it is not admissible upon the ground that the document is clear and unambiguous. If there was any ambiguity in the clause I might accept it. The net result is that there should be an order made to pay into Court $1,245.71 for distribution among creditors.

The costs of the action generally ought to go to the plaintiff. The costs of the present issue ought to be deducted, as I find that the mortgage has not been successfully assailed.

The appeal was argued at Victoria on 14th and 15th June, 1904, before DRAKE, IRVING and DUFF, JJ.

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J. A. Macdonald, for appellant.
A. H. MacNeill, K. C., for respondent.

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DRAKE, J.: In this case my brother Judges and myself are agreed that the deed itself conveyed the book debts which had been assigned to Hamon & Bisson by their predecessors in business; and that the object and intention of the mortgage was such that those book debts, and all other proceeds whatever of the estate of Hamon & Bisson, should go over to Empey. In a case of this sort, if there is ambiguity in the language used, we have to look at the intention of the parties, and whether the language that has been used carried out that intention. We have to give effect to whatever was the intention of the parties. I am of opinion that the object was that the book debts should be transferred to Empey; and that the proceeds of those book debts were just as much part of the assets of Hamon & Bisson as any other portion of their stock in trade. And that being so, I think the learned Judge's judgment with regard to this will have to be set aside. I think further, that the appeal should be allowed with costs, both here and below.

DRAKE, J.

The further questions that have been raised in argument do, not, I think, come under our consideration, because it was stated that the only point for discussion was whether the book debts passed or not—the question of fradulent preference was not argued, and I do not think there is any necessity for us to go into that question at all; there is no cross appeal, and our duty is simply to decide this one fact.

IRVING, J.: I concur.

IRVING, J.

DUFF, J.: I concur that this appeal should be allowed. I desire to add but one word to the reasons given by my brother Drake. The question arises in regard to the construction of a certain clause in the mortgage made between Hamon & Bisson, of the city of Rossland, and the defendant, Frederick E. Empey. That clause provides that, "as further security for the repay-

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ment of the moneys secured hereby, the mortgagors do sell, assign, transfer and set over unto the mortgagee all their right, title and interest in and to all book debts, bills of exchange, promissory notes and other evidences of debt which may be now due, or which may hereafter become due to the mortgagors in the business carried on by them as grocers as aforesaid, and all the books of account used, or that may hereafter be used in said business. Hamon and Bisson had on the 17th day of June, three days before the execution of this chattel mortgage, purchased from their predecessors, Vaughan & Cook, the grocery business which was then carried on by Vaughan & Cook, in the city of Rossland. The bill of sale which embodied the transaction between these two firms sufficiently shews, I think, that the business was taken over as a going concern. It assigns not only the goods, the stock in trade, goods and chattels used in connection with the business, such as horses, wagons, and so on, but assigns also all the book debts; and the assignees assumed all the liabilities subsisting in connection with the business. It is true there is no specific reference to good will, but I am perfectly satisfied from an examination of the bill of sale as a whole, that the intention was that the business should be taken over as a going concern. Now, the book debts in question were debts which were owing to the firm of Vaughan & Cook, in the business which passed to

DUFF, J.

Hamon & Bisson by the assignment. It is argued on behalf of the respondent, and the Chief Justice has held, that these book debts having been incurred during the time when Vaughan & Cook were carrying on the business, were not book debts which were due to the mortgagors in the business carried on by them; but could only properly be described as book debts due to Vaughan & Cook. I am unable to agree that that is the correct construction. It seems to me that these book debts, which were assigned together with the stock-in-trade, must be regarded as a part of the assets of the business carried on by Hamon & Bisson. And it seems to me that a book debt which is a part of the assets of a business carried on by a firm doing business as retailers must be considered as a book debt due

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to them in that business, therefore as answering the description contained in the mortgage in question.

The only doubt I have with regard to the matter is this: the Chief Justice appears to have been influenced in his decision upon the issue of fradulent preference by the circumstance that in his opinion part of the assets, namely the book debts in question, did not pass under the chattel mortgage; and I have some doubt as to whether, having decided here that the view of the Chief Justice with regard to that was erroneous, the plaintiffs are not now entitled to have the question of fraudulent preference relitigated. However, as my brother Judges are perfectly clear that there is no reason why that right should be given, I do not dissent on that ground.

Appeal allowed.

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New trial—Directions to jury—Obligation of Judge to apply facts to law—Suitors' right to have questions submitted to jury—Exclusion of jury during exceptions to charge—Mode of trial—Order XXXVI., r. 5—Scientific investigation—Supreme Court Act, 1904, Sec. 66.

In an action by a ship owner against a tug owner for damages for negligence on the part of the tug in allowing the ship to drift ashore while attempting to tow her from a dangerous position, the Judge in his charge to the jury explained the law applicable to the issues, but he did not point out to the jury the bearing of the facts in evidence upon the questions to be determined:—

Held, that the charge was incomplete and was misunderstood by the jury and that there must therefore be a new trial.

The Judge is bound to submit questions to the jury if requested to do so.

Per HUNTER, C.J.: (1.) A jury is not suited to try a dispute involving questions as to what were the proper nautical manoeuvres to be performed under peculiar conditions and the new trial should be held before a Judge without a jury.

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(2.) The Court has jurisdiction to order a new trial without a jury although the appellant in his motion for a new trial does not so ask.

Per MARTIN, J.: (1.) It is the duty of the Judge under section 66 of the Supreme Court Act, 1904, to instruct the jury upon all leading groups of evidence and apply to them the law as affecting the issues arising out of such evidence.

(2.) The jury should not be excluded from the Court room during the discussion on an application by counsel for further direction by the Judge.

(3.) Mere complexity of fact is not a ground for depriving parties of their inherent right to a jury.

APPEAL by plaintiffs from judgment of IRVING, J., at the trial with a special jury.

The plaintiffs were the owners of the ship Santa Clara and the defendant was the owner of the tug Mystery. On the 25th of December, 1901, while the ship was lying at anchor in the Royal Roads of the harbour of Victoria, a violent storm arose and the ship was driven, dragging her anchors, to within about 260 yards of the rocks of Trial Island, when her anchors caught. The next day the tug Mystery came up, and the captain of the ship and the captain of the tug made a bargain by which the tug was to take hold and tow the ship. The captain of the ship deposed to having asked the tug captain, "Are you sure you can tow this ship?" and that the tug captain replied, "I can tow you and another like you, don't worry about that."

Statement

The captain of the tug deposed that he told the captain of the ship that he had towed a larger ship, and that he would do the best he could for him; those two statements, he said, constituted "the whole talk" on the subject.

The tug then passed a hawser on board the ship and began to move her forward from her place of anchorage, the crew of the ship in the meantime being engaged in heaving short on the ship's anchor, but the ship was driven back by the wind and tide on to the rocks and seriously damaged.

After the tug commenced to tow, the messenger chain connecting the donkey engine with the wince on the ship broke, and a delay ensued in hauling in the anchor.

The plaintiffs contended that the defendant was negligent in that the tug was not powerful enough for the work she undertook and their witnesses swore that the tug had not sufficient power,

while the defendant produced evidence that the tug had towed just as heavy ships and in bad weather.

The plaintiffs' case was that at the time the messenger chain broke there were still thirty fathoms of chain out and the vessel was riding in safety, and that she continued to ride at anchor until after the messenger chain was repaired; that the tug then being four points off the starboard bow when the messenger chain was repaired, they were unable to see any one on the tug, and that although the captain hailed the tug he did not know whether the tug heard him or not, but that he supposed if he continued hauling up anchor that the tug would get herself in a right position, and under these circumstances he did haul up anchor until it broke ground, but the tug was then in such a position that it was impossible for it to do any good and the ship went ashore.

The evidence on behalf of the defendant was to the effect that the tug got to leeward inevitably on account of the delay caused by the break of the messenger chain, and of the cause of the delay the tug was not informed; that the plaintiffs were negligent in hauling in cable at a time when the ship was perfectly safe and when it could be seen that the tug was in an improper position, and that the tug signalled to cease hauling in cable.

There was evidence that the tug did whistle and that she didn't whistle.

In the end the crew of the tug cut the hawser, and the ship went on the rocks. Statement

The amount of damages claimed was $25,000, and the trial took place at Victoria in December, 1902, before IRVING, J., and a special jury.

Bodwell, K.C., and *J. H. Lawson, Jr.*, for plaintiffs.
Peters, K.C., and *C. E. Wilson*, for defendant.

The following passages are extracted from the charge to the jury and the objections taken by plaintiffs' counsel:

"So that this makes the question of liability turn on the finding of fact, and it is your duty to find which of the two parties, the ship or the tug, was guilty of the last act of negligence

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previous to the injury—that is, the last act of negligence without which the accident would not have happened.

"Of course, if there is no contributory negligence at all—if you believe that it is a straight case of negligence on the part of the tug, there is no trouble, and the case is very simple. But if there is the compound negligence, then I think the question comes down to this—which of the two parties, ship or tug, was guilty of the last act of negligence previous to the injury; that is, that last act without which the accident would not have happened? . . . .

"I am not going through all the facts. In the first place, there has been such a tremendous amount of differences, it would be almost unfair to the parties after the way they have put the case, to go through them. There is hardly a single statement made by one of the witnesses that is not contradicted by another. Now, when that takes place, jurors have to make up their minds whom they are going to believe. . . . . There is not a great deal, but there is some little in common between both parties. The plaintiffs say that the tug started out straight ahead, and fell off four points to starboard. The defendants say they started out to port and fell off four points—that is, two points to starboard. There was whistling, undoubtedly, but when did that whistling take place?

Statement

"*Bodwell:* I would like to have your Lordship tell the jury that there was an express representation of the ability of the tug—

"The Court: That is a question of fact; they have heard the evidence.

"*Bodwell:* And that the plaintiff was entitled to rely upon that; and that if he did rely on that and acted accordingly, and if there was a failure to perform that representation, that the plaintiff is entitled to a verdict. I do not quarrel with your Lordship's statement of the law, except that you have not applied it to the facts in the case; and I think that the jury ought to have a more extended statement, not of the law, but of the way that it applied to these facts. For instance, in considering what was the last act of negligence—

"The Court: You know in that case of *Bridges* and the

North London Railway Co.,* Mr. Justice Brett says: 'When the Judge has so directed the jury as to the law, he has finished all which it is legal for him exclusively to determine in the case. He ought then, though I do not think there is any legal absolute obligation on him to do so, to point out to the jurors the bearing of the facts in evidence upon each of the questions which they must determine.'

"*Bodwell:* I do not ask your Lordship to go over the evidence or charge the jury about the evidence; but what I apprehend is that, although the general statement of the law may be correct, it is not apt—or at least the jury are very apt to apply it improperly to this case, because they need more instruction from your Lordship. . . . . And with reference to the question of the proximate cause of the accident, I ask your Lordship to tell the jury that if they shall find that the accident would not have happened supposing that the tug had the power she was represented to have, then that it was the neglect of the tug, and it becomes the last act of negligence, because it is the one without which nothing could have happened.

"The Court: I do not know that I could put it any fairer than I did—the question which of the two parties, the ship or tug, was guilty of the last act of negligence previous to the injury; that is, the last act without which the accident would not have happened.

Statement

"*Bodwell:* I ask your Lordship to tell the jury this—that in considering whether there was negligence or not, they are not to look at the act itself merely, but at the act in the light of the circumstances. For instance, if they are considering whether or not the captain of the ship is negligent—"

(The jury retired at the direction of the Judge to consider their verdict, and counsel for plaintiffs proceeded to ask the Judge to tell the jury that they would have to consider whether the hoisting of the anchor under the circumstances was an act of negligence in itself, and during the discussion the jury returned and the following occurred):

"The Foreman: The amount of responsibility attached by

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you to the last act of negligence—Mr. *Bodwell* mentioned before we went into the room here; your Lordship dwelt on it for a little; and there was some question on the mind of the jury as to the amount of importance that was attached to it, whether that was responsible—to what extent that was responsible.

"The Court: That is what you want to find out, the last act without which the accident would not have happened?

"The Foreman: That is it, your Lordship.

"The Court: Well, that is a question for you; that is a question of fact. What was the last act of negligence previous to the injury, without which the accident would not have happened?

"What I endeavored to point out in my charge was this: First of all you would determine whether the defendant was guilty of negligence; and then, if the defendant was guilty of negligence, was the injury to plaintiff caused by that negligence? Then it would become a question, could the plaintiff, by the exercise of reasonable care, have avoided the injury—that is, did the plaintiff do anything that a person of ordinary care and skill would not have done under the circumstances, or omit to do anything that a person of ordinary care and skill would have done, etc. . . . . I am afraid I will not help you any more than that. It is the question of fact for you to determine; the last act of negligence previous to the injury—that is, the last act of negligence without which the accident would not have happened. The act of negligence means doing something, or omitting to do something, which a reasonably prudent man would have done or omitted to do under the circumstances. It is difficult, you know, gentlemen, but you have to deal with it the best you can. I do not know that I can put it plainer."

Statement

The jury returned a verdict for defendant, and judgment was entered accordingly.

The appeal was argued at Vancouver on 21st and 22nd April, 1904, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Argument

Bodwell, K.C., for the appeal: When a tug engages to tow a

ship there are certain implied conditions surrounding the contract, such as that she will bring to the task competent skill and such a crew, tackle and equipment as are reasonably to be expected, that she is adequate for the purpose and that she has a knowledge of the local conditions: see *The Minnehaha* (1861), Lush. 335 at p. 347; *The Lady Pike* (1874), 21 Wallace, 1; *The Energy* (1870), L.R. 3 A. & E. 48 at p. 54 and *The Julia* (1861), Lush. 224; in addition, the plaintiffs relied on an express warranty of power made by the captain of the tug.

Our contention is that the accident could not have happened if the tug had been sufficiently powerful. The Judge in his charge didn't apply the law to the facts and the jury thought all they had to do was to ascertain what was the last act of negligence; he should have asked them what was the effective cause of the accident and if the captain of the ship was negligent in letting the anchor get short; of course the accident could not have happened if the anchor had not been pulled up: he cited *The Bernina* (1887), 12 P.D. 58 at p. 89 and *Engelhart* v. *Farrant & Co.* (1897), 1 Q.B. 240.

The definitions given in the charge are not objectionable, but there was a total failure to apply the law to the facts as required by section 67 of the Jurors Act (now included with a proviso, in the Supreme Court Act, 1904); there was non-direction which amounted to misdirection; under our practice, questions cannot be asked of the jury without consent.

Argument

[*Per curiam:* If either party wants questions put to the jury the Judge is bound to put questions].

He cited *Ford* v. *Lacey* (1861), 30 L.J., Ex. 352; *Great Western Railway Company of Canada* v. *Braid* (1863), 1 Moore, P.C. N.S. 101; *Green* v. *Miller* (1901), 31 S.C.R. 177 at p. 183; *Elliott* v. *South Devon Railway Co.* (1848), 2 Ex. 725.

We are entitled to a new trial on the failure of the Judge to put a question on or charge the jury in reference to the express warranty made by the captain of the tug that it was sufficient to hold the ship: see *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 217 at p. 219; *Sewell* v. *British Columbia Towing Co.* (1883), 9 S.C.R. 527 at pp. 545-7 and *De Lassalle* v. *Guildford* (1901), 2 K.B. 215.

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Davis, K.C. (*C. E. Wilson*, with him), for respondent: There is evidence both ways respecting everything in the case and including the express warranty as to the tug's power; the captain of the tug denies he gave any express warranty; he did say he would do his best and that he had towed larger ships, and he had; the question as to sufficiency of power was treated all through the trial as a question of negligence.

As to the duty of the Judge to discuss the facts: section 67 of the Jurors Act is taken from the Judicature Act of 1875 (section 22) and is only a precautionary declaration.

[HUNTER, C.J.: That is later than the judgment of Brett, J., in *Bridges* v. *Directors, &c., of North London Railway Co.* (1874), L.R. 7 H.L. 213].

Yes, but if any great change was effected, one would expect to find some decisions in respect to it.

Green v. *Miller, supra,* and *Elliott* v. *South Devon Railway Co., supra,* are distinguishable; in the former there was an insufficient direction as to a matter of law and in the latter the Judge didn't tell the jury what a town was, but in this case the Judge did explain what negligence was. He dealt with the whole charge and contended that it did really apply the facts to the law: he cited Taylor on Evidence, para. 26.

Argument

The main question at the trial was whether the ship was negligent in hauling in the anchor, and that had been dwelt upon by counsel to the jury; the Judge said that he was not going through all the facts and no objection was made at that stage by counsel for the appellants and they are bound by the course of the trial: see *Nevill* v. *Fine Art and General Insurance Co.* (1897), A.C. 68 at p. 75 and *Waterland* v. *Greenwood* (1901), 8 B.C. 396.

Bodwell, replied.

Cur. adv. vult.

30th July, 1904.

HUNTER, C.J.: With some hesitation I have come to the conclusion that there ought to be a new trial.

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At first I was inclined to think that the utmost that could be said on behalf of the appellant was that it was merely a case of non-direction, and there being evidence both ways, a new

trial should therefore be refused in accordance with the principle which is well settled by such authorities as *The Great Western Railway Company of Canada* v. *Braid* (1863), 1 Moore, P.C. N.S. 101 at p. 122 and *Ford* v. *Lacey* (1861), 7 H. & N. 150.

But the difficulty is that notwithstanding that the learned trial Judge gave the jury full and careful instructions as to what constitutes negligence and contributory negligence, the jury went into the jury room with a confused idea as to what were the issues to be decided, and especially as to what would be the legal effect on the rights of the parties of their considering that a particular act was negligent. This is evident from the colloquy between the foreman and the Court when they came in for further instructions, nor does it appear that their bewilderment was removed by the Court, as all that the Court did was to repeat in condensed form the instructions which had already been given.

No fault is ascribed to either the Court or the jury under the circumstances; the fact is that a wholly unsuitable tribunal was selected to try a dispute which involved questions as to what were the proper nautical manoeuvres to be performed under peculiar conditions. It would, I think, be little short of miraculous if a jury of persons wholly unacquainted with nautical matters could intelligently decide the issues raised in a case of this character, which requires the closest scrutiny of a series of rapidly changing conditions, and it is, in my opinion, mere guess work for such persons to undertake to determine whether the manoeuvres complained of were or were not negligent in the circumstances.

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The proper tribunal to try a case of this kind is clearly a Judge, aided by persons skilled in navigation, and it is to be regretted that there appears to be no machinery by which such a tribunal can be called into existence, as is the case in England under the Imperial Judicature Act of 1873, Sec. 56.

Failing such a tribunal, I think there ought to be a new trial before a Judge without a jury, which, in my opinion, we may order under Order XXXVI., r. 5: see *Swyny* v. *The North-Eastern Railway Co.* (1896), 74 L.T.N.S. 88. And I think we may so order, although the appellant in his motion for a new trial does not ask that it be tried without a jury, as if, accord-

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ing to Lord Halsbury in *Nevill* v. *Fine Art and General Insurance Co.* (1897), A.C. 68, the Court has jurisdiction to order a new trial, although not asked for, (see also r. 675), it must *a fortiori* have jurisdiction to order that it be had without a jury, although not so moved, it being a case in which, if so moved, it would have jurisdiction.

The costs of the appeal go by statute to the appellant, the costs of the former trial should abide the result.

DRAKE, J.: The issues tried here apparently are:

First. Was the tug of sufficient power to tow the vessel under all the circumstances? Second. If she was, was she negligent in the steps she took to perform her service? and third. Was the tow negligent in tripping her anchor before the tug had straightened her position ahead of the tow?

The learned trial Judge clearly pressed on the jury the legal definition of negligence and contributory negligence, and no fault is found with his exposition of the law. But what is complained of is that the learned Judge did not instruct the jury as to the application of the legal position to the facts as shewn. The fact whether there was anything in the nature of a warranty as to the tug's power, is one of those facts with evidence on both sides. The second point is also one of fact, and in what respect the negligence or non-negligence was shewn was pointed out to the jury, leaving them to decide which view was correct.

DRAKE, J.

The third point was also one of fact, and it was clearly pointed out to the jury, and the law applicable to it. Thus having all these facts brought to their attention, the verdict should stand unless it was against the evidence, or there was no evidence to support their findings.

The learned Judge drew the jury's attention to the alleged negligence on the part of the tow, as well as on the part of the tug, pointing out that if the failure of the tug was one of power generally, or of unskilfulness, or breakdown of machinery, it would be negligence; and goes on to say that if the tug in its turn proved that the ship by her own act in tripping the anchor contributed to her injury, and was of such a character that the exercise of ordinary care on the tug's part would not have pre-

vented the ship's negligent act from causing the injury, then it was a negligent act of the tow, and the jury were to direct their attention as to what was in fact the last act of negligence which contributed to the accident.

These are the points of the case on which the whole question hinges, and this is followed up by a judicial definition of injury arising from the combined negligence of the tug and tow. Mr. *Bodwell* argued strongly that there was not a sufficient application by the learned Judge of the facts to the law, in order to enable the jury to distinguish what acts of negligence were charged against both tug and tow, or against one or either; and this involved the question of the last act of negligence owing to which the accident happened, and whether or not it could have been avoided by the other. I think the jury understood the position and were sufficiently instructed, and I think the appeal should be dismissed with costs.

DRAKE, J.

MARTIN, J.: It is admitted by the appellant that the learned trial Judge's charge is a careful and accurate one so far as the statements of law are concerned; but the objection taken at the trial and at this bar is that said legal definitions were not applied to the evidence, and that consequently the jury received no substantial assistance from his Lordship.

The objection was thus raised at the trial:

"I do not quarrel with your Lordship's statement of the law, except that you have not applied it to the facts in the case; and I think that the jury ought to have a more extended statement, not of the law, but of the way that it applies to these facts. For instance, &c., &c." (App. Bk. 365).

Again, at p. 366, in reply to the remark of his Lordship that according to *Bridges* v. *Directors, &c. of North London Railway Co.* (1874), L.R. 7 H.L. 213 at p. 234, there was no "absolute legal obligation" upon him to give the required instruction, counsel said:

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"I do not ask your Lordship to go over the evidence or charge the jury about the evidence; but what I apprehend is that, although the general statement of the law may be correct, it is not apt—or at least the jury are very apt to apply it improperly to this case, because they need more instruction from your Lordship. For instance, &c., &c."

And again, at p. 368, after further discussion:

"It is not that your Lordship has not properly defined negligence and

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contributory negligence, in so far as general words are concerned, but that there has not been such an application of those terms to the peculiar circumstances of this case to properly instruct the jury on the evidence."

I agree with my Lord that what occurred upon the return of the jury into Court, to get, as their foreman said, "a little information," shews, as might under the circumstances have been expected, that they did not properly comprehend the real issues, and I think that the failure to apply the law to the facts left them in such a confused state of mind that they did not derive practical benefit from the legal propositions, however accurately or ably they were enunciated.

Apparently the reason why the learned Judge did not accede to the request of counsel was because of the conflict of evidence. I gather this from the charge, p. 364, wherein it is stated:

"I am not going through all the facts. In the first place, there has been such a tremendous amount of differences, it would be almost unfair to the parties after the way they have put the case, to go through them. There is hardly a single statement made by one of the witnesses that is not contradicted by another. Now, when that takes place, jurors have to make up their minds whom they are going to believe, &c., &c."

But complexity of fact is not good ground for refusing to give an instruction which a suitor is otherwise entitled to. This is clearly established by the important case of *Panton* v. *Williams* (1841), 2 Q.B. 169, at p. 194, wherein it is laid down by Lord Chief Justice Tindal, when delivering the unanimous judgment of a Court of exceptional strength, consisting of no less than

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eight judges (Tindal, C.J., Lord Abinger, C.B., Bosanquet, Coltman and Maule, JJ., and Parke, Alderson and Rolfe, Barons), as follows:

"And, such being the rule of law where the facts are few, and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts, and inferences from facts, are made out to their satisfaction. But it is equally certain that the task is not impracticable: and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them."

It would be difficult to find a stronger authority in support of the appellant's contention than this, and speaking for myself, it

is a course I have heretofore never known to be departed from by other Judges, and have invariably followed myself. Coincidently enough, though this case was not cited at the bar, yet it supports the exact proposition contended for by the appellant's counsel, and almost in his very language, *i.e.*, "To place in a distinct point of view the application of the rule of law, according as all or some only of the facts, and inferences from facts, are made out to their satisfaction." And in criminal law the rule is the same. Mr. Justice Stephen says on this subject:

"I think, however, that a judge who merely states to the jury certain propositions of law, and then reads over his notes, does not discharge his duty. This course was commoner in former times than it is now. It was followed, to take one instance in a thousand, by Lord Mansfield in Lord George Gordon's Case." (General View of Criminal Law (1890), p. 170).

And it is laid down in Chitty's Criminal Law, Vol. 1, Am. Ed., 1847, p. 632, that—

"When the evidence and the speeches on both sides are thus concluded it becomes the duty of the judge or presiding magistrate to sum up the evidence to the jury. In order to enable him to do this with accuracy, he ought to take notes of the proofs adduced in every part of the proceedings. . . . . Where the evidence affects several defendants differently, the judge will, as we have seen, select the evidence applicable to each, and leave their cases separately for the jury."

If the present case were to be considered as one of non-direction merely, some difficulty might be experienced in giving the appellant relief, for as was said, affirming *Ford* v. *Lacey* (1861), 30 L.J., Ex. 352, in *Great Western Railway Company of Canada* v. *Braid* (1863), 1 Moore, P.C.N.S. 101, "Non-direction is only a ground for granting a new trial where it produces a verdict against the evidence."

The precise distinction, however, between non-direction and misdirection is sometimes difficult to determine, and that in some cases non-direction may amount to misdirection there is no doubt—it is only a question of degree how great the omission is. This is made clear by *Ford* v. *Lacey*, *supra*, where the exact point raised here is forestalled by Baron Channell thus:

"I do not mean to say that it may not be a good ground for a new trial that a direction has been left so bare as to require an explanation to prevent the probability of its being misunderstood."

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And see *Elliott* v. *South Devon Railway Co.* (1848), 2 Ex. 725; *Griffiths* v. *Boscowitz* (1891), 18 S.C.R. 718.

The language of the learned Baron just quoted sets out the principle on which this Court should act in the case at bar. A charge which is so incomplete that it does not afford the jury that assistance which, varying doubtless with the special circumstances of each case, they are entitled to expect, cannot be supported. This was the view of the Court of Exchequer, *in banc*, in *Toulmin* v. *Hedley* (1845), 2 Car. & K. 157, where a new trial was ordered on the ground that though in terms the charge was not open to exception, yet "the question left to the jury was certainly one capable of being misunderstood . . . . and for this reason the cause should go down again for trial."

There can be no doubt, it seems to me, that it is the duty of the Court to aid the jury in every possible way in the discharge of functions which often are puzzling to unskilled persons, of which the case at bar is an unfortunate illustration. This is the practice I find in Ontario also, for in delivering the judgment of the Common Pleas Division in *Scougall* v. *Stapleton* (1886), 12 Ont. 206, Mr. Justice Galt says at p. 209:

"It appears to me essential that the Judge should call the attention of the jury to the special circumstances and afford them every assistance in his power."

And in *Green* v. *Miller* (1901), 31 S.C.R. 177, it was likewise laid down by the Supreme Court (p. 182) that:

MARTIN, J.

"It is sufficient that he (the judge) should explain the law to the extent required in dealing with the facts arising in the case."

In answer to this authority the respondent's counsel said that it was a case of libel, but I am unable to see how that affects the principle it enunciates, or why a litigant in a libel action should expect to have his case more carefully submitted to a jury than a litigant in a negligence action.

I do not wish it to be understood that I for a moment consider it is the duty of the Judge to refer to every fact or to every witness, or mention by name any particular witness; that would be an absurd contention, which is not put forward here. Indeed it would be hopeless to advance it, for it is stated in *Phillips* v. *London and South Western Railway Co.* (1879), 5 C.P.D. 280 at p. 285:

"Clearly it is no misdirection to omit to call the attention of the jury to every part of the evidence given in the cause."

And—

"The nature and degree of such comment (on the evidence) must rest entirely in the discretion of the judge who tries the case": *Reg.* v. *Rhodes* (1899), 1 Q.B. 77 at p. 83; and *cf. Wolley* v. *Lowenberg, Harris & Co.* (1894), 3 B.C. 416; (1895), 25 S.C.R. 51 at pp. 55, 58, and *Harry* v. *The Packers Steamship Co.* (1904), 10 B.C. 258. It is laid down by Lord Morris in *Seaton* v. *Burnand* (1900), A.C. 135 at p. 145:

"But then, my Lords, it is said that the judge did not dwell upon particular points. I never heard that by way of objection to a judge's charge you might enter upon a sort of literary criticism upon it, and say that he did not put this point or press the other; indeed, it is said that he should have reviewed the evidence, which I suppose in some cases would mean that he should read it over for days, when an ordinary jury would get obfuscated instead of being assisted. If counsel thought that the learned judge had not called attention to any particular point, in my opinion it was their duty to call his attention to it at that time, and ask him to submit it to the jury. Are counsel to stand by and say, 'You overlooked that point, and though I had already put it myself to the jury till they were quite tired of it, I think the judge ought also to have laboured it.' That would, in my opinion, be throwing a duty upon the judge of a most extraordinary character."

On the other hand, however, it is equally plain from the authorities cited that the application of at least the leading groups of evidence to the various issues should be made as clear as practically possible to the jury, though the doing of that in the manner which will be the fairest to both parties having regard to all the evidence must be left to the discretion of the Judge, and an appellate tribunal would only interfere with a discretion so exercised in a very exceptional case, if at all. MARTIN, J.

The language of Mr. Justice Brett* referred to by the learned trial Judge is as follows:

"When the Judge has so directed the jury as to the law, he has finished all which it is legal for him exclusively to determine in the case. He ought then, though I do not think there is any legal absolute obligation on him to do so, to point out to the jurors the bearing of the facts in evidence upon each of the questions which they must determine, and which of the facts are in his judgment in dispute, and that there are not only the facts

*In *Bridges* v. *Directors, &c. of North London Railway Co.* (1874), L.R. 7 H.L. 213 at p. 234.

