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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

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

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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. PAULUS ÆMILIUS IRVING
THE HON. ARCHER MARTIN.
THE HON. AULAY MORRISON.
THE HON. WILLIAM HENRY POPE CLEMENT.

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

COUNTY COURT JUDGES:

HIS HON. ELI HARRISON,	Nanaimo
HIS HON. WILLIAM NORMAN BOLE,	Westminster
HIS HON. WILLIAM WARD SPINKS,	Yale
HIS HON. JOHN ANDREW FORIN,	West Kootenay
HIS HON. FREDERICK McBAIN YOUNG,	Atlin
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HIS HON. GEORGE FILLMORE CANE,	Vancouver
HIS HON. DAVID GRANT,	Vancouver
HIS HON. FREDERIC WILLIAM HOWAY,	Westminster

ATTORNEYS-GENERAL:

THE HON. FREDERICK JOHN FULTON, K. C.
THE HON. WILLIAM JOHN BOWSER, K. C.

MEMORANDA.

On the 14th of February, 1907, George Fillmore Cane, Barrister-at-Law, was appointed Judge of the County Court of Vancouver in the room and stead of His Honour Alexander Henderson, resigned.

On the 19th of May, 1907, David Grant, Barrister-at-Law, was appointed Junior Judge of the County Court of Vancouver.

On the 13th of January, 1908, the Honourable George Anthony Walkem, K.C., retired Judge of the Supreme Court of British Columbia, died at the City of Victoria.

On the 19th of April, 1908, the Honourable Montague William Tyrwhitt Drake, K.C., retired Judge of the Supreme Court of British Columbia, died at the City of Victoria.

On the 14th of October, 1907, Frederic William Howay, Barrister-at-Law, was appointed Judge of the County Court of Westminster, and a Local Judge of the Supreme Court of British Columbia in the room and stead of His Honour William Norman Bole, resigned.

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REPORTS OF CASES

DECIDED IN THE

SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY.

REX v. BRUCE.

FULL COURT

1907

Jan. 8.

REX
v.
BRUCE

Criminal law—Statements made to constable at time of and after arrest—Admissibility—Inducement—Appeal.

The constable when arresting the accused, said: "I arrest you for assaulting old man McGarvey," and proceeded to handcuff him. Accused asked to be permitted to go to the office to get some money, and inquired: "How much will the fine be?" to which the constable replied that he did not know anything about that. Subsequently the accused asked to have the handcuffs removed as he had no intention of escaping, to which the constable answered that he was taking no chances, and that he "had not much sympathy with a man who would kick an old man and bite him":—

Held, that these remarks of the constable were not an inducement to the accused to speak.

MOTION for leave to appeal from the ruling of HUNTER, C.J., in a criminal trial held before him and a jury at the Nelson Fall Assizes, on the 12th of October, 1906.

Statement

The accused and a man named McGarvey had a quarrel in which McGarvey sustained bodily injuries, subsequently contracting pneumonia and dying. Accused was charged with

FULL COURT
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murder, but was acquitted, and was then tried for committing an assault on McGarvey, occasioning actual bodily harm. The constable when arresting accused said: "I arrest you for assaulting old man McGarvey," and as he was placing the handcuffs in position, accused said, "I want to go to the office to get some money. How much will the fine be?" The constable said he did not know anything about that. On the way to the police quarters, some four or five miles from the place of arrest, accused asked to have the handcuffs removed, to which the constable replied that he was taking no chances that he "had not much sympathy with a man who would kick an old man and bite him." At the preliminary hearing, in answer to the usual question from the magistrate, the accused said, "It is just like a dream to me." Accused was committed for trial and while being taken to gaol, the constable, in the morning, told him McGarvey would die. While the constable was replacing the handcuffs after dinner (some 24 hours after arrest), accused asked the constable: "What do you think I will get?—about 15 years?" to which the constable replied that he did not know. Accused then said: "I had better get a lawyer; as I don't know anything about this business." The constable said: "I guess you had." At the trial, it was objected on behalf of the accused that this evidence was not admissible, the remarks of the constable, coupled with the placing on of the handcuffs, being in the nature of a threat or challenge to the accused to speak. The learned trial judge ruled that there had been no inducement, and held the evidence to be admissible. The learned judge charged the jury on this point as follows:

Statement

"With reference to the statements made to the constable, you heard the discussion that took place between counsel and the Court on the question of the admissibility of those statements. It is admitted that no caution was administered to the prisoner by the constable; all that took place, in short, was that the constable went and arrested him for assaulting old man McGarvey, and the prisoner answered, 'I want to go to the office and get some money, how much do you think the fine will be?' The constable answered, 'I don't know anything about fines.' Now there have been expressions of opinion by learned judges that where a man is charged with a criminal offence it is the proper thing for the constable to warn him; to tell him that anything he says may be used against him; and if that precaution is not taken by the constable some judges have gone so

far as to say to the Crown that they do not think it is proper to adduce that evidence. But so far as I am aware, I know of no decision saying it is the legal duty of the constable to administer that caution. This much is clear, that when a constable arrests a prisoner and states the charge as he should do, he is prohibited from questioning the prisoner; and if the prisoner is questioned by the constable and makes any answers, those answers are not to be used against him. The only statements which can be used are those made voluntarily by the accused without undue pressure or fear or inducement or threat. But, as I say, I know of no case that has gone the length of deciding positively that it is the duty of the constable to warn the accused that anything he says may be used against him, and if that warning is not given, anything the prisoner says is not admissible. I think the law is in this condition: that if the constable stands pat and says nothing and the prisoner makes a voluntary statement, that statement is admissible. I have so ruled, and of course as the law stands, you are bound to abide by any direction on the law I give you, but on the facts you are the sole judges. If I am wrong in that decision, the prisoner has a remedy by going to the Court of Appeal, and in the meantime you must take that as the law."

Statement

The appeal was argued at Victoria on the 8th of January, 1907, before IRVING, MORRISON and CLEMENT, JJ.

S. S. Taylor, K.C., for the prisoner: The mere fact of arresting the prisoner and putting on the handcuffs was an inducement to him to speak. He should have been warned. Prisoner was drunk the night before, and when called upon by the magistrate to make a statement he said, "it is just like a dream to me." After leaving the magistrate's court, he was informed that the man was going to die, when he asked the question, "What do you think I will get?" etc. Neither of these statements is admissible and should not have been received without a warning. The general principle governing is enunciated in *Rex* v. *Kay* (1904), 11 B.C. 157. An assertion applies equally with a question. The constable's first duty is to tell the accused that he has a warrant for his arrest, and as soon as he sees that the man is going to talk, to warn him. The Crown here has not relieved itself of the obligation to shew that this was a free and voluntary confession. There was no evidence that the accused was in the vicinity where McGarvey received his injuries.

Argument

Maclean, K.C., D.A.-G., for the Crown, was not called upon.

Per curiam: The question put by the accused, "How much

Judgment

FULL COURT
1907
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v.
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will the fine be?" is a strong inference that he was present when the injuries were inflicted. The rule as to cautioning is that before the Crown introduces statements by prisoners, the onus is on the Crown to shew that there has been no inducement given to make those statements. Here there was no inducement whatever, and the learned Chief Justice stated the point clearly. The application must be dismissed.

Application dismissed.

MARTIN, J.
1907
Feb. 5.
ROYAL BANK
v.
KIRK AND
RUMBALL

ROYAL BANK OF CANADA v. KIRK AND RUMBALL.

Promissory note—Bills of Exchange Act—Dom. Stat. 1890, Cap. 33, Sec. 48—Demand note—Notice of dishonour to indorser, whether necessary.

It is necessary before action to give notice of dishonour to an indorser of a demand note.

TRIAL before MARTIN, J., at Rossland on the 11th of December, 1906, of an action on a promissory note for $4,806.75.

A. H. MacNeill, K.C., for plaintiff Bank.
Hamilton, K.C., for defendant Rumball.

5th February, 1907.

MARTIN, J.: Judgment herein, as regards the defendant Rumball, was suspended in order to allow the plaintiffs' counsel an opportunity to hand in authorities supporting his contention that, despite section 48 of the Bills of Exchange Act, it is not necessary before action to give notice of dishonour to an indorser of a demand note. Since then the authorities have been submitted and considered by me, but I find they relate to the case of a maker and not an indorser, which is quite a different thing. Consequently I hold that notice was necessary and judgment, therefore, will be entered for said defendant. See also sections 50 (2) and 55 (2), and *May* v. *Chidley* (1894), 1 Q.B. 451 and *Roberts* v. *Plant* (1895), 1 Q.B. 597. As regards section 85 the case is not, in my opinion, within it on the facts.

Judgment

Judgment for defendant.

THE CORPORATION OF THE CITY OF VICTORIA v. BELYEA.

LAMPMAN, CO. J.
1906
Dec. 11.

FULL COURT
1907
Feb. 22.

CORPORATION OF VICTORIA v. BELYEA

Municipal law—Tax-imposing powers of Council—By-law, interpretation of —Description of class of persons taxed.

The effect of reprinting a municipal by-law was to alter the position of the last word in the first line of a section. The same word occurred five times in the section. An amendment was subsequently passed, intending the insertion of another word before the word so changed in position:—

Held, that the amendment should be placed and read in the position only to which it could sensibly relate.

A by-law provided for the taking out of a licence by every person using or following "any of the professions particularly described and mentioned in Schedule A." The profession of barrister or solicitor was not mentioned, but clause 27 of the by-law contained an omnibus provision that "every person following within the municipality any profession . . . . not hereinbefore enumerated" should take out a licence:—

Held (CLEMENT, J., dissenting), that this provision took in the professions of barrister and solicitor without any more definite description.

APPEAL from the judgment of LAMPMAN, Co. J., in an action tried before him at Victoria on the 16th of November, 1906, wherein the Corporation sued the defendant for taxes due by him to the Corporation for the years 1901 to 1905.

Statement

W. J. Taylor, K.C., and *Mason*, for plaintiff Corporation.
Belyea, K.C. (defendant), in person.

11th December, 1906.

LAMPMAN, CO. J.

LAMPMAN, Co. J.: The City sues Mr. Belyea for $72.50, being the amount of the barrister and solicitor tax alleged to be owing by him for the period from 15th January, 1901, to 15th July, 1905. The defendant admits that he has not paid the tax and that he was practising in Victoria as a barrister and solicitor during the period for which the taxes are claimed.

In the appeal proceedings in May last between the same parties, the same questions, save one, were argued before me, and in my judgment (dated 1st June) the points then raised were

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decided by me in favour of the Corporation, and I see no reason to alter the opinion I then formed. [(1906), 12 B.C. 112]. In my former judgment I referred at length to the statutes and by-laws affecting the question, and so do not now set them out.

Mr. *Belyea* now argues that By-law No. 393 of 1902, amending By-law No. 321 of 1900, does not fix a licence tax to be paid by barristers and solicitors. Section 27 of the original By-law No. 321, as passed by the Council, is as follows:

"27. From every person following, within the Municipality, any profession, trade, occupation or calling, not hereinbefore enumerated, or who enters into or carries on any profession, contract or agreement to perform any work or furnish any materials, $5.00 for every six months. Provided always, that no person employed as a journeyman, or for wages only, and not employing any other person or persons, shall be subject to the provisions of this section."

In it, it will be seen that the word "any" where it first occurs is in the second line of the section. For use at the city hall there is a printed book of by-laws, and in it the number of words to the line is not the same as in the original; in it in the section in question, the word "any" first occurs in the first line instead of in the second line as in the original.

In amending the By-law No. 321 in 1902 by section 7 (*c.*) of No. 393 the word "profession" is added after the word "any" in the first line of the original by-law, but as the word "any" does not occur in the first line, Mr. *Belyea* argues that the amendment is bad. The mistake probably occurred by reason of the Council not using the original copy in making the amendment. The solicitor for the City contends that it is clear what was meant, and that the amendment must be given a reasonable construction; and he cites *Esquimalt Water Works Co.* v. *Victoria* (1904), 10 B.C. 193; *Ex parte Walton* (1881), 17 Ch. D. 746; *Mersey Steel and Iron Company* v. *Naylor* (1882), 9 Q.B.D. 648 and *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627.

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Now, it is well-settled that legislation will not be held to be meaningless or absurd unless the language used is absolutely unmanageable, and also that mere want of skill on the part of the draftsman will not be allowed to prejudice the rights of the parties. In *Kruse* v. *Johnson* (1898), 2 Q.B. 91, Lord Russell of Killowen, C.J., said that municipal by-laws should be "benevo-

lently" interpreted. But even giving the Corporation the benefit of a benevolent construction, I think Mr. *Belyea's* contention must prevail. If the word "any" occurred only once in the section, there would be no difficulty in giving the amendment the meaning probably intended, but it occurs three times; and if the word "profession" were added after it where it occurs the second time, it is not beyond reasonable argument that the amendment would be sensible. It is the element of doubt and uncertainty which makes the amendment bad. The plaintiff Corporation is entitled to judgment for $37.50, being amount of licence payable for three quarters before the amendment of 1902. The plaintiff only asks for court fees and disbursements, so no costs other than those will be taxed.

The appeal was argued at Victoria on the 28th of January, 1907, before IRVING, MARTIN and CLEMENT, JJ.

W. J. Taylor, K.C. (*Mason*, with him), for appellant (plaintiff Corporation): The registered copy of the by-law is correct and is binding on all persons: section 86 of Cap. 32, 1906. See also *Esquimalt Water Works Co.* v. *Victoria* (1904), 10 B.C. 193; *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627 and *Rex* v. *Vasey* (1905), 2 K.B. 748. The obvious meaning was to impose a tax, and the difficulty of the learned County Court Judge is not insurmountable, because the amendment would not convey any intelligible meaning except in the place in the section where it has been put. He also cited *Mersey Steel and Iron Company* v. *Naylor* (1882), 9 Q.B.D. 648 at p. 660.

Argument

Peters, K.C., for respondent (defendant): The evidence is that there was an original by-law signed by the Mayor, under the seal of the Corporation, and in the document the word "any" is in the second line. That document must be the original. If the word "any" occurred only once in the section, there would be no difficulty; but it occurs four times. The Courts cannot correct an error made by the Council. There must be a by-law specifically mentioning the person to be taxed. Here the decision as to who is taxable is left to the discretion of the collector. The Council must decide who is a professional man, and must do so in a by-law.

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Taylor, in reply: "Profession" is used in the by-law as an omnibus term, and it is a question of fact who is a professional man.

Cur. adv. vult.

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22nd February, 1907.

IRVING, J.: This is an appeal from His Honour Judge Lampman, who came to the conclusion that the by-law of 1902 amending the by-law of 1900 was so uncertain that he was unable to say that a tax was thereby imposed upon the defendant or any other person following a profession within the municipality. The by-law of 1900 (paragraph 27) imposed a tax upon every person following within the municipality any trade, occupation or calling, but nothing was said as to those carrying on a profession. In 1902 paragraph 27 was amended by adding after the word "any" in the first line in such paragraph the word "profession"; the intention being to bring within paragraph 27 every person following within the municipality any profession, trade, occupation or calling.

On the point upon which the learned County Court Judge decided this case no trouble arises at all if you turn to the copy of the by-law as printed in the consolidation prepared by the city solicitor in 1901, nor if the copy of the by-law filed with the Registrar of the County Court pursuant to section 22 of the Municipal Act of 1902 (now section 86 of 1906) is looked at; but if you refer to another copy of the by-law (also a legally recognized copy) you will find that there is no word "any" in the first line. In this last copy the word "any" is the first word of the second line. It is this last mentioned copy that causes the difficulty. The defendant produced this last mentioned edition and argued that no effect could be given to the amendment of 1902 on account of this element of doubt and uncertainty. With that argument I cannot agree. According to a legally recognized copy of the by-law, that is to say, the copy filed with the Registrar, the last word of the first line is "any." If the amendment of 1902 is read in connection with this legally recognized copy then the amendment of 1902 is sensible. Why the copy to which the amendment does not apply should be preferred I cannot imagine.

IRVING, J.

In *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627 at p. 634, Lord Hobhouse said in giving judgment in the Privy Council:

"It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used."

And in the case of *Rex* v. *Vasey* (1905), 2 K.B. 748, where it was argued that the Court should endeavour to give some meaning to the section, and should not allow the error of the draftsman to destroy the clear intention of the Legislature, the Court of Crown Cases Reserved consisting of Lord Alverstone, C.J., and Wills, Kennedy, Channell and Bucknill, JJ., agreed that that argument must prevail. Wills, J., said:

"Nobody, I think, who considers the enactments in question as a whole, can doubt that such was the intention of the amending section, and, if so, something must be cast aside in order to make sense of the earlier section as amended. It matters little which words go, so long as the obvious meaning is preserved."

I think the amendment of 1902 may be expanded by inserting the following words "according to the copy filed in the County Court office."

In support of the judgment Mr. *Peters* contended in addition to the point just disposed of that there was no tax imposed at all. His argument was this: by the by-law of 1890, as amended in 1902, licences were to be taken out by every person using or following within the limits of the Corporation of the City any of the professions "particularly described and mentioned" in Schedule A. hereto. Now in Schedule A. which of course is not an enacting part of the by-law, the profession of barrister or solicitor was not particularly described or mentioned. These professions were not mentioned or described at all, but instead a sweeping clause, 27, was introduced. Section 27 is as follows: "For every person following within the Municipality any profession, trade, occupation or calling, not hereinbefore enumerated," etc. His contention was that that was not sufficient and that as there was no profession particularly described or mentioned by clause 27, therefore there was no tax. It seems to me that the general expression in 27 was sufficient. I rely on the authorities above cited.

IRVING, J.

I would allow the appeal.

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MARTIN, J.: With respect to the first point, *viz.*: the sufficiency of the amendment of 1902, the only difficulty experienced by the learned County Judge was the appearance of the word "any" more than once in the section. But this difficulty is more apparent than real because the amendment could, having regard to the context, manifestly only sensibly relate to that first word "any" which it is obviously aimed at. Therefore on the principles enunciated in the cases cited the Court should give effect to said amendment. In so doing we are not going so far as we did in *McGregor* v. *Canadian Consolidated Mines* (1907), 12 B.C. 373.

Then as to the second point, that there is no by-law authorizing this tax. This contention is based on the fact that though section 2 of the by-law states that "every person using or following within the limits of the Corporation of the said City, any of the trades, occupations or professions particularly described and mentioned in Schedule A. hereto, shall take out a periodical licence therefor," etc., yet none of the various professions is "particularly described or mentioned" in the schedule, the mere direction in section 27 of the schedule that "every person following any profession" shall pay the specified tax is urged to be an insufficient exercise of the power because the particular description is not satisfied by general language embracing all professions.

MARTIN, J.

A perusal of the schedule shews that it deals with many different trades and callings and imposes, as might be expected, fees of varying amounts to meet the circumstances, some being high and some low, and after a particular specification in section 27 there is an omnibus clause to cover all trades, occupations and callings "not hereinbefore enumerated." Now to me at least it is quite clear that no tradesman, for example, could escape taxation under this clause on the ground that he was not "particularly described" in the preceding sections, even though the clause is a precautionary one and based on the fact that it is difficult if not impossible to enumerate or foresee all occupations and hence to describe them. Likewise I see no necessity where a whole class is to be taxed of describing its various branches. The manifest intention here is to tax the professional class as a whole

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and if the section had said, *e.g.*, "members of the learned professions" that would have been clearly a sufficient "particular description," and it is not, in my opinion, the less so because it simply says all "professions" which includes the learned. As to what may be included in the word "profession," that like many other things mentioned in the schedule must be determined as a fact should the question arise. Seeing that the section places all professions on the same footing, it would be as useless as superfluous to name each one separately and yet charge the same fee in each case. It is, in short, only necessary to "particularly describe" any person when it is necessary to distinguish him from others.