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directly deposed to which are to be considered, but facts or propositions of fact which are to be inferred from the facts directly deposed to, and finally that it is for them to say whether the facts directly in evidence and adopted by them, and the facts and propositions of fact inferred by them, do or do not amount in their judgment to proof of the propositions which the plaintiff is bound to maintain."

I call attention to the words "to point out to the jurors the bearing of the facts in evidence upon each of the questions which they must determine," because if the Judge is called upon to do that, then the case is a direct authority in favour of the appellant's contention, for, as has been seen, that was not done by his Lordship on the trial here. In regard to Mr. Justice Brett's remark that he did not think there was any absolute legal obligation upon the Judge to so direct, it should be noted that his attention was not called to *Panton* v. *Williams, supra*, otherwise he would, it is fair to assume, have had no doubt about the legal obligation to take that course which he felt it was the duty of the Judge to adopt without any such obligation. And since his judgment was delivered, a statute has been passed, which I shall refer to later, doubtless for the express purpose of setting at rest any uncertainty about the matter which might have been raised by Mr. Justice Brett's remarks.

It was urged by the respondent that it would be impossible to carry out to the letter those remarks, as that would involve a review of every fact, but I do not think that is a fair construction to put upon that learned Judge's language. He is speaking of "the bearing of the facts in evidence upon each of the questions which they must determine," and doubtless had in mind that course which he would naturally have according to the long established practice of the Court, as set out in Archbold's Q.B. Prac., 12th Ed. (1866), p. 400, and 14th Ed. (1885), p. 645:

MARTIN, J.

"When the case is closed on both sides, if plaintiff do not elect, or have not previously elected, to be non-suit, the Judge sums up the evidence (as it is termed); that is, he states to the jury the matters really in dispute between the parties, calls their attention to such parts of the evidence as he thinks proper, and makes his remarks on it when necessary; he may, if he think it necessary, tell the jury the impression the evidence has left upon his mind. If any question of law be mixed up with the questions of fact, he states to them the principles of law upon which the case must be decided, and the manner in which they must be applied to the case and their effect

upon it; and, lastly, he states to them, if necessary, the form in which they are to give their verdict."

It is true that the learned author proceeds as follows:

"As all this, however, is intended merely as an assistance to the jury, the Judge, in his discretion, will omit any part of it he may think unnecessary. Where the case is very clear both in point of law and fact, and it is apparent that the jury have already determined on a verdict according with the justice and merits of the case, the Judge will omit the summing up altogether. The Judge may inform the jury what amount of damages will carry costs."

While to the greater part of that language little, if any, exception can be taken, it is, in my opinion, clearly too broadly stated in one particular, *viz.*: where it says inferentially that the Judge may solely at his discretion and in any kind of case omit any of the essentials of a complete charge. If that is what is meant by the language, then I do not hesitate to say that in my opinion there is no authority for it—certainly none of the cases cited in the notes bears it out, and it is in direct conflict with those I have cited above. And that the latter paragraph needs revision is apparent, because it does not even refer to the only statute (hereinafter to be noticed) dealing with the subject, though the said 14th edition was published ten years thereafter.

Two years after Mr. Justice Brett's decision, in the House of Lords, Lord Blackburn, in the case of *Prudential Assurance Co.* v. *Edmonds* (1877), 2 App. Cas. 487 at p. 507, laid it down thus:

"I take it that when there is a case tried before a Judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the Judge is to give a direction upon the law to the jury, so far as is necessary to make them understand the law as bearing upon the facts before them. Farther than that, it is not necessary for him to go. It is a mistake in practice, and an inconvenient one, which very learned Judges have fallen into, of thinking it necessary to lay down the law generally, and to embarrass the case by stating to the jury exceptions and matters of law which do not arise upon the case. That is not the duty of the Judge at all, and I think it is better not to do it."

And again, at p. 515, he shews how the test should be applied:

"My Lords, I agree that we ought not to criticise any one particular word in this direction to the jury, but taking the whole summing-up as applied to such facts, to such evidence, and to such a contention as are stated upon the record, as being the facts and the evidence, and the contention which then took place, are we satisfied that the learned Chief

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Baron failed to give the proper direction to the jury. I come, my Lords, very reluctantly to the conclusion that he did fail to give the proper direction, and consequently that there should be a *venire de novo*."

As the result therefore of these authorities, I have come to the conclusion that the practice is as contended for by the appellant, and that he was entitled to the direction asked for at the trial.

But assuming that the former practice did not require the Judge to give such a direction, then the appellant relies upon section 66 of the Supreme Court Act, 1904, as follows:

"66. Nothing herein, or in any Act, or in any Rules of Court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the Judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues: Provided also that the said right may be enforced by appeal, as provided by this Act or Rules of Court, without any exception having been taken at the trial: Provided further, that in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the Court."

The former part of this section is taken from section 46 of the Judicature Act of 1875 (Yearly Prac. 1904, p. 88), and was introduced into this Province by the "Local Administration of Justice Act, 1881," Sec. 22. The proviso changes (in my opinion, very unfortunately) the existing salutary rule requiring objections to a charge to be taken at the time: *Parsons* v. *The Queen Insurance Co.* (1878), 43 U.C.Q.B. 271; *Nevill* v. *Fine Art General Insurance Co.* (1897), A.C. 68; *Clifford* v. *Thames Ironworks and Shipbuilding Co.* (1898), 1 Q.B. 314; *Seaton* v. *Burnand* (1900), A.C. 143-5; *Quinn* v. *Leathem* (1901), A.C. 495 and *Waterland* v. *Greenwood* (1901), 8 B.C. 396. Though as to how far the rule prevails in criminal cases is uncertain: *Reg.* v. *Seddons* (1866), 16 U.C.C.P. 389; *Reg.* v. *Fick* (1866), *ib.* 379, 384; *Reg.* v. *Gibson* (1887), 16 Cox, C.C. 181 and *Reg.* v. *Theriault* (1894), 2 C.C.C. 444; and on this point it should be remembered that in Canada either the accused or his counsel may make admissions at the trial. Crim. Code, 690.

MARTIN, J.

Counsel on both sides informed us that they had not been able to find any case on the effect of this important section 66, and consequently it remains for this Court to put a construction upon

it for the first time. It should be noted that it was not cited to the learned trial Judge, and therefore we have not the benefit of his view thereof.

The appellant's counsel's contention is that a fair construction of the section, which calls upon the Judge to give a "proper and complete direction to the jury . . . . as to the evidence applicable" to the issues, does not require him to review or charge upon each particular fact, but does require him to instruct upon all leading groups at least of the evidence, and apply to them the law as affecting the issue or issues arising out of such evidence.

The section speaks for itself, and is clearly broad enough to include this very reasonable and practical contention, which conforms to the authorities already cited, and the only ground which the respondent's counsel has been able to suggest why it should not be given effect to is that if pushed to its extreme literal conclusion it would be unworkable. The answer to that objection is that so far as the case at bar is concerned, this Court is not asked to put an unreasonable or impracticable construction upon the section; and if it ever should be so asked, which I think there is no reason to apprehend, in all probability no difficulty will be found in applying the section to the particular facts of any case which may arise, and in the manner directed in *Panton* v. *Williams*.

MARTIN, J.

Speaking of charges in general, I quite agree with the respondent's counsel that the mere fact that a jury failed to comprehend a charge is no ground for a new trial, provided the charge is delivered in such a manner that they ought to have understood it: *Fraser* v. *Drew* (1900), 30 S.C.R. 241.

In the present case, in view of its difficulty, it would, I think, have been better to have submitted questions to the jury as is the usual practice in cases of negligence other than those of a very simple character: see *Hornby* v. *New Westminster Southern Railway Co.* (1899), 6 B.C. 588 at p. 595; *Love* v. *Fairview* (1904), 10 B.C. 330 at p. 350. The direction of their attention to the particular matters raised by the questions would undoubtedly have been of much assistance to them in elucidating the points in controversy. Furthermore, I think that it was irregular to

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exclude the jury from the Court during the application of the appellant's counsel for further instruction, and against his protest. The jury, as one of the two constituents of the tribunal of justice, have their ancient right according to the established practice to hear and see all that passes at the trial, and I know of no other authority (other than the recent ruling of his Lordship in the *Bank of B. C.* v. *Oppenheimer* (1900), 7 B.C. 448), in support of this innovation. In the case at bar I think it would have been well to let the jury remain in Court, for certainly the discussion that occurred could not have rendered them any more bewildered, and it may have enlightened them somewhat as to the real points at issue. It is true the point was not raised on the appeal, but this question of excluding the jury is one of importance, and I take this opportunity of recording my past and present adherence to the existing practice, and as being opposed to any departure from it.

Though I have come to the conclusion that the objection to the charge of the learned trial Judge should prevail, yet in doing so I fully recognize that he had a difficult duty to perform in a case of an unusual character, and to unduly criticise the language of a Judge in discharging that important duty is very ungracious, because, as so eminent a jurist as Mr. Justice Stephen has said (*supra*, pp. 170-1):

MARTIN, J.

"The judge's position is thus one of great delicacy, and it is not, I think, too much to say that to discharge the duties which it involves as well as they are capable of being discharged, demands the strenuous use of uncommon faculties, both intellectual and moral. It is not easy to form and suggest to others an opinion founded upon the whole of the evidence without on the one hand shrinking from it, or on the other closing the mind to considerations which make against it. It is not easy to treat fairly arguments urged in an unwelcome or unskilful manner. It is not easy for a man to do his best, and yet to avoid the temptation to choose that view of a subject which enables him to shew off his special gifts. In short, it is not easy to be true and just. That the problem is capable of an eminently satisfactory solution there can, I think, be no doubt. Speaking only of those who are long since dead, it may be truly said that, to hear in their happiest moments the summing up of such judges as Lord Campbell, Lord Chief Justice Erle, or Baron Parke, was like listening not only (to use Hobbes's famous expression), to 'law living and armed,' but to the voice of Justice itself."

While agreeing with my Lord that this appeal should be

allowed with costs, and that there should be a new trial, yet I am unable to go to the length of saying that the circumstances are such that the jury should be dispensed with, assuming we have the power to so order. The plaintiff has an inherent right to a jury, and mere complexity of fact is no ground for depriving him of that right, and with a complete direction from the Court, and assisted by apt questions, I have every confidence that the jury will arrive at a just verdict, even if the tribunal selected is not the one best adapted to try the case.

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Appeal allowed, Drake, J., dissenting.

BORLAND v. COOTE.

HUNTER, C.J.
1903
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BORLAND
v.
COOTE

Statute of Frauds—Agreement for sale of land—Description of property—Latent ambiguity—Evidence to identify—Specific performance.

Appeal—Introducing fresh evidence—Acquittal for perjury alleged to have been committed at civil trial—Proof of not allowed on appeal in civil action.

B. on behalf of D. negotiated with C. for the purchase of C's property on the N. W. corner of Hastings Street and Westminster Avenue, Vancouver, and D. drew up a receipt for the part payment of the purchase price leaving the description blank for C. to fill in as he did not know the Land Registry description, but adding the description "N. W. cor., etc." below the space reserved for C's signature. B. took the receipt to C. and paid him $10, and he filled in the blank description as lots 9 and 10, block 10, and signed the receipt.

Lots 9 and 10, block 10, were on the North-East corner, and were not owned by C.; whereas lots 9 and 10, block 9, were on the North-West corner, and were owned by C.

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B. sued to have the agreement or receipt rectified or reformed so as to cover lots 9 and 10, block 9, and to have the agreement specifically performed:—

Held, that it was the property on the North-West corner that the parties had in contemplation, and that C. filled in the wrong description either by mistake or fraud, and that the plaintiff was entitled to specific performance of the true agreement.

For perjury alleged to have been committed at the trial by the defendant, he was tried and acquitted before the hearing of the appeal, and, on the appeal, his counsel moved the Full Court to be allowed to read the verdict of the jury in the criminal trial:—

The Court dismissed the motion.

APPEAL by defendant from judgment of HUNTER, C.J., at the trial.

The plaintiff sued to have the agreement or receipt set out below "rectified or reformed by this Court so that the same may cover the said lots nine (9) and ten (10) in block nine (9), District lot one hundred and ninety-six (196) in the City of Vancouver, being the property intended to be sold by defendant to and purchased by the plaintiff, and to have the said agreement specifically performed."

The action was tried at Vancouver in November, 1902, before HUNTER, C.J.

Statement

Bowser, K.C., and *Wallbridge*, for plaintiff.

Wilson, K.C., and *Bloomfield*, for defendant.

*19th October, 1903.

HUNTER, C.J.: This is an action for specific performance of an agreement for the sale of land evidenced by the following receipt: (Setting out receipt, copy of which is reproduced on next page.)

It is contended by Mr. *Wilson* for the defence that this is not sufficient to satisfy the statute: first, because there is a discrepancy between the description of the parcel sold, the proper Land Registry description corresponding to "N. W. Cor. Westr. Ave. and Hastings" being lots 9 and 10, block 9, etc.,

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*The defendant was committed for trial for perjury by the Chief Justice, who on 7th April, 1903, filed a sealed judgment in the Registry with instructions that it should not be opened until after the conclusion of the criminal trial.

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Vancouver, June 28th, 1902

Received from James Borland the Sum of ten dollars, being a deposit on the purchase of Lots No 9 & 10 Block No 10 District Lot 196, purchase price twenty thousand dollars ($20,000'), the balance to be paid within 10 July days when I agree to give the said James Borland a deed in fee simple free from all incumbrances

Jos Coote

N.W. Cor Hastings & West Hol

The above is a reproduction of the receipt referred to on the preceding page.

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whereas the body of the receipt calls for lots 9 and 10, block 10, etc.; secondly, that the defendant's signature was not intended to authenticate the description below his signature, the same having been written on the document after he had signed it without his knowledge or authority; and thirdly, because the plaintiffs cannot get specific performance of an agreement which they seek to rectify.

At the trial it was proved by the evidence of Borland and Dawson, both credible witnesses, that Borland negotiated with Coote on behalf of Dawson for the purchase of Coote's property, on the North-West corner of Westminster Avenue and Hastings Street, Vancouver; that they agreed on the sum of $20,000; that Coote gave Borland a list of the tenants and rentals which Borland verified on inquiry; that in the afternoon of Saturday, June 28th, 1902, Dawson in presence of Borland drew up the receipt in question, leaving the description blank for Coote to fill in as he did not know the Land Registry description but adding the description below Coote's signature; that Borland took it in that condition to Coote; that Coote signed it after filling in the blank and was paid $10 on account; and that Borland gave the signed receipt to Dawson on the same day. On the Monday following Coote repudiated the bargain, but said nothing to indicate that he understood that some other property was the subject of the sale; and it was not until the 8th of July when he

HUNTER, C.J.

was formally tendered the consideration moneys and the deed for signature that he pretended that it was the North-East corner, and not the North-West corner, that he was selling. As to all this, I am not only satisfied that Coote frequently committed perjury in giving his evidence, and especially so when he swore that the words below his signature were not there before he signed, but that he has also fraudulently attempted to foist off on the plaintiff a property which was not in the contemplation of the parties, and which he did not own, and which, for anything he knew, he could not have obtained.

Now whether he marked the wrong description in the blank by fraud or mistake is immaterial. If by fraud, then he cannot be allowed to set up his own wrong and thereby take advantage of the statute, especially as he has not, to use the words of

James, L.J., "put his scoundrelism clearly forward." If by mistake, it is well settled that parol evidence may be given to shew what property the parties were bargaining about, and the wrong description will be rejected: see *e.g.*, *Hutchins* v. *Scott* (1837), 2 M. & W. 809; *Cowen* v. *Truefitt, Ltd.* (1899), 2 Ch. 309; unless the evidence shews that the parties were also negotiating about another property to which one of such descriptions could apply. Here the defendant did not own the property to which the description inserted by him applies, and he made no mistake as to what he was selling, but only, if at all, in filling in the description.

It cannot be doubted that if the blank had not been filled in at all the receipt would have been a perfectly good memorandum to satisfy the statute as the description "N.W. corner, etc.," is sufficient to let in evidence to identify the property: *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53; *Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90; *Plant* v. *Bourne* (1897), 66 L.J., Ch. 643; and it was authenticated by the signature: *Ogilvie* v. *Foljambe, supra*; *Caton* v. *Caton* (1867), L.R. 2 H.L. 127. That being so, the filling in of the erroneous description cannot affect the matter, as Coote was only authorized by the words below his signature to insert the proper Land Registry description corresponding to those words.

It only remains to dispose of the other objection that specific performance is not granted when the plaintiff is also seeking to rectify. This rule does not apply to the case where as here the parties were *ad idem*, but the defendant either by *chicane* or mistake puts a wrong description into a writing which already contained a right description. But the truth is that the plaintiff does not need the document rectified; he relies on the memorandum which contained a true description, and the particulars necessary to satisfy the statute at the time when the defendant signed, and cannot be defeated by the defendant having inserted the false description.

I must order specific performance with costs.

For perjury alleged to have been committed in the civil trial, Coote was tried and convicted, but obtained a new trial (see *ante* p. 285) and was acquitted.

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The defendant's appeal from the judgment of the Chief Justice was argued at Vancouver on 11th and 12th November, 1903, before DRAKE, IRVING and MARTIN, JJ.

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Joseph Martin, K.C., for appellant (defendant), moved to be allowed to read under r. 674 the verdict of the jury in the criminal trial.

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The Court refused the motion.

Martin, on the merits: If the Court comes to the conclusion on the law that oral evidence can be referred to, then it must be of such a positive nature as to leave no doubt about the correctness of Borland's evidence. It is not necessary for our case that the Court should come to the conclusion absolutely that defendant's story is true as the cases shew that unless the evidence on the point is clear and conclusive a party will not be allowed to give evidence to contradict or vary a written document.

If Borland's story is true, then Coote filled the blank in either in error or fraudulently, and as a matter of law Borland can't get specific performance because of the Statute of Frauds: in the pleadings there is a claim to have the mistake rectified. Where the statute says an action can't be brought without a writing, the Court cannot supply the writing. The statement in Fry on Specific Performance, 3rd Ed., 814, as to the law is incorrect, and none of the cases support it: he referred to *Olley* v. *Fisher* (1886), 34 Ch. D. 367; *Walker v. Walker* (1740), 2 Atk. 98; *Joynes* v. *Statham* (1746), 3 Atk. 388; *Pember* v. *Mathers* (1779), 1 Bro. C.C. 52; *The Marquis Townshend* v. *Stangroom* (1801), 6 Ves. 328; *Cooth* v. *Jackson* (1801), *ib.* 11 at p. 24; *Clifford* v. *Turrell* (1841), 1 Y. & C.C.C. 138 and *Martin* v. *Pycroft* (1852), 2 De G.M. & G. 785.

Argument

The requirements of the Statute of Frauds are not ousted by any other considerations; the statute is a shield and not a weapon: see *Rich* v. *Jackson* (1794), 4 Bro. C.C. 514; *Brodie* v. *St. Paul* (1791), 1 Ves. 326; *Jordan* v. *Sawkins* (1791), 3 Bro. C.C. 388; *Woollam* v. *Hearn* (1802), 7 Ves. 211*b*; 6 R.R. 43; Wt. and T.L.C. 513; Encyclopædia of the Laws of England, Vol. 11, p. 662; *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22; 9 R.R. 3; *Clarke* v. *Grant* (1807), 14 Ves. 519; *Attorney-General* v. *Jack-*

son (1846), 5 Hare 355; *Davies* v. *Fitton* (1842), 2 Dr. & War. 225; *Squire* v. *Campbell* (1836), 1 Myl. & Cr. 459, 43 R.R. 231 at p. 243; *Manser* v. *Back* (1848), 6 Hare 443; *Attorney-General* v. *Sitwell* (1835), 1 Y. & C. 559 at p. 583; *Warden* v. *Jones* (1857), 2 De G. & J. 76 at p. 84; *Higginson* v. *Clowes* (1808), 15 Ves. 516, 10 R.R. 112; *Clowes* v. *Higginson* (1813), 1 Ves. & Bea. 524, 12 R.R. 284; *Bank of New Zealand* v. *Simpson* (1900), A.C. 182 at p. 189; *Glass* v. *Hulbert* (1869), 102 Mass. 24; *Lincoln* v. *Wright* (1859), 4 De G. & J. 16 and *May* v. *Platt* (1900), 1 Ch. 616.

The words under Coote's signature should be excluded; they are not in his handwriting: see *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53; *Stokes* v. *Moore and Uxor* (1786), 1 R.R. 24; *Caton* v. *Caton* (1867), L.R. 2 H.L. 127; *Evans* v. *Hoare* (1892), 1 Q.B. 593 and *Johnson* v. *Dodgson* (1837), 2 M. & W. 653.

Assuming that evidence should be received, then it should have been shewn clearly that Borland's story was correct; there are strong circumstances going to shew that Coote's story was correct, and the Court can't come to any conclusion without some reasonable doubt: *Evans* v. *Bicknell* (1801), 6 Ves. 174 at p. 184, 5 R.R. 245 at p. 253; *Alexander* v. *Crosbie* (1835), L. & G. temp. Sugden 145, 46 R.R. 183; *Mortimer* v. *Shortall* (1842), 2 Dr. & War. 363, 59 R.R. 730; Taylor on Evidence, Sec. 1,139 and *Wood* v. *Scarth* (1855), 2 K. & J. 33.

Argument

As to the cases cited by the Chief Justice, *Hutchins* v. *Scott* is not in point; the Statute of Frauds had no application to *Cowen* v. *Truefitt, Limited;* as to the other cases, there is none in which there were two descriptions contradictory to each other; here both lots are described accurately, but in the cases cited there were discrepancies, while here we have two descriptions irreconcilable.

This is a patent ambiguity, and so cannot be explained: Dart's Vendors and Purchasers, 6th Ed., 1,092.

He then referred to the evidence to shew that Coote's story was probable.

Davis, K.C. (*Bowser, K.C.*, with him), for respondent (plaintiff): The plaintiff asks the Court to construe and decree performance of the agreement, and not rectification and per-

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formance. We contend the words "N.W. corner, etc.," were on the paper when it was signed, and we prove it by oral evidence; such evidence can be given even to connect different documents: see *Olley* v. *Fisher* (1886), 34 Ch. D. 367.

The agreement exhibits a latent ambiguity, and so oral evidence may be given to explain it; it is not a patent ambiguity, as no one by reading would notice it.

Assuming the words were there when document signed, then the signature authenticated them; my learned friend's argument assumed that you must look at the document without the oral evidence shewing that they were there: see *Oliver* v. *Hunting* (1890), 44 Ch. D. 205; *Schneider* v. *Norris* (1814), 2 Maul. & Sel. 286; *Tourret* v. *Cripps* (1879), 48 L.J., Ch. 567; *Johnson* v. *Dodgson* (1837), 2 M. & W. 653, which shews that whether words are authenticated by the signature is a question for the jury: *Saunderson* v. *Jackson* (1800), 2 Bos. & P. 438; *Caton* v. *Caton, supra; Evans* v. *Hoare, supra* and *Plant* v. *Bourne* (1897), 2 Ch. 281.

A document under the Statute of Frauds is in the same position as any other, so far as construing it is concerned: in construing wills, evidence as to family, etc., is constantly allowed: here the part written is more likely to be correct: he cited *Heffield* v. *Meadows* (1869), L.R. 4 C.P. 595; *McCollin* v. *Gilpin* (1881), 6 Q.B.D. 516; *Doe d. Hiscocks* v. *Hiscocks* (1839), 5 M. & W. 362; *Doe* v. *Huthwaite* (1820), 3 B. & Ald. 632; *Macdonald* v. *Longbottom* (1859), 28 L.J., Q.B. 293; *Charter* v. *Charter* (1874), L.R. 7 H.L. 364 and *Drake* v. *Drake* (1860), 8 H.L. Cas. 172.

Argument

It is not necessary that the evidence should be overwhelmingly in plaintiff's favour; the finding of fact by a judge will not be upset much more lightly than a jury's verdict: *The Village of Granby* v. *Menard* (1900), 31 S.C.R. 14 and *Coghlan* v. *Cumberland* (1898), 1 Ch. 704.

But the evidence is overwhelmingly in our favour; he referred to the evidence.

Martin, in reply: There is no ambiguity either patent or latent in the document; an ambiguity cannot be created by evidence, and without the oral evidence here there is no uncer-

tainty; there is no ambiguity in either description. He referred to Taylor on Evidence, Secs. 1,158-9, 1,212; Phipson, 538; Best, 9th Ed., 210; Powell, 393; Stephen, 91; *Stringer* v. *Gardiner* (1859), 4 De G. & J. 468 and *Saunderson* v. *Piper* (1839), 5 Bing. N.C. 425.

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DRAKE, J.: The contention of Mr. *Martin* for the defendant in his elaborate argument was that the Court would not rectify an agreement, and then decree specific performance. There is a long line of cases upholding this rule, and it is only necessary to say that the point hardly arises here. There is a complete contract, but owing to the wording it is ambiguous, and the Court is asked to construe it, and for that purpose parol evidence is admissible. The agreement on which this action is founded is as follows: [Setting out receipt.]

Coote fraudulently filled in the block as 10, but the term N.W. corner would not be block 10, but block 9. The Court had to construe this agreement; it is not necessary to rectify it. In construing it, parol evidence is admissible to enable the Court to say what lot was intended to be conveyed, but not to alter or vary the contract. The contract is quite sufficient without the addition of the term "block 10."

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In *Chattock* v. *Muller* (1878), 8 Ch. D. 177, where a person agreed if he should buy a certain estate he would cede part to the plaintiff, the Court directed a reference to ascertain what part the plaintiff was entitled to. The Vice-Chancellor in his judgment said, "I think that the Court would be bound, if possible, to overcome all technical difficulties in order to defeat the unfair course of dealing of the defendants;" and in *The Duke of Leeds* v. *The Earl of Amherst* (1850), 20 Beav. 239: "The author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effects of it recoil upon himself."

Coote also sets up the Statute of Frauds as a bar to relief. The statute is no protection to a fraud, and the person committing a fraud cannot shelter himself under the statute.

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In *Mestaer* v. *Gillespie* (1806), 11 Ves. 627, Lord Eldon says "that a fraudulent use shall not be made of that statute; where this Court has interfered against a party, meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud, even, though the statute has declared, that, in case those circumstances do not exist, the instrument shall be absolutely void." And Fry on Specific Performance, section 814: "It may be said that a plaintiff seeking to correct and enforce a contract which is within the Statute of Frauds is suing in contravention of that Act. But the objection seems untenable. . . . . Mistake, like fraud, must be deemed an exception to the statute in Equity." In *Stedman* v. *Collett* (1854), 17 Beav. 608, the plaintiff executed a bond which by mistake proved usurious. He proved the mistake, had the bond rectified, and was held entitled to consequential relief.

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Here the figure 10 was inserted fraudulently. If it was a mere mistake of the defendant, specific performance might be refused, as in *Jones* v. *Rimmer* (1880), 14 Ch. D. 588, or rectified as in *Ball* v. *Storie* (1823), 1 Sim. & S. 210. If fraudulently, the defendant cannot avail himself of it in any way. The finding of the Chief Justice is that it was fraudulent on the part of the defendant, and therefore the statute affords no protection, and in this view I concur.

But the document is sufficient for all purposes without the insertion of the figure 10. The document refers to the N.W. corner, and it is proved that this description was inserted before the document was signed by Coote. In the face of the evidence which was adduced, it is clear that Coote signed the same with the words N.W. corner in it at the time he affixed his signature.

In my opinion the appeal should be dismissed with costs.

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IRVING, J.: I accept the fact as found by the learned Chief Justice that the words "N.W. cor. Hastings & Westr. Ave." were on the memorandum when signed by defendant; but, with the utmost deference to his opinion, I am unable to accept his conclusion. The memorandum as signed, in my opinion, does not satisfy the Statute of Frauds. When one reads the memorandum without the assistance of a map, there is

nothing to suggest that there is anything but a perfect agreement; but the moment a map is referred to, and a definite meaning annexed to the words "N.W. corner," then it is seen that there is a plain and obvious uncertainty.

In many reported cases parol evidence has been admitted to identify the parties (*Potter* v. *Duffield* (1874), L.R. 18 Eq. 4; *Carr* v. *Lynch* (1900), 1 Ch. 613); or the lands sold (*Ogilvie* v. *Foljambe* (1817), 3 Mer. 53; *Parrott* v. *Watts* (1878), 47 L.J., C.P. 79; *Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90; *Plant* v. *Bourne* (1897), 2 Ch. 281.)

On the principle *Id certum est quod certum reddi potest*, the rule has been formulated that the statute is satisfied if there is a sufficient description of the parties or the land, as the case may be, so that the identity of the parties or the land cannot be fairly disputed. In admitting this evidence, you are not breaking in on the Statute of Frauds. The oral evidence is receivable to annex a definite meaning to the subject-matter.

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But if after you have employed these means for removing the uncertainty you are still face to face with the same contradiction, the principle upon which the Latin maxim is founded can not be applicable to the case.

To allow parol evidence to decide which of the two properties mentioned in the memorandum was the subject-matter of the sale would be contrary to the Statute of Frauds, as it would be evidence to prove intention as an "independent fact": *Rossiter* v. *Miller* (1878), 3 App. Cas. 1,124, *per* Lord Blackburn at p. 1,153.

MARTIN, J.: Before considering the law as applicable to this case, there is a preliminary and, I am glad to say, very unusual question of fact which must be determined, *i.e.*, is the document now before us in the same state as it was after the blanks had been filled in by Coote and he had given it to Borland in its completed form as Coote describes in his evidence? It is contended on Coote's behalf that after his delivery to Borland as aforesaid it has been fraudulently tampered with, and the words below his signature "N.W. Cor. Hastings & Westr. Ave." have been added. This is a serious charge, and I need

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only say that I see no reason to interfere with the finding of the learned trial Judge on it and against it.