The appeal should be allowed with costs.

CLEMENT, J.

CLEMENT, J.: I am not much impressed with the difficulty which the learned County Court Judge seems to have found as to the insertion of the word "profession" in clause 27 of Schedule A. of the by-law in question. The only word "any" after which it could be inserted so as to make sense, is the word "any" where it first occurs in the clause, and I think that without doing violence to any recognized rule of construction we may treat it as inserted there.

I agree, however, with the view contended for by Mr. *Peters* that the City has not succeeded in passing a by-law to tax the defendant's profession. Clause 2 of the by-law itself says that "every person using or following . . . . any of the trades, occupations or professions particularly described and mentioned in Schedule A. hereto shall take out" a licence for which a certain sum is to be paid. The schedule after enumerating a number of trades, occupations, etc., contains a clause, 27, covering "every person following within the Municipality any profession, trade, occupation or calling not hereinbefore enumerated." If the defendant's profession has been made legally liable to taxation it must be under this clause 27 of the schedule, and it seems to me that it would be doing violence to the English language to say that in the words I have quoted the defendant's profession is "particularly described and mentioned." I quite appreciate that if my view be sound clause 27 of the schedule is inoperative.

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I think it is. If the Council desired to put out a residuary drag net I think that (clause 2 of the by-law standing) they could only do it by a substantive section in the by-law itself.

For this reason I would dismiss the appeal.

Appeal allowed, Clement, J., dissenting.

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March 2.

FERNIE v. CROW'S NEST PASS E. L. & P. Co.

CITY OF FERNIE v. CROW'S NEST PASS ELECTRIC LIGHT AND POWER COMPANY, LIMITED.

Municipal law—Trades licences—By-law, registration of under section 86, Municipal Clauses Act, B.C. Stat. 1906, Cap. 32—Certiorari.

A municipal by-law, providing for the imposition of a licence "for every six months" was passed and registered on the 18th of September, and the time limited for the expiration of the first licence thereunder was fixed for the 15th of the ensuing January. There was no provision made for the period of time between the passage of the by-law and the 15th of January:—

Held, that a conviction of defendant Company for carrying on business on or about the 4th of December intervening, without having taken out a licence under the by-law, was bad, in that section 1 of the by-law could apply only to a six months' licence for which a six months' fee had been paid:—

Held, further, that the copy of the by-law deposited for registration, having impressed upon it the seal of the Municipality, that was sufficient, and that it was not necessary to affix the seal to the certificate of the municipal clerk, authenticating the by-law.

Statement

APPLICATION by way of *certiorari* to quash a conviction of the Crow's Nest Pass Electric Light and Power Company, Limited, for carrying on in the City of Fernie the business of a waterworks company without having obtained a municipal licence therefor as required by the Trades Licence By-law of the City. Heard before CLEMENT, J., at Nelson on the 1st and 2nd of March, 1907.

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Sub-paragraph 29 of paragraph 1 of such by-law reads, "Every waterworks company shall pay the sum of fifty dollars for every six months." The by-law was passed on the 18th of September, 1906, and was registered under the provisions of section 86 of the Municipal Clauses Act, B.C. Stats. 1906, Cap. 32. On the 5th of February, 1907, the Company was convicted before W. H. Whimster, police magistrate of Fernie, "for that the said Crow's Nest Pass Electric Light and Power Company, Limited, on or about the 4th day of December, 1906, at the City of Fernie, B.C., did carry on the business of a waterworks company without having taken out and having granted to it, the said Crow's Nest Pass Electric Light and Power Company, Limited, a licence in that behalf, contrary to the form of the statute in such case made and provided and the Trades Licence By-law, No. 37, of the said City of Fernie, called Trades Licence By-law, 1906, passed thereunder." The Company then moved by way of *certiorari* against this conviction.

Statement

W. A. Macdonald, K.C., opposing the motion, took the preliminary objection that the affidavit of service of the notice of motion does not shew that W. H. Whimster, upon whom the notice was served, is the same person as W. H. Whimster who made the conviction.

[CLEMENT, J.: The conviction was made by W. H. Whimster, police magistrate of Fernie. The affidavit of service shews that the notice was served on W. H. Whimster, police magistrate of Fernie. I think I must hold that the affidavit sufficiently establishes the identity.]

Argument

S. S. Taylor, K.C., for the Company: It is submitted that no by-law has been proved, and without a by-law there can be no conviction, as the statute does not by itself establish any specific licence fee. The evidence shews that the copy of the by-law registered did not have a copy of the seal of the Municipality. Under section 86 of the Municipal Clauses Act, the original by-law should be sealed, the copy to be registered should contain a copy of that seal and that copy should be certified by certificate sealed with the seal of the Corporation. The case *Re Kwong Wo* (1893), 2 B.C. 336, is distinguishable because in the statute of

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1892, Cap. 33, Sec. 206, the words "as therein specified" are replaced in section 117 of the present Act by the words "as may be imposed under this section." See also *Corporation of Victoria* v. *Belyea* (1906), 12 B.C. 112.

[CLEMENT, J.: It certainly would seem that a by-law is necessary, but I think that this by-law was properly registered.]

The by-law under which this conviction was made cannot support the conviction in any event. This by-law was registered on the 18th of September, 1906, and the time limited for the expiration of the first licence was therein fixed for the 15th of January, 1907, which date is also fixed by section 178 of the Municipal Clauses Act. There is no power to fix a shorter period than six months and no authority to provide for a reduced licence fee for a broken period.

Argument

Macdonald: Under the circumstances the by-law could not provide for a six months' licence between the time of the by-law coming into force and the 15th of January following, and there is nothing in the Act to prevent the Municipality from receiving a smaller sum for the fractional part of the first six months for the period between the registration of the by-law and the first statutory date. The Act does provide (section 178) that such fractional sum shall not be taken from a trader commencing business after the by-law comes into force, but this is the only restriction in this respect. Aside from the question of whether the by-law is effective for the period in question, section 179 creates a penalty for parties carrying on business without a licence, and the onus is cast on the party carrying on business to obtain a licence or suffer the penalty. "It is his duty to take out and pay for a licence": *Re Kwong Wo* (1893), 2 B.C. 336 at p. 340; *Poole* v. *Victoria* (1892), 2 B.C. 271.

Judgment

CLEMENT, J.: I think the conviction in this case must be quashed. In my opinion, no prosecution can be had against traders in any municipality until a by-law has been passed fixing the amount required for licence for the various trades. The by-law put forward here seems to make no provision for the period between the date of its passage and the 15th of January; in fact I am not at all sure that the difficulty does not arise on the

statute itself; but at all events, and as to this Company, section 1 of the by-law clearly can apply only to a six months' licence for which a six months' fee has been paid; and no such licence could have issued to the Company covering the period within which the offence is alleged to have been committed. The Company are entitled to their costs, and the magistrate will of course be protected.

As I intimated during the course of the argument I think the by-law in this case has been properly registered within the meaning of section 86. There is no requirement under that section that the clerk's certificate should be under the seal of the Municipality. Three things seem to be required; first, that the true copy should be written or printed; second, that it should be certified by the clerk; and third, that it should be under the seal of the Municipality. In this case the document filed has impressed upon it the seal of the Municipality, and I think that impress is both a sufficient copy of the impress upon the original by-law and the seal of the Municipality for the purpose of authenticating the copy registered.

Judgment

Conviction quashed.

HUNTER, C.J.

1907

March 18.

MACLEOD v. McLAUGHLIN.

Verdict, general, special—Right of jury to return a general verdict if they choose—Direction to jury.

MACLEOD v. McLAUGHLIN

If either party asks that the jury return a general verdict, then the jury must do so unless they are unable to agree.

TRIAL before HUNTER, C.J., and a special jury at Vancouver from the 12th to the 18th of March, 1907.

Before the charge to the jury his Lordship stated that he proposed submitting certain questions to the jury and their form was agreed to by the counsel. Then counsel for the plaintiff asked for a direction to the jury to return a general verdict. Counsel for defendant objected and urged that the jury had a right to return a general verdict if they chose, but that they should not be directed to do so.

Statement

[HUNTER, C.J.: In *Mayor and Burgesses of Devizes* v. *Clark* (1835), 3 A. & E. 506, it is stated that the jury may stand on their right to return a general verdict, but in addition to that it is the right of either of the litigants to have a general verdict.]

A. D. Taylor, and *Garrett*, for plaintiff.
Davis, K.C., and *W. J. Whiteside*, for defendant.

HUNTER, C.J. [to the jury]: I think that is all that it is necessary for me to say, except with reference to the question of a general verdict. As I understand the law on this question, it is in this condition at the present time. The custom has been established for a long time for the Court to submit special questions to the jury in the majority of cases. The object of that is to see whether or not the jury understand the issues, and to bring before their minds a little more clearly if possible what the issues are, and in that way to make certain that they have considered them. But while it is the custom of the Court to submit special questions to the jury with the request that they

answer them if possible, if either of the parties asks that the jury return a general verdict, that is to say, a verdict generally, for either one party or the other, then the jury must do so under the existing state of the law, unless of course they are unable to agree. So you understand the situation—you are not compellable to answer these questions. You can take the position that the matter is too complex and intricate, or if you are not satisfied on the evidence one way or the other on any one of these questions you need not answer it, but you should if possible return a general verdict for either the plaintiff or the defendant. If you return a general verdict for the plaintiff, then state the amount of damages, and tell me under what head, and fix the damages from the three different points of view, so that I will know, if judgment ought finally to be entered for the plaintiff, what damages the jury think should be given. If, on the other hand, as I have told you, you consider (the onus is on the plaintiff to make out his case) the plaintiff has failed to make out his case, you will return a general verdict for the defendant.

Verdict for defendant.

HUNTER, C.J.

1907

April 9.

CHANG v. CULLEY

CHANG SHEE HO CHONG v. CULLEY *ET AL.*

Practice—Indorsement on writ—Statement of claim setting up different cause of action—Directions—Discretion.

The indorsement on the writ asked for the delivery up and cancellation of a certain document, dated the 24th of April, 1906. The statement of claim, when delivered, shewed in effect that the document sought to be declared void was dated the 20th of September, 1906, and was of a different purport:—

Held, that the indorsement was defective and erroneous, but that it might be amended and redelivered on payment of costs.

Statement

APPLICATION on a summons for directions, to strike out plaintiff's statement of claim as going beyond the indorsement on the writ, heard before HUNTER, C.J., at Chambers, in Vancouver on the 26th of March, 1907.

Pugh, for plaintiff.
Woodworth, for defendant.

9th April, 1907.

HUNTER, C.J.: This is an application to strike out the statement of claim on the ground that it sets up a wholly different cause of action from that indorsed on the writ.

The claim indorsed is "to have a certain document purporting to be an assignment in favour of the defendant Emma Culley of a certain agreement for the sale of lots 3 and 4 in block 63, subdivision of district lot 181, in the said City of Vancouver, dated the 24th day of April, 1906, declared to be null and void and to have the same delivered up and cancelled and for a *lis pendens*."

Judgment

On turning to the statement of claim it appears that it is not the document mentioned in the writ which is desired to be declared void: on the contrary a declaration is asked that the plaintiff is the purchaser of and entitled to the lands mentioned in and by virtue of the document; but the document which in effect it is asked to be declared void is dated September 20th, 1906, by which the defendant Culley is alleged to have resold

the property to her co-defendants in violation of the plaintiff's rights.

It will thus be seen that the indorsement is both defective and erroneous; defective in that it does not shew by what right (*e.g.*, as purchaser) the plaintiff claims the declaration; and erroneous in that it asks the wrong document to be declared void. It is true that the indorsement is not required to state all the material facts which make up the cause of action, but it should contain enough to identify it and enable the defendant to know why he is being sued and therefore whether he should yield or resist.

However, I do not think, as the matter comes up under the general summons for directions, that it is incumbent on me to grant the application in terms, as that would only involve unnecessary delay and expense; but I think the justice of the case will be met by ordering that if the indorsement is amended and redelivered within five days the statement of claim shall stand, otherwise to be struck out without further order, plaintiff to pay the costs of the amendment and of this application in any event and the time for delivery of defence to run from the redelivery of the amended writ.

Judgment

Order accordingly.

HUNTER, C.J.

1906

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Feb. 22.

McMEEKIN v. FURRY

McMEEKIN v. FURRY *ET AL.*

Contract—Sale of mineral claims—Interest in and division of proceeds. Statute of Frauds—Signature, sufficiency of—What constitutes—Party to be charged, description of—Mineral Act, R.S.B.C. 1897, Cap. 135, Secs. 50 and 130.

Oliver Furry located certain mineral claims under an arrangement made in 1898 with one L. J. Boscowitz on a basis of Furry having a non-assessable half-interest. Certain claims known as the "Queen," "Empress" and "Victoria" were located by Furry pursuant to this understanding. When the memorandum of the arrangement of 1898, and a further memorandum conveying a half interest in the claims, was being drawn up, Boscowitz, at the request of Furry, signed the firm name of "J. Boscowitz & Sons." The latter memorandum, made in May, 1899, was recorded with the mining recorder in April, 1901.

Section 50 of the Mineral Act provides that transfers of mineral claims, or interests therein shall be in writing, signed by the transferror, or his agent authorized in writing, and recorded with the Mining Recorder, and if signed by an agent, the authority of such agent shall be recorded before the record of such transfer.

In June, 1900, Boscowitz and Furry, after a consultation relative to handling and controlling the property generally, went together to a solicitor who drew up a document allotting to Furry a one-fifth interest in the claims already mentioned along with certain other claims, in lieu of the half interest previously arranged upon. This document was signed by L. J. Boscowitz but not by Furry:—

Held, on appeal, *per* IRVING, J., that the document of May, 1899, was a conveyance of a one-half interest in the claims mentioned therein to Furry.

Per MARTIN, J.: That in signing the name "J. Boscowitz & Sons," there was no element of mistake on the part of L. J. Boscowitz, who thereby gave a deliberately incorrect signature which had no legal effect as regards those it purported to bind, and consequently no interest in the mineral claims was conveyed to Furry.

Per CLEMENT, J.: The Statute of Frauds and section 50 of the Mineral Act were a fatal bar to the enforcement of the document of June, 1900, reducing Furry's interest to a one-fifth; while, on the other hand neither of them stood in the way of the enforcement of the document of May, 1899, conveying to Furry a one-half interest in the three claims therein mentioned.

Judgment of HUNTER, C.J., varied, and Furry declared to have a half interest.

APPEAL from the judgment of HUNTER, C.J., in an action

tried before him at Vancouver on the 28th, 29th and 30th of May, 1906.

The action was for a declaration as to what interest in the proceeds of the sale of certain mineral claims the plaintiff and defendants were entitled to respectively, the defendant Furry claiming an undivided one-half interest in the Empress, Queen and Victoria mineral claims, or the proceeds of the sale of the same, while the defence set up was that he was entitled only to a one-fifth of the proceeds of the sale of said claims together with an additional claim called the Barbara fraction. On the facts at the trial it was declared that Furry was entitled to 20 per cent. of the proceeds of sale.

Davis, K.C., and *Marshall*, for plaintiff.
Martin, K.C., and *Craig*, for defendant Furry.
L. G. McPhillips, K.C., for defendant Turner.
Bowser, K.C., for defendants Boscowitz.

19th November, 1906.

HUNTER, C.J.: This is an action for a declaration of the Court as to what interests in the proceeds of sale of certain mineral claims the plaintiff and defendants are respectively entitled, the Furry estate claiming an undivided one-half interest in the Empress, Queen and Victoria mineral claims, or their proceeds; while it is alleged on the contrary that it is only entitled to a fifth of the proceeds of sale of these claims together with another claim called the Barbara fraction.

At the trial the only question about which I was in doubt was the question of fact, namely, as to whether Oliver Furry had exchanged his undivided one-half interest in the Victoria, Queen and Empress claims, for an undivided fifth interest in those claims together with the Barbara fraction.

According to the testimony of David Boscowitz, he was present at an interview between his brother Leo and Furry, at the Commercial Hotel, Vancouver, in 1900, in which Leo agreed to give Furry a 20 per cent. interest in the three original claims and the Barbara fraction and three or four other claims in lieu of Furry's half interest in the three original claims; that the reason for this arrangement was that, as Leo told Furry, he

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could not sell the claims in the position they were; that Furry agreed to this arrangement; that they then went to the office of Davis, Marshall & Macneill; that Mr. Weart, who was then a clerk in that office, and his brother talked the matter over, and that Mr. Weart drew the document of June 2nd, 1900; that it was shewn to Furry, and that Leo signed it in Furry's presence; that the document was in duplicate, but that he does not recollect whether it was signed in duplicate; that Furry took one away with him; that he then departed, leaving Leo and the witness in the office.

Mr. Weart, who became solicitor *pendente lite* for Furry, being cross-examined would not contradict a statement which was taken by Mr. *Bowser* of his intended evidence before he became solicitor for Furry, to the effect that Leo signed the document in the presence of Furry and himself, and that Furry made no objection to it; and also admits that the document was shewn to Furry either by Leo or himself, therein corroborating the last witness; and that Furry made no comment about it. Again, he says he is inclined to think that the original was handed to Furry, but whether by Leo or himself he could not say. On being re-called, he further testified that he explained to Furry that he was getting a 20 per cent. interest under the declaration of trust; and that Leo was retaining to himself the right to dispose of the claims if he saw fit and give him 20 per cent. net of the purchase moneys.

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Leo Boscowitz says that he sent for Furry in June, 1900, to reduce his one-half interest in the three claims, and to substitute a one-fifth interest in these claims together with the Barbara fraction, and any other fractions that comprised the Empress group; that he explained to him that he could not otherwise handle the sale of the property; that after talking it over with him for two days, they went with his brother to Mr. Weart to have the document prepared; that after instructing him they came back in about an hour and a half; that he signed it in duplicate; that Mr. Weart witnessed it; that Furry put one in his pocket and he kept the other; that he explained to Furry that he was making the same arrangement with him that he had made with Turner in the case of the Britannia group (a neigh-

bouring group of claims); that after making this arrangement with Furry he gave Walters a 20 per cent. interest in the proceeds, his brother 20 per cent., Seifert 15 per cent., Turner 12½ per cent., and kept the remaining 12½ for himself. He denies having undertaken with Furry to build a trail up South Valley to the claims, although he admits there was some conversation on that subject, and explains that one reason why he could not agree to do that was because it was not certain that that was the best way to get in to the claims.

Cross-examined about the circumstances surrounding the documents of the 10th of November and the 20th of May, as well as his recollection of Furry's testimony in discovery, he became involved in numerous contradictions and gave unsatisfactory evidence, but I think this was not done with any desire to mislead the Court, but rather in part to inability to pay attention to the questions, and partly to his being obsessed with the idea that the document of the 2nd of June, 1900, settled the question so far as he was concerned, and that nothing else in the case was of any consequence.

The next witness, Turner, says that he knew Furry about 12 years; that he was interested with him in the Britannia group of claims; that he had a conversation with him in June, 1900, in which Furry stated that he had been up to Mr. Weart with the Boscowitz brothers to get his interest reduced from 50 per cent. to 20 per cent.; that he was to get an interest in the Barbara fraction and anything else included in the Empress group; that he had only done the same as the witness had done in the case of the Britannia group; and that he had taken the document from Mr. Weart's office.