Cleared of this difficulty, the position of affairs is that Coote delivered the document to Borland in its present state, and such being the case there is nothing to prevent our looking at it as a whole, and the fact that some words of a document appear below the signature is of no consequence provided they are connected with what goes before. It was admitted by defendant's counsel that words in a postscript could be looked at provided they were all in the signer's hand, but it is not necessary that they should be in the same hand or else *e.g.*, type-written postscripts in type-written letters would be excluded. If such a document, and so issued, appears on the face of it to deal with the subject-matter, the whole of it should be considered whether it is written, printed or type-written (see cases cited below) and the *onus* is on him who asserts that it has been tampered with to prove it. The present document is in legal effect that of Coote issued and delivered in its present shape by him to Borland after completing it himself, and as such it must be dealt with. The position of words unless they are clearly exclusive is really immaterial provided that the fact of their being there at the time of issue or delivery, and the intention with which they were so placed, can be established if challenged. If authority be needed in support of this view it will be found in *Saunderson* v. *Jackson* (1800), 2 Bos. & P. 238; *Schneider* v. *Norris* (1814), 2 Maul. & Sel. 286; *Johnson* v. *Dodgson* (1837), 2 M. & W. 653; *Tourrett* v. *Cripps* (1879), 48 L.J., Ch. 567 and *Evans* v. *Hoare* (1892), 1 Q.B. 593. In *Johnson* v. *Dodgson*, it is laid down by Lord Chief Baron Abinger (p. 659), Barons Parke and Bolland concurring, that

> "The cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if it were at the foot of it; the question being always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing shewing the terms of the contract, and recognized by him."

And in *Evans* v. *Hoare*, Mr. Justice Cave says, p. 597:

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"Whether the name occurs in the body of the memorandum, or at the beginning, or at the end, if it is intended for a signature there is a memorandum of the agreement within the meaning of the statute."

This being the law, the document should be read in such a way as to give the words at the foot thereof, which, be it noted are placed in a position to challenge attention, due effect. The description of the land should then be taken as if it read "Lots No. 9 and 10, N. W. cor. Hastings & Westr. Ave., block No. 10," etc. Now these words contain in themselves nothing calculated to raise any doubt, uncertainty or ambiguity as regards the subject-matter of the contract for sale, *i.e.*, the two lots of land. But it appears that external circumstances do create a doubt or difficulty as regards the subject-matter, because the fact is that block 10 is not on the N.W. corner of Westminster Avenue, but on the North-East. The question then arises, which construction should prevail—the words "N.W. cor.," etc., or the figure 10?

It is contended for the plaintiff that there is here a latent ambiguity, and that the written words should prevail over the figure 10. This raises the question of what a latent ambiguity is, and as might be expected there are numerous definitions of that expression, but the one which I think throws most light on the present case is that to be found in Smith on Contracts, 7th Ed. (1878), p. 50, founded on the leading case of *Grant* v. *Grant* (1870), L.R. 5 C.P. 380, as follows:

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"A latent ambiguity, therefore, is where, on attempting to carry out the contract, it is found that the words used apply equally to two or more different things, and then, the latent ambiguity having been shewn by evidence, further evidence is admissible to show which of them was the thing intended."

And the rule, of course, is the same if the equivocal words apply to persons as well as things. This is illustrated by many cases, but it is only necessary to refer to *Grant* v. *Grant, supra*, where parol evidence was admitted to shew that by the expression "my nephew Joseph Grant" the testator intended to refer to one who would not primarily answer that description, there being another nephew of the same name and nearer relation in blood, but it was laid down by Lord Chief Justice Bovill, p. 385, as follows:

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"In each case this kind of parol evidence is not admissible for the purpose of controlling, varying or altering the written will of the testator, but is admitted simply for the purpose of enabling the Court to understand it, and to declare the intention of the testator according to the words in which that intention is expressed. If such evidence establishes that the description in the will may apply to each of two or more persons, then a latent ambiguity is exposed, and, rather than that the devise should fail altogether for uncertainty, the law allows the ambiguity which is exposed by the parol evidence to be cleared up and removed by similar evidence, provided such parol evidence is sufficient to enable the Court to ascertain the sense in which the testator employed the particular expression upon which the ambiguity arises. If the parol evidence, after exposing the latent ambiguity, fails to solve it, the Court cannot give effect to that part of the will."

And see also *Doe* v. *Huthwaite* (1820), 3 B. & Ald. 632; *Fleming* v. *Fleming* (1862), 1 H. & C. 243 and *Ryall* v. *Hannam* (1847), 10 Beav. 536, wherein the same course was adopted.

In the leading and very instructive case of *Miller* v. *Travers* (1832), 8 Bing. 244, which was decided by a strong Court, the extent to which extrinsic evidence is admitted is fully considered, and the two separate classes of cases wherein it is admissible are clearly defined on p. 248, the first being where the description of the thing devised or the devisee is clear, but it is found that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words of the will; and the second where (p. 248):

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"The description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part but not true in every particular. As where an estate is devised called A., and is described as in the occupation of B., and it is found that though there is an estate called A., yet the whole is not in B.'s occupation; or where an estate is devised to a person whose surname or Christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to shew what estate was intended to pass, or who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence."

And again at p. 251, and explaining why the plaintiff therein failed to succeed, the same learned Judge says:

"An uncertainty, which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but a new subject-matter of devise, or a new

devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself."

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And to the same effect at p. 253, after considering two decisions cited by the plaintiff:

"But neither of these cases afford any authority in favour of the plaintiff; they decide only that where there is a sufficient description in the will to ascertain the thing devised, a part of the description which is inaccurate may be rejected, not that anything may be added to the will, thus following the rule laid down by Anderson, C.J., in Godb. Rep. 131:—'An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator.'"

It may be said that the above cases apply only to wills, but that the principle is generally applicable to all written instruments appears from *Shore* v. *Wilson* (1839), 9 Cl. & F. 355, particularly at pp. 565-6, which contain the judgment of Lord Chief Justice Tindal, and at pp. 556-7, which contain that of Mr. Baron Parke. The latter lays it down very concisely that extrinsic evidence is admissible "where there are two subjects, or two objects, both described in the instrument and each equally agreeing with it."

That language aptly describes the position here where inquiry shews there are two parcels of land embraced within one repugnant description, though on the face of the instrument no equivocation, as I find it is sometimes happily expressed, arises. And it is laid down in Broom's Legal Maxims (1870), p. 631, in discussing the principle of extrinsic evidence that "the foregoing observations are, in the main, applicable not only to wills but to other instruments."

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The rule was applied in the case of a lease by Lord Chief Justice Bacon in *Hutchins* v. *Scott* (1837), 2 M. & W., 809, where there was a mistake in the number of the premises demised—No. 38 being given instead of the proper No. 35, and the Court said (p. 814):

"Now suppose it never to have been altered, and to stand No. 38, the plaintiff might have shewn that the defendant had no house No. 38, or any other circumstances to prove that No. 38 was an immaterial part of the description. . . . . Again, if No. 35 was the house intended, I am clearly of opinion that parol evidence was receivable to shew that the 38 was a mistake. If there were any suggestion that the defendant had any other house, the case might be different; but we must take the facts to be,

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Now, in the case at bar, the learned trial Judge has found as a fact (and I concur with him) that "here the defendant did not own the property to which the description inserted by him applies, and he made no mistake as to what he was selling, but only if at all, in filling in the description." It is stated by Lord Chancellor Cranworth in the House of Lords, in *Lyle* v. *Richards* (1866), L.R. 1 H.L. 222 at pp. 232-3, speaking of a very inaccurate map and boundary line in a sett or grant of a mine that—

> "When once the jurors were satisfied that the house known as John Vincent's house is that referred to in the deed, the error in the description of its locality is no more material than if there had been an error in describing it as brick-built instead of stone-built, or as a house of three storeys instead of two. No error is material which would not prevent the jury from being satisfied that the existing house is the house referred to in the deed. . . . . So, again, it was the duty of the Judge to ask whether the evidence satisfied the jury that the actual existing house, called John Vincent's house, is the house intended to be described on the map."

It is quite apparent that what the plaintiff herein intended to buy, and what the defendant wished to sell were the two lots on the North-West corner, and the numbers of these lots and of the block were wholly immaterial, and the memorandum would have been quite sufficient if said numbers had been omitted and simply the words "Lots on N.W. Cor.," etc., had stood, as it would be only a question of identity: *Plant* v. *Bourne* (1897), 2 Ch. 281.

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One of the best tests of a latent ambiguity is to see whether by the rejection of surplus words the meaning of the instrument remains certain. This is pointed out in some of the cases above cited, notably *Miller* v. *Travers* and *Hutchins* v. *Scott*; and it is relied upon in others, such as *Doe d. Dunning* v. *Cranstoun* (1840), 7 M. & W. 1 at pp. 10 and 11, where Mr. Baron Parke says, in speaking of some lands in certain parishes which were incorrectly described as freehold:

> "This is a case which is perfectly clear. The rule is, that where any property described in a will is sufficiently ascertained by the description, it passes by the devise, although all the particulars stated in the will with reference to it may not be true. . . . . We have only to reject the words indicating them to be freehold, and the devise will be as complete

as if the lands were set out by metes and bounds, or by the tenants' names, or by any other peculiar marks by which they might be designated."

Here the peculiar mark of designation was the "N.W. corner."

There is an old and oft cited case which by reason of its treating of a corner property is in that respect very similar to the present: I refer to *Blague* v. *Gold* (1637), 2 Croke, 473, wherein there was a devise to J.S. in fee of the "Corner House" in Andover which was stated to be "in the tenure of Binson and Hitchcock," whereas the fact was that it was in the tenure of Binson (or Wilson) and Nott, yet it was held, p. 473, that it was a good devise—

"for although the corner house was not in the tenure of Hitchcock, but a misprision, yet the devise is good, for it is sufficiently ascertained before, *viz.*, the former house in Andover. And the addition *in tenura* Hitchcock, although it be not in his tenure and is a mistake, yet it is but surplusage, and, although false, shall not vitiate the devise, because the devise was of a thing certain at the first, and shall be expounded according as the intent of the parties is apparent."

And, finally, on the same point of surplusage I cite the oft quoted words of Vice-Chancellor Wigram, Best on Evidence, (1902), p. 210:

"It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient merely by the rejection of words or surplusage, are cases in which no ambiguity really exists. The meaning is certain notwithstanding the inaccuracy of the testator's language."

And where the words used as mere "words of demonstration" they may be rejected either as surplusage in the case of ambiguity or in pursuance of the doctrine of "*Falsa demonstratio non nocet*," and it is immaterial where they occur in the sentence. In *Cowen* v. *Truefitt, Limited* (1899), 2 Ch. 309, it was laid down, p. 312:

"If the language is clear but does not fit because of some words which have been inserted, then, if it is possible to reject the part that makes it inapplicable, the Court will do so."

And Lord Justice Rigby says, p. 313:

"I will only add on this part of the case that I altogether reject the argument, as my learned brothers have done, that in applying the doctrine of *falsa demonstratio* it is material in what part of the sentence the *falsa demonstratio* is found. To adopt such an argument would be to reduce a very useful rule to a mere technicality."

In arriving at the conclusion that there is a latent ambiguity

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in this document it must be understood that if it had appeared by the extrinsic evidence of the intention of the parties that the one party meant one thing and the other party meant another, both equally within the words of the contract, there would then be a case of mistake between the parties as to the matter of their agreement, and the agreement as the basis of the contract would have failed altogether; this is one clear illustration given in Leake on Contracts, 4th Ed. (1902), p. 141, of the difference between mistake and latent ambiguity; and see Broom's Legal Maxims (1870), p. 644, proposition 4. To a certain extent, however, ambiguity always partakes of error, mistake and inaccuracy; it is only really a question of degree. Fortunately, however, in the present case, the fact has been properly found that the parties meant the same thing in their dealings.

If it had become necessary to consider the question of error or mistake, apart from ambiguity, it was strongly urged upon us that it would be more likely to occur in the figure 10 than in the written words, with which I agree; that is a recognized principle in dealing with documents, *e.g.*, commercial instruments, in regard to which the following remarks are to be found in Byles on Bills (1891), p. 94:

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"The sum for which a bill is made payable is usually written in the body of the bill in words at length, the better to prevent alteration; and if there be any difference between the sum in the body and the sum superscribed, the sum mentioned in the body will be taken to be that for which the bill is made payable; when the figures express a larger sum than the words, evidence to shew that the difference arose from an accidental omission of words, is inadmissible. An omission in the body may be aided by the superscription."

And it is stated by Mr. Justice Bosanquet in *Saunderson* v. *Piper* (1839), 5 Bing. N.C. 425 at p. 432:

"But the same writers also lay it down that in the absence of instructions the words at length, and not the figures, are to determine the sum to be paid; and we think that is the rule that should be followed."

In my opinion the appeal should be dismissed with costs.

Appeal dismissed, Irving, J., dissenting.

DUMAS GOLD MINES, LIMITED v. BOULTBEE *ET AL.*

MARTIN, J.

1904

March 18.

DUMAS MINES *v.* BOULTBEE

Mineral claim—Transfer of—Time allowed for recording—Mineral Act, Secs. 19 and 49.

The claimant of an interest in a mineral claim seized under an execution on 18th May, 1903, relied on a bill of sale obtained by him on 23rd February, 1903, while in Dawson, Y. T., over 2,000 miles from the Mining Recorder's office. The bill of sale was not recorded until 22nd May, 1903:—

Held, that as the time for recording mineral claims fixed by section 19 of the Mineral Act is dependent upon the distance of the claim (not of the locator) from the Recorder's office, therefore by section 49 of the Act the bill of sale was of no effect as against the intervening execution, as it was not recorded within the time limited by said section 19.

INTERPLEADER issue tried before MARTIN, J., at Rossland on 15th and 16th March, 1904, the question to be determined being "does the defendants' execution against Gilbert Pellent prevail against the claim of the plaintiff Company or of its predecessor in title E. M. Pellent," to the undivided half interest of the said Gilbert Pellent in the mineral claims mentioned in the issue. Statement

J. A. Macdonald and *Galt*, for plaintiffs.
Hamilton, for defendants.

18th March, 1904.

MARTIN, J.: According to the issue as amended pursuant to the principle laid down in *Bryce* v. *Kinnee* (1892), 14 P.R. 509 the question to be determined is, does the defendant's execution against Gilbert Pellent prevail against the claim of the plaintiff Company "or of its predecessor in title, E. M. Pellent," to the undivided half interest of the said Gilbert Pellent in the mineral claims mentioned in the issue? Judgment

The chain of the title set up by the Company is through a bill of sale (for the consideration of $500) from said Gilbert Pellent of his half interest to E. M. Pellent, the Company's predecessor

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in title, dated 23rd of February, 1903, and it is admitted that this document was not recorded till the 22nd of May, 1903, and that in the meantime the Sheriff had seized under the defendant's execution on the 18th of May, 1903.

Gilbert Pellent was in the Yukon Territory, at Dawson, at the time, over two thousand miles from the Mining Recorder's office having jurisdiction over the claims in question, and it is contended that by the operation of sections 19 and 49 he or his transferees had some 215 days within which to record the instrument, on the assumption that, like a locator, one who wishes to record an instrument should be allowed one day for every ten miles of distance he who executes it may happen at the time to be from the Recorder's office. This is an ingenious but clearly fallacious argument. Section 49 says that conveyances, etc., "shall be recorded within the time prescribed for recording mineral claims," and that prescribed time is fixed by section 19 as dependent upon the distance from the claim to the Recorder's office, not of the locator himself therefrom. It is a fixed geographical and not a shifting personal distance that is contemplated by the statute, and it would be unreasonable to hold that the transferee of a bill of sale of a mineral claim would have more time to record that instrument than the free miner would have originally had to record the claim iself.

Judgment

Such being the case, the bill of sale relied upon has not been duly recorded and is of none effect as against the defendant's intervening execution.

It is admitted by Croteau, an unreliable witness, that the Company had actual notice of the seizure before it took the bill of sale of May 26th, 1903, from E. M. Pellent; and in any event I cannot see how it is aided by that document. I further find, if it is material, that Croteau knew of the judgment recovered in Vancouver setting aside said bill of sale from Gilbert to E. M. Pellent before he recorded that bill of sale.

Other points were raised, but it seems unnecessary to go into them. I find that the plaintiff Company has failed to establish its title, and the issue is hereby determined in favour of the defendant.

Judgment for defendant.

BANK SHIPPING CO. v. THE "CITY OF SEATTLE."

MARTIN, LO. J. A.

1903

July 30.

Collision—Negligence—Application of Regulations—Ship at wharf—Lights—Fog signals.

Articles 11 and 15 (*d.*) of the Collision Regulations of February 9th, 1897, do not apply to the case of a ship made fast to a lawful wharf in a harbour:—

Held, on the facts, that a vessel which ran into another so moored was guilty of negligence.

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TRIAL at Vancouver before Mr. Justice MARTIN, Local Judge in Admiralty. The case is reported chiefly on the point of the applicability of the Collision Regulations to vessels moored to a wharf.

The steamship City of Seattle, in a fog, about 4.30 a.m. on March 16th, 1903, ran into the barque Bankleigh which, while discharging cargo, was moored to Evans, Coleman & Evans' wharf in Vancouver harbour, with her starboard side to the west side of the wharf, and with her stem a few feet, and her bowsprit over 20 feet beyond the end of the wharf; the witnesses differed as to the exact distance that her stem projected beyond the wharf, but that fact was immaterial, as will be seen from the judgment.

Statement

The position of the wharf was defined by three fixed and well-known lights known as the "wharf lights"; two of these lights were red, one at the N. W. corner of the northerly extension of the wharf, and the other nearer the shore on the west side at the projecting corner of the original wharf, and the third was a green one at the N. E. corner. The wharf was in a lawful position as regards navigation in Vancouver harbour, *i.e.*, within the wharf head line as fixed by Order in Council of February 28th, 1903. The barque displayed two white lights—ordinary ships lanterns—one forward on the fore-topmast stay, and one aft on the port quarter at the round of the stern; she sounded no bell, but had a watchman on duty who hailed the Seattle as soon as he saw her approaching close to the Bankleigh. There was a very slight

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southerly wind and the weather was misty, with fog lifting and thickening at irregular intervals from about 2 a.m. The Seattle had usually docked at Evans, Coleman & Evans' wharf for some seven years, and was at that wharf that night close to the Bankleigh till 11.30 p.m., loading freight, when she went to the Canadian Pacific Railway Company's wharf some 500 yards distant to the west, for some freight, and in returning from that wharf in endeavouring to make her way out of the harbour on a supposed N. E. course, she ran into the Bankleigh and with her stem struck her on the port side near the mizzen hatch, inflicting considerable damage.

Statement

In explanation of this occurrence, the defendant set up that it was occasioned by a thick fog settling down within three minutes after the Seattle left the Canadian Pacific Railway wharf, and that she proceeded thereafter under slow and half-speed bells till the Bankleigh loomed up suddenly through the fog, and that thereupon the engines were immediately reversed, but too late to avoid a collision. The reason assigned for being out of her course was that she had during the fog been caught in an unusual tide current, and the defence of inevitable accident was consequently set up. Negligence was attributed to the Bankleigh because of (1.) insufficient look-out; (2.) insufficient lights; and (3.) no fog bell.

Argument

Davis, K.C., and *Marshall*, for the plaintiff: The City of Seattle ran down our barque when she was moored to a wharf in a lawful position and was thus for purposes of navigation part of a fixed and permanent object, and not in any way a vessel "at anchor" in the sense that term is used in Articles 11 and 15 (*d.*); those provisions do not apply to her, and it was not necessary for her to have had lights in the exact position therein specified or to sound a fog bell; if all the ships so moored in the harbour were to ring bells it would not only not aid but disturb and mislead mariners, who would assume the sound and lights came from vessels at anchor in the fairway. On the face of it the Seattle has been guilty of gross negligence, and the reason why no case can be cited on the exact point is that this is the first time a ship which had so run down another ever thought

seriously of defending such bad seamanship. The case is determinable on the same principle as a ship running down a wharf or break-water: *The Uhla* (1867), 19 L.T.N.S. 89; L.R. 2 A. & E. 29, n.; Roscoe's Ad. Prac. (1903), 3rd Ed., 205. Here the onus has been thrown upon the defendant ship and there must be a full explanation of what the alleged inevitable accident was: *The Merchant Prince* (1892), P. 179; 7 Asp. M.C. 208-11; Roscoe, 163, 168-72. She should have dropped her anchor when the fog came on: *The City of Peking* (1888), 58 L.J., P.C. 64; 6 Asp. M.C. 396-8. As to the evidence, it shews that so far as this harbour was concerned the knowledge of the captain of the Seattle was defective, and he was not a mariner of ordinary skill or competency. As to the alleged unusual tide current, there is no evidence that it was other than normal at that stage of the tide and time of year. The Seattle could not have been on a N.E. course, and the accident in all probability arose from her failing to distinguish between the two red lights on the wharf and picking up the inner one instead of the outer.

J. A. Russell and *Wintemute*, for the City of Seattle: This is a case of inevitable accident and everything was done on the Seattle that was possible to avoid the accident, and all due skill and care used in navigation. The evidence shews that the collision was attributable to the fog settling down upon that ship almost immediately after she left the Canadian Pacific Railway wharf, and while in that fog she was carried by a strong current into the Bankleigh. We rely upon the case of *The Virgil* (1843), 2 W. Rob. 201; *The Marpesia* (1872), L.R. 4 P.C. 212; *The William Lindsay* (1873), L.R. 5 P.C. 338; *The Steamship Westphalia* (1871), 24 L.T.N.S. 75; *The Buckhurst* (1881), 6 P.D. 152 and *The Industrie* (1871), L.R. 3 A. & E. 303-8. The Bankleigh should have exhibited the lights of a ship aground in a channel, quite apart from regulations. Even if she was moored to a wharf she should have rung her bell at intervals, as her position was tantamount to a ship at anchor under Article 15 (*d.*)

Argument

[*Per curiam:* When a ship is tied up at her lawful wharf in a harbour is she not in a position somewhat analogous to that of a man in bed in his own house, that is, she is "at home" and entitled to assume she is in a place of safety? Are not the four

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states of a vessel contemplated by the regulations thus set out in the preliminary article, *viz.:* (1.) under way, (2.) at anchor, (3.) made fast to the shore, and (4.) aground? As to the meaning of "under way" or "at anchor" see *The Dunelm* (1884), 9 P.D. 164 at p. 171 and *The Romance* (1901), P. 15. In what way did the position of the Bankleigh resemble that of a vessel "at anchor" under Articles 11 and 15 (*d.*), or "a vessel aground in or near a fairway" under Article 11? The two lights she did shew were, apart from the regulations, sufficient in the circumstances.]

We admit that we cite no case which is like the present, but the Bankleigh was in a position analogous to that of a ship at anchor, and should have given the fog signals customary under such circumstances. She was in the fairway, practically, for her stem and bow-sprit projected beyond the wharf. Though she had two lights out as was necessary when over 150 feet in length, yet her stern light was admittedly too low down.

Per curiam: There is no reason why judgment should be deferred in this matter. It is the practice of this Admiralty Court that cases should be decided as speedily as possible.

In the first place, it is necessary to dispose of the question as to whether or not the Collision Regulations, or Sea Rules as they are often called, apply to the ship Bankleigh, and if she is to be condemned for a breach thereof. Now, there is no ground at all for finding that the ship in any way infringed those regulations. I have no hesitation at all in deciding that point in her favour. Her position there was tantamonnt to that set out by the preliminary act, that is to say, being "fast to the shore;" and she was not a ship "at anchor" or "under way" within the proper meaning of those terms as understood by seafaring men. Neither of those nautical expressions applies to the situation of the ship at that time. She was moored to and discharging her cargo at that wharf in a position of safety and entitled to assume that she was safe, and the two lights shewed were a sufficient warning to competent mariners. In regard to the point taken that her bowsprit projected some twenty feet beyond the north end of the wharf, nothing turns on that. I must assume,

Judgment

there being no evidence to the contrary, that the wharf as constructed conformed to the official regulations in that behalf, and she was, I say, properly berthed there, and though her bowsprit did project some considerable distance, and part of her stem for a small number of feet beyond, or a few inches, as you may take the evidence, it does not concern the present question, and I do not propose to go into it, because the damage did not arise in this case from the fact that she projected, but from the fact that she was struck aft of amidships towards her mizzen hatch, the consequence being that the point of collision was 153 feet from the north end of the wharf.

Then in the second place, as to the facts. The principle upon which this case is decided in regard to inevitable accident, which is really what the defence is here, is so well laid down in the case of *The Merchant Prince* (1892), P. 179, that it seems unnecessary to refer to it again, counsel having already cited the parts which are peculiarly appropriate to this case.

The facts that the Bankleigh was in the position I have referred to and that she was run down as aforesaid, establish such a *prima facie* case of negligence against the defendant ship that the rule of law set out in the case of *The Merchant Prince* is properly invoked against her. That is to say, the defence has failed to sustain the plea of inevitable accident, because to do so it was necessary to shew what was the cause of the accident and that though exercising ordinary care and caution and maritime skill the result of that accident was inevitable. That is the principle which seems to apply to such a case as the present, and the fact that counsel on both sides have been unable to discover any case like it, shews what a very unusual state of facts this is. The *prima facie* case established against the defendant ship is of an exceptionally strong nature. I find that the defence has failed to sustain the plea of inevitable accident, and I find that there was bad seamanship in the way the City of Seattle was handled, and there is no valid excuse for the collision which occurred. It seems to me, on his own confession, that the captain of the Seattle has shewn himself to be—for the purposes of this harbour at least—not a competent mariner, and it would have been well for him to have taken

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some other precautions, in the light of the unsettled state of the weather to which he referred, than those he did; either, as suggested by one of the pilots, stayed at the wharf until the weather cleared, or certainly, when he found he was liable to run into a bank of fog, have had his anchor ready beforehand, or reversed his engines, so as to bring his bow further to the north. It is very difficult to believe his statement in regard to the state of the tide; but even if it were setting in that way, in the face of what the pilots say that would not under the circumstances, in my opinion, exonerate him for not having taken the precautions to which I have alluded. Every case must be judged by its circumstances. Here we have a steamer, having left Evans' wharf a few hours before where it knew a ship was lying in a certain position, going to a neighbouring wharf only 500 yards away—and here I may remark the captain made a very considerable mistake in the distance, the difference between 500 and 800 yards—and having landed at that wharf purporting to return near the first wharf. One would think he would take such precautions, under such circumstances known to him, which would have prevented an accident like the present. Evidently the captain also did not understand the tides of Vancouver harbour, which, as Mr. *Russell* very truly says, are peculiar, but at the same time it must not be overlooked that there was not a particle of evidence to shew that on that particular night there was anything exceptional in the state of the tide. Therefore, the inference I am asked to draw that there was something very peculiar, cannot be drawn.

Judgment

I believe that the real explanation of the accident is the mistake about the light that the mate and captain gave evidence of. The captain proceeded on the assumption that there was only one red light on the wharf, that he only saw one, and he must have picked up the wrong one. It seems to me that is the real explanation of what otherwise seems to be inexplicable.

It is unnecessary to add any more. I formally find all relevant issues of fact in favour of the plaintiff, and those of law are likewise determined. There will be a reference to the Registrar and two merchants to assess the damages.

Judgment for plaintiff with costs.

IN RE THE ASSESSMENT ACT AND THE NELSON & FORT SHEPPARD RAILWAY COMPANY.

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RE ASSESSMENT ACT AND NELSON & FORT SHEPPARD RY. CO.

Assessment Act, 1903—Wild lands—Duty of Assessor—Fixing of an average value—Whether compliance with statute—B. C. Stats. 1892, Cap. 38, and 1897, Cap. 37—Exemption from taxation—Jurisdiction of Court of Revision to decide.

In assessing 500,000 acres of wild land consisting largely of inaccessible mountains and valleys, the Assessor acted on instructions received from the Provincial Assessment Department and fixed the value at $1 per acre for the whole tract. On appeal to the Court of Revision and Appeal, evidence was taken and an average value of 45 cents per acre was fixed.

An appeal was taken to the Full Court on the grounds that the valuation was too high and that so far as some of the lands were concerned they were exempt from taxation under the Company's Subsidy Act, and on the argument counsel for the Company asked the Court to fix the assessable value of the lands at the specific sum of $47,986.23:—

Held, per DRAKE, J., that as some of the land was of some value and some of it of no value, the fixing of a flat rate was not a compliance with section 51 of the Assessment Act, 1903, and that the assessment should be set aside with costs.

Per IRVING, J.: The evidence did not enable the Court to form any opinion as to the value of the land within the meaning of section 51, and as the assessment was improperly levied at the outset the Court should simply declare that there was no proper assessment in respect of which an appeal will lie.

Per DUFF, J. (dissenting): (1.) That the evidence was adequate to enable the Court to fix, as against the appellant, the assessable value of the lands.

(2.) The Court has power to deal with the assessment even though it was not made in accordance with the statute.

(3.) In fixing the value of a tract of wild land a process of averaging is reasonable and a compliance with the statute.

Held, per DRAKE and IRVING, JJ. (DUFF, J., dissenting), that by the operation of section 3 of the Amending Act with respect to all the lands granted to the Company the exemption from taxation conferred by section 7 of the Subsidy Act expired with the expiration of the period of ten years, beginning with 8th April, 1893, and that therefore the lands claimed to be exempt were assessable.

Per DUFF, J.: The Court of Revision under the Assessment Act, 1903, had no jurisdiction to decide whether or not the lands in question were

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exempt from taxation and consequently the Full Court has no jurisdiction to deal with that question.

RE ASSESSMENT ACT AND NELSON & FORT SHEPPARD RY. CO.

APPEAL by the Nelson & Fort Sheppard Railway Company to the Full Court from the judgment of the Court of Revision and Appeal, made on the 18th of April, 1904, whereby the valuation of 502,861 acres of land of the Company in the Nelson Assessment District was fixed at 45 cents per acre.

The grounds of appeal were that the valuation placed on the lands was more than their actual value in money and more than the value at which such property would generally be taken in payment of a just debt from a solvent debtor, and that as to four of the lots that they were exempt from taxation for the year 1904 by virtue of the provisions of the Nelson & Fort Sheppard Railway Subsidy Act, 1892. The same grounds were taken in the notice of appeal to the Court of Revision and Appeal.