In cross-examination, this witness admits that he was in Mr. *Martin's* office for the purpose of informing him what evidence he could give; that he said nothing about Furry's statement as to reducing his interest; and that it was only on the eve of the trial that he warned Mr. *Martin* not to call him as a witness, and he gives no explanation why he had not informed Mr. *Martin* of this conversation with Furry. The witness, however, claimed that it would not make much difference to him how the

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suit was decided, as he had interests which the purchasers would have to buy in any event.

According to the testimony of Furry given in discovery (Furry died insane shortly afterwards, and before the trial, and I will assume that his evidence is admissible, although it was objected to), it is clear that there were negotiations between himself and Leo Boscowitz regarding the proposed exchange, but Furry says that the agreement was conditioned upon the latter building a trail up South Valley. He denied being at Weart's office, or that he took or accepted any document shewing that he was entitled to a 20 per cent. interest, but said that Leo Boscowitz read him over a paper containing something about the Barbara fraction and, he thinks, the other claims; that on Leo saying that he would take the papers down to the Britannia office, he replied that he could take them where he liked, that he did not want them; that they went to the Britannia office and that Leo told a man there that he would "leave these papers for Furry," to which he, Furry, said nothing because he thought it might make a row. He admits that there was a deal on to reduce his interest, but he says he did not agree to anything except that if the trail was built he might have taken the 20 per cent. interest.

It will thus be seen that all the witnesses to this controversy are interested witnesses, and therefore I must take into account the inherent probabilities of the case. It is, in the first place, in the highest degree unlikely that Boscowitz would have entered into such an agreement as alleged by Furry, that is to say, that he was to go to the expense of building this trail on the verbal promise of Furry that he would accept a reduction of his interest. It is, moreover, undeniable that just such a reduction of Turner's interest in the Britannia group occurred to the knowledge of Furry. He was an illiterate man, without any means or any access to capital, while Boscowitz had; it would have been difficult, if not impossible, for anyone to interest capital in these claims unless he could hand over a controlling interest; and at the time of the alleged reduction of interest the value of the claims was of a highly speculative character.

The document of the 2nd of June, 1900, was in fact drawn up

and was, I find, taken away by Furry after it was signed by Boscowitz, and there is no independent evidence to shew that it had ever left his possession, and I am unable to see how his insisting that the escrow of 1903 should be drawn up so as to shew that he still retained his original interest can be relied on to shew that he had not accepted the interest thus created in 1900. Nothing short of prompt disclaimer would have prevented that interest from vesting in him as from the delivery of the document. Of course, it may be that his reason for insisting on the escrow being drawn up so as to shew that he still retained his original interest was that he conceived that the failure to build the trail entitled him to repudiate the transaction of the 2nd of June, but as to that, obviously his only remedy, if he had any, was by action.

Mr. *Martin* contended that Furry already had a legal interest in the claims, and that before he could be held to have surrendered it for a different interest, some writing by him would have to be produced and proved. The short answer to this is that Furry had no legal interest; that he had only a right in equity to a conveyance of the half interest under the agreement of the 20th of May, 1899, and as already intimated, I think the weight of evidence preponderates in favour of the view that he accepted the declaration of trust of the 2nd of June, 1900, in substitution of the obligation which was created by the document of the 20th of May.

There will therefore be a declaration that Furry's estate is entitled to 20 per cent. of the proceeds of sale. Other questions reserved.

The appeal was argued at Vancouver, before IRVING, MARTIN and CLEMENT, JJ., on the 29th, 30th and 31st of January, 1907.

Martin, K.C., for appellant (defendant Furry): We submit that the learned trial judge has given the plaintiff judgment for something he never asked for, and made us pay the costs. His Lordship also charged us up with the costs of a partner with whom we had no dispute.

Argument

We say it is not permissible to change the agreement of the 20th of May, except by another document, as this is an agreement

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respecting land, and we are unable to find a case where an agreement which, by the Statute of Frauds must be in writing, can be varied verbally: *Marshall* v. *Lynn* (1840), 6 M. & W. 109; *Stowell* v. *Robinson* (1837), 3 Bing. N.C. 928; *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58; *Sanderson* v. *Graves* (1875), L.R. 10 Ex. 234; Chitty on Contracts, 14th Ed., 113; Leake, 5th Ed., 566; *Hoofstetter* v. *Rooker* (1895), 22 A.R. 175 at p. 189, (1896), 26 S.C.R. 41.

As to the question of signature, that referred to in the statute is not necessarily the man's own signature. It has been held that a mark or a figure is good, so long as the person signing puts it there as his own signature: *Durrell* v. *Evans* (1862), 1 H. & C. 174; *Torret* v. *Cripps* (1879), 27 W.R. 706; *In the Goods of Susan Glover* (1847), 11 Jur. 1,022; *In the Goods of C. Redding* (1850), 14 Jur. 1,052; *Pryor* v. *Pryor* (1860), 29 L.J., P. 114; *In re the Goods of William Olliver* (1854), 2 *Spinks*, 57; *Lobb* v. *Stanley* (1844), 5 Q.B. 574.

Argument

Davis, K.C., for respondent (plaintiff): The strongest case shewing the reasons which will move the Court of Appeal to interfere with the decision of the trial judge is *Montgomerie & Co., Limited* v. *Wallace-James* (1904), A.C. 73 at p. 83. See also *Camsusa* v. *Coigdarripe* (1904), 11 B.C. 177 at p. 192; *Colonial Securities Trust Company* v. *Massey* (1896), 1 Q.B. 38 at p. 40. There was no enforceable interest existing in Furry on the 2nd of June. The document of the 20th of May, 1899, was not recorded by the recorder on the 2nd of June, 1900.

[CLEMENT, J.: You start out with an admission of a 50 per cent. interest.]

No; we state in the pleadings what the fact is. As to an interest in a mineral claim not being an interest in land, see *Wells* v. *Petty* (1897), 5 B.C. 353.

On the principle that the Statute of Frauds cannot be used as a cloak for fraud, the evidence shews that he spent several thousand dollars on these claims, and when he got them into a position in which he could find a buyer for them, then this man says "I will set up the Statute of Frauds." This the Court will not permit: *In re Cooke's Trustee's Estate* (1880), 5 L.R. Ir. 99.

The man was induced to change his position: *Lincoln* v. *Wright* (1859), 4 De G. & J. 16.

As to section 4 of the Statute of Frauds, here, Boscowitz is not bringing an action, but the whole case arises on the counterclaim of Ira Furry in which he asks for a declaration that he has an undivided half interest. Plaintiff has no right to set up the statute: *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266 at pp. 278 and 296; *Lavery* v. *Turley* (1860), 30 L.J., Ex. 49; see also *Stussi* v. *Brown* (1897), 5 B.C. 380.

At the time the agreement, which culminated in the document of the 2nd of June, was consummated, this man had absolutely no interest in either the Queen or the Victoria claims, and no enforceable interest in the Empress, under section 50 of the Mineral Act. All that was done was to substitute a verbal agreement by which he was to have a 20 per cent. interest for this vague, shadowy interest which he had in the Empress claim. The Statute of Frauds and section 50 of the Mineral Act deal only with interests which cannot be enforced in a court of law.

Argument

As to the signature, we plead sections 50 and 130 of the Mineral Act; and then we say, alternatively, that if there was such an agreement, it was substituted by a 20 per cent. interest for a 50 per cent. They took their choice of a signature, and therefore took their chance under the statute. If a person signs a name in mistake, intending to sign his own name, then he is bound, but if the person with whom he is dealing says another signature is preferable, then that person gets the benefit of that signature and nothing more: *In the Goods of Leverington* (1886), 11 P.D. 80; *In the Goods of Maddock* (1874), L.R. 3 P. & D. 169.

Martin, in reply, cited *Hood* v. *Eden* (1905), 36 S.C.R. 476, on the point of the Court of Appeal interfering with the finding of the trial judge.

Cur. adv. vult.

22nd February, 1907.

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IRVING, J.: The late Oliver Furry in his lifetime, in particular in July, 1903, and from then until his death, claimed that by virtue of writing dated 20th May, 1899, and given to him by Leopold Boscowitz, he was the owner of an undivided non-

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assessable one-half interest in three mineral claims, namely, the Empress, Victoria and Queen which then formed part of the Empress group of mineral claims.

Leopold Boscowitz on the other hand contended that Furry had on 2nd June, 1900, relinquished the above mentioned half interest for something which amounted to a one-fifth assessable interest in the said three claims and the Barbara mineral claim, also part of the Empress group, and certain other claims which were or which might afterwards be brought into the Empress group.

In consequence of these disputes, an action was commenced in January, 1905, by McMeekin, who was the holder of an interest in the three said claims, against Furry, Turner, Leopold Boscowitz, Joseph Boscowitz, David Boscowitz and F. M. Leonard, also interested in the said claims, in order that the rights of the plaintiff and defendants in and to the said three mineral claims and also the Barbara claim might be declared and for a partition or sale of the said claims.

Before the pleadings were closed, Oliver Furry died, and Ira Furry, his administrator, was substituted in his place. In an amended counter-claim set up by Ira Furry he asked that it should be declared that his interest in the said three claims was an undivided one-half interest.

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The case put forward by the three Boscowitz' and the plaintiff in opposition to this counter-claim was the matter discussed in the argument before us. Their contention is that on the 2nd of June, 1900, when the property in the said three claims was vested in David, Leopold and David met Furry in Vancouver, and Leopold arranged with him that he should surrender the one-half non-assessable interest in the said three claims which he had acquired by virtue of the document of the 20th of May, 1899, and accept in lieu thereof a one-fifth interest in the proceeds to be derived from the said three claims and from the Barbara mineral claim and three or four other claims constituting the Empress group. This agreement, they say, was carried into effect by the document of the 2nd of June, 1900, and in their reply to the counter-claim they set up sections 50 and 130 of the Mineral Act and the Statute of Frauds.

Furry in his turn, to defeat the operation of the document of the 2nd of June, 1900, claims the benefit of section 50 of the Mineral Act and also of the Statute of Frauds.

The Chief Justice who heard the trial found Leopold a most unsatisfactory witness, but thought that the weight of evidence preponderated in favour of the view that Furry had accepted the declaration of trust which was created by the document of the 2nd of June, 1900, and that therefore Furry's estate was entitled to the 20 per cent. and not the 50 per cent. interest. He gave judgment accordingly, and condemned Furry's estate in all the costs of the plaintiff's action and counter-claim and ordered him to pay the other defendants their costs of the defence and of the counter-claim. From that order the administrator appeals on the ground that the learned Chief Justice was wrong in his facts as well as in his law; in any event he should not have condemned Furry to bear the whole expense of the litigation.

It appears beyond question that Leopold gave to Furry the two documents of November, 1898, and May, 1899, purporting to give Furry a non-assessable half interest in the three said claims. It is also established beyond doubt that in June, 1900, a two day conference did take place between Furry and Leopold and David in which the question of Furry's surrendering his 50 per cent. interest in the three said claims for the 20 per cent. interest was discussed. That at that time all three claims were vested in David, the Barbara claim only being vested in Leopold. That on the 2nd of June, Leopold, David and Furry went to the office of Messrs. Davis, Marshall & Macneill and there the document of the 2nd of June, 1900, which had been previously prepared under the direction of Leopold, was read over and explained to Furry by Weart. Weart says the explanation was that it was a gift to him from Leopold of a 20 per cent. interest, and nothing was said as to its being a reduction from 50 per cent. to 20 per cent. Weart says he did not know that Furry was surrendering anything. The document was executed by Leopold, whether in duplicate or not is not clear, but the original or, if executed in duplicate, one of the originals was retained by Leopold. A copy (or the duplicate) may have been taken away by Furry, but the evidence on this point is contradictory. That immediately

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afterwards, *viz.*, on the 11th of July, 1900, David transferred to Leopold the three said claims and Leopold then proceeded to deal with them as follows: On the 11th he gave a one-fifth interest to David; on the 13th he executed a declaration of trust in favour of Seifert as to 15/100; on the 13th he transferred to one H. C. Walters a fifth interest, and on the 16th he made an arrangement with the defendant Turner as to one-eighth. These allotments and the expenditure of $8,000 which Leopold then made, it is said, are only consistent with the theory that Furry had agreed to accept a 1-20th interest, but it may be observed as to the $8,000, that sum might have been expended even if the original agreement between him and Furry still remained in force, as under the original arrangement Leopold was to advance all the money necessary to develop the claims.

Furry, who was examined for discovery, swears that he never executed nor accepted any agreement in reduction of his one-half interest; that he never went to the office of Messrs. Davis, Marshall & Macneill, but at the same time he admits that Leopold wanted him to reduce his interest to 20 per cent. and that had Leopold constructed a trail up South Valley to the mine he might possibly have accepted the proposed reduction.

Furry's evidence does not satisfy me that he was perfectly frank when being examined. Underlying the whole of his evidence is an acknowledgment that there was an arrangement between him and Leopold, by which, possibly, under certain conditions, he would accept the reduction proposed. There are expressions used by him that convey to me the idea that he thought there was reserved to him the right to accept the document of the 2nd of June, 1900, if he was satisfied with what Leopold was doing or to reject it, as he did, if he thought fit. I refer to his evidence, p. 218, as put in by Mr. *Bowser*.

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Before referring in detail to the evidence on the other side, it may be convenient to call attention to the fact that this really is a claim against a dead man's estate. Nominally the administrator is the plaintiff in the counter-claim, but a perusal of the pleadings will shew that the action is really by Leopold Boscowitz and his assigns to enforce the document of the 2nd of June, 1900.

Our Evidence Act Amendment Act, 1900, enacts (Sec. 52) that:

"In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

Prior to the passage of this Act it was a rule of prudence as distinguished from one of law, that this Court would not act upon the uncorroborated testimony of claimants to the property of deceased persons unless convinced that such testimony was true. If the evidence given by the living man brought conviction to the tribunal which had to try the case, that was sufficient, although said Sir J. Hannen "it is natural that in considering the statement of the survivor we should look for corroboration in support of it"—see on this point *In re Garnett* (1885), 31 Ch. D. 1 at p. 9, where Brett, M.R., said:

"The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any judge who hears it ought to be, first of all, in a state of suspicion."

Having regard to that rule I think the defendants to the counter-claim have failed to establish that Furry did agree to accept the document of the 2nd of June in substitution for the former document. There are two or three things that seem to me unexplainable. Why was the document executed by Leopold who was not the recorded owner of the three claims? If Furry accepted, why was not his signature obtained? Why was it that Leopold (or David Boscowitz, who was then the recorded owner of the three claims) did not get back from Furry the documents of November, 1898, and May, 1899, or why did not Leopold put the document of June, 1900, on record? Furry, it must be remembered, was in possession of the document of May, 1899, and held it until the 10th of April, 1901, when he recorded it. From all the facts that are given in evidence I cannot help feeling that Furry was of opinion when he left Mr. Weart's office that the reduction agreement of June, 1900, was to come into force upon certain disbursements being made by Boscowitz including the construction of the trail up the South Valley. The drawing up and signing the document of the 2nd

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of June, 1900, by Leopold was only a step towards the reduction to which he had not yet consented; Furry might well feel that as he had signed nothing he was not bound. The evidence of David Boscowitz is to the effect that Furry was quite satisfied with the arrangement. He may have seemed quite satisfied—but what was the arrangement? Did he regard this as a surrender of 30 per cent. of his interest? Weart's evidence is consistent with the conclusion I have reached. Weart says that he never understood that Furry was parting with any interest. Apparently he was ignorant of the fact that David was the recorded owner of the three claims. As to Turner's evidence that Furry had told him that he had accepted the reduction, we know that of all kinds of evidence that of casual declarations is the weakest and most unsatisfactory. Words spoken are liable to be mistaken or misremembered or their meaning is liable to be misrepresented or exaggerated. Furry's action of the 10th of April, 1901, is quite inconsistent with the story told by Leopold.

Now it is for Boscowitz to prove that there was an out and out acceptance by Furry of the reduction of 30 per cent.; that their minds were *ad idem*. I am not satisfied with the proof offered. It will be remembered that Furry gave his evidence on discovery some time before the trial. At the hearing the following questions were put to Leopold (p. 101):

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"What do you say as to the contention which Furry sets up that a trail was to be put in, a trail up South Valley? I didn't do anything of the sort. We talked about trails, and the best way of working the property, and this, that and the other. We are not sure that is the best way of getting into that mountain to-day, whatever it is.

"What do you say as to his statement that that was the main part of the consideration? Nothing of the kind; it is not in the document either —the agreement.

"Court: Where was this trail to come from, and where to go? Up to what they call South Valley, about six miles up Howe Sound.

"How much would it have cost? I suppose it could have been done for about $2,500; it would cost about double the one I put into the Britannia.

"Mr. Bowser: You say even now, you don't know whether it is practicable or not? No, it is practicable, but I don't know it is the right way to get over there."

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"You say that the arrangement that was made with Furry on the 2nd of June, 1900, was that you were to give him an undivided one-fifth interest in the Barbara fraction, which you then owned, and in these other fractions which you had had staked at that time? Quite right.

"And that also a piece of land which was taken up? I said, should there be any land, anything in connection.

"At that time hadn't you taken up the land? No.

"You were to take it? No, I didn't have to do anything.

"Why did you mention the land? Anything that was in connection with the Empress group; we had a pack-train.

"Did you contemplate taking up land? If there was any at the beach. As a matter of fact I bought a piece in 1900, or 1901.

"You took up a pre-emption? No, that was the Britannia. I bought this outright.

"You did buy a piece of land? A small piece of land at the entrance of South Valley.

"In connection with the Empress group? In 1900, or 1901.

"You told me you stated to Furry that if there were any lands—any fractions of land—he would have a one-fifth interest? Yes, in anything.

"Then a one-fifth interest would include this land? Yes.

"What fractions were there at that time, on the 2nd of June, besides the Barbara fraction? The Osborne, the Balmoral, the Cissy, the Windsor, that I bought from a man who was running the chain—a surveyor.

"These were fractions you had, and which you intended to give Furry at that time? Yes, the entire group.

"And the reason the Barbara fraction was given to him in that document, and these other fractions were not given to him, was because Mr. Weart left them out? That is all, I don't know whether they were all staked at that time.

"And when the surveyor used to go up there, he used to find some fractions—there were some? Oh, yes.

"And those that were staked at the time, should have been put in the document? All of them.

"And there should have been, to have carried out fully your arrangement with Furry, a declaration in the document that any subsequent fractions located should also be included in the Empress group? Quite right.

"And you instructed Mr. Weart to have that done? That was the intention.

"Exactly, but did you tell him that? I can't tell you what I told him.

"In your examination, did you not tell me that you instructed Mr. Weart particularly that he was to reduce Furry's claim from 50 to 20 per cent.? That is right, and he was to have a one-fifth of everything in the Empresses; that is exactly what the others have got.

"You instructed Mr. Weart? As far as I remember.

"Did you qualify that in your examination? I have forgotten, but that was my intention.

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"Did you or did you not? How can I remember? It doesn't make any difference, he had an interest just the same.

"You see you were there, and I was not; I want to know what occurred then. You would not like to say you did give Mr. Weart any other instructions than those embodied in the document? I think I told him to throw in all the fractions as well as the Barbara; I am pretty nearly sure of it.

"You could not have agreed to give them to Furry? Oh, yes; that was part of the arrangement; anything that came into the group, when it was staked, if we had 20 fractions, he would have had one-fifth.

"And that was the arrangement you communicated to Mr. Weart, for the purpose of having this document drawn? That is right.

"You told me before that you asked Mr. Weart if it was not necessary for Furry to execute the document? Quite right.