The land, which comprised eleven lots was of a very varied character, consisting of in part mountain ranges and narrow valleys; much of it inaccessible and of no value; much of it worthless except in view of anticipations of future mining enterprises. Some extensive areas of timber were more or less available for commercial purposes and there were small portions useful for agriculture and grazing.

Statement

The Assessor treated each lot as a separate parcel and assessed all the land at an average value of $1 per acre; in fixing the value he acted on instructions received from the Provincial Assessment Department. On appeal by the Company the assessment was reduced to 45 cents per acre after hearing the evidence of witnesses called by the Company and the Assessor.

The lands in question had been granted to the Company under the provisions of the Nelson & Fort Sheppard Railway Company Subsidy Act, 1892. On the 11th of April, 1902, the Deputy Commissioner of Lands & Works wrote to the Solicitor for the Company stating that in the Crown grants for lots 1238, 1241, 1243 and 1244 the date, 18th October, 1895, appeared as the date of selection of said lots by the Company.

The facts are set out in detail in the judgment of DUFF J., *post* p. 526.

There were also appeals by the Kaslo & Slocan Railway Company in which the sole point was in reference to the exemption under the terms of the Company's Subsidy Act (B. C. Stat. 1892, Cap. 37), which is identical with the Nelson & Fort Sheppard Railway Company Subsidy Act.

The appeal was argued at Victoria in June, 1904, before DRAKE, IRVING and DUFF, JJ.

A. H. MacNeill, K.C., for the appellant Company: He referred to the evidence of the witnesses called on behalf of the Company who assigned an average value per acre for each lot separately and contended that a fair valuation for the whole of the lands in respect of which the appeal was brought would be $47,986.23, made up as appears from a schedule which he furnished the Court,* and at that amount he asked the Court to fix the assessment subject to a deduction of the value of lots 1238, 1241, 1243 and 1244 if the Court should decide that they were exempt from taxation.

He referred to the Acts of 1892 and 1897 and contended that section 3 of the latter Act applied only to those lands which are within the scope of section 3 of the principal Act, and lots 1238, 1241, 1243 and 1244, known as deficiency lands, were not selected until 18th October, 1895, and so are not yet assessable.

He cited *Lauro* v. *Renad* (1892), 3 Ch. 402; *Hughes* v. *Chester and Holyhead Railway Co.* (1861), 31 L.J., Ch. 97; B.C. Stat. 1903, Cap. 53, Sec. 51 and *Re Municipal Clauses Act and J. O. Dunsmuir* (1898), 8 B.C. 361. Argument

John Elliot, for the Crown: He referred to the evidence and contended that the value fixed by the Court of Revision was justified by the evidence. On the hearing of the appeal before the Court of Revision the Company declined to produce reports made to it by timber cruisers.

As to the exemption: Section 3 of the Amending Act has the effect of declaring that with respect to all lands granted to the Company the exemption from taxation conferred by section 7 of

*The figures of the schedule were as follows: Township 7 A., $165.20; Lot 1236, $13,892.95; Lot 1237, $5,382; Lot 1238, $5,697.80; Lot 1239, $4,689; Lot 1240, ——; Lot 1241, $1,744.48; Lot 1242, $6,302.50; Lot 1243, $632.15; Lot 1244, $334.35; Lot 2381, $9,145.80; Total, $47,986.23.

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the Principal Act expired with the expiration of the period of ten years beginning with the 8th of April, 1893: he referred to Endlich, 397; Beal, 197, 361 and Maxwell, 3rd Ed., 319, 405.

MacNeill, replied.

Cur. adv. vult.

29th July, 1904.

DRAKE, J.: The first question is, what is the date at which the lands granted to these Companies became liable to taxation under their Subsidy Act passed in 1892? The seventh section of the Act enacts that the lands to be granted to the Company shall not be subject to provincial taxation until the expiration of ten years from the date of their selection by the Company.

By section 3 of the Act, the Company were to define within one year after passage of the Act the alternative blocks of land 6 by 16 miles, which they desired to take. It turned out that owing to the curves in the line necessitated by the contour of the country, alternative blocks could not be selected, and by section 5 the Company had to select areas to make up the deficiency, and this necessitated a considerable delay in selecting the lands, much greater than would have happened if they had been able to take up alternative blocks. Therefore, the Company say the ten years freedom from taxation should run from the actual time of selection. By Cap. 37 of 1897, the time for designating and surveying lands granted by section 4 of the original Act was extended for six months. Section 3 limited the exemption from taxation for ten years from 8th April, 1893. It is contended that this limitation refers only to the lands mentioned in section 3 of the original Act, and not to lands which were taken up under section 4. I do not agree with this contention. The Act, 37 of 1897, is an amendment of the original Act. It is cited as the Nelson & Fort Sheppard Railway Subsidy Act Amendment Act, 1897. The effect of an amendment to an Act is to read the amendment clause into the Act as if it originally was therein inserted, and this amendment is quite clear in its terms and apparently was inserted as a *quid pro quo* for the extended time granted by the Legislature to enable the Company to take up the additional lands requisite to make up their grant; and in my

DRAKE, J.

opinion, the freedom from taxation is not affected by the period when the lands were located and defined, but is expressly fixed to commence from the 8th of April, 1893, and therefore these lands are liable to taxation, commencing on the 8th of April, 1903. In *The Queen* v. *Judge of City of London Court* (1892), 1 Q.B. 273 at p. 290, Lord Esher says:

"If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. . . . . If the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the Legislature did not intend to lead to an absurdity, and will adopt the other interpretation."

This section affects all the lands subject to appeal, that is the Nelson & Fort Sheppard Railway and the Kaslo & Slocan Railway, as the language used is identical in both Acts and Amendments.

With regard to the other portion of the appeal relating to the mode in which the assessment was made, the Judge of the Court of Revision has fixed the amount over 502,861 acres at 45 cents an acre. Under section 51 of Cap. 53 of the Assessment Act, 1903, property is to be assessed at the actual value in money and each description of property is to be valued by itself at such sum as the assessor believes the same to be fairly worth in money at the time of assessment; and that is the value at which the property would generally be taken in payment of a just debt from a solvent debtor. The land here has been surveyed into blocks one mile square, and according to the evidence some of this land is alleged to be worth $1 an acre, other portions, nothing. It is land consisting of mountain ranges and narrow valleys, the latter have a prospective value for lumber, but the prospective value is not to be considered in estimating the value for taxation purposes. Some land is valuable for agricultural purposes, for which purpose it has to be cleared and fitted for agriculture. It is, in my opinion, impossible on the evidence before us where this large tract of country has to be valued and assessed, to say that a flat rate is a compliance with the statute. Neither is it possible to say that all the land is of equal value.

DRAKE, J.

I think the assessment is not in accordance with the statute, and should be set aside, with costs of this appeal.

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RE ASSESSMENT ACT AND NELSON & FORT SHEPPARD RY. CO.

IRVING, J.: This is an appeal from the Court of Revision in respect of the assessment of 502,861 acres of land, the property of the Nelson & Fort Sheppard Railway Company.

A uniform rate of 45 cents per acre—making a total of $226,287.45—was fixed by the Court of Revision. In the first place, we have to determine whether each of the eleven lots is liable to taxation; and in the next place, whether the rate of 45 cents per acre is the proper rate, having regard to the requirements of section 51 of Cap. 53, B. C. Statutes of 1903-4. That section is as follows:

> "Real and personal property shall be assessed at their actual value in money. In determining the actual value of real and personal property in money, the Assessor shall not adopt a lower or different standard of value, because the same is to serve as a basis of taxation, nor shall he adopt as a criterion of value the price for which said property would sell at auction, or at a forced sale, or in the aggregate, with all the property in the Assessment District, but he shall value each article, or description of property, by itself, and at such sum or price as he believes the same to be fairly worth in money at the time of assessment. The true cash value of property shall be that value at which the property would generally be taken in payment of a just debt from a solvent debtor."

With regard to the first point. The land grant made to the Company by Cap. 38 of 1892, is not worded in the clearest way. Section 1 specifies the amount of the grant. Section 2 provides for a reserve being placed upon the land intended to be traversed by the Company. Section 3 directs a survey to be made dividing the country into blocks of 6 x 16 miles. The Company is to select alternate blocks.

IRVING, J.

Section 4 provides that grants of land in the Company's blocks may be issued as the work progresses. The last clause in that section provides that the Company is to make these surveys within five years.

Paragraph 5 provides that in case land is taken up in the Company's blocks, then the Company can take up in the Government blocks, or any other part of West Kootenay, a sufficient amount to make up the deficiency.

Paragraph 7 declares that the Company shall hold their lands free from taxation for a period of ten years from the date of their selection by the Company.

The use of the word "selection" in sections 3, 4 and 7 is unfortunate.

Does the exemption granted by section 7 run from the date of selection by the Company for grant under section 4, or merely from the date of the selection of the alternate blocks under section 3?

Looking at the Act of 1892, I should be inclined to think that under section 7 the period should be calculated from the date of the selection or "request and designation" mentioned in section 4, that is, before the 8th of April, 1898. If that view is right, the period of exemption from taxation would, in some cases, extend from the 7th of April, 1898, to the 7th of April, 1908.

By the Act of 1897, the Legislature declared that that view would not be allowed to prevail. The Act passed in that year declares that the ten years' exemption from taxation shall begin to run against the Company from the 8th of April, 1893. The latest date at which the Company's lands were exempt from taxation was declared to be the 8th of April, 1903.

It would look as if the Legislature intended to prevent any dispute arising as to the meaning of section 7 of the Act of 1892, and when the extension of time for the selection of their lands was granted to the Company the Legislature passed section 3 as a set off to section 2.

For the Company it is argued that section 3 of 1897 should be limited to the lands mentioned in section 2; but the reference to section 3 of the Act of 1892, disposes of that argument. The Legislature says the selection of section 7 means the selection mentioned in section 3 of the Act of 1892.

As to the valuation of the land. It appears that these lands were never assessed by the Assessor in the manner prescribed by the Act. Instead of placing a valuation on the property the Assessor arbitrarily fixed the sum at $1 and then called upon the Company to appeal against it.

The Company on the appeal gave evidence, one of their witnesses who followed the language of section 51, reduced the assessment to $47,986.23.

Witnesses for the Crown gave evidence as to the value of

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isolated spots, but without taking into consideration the remoteness of those spots from the centres of commerce.

On the whole, the evidence furnished us does not enable us to form any opinion as to the value of the land within the meaning of section 51, and as the assessment was, in my opinion, improperly levied at the outset, I think we should content ourselves with expressing our views as to the Statute of 1897, and declaring that there was no proper assessment in respect of which an appeal will lie.

DUFF, J.: Two questions only are raised in these proceedings.

These questions take the form of the affirmation by the appellant Company, and the denial by the respondent, the assessor of the propositions: (1.) That certain of the appellant's lands, assessed by the respondent, are exempt from taxation and assessment by reason of the terms of the appellant's Subsidy Act (B. C. Stat., 1892, Cap. 38); and that consequently the judgment of the Court of Revision affirming the assessment of these lands is contrary to law; (2.) that, with respect to the whole of the lands affected by the proceedings, the value at which they are assessed by the judgment of the Court of Revision is in excess of their actual value in money.

These propositions I shall consider in inverse order.

DUFF, J.

And first, of excessive valuation. I at once agree that the assessment is too high. The value affixed to these lands by the judgment of the Court of Revision is far in excess of anything warranted by the evidence before that Court. The Revising Officer must, I think, have been misled by some erroneous views respecting the presumption arising from the non-production of the appellant Company's reports; and he doubtless permitted these views to sway his decision of the case. On no other hypothesis can I account for the conclusions to which his judgment gives effect. But while I have no hesitation in deciding that the judgment of the Court of Revision is erroneous, I have—with great respect for the opinion of my learned brethren—as little doubt that on this appeal there are before us materials quite adequate to enable us

to fix—as against the appellant—the assessable value of these lands. It would serve no useful purpose, in view of the opinion of the majority of the Court, to work out with exactitude, much less to support by copious references to the record, one's own view of the fair inference which the evidence as a whole yields respecting this question of value. There are, however, two outstanding forensic facts which one cannot overlook. The appellant's counsel, during the argument, distinctly disavowed any contention that the evidence was insufficient to lead us to a conclusion on that question; moreover, he expressly asked us to fix the assessable value of the lands involved at the specific sum of $47,986.23.

I do not stop to discuss that figure. Naturally counsel minimized it as far as he fairly could. I do not agree that it correctly represents the effect of the evidence. But it was put forward as the view upon which the appellant Company wished the Court to act. Nor was there any uncertainty respecting the value of the particular parcels involved. To each parcel the argument thus addressed to us assigned a specific value. And if we acceded to it the corrections of the roll required to give it effect . . . . could be only mechanical. I ask myself the question: How, in the face of this position assumed before us by counsel for the appellant Company, can it be maintained that, as against the appellant Company, we have no materials on which this property can be assessed? To that question I am unable to discover any satisfactory or, indeed, intelligible answer.

DUFF, J.

These considerations are, in my opinion, sufficient to dispose of all questions raised by the parties, and, therefore, of all questions properly before us in these proceedings, except that relating to the scope of the exemption conferred by the appellant Company's Subsidy Act.

It is, however, now suggested, and the majority of the Court hold, that the mode of valuation followed in this case—being a radical departure from the course prescribed by the statute—vitiates the assessment; in short, that there is no assessment which this Court can consider.

Passing for the moment the question whether such a point is

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open at this stage, one seems at once to see that if there be nothing respecting which the powers of this Court can be invoked in an appeal under the Assessment Act—in other words if no appeal lie—it must follow that we have no power in these proceedings to grant any relief; we cannot correct the roll; we cannot direct the Assessor or the Revising Officer to correct it; any declaration concerning its validity must be mere pious opinion, binding nobody; leaving the executive authority to act or not to act, as it shall see fit. On the other hand, if there be something on which the powers conferred upon this Court by the Assessment Act may be exercised, in other words, if an appeal be competent under the Act, then in the language of the Act "The procedure generally and the powers of the Full Court in respect of such appeal shall be the same as in the case of an ordinary appeal from any judgment made by a Judge of the Supreme Court to the Full Court;" the whole matter is before us for rehearing; we can, if not satisfied with the sufficiency of the evidence, call for fresh evidence; we can draw inferences of fact; we are bound to give the judgment which in our opinion the Revising Officer ought to have given on the materials before us; in other words, we are, on the materials before us, to assess the property.

It seems to follow that if the appeal be not competent we can do nothing but dismiss it, leaving the appellant to such other remedy or want of remedy as the law puts at his disposal; if the appeal be competent, and we cannot find in the evidence a sufficient basis of assessment, and we think the case is not one for fresh evidence, we must at least give effect to the appellant's admission, and assess the various parcels in question at the values assigned to them in the argument of the appellant's counsel.

DUFF, J.

But in my opinion at this stage of these proceedings effect cannot be given to the contention that we are deprived of power to deal with the assessment because it was not made in accordance with the statute. The contention finds no place in the complaint addressed to the Court of Revision. It was not urged in the argument before that Court. Upon it, the notice of appeal to this Court is silent. The appellant could not, therefore,

agreeably to established principles of procedure now have the benefit of it; and it was not so much as hinted at in the argument before us. One can hardly conceive counsel for the appellant seriously asking us to give judgment in his favour on the ground that the thing appealed from was something from which no appeal would lie. Indeed the appellant did not at any time in the proceedings dispute the statutory validity of the assessment. It asked relief on the ground, and only on the ground, that the value placed upon the subjects affected by the assessment was higher than their "actual value in money." One is fortunately not charged with the fiscal administration of the Province, and, sitting only as a Court, with no executive responsibility, empowered only to decide a controversy *inter partes*, one looks in vain for the source of one's authority judicially to nullify an administrative Act, the validity of which nobody disputes.

I should not be disposed further to pursue the discussion of this subject, were it not of some general importance as affecting the operation of the fiscal machinery created by the Assessment Act. Before considering the defects and improprieties which, it is alleged, vitiate this assessment, it is convenient to look at the nature of the property affected by it. The land in question is of very varied character; much of it inaccessible and of no value; much of it worthless except in view of anticipations of future mining enterprise. Some extensive areas of timber are more or less available for commercial purposes, and there are small portions useful for agriculture and for grazing. In the main it is classed properly as wild land. In all it embraces over 500,000 acres, divided into eleven lots described by official numbers, each of which has been conveyed to the appellant by the Crown through a separate grant. The land comprised within each of these separate parcels is, generally speaking, varied in character—an epitome of the whole. There are no reports or other sources of information available to the public authorities by which any accurate classification of the whole area, or of the individual lots, could be made. Such information, so far as it goes, is in the possession of the appellant Company, and was not produced at the hearing before the Revising Officer, or before us.

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The Assessor, treating each lot as a separate parcel, assessed it as a whole, at an average value for each acre; in fixing this value, he acted on instructions received from his superior officers; and it is on these facts that the contention I am now considering—a contention not raised or argued by the parties at any stage of the proceedings—is based.

And first, of the last mentioned fact: I at once agree that the conduct of the Assessor is indefensible. He was bound to exercise his judgment; he acted arbitrarily. He was bound to act independently; he obeyed the directions of an officer of the Government. To a valuation so made, one can ascribe no possible evidentiary weight. But I am unable to agree that because of these improprieties the assessment is a nullity, to which the relief by way of appeal given by the Act is inapplicable. I do not stop to set out the provisions of the Act. A most cursory examination reveals that the roll is intended to be the product of the joint labour of the Assessor and the Revising Officer; the Revising Officer, in all cases before him, has power to increase as well as diminish the assessment; the roll, as finally passed by him, is "valid, and binds all parties concerned, notwithstanding any defect or error committed therein or with regard to such roll."

Subject to formal compliance with the requirements of the Act—a roll, an entry in the roll, notice to the person assessed—it seems plain that the Legislature intended to provide, and has provided in the Court of Revision, a tribunal having full power in all cases before it on a proper complaint to grant relief against any over-valuation by the Assessor. One does not find that this title to relief is affected by the circumstance that the complainant's grievance arises from the Assessor's arbitrary, or even corrupt, disregard of the directions of the statute, and not from his honest mistake.

DUFF, J.

And why should such a distinction exist? The Act requires real and personal property to be assessed at its actual value in money. On receiving notice of assessment, the person affected by it may, if dissatisfied, appeal to the Court of Revision. Surely there is no principle of interpretation by which this right, given in unequivocal words, can be made to depend upon the

subjective process by which the Assessor's appraisal has been evolved; or upon a distinction so unsubstantial as the distinction between the Assessor's judgment and the Assessor's guess.

And if the relief provided by the Act be inapplicable to a case of arbitrary or corrupt valuation, is there in such cases any remedy? And is there any limitation of the period during which it may be invoked? And with respect to what classes of cases is it available? It is much to be hoped that the Legislature, being now informed by the judgment on this appeal of the meaning and effect of their legislation, will provide some short cut to the solution of these puzzles.

Of course, if I am correct in thinking that the appellant here took the proper course in appealing to the Court of Revision under the Act, it cannot be disputed that its complaint was properly before us on appeal from that Court; and we have full power to assess the lands as the Court of Revision might have assessed them.

I have still to deal with the other facts relied upon as making void the assessment. It is said that the property should have been assessed in parcels one mile square—not in parcels coterminous with the lots into which it was subdivided, and in which it was conveyed by the Crown. It is said that the valuation "at a flat rate," or at an average or uniform value is a violation of the statutory directions.

Had these objections been suggested at a stage when it would have been possible for the Crown to meet them, I should have been surprised to hear them pressed by the appellant. But I am now discussing them on their merits. It will be convenient to consider them together. The statute directs that each parcel shall be separately valued. The acreage, the value, and the lot number of each parcel is to appear on the roll. It was conceded on the argument that the boundaries of each lot only had been surveyed; other lines appeared on the plans, but they had not been surveyed or marked on the ground. It must be apparent, therefore, that, however in theory desirable, the valuation in parcels of one mile square would be, in the circumstances, impossible, or, at all events utterly impracticable. Indeed, in this

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respect the Assessor seems exactly to have observed the requirements of the statute.

Then, was the valuation of each parcel at an average acreage value a breach of the statutory provisions? I can find nothing in the Act to require the Assessor in fixing the value of a tract of wild lands, separately denominated as a parcel, to differentiate between mountains and valleys, between mining and agricultural, or between timber and pastoral lands. By what means in the absence of information enabling him accurately to determine the locality and extent of the area belonging to each class he could so proceed I profess my inability even to guess. In this case no such information was before him; nor was it obtainable except at an expenditure which no government would—and I think, no Legislature intended to—sanction.

The Assessor has assigned to each parcel an aggregate value—not, it is true, in form—but by giving the acreage and affixing an average value to every acre he has provided the elements from which the aggregate value at once appears. Can it be seriously contended that an assessment of lot 1,243 at the sum of $55,771 is a valid assessment within the Act, and that the assessment of lot 1,243 containing 55,771 acres at $1 per acre is a void assessment? In every parcel some land is valuable; some valueless. The process of appraisal of any large area of land must always be a process of averaging. Was it the duty of the Assessor to ascribe to each acre its particular value, or is it his duty in any way to disclose on the face of the roll the process by which the value of the whole parcel has been ascertained? I cannot agree that the statute imposes any such duty on the Assessor. So to hold would in effect exclude from the operation of the statute the hundreds of thousands of acres appropriated for the purpose of subsidizing railways in this Province. One must not forget that the lands included in these large grants are of the same general character, and their assessment must proceed in the same way as the assessment of the lands in question here, and that the validity of all these assessments must be tried by the same tests. Did the Legislature, knowing the character and extent of the territory embraced in these grants, frame the Act of 1903 in

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such a way as to make the assessment of them impracticable within the law?

The answer, I venture to think, is to be found in the language of the Act, which, construed in its ordinary sense, supplies, in my opinion, machinery capable of practical and efficient application for assessment purposes to large as well as to small areas of land; and there is no reason, visible to one's perception, why one should be astute to reduce this plain language to an absurdity.

It remains to consider the appellant Company's exemption under its Subsidy Act, and the amending Act of 1897.

Before doing so, I should say that an examination of the Assessment Act points to the conclusion that the jurisdiction conferred by the Act upon this Court in appeal from the Court of Revision, does not include the power to decide a question whether the statutory officials have exceeded their authority in assessing property not legally assessable. No objection was taken to the competence of the appeal on that ground; and, without argument, I should not desire to commit myself to an opinion respecting its validity; and I may, therefore, perhaps, without impropriety, express my opinion upon this question, notwithstanding my doubts as to the competence of the Court to deal with it on these proceedings.

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The amending Act was passed on the 8th of May, 1897 (Cap. 37). The principal Act, which was passed in 1892 (Cap. 38), authorized the grant by the Lieutenant-Governor in Council to the appellant Company of lands in West Kootenay, in aid of the Company's undertaking, not exceeding 10,240 acres for each mile of railway to be constructed by the Company. The Act provides, by section 3, that the Company shall define and project within one year after the passing of the Act (*i.e.*, on or before the 8th of May, 1893) upon a plan of the located line of railway, alternate blocks fronting on each side of the line, having a frontage of six and a depth of sixteen miles; by section 4, that no lands shall be granted to the Company which have not been designated and surveyed by them within five years from the passing of the Act; by section 7, that "The land to be granted to the Company shall not be subject to taxation until

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the expiration of ten years from the date of their selection by the Company, or until alienated by the Company, whichever event shall soonest happen." Certain of the lands affected by the assessment here in question were not selected until within the ten years preceding the date of the assessment; and the point to be determined is whether under the provisions of the Subsidy Act as amended these lands are now liable to taxation.

The Company did, in compliance with the principal Act, define and project the alternate blocks as provided by section 3. These blocks did not exhaust the subsidy. Subsequently at varying dates, all of which are within the ten years preceding the date of the assessment in question, the lands required to complete the subsidy—known generally as "deficiency lands"—were selected by the Company with the approval of the Government. There was some controversy on the argument about the date of these last mentioned selections; but the letters of the Deputy Commissioner of Lands and Works, as well as the terms of the grants of the deficiency lands themselves, put this matter, in my opinion, beyond doubt.

At the date of the passing of the Amendment Act, the deficiency lands had, with the approval of the Government, been selected; they had all been selected after the 8th day of May, 1893; it had occurred to nobody concerned on behalf of the Crown, or on behalf of the Company, that the time limit imposed by section 3 of the principal Act for the selection of the alternate blocks could apply to the selection of the deficiency lands. Indeed, it is obvious that the extent of the area which the Company should be entitled to receive as deficiency lands could not be ascertained until after the selection of the alternate blocks and the determination of their acreage; and it must be equally obvious that if the section in question required the Company to select the deficiency lands within the period of one year fixed by that section, then the time limit for the selection of the alternate blocks must *ex necessitate rei* be reduced to something less than a year; a result which seems to be out of harmony with the express terms of the section.

In 1897, a difficulty arose about the surveys. The Company found it impracticable to comply with section 4 of the principal

Act, which prohibited the granting of any lands under the Act which had not been surveyed within five years after its passing. And in that year the Legislature passed the amending Act referred to, which, by section 2, provided that:

"The time limited by section 4 of the 'Nelson and Fort Sheppard Railway Subsidy Act, 1892,' for designating and surveying the lands to be granted to the Nelson and Fort Sheppard Railway Company, in pursuance of the said section, is hereby extended for six months after the passage of this Act."

Some weeks after the passing of this amending Act, Crown grants of the deficiency lands were delivered to the Company.

On behalf of the Crown, it is contended that by section 3 of the amending Act the Legislature has declared that with respect to all lands granted to the Company the exemption from taxation conferred by section 7 of the Subsidy Act expired with the expiration of the period of ten years, beginning with the 8th of April, 1893.

The section in question reads as follows:

"(3.) Nothing in this Act contained shall be held to extend the time for exemption from taxation of the land selected more than, at most, ten years from April 8th, 1893, the furthest date at which, by the 'Nelson and Fort Sheppard Railway Subsidy Act, 1892,' section 3, the lands were to be selected."

I am unable to doubt that this section applies only to those lands which are within the scope of section 3 of the principal Act.

I have already pointed out that section 3 of the principal Act in terms relates only to lands comprised within the alternate blocks, and that the "deficiency lands" are free from its operation. I am, therefore, unable so to read the third section of the amending Act as to make it applicable to the "deficiency lands."

In my judgment the language is not equivocal; but if it is open to more than one construction, it is difficult to see how the construction contended for by the Crown can, in the circumstances, be maintained. If the section applies to the deficiency lands, it, in effect, declares that these lands were within the operation of section 3 of the Subsidy Act, and, consequently, that no selection of these lands could legally be made after the 8th of April, 1893. But the selection of all the deficiency lands

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was made after that date. At the passing of the amending Act this fact was known to the Crown as well as to the Company, and must, I think, be assumed to have been within the knowledge of the Legislature. After the passing of the Act, the lands so selected were granted to the Company. Are we to give to the Act a construction which assumes on the part of the Legislature a determination *ex post facto* to deprive the Company of nearly half its grant, and on the part of the Government the illegal delivery of Crown grants of 200,000 acres of land?

It is suggested that section 3 may be regarded as expressing a *quid pro quo* agreed to by the Company for the extension of time provided for by section 2. But regarding the Act as a bargain, is it supposable that for the sake of that extension of time the Company would have agreed to deprive itself of half its subsidy?

The section in question does not purport to alter the principal Act; it is framed expressly to restrict the operation of section 2 of the amending Act. The Legislature, in common with everybody acquainted with the history of such legislation, was not ignorant of the importance, in amending a railway subsidy Act, of confining the scope of the amendment to the precise point before it, and, in my opinion, section 3 was introduced with that object and that object alone.

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Re KASLO & SLOCAN RAILWAY COMPANY ASSESSMENT.

DUFF, J.: As at present advised, speaking without the benefit of argument, I am disposed to think that in these proceedings this Court has no jurisdiction to deal with the sole question raised on this appeal, *viz.:* whether at the time of the assessment appealed from the lands affected by the appeal were not legally subjects for assessment.

This view, if sound, furnishes a sufficient reason for the dismissal of the appeal; but it does not follow that the appellant Company may not still raise that question in a proper proceeding.

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Will—Testamentary capacity—Undue influence—Delusions—Certificate of physician—Evidence—Costs.

The best evidence of testamentary capacity is that which arises from rational acts and where the testatrix herself, without assistance, drew up and executed a rational will, medical evidence that she was mentally incapable of so doing will be rejected.

Where one who benefits by a will procures it to be prepared without the intervention of any faithworthy witness, or anyone capable of giving independent evidence as to the testator's intention and instructions it will be regarded with suspicion and its invalidity presumed, and the onus is on the party propounding it to clearly establish it.

Where a physician improperly gives a certificate as to testamentary incapacity of his patient it should not on that ground alone be rejected as evidence, if otherwise admissible, but the circumstances will affect the weight that should be attached thereto.

Observations upon delusions and undue influence.

Held, on the facts, that the will of the testatrix was valid, but that the codicil was obtained by undue influence, and probate thereof was refused.

In the unusual circumstances the Court made no order as to costs.

TRIAL held before MARTIN, J., at Victoria in February, 1903. The facts appear in the judgment.

Luxton and *R. H. Pooley*, for plaintiff.

A. E. McPhillips, K.C., and *Barnard*, for defendants.

24th July, 1903.

MARTIN, J.: This is an action to admit to probate in solemn form of law the will and codicil of Elizabeth McHugh, widow, who died at her house in Fisguard Street, Victoria, B. C., on the 7th day of April, 1902, at the age of about 86 years. The said will as propounded by the plaintiff bears date the 17th of December, 1900, and the said codicil bears date the 28th of the same month.