"And he said it was not necessary? Yes.

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"Since that date, you have not executed any declaration of trust, or given Furry any of these fractions—an interest in any of these fractions? It was not necessary.

"Why not? Because I told him in any fractions, he would have his interest.

"Do you mean to say that during all the conversations between Furry and you, on the 1st and 2nd of June— Yes, two days.

"That there never was anything mentioned about a trail at all? No, I would not say that. We talked about the best way of running the property, the best way to build a trail; someone must have said something in two days, but I don't remember—I am sure I did not promise to build him a trail.

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"You answer a question that I did not ask, and you fail to answer those that I do? It is a very difficult thing for me to answer; there is no doubt we talked about trails, as we talked about a great many other things.

"This is the question I asked you, if, during those two days, there was any discussion whatever about a trail, and you promptly answer me, no. Now, I understand you to say you admit that there was? Not for him, but which was the best way to work the property, and which was the best way to get in there. Naturally the men interested would talk about that.

"Then you say there was a discussion? Me guaranteeing to build one?

"Court (to witness): Pay attention to the question, and then you won't be giving these loose answers.

"Mr. *Martin*: During those two days, there was some discussion with regard to a trail up over to South Valley? No, I don't think so, no. To begin with, that is not the best way to get to that property.

"Then do you consider positively, there was no discussion whatever with regard to building a trail over to South Valley? Yes sir.

"That is the trail, you know, that Furry was referring to when he gave his evidence? I don't know which trail he was referring to.

"You swear you do not know? I don't know.

"How did you come to say—did you ever make any estimate of what a trail up South Valley would cost? Never.

"How did you come to tell his Lordship a few minutes ago that it would cost $2,500? Because I know what the Britannia cost, it would cost about double.

"Then you did make an estimate? No, none whatever; I have walked over the ground, it is about six miles.

"What did you mean when you told me that naturally there was a discussion between you and Furry as to the best means of opening up these claims? Was there, or was there not? Two men being together for two days surely would discuss all kinds of things, wouldn't they?

"Yes. Now I don't want any general answers like that. I am not asking for your opinion, but for your memory, if you have any. You understand that? Certain things occurred between you and Furry on the 1st and 2nd of June, 1900. You have come here and sworn to certain things that were said and done. I want to know some more, but I do not want to know what would naturally occur, but whether you remember, and if you remember, what it is you remember. Now, do you understand that? Certainly.

"Well, let us start with that. Now, do you remember what discussion, if any, took place, between Oliver Furry and you on that occasion with regard to the best means of opening up those claims? No, I do not.

"Are you prepared to swear there was no discussion? Yes, I don't remember any at all with him.

"But are you prepared to swear there was no discussion? I don't remember.

"You would not swear there was not? I don't remember.

"Then what did you mean by saying a few minutes ago, that naturally you would discuss it? Two men interested in the property would naturally talk this thing over, wouldn't they?

"I should think so. Well, as I said, I don't remember at all.

"In your opinion, it is doubtful whether that is the best way? I don't know to-day.

"Has it ever been discussed between you and somebody else? As to opening up the claims?

"In this way? No.

"Now are you positive of that now? Absolutely.

"That it was not discussed between Oliver Furry and you? That I don't remember; I thought you said other people.

"Between you and other people, including Furry, you are positive it has never been discussed with anybody else, but you are not positive whether it was discussed with Furry or not? I don't remember about that.

"But you said it would be a very natural thing to do? As I said before, two men talking for two days, on the same business, surely would talk about different things. We talked about nothing else.

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"There were other people interested in that property besides you and Furry, afterwards? That is right.

"Did you never discuss, with any of them, the question of whether a trail ought to be built up South Valley? No, never went to work on it, except to keep the assessment work up."

It is not possible for me on this evidence to come to the conclusion that Boscowitz and Furry were agreed on the 2nd of June that the document of that date should govern their relations in place of the previous document.

It is admitted that the document of the 2nd of June should have included certain other claims, either staked or to be staked, also some land to be used apparently as a depot or landing place at the foot of the trail, also provision should have been made as to doing assessment work by Boscowitz upon the claims. The document of the 2nd of June mentions none of these. It is extraordinary that so many inducements should have been omitted if Weart understood that he was drawing up a document for the surrender of an interest by Furry.

For these reasons I am not able to agree with the conclusion reached by the learned Chief Justice.

Now assuming that the one-half interest claimed by Furry was vested in him by the document of the 20th of May, 1899, recorded on the 10th of April, 1901, I do not see how the defendants can get over section 50 of the Mineral Act. That section enacts:

IRVING, J.

"No transfer of any mineral claim, or of any interest therein shall be enforceable unless the same shall be in writing, signed by the transferror or by his agent in writing, and recorded by the Mining Recorder....."

Are not the defendants to this counter-claim trying to enforce the transfer of a one-thirtieth interest from Furry to Boscowitz?

There remains the question whether the document of May, 1899, signed by Leopold with the signature of "J. Boscowitz & Sons" at a time when one only of the three claims was in the possession of Leopold is, in view of section 130, and the Statute of Frauds and section 50 of the Mineral Act, sufficient to give Furry a claim to any of the mineral claims.

Section 130 was passed in consequence of the decision in *Wells* v. *Petty* (1897), 5 B.C. 353. It is intended to prevent the locator being divested of his interest unless there is a written

document. The section can have no application as it is admitted in paragraph 2 of the amended reply that Furry located these three claims. In my opinion the document of May, 1899, is not touched by section 130.

As to section 50 and the Statute of Frauds: the signature "J. Boscowitz & Sons" Leopold says he intended as his own. That being so, no question arises as to the Queen claim which stood in his name: *cf. In re Central Klondyke Gold-Mining. Co.* (1898), 5 Manson, 282, where a person who applied for shares under an alias was held estopped from denying his liability as a shareholder.

As to the other two claims recorded in the names of Joseph and David, respectively, Leopold says these names were merely used by him as he knew that he could rely on them to reconvey to him whenever he wished. As a matter of fact they did convey back to him, and in those circumstances Leopold is precluded from denying that he was their agent to sign for them. Further, David stood by on the 2nd of June and permitted Leopold to say that the agreement of November, 1898, was valid. Again, the estate which Leopold acquired in the Empress and Victoria by the conveyance by them at a subsequent date feeds the estoppel and Furry became entitled as if Leopold had himself originally possessed the interests which he represented he had a right to assign by using their names.

The agreement of the 20th of May, 1899, "We hereby agree to give," etc., in the opinion of the learned Chief Justice conferred on Furry no legal interest but merely a right in equity to a conveyance of the half interest. This document in my opinion was twofold; it gave an equitable interest which took effect at once. It also expressed a promise (quite unnecessary) to convert that equitable estate into a legal estate by the necessary documents. The lands and interests therein being specified, the agreement was no longer merely executory. It was, in fact, a conveyance of a one-half interest to Furry.

In Cruise's Digest, Vol. 4, at p. 376, the difference between a covenant relating to lands of a certain value and a covenant dealing with particular lands is pointed out. The first is a general covenant and does not bind any particular lands, but the latter is a specific covenant and binds the lands mentioned.

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Boscowitz having on the 20th of May, 1899, specified the lands, thereby gave a one-half interest in the claims.

In my opinion the judgment should be reversed and the administrator declared entitled to the one-half interest in the said three claims, with costs here and below.

MARTIN, J.: A number of difficult questions are raised on this appeal and not the least difficult (and the most generally important) is the first to be decided, *viz.:* Is the signature "J. Boscowitz & Sons" placed by Leopold Boscowitz at the end of the document which is the foundation of the defendant Furry's case sufficient to satisfy the Statute of Frauds. Is it, in other words, "signed by the party to be charged?" I have examined with great care all the authorities cited and a great number of others in the Courts of Canada as well as in England and Ireland, and some American authorities, but have been unable to find a case resembling the peculiar facts of this one which raises, when thoroughly understood, a new and distinct point. Here the "party to be charged" did not sign the document in his own name nor as the agent of any other person. His own individual signature was rejected by Furry who had staked the three claims in the separate names of Leopold Boscowitz, his brother David, and his father Joseph, one in each name, but without the authority or even knowledge of any of them. Furry thought that if he got the document signed "J. Boscowitz & Sons" he could bind all the interests in the claims, and so refused to take Leopold's personal signature. Leopold without any authority as agent or otherwise was prepared to sign the others' names trusting to their ratification. This is the case, therefore, of a deliberately incorrect signature and no element of mistake, uncertainty, or lack of identification enters into it. Can a document be said to be "signed by the party to be charged" when he intentionally uses a signature other than his own with the knowledge that it can at that time have no legal effect as regards those he purports to bind?

MARTIN, J.

The leading cases on the mode of signature are well collected in Leake on Contracts (1906), pp. 183-6, and the sufficiency thereof ranges from that of a party writing a surname in the

third person, to the use of initials. Nor does the position of the signature in the document affect its sufficiency, for it has been decided that the signature as a witness of one who was the vendor's agent does not restrict its larger application: *Wallace* v. *Roe* (1903), 1 I.R. 32; *Welford* v. *Beazely* (1747), 3 Atk. 503; and see *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q.B.D. 314, at pp. 323-4. But in all the cases cited the defendant used his true name or that which related to him alone, or enough of his own name to leave the question merely one of identification—such as, in certain circumstances, the printed bill-head used in *Schneider* v. *Norris* (1814), 2 M. & S. 286, which decision was for a long time questioned as going too far. In *Lobb* v. *Stanley* (1844), 5 Q.B. 574, where "Mr. Stanley" was held sufficient as "Mr. Ogilvie" long before 1817, in *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53, had been, Lord Denman said: "It is a signature of the party when he authenticates the instrument by writing his name in the body. Here, it is true, the whole name is not written, but only 'Mr. Stanley.' I think more is not necessary." The distinction between that and this case is obvious and twofold—first, the signer herein did not write his own name, and second, he did not intend to. In *Durrell* v. *Evans* (1862), 31 L.J., Ex. 337 (explained in *Murphy* v. *Boese* (1875), 44 L.J., Ex. 40) the expressions of Blackburn, J., which were much relied on, all presuppose the true name, so far as it went, being written as it was in that case—"Messrs. Evans." The learned judge, at p. 345, says:

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"If the name appears on the contract, and be written by the party to be bound or by his authority, and issued or accepted by him, or intended by him as the memorandum of a contract, that is sufficient."