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The testatrix and her husband left Ireland in 1837, and went to Australia, thence to New Zealand, thence back to Australia, and thence to California in 1861, and, after a stirring and event-

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ful life, came to Victoria on the 14th of July, 1861, with five children—two sons and three daughters. They brought with them a considerable sum of money—stated to be upwards of $50,000, or thereabouts—and shortly afterwards settled at Saanich, acquiring a farm of 1,000 acres. Of the five children, the elder son Henry left British Columbia in 1869, and returned to New Zealand, where he has since resided. The other children are all alive, and are parties to the action. The second son William, the plaintiff, is the youngest of the family, and is 53 years of age; and the daughters Catherine (Mrs. Steinberger), Minnie Elizabeth (Mrs. Dooley), and Anne (Mrs. Wale) are the defendants. The father died in 1888, at 90 years of age, and sometime before his death the mother made a journey to New Zealand for the express purpose of seeing and giving her son Henry a considerable sum of money which, I am satisfied, in the opinion of the deceased at least, was regarded as a satisfaction of all claims he might have upon her bounty or estate, and it does not appear that since that time she has had any communication with him, nor is he a party to this action. Under all the circumstances for the purposes of these proceedings he may be disregarded.

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The deceased was born in the County Tyrone in Ireland, and it is alleged that her family were remarkable for longevity, as an illustration of which it is stated that one of her sisters lived to the age of 101 and the other to 111 years. All the witnesses who knew her agree that she was a woman of exceptional force of character and unusual business ability, robust in mind as well as in body. In disposition she was self-willed, impatient of control and hard to influence; she was quick-tempered, though not irritable; of convivial habits, and, especially when her temper was roused or her wishes opposed, rough in speech and apt to be abusive and profane. Her education was limited, but she could read, write and figure well enough, and thoroughly understood how to look after her property and affairs. She was, in short, in many respects a remarkable woman and a good example of a sturdy pioneer of the rougher type, well able to hold her own in all emergencies as the incident of her outwitting the highwayman in Australia and the defence of her gold in her house at Saanich from the negro burglar, testify.

On the 1st of November, 1895, she came to live in Victoria, and occupied her house in Fisguard Street till her death. She seems all through her life to have enjoyed very good health, and it is not suggested that she had any serious illness till September, 1898, when Dr. Frank Hall was called in to see her, and he states that she had had a slight cerebral hemorrhage shortly before his visit, accompanied by temporary paralysis to a slight extent, and a slight interruption of speech, and a slight deviation of one side of her face, and a slight loss of muscular power in one hand. On cross-examination he stated that her condition was not serious, and he prescribed for her but did not consider it necessary to visit her again at that time, nor did he see her again for more than two years—till December, 1900—when he visited her three times, somewhere between the 8th and 17th. He thinks the visits were on or close to the dates of the 8th, 10th and 17th. He then found that she had had a slight repetition of the seizure she had in 1898, but to a less extent, and that she was suffering from senile dementia, which he states may be generally described in old persons as a progressive mental enfeeblement resulting from organic trouble in the brain, and is of the opinion that the first hemorrhage in 1898 was in her case probably the commencement of it, because when he saw her then senile dementia had already set in. The enfeeblement progressed he says gradually, without exception, except in abeyance sometimes for a few months, and finally resulted in her death. When he saw her in 1900 the progress of the disease was more noticeable, she had more markedly the appearance of general senile decrepitude. He attended her again in 1901, in February, and in April, 1902, three times before she died. The general result of his evidence is that he believes that anyone suffering from senile dementia to however slight a degree is not competent to make a will; but on being cross-examined as to what he had to say to the document which is propounded as being written solely by herself, is forced to admit that he never thought she could have had the capacity to write it, and suggests that it could only have been done by its being dictated to her, and that she could not have done it of her own volition.

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Now the view this Court should take as to the competency of

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the deceased would ordinarily largely depend on reliable medical evidence, and it would have been of great assistance to the Court had Dr. Hall's testimony been such that it could have been received without a suspicion of its being in any way biased. But unfortunately on the 15th of December, 1900, two days before the will was signed, he gave Mrs. Dooley a written statement as follows:

"Victoria, B. C., Dec. 15th, 1900.

"To Mrs. Mary E. Dooley.

"Dear Madam,—In answer to your question if I consider your mother, Mrs. Elizabeth McHugh, capable mentally of making a will, I must answer you emphatically no; she is not.

(Signed) "F. W. Hall, M.D."

This document has been not unnaturally animadverted upon, and it was contended that it was a breach of professional duty for the doctor to have given it to Mrs. Dooley, and an improper act under all the circumstances, because even if he had been requested to do so by those who employed him, he should, on no account have given it to one like Mrs. Dooley to whom he was under no professional obligation whatever as regards his patient, her mother. And it is further objected that even if the statement should be admitted in evidence, yet having regard to the manner and the circumstances in which it was given, the effect of it is to destroy the value of the witness' testimony, because he would naturally be expected to stand by the statement to which he had in a hasty and unguarded moment committed himself without the careful examination and reflection which such a grave act called for. He explains the reason why he gave it was because Mrs. Dooley had been pestering him at least two dozen times, asking him for such a document, and telling him things that the deceased had said and that the plaintiff had said, and that Mrs. Dooley told him that the deceased had already made a will, and that William was trying to get her mother to "break" it and make another. He says "The certificate was rushed on me pretty quick," that Mrs. Dooley came to him about 7:30 in the evening when he was very busy, and stayed round the office with people waiting, and said that Mr. Pooley wanted it, and that finally he gave it to her with a "double object," and that he now

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sees that he did so "foolishly," because he did not wish to be dragged into the family quarrels. Nevertheless he maintains that the document contains his true belief then and now as to the mental condition of the deceased.

At one time it seems to have been thought that such a certificate given by a medical practitioner under circumstances bearing a general similarity in principle to the present should not be admitted as evidence, but in the case of *Russell* v. *Lefrancois* (1883), 8 S.C.R. 335, Mr. Justice Gwynne points out at p. 382, that though the giving of the certificate may be open to censure, yet the Court would not be justified in rejecting it, and the objection is simply one as to the weight of evidence. In the present case I am of the opinion that the explanation of the witness himself shews how unfortunate it was that he did yield to the importunities of Mrs. Dooley, because it was quite apparent from his demeanour in the witness box that he was not a little embarrassed by the existence of that certificate, moreover that it had, quite unconsciously doubtless, a considerable effect upon his evidence, as indeed would be expected to be the case. So far as the performance of my duties is concerned, sitting as a jury, the result is that I feel unable to give that full effect to the statements of this witness which under other circumstances I should feel justified in doing. It flows from this also that the opinions expressed by Dr. Manchester as a medical expert are likewise of much less weight than they otherwise would be because they are very largely based upon the statements of Dr. Hall.

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Speaking now as to the will alone. I have considered it in relation to the large number of authorities cited, all of which, and more, I have carefully perused, and this case at once can be distinguished from them all, because not one of them, with the exception of *Lloyd* v. *Roberts* (1858), 12 Moore, P.C. 158 was written by the testator, and it is practically admitted that if it could be established that this will was composed and written solely by the testatrix, that alone is very strong evidence indeed of her testamentary capacity, because the document on the face of it is in all respects rational. As Vice-Chancellor Blake puts it in *Wilson* v. *Wilson* (1875), 22 Gr. 39, at p. 76, "It must be admitted that a man may be many days ill, and may lose his

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memory, or his mind may become unsound, and he may thereafter have a lucid interval, and be capable of making a valid settlement of his affairs." A well known example of this is furnished by the case of *Cartwright* v. *Cartwright* (1793), 1 Phillim. 90, wherein Sir William Wynne says in a very able judgment at p. 100:

"Now I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved."

In considering what attention the Court should pay to medical testimony, Chancellor Spragge, on the re-hearing of *Wilson* v. *Wilson*, *supra*, (1876), 24 Gr. 377 at p. 380, makes some very apt remarks as follows:

"Taking the evidence of the medical witnesses alone, the conclusion would be that he was not, and could not be on that day, so possessed of his mental faculties as to have testamentary capacity. I expressed myself in *Waterhouse* v. *Lee* (1863) 10 Gr. 176 to the effect that although medical witnesses should depose that it was impossible that at a given time a person who had executed what purported to be his will, could have been in a state of mind to comprehend what he was doing, I must still exercise my judgment between facts sworn to and matters of scientific opinion; that facts might be established by such clear and convincing testimony in the face of opinion evidence by scientific men, that they must be accepted as established; although in the opinion of those well qualified to form a scientific opinion they are held to be improbable or even impossible, I see no reason to change or qualify my then opinion. I refer to it now because, testing this case upon that principle, I place it upon as high a ground for the defendants as it can properly be placed."

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This question of the weight of medical evidence was recently before the Privy Council in the case of *Aitken* v. *McMeckan* (1895), A.C. 310, and their Lordships in reversing the verdict on the ground that undue weight had been attached to it, state, at p. 316:

"The disproportionate amount of attention given to the medical evidence, which as above observed bears rather on the probable capacity of the testator than on his actual capacity as exhibited in action, was calculated to divert the attention of the jury from the real issue."

The matter is put very clearly by Lord Morris at p. 315:

"A very considerable portion of the evidence in the case was addressed to the nature of the seizure that the testator had at the club on the 9th of March, whether it was apoplexy arising from affection of the brain, or a fainting fit from affection of the heart. An undue amount of imptorance

was given to this contention, and to the skill, accuracy and credit of Doctors Jackson and Flett, who respectively supported these rival theories. Whether it was cerebral affection or heart affection from which the testator suffered becomes of importance only to the extent that if it was the former the testator would be more unlikely to be capable of understanding business than if the attack arose from the latter cause; and it is probable that the jury were unduly impressed as to the capacity of the testator on the 1st of June, 1888, by the conclusions they formed as to the accuracy and credit of Dr. Jackson or of Dr. Flett. Assuming that the seizure was of the character of cerebral affection, the question still remains, had the attack so affected the testator as to render him incapable of transacting important business? From the time of the seizure he undoubtedly became an altered man. It caused an entire change in his mode of life. He did not leave his home. He wrote no letters. He made no entries of his expenses as he had previously done. He did not fill up his cheques, though he signed them. He became a shattered man. But to what extent? The evidence for the plaintiff, apart from the medical evidence, is the evidence of witnesses who speak to the condition of the testator as he appeared to them, and who state that in their opinion he was not fit to transact business, but it is important to notice that none of them appears to have tried him on business subjects; on the other hand, several of the witnesses for the defendants speak not only of their opinions as to his capacity, but also to conversations with him on business subjects, and to the actual transaction of business with him."

And in the very recent case of *Perera* v. *Perera* (1901), A.C. 354 at p. 359, the Privy Council likewise refused to accept the statement of a physician of "acknowledged eminence in his profession" that the deceased in that case "was not in a fit condition to execute a will," remarking that

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"The question, therefore, comes to this: Having regard to all the circumstances of the case, ought the diagnosis of Dr. Fonseka and Dr. Rockwood, who were not present when the will was executed, to outweigh and prevail over the testimony of eye-witnesses based upon the evidence of their own senses?"

It is only necessary to remark finally on this subject that on cross-examination Dr. Manchester admitted that there was a difference between mental capacity as understood in medicine and as understood in law.

Here the will propounded is, having regard to all the circumstances of the family and prior dispositions of property, one which so far as it goes cannot on any reasonable ground be excepted to, nor was there the slightest element of concealment as to the execution, which as has been pointed out in many cases is

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an important factor. See *Perera* v. *Perera, supra.* It is witnessed by two reputable persons selected by the testatrix, one of whom, Harrison, a friend of upwards of 40 years, came in pursuance of a long standing arrangement between the deceased and himself that he should witness her will as he had that of her husband before her. She went so far as to go and meet him at the tram near the Masonic Hall, despite her advanced age—about 84—and brought him to her own house telling him that she had made out the will herself, and retained possession of it after it was duly executed. To the other witness, Goodacre, she explained that it dealt, as was the case, with part only of her property. At first there was some speculation in my mind as to where she got the form from which she had drawn the will, but this is explained by Mrs. Dooley, who says that some time previously when she, Mrs. Dooley, asked her mother if she was going to a lawyer to get her will made that she said "No," because she already had a copy of a will from Mr. Bishop (a solicitor) and she could do her own writings and make her will from that. And further, the same witness shews that the testatrix had some knowledge of the phraseology of a will, because she states that in 1895, near the new Methodist Church, the deceased repeated some of the words that she then intended, as is alleged, to put in her will—"I leave to my three daughters my house in Fisguard Street."

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A good deal was said during the argument about the delusions under which it is alleged the deceased laboured at times, both before and after the making of the documents propounded, but specially towards the last months of her life. The times of these visitations are not, with few exceptions, definitely stated, and it is difficult to deal with them accurately or satisfactorily. Generally however they were alleged to take the form of the belief that occasionally "people," invisible to others, were in the rooms or hall of her house grinning at her and disturbing her, also that the Lord appeared to her, on one or two occasions, and lifted her up in His arms. Now even assuming that these delusions existed to anything like the extent alleged by Mrs. Dooley, which I do not credit for a moment, they are not of such a nature as would in any way affect the matters dealt with in her

will, but were quite foreign to it and harmless in themselves. As to the appearances of or being visited by the Lord on one or two occasions, I only feel called upon to say that doubtless many deeply religious but wholly sane people have, in moments of exaltation at least, experienced like harmless and comforting convictions; but the subject of beliefs of such a sacred nature is one I do not care to embark upon unless it becomes absolutely necessary. The case of *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549, limiting the case of *Waring* v. *Waring* (1848), 6 Moore, P.C. 341, is the leading authority on this subject, and is a much stronger case for the defence than the present. There the testator had been confined in an asylum; but even after his discharge therefrom he remained subject to certain fixed delusions, believing that he was pursued and molested by a man who had long since been dead, and the mere mention of whose name was sufficient to throw him into a state of violent excitement. He also frequently believed that he was pursued by devils and evil spirits whom he thought were visibly present. Lord Chief Justice Cockburn says, p. 552, "the jury, however, found in favour of the will." And at p. 571,

"Neither of these delusions . . . . had, or could have had any influence upon him in disposing of his property. . . . .

"Under these circumstances, we see no ground for holding the will to be invalid. If, indeed, it had been possible to connect the dispositions of the will with the delusions of the testator, the form in which the case was left to the jury might have been open to exception. It may be, as was contended on the part of the plaintiff, that in a case of unsoundness, founded on delusion, but which delusion was not manifested at the time of making the will, it is a question for the jury whether the delusion was not latent in the mind of the testator. But, then, for the reasons we have given, in the course of this judgment, we are of opinion that a jury should be told, in such a case, that the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it."

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And the Supreme Court of Canada in the late case of *Skinner* v. *Farquharson* (1902), 32 S.C.R. 58, lays it down *per* Taschereau, J., p. 59, that,

"But even if this erroneous suspicion constituted insanity in the testator in this case, I cannot see in the evidence that it was that insane delusion, if an insane delusion it were, that controlled his power of will and

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prompted him to execute the instrument in question and reduce the bequests to his wife and son that he had made by his prior will."

Some argument was based on the fact that she occasionally failed to immediately recognize some members of her family, and at other times was mistaken in individuals; but under all the circumstances of her age, state of health and surroundings, I attach little importance to such isolated instances because such lapses are not uncommon in people of her years.

Having disposed then of this question of delusions, it only remains for me to say that after a careful sifting of the evidence of all the witnesses at this trial—35 in number—I am satisfied that the testatrix was competent to and did of her own volition make the will in question—by competent, I mean she was "of sound mind, memory and understanding," as defined by Sir James Hannen in his charge to the jury in the case of *Boughton* v. *Knight* (1873), 42 L.J., P. & M. 25, as explained by him in the note at p. 41. Nor can I, so far as this branch of the case is concerned, see any ground for holding that there was any undue influence (as hereinafter defined) in the execution of that instrument. There is one important fact in this relation which bears strongly in favour of the plaintiff which is that had he been the real author of that will, as suggested, he would have taken good care to see that it put him in such a position that it would not have been necessary for him to undertake the risk of having to prepare a second instrument, in short, there would have been no property "reserved," to use the expression of the deceased, for further testamentary disposition. There is a remark made by the Court in the case of *Keays* v. *M'Donnell* (1872), 6 Ir. R. Eq. 611 at p. 613, on the question of evidence in actions of this nature which may well be quoted here:

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> "What then is the evidence? It is clear that the deceased though broken down in mind and body, was neither an idiot nor a lunatic. Any person, however, attending to the testimony of witnesses examined in this Court on questions of capacity must have observed how very little weight can be given to the evidence of opinion, as distinguished from the evidence of facts in such cases, particularly when the witnesses do not belong to the educated classes, and when their purses, their feelings, or their character are in any degree involved in the enquiry."

After weighing all the evidence before me in the light of the

authorities cited, I can come to no other conclusion than that the will as propounded must be admitted to probate.

Turning then to the second branch of the case, the codicil of eleven days later, the 28th of December, 1898.

In regard to this document, it was alternatively urged that whatever might be said in favour of the will, the codicil must be regarded from a wholly different point of view. It is pointed out that the plaintiff is the sole beneficiary, and that it was obtained through him and by him alone, without the intervention of, or consultation with anyone, not even her solicitor, and while the plaintiff and his family were resident in the deceased's house, and after the execution of the will at least exercising undue influence over her with the manifest object of acquiring to the exclusion and detriment of her other children the whole of her property which was "reserved" and undisposed of by her will.

The general principles which govern such a transaction have already been considered by this Court in the case of *Adams* v. *McBeath* (1894), 3 B.C. 513, and by the Supreme Court of Canada in appeal affirming the Full Court (1897), 27 S.C.R. 13; and in that case many of the leading authorities cited in the case at bar have been considered. The will in that case was upheld, but the case is at once distinguishable from the case at bar, because the solicitor there had been called in to discharge his duties in a way that was satisfactory to the Court; as to what the duties of a solicitor are in such case it may not be inopportune to refer to the language of Vice-Chancellor Blake in *Wilson* v. *Wilson*, *supra*, at p. 74.

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The rule applicable to such a state of facts as exists here is laid down by the Privy Council in *Baker* v. *Batt* (1838), 2 Moore, P.C. 317 at p. 321, by Baron Parke as follows:

> "There is also another principle upon which the Court below has acted, and which has long prevailed in the Ecclesiastical Courts, which is this, that if the person benefitted by a will, himself writes or procures it to be written, the will is not void, as it would have been by the Civil Law; but the circumstance forms a just ground for suspicion, and calls upon the Court to be vigilant and jealous, and requires clear and satisfactory proof that the instrument contains the real intention of the testator."

And this decision has been followed in the cases of *Mitchell* v.

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Thomas (1847), 6 Moore, P.C. 137; *Fulton* v. *Andrew* (1875), L.R. 7 H.L. 448; *Hegarty* v. *King* (1881), 7 L.R. Ir. 18; *Brown* v. *Fisher* (1890), 63 L.T.N.S. 465; *Hampson* v. *Guy* (1891), 64 L.T.N.S. 778; *Tyrrell* v. *Painton* (1893), 6 R. 540; *Wright* v. *Jewell* (1893), 9 Man. 607; *Kaulbach* v. *Archbold* (1901), 31 S.C.R. 387. And the rule is exceptionally well put by the Lord Chancellor of Ireland at p. 20 in *Hegarty* v. *King*, *supra*, as follows:

"It is now too clear for controversy that if there be a testamentary disposition in favour of a particular person, and if the will containing it was prepared by that person, without the intervention of any faithworthy witness, or anyone capable of giving independent evidence as to the alleged testator's intention and instructions, the duty of establishing that disposition by plain and coercive proof is cast upon the man who propounds such a will for his own benefit; the presumption is against its validity, and the gravest suspicion is attached to it, which must be removed before the will can be confirmed, either by the finding of a jury or the ruling of a Judge in a Court of Justice. This salutary principle is adopted in many cases, if indeed cases were wanted to support a doctrine, so needful to be steadily sustained in the interest of society and for the prevention of fraud. Within the operation of that doctrine this case plainly comes, upon its uncontested facts."

The only authority which can be cited to the contrary is that of *Goodacre* v. *Smith* (1867), L.R. 1 P. & D. 359, but it is stated by the Judge Ordinary at p. 360, that "there was evidence that the deceased had previously informed the attorney who had prepared it (the will) of her wishes as to the disposition of her property after her death, and that she gave instructions to Mrs. Goodacre to talk to her attorney, adding that he knew her wishes." In the present case, as already pointed out, the point is made that there was no communication with the solicitor other than through the plaintiff, and the case resembles that of *Mitchell* v. *Thomas*, *supra*, wherein it is stated, p. 151, "Here is not one atom of evidence (*i.e.*, independent) of any instructions ever being given by the testator himself."

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It has been stated by Lord Hatherly in *Fulton* v. *Andrew*, *supra*, p. 469, that the Court should avoid laying down any general rule of any description whatever in cases of this kind. And at p. 471,

"There is one rule which has always been laid down by the Courts having to deal with wills, and that is that a person who is instrumental in

the framing of a will . . . . and who obtains a bounty by that will is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction."

And the learned Judge proceeds on the same page to remark upon the heavy burthen which is cast upon one who propounds a will which has been framed from his agency and in favour of himself, and the Lord Chancellor in the same case, p. 461, points out the disadvantages under which persons there labour, even though in that case they stated that the will had been left with the testator over night for the purpose of being read over.

So far as regards the charge of undue influence, I cannot do better in an attempt to generally define that term than quote the language of the Lord Chancellor in the celebrated case of *Boyse* v. *Rossborough* (1857), 6 H.L. Cas. 2 at pp. 48-9:

"In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. . . . . It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud."

As stated by Lord Penzance in *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462 at p. 470,

"There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition

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of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another."

And see to the same effect in *Hall* v. *Hall* (1868), 37 L.J., P. & M. 40, the judgment of Sir J. P. Wilde states:

"To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections, or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, these are all legitimate, and may be pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or hopes of an individual, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has not the courage to resist, moral command asserted and yielded for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these if carried to a degree on which the free play of the testator's judgment, discretion or wishes is overborne, will constitute undue influence, although no force is either used or threatened. In a word, a testator may be led, but not driven, and his will must be the offspring of his own volition, and not that of another."

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It is true that in general "once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burthen of proving that it was executed under undue influence, is on the party who alleges it. Undue influence cannot be presumed": *Boyse* v. *Rossborough*, p. 49. But in a case such as the present where the beneficiary himself is the agent through whom the will is drawn, the onus of establishing everything necessary to support the will is imposed upon him, including the proof of lack of undue influence on his part. In *Hampson* v. *Guy*, *supra*, at p. 779, Lord Justice Lindley remarks that the testatrix "was in such a state of mind as to be very easily influenced by those about her;" and Lord Justice Kay says, p. 780, that

"The true result of the authorities is this, which has been already indicated by Lindley, L.J., that when you have a case of evidence tending to shew some mental incapacity, and also evidence tending to shew undue influence, it is very much more easy to satisfy yourself that undue influence has been used where the mind of the person to whom it is addressed is evidently in a weak condition—the amount of influence which would induce a person of strong mind and in good health to make a will according to the wishes of the persons who were attempting to induce such a testator must be very much greater than the amount of inducement which would

improperly influence the mind of a person who was weak partly from mental infirmity and partly from ill-health, as is the case here."

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In *Donaldson* v. *Donaldson* (1866), 12 Gr. 431, Vice-Chancellor Mowat says:

"The defendant was bound to establish that the transaction was entered into willingly and deliberately on the part of the plaintiff, and without pressure from, or influence by, the defendant, as the recipient of the benefit."

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And see also *Wright* v. *Jewell, supra*, to the same effect.

The question then arises has the plaintiff satisfied the onus so cast upon him by the rules of law above cited? It is strongly urged upon me that he has not, and that all the circumstances lead irresistibly to the conclusion that finding that property still remained undisposed of by the first will he, in effect, coerced the deceased, then living in the house with him, into making a codicil securing everything for himself. My attention was particularly drawn to the fact that the plaintiff deliberately refrained from taking the precaution suggested to him by Mr. Pooley when he gave him the codicil on behalf of his mother—that is, that he should take his mother's medical attendant with him so as to be able to speak as to her capacity. This precaution was suggested by the solicitor as a result of a visit from Mrs. Dooley a few days previous, but instead of having her examined by her medical attendant, Dr. Hall, he took with him his partner, Dr. Hart, who had had no prior personal knowledge of her case, nor did he pretend to make any examination of her, or diagnose her condition at that time. This witness states that the will was not read over in his presence, and that the old woman shewed very marked signs of senility, physical and mental, but not beyond a certain amount of childishness, although she told him she knew she was signing a will, meaning codicil, and that she was feeling very well, and that nothing was wrong with her. And he further states that when he was sent for he did not know that it was for the purpose of witnessing a will, and that it was not agreeable news to him to be required to do so, but that it was too late to make a fuss about it. His evidence, I feel constrained to say, is of a disappointing nature, and it would have been well had he considered the following remark applicable to his situation made in Taylor's Medi-

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cal Jurisprudence, 12th Ed., p. 769: "A medical man has sometimes placed himself in a serious position by becoming a witness to a will without first assuring himself of the actual mental condition of the person making it (case of the *Duchess of Manchester*, 1854)." Russell, the other witness to the codicil called by the plaintiff, says that her mental condition was very feeble. "I think she knew me when I came in but I could not tell."

The plaintiff was present at the time of the signing of the codicil, and also his wife, being, as she described it, "backwards and forwards." It is stated by Mrs. Dooley that her mother's condition was then very low, nevertheless the doctor had not been to see her since the time of the signing of the will, or thereabouts. According to the plaintiff, there was no change in her condition between the time of the signing of the will and the codicil, and in the absence of any medical testimony on the point the Court is left in doubt as to what her real state was after the first will was made and up to the time the codicil was signed. The plaintiff and his wife contend that she saw the codicil the day before, and read it over, and understood its contents, but as has been seen in such a case as this the Court requires more than the evidence of interested parties. What went on in that house during the period in question is, so far as this Court is concerned, shrouded in mystery; but of this I am satisfied, having regard to all the circumstances, that pressure of some sort was brought to bear upon the deceased in favour of the plaintiff. To what extent this pressure was exercised, I find it quite impossible to say, but my view that it must have been of some appreciable extent is confirmed by subsequent occurrences, such as the remarkable provision in favour of the plaintiff as regards the rent due under Mycock's lease of March 1st, 1902. It may have been that had I felt that I could place entire confidence in the testimony given by the plaintiff in other respects I might be inclined to take a more favourable view of his account of what occurred during the whole period when he was living with his mother, but I feel I am not able to fully rely on his testimony in view of the fact that in several material particulars he has been contradicted by other witnesses. At the same time it is due to him to say that in many instances, and not minor ones,

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his statements bear the stamp of truth and have been corroborated, but I feel unable to give entire credence to his story. The same defect is met, though in a greater degree, in the principal witness for the defence, Mrs. Dooley. Her statements were frequently contradicted, and her demeanour in the witness box was such as to convey an unfavourable impression of her reliability or discretion. I do not think it desirable in the interests of the peace of the family to remark upon the other witnesses more or less connected with the deceased, other than to say that they range from the utterly unreliable, such as the young man William Henry Harrison, to those who are too eager, such as W. J. Wale; or disengenuous, such as Mary Steinberger; or on the whole reliable, such as Thomas Tunstead. So far as the witnesses outside the family are concerned and who may be generally classed as disinterested, I have given effect to their evidence of the deceased's intentions regarding the plaintiff so far as I feel justified in doing on both branches of the case, and it preponderates in favour of the plaintiff. But the main difficulty in this case arises from the plaintiff's own evidence and his own acts of omission, and his neglect to adopt those proper safe-guards which are clearly laid down in the authorities cited. In conclusion I may adopt the language of the Privy Council in *Mitchell* v. *Thomas*, *supra*, at p. 151: "Unfortunately for himself, he has not produced the proof which the law requires, and such as their Lordships are all of opinion is demanded by the rule we are bound strictly to adhere to." Every case of this nature must be disposed of on its own merits having regard to the facts and surroundings, because the inferences to be drawn from the act of a person in one walk of life may be quite different from those to be drawn from that of a person in a lower or higher station, and the education, temperament, habits, means and environment of the deceased must be borne in mind.

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It follows then that as it is aptly put in *Baker* v. *Batt*, *supra*, at p. 320: "The conscience of the Judge is not judicially satisfied" by the proof advanced by the person propounding this codicil, and it must be and is hereby declared to be disentitled to probate.

In regard to costs, I was asked by counsel at the hearing to

MARTIN, J. reserve that question, and it may be discussed at any convenient time.

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This reserved question of costs was subsequently spoken to on the 18th of August, 1903, when the following authorities, among others, were referred to: *Young* v. *Dendy* (1867), L.R. 1 P. & D. 344; *Bridges* v. *Shaw* (1894), 3 Ch. 615; *O'Kelly* v. *Browne* (1874), 9 Ir. R. Eq. 353; Coote & Tristram's Probate (1900), p. 520; Land Registry Act, Sec. 64. Judgment thereon was delivered as follows by

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MARTIN, J.: It has often been stated that in cases of this nature the question of costs is a difficult one, and I find it so now to an unusual degree because of the presence of some very unusual circumstances.

It is sufficient for the purpose of the present application to say that neither the plaintiff nor the defendants have placed themselves in a satisfactory position—the conduct of all in that respect is more or less open to the criticism that has been passed upon it in the argument before me.

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Having regard to all the circumstances, I am of the opinion that the justice of this case will be best met by adopting the course which I see has been adopted in some of the cases I have consulted and which is peculiarly appropriate to the present case, that is, I make no order as to costs.

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Criminal law—Judge's charge to jury — Murder — Manslaughter — Definitions of—Failure to instruct jury as to—Failure to object to charge—New trial—Rebuttal evidence—In discretion of Judge.

It is the duty of the Judge in a criminal trial with a jury to define to the jury the crime charged and to explain the difference between it and any other offence of which it is open to the jury to convict the accused.

Failure to so instruct the jury is good cause for granting a new trial and the fact that counsel for the accused took no exception to the Judge's charge is immaterial.

After the case for the Crown and defence was closed the Crown called a witness in rebuttal whose evidence changed by a few minutes the exact time of the crime as stated by the Crown's previous witnesses and which tended to weaken the *alibi* set up by the accused:—

Held, that to allow the evidence was entirely in the discretion of the Judge and there was no legal prejudice to the accused as he was allowed an opportunity to cross-examine and meet the evidence.

IN the Supreme Court of British Columbia *in banc:* Crown Case Reserved. The following case was reserved by IRVING, J., the trial Judge:

Wong On and Wong Gow were tried before me at the last Assizes for the County of Victoria, holden at the City of Victoria, upon an indictment charging them with the murder of one Man Quan, alleged to have been committed by them on the morning of Sunday, 31st January, 1904.

There was evidence given for the Crown that the prisoners had been present before and at the time the deceased was thrown down upon the stage. Statement

In the course of the case for the Crown, one Carson, a constable, stated that he had left the police station on Cormorant Street at about ten minutes past one and walked to the Chinese theatre, the scene of the affair; that the time occupied by him in going from one place to the other would be about four minutes. That when he arrived at the theatre the deceased (then alive) was lying on the stage floor.

The defence was an *alibi;* one prisoner's case being that he,

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Wong Gow, had gone to bed at about twelve o'clock on the night in question, and remained at home till three o'clock in the morning, when he was arrested; the other prisoner's defence being that he, Wong On, had been with his friends in his house (which is situate on Cormorant Street) all the night in question, except for a space of about ten minutes, more or less.

During the period of time in which it is admitted he was absent from his house he was, it is alleged, with another Chinaman, Chin Sam, first in his (Chin Sam's) house which is also situate on Cormorant Street and then afterwards the two, Chin Sam, and Wong On had gone together towards his (Wong On's) own house, and when passing the entrance to the alley leading from Cormorant Street to the Chinese theatre (which alley is about half way between the prisoner's house and that occupied by Chin Sam) they were there informed by one Lee Yim, or Lee Sam, of the affray in the theatre. This same Lee Yim had given evidence in the case for the Crown that he had not left the theatre until after the body of the deceased had been thrown down upon the stage, that the prisoner Wong On, and Chin Sam then proceeded together to the Cormorant Street police station where Chin Sam gave to the officer in charge of the station the first information of the affray. After the prisoners had closed their defence I permitted the Crown to call the officer (Sheppard) who was at the station, who stated that the information of the affray, and upon which information Constable Carson acted, was given to him by a Chinaman, whom he is not able to identify, about 1.25 a.m. On cross-examination, Sheppard stated that he had made the entry after the constable had left for the theatre. The question for consideration of the Court is:

Statement

Was the evidence given by Sheppard improperly admitted at that time, having regard to the circumstances of the whole case, in particular to the fact that the case, as well for the Crown as the defence, had closed? If this evidence was improperly admitted, then, to what relief, if any, are the prisoners entitled under the circumstances.

As the foregoing statement of facts may not on the argument prove sufficiently exhaustive, I make the transcript of the evidence taken at the trial a part of this case.

I reserved the above-mentioned question on the application of Mr. *Taylor*, of counsel for the prisoners made at the trial and I now proceed to state the following questions, pursuant to section 744 of the Criminal Code for the consideration of the Court of Appeal.

Afterwards, namely on the 6th of June, 1904, Mr. *Taylor* of counsel for the prisoners, complained to me that my charge to the jury was wrong in the following respects:

(1.) That the direction was erroneous and improper by reason of the fact that no instruction or direction was given to the jury in reference to or relating to or bearing upon the law defining and governing the crime and offence for which the accused stood indicted and were then upon trial.

(2.) That the said direction was erroneous and improper by reason of the fact that no instruction or direction was given to the jury pursuant to section 713 of the Criminal Code, that if upon the evidence adduced the jury deemed the offence of manslaughter proved and not the offence of murder, the jury could find the said accused not guilty of murder but guilty of manslaughter.

(3.) That the said direction was erroneous and improper by reason of the fact that no instruction or direction was given to the jury as to the meaning and effect of and as to the matters set forth and dealt with in and by sections 218, 220, 227, 228, 229, 230 and 713 of the Criminal Code of 1892.

(4.) That the said direction was erroneous and improper by reason of the fact that no instruction or direction was given to the jury, that in order to enable the jury to return a verdict of guilty, the jury must be satisfied by the evidence beyond any reasonable doubt of the prisoners' guilt, and this as a conviction created in their minds, not merely as a probability and if it was only an impression of probability, the duty of the jury was to acquit the said accused.

Statement

(5.) That the said direction was erroneous and improper by reason of the fact that it contained an instruction or direction to the jury that the degree of certainty necessary to enable the jury to pronounce and find the said accused guilty as charged was the degree of certainty ordinarily arrived at in business transactions.

(6.) That the said direction was erroneous and improper by reason of the fact that no instruction or direction was given to

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the jury in order to enable the jury to return a verdict of guilty. The jury must be satisfied not only that the circumstances were consistent with the accused having committed the alleged murder, but the jury must also be satisfied that the facts were inconsistent with any other rational conclusion than that the said accused were the guilty persons.

The question for the opinion of the Court is: Was there any misdirection in the matters complained of, and if so, then to what relief, if any, are the prisoners entitled under the circumstances? For the determination of these points I make the said direction and the proceedings on the trial a part of this case.

The following are extracts from the charge to the jury:

Statement

"The contention of the Crown in this case is this, that during the night of Saturday or Sunday, Man Quan was killed after being attacked by some people, of whom one was a man named Wong Hong, not here; that these two men (the prisoners) with others were there; that the attack, first of all, was commenced by the use of iron bludgeons, more or less. But in order to justify you in bringing in a verdict you have got to be satisfied that these people that have been called here by the Crown, and identify the two prisoners as having been present on that occasion and taking part in it, are witnesses of truth. In civil cases, it is simply a balance of testimony; but it is not so in criminal cases. In criminal cases the law has thrown a protection around every prisoner, and says that a jury must be satisfied beyond a reasonable doubt that they are guilty. It is not possible to be sure of anything except mathematical questions in this world. There is always some uncertainty. But there is a degree of certainty that we all attain when we are managing our business affairs. When a jury attains that degree of certainty, that is the degree of certainty that enables them to say they are satisfied that people are guilty or not. If the evidence produced on behalf of the Crown fails to bring your mind up to that degree of certainty, then it is your business to find the prisoners not guilty. The onus is upon the Crown."

In respect to the points included in the reserved case no objection was made to the charge at the trial by the counsel for the accused, except in regard to the admissibility of Sheppard's evidence.

The questions were argued at Victoria on 21st June, 1904, before HUNTER, C.J., DRAKE and DUFF, JJ.

Argument

W. J. Taylor, K.C., for the prisoners: The Crown's case was that the murder took place about ten minutes past one; the evidence on behalf of Wong On shewed that it was impossible for him to have participated in the crime at the time fixed by the Crown and the Crown should not have been allowed to put in Sheppard's evidence and thus contradict their own case: if the effect of this evidence might have been injurious it is suffi-

cient to vitiate the verdict: he cited *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57; *Rex* v. *Stimpson* (1826), 2 Car. & P. 415; *Bray* v. *Ford* (1896), A.C. 44 at p. 48; *Rex* v. *Hilditch* (1832), 5 Car. & P. 299; *The Queen* v. *Gibson* (1887), 18 Q.B.D. 537.

As to the duty of a Judge to direct the jury as to the law: the crime should be defined and the jury should be instructed as to the law, but the charge in question here does not contain a word of instructions as to the law defining and governing the crime of murder: he cited Taylor on Evidence, 9th Ed., Vol. 1, para. 22, footnote; 1 Co. Litt. 155 *b.*; Foster's Criminal Law, 255-6; *Rex* v. *Dean of St. Asaph* (1783), 21 How. St. Tr. 847 at pp. 1,039, 1,040; Forsyth on Juries, 233; *Parmiter* v. *Coupland* (1840), 6 M. & W. 104; *Rex* v. *Burdett* (1820), 4 B. & Ald. 95 at p. 131; *Rowlands* v. *Samuel* (1874), 17 L.J., Q.B. 65 at p. 67; *Panton* v. *Williams* (1841), 10 L.J., Ex. 545; Taschereau on Criminal Code, 1888 Ed., 848 and *Macklin and Others' Case* (1838), 2 Lewin, C.C. 225.

[DUFF, J., referred to *Sparf and Hansen* v. *United States* (1895), 156 U.S. 51.]

Argument

On the question of the duty of the Judge to define the crime the Court called on

Belyea, K.C., for the Crown: There is nothing in the evidence to suggest or support a conviction for manslaughter, and so the Judge had no occasion to charge in reference to manslaughter. The definition of murder is in the Code which is statute law and everyone is supposed to know the law.

The whole course of the trial was directed to the charge of murder only; no objection was taken to the charge and no direction as to the law was asked for by counsel for the prisoners: he referred to Taylor on Evidence, 9th Ed., para. 25; *The Queen* v. *Brennan* (1896), 4 C.C.C. 41 and *The Queen* v. *Theriault* (1894), 32 N.B. 504, 2 C.C.C. 444.

HUNTER, C.J.

HUNTER, C.J.: In my opinion, there is nothing in the first point. The question as to whether the evidence should be allowed at that stage was entirely in the discretion of the learned

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trial Judge, and no legal prejudice was caused the accused as they were allowed full opportunity to meet it.

On the second point, I think that the verdict and sentence must be set aside, and the prisoners remanded for a new trial.

The authorities which have been brought to our attention go to shew that it is the duty of the Judge—and in my opinion, the cardinal duty of the Judge—in his address to the jury to define the crime charged, and to explain the difference between it and any other offence of which it is open to the jury to convict the accused. As the jury must take the law from the Court alone it is obvious that if they are not so instructed they are not competent to decide whether on the facts proved the prisoner has committed the offence charged or any other offence open under the indictment. Here, for anything that appears to the contrary, the jury may have thought that the mere fact of killing required a verdict of murder.

HUNTER, C.J.

DRAKE, J.

DRAKE, J.: I agree.

DUFF, J.: I agree. I only wish to add that I think the ground upon which our decision rests is put very well in a decision in *The State* v. *Smith*, 6 R. I. 33 and 34, by Chief Justice Ames, in a judgment which reads as follows:

"The line between the duties of a Court and jury in the trial of causes at law, both civil and criminal, is perfectly well defined; and the rigid observance of it is of the last importance to the administration of systematic justice. Whilst, on the one hand, the jury are the sole ultimate judges of the facts, they are, on the other, to receive the law applicable to the case before them solely from the publicly given instructions of the Court. In this way Court and jury are made responsible, each in its appropriate department, for the part taken by each in the trial and decision of causes, and in this way alone can errors of fact and errors of law be traced, for the purpose of correction, to their proper sources. If the jury can receive the law of a case on trial in any other mode than from the instructions of the Court given in the presence of parties and counsel, how are their errors of law, with any certainty, to be detected, and how, with any certainty, therefore, to be corrected? It is a statute right of parties here, following, too, the ancient course of the common law, to have the law given by the Court, in their presence, to the jury, to guide their decision, in order that every error in matter of law may be known and corrected."

DUFF, J.

New trial granted.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council.

ALASKA PACKERS ASSOCIATION v. SPENCER (p. 473).—Affirmed by Supreme Court of Canada, 21st November, 1904.

ASSESSMENT ACT, *In re* THE and THE NELSON AND FORT SHEPPARD RAILWAY COMPANY (p. 519).—Leave to appeal granted by Privy Council, 8th December, 1904.

ATTORNEY-GENERAL v. WELLINGTON COLLIERY COMPANY (p. 397).—Leave to appeal granted by Privy Council, 8th December, 1904.

BORLAND v. COOTE (p. 493).—Affirmed by Supreme Court of Canada, 21st November, 1904.

BRIGGS AND GIEGERICH v. FLEUTOT (p. 309).—Affirmed by Supreme Court of Canada, 21st November, 1904.

BYRON N. WHITE COMPANY v. SANDON WATER WORKS AND LIGHT COMPANY, LIMITED (p. 361).—Judgment varied by Supreme Court of Canada, 21st November, 1904.

CLARK v. CORPORATION OF THE CITY OF VANCOUVER (p. 31).—Reversed by Supreme Court of Canada, 8th June, 1904. See 35 S.C.R. 121.

DOBERER AND MEGAW'S ARBITRATION, *In re* (p. 48).—Reversed by Supreme Court of Canada, 10th November, 1903. See 34 S.C.R. 125.

HASTINGS v. LE ROI NO. 2, LIMITED (p. 9).—Affirmed by Supreme Court of Canada, 30th November, 1903. See 34 S.C.R. 177.

MANLEY v. MACKINTOSH (p. 84).—Affirmed by Supreme Court of Canada, 30th November, 1903. See 34 S.C.R. 169.

SANDBERG v. FERGUSON (p. 123).—Affirmed by Supreme Court of Canada, 24th October, 1904.

TRACY v. CORPORATION OF THE DISTRICT OF NORTH VANCOUVER (p. 235).—Reversed by Supreme Court of Canada, 10th November, 1903. See 34 S.C.R. 132.

Case reported in 9 B.C. Reports and since the issue of the volume appealed to the Supreme Court of Canada.

NIGHTINGALE v. UNION COLLIERY COMPANY OF BRITISH COLUMBIA, LIMITED LIABILITY (p. 453).—Affirmed by Supreme Court of Canada, 30th May, 1904. See 35 S.C.R. 65.

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ACQUIESCENCE — *Laches.*] Mere submission to an injury, such as the erection of a building by another on one's land, for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right: to amount to laches raising equities against the person on whose land the erection was placed, there must have been some equivocal conduct on his part inducing the expenditure by the person erecting it. THE BYRON N. WHITE COMPANY v. THE SANDON WATER WORKS AND LIGHT COMPANY, LIMITED. 361

ADMIRALTY LAW—*Assessors—Application for—When to be made.*] Assessors will be appointed in salvage cases where necessary. The proper time to apply for assessors is on the application to fix date of trial. VERMONT STEAMSHIP CO. v. THE ABBY PALMER. (No. 1.) - - 380

2.——*Bail — Cash deposit — Retention of pending appeal to increase salvage award—Arrest of property to answer extravagant claims.*] An application by defendant to pay money out of Court which was paid in by him to obtain the release of his ship arrested to answer a claim for salvage will, if the defendant be a foreign resident, be stayed, wholly or partially, pending an appeal to the Exchequer Court to increase the salvage award. Observations upon the scope of bail bonds and the retention of security pending appeal. It is an improper practice, and one which the Court will discourage, to arrest property to answer extravagant claims. VERMONT STEAMSHIP CO. v. THE ABBY PALMER. (No. 3.) - 383

3.——*Collision regulations.* - - 513
See COLLISION.

ADMIRALTY LAW—*Continued.*

4.——*Practice — Civic time of place in which Court is sitting adopted.*] In the service of process, as well as in its sittings and in the public hours of its registry, the Court will be guided by the civic time in use in the town where the Court sits, unless it is shewn that such time is in fact incorrect. VERMONT STEAMSHIP CO. v. THE ABBY PALMER. (No. 2.) - - - - 381

AGENT, REAL ESTATE—*Purchaser at tax sale—Fiduciary relationship.*] In July, 1897, a real estate agent on behalf of the owner, negotiated with a prospective purchaser, but the attempted sale fell through and after that the agent and the owner ceased to have any dealings with each other. In September, 1898, the agent bought the property at a tax sale at a very low figure. *Held*, that at the time of the sale the agent was not in a fiduciary relation to the owner. MCLEOD v. WATERMAN. (No. 2.) - 42

AGREEMENT—Failure to insert particulars to satisfy Statute of Frauds—Mutual misconception of existing facts — Impossibility of performance. - - - - - 84
See VENDOR AND PURCHASER.

2.——*Void for champerty—Parties entitled to take advantage of.*] The defence that an agreement is champertous and therefore void is open to others than those who are parties to the agreement. BRIGGS AND GIEGERICH v. FLEUTOT. - - - 309

ALIEN LABOUR ACT — 60 & 61 Vict., Cap. 11 and 1 Edw. VII., Cap. 13—Advertisement for labourers—Whether promise of employment. 367
See CRIMINAL LAW.

APPEAL— *Introducing fresh evidence — Acquittal for perjury alleged to have been committed at civil trial—Proof of not allowed on appeal in civil action.*] For perjury alleged to have been committed at the trial by the defendant, he was tried and acquitted before the hearing of the appeal, and, on the appeal, his counsel moved the Full Court to be allowed to read the verdict of the jury in the criminal trial:—The Court dismissed the motion. BORLAND v. COOTE. 494

2.——*Time for—Garnishee issue—Entry of order on.*] An order deciding a garnishee issue was dated the 26th of March, settled by the Judge on the 15th of July, and entered on the 25th of July. Notice of appeal was served on the 19th of July:—*Held*, the appeal was brought in time. MANLEY v. MACKINTOSH. - - - - - - 84

ARBITRATION AND AWARD—*Setting aside award—Misconduct of arbitrator—Waiver.*] A party to an arbitration does not waive his right to object to an award on the ground of misconduct on the part of an arbitrator by failing to object as soon as he becomes suspicious and before the award is made; he is entitled to wait until he gets such evidence as will justify him in impeaching the award. Where two out of three arbitrators go on and hold a meeting and make an award at a time when the third arbitrator cannot attend, it amounts to an exclusion of the third arbitrator and the award is invalid. A party by attending at such a meeting and not objecting (although he knew of the third arbitrator's inability to attend) does not waive his right to object afterwards. *Per* HUNTER, C.J.: It is not necessary that there should be absolute proof of misconduct before an award will be set aside on that ground; it is enough if there is a reasonable doubt raised in the judicial mind that all was fair in the conduct of the arbitrators. *In re* DOBERER AND MEGAW'S ARBITRATION. - - 48

ASSESSMENT—*Wild lands—Duty of assessor—Fixing of an average value—Whether compliance with statute—B. C. Stats. 1892, Cap. 38, and 1897, Cap. 37—Exemption from taxation—Jurisdiction of Court of Revision to decide.*] In assessing 500,000 acres of wild land consisting largely of inaccessible mountains and valleys, the Assessor acted on instructions received from the Provincial Assessment Department and fixed the value at $1 per acre for the whole tract. On appeal to the Court of Revision and Appeal, evidence was taken and an average value of 45 cents per acre was fixed. An appeal was

ASSESSMENT—*Continued.*

taken to the Full Court on the grounds that the valuation was too high and that so far as some of the lands were concerned they were exempt from taxation under the Company's Subsidy Act, and on the argument counsel for the Company asked the Court to fix the assessable value of the lands at the specific sum of $47,986.23:—*Held*, *per* DRAKE, J., that as some of the land was of some value and some of it of no value, the fixing of a flat rate was not a compliance with section 51 of the Assessment Act, 1903, and that the assessment should be set aside with costs. *Per* IRVING, J.: The evidence did not enable the Court to form any opinion as to the value of the land within the meaning of section 51, and as the assessment was improperly levied at the outset the Court should simply declare that there was no proper assessment in respect of which an appeal will lie. *Per* DUFF, J. (dissenting): (1.) That the evidence was adequate to enable the Court to fix, as against the appellant, the assessable value of the lands. (2.) The Court has power to deal with the assessment even though it was not made in accordance with the statute. (3.) In fixing the value of a tract of wild land a process of averaging is reasonable and a compliance with the statute. *Held, per* DRAKE and IRVING, JJ. (DUFF, J., dissenting), that by the operation of section 3 of the Amending Act with respect to all the lands granted to the Company the exemption from taxation conferred by section 7 of the Subsidy Act expired with the expiration of the period of ten years, beginning with 8th April, 1893, and that therefore the lands claimed to be exempt were assessable. *Per* DUFF, J.: The Court of revision under the Assessment Act, 1903, had no jurisdiction to decide whether or not the lands in question were exempt from taxation and consequently the Full Court has no jurisdiction to deal with that question. *In re* THE ASSESSMENT ACT AND THE NELSON & FORT SHEPPARD RAILWAY COMPANY. - - - - - - - 519

ASSESSMENT ACT, R.S.B.C. 1897—*Cap. 179, Secs. 3 (Sub-Sec. 24) and 49—Tax sale.*] The City of Nelson was incorporated in March, 1897, and in September, 1898, land situated therein was sold by the Provincial Assessor for taxes for the years 1896 and 1897, levied under the provisions of the Assessment Act:—*Held*, setting aside the tax deed, that there was no authority to hold the tax sale as the Assessment Act does not apply to municipalities. MCLEOD v. WATERMAN. (No. 2.) - - - 42

ASSIGNMENT—Deed—Condition subsequent—Breach of—Forfeiture—Assignment by vendor before re-vesting—Validity of. - - - 31
See DEED.

BILL OF EXCHANGE. - - 101
See PROMISSORY NOTE.

BILL OF SALE—*Sale of business as a going concern—Chattel mortgage by new firm covering book debts due to it—Whether debts due old firm included.*] V. and C. sold their grocery business including all their stock in trade and book debts to H. & B., who shortly afterwards gave a chattel mortgage to E. covering the stock-in-trade of the grocery business and also all book debts due to H. & B. in the business carried on by them as grocers:—*Held*, reversing HUNTER, C.J., that the book debts originally due to V. & C. and assigned by them to H. & B. were covered by the chattel mortgage. ROBINSON v. EMPEY *et al.* - - - - - - 466

BY-LAW—*Illegality—Insensible—Rules of construction.*] In a by-law passed by the Corporation of the City of Victoria having for its object the closing of a portion of the Craigflower Road, the word "by" was omitted inadvertently, with the result that by the strict grammatical construction of the by-law a former by-law dealing with the same road was declared closed, instead of the road itself:—*Held*, that certain words in the enacting clause should be regarded as a parenthetical expression and as descriptive of the portion of the road referred to, thus giving the by-law a sensible meaning and the one intended. The Court will not hold any legislation to be meaningless or absurd unless the language is absolutely intractable. Decision of DRAKE, J., reversed, IRVING, J., dissenting. ESQUIMALT WATER WORKS COMPANY v. THE CORPORATION OF THE CITY OF VICTORIA. - 193

CAPIAS—*Sheriff—Mileage.*] A Sheriff is required to keep a person arrested on a capias safely, and as there is no common gaol in Vancouver the Sheriff of Vancouver is entitled to lodge such a person in New Westminster gaol and charge mileage therefor. CARSON v. CARSON. - - - 83

CERTIORARI—*Rule nisi to quash conviction—Motion for — Jurisdiction of single Judge to hear—Practice.*] The Full Court will not hear a motion for a rule *nisi* to quash a conviction; the motion should be made to a single Judge. REX v. TANGHE. 298

CHAMPERTY AND MAINTENANCE—The laws of maintenance and champerty as they existed in England on 19th November, 1858, are in force in British Columbia, and an agreement for a champertous consideration is absolutely null and void. BRIGGS AND GIEGERICH v. FLEUTOT. 309

CHINESE IMMIGRATION ACT, 1900—*Deportation of Chinaman refused admittance to United States—Habeas corpus.*] Where a Chinaman, who contracts with a transportation company for his passage from China through Canada to the United States on the understanding that if he is refused admittance to the States he will be deported to China by the Company, is refused admittance to the States and is being deported, he will not be granted his discharge on *habeas corpus* proceedings as the contract is not illegal and under the Chinese Immigration Act, 1900, deportation is proper. *In re* LEE SAN. - 270

COAL MINES REGULATION ACT—*Employment of Chinamen—Rule prohibiting—Constitutionality of—B.N.A. Act, Sec. 91, Sub-Sec. 25 and Sec. 92, Sub-Secs. 10, 13—Naturalization and aliens—R.S.B.C. 1897, Cap. 138, Sec. 82. r. 34, and B.C. Stat. 1903, Cap. 17, Sec. 2.*] Rule 34 of section 82 of the Coal Mines Regulation Act as enacted by the Legislature in 1903, and which prohibits Chinamen from employment below ground and also in certain other positions in and around Coal mines is in that respect *ultra vires*. So *held, per* HUNTER, C.J., and IRVING, J., MARTIN, J., dissenting. *Union Colliery Co.* v. *Bryden* (1899), A.C. 580, applied and distinguished from *Cunningham* v. *Tomey Homma* (1903), A.C. 151. *In re* THE COAL MINES REGULATION ACT AND AMENDMENT ACT, 1903. - 408

2.—— *Rule prohibiting employment of Chinamen below ground—Colliery Company infringing rule — Injunction to restrain — Practice.*] *Held*, on a motion by the Attorney General for an injunction to restrain a colliery company from employing Chinamen below ground in contravention of r. 34, section 82 of the Act, that the matter was not one affecting the public or likely to affect the public to such an extent as to call for the granting of an injunction. ATTORNEY-GENERAL v. WELLINGTON COLLIERY CO. - - - - - - - 397

COLLISION—*Negligence — Application of Regulations—Ship at wharf—Lights — Fog signals.*] Articles 11 and 15 (*d.*) of the Collision Regulations of February 9th, 1897,

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do not apply to the case of a ship made fast to a lawful wharf in a harbour:—*Held*, on the facts, that a vessel which ran into another so moored was guilty of negligence. BANK SHIPPING CO. v. THE "CITY OF SEATTLE." - - - - - - 513

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See MASTER AND SERVANT. 3.

COMPANY—*Security taken bona fide—Holder of—Necessity to inquire as to regularity of proceedings—Liquidator suing in his own name—Liability for costs.*] Where an action is brought by the liquidator of a company in liquidation in his own name he is personally liable for costs; the fact that he obtained leave from the Court to sue will not relieve him of his liability in this respect. A person who *bona fide* takes a security in the ordinary course of business from an incorporated company is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly. In this respect a shareholder stands on the same footing as a stranger. JACKSON v. CANNON. - 73

CONSTITUTIONAL LAW—Chinamen in coal mines. - - - 408
See COAL MINES REGULATION ACT.

CONTRACT—*Fire insurance—"Valid in Canada"—Meaning of—Policy in company not licensed in Canada—Premium paid to—R.S. Canada, 1886, Cap. 124, Sec. 4.*] A contract to procure fire insurance in some office valid in Canada means in some company licensed to do business in Canada, and a premium paid under such a contract may be recovered back, as upon a failure of consideration, if the insurance is effected without the knowledge of the insured in a company not so licensed. BARRETT *et al.* v. ELLIOTT *et al.* - - - - - - 461

2.——*Rescission of sale.* - - 291
See INJUNCTION.

COSTS—*Appeal.*] A party who supports on appeal a judgment which he did not ask for in the Court below must pay the costs of appeal if it is successful. GUILBAULT *et al.* v. BROTHIER *et al.* - - - - 449

2.——*Husband and wife—Application by husband by habeas corpus for custody of child.* - - - - - - - 40
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COSTS—*Continued.*

3.——*Liquidator suing in his own name.*] Where an action is brought by the liquidator of a company in liquidation in his own name he is personally liable for costs; the fact that he obtained leave from the Court to sue will not relieve him of his liability in this respect. JACKSON v. CANNON. - 73

4.——*Negotiations for settlement—Appeal stood over at suggestion of Court.*] After an appeal was opened, it was stood over at the suggestion of the Court in order to give the parties an opportunity to settle; the negotiations for settlement were unsuccessful, and the appeal was ultimately dismissed with costs:—*Held*, that the successful party was entitled (1.) to a counsel fee (under item 224 of the Tariff of Costs) on the first day's hearing and (2.) to an allowance for costs of the negotiations for settlement under item 81 of Schedule No. 4. MILTON v. THE CORPORATION OF THE DISTRICT OF SURREY. (No. 2.) - - - - - 325

5.—*Of appeal on point not taken at trial.*] Where an appeal is allowed on a point of law not taken at the trial or in the notice of appeal but open on the pleadings, it is not in strictness successful, and no costs of the appeal will be allowed; but as the appellant should have succeeded at the trial, he will be allowed the costs of it. THE BYRON N. WHITE COMPANY v. THE SANDON WATER WORKS AND LIGHT COMPANY, LIMITED. - - - - - - - - - 361

6.——*On County Court scale—Jurisdiction to order—Supreme Court Act, 1903-4, Sec. 100.*] In a Supreme Court action, the Judge has no jurisdiction to order costs on the County Court scale on the ground that the action might or should have been brought in the County Court. RUSSELL v. BLACK. - - - - - - - - 326

7.——*Security for—Test actions—Waiver* [224
See PRACTICE. 19.

8.——*Trial and appeal.*] At the trial plaintiff obtained judgment declaring that defendant was a trustee for him of an undivided one-quarter interest in two mineral claims; on appeal by defendant, plaintiff's interest was reduced to one-fortieth: The Court allowed defendant the costs of the appeal, but allowed no costs of the trial to either side. BRIGGS AND GIEGERICH v. FLEUTOT - - - - - - - - 309

COUNTY COURT—*Costs — Of adjournment when no Court room available.*] No costs of an adjournment of trial will be allowed to the successful party where the adjournment was caused by reason of there being no Court room available. MACDONELL v. PERRY. - - - - - - 326

2.——*Garnishee summons based on default summons.*] A garnishee summons may be issued based on a default summons as well as on an ordinary summons. JOWETT v. WATTS. - - - - - - - - 172

CRIMINAL LAW—*Alien Labour Act, 60 & 61 Vict., Cap. 11 and 1 Edw. VII., Cap. 13 — Advertisement for labourers — Whether promise of employment.*] The Company published in a Seattle newspaper this advertisement: "Wanted. First-class machinists. Apply Vancouver Engineering Works, Limited, Vancouver, B. C.":—*Held*, the advertisement did not contain a promise of employment within the meaning of the Alien Labour Act as amended by 1 Edw. VII., Cap. 13, Sec. 4. DOWNIE v. VANCOUVER ENGINEERING WORKS, LIMITED. 367

2. *Evidence—Dying declaration—Indian woman—Consciousness of impending dissolution—Hearsay evidence to prove dying declaration.*] An Indian woman's statement that she thinks she is going to die is a sufficient indication of such a settled hopeless expectation of immediate death as to render the statement admissible as a dying declaration. Before the death of an Indian woman, for whose murder the prisoner was being tried, a statement was obtained from her in the following way: A Justice of the Peace swore an Indian to interpret the statement the woman was about to make; a constable then asked questions through the interpreter and a doctor wrote down what the interpreter said the woman's answers were. The doctor and the Justice of the Peace then signed the statement. To some of the questions the woman indicated her answer by nodding her head. At the trial the statement was tendered as a dying declaration and the doctor, the Justice of the Peace and the constable identified the statement; the interpreter deposed that he interpreted truly, but he gave no evidence as to what the woman really did say:—*Held*, disapproving *Reg.* v. *Mitchell* (1892), 17 Cox, C.C. 503, that the statement was admissible as a dying declaration; also that it had been properly proved. A dying declaration may be obtained by means of questions and answers and if it is reduced to writing it is sufficient if the answers only appear in the writing. REX v. LOUIE. 1

CRIMINAL LAW—*Continued.*

3.——*Evidence — Perjury committed in civil action — Admissibility of depositions taken in civil action—Indictment for perjury —Form of—Surplusage.* A person charged with perjury committed in a civil action is entitled to have put in evidence those parts of his testimony in the civil action which may be explanatory of the statements in respect of which the perjury is charged. REX v. COOTE. - - - - - - 285

4.——*Judge's charge to jury—Murder—Manslaughter—Definitions of—Failure to instruct jury as to—Failure to object to charge —New trial—Rebuttal evidence—In discretion of Judge.*] It is the duty of the Judge in a criminal trial with a jury to define to the jury the crime charged and to explain the difference between it and any other offence of which it is open to the jury to convict the accused. Failure to so instruct the jury is good cause for granting a new trial and the fact that counsel for the accused took no exception to the Judge's charge is immaterial. After the case for the Crown and defence was closed the Crown called a witness in rebuttal whose evidence changed by a few minutes the exact time of the crime as stated by the Crown's previous witnesses and which tended to weaken the *alibi* set up by the accused:—*Held*, that to allow the evidence was entirely in the discretion of the Judge and there was no legal prejudice to the accused as he was allowed an opportunity to cross-examine and meet the evidence. REX v. WONG ON AND WONG GOW. 555

DEED—*Condition subsequent—Breach of—Forfeiture—Assignment by vendor before revesting—Validity of.*] On the grant of a fee simple defeasible on breach of a condition no estate is left in the grantor, but only a possibility of reverter, and, therefore, before breach there is nothing capable of assignment. After breach, where the deed does not provide for *ipso facto* forfeiture, the fee does not revest automatically, and until revesting by suit or otherwise there is nothing capable of assignment. Land was conveyed subject to certain conditions to be performed by the purchasers, and, in default of the performance of such conditions, the purchasers were to hold the land in trust for the grantor, and reconvey to him, notwithstanding that any prior breach may have been waived. The conditions were not performed. In an action by the assignee under seal of the vendor for a declaration that the purchasers held the land in trust for him, and for an order for the conveyance thereof to him:—

DEED—*Continued.*

Held, that after the conveyance there was no estate left in the grantor, but only a possibility of reverter, which was not assignable, and no action lay. Decision of MARTIN, J., affirmed on different grounds. CLARK v. THE CORPORATION OF THE CITY OF VANCOUVER. - - - - - - 31

DISCOVERY—*Examination for — Nature of—Rule 703.*] The examination for discovery under r. 703 is a cross-examination both in form and in substance, and a party being examined must answer any question the answer to which may be relevant to the issues. HOPPER v. DUNSMUIR. (No. 2.) 23

DOMINION OFFICIAL—*Salary — Receiver—Appointment—Partnership in—Right to share in salary ceases on dissolution.*] While C. and M. were in partnership as architects, M. received an appointment from the Dominion Government as supervising architect and clerk of the works in connection with a Government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end and thereafter refused to account for the salary. C. sued for a declaration that he was entitled to half the salary since the dissolution:—*Held*, that even if it were agreed that the appointment should be for the benefit of the firm, the plaintiff would not have any right to share in the salary after dissolution unless there was a special agreement to that effect. Judgment of HUNTER, C.J. (9 B. C. 297), affirmed. CANE v. MACDONALD. - 444

ELECTION—Judgment against an agent. 371

See PRINCIPAL AND AGENT.

ELECTIONS ACT—*Application for registration—Affidavit—Official to take.*] Under the Provincial Elections Act and amendments an affidavit or application to be placed on the Register of Voters for an Electoral District may be sworn outside the Province of British Columbia; and the venue and jurat of the affidavit, Form A., Provincial Elections Act Amendment Act, 1902, may be varied to conform to that fact. The affidavit may be sworn before a Commissioner for taking affidavits in and for the Courts of the Province, or before any of the officers named in section 4 of the said Amending Act of 1902, provided they derive their power from Provincial authority, or ordinarily reside and perform their duties within the Province. The Lieutenant-Governor in Council has power under the Elections Act and section 11 of the Redistribution Act to make regulations providing that affidavits sworn outside the Province may be received by Collectors of Voters and the applicants' names be placed upon the Register. *Per* WALKEM and DRAKE, JJ.: Acts affecting the franchise should be construed liberally so as not to disfranchise persons having the necessary qualifications of voters. *In re* PROVINCIAL ELECTIONS ACT. 114

ELECTIONS ACT—*Continued.*

2.——*Recount—Ballots in custody of Deputy Provincial Secretary — Production for recount—Jurisdiction of Court or Judge to order—R.S.B.C. 1897, Cap. 67, Secs. 152, 154 and 211 and B.C. Stat. 1899, Cap. 25, Secs. 43 and 44.*] The Court or a Judge thereof has no jurisdiction, under section 154 of the Provincial Elections Act, to order the Deputy Provincial Secretary to produce ballots for the purpose of a recount before a County Court Judge under section 43 of the amendment to the said Act in 1899. *Re* FERNIE ELECTION (PROVINCIAL) PETITION. 151

ESTOPPEL—*By conduct—Litigation over specific property—Person not a party but supplying funds for litigation. Per* HUNTER, C.J.: It is not open to a man to stand by and assist another to fight the battle for specific property to which he himself claims to be entitled and in the event of the latter's defeat, claim to fight the battle over again himself. He is not bound to intervene but if he does not he must accept the result so far as concerns the title to the property. BRIGGS AND GIEGERICH v. FLEUTOT. - - - - - - - - 309

EVIDENCE — *Corroboration — Action against executor—Evidence Act Amendment Act, 1900, Cap. 9, Sec. 4.*] The corroboration required by section 50 of the Evidence Act (B.C. Stat. 1900, Cap. 9, Sec. 4) must refer specifically to the contract on which action is based, and not to some part of it, so as to leave the effect of the whole unascertained. BLACQUIERE v. CORR. - 448

2.——*Dying declaration* - - - 1
See CRIMINAL LAW. 2.

3.——*Finding based on positive evidence.*] Where the trial Judge accepts positive in preference to the negative testimony, the full Court will not interfere unless he is clearly wrong. MILTON v. THE CORPORATION OF THE DISTRICT OF SURREY. - 296

4.——*Rebuttal—Judge's discretion.* 555
See CRIMINAL LAW. 4.

EXECUTION—*Exemption under Homestead Act—Thing seized of a value over $500.*] *Held*, in an interpleader issue, that the execution debtor was entitled, as an exemption under the Homestead Act, to $500 out of $1,000 realized by the Sheriff on the sale of a steamship, the only exigible personality of the debtor. *Vye* v. *McNeill* (1893), 3 B.C. 24, approved. *Semble*, notice of claim of exemption is necessary. YORKSHIRE GUARANTEE & SECURITIES CORPORATION v. COOPER. - - - - - - - - 65

EXEMPTION. - - - - - - 65
See EXECUTION.

FIRE ESCAPE ACT—Neglect of statutory duty—Injury to hotel guest while rescuing fellow guest from fire. - - - - - - 33
See NEGLIGENCE.

FIRE INSURANCE—Contract "valid in Canada." - - - - - 461
See CONTRACT.

FORESHORE—Cause of action—Crown. 108
See PRACTICE.

FULL COURT ORDER—Interference with by Chamber order. - 404
See PRACTICE. 16.

HEALTH ACT—*Smallpox—Detention of person exposed to infection—Suspected case only.*] Section 75 of the Health Act provides that when smallpox, scarlet fever, diphtheria, cholera or any other contagious or infectious disease dangerous to the public health is found to exist in a municipality, the health officers shall use all possible care to prevent the spreading of the infection or contagion:—*Held*, that health officers were justified under this section in detaining a person who had been exposed to infection from a person suspected of having smallpox, but who in reality had measles. MILLS v. THE CITY OF VANCOUVER *et al.* 99

HUSBAND AND WIFE—*Application by husband by habeas corpus for custody of child—Costs.*] Where a wife leaves her husband without justification she is not entitled to her costs of unsuccessfully resisting his application by *habeas corpus* for the custody of children. *In re* C. T. MCPHALEN. 40

ILLEGALITY—*Action involving indecent matter—Striking out objectionable causes of action—Judgment—Form of—Dismissal of action—Res judicata—Costs.*] On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for

ILLEGALITY—*Continued.*

damages for assault and false imprisonment and a third for damages for procuring the plaintiff to enter a house of prostitution, the Judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion, the formal judgment stating that "this Court doth of its own motion and without adjudicating as between the plaintiff and defendants on the matters in dispute between them, order that this action be dismissed out of this Court, with costs:—" *Held*, by the Full Court, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. Judgment of IRVING, J., set aside. GUILBAULT *et al.* v. BROTHIER *et al.* - - - - - 449

INJUNCTION—*Sale of property—Rescission of contract—Misrepresentation—Action for damages.*] Where a party contracts to purchase property and pays an instalment and afterwards repudiates the contract and sues for rescission, the Court has no jurisdiction to restrain by *interim* injunction the vendor who accepted the repudiation and re-took his property from dealing with it as he sees fit. CHRISTIE v. FRASER *et al.* 291

JUDGE AND JURY—Duty of Judge to define crime to jury. - 555
See CRIMINAL LAW. 4.

2.——*Obligation of Judge to apply facts to law.* - - - - - - - - 473
See NEW TRIAL.

3.——*Misdirection.* - - - 258
See NEW TRIAL. 3.

4.——*Misdirection.* - - - 330
See NEGLIGENCE.

JUDGMENT—Form of—Dismissal of action—Res judicata. - - 449
See ILLEGALITY.

JURY—Exclusion of during exceptions to charge—Suitor's right to have questions submitted. - - 473
See NEW TRIAL.

2.——*Rules 81 and 330.* - - - 17
See PRACTICE. 5.

LACHES. - - - - - - 361
See ACQUIESCENCE.

LANDLORD AND TENANT—*Eviction—Surrender of term by operation of law—Creditors' Trust Deeds Act, 1901, Cap. 15, Sec. 54, Sub-Sec. 5.*] Plaintiff let a store to H. A. & Co., who afterwards executed an assignment for the benefit of creditors to defendant, who did not take possession of the premises. Plaintiff on the third day after the assignment, requested and obtained from H. A. & Co. the keys of the premises which she proceeded to clean up and put in repair, and she took down a sign board having on it the firm name of H. A. & Co. and painted the name out. Plaintiff afterwards sued for a declaration that she was entitled to a privileged claim against the estate for rent accruing due after the assignment:—*Held*, affirming HENDERSON, Co. J., who dismissed plaintiff's action, that there had been a surrender of the premises to the landlord by act and operation of law. *Phene* v. *Popplewell* (1862), 12 C.B.N.S. 334, applied. GOLD v. ROSS. 80

2.——*Lease of premises for hotel—Premises not fulfilling requirements of by-law—Illegal lease.*] Premises in Vancouver leased for use as a hotel did not fulfil the requirements of a by-law in regard to the number of bedrooms, and of this both the lessor and lessee were aware at the time the lease was entered into. The lessee was stopped using the premises as a hotel by the authorities. *Held*, in an action by the lessor on covenants for rent and repair, that the lease was void *ab initio* and the maxim *In pari delicto potior est conditio defendentis* applied. Even if the lease were not void *ab initio* it became void by the action of the authorities in stopping the further use of the premises as a hotel. HICKEY v. SCIUTTO. - - 187

LAND REGISTRY ACT — *Debentures creating a charge—No description of land—Whether capable of registration.*] A company issued debentures which created a charge upon all its property without describing the property:—*Held*, that the debentures were capable of registration under the Land Registry Act. *In re* THE LAND REGISTRY ACT. - - - - 370

LAND REGISTRY — *Registered plan—Unregistered plan—Description of land by reference to plan—Boundaries—Mistake—C.S.B.C. 1877, Cap. 102, Secs. 25, 64 and 67 and R.S.B.C. 1897, Cap. 111, Sec. 65.*] The owner of a district lot registered in 1885 a plan of it drawn to scale, but not shewing the sub-divisions, and afterwards had another plan made from a survey and which differed from the registered one; from an inspection of the ground and the unregistered plan, one Kilby, who was unaware of the registered plan, bought in 1889, lot 16 and registered the deed which did not refer to the plan. On 11th July, 1889, the defendant bought from the same vendor lot 15. In 1890, the plaintiff bought from Kilby lot 16, the deed shewing the purchase to be according to the registered plan, but before purchase she inspected the property and saw the boundaries which were then according to the unregistered plan. Lot 16 according to registered plan overlapped lot 15 according to the unregistered plan:—*Held*, in an action for possession by the owner of lot 16 (1.) That both plaintiff and defendant must be deemed to be holders of their respective parcels according to the registered plan and to have registered their conveyances in conformity with the Land Registry Act. (2.) It was not open to defendant who had accepted and registered a conveyance of land according to a registered plan to afterwards object, in an action respecting the title to the same land, to the validity of that plan. Decision of DRAKE, J., affirmed. FOWLER v. HENRY. - 212

MANDAMUS—To compel Medical Council to hold inquiry. - - 268
See MEDICAL ACT, 1898.

2.——*Wholesale liquor license—Refusal of to Japanese.* - - - - - 354
See VANCOUVER INCORPORATION Act, 1900.

MASTER AND SERVANT—*Dismissal of servant—Breach of contract—Damages—Action tried before expiration of term for which engagement was made.*] The plaintiff who had been engaged for one year from August, 1902, by defendants at a monthly salary, was dismissed wrongfully in December. He sued for damages for breach of contract, and the action was tried in May, 1903:—*Held*, by the Full Court, affirming the judgment entered at the trial, that plaintiff was entitled to recover damages covering the unexpired term of his engagement. HOPKINS v. GOODERHAM *et al.* 250

MASTER AND SERVANT—*Continued.*

2.——*Employers' Liability Act—Dangerous place — Duty to warn workmen of.*] Where a workman is put to work in a place where there is an imminent danger of a kind not necessarily involved in the employment and of which he is not aware, but of which the employer is aware, it is the employer's duty to warn the workman of the danger. G. had been working in the defendants' mine on the floors immediately below the 600 foot level, and on the night of the accident when he was going to work he was told by the shift whom he was relieving that the place was in pretty bad shape and to look out for it. He proceeded to make an examination, but while thus engaged the mine superintendent directed him to do some blasting, and while doing it a slide occurred and he was injured. The principal evidences of the likelihood of a slide were two floors beneath the 600 foot level, and of which the superintendent was aware and G. not aware. The jury found that the superintendent was negligent inasmuch as he did not advise G. of the probable danger. *Held*, in an action under the Employers' Liability Act, that the defendants were liable. GUNN v. LE ROI MINING COMPANY, LIMITED. - - - - - - - - 59

3.——*Negligence—Common employment—Mine owner and contractor.*] H. & M. contracted to sink a winze in defendants' mine at a certain price per foot, and by the terms of the contract the direction and dip of the winze were to be as given by the defendants' engineers; the defendants were to provide all necessary appliances, etc.; H. & M.'s workmen should be subject to the approval and direction of the defendants' superintendent, and any men employed without the consent and approval of or unsatisfactory to such superintendent should be dismissed on request. A hoisting bucket hung on a clevis was supplied to H. & M. by defendants, and through the negligence of the defendants' superintendent, master mechanic or shift boss, a hook substituted for the clevis, by defendants, at the request of H. & M., got out of repair, in consequence of which the bucket slipped off and in falling injured the plaintiff, who was one of H. & M.'s workmen engaged in sinking the winze. *Held*, that the plaintiff being subject to the orders and control of the defendants was acting as their servant and the doctrine of common employment applied, and the action was not maintainable. Judgment of IRVING, J., reversed. HASTINGS v. LE ROI No. 2, LIMITED. - 9

4.——*Negligence — Verdict — Inconsistent answers—Construction of.*] In construing a jury's verdict consisting of a number of questions and answers the whole verdict must be taken together and construed reasonably, regard being had to the course of the trial. In an action for damages for personal injuries from an accident happening because of plaintiff's failure to withdraw himself from danger in response to a signal, the jury found that the defendant was negligent and that the signal was given prematurely, and that the plaintiff should have heard the signal, but being busy may not have heard it. The answer to the question as to contributory negligence, to which the jury's attention was directed by the Judge, was "We do not consider that plaintiff was doing anything but his regular work." Judgment was entered for plaintiff. *Held*, by the Full Court that the judgment must be affirmed. MARSHALL v. CATES. - - - - - - - - 153

MEDICAL ACT, 1898—*Registered practitioner—harge of unprofessional conduct—Inquiry by Council—Mandamus.*] Under section 36 of the Medical Act, 1898 (previous to its amendment in 1903) the Council may hold an inquiry into a charge of unprofessional conduct made against a registered medical practitioner:—*Held*, that mandamus did not lie to compel the Council to hold an inquiry. Charges of unprofessional conduct may be investigated by the Council notwithstanding the acts complained of may be the subject-matter of an action at law. *In re* THE MEDICAL ACT: *Ex parte* INVERARITY. - - - 268

MEDICAL ATTENDANCE — *Duty of ship owner to provide—Merchants Shipping Act, 1894, Sec. 207.*] A ship owner is under no duty either at common law or under section 207 of the Merchants Shipping Act, 1894, to provide surgical or medical attendance for the ship's company. MORGAN v. THE BRITISH YUKON NAVIGATION COMPANY, LIMITED. - - - - - - - - 112

MINING LAW — *Expiration of certificate — Special certificate — R. S. B. C. 1897, Cap. 135, Sec. 9 and B.C. Stat. 1901, Cap. 35, Sec. 2.*] On the expiration of a free miner's certificate any mineral claim of which the holder thereof was the sole owner becomes open to location. The obtaining of a special certificate under section 2 of the Mineral Act Amendment Act, 1901, does not revive the title if in the meantime the ground has been located as a mineral claim. WOODBURY MINES, LIMITED, v. POYNTZ. - - - - - - - - 181

MINING LAW—*Continued.*

2.——*Fractional claim—Location line of—Necessity for blazing—Relocation by another person at instance of first holder—Permission of Gold Commissioner.*] Where the holder of a mineral claim which is the subject of an adverse action causes the ground to be relocated by someone else from whom he purchases it for a small consideration, the provisions of section 32 of the Mineral Act, requiring permission to relocate, do not apply. The location line of a fractional mineral claim must be marked by the blazing of trees or the setting of posts in the same manner as that of a full sized claim. SNYDER v. RANSOM: RANSOM v. SNYDER. - - - - - - 182

3.——*Location—Non-observance of formalities—No. 2 post planted in glacier—Mineral Act, Secs. 12-16.*] The failure to write on the No. 2 post of a mineral claim, the date of the location and the name of the locator is a non-observance of formalities within the meaning of section 16 (*g.*) of the Mineral Act. The fact that a No. 2 post of a mineral claim is planted in a moving glacier will not invalidate the location, provided the location line is well marked and the claim is otherwise properly marked out so as to be easily identified. Decision of MARTIN, J., affirmed. SANDBERG v. FERGUSON. 123

4.——*Transfer of—Time allowed for recording—Mineral Act, Secs. 19 and 49.*] The claimant of an interest in a mineral claim seized under an execution on 18th May, 1903, relied on a bill of sale obtained by him on 23rd February, 1903, while in Dawson, Y. T., over 2,000 miles from the Mining Recorder's office. The bill of sale was not recorded until 22nd May, 1903:—*Held*, that as the time for recording mineral claims fixed by section 19 of the Mineral Act is dependent upon the distance of the claim (not of the locator) from the Recorder's office, therefore by section 49 of the Act the bill of sale was of no effect as against the intervening execution, as it was not recorded within the time limited by said section 19. DUMAS GOLD MINES, LIMITED v. BOULTBEE *et al.* - - - - - - - - 511

5.——*Smelting contract—Sampling ores.* 138

See SMELTING CONTRACT.

MORTMAIN ACT—*9 Geo. II., Cap. 36—Introduction of English law.*] The Statute, 9 Geo. II., Cap. 36, relating to charitable uses and commonly known as the Mortmain Act, is not in force in British Columbia. *In re* PEARSE ESTATE. - - - - - 280

MUNICIPAL LAW—*Officer of municipal corporation — Tenure of office — Removal of officer—Tax sale—Commission.*] Under section 45 of the Municipal Clauses Act a municipal officer holds office "during the pleasure of the Mayor or Council," and so may be removed at any time without notice or cause shewn therefor. A tax sale by-law provided that the Collector should be entitled to a commission on all arrears of taxes collected:—*Held*, that where lands were bid in by the Municipality because the amount offered at the sale was less than the arrears of taxes and costs owing on the lands, the Collector was not entitled to a commission on the price of lands so bid in. THE MUNICIPALITY OF THE DISTRICT OF NORTH VANCOUVER v. KEENE. - 276

2.——*Tax sale—Land bid in by Municipality—Redemption by original owner—Sale by Council by resolution—Necessity for contract under seal—R.S.B.C. 1897, Cap. 144, Sec. 26 and B. C. Stat. 1898, Cap. 35, Secs. 15 and 16.*] At a tax sale in November, 1899, as the price offered for a lot owned by one Beatty was less than the arrears of taxes, it was bid in by the Corporation. In September, 1902, plaintiff wrote the Corporation asking if they would accept "the taxes and costs" for the property, and the next day the Council passed a resolution reciting plaintiff's offer and resolving to accept for the property the amount of "taxes, costs and interest," amounting to $88, and the Reeve and Clerk were authorized to issue a deed for that price, and a deed in the statutory form of conveyance by the officers upon a sale for taxes was prepared and signed and the corporate seal attached, but was not delivered to plaintiff, who then demanded the deed and tendered his cheque for $88. Subsequently the Clerk received from the agent of Beatty $88, and returned plaintiff his cheque, informing him that Beatty had redeemed his property. Plaintiff sued for specific performance. *Held, per* HUNTER, C.J., at the trial, that no cause of action existed against the Corporation, and that the action lay, if at all, only against the Reeve and Clerk as *personæ designatæ*. *Held*, on appeal, reversing the decision of HUNTER, C.J. (IRVING, J., dissenting), that a contract had been made out and that plaintiff had a good cause of action against the Corporation, but that as the land had been redeemed by the original owner specific performance could not be granted, and it was therefore referred to the Registrar to assess the damages. *Per* IRVING, J. (dissenting): The resolution of 3rd September, did not satisfy the requirements of section 26 of the Municipal Clauses Act, which

MUNICIPAL LAW—*Continued.*

requires all contracts to be made under seal; a resolution to sell must be followed up by a contract under the corporate seal, placed there by order of the Council. TRACY v. THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER. - - - 235

NEGLIGENCE—*Fire Escape Act—Neglect of statutory duty—Injury caused thereby—Injury to guest while rescuing fellow-guest from fire—Contributory negligence—Volenti non fit injuria — Misdirection — New trial.*] Where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor, notwithstanding that a penalty is imposed for breach of the statutory duty. *Groves* v. *Lord Wimborne* (1898), 2 Q. B. 402, applied. The defence arising from the maxim *volenti non fit injuria* (the guest being aware of the lack of means of fire escape and having made no objection) is not applicable where the injury arises from a breach of a statutory duty. *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423, applied. The fact that the guest delayed his exit in order to rescue a fellow-guest and thereby lost his own chance of getting out safely is not as a matter of law "contributory negligence;" whether the plaintiff did anything which a person of ordinary care and skill would not have done under the circumstances or omitted to do anything which a person of ordinary care and skill would have done, and thereby contribute to the accident, was for the jury to decide. Judgment of HUNTER, C. J., set aside and new trial ordered, IRVING, J., dissenting. LOVE v. THE NEW FAIRVIEW CORPORATION, LIMITED. - 330

NEW TRIAL—*Directions to jury—Obligation of Judge to apply facts to law—Suitor's right to have questions submitted to jury—Exclusion of jury during exceptions to charge—Mode of trial—Order XXXVI., r. 5—Scientific investigation—Supreme Court Act, 1904, Sec. 66.*] In an action by a ship owner against a tug owner for damages for negligence on the part of the tug in allowing the ship to drift ashore while attempting to tow her from a dangerous position, the Judge in his charge to the jury explained the law applicable to the issues, but he did not point out to the jury the bearing of the facts in evidence upon the questions to be determined:—*Held*, that the charge was incomplete and was misunderstood by the jury and that there must therefore be a new trial. The Judge is bound to submit questions to the jury if requested to do so. *Per* HUNTER, C.J.: (1.) A jury is not suited to try a dispute involving questions as to what were the proper nautical manoeuvres to be performed under peculiar conditions and the new trial should be held before a Judge without a jury. (2.) The Court has jurisdiction to order a new trial without a jury although the appellant in his motion for a new trial does not so ask. *Per* MARTIN, J.: (1.) It is the duty of the Judge under section 66 of the Supreme Court Act, 1904, to instruct the jury upon all leading groups of evidence and apply to them the law as affecting the issues arising out of such evidence. (2.) The jury should not be excluded from the Court room during the discussion on an application by counsel for further direction by the Judge. (3.) Mere complexity of fact is not a ground for depriving parties of their inherent right to a jury. ALASKA PACKERS' ASSOCIATION v. SPENCER. - - - - - - 473

NEW TRIAL—*Continued.*

2.——*Jury—Verdict—Fact in issue—Failure to submit to jury.*] On the trial with a jury of a replevin action, the fact in issue was whether an annual rent, the amount whereof was fixed by an award, was agreed prior to the submission to arbitration to be paid in advance, or whether both the amount of the rent and the time of payment were included in the submission. The ascertainment of this fact was not left to the jury, and pursuant to a general verdict judgment was entered for defendant:—*Held*, on the appeal that in consequence of the non-submission of this question of fact to the jury, there must be a new trial. MACADAM v. KICKBUSH. - - - 358

3.——*Misdirection—Judge's comments on evidence.*] It is not misdirection for the Judge to tell the jury his own opinion on the evidence before them. In his charge to the jury the Judge stated that he himself would pay very little attention to certain corroborative evidence adduced by defendants, but he also told them that the matter was entirely for them to decide:—*Held*, not misdirection. HARRY *et al.* v. THE PACKERS STEAMSHIP COMPANY. - - - 258

4.——*On ground of wrongful rejection of evidence—Duty of counsel to put evidence squarely before Judge.*] Where a party seeks a new trial on the ground of wrongful rejection of evidence, he should shew that the evidence sought to be adduced was put squarely before the Judge so that his mind was applied to the point. HOPKINS v. GOODERHAM *et al.* - - - - 250

PRACTICE — *Cause of action — Crown—Foreshore—Order XIX, r. 27 and Order XXV., rr. 2 and 4.*] In an action for damages and an injunction the plaintiff alleged in the statement of claim that the defendant Company had wrongfully erected an embankment on the foreshore of Burrard Inlet and thereby obstructed the outfall of sewers, to the damage and annoyance of the people of Vancouver:—*Held*, on an application to strike out the pleading as embarrassing and as disclosing no cause of action, that the pleading was good. In such an action it is not necessary for the plaintiff to allege ownership in the foreshore. *Semble*, a combined application may be made under Order XIX., r. 27 and Order XXV., r. 4 to strike out a statement of claim on the ground that it is embarrassing and discloses no reasonable cause of action and such procedure is not limited to cases which are plain and obvious. THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA *ex rel.* THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY. **108**

2.——*Discovery.* - - - - - **23**
See DISCOVERY.

3.——*Equitable relief—Appointment of receiver—Return of nulla bona.*] A receiver for the purpose of giving a judgment creditor equitable relief will not be appointed until the judgment creditor has exhausted his legal (as distinguished from equitable) remedies. DAVIDGE v. KIRBY. - **231**

4.——*Examination of solicitor—Order for—Summons—Affidavit in support—"Professional confidence" — Rule 383 — Subpœna under.*] A subpœna under r. 383 cannot be issued without an order therefor. In actions for damages brought against colliery owners by relatives of miners killed in an explosion, the defendants applied to add the plaintiffs' solicitors as parties, and while the summons was pending they obtained under r. 383 an order on summons, in support of which no affidavit was filed, for the examination of the solicitors as to what interest they had in the subject-matter of the action:—*Held*, that the summons should have been supported by an affidavit shewing that it was probable that the solicitors had some interest in the subject-matter of the litigation and the order should not have been made as of course. LEADBEATER *et al.* v. CROW'S NEST PASS COAL COMPANY, LIMITED. - - - - - - - **206**

5.——*Jury — Rules 81 and 330.*] In an action to set aside a will on the ground that it was obtained by fraud and undue influence,

PRACTICE—*Continued.*

the plaintiff asked for a jury:—*Held*, by the Full Court, reversing WALKEM, J., that the action was one of those referred to in r. 81, and as such, according to r. 330, must be tried without a jury. *Per* DRAKE, J.: The character of an action is determined by the issues raised in the pleadings rather than by the prayer for relief. *Stewart* v. *Warner* (1895), 4 B.C. 298, and *Corbin* v. *Lookout Mining Co.* (1897), 5 B.C. 281, approved. HOPPER v. DUNSMUIR. (No. 1.) - **17**

6.——*Notice of trial—Rule 340.*] In January, plaintiff's solicitors gave notice of trial at the Civil Sittings to be held in July in Victoria, where, according to statute, Civil Sittings are also held in February, March and May:—*Held*, on a summons to dismiss for want of prosecution, that plaintiff must give notice of trial for the March Sittings, otherwise the action will stand dismissed. WILES v. THE TIMES PRINTING AND PUBLISHING COMPANY, LIMITED LIABILITY. - **226**

7.——*Particulars — Of undue influence.*] A party alleging undue influence will be required to give particulars of the acts thereof. *Lord Salisbury* v. *Nugent* (1883), 9 P.D. 23, considered. HOPPER v. DUNSMUIR. (No. 3.) - - - - - - - - **159**

8.——*Parties — Joinder of joint wrongdoers as defendants—Action to set aside tax sale deed and for damages against Municipality.*] In an action to set aside a tax sale deed obtained by defendant Tretheway and for an account and damages against the Municipality, the tax sale was impeached on the grounds, amongst others, that there were no taxes due, that there was no proper assessor's roll or collector's roll and that the provisions of the Municipal Clauses Act respecting tax sales had not been observed:—*Held*, affirming an order of IRVING, J., that the Municipality was not improperly joined as a party defendant. LASHER v. TRETHEWAY AND THE TOWNSHIP OF RICHMOND. - - - - - - **438**

9.——*Pleading — Condition precedent — Rule 168.*] The statement of claim alleged a contract of hiring plaintiff as superintendent of a mill, arising from two letters, without setting them out, and without alleging the continuance of the construction of the mill, which was one of the conditions stated by defendants in their second letter. The defence denied the allegations in the statement of claim and alleged the contract was contained in the second letter:—*Held*, that it was not necessary for the plaintiff to

PRACTICE—*Continued.*

prove the continuance of the construction of the mill. HOPKINS v. GOODERHAM *et al.* 250

10.——*Pleading — Extension of claim as indorsed on writ—Some of defendants served under Order XI.—Order XX., r. 3.*] Plaintiffs issued a writ against three defendants all resident in England and served it on one of the defendants while temporarily in British Columbia, and then under Order XI., served the other defendants in England. The claim indorsed on the writ was for damages for non-transfer to plaintiff of shares according to agreement and for failure to hold certain stock in trust. By the statement of claim the plaintiffs set up in effect a claim for damages against defendants for fraudulently manipulating certain companies so that the stock had become worthless:—*Held*, that the matters alleged in the statement of claim were within the scope of the indorsement. In deciding whether or not the cause of action indorsed on a writ has been unduly extended in the statement of claim, the fact that one of the defendants was served within the jurisdiction and the others were subsequently served without the jurisdiction under Order XI., is immaterial. OPPENHEIMER v. SPERLING *et al.* - - - - - - 162

11.—— *Pleadings — Particulars.*] In an action by the Provincial Attorney-General for a declaration that the public had a right of access to the sea over the embankment of the C.P.R. *via* certain streets in Vancouver, it was alleged that in 1870, Her Majesty by the officers of Her Colony of British Columbia, laid out and planned a townsite on Burrard Inlet and dedicated certain parts of the townsite to public uses:—*Held*, that plaintiff must give (1.) particulars of the authority under which the townsite was laid out; (2.) of the nature and dates of dedication and by whom made and (3.) of what portions of the townsite were dedicated. THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA *ex rel.* THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY. (No. 2.) 184

12.——*Proceedings outside Victoria, Vancouver or New Westminster—Chamber summons returnable at one of these places—Must be issued at place returnable.*] Where it is desired to make an application, under section 32 of the Supreme Court Act as amended in 1901, Cap. 14, section 13, to a Judge at Victoria, Vancouver or New Westminster, the summons must be issued at the

PRACTICE—*Continued.*

place at which it is returnable. CENTRE STAR MINING CO., LIMITED v. ROSSLAND AND GREAT WESTERN MINES, LIMITED AND EAST LE ROI MINING CO., LIMITED. - 136

13.——*Production of documents—Place of production—Rules 4 and 5 of Rules of 7th April, 1899.*] Where an order has been made for the production of documents, the documents should be produced in the city or town in which the writ was issued, but a Judge has a discretionary power to order production somewhere else to prevent inconvenience and prejudice to a party's business operations. DAVIES, SAYWARD MILL AND LAND COMPANY, LIMITED v. BUCHANAN *et al.* - - - - - - - 175

14.——*Short notice of motion.*] Where a party applies for special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party. CANADIAN PACIFIC RAILWAY COMPANY v. VANCOUVER, WESTMINSTER AND YUKON RAILWAY COMPANY. - 228

15.——*Substituted service — Order for — Extra-provincial Company—Affidavit leading to order—New material on application to discharge order — Judge's discretion.*] An affidavit leading to an order for substituted service is a jurisdictional affidavit. An affidavit leading to an order for substituted service under section 130 of the Companies Act on an extra-provincial Company licensed to do business in British Columbia, should shew clearly that the Company is an extra-provincial one licensed to do business in the Province. On an application to set aside an order for substituted service it is discretional with the Judge to allow plaintiffs to read further affidavits setting out facts omitted in the affidavit on which the order was made, and where in the exercise of his discretion he refused leave, the Court on appeal will not interfere. Judgment of IRVING, J., affirmed, HUNTER, C.J., dissenting. CENTRE STAR MINING COMPANY, LIMITED v. ROSSLAND GREAT WESTERN MINES, LIMITED, *et al.* (No. 2.) - - - 262

16.——*Test action — Pleadings — Particulars — Substituted test action — Full Court order—Interference with by Chamber order.*] Where particulars of the statement of claim in a test action are struck out on an appeal to the Full Court and full and true particulars ordered to be given, the plaintiffs may deliver their particulars in another

PRACTICE—*Continued.*

action which has since been settled on as a test action; and an order obtained in Chambers which has the effect of nullifying in part the Full Court order will be set aside. LEADBEATER *et al.* v. CROW'S NEST PASS COAL COMPANY, LIMITED. (No. 2.) 404

17.——*Test action—Selection of.*] Forty-four actions were brought by different persons against defendants for damages caused by the death of relatives in an explosion extending over a large area of defendants' coal mine, and plaintiffs applied to consolidate these actions with twenty-nine other actions, one of which had been chosen as a test action. On account of the workmen who were killed not all being of the same class and also on account of the different conditions in the different parts of the mine where deaths occurred, the defendants contended that one action would not be a fair test of all the others:—*Held*, that the defendants should have the right to select four actions as test actions for those of the same class. Order of FORIN, Lo. J., set aside. ELLYN v. THE CROW'S NEST PASS COAL COMPANY, LIMITED. - 221

18.——*Test action—Substitution of another action as test action.*] After one of a number of actions brought by different plaintiffs against the same defendants in respect of causes of action which are identical, has been ordered to be tried as a test action, the Court has power to substitute another action as a test action. Twenty-nine actions were brought by different persons against defendants for damages caused by the death of relatives in an explosion in the defendants' coal mine, and on plaintiffs' application an order for a test action was made, the order providing that defendants, if dissatisfied with the result of the test action, might apply to have the other actions proceeded with and that they might apply to have any of the actions forthwith proceeded with if there existed any special ground of defence applicable to it, and not raised in the test action. After obtaining the order, plaintiffs' solicitor discovered that on account of the particular place in the mine at which McLeod was killed, a separate defence not applicable to the other cases might apply, and an application was made for the substitution of another action as the test action:—*Held*, reversing WALKEM, J., who held that there was no jurisdiction to substitute another action, that the object of the order, which was provisional in its nature, was to have a fair test action, and as the one chosen would not

PRACTICE—*Continued.*

be a fair one, another should be chosen. MCLEOD *et al.* v. THE CROW'S NEST PASS COAL COMPANY, LIMITED. - - 103

19.——*Test actions — Consolidation of — Plaintiffs in some actions outside jurisdiction—Security for costs—Waiver.*] Twenty-nine actions by different plaintiffs were commenced against defendants at one time, and subsequently fourty-four similar actions were commenced. One action known as the *Leadbeater* action was ordered to be tried as a test action for the twenty-nine, and afterwards by consent four actions out of the forty-four were consolidated by order of the Full Court with the *Leadbeater* action and ordered to be tried as test actions for the whole seventy-three. In the *Leadbeater* action and in one of the four remaining test actions the plaintiffs resided in the jurisdiction and in the other three they resided outside the jurisdiction:—*Held*, by the Full Court, reversing IRVING, J., that the plaintiffs outside the jurisdiction should not be required to give security for costs. SILLA V. CROW'S NEST PASS COAL COMPANY, LIMITED. - - - - - - - 224

20.——*Venue—Change of—Convenience—Fair trial.*] Where a plaintiff has selected his place of trial, the venue will not be changed on the ground of greater convenience unless it is clear that a fair trial can be had at the place proposed by defendant. CENTRE STAR MINING COMPANY, LIMITED V. ROSSLAND MINERS UNION *et al.* - 306

21.——*Writ of summons—Indorsement of residence—Order IV., r. 1.*] Where plaintiffs sue as trustees for a corporation it is not necessary to indorse on the writ the addresses of the individual plaintiffs. Plaintiffs sued as trustees of the Standard Life Assurance Company, and their address was indorsed on the writ as "Edinburgh, Scotland."—*Held*, insufficient address, but as there was nothing misleading in the address leave was given to amend by stating the place of business of the Company. DUNDAS *et al.* v. MCKENZIE. - - - - 174

PRINCIPAL AND AGENT—*Undisclosed principal—Action against agent—Election—Purchase of judgment—Conditions and equities affecting—Notice.*] The plaintiff, Clara Semisch, sold a judgment of over $9,000 against K. to G. who was acting as agent for Mrs. K., to whom he at once assigned the judgment and received $1,000 from her therefor; G. by his instructions from Mrs. K. was limited to $1,000 as the purchase

PRINCIPAL AND AGENT—*Continued.*

price of the judgment, but as he was interested in the architect's commission which he expected to receive out of the erection of a proposed building to be erected on the land against which the judgment was registered, he agreed to pay plaintiff $1,000 in cash and $500 when the roof of the building was completed or at the latest on 1st January, 1903, and he also agreed to enforce the judgment against K. and pay plaintiff half the proceeds he received; his agreement with plaintiff was contained in two writings, one being an assignment from plaintiff to G. of all her rights under the judgment for $1,000 and the other containing the additional terms of which Mrs. K. was not aware when she bought from G.; G. failed to pay plaintiff the additional $500 and plaintiff sued for it in the County Court and although the fact came out in evidence during the trial that G. in buying the judgment had been acting as Mrs. K's agent the plaintiff took judgment against G. Subsequently plaintiff sued G. and Mrs. K. to have the assignment set aside or to have Mrs. K. declared a trustee for plaintiff:—*Held*, (1.) That plaintiff by taking judgment against G. founded upon his promise contained in one of the documents which made up the transaction elected to treat him as the sole principal; and (2.) That Mrs. K. bought the judgment without any knowledge of the agreement between plaintiff and G. and so was not bound by its terms. SEMISCH v. GUENTHER AND KEITH. - - - - - - - 371

PROBATE DUTY — Probate duty is in the nature of a legacy duty and is payable in the first instance out of the estate. *In re* PEARSE ESTATE. - - - - - 280

PROBATE FEES—*Supreme Court Rules, Appendix M. (cxiii).*] By r. 1,065, the Appendices to the Supreme Court Rules form part thereof, and by section 94 of the Supreme Court Act (R.S.B.C. 1897, Cap. 56) the Rules are declared to be valid and binding, therefore probate fees as set out in Appendix M of the Rules may be collected as being imposed by statutory enactment. *In re* PORTER ESTATE. - - - - - 275

PROMISSORY NOTE — *Indorsement — Evidence to vary written contract—Bills of Exchange Act, Sec. 55, Sub-Sec. 2.*] Parol evidence will not be received to shew that a person who indorsed a promissory note to another for valuable consideration stipulated at the time that he was not to be liable

PROMISSORY NOTE—*Continued.*

on the indorsement. *Smith* v. *Squires* (1901), 13 Man. 360, followed. EMERSON v. ERWIN *et al.* - - - - - - 101

RAILWAYS—*Barbed wire fence—Injury to horse therefrom.*] The Company maintained along its line of railway a barbed wire boundary fence, without any pole, board or other capping connecting the posts; plaintiffs' horse, picketed in their field adjoining, became frightened from some cause unexplained, and ran into the fence, receiving injuries on account of which it had to be killed:—*Held*, that the fence was not inherently dangerous, and therefore the Company was not liable. The test is whether the fence is dangerous to ordinary stock under ordinary conditions, and not whether it is dangerous to a bolting horse. Judgment of LEAMY, Co. J., reversed, IRVING, J., dissenting. PLATH AND BALLARD v. THE GRAND FORKS AND KETTLE RIVER VALLEY RAILWAY COMPANY. - - 299

2.——*Crossings — Permission of Railway Committee—Appeal from to Cabinet—Injunction—Notice of intention to lay crossing—Costs.*] The defendant Company had obtained from the Railway Committee of the Privy Council an order permitting it to cross the C.P.R. track. Pending an appeal by the C.P.R. Company from the order to the full Cabinet, the defendant Company proceeded to lay the crossing and the C.P.R. Company applied for an injunction:—*Held*, that defendant Company was not exceeding the terms of the order, which was binding on the Court until reversed on appeal to a competent authority, and therefore an injunction could not be granted. Before laying a crossing notice should be given of the time at which it is intended to commence the work. Failure by a Company to give such notice constitutes good cause for depriving it of the costs of successfully resisting a motion for an injunction. CANADIAN PACIFIC RAILWAY COMPANY v. VANCOUVER, WESTMINSTER AND YUKON RAILWAY COMPANY. - - - 228

RECEIVER—Dominion official—Partnership in appointment — Right to share in salary ceases on dissolution. - - - - - - 444
See DOMINION OFFICIAL.

REFERENCE—Extra cursum curiæ. 387
See YUKON LAW.

SALE OF LAND — Agreement for — Description of property — Latent ambiguity. - - - - 493
See STATUTE OF FRAUDS.

SHERIFF—*Capias—Mileage.*] A Sheriff is required to keep a person arrested on a capias safely, and as there is no common gaol in Vancouver the Sheriff of Vancouver is entitled to lodge such a person in New Westminster Gaol and charge mileage therefor. CARSON v. CARSON. - 83

SHIP OWNER—Duty to provide medical attendance. - - - 112
See MEDICAL ATTENDANCE.

SMELTING CONTRACT — *Sampling ores—Automatic or hand sampling—Mine owner's representative at smelter—Authority of — Ores improperly sampled — Method of estimating values of.*] A contract between mine owners and smelter owners provided *inter alia* that the ores supplied by the former to the latter should be sampled within one week after shipment. The evidence shewed that "automatic" or machine sampling had displaced the old method of "grab" or "shovel" sampling and had been in vogue for about twenty years:— *Held, per* HUNTER, C.J., and WALKEM, J., that the contract was entered into on the footing that the sampling was to be done automatically. *Per* DRAKE and IRVING, JJ.: The contract permitted any mode of sampling so long as it was done properly and the true value of the ore was arrived at.

A mine owner's representative at a smelter for the purpose of watching the weighing and sampling of ores so that the mine owner may be satisfied as to the correctness of the weight and sampling, has no authority to consent to a method of sampling not allowed by the contract. Where the smelter returns of ore of average character sampled either negligently or in a manner not contemplated by contract, shew a value below the average, the probable value of the ore will be estimated by the Court by taking the average value of a certain number of lots immediately before and after the lots in dispute. THE LE ROI COMPANY NO. 2, LIMITED v. THE NORTHPORT SMELTING AND REFINING COMPANY, LIMITED AND THE LE ROI MINING COMPANY, LIMITED. - - - - - - - 138

SANDON WATER WORKS ACT—*B. C. Stat. 1896, Cap. 62—Permission to divert water—Condition precedent—Trespass.*] By section 9 of the Sandon Water Works and Light Company Act (B.C. Stat. 1896, Cap. 62) the Company was authorized to divert water from certain creeks and to use so much of the water of the creeks as the Lieutenant-Governor in Council might allow, with power to construct such works as might be necessary for making the water power available, but the powers were not to be exercised until the plans and sites of the works had been approved by the Lieutenant-Governor in Council. The Company got their sites and plans approved and proceeded with the construction of a tank and a flume on plaintiffs' lands for the purpose of diverting water:—*Held*, that the authority of the Lieutenant-Governor in Council to divert was a condition precedent to the Company's right to interfere with the plaintiffs' soil, and that plaintiffs were entitled to damages and a mandatory injunction. THE BYRON N. WHITE COMPANY v. THE SANDON WATER WORKS AND LIGHT COMPANY, LIMITED. - - - - - 361

SPECIFIC PERFORMANCE — Agreement for sale of land. - - 493
See STATUTE OF FRAUDS.

2.——*Contract to accept part payment for services in stock—Failure to deliver stock.*] Plaintiff contracted with defendant to do work at a certain price per day and to take in part payment stock in a mining company. On completion of the work defendant failed to deliver the stock:—*Held*, that on defendant's failure to deliver the stock plaintiff was entitled to damages for breach of contract and could not be compelled to accept stock. MILLER v. AVERILL. - - 205

STATUTE—9 Geo. II., Cap. 36. - 280
See MORTMAIN ACT.

30 & 31 Vict., Cap. 3, Sec. 91, Sub-Sec. 25 and Sec. 92, Sub-Secs. 10, 13. - 408
See COAL MINES REGULATION ACT.

57 & 58 Vict., Cap. 60, Sec. 207. - 112
See MEDICAL ATTENDANCE.

60 & 61 Vict., Cap. 11; 1 Edw. VII., Cap. 13, Sec. 4. - - - - - 367
See CRIMINAL LAW.

B.C. Stats. 1892, Cap. 38; 1897, Cap. 37. 519
See ASSESSMENT.

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B.C. Stat. 1896, Cap. 62, Sec. 9. - 361
See SANDON WATER WORKS ACT.

B.C. Stat. 1898, Cap. 35, Secs. 15 and 16. 235
See MUNICIPAL LAW. 2.

B.C. Stats. 1898, Cap. 9, Sec. 36; 1903, Cap. 4. - - - - - - 268
See MEDICAL ACT.

B.C. Stat. 1899, Cap. 25, Secs. 43 and 44. 151
See ELECTIONS ACT. 2.

B.C. Stat. 1900, Cap. 9, Sec. 4. - 448
See EVIDENCE.

B.C. Stat. 1900, Cap. 54, Sec. 133, Sub-Sec. 16. - - - - - - - 198
See VANCOUVER INCORPORATION ACT, 1900. 2.

B.C. Stat. 1901, Cap. 14, Sec. 13. - 136
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B.C. Stat. 1901, Cap. 15, Sec. 54, Sub-Sec. 5. 80
See LANDLORD AND TENANT.

B.C. Stat. 1901, Cap. 35, Sec. 2. - 181
See MINING LAW.

B.C. Stat. 1903, Cap. 17, Sec. 2. - 408
See COAL MINES REGULATION ACT.

B.C. Stat. 1903-4, Cap. 15, Sec. 100. 326
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B.C. Stat. 1903-4, Cap. 15, Sec. 66. - 473
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See YUKON LAW.

C.S.B.C. 1877, Cap. 102, Secs. 25, 64 and 67. 212
See LAND REGISTRY.

STATUTES—*Continued.*

R.S.B.C. 1897, Cap. 56, Sec. 94. - 275
See PROBATE FEES.

R.S.B.C. 1897, Cap. 67, Secs. 152, 154 and 211. - - - - - - - 151
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R.S.B.C. 1897, Cap. 111, Secs. 13, 19 and 23. 179
See TAX SALE. 2.

R.S.B.C. 1897, Cap. 111, Sec. 65. - 212
See LAND REGISTRY.

R.S.B.C. 1897, Cap. 135, Sec. 9 - 181
See MINING LAW.

R.S.B.C. 1897, Cap. 135, Secs. 12-16. 123
See MINING LAW. 3.

R.S.B.C. 1897, Cap. 135, Secs. 19 and 49. 511
See MINING LAW. 4.

R.S.B.C. 1897, Cap. 138, Sec. 82, r. 34. 408
See COAL MINES REGULATION ACT.

R.S.B.C. 1897, Cap. 138, Sec. 82, r. 34. 397
See COAL MINES REGULATION ACT. 2.

R.S.B.C. 1897, Cap. 144, Sec. 26. - 235
See MUNICIPAL LAW. 2.

R.S.B.C. 1897, Cap. 144, Sec. 45. - 276
See MUNICIPAL LAW.

R.S.B.C. 1897, Cap. 179, Secs. 3 (Sub-Sec. 24) and 49. - - - - - 42
See TAX SALE.

R.S.B.C. 1897, Cap. 190, Secs. 22, 27, 85, 87 and 89. - - - - - - 356
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R.S.C. 1886, Cap. 124, Sec. 4. - 461
See CONTRACT.

STATUTE OF FRAUDS — *Agreement for sale of land—Description of property—Latent ambiguity—Evidence to identify—Specific performance—Appeal—Introducing fresh evidence—Acquittal for perjury alleged to have been committed at civil trial—Proof*

STATUTE OF FRAUDS—*Continued.*

of not allowed on appeal in civil action.] B. on behalf of D. negotiated with C. for the purchase of C's property on the N. W. corner of Hastings Street and Westminster Avenue, Vancouver, and D. drew up a receipt for the part payment of the purchase price leaving the description blank for C. to fill in as he did not know the Land Registry description, but adding the description "N. W. cor., etc.," below the space reserved for C's signature. B. took the receipt to C. and paid him $10, and he filled in the blank description as lots 9 and 10, block 10, and signed the receipt. Lots 9 and 10, block 10, were on the North-East corner, and were not owned by C.; whereas lots 9 and 10, block 9, were on the North-West corner, and were owned by C. B. sued to have the agreement or receipt rectified or reformed so as to cover lots 9 and 10, block 9, and to have the agreement specifically performed:—*Held*, that it was the property on the North-West corner that the parties had in contemplation, and that C. filled in the wrong description either by mistake or fraud, and that the plaintiff was entitled to specific performance of the true agreement. BORLAND v. COOTE. - - - - - - 493

TAX SALE—*Assessment—Taxes—Assessment Act, R.S.B.C. 1897, Cap. 179, Secs. 3 (Sub-Sec. 24) and 49.*] The City of Nelson was incorporated in March, 1897, and in September, 1898, land situated therein was sold by the Provincial Assessor for taxes for the years 1896 and 1897, levied under the provisions of the Assessment Act:—*Held*, setting aside the tax deed, that there was no authority to hold the tax sale as the Assessment Act does not apply to municipalities. MCLEOD v. WATERMAN. (No. 2). 42

2.——*Certificate of title based on—Regularity of sale proceedings—Onus of proof—Land Registry Act, Secs. 13, 19 and 23.*] In an action for the recovery of land, a plaintiff who relies on a certificate of title based on a tax deed, is not called upon to prove the regularity of the tax sale proceedings until the defendant shews some title to the land in question. CARROLL v. THE CORPORATION OF THE CITY OF VANCOUVER. - 179

VANCOUVER INCORPORATION ACT, 1900—*Mandamus—Wholesale liquor license—Refusal of to Japanese.*] The Vancouver Licensing Board refused to consider an application for a wholesale liquor license because the applicant was a Japanese. An application for a *mandamus* was refused by

VANCOUVER INCORPORATION ACT, 1900—*Continued.*

IRVING, J. Applicant appealed to the Full Court, and at the time of the hearing of the appeal the personnel of the Board had been changed:—*Held*, that the Board should have considered the application regardless of the fact that he was a Japanese, but as the personnel of the Board had been changed, no order would be made. *In re* KANAMURA. 354

2.——*Sec. 133, Sub-Sec. 16—Laying sewer through private property—Compensation—Condition precedent.*] Before entering on land for the purpose of putting a sewer through it the City of Vancouver must compensate the owner of the land through which it is proposed to lay the sewer. ARNOLD v. THE CORPORATION OF THE CITY OF VANCOUVER. - - - - - - 198

VENDOR AND PURCHASER—*Agreement for sale and purchase made subject to the happening of a contingent event as a condition precedent—Liability of purchaser on voluntary promise to pay a debt of the vendor, the contingent event not having happened.*] Manley having recovered judgment for $542.50 against O'Brien, issued a garnishee order against Mackintosh and an issue having been ordered in which Manley was plaintiff and Mackintosh defendant, the trial Judge, WALKEM, J., held that the agreements (set out in the judgment of IRVING, J., *post* pp. 88 and 90) between O'Brien and Mackintosh, by virtue whereof the alleged indebtedness arose, did not comply with the Statute of Frauds, inasmuch as the parties had omitted to state therein the terms actually agreed upon, and decided the issue in favour of the defendant. Upon appeal to a Full Court constituted, by consent of the parties, of two Judges, IRVING and MARTIN, JJ., the appeal was dismissed, the Court in delivering opinions sustaining the decision of the trial Judge holding (1.) That the promise made by defendant and now sought to be enforced against him was *nudum pactum;* (2.) That the defendant O'Brien in the original action and Mackintosh, the defendant in the issue, in reality came to an agreement in ignorance of the fact that its performance in view of the conditions it was contingent upon, was impossible. MANLEY v. MACKINTOSH. - 84

VERDICT — *Inconsistent answers — Construction of.*] In construing a jury's verdict consisting of a number of questions and answers, the whole verdict must be taken

VERDICT—*Continued.*

together and construed reasonably, regard being had to the course of the trial. MARSHALL v. CATES. - - - - - 153

WAIVER—*Arbitration and award—Misconduct of arbitrator.*] A party to an arbitration does not waive his right to object to an award on the ground of misconduct on the part of an arbitrator by failing to object as soon as he becomes suspicious and before the award is made; he is entitled to wait until he gets such evidence as will justify him in impeaching the award. *In re* DOBERER AND MEGAW'S ARBITRATION. 48

WATER RIGHTS — *Decision of Gold Commissioner—Appeal from—Evidence on—Practice.*] The appeal under section 36 of the Water Clauses Consolidation Act from the decision of the Gold Commissioner is a trial *de novo*. ROSS v. THOMPSON *et al.* 177

2.——*Water Clauses Consolidation Act, Secs. 22, 27, 85, 87 and 89—Power company—Consolidation of records—Alteration of points of diversion—Effect of certificate of Lieutenant-Governor in Council.*] When a power company has submitted the documents specified in section 85 to the Lieutenant-Governor in Council, one of the purposes set forth in the documents being to alter the points of diversion mentioned in water records purchased by the company, and when a certificate has duly issued under section 87, approving the proposed undertaking, the power company is entitled under section 89, to have the said records amended, and is not bound to give fresh notices or submit to such terms as the Commissioner might impose, in ordinary cases, under section 27. *In re* WATER CLAUSES CONSOLIDATION ACT. - - - - - - 356

WILL—*Testamentary capacity—Undue influence—Delusions—Certificate of physician—Evidence—Costs.*] The best evidence of testamentary capacity is that which arises from rational acts and where the testatrix herself, without assistance, drew up and executed a rational will, medical evidence that she was mentally incapable of so doing will be rejected. Where one who benefits by a will procures it to be prepared without the intervention of any faithworthy witness, or anyone capable of giving independent evidence as to the testator's intention and instructions it will be regarded with suspicion and its invalidity presumed, and the onus is on the party propounding it to clearly establish it. Where a physician improperly

WILL—*Continued.*

gives a certificate as to testamentary incapacity of his patient it should not on that ground alone be rejected as evidence, if otherwise admissible, but the circumstances will affect the weight that should be attached thereto. Observations upon delusions and undue influence. *Held*, on the facts, that the will of the testatrix was valid, but that the codicil was obtained by undue influence, and probate thereof was refused. In the unusual circumstances the Court made no order as to costs. MCHUGH v. DOOLEY *et al.* - - - - - 537

WINDING UP—*Appearance to petition—Costs—Waiver—Rule 56 of Winding Up Rules.*] *Held*, that creditors and debenture holders who neglected to enter an appearance to a winding-up petition as required by r. 56 of the Winding Up Rules passed by the Judges on 1st October, 1896, but who appeared by counsel on the return of the petition which was dismissed with costs, were not entitled to costs. The fact that their counsel was heard without objection by petitioner's counsel makes no difference. IN THE MATTER OF THE WINDING UP ACT AND IN THE MATTER OF THE ALBION IRON WORKS COMPANY, LIMITED. - - - 351

2.——*Leave to proceed with action—Debenture holder—Judgments registered prior to winding up—Effect of.*] The fact that prior to a winding-up order judgments against the Company being wound up were registered, will not disentitle a mortgagee or a debenture holder of his right to obtain leave to proceed with an action to enforce his security. IN THE MATTER OF THE WINDING UP ACT AND IN THE MATTER OF THE GIANT MINING COMPANY, LIMITED. - - 327

YUKON LAW—*Order of reference—Jurisdiction of Court to make—Question of law and fact—Extra cursum curiæ—Co. Or. N.-W.T., 1898, Cap. 21.*] In an action in the Yukon Territory in which the question in issue was as to the true boundary between a creek and a hill claim, a reference to ascertain the boundary was ordered on the application of the plaintiff; the referee adopted a line run by a surveyor named Gibbons under instructions from the Gold Commissioner (after the location of plaintiff's claim) for the purpose of establishing an official boundary between the hill and the creek claims, and which cut off part of plaintiff's claim. On motion to the Court the report was confirmed and judgment entered accordingly:—*Held*, on appeal *per* WALKEM,

YUKON LAW—*Continued.*

J. (1.), that the Gibbons line was a nullity, and as the Court below adopted it and based its judgment upon it, that judgment must be set aside; (2.) The reference was a nullity, as it involved the determination of a mixed question of law and fact and was not a matter of "practice and procedure," but of jurisdiction; and it was beyond the power of the Court to order the reference even by consent. *Per* IRVING, J., allowing the appeal (following *Williams* v. *Faulkner and Kroenert* (1901), 8 B.C. 197), that the

YUKON LAW—*Continued.*

Yukon Court has no power to make an order of reference, and as the whole proceedings before the referee were founded on a mistaken idea of the jurisdiction to refer the doctrine of *extra cursum curiæ* did not apply. *Per* MARTIN, J., dissenting, that on the motion, to vary or refer back the report, which was dismissed, the substantial question in the action was disposed of and there was nothing properly open for the consideration of the Appeal Court. STEVENSON *et al.* v. PARKS *et al.* - - - - - - 387