The context and authorities cited by the learned judge shew the point now under consideration was not and could not have been present to his mind. The question was one of the authority of the agent to bind the principal and as the learned judge says:

"In order to do this, it is essential that there should be a signature made by an agent authorized to make it. Now 'Messrs. Evans' was written by Noakes at the top of the document."

It is clear that a signature consisting of descriptive words of ceremony is not sufficient. That was decided in *Selby* v. *Selby* (1817), 3 Mer. 2, wherein the Master of the Rolls (Sir Wm. Grant)

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held that a letter addressed to "My Dear Robert" and signed "the most affectionate of Mothers" was insufficient. He said, p. 6:

"It is a very forced construction of the words of the statute to say that the use of the mere ordinary terms of ceremony constitutes a compliance with the regulations it prescribes. It is not enough that the party may be identified. He is required to sign. And, after you have completely identified, still the question remains, whether he has signed or not. There may be in the instrument a very sufficient description to answer the purpose of identification without a signing; that is, without the party having either put his name to it, or done some other act intended by him to be equivalent to the actual signature of the name—such as a person unable to write making his mark. But it was never said, because you may identify the writer, therefore there is a signature within the meaning of the statute. If so, the word 'I' or 'me' would be enough, provided you can prove the handwriting."

The principle conveyed in this language applies to my mind with great force to the case at bar, and here the writer cannot be identified other than as one who performed a physical act because there was no such firm in existence as J. Boscowitz and Sons, nor any individual or collection of individuals using that signature. It is manifest therefore that Leopold Boscowitz did not sign the document as "the party to be charged" individually, and it is equally clear that since he was admittedly not "lawfully authorized" to sign for the others they are not bound. This is well illustrated by the case of *Graham* v. *Mosson* (1839), 8 L.J., C.P. 324, decided by the four judges *in banc.* There it was alleged that the traveller of the plaintiffs, doing business under the firm name of North, Simpson, Graham & Co., or North & Co., had by an entry in the defendant's book bound him under the statute, but it was held he had not, because, as Tindal, C.J., at p. 327, says:

MARTIN, J.

"There was no authority given to the traveller.....to act as agent of the defendant.....Dyson was not the agent of Mosson; the latter did not intend he should be his agent, or act in such capacity. In my opinion, the exceptions out of the statute should not be extended, and the rule for entering a nonsuit should be made absolute."

Vaughan, J.:

"I am of the same opinion. We should take care not to open the door to those perjuries which it was the object of the statute to prevent..... The name of Dyson is not alleged to be that of the principal, but of the agent properly authorized.....The plaintiffs have failed in the outset.

They have not shewn distinctly, as they ought, that Dyson was the agent of Mosson."

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And the other judges while recognizing that the agent if authorized could bind his principal by signing his own name, took the same view, noting the possibility of Dyson having "made himself personally liable" by his incautious mode of inserting his name in the contract. This decision was followed by the same Court in another action wherein the same firm were plaintiffs—*Graham* v. *Fretwell* (1841), 11 L.J., C.P.41.

Now in the case at bar no authority was, as has been mentioned, given or in the circumstances could have been given by these various independent claim owners to Leopold to represent them in any way, nor, as David Boscowitz' evidence shews, was there any firm or individual in existence represented by the signature which Leopold deliberately appended to the document after his own had been refused, which signature he did not intend to be taken as his individual signature nor as an attempt to write it.

But all the authorities cited and all the remarks of the learned judges in them, without exception that I can find, proceed upon the assumption that the party to be charged must sign and has in fact signed (by writing, printing or stamping) the document either with his full name, or with some signature more or less full, that he intends shall represent it. Such being the case the position of affairs in the present case is equivalent to that in *Selby* v. *Selby*, *supra*, *viz.*: that the signature amounts to nothing and in the eye of the law there is no signature. This Court cannot here patch up a valid signature by striking out all the words except "Boscowitz" and so leaving it as a question of identification, yet that is practically what it must do to support the defendant Furry's contention, which would be doing what Mr. Justice Vaughan said the Court should take care not to do; and as Lord Justice Fitzgibbon said in *Dyas* v. *Stafford* (1882), 9 L.R. Ir. 521, a defendant who succeeds on the Statute of Frauds is not "to be regarded as an unmeritorious litigant."

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I have not overlooked the cases on wills that were cited, but they do not give much assistance for they largely proceed upon a different principle. *Pryor* v. *Pryor* (1860), 29 L.J., P. 114,

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however may be noted as an example of a witness signing a wrong name by intention and consequently probate was refused, Sir Cresswell Cresswell saying:

"I am not aware of any case in which an attestation has been held sufficient in which the party subscribing has not intended by the name subscribed or by the mark to represent his or her own signature. Now in this case the deceased desired that the will should have the appearance of having been attested by the husband instead of the wife, and the signature was written as the signature of the husband. It would produce great inconvenience to permit persons to sign any name they pleased, and to hold that such signature was good."

At the same time if the all important intention to sign correctly is present the Court of Probate will endeavour to uphold it, as witness the case of *In the Goods of Charles Robert Sperling* (1863), 3 Sw. & Tr. 272, where a descriptive signature was held to be sufficient, the witness having misunderstood the solicitor's instructions.

Some discussion arose on the question as to whether or no the interest of a free miner in his claim is "an interest in land" and I am clearly of the opinion that Mr. *Martin's* contention to that effect is correct: see *Williams Creek Bed Rock Flume & Ditch Co., Ltd.* v. *Synon* (1867), 1 M.M.C. 1; *Wells* v. *Petty* (1897), 5 B.C. 353, 1 M.M.C. 147; *Stussi* v. *Brown* (1897), 5 B.C. 380, 1 M.M.C. 195; *Fero* v. *Hall* (1898), 6 B.C. 421, 1 M.M.C. 238; *Sunshine, Limited* v. *Cunningham et al.* (1899), 1 M.M.C. 286; and section 2 of Mineral Act, definition "mine" and "mineral claims." *Cf.* also, *Brown* v. *Spruce Creek Power Co.* (1905), 11 B.C. 243, 2 M.M.C. 254 at p. 266.

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The result is that on all the said authorities I am of the opinion that Furry's case fails on the Statute of Frauds, and that consequently he has no interest in the said mineral claims. His appeal therefore must be dismissed.

Then as to costs: the judgment directs the defendant Furry to pay the whole costs of the action both of plaintiff and of the other defendants, and it is contended that this direction is erroneous in principle and goes too far. In my opinion this contention is correct, though the matter is unusually complicated and difficult to decide with precision. The order should have been that the defendant Furry do pay to the co-defendants and

the plaintiff all costs of and occasioned by the counter-claim and also pay to the plaintiff the costs of his action as against Furry, because by paragraph 16 of the statement of defence Furry in effect claimed a priority which he has failed to establish. It was I think, with every respect, an error to relieve the other defendants of their share of the general costs of the action and make Furry pay them because as originally framed and launched it would have to have been brought irrespective of Furry's contention.

Therefore on this issue of costs I think the appeal should be allowed.

CLEMENT, J.: I agree with the learned Chief Justice that Oliver Furry did agree with Leopold Boscowitz in June, 1900, to reduce his interest in the Empress, Queen and Victoria mineral claims from a half interest (non-assessable) to a 20 per cent. interest in those claims and certain additional fractions; but an anxious consideration of the evidence leaves the conviction strong upon my mind that this agreement was conditional upon the performance by Leopold of certain active work in connection with the claims which he in fact never performed. It stands out clearly upon Leopold's own evidence, that the declaration of trust signed by him on June 2nd, 1900, does not embody all the terms of the arrangement; for he admits that, in addition to an interest in the Barbara fraction, Oliver Furry was to have an interest in all the fractional claims which might go to make up the Empress group as well as in the pack-train and other assets. There was no reason suggested why an agreement should not have been drawn up and signed by both parties shewing all the terms, conditional or otherwise, of the bargain at which they had arrived; and when a written document is put forward signed by one only of the parties and embodying confessedly only part of the bargain, it seems to me that we are justified in holding Leopold to strict and precise proof that Furry accepted that document as presently and unconditionally operative to effect a reduction of Furry's interest. On the real point in controversy, namely, was or was not the agreement conditional, we derive no assistance so far as I can see from the evidence of David

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Boscowitz, Turner or Mr. Weart. Oliver Furry's evidence is emphatic that the whole bargain was conditional upon Leopold entering at once upon the construction of a trail to open up the property, and his subsequent conduct was consistent with that view. Leopold, it is true, denies this, but he does say that during the two days throughout which the matter was threshed out between him and Furry "we talked about the best way of running the property, the best way to build a trail," and again "there is no doubt we talked about trails." It further appears that at this time Leopold made a gift of a 15 per cent. interest to Seifert, "a sort of foreman for me," and of a 20 per cent. interest to Walters who "was to have the management of the thing." All of which strongly tends to convince me that Leopold gave Furry to understand that a period of active development was about to be inaugurated.

The learned Chief Justice was evidently unwilling to decide the question of fact upon the oral testimony alone and so had recourse, as he says, to the "inherent probabilities of the case," and it is here particularly that I cannot bring myself to agree with his views.

CLEMENT, J.

"It is," he says, "in the highest degree unlikely that Boscowitz would have entered into such an agreement as alleged by Furry, that is to say, that he was to go to the expense of building this trail on the verbal promise of Furry that he would accept a reduction of his interest. It is moreover undeniable that just such a reduction of Turner's intetest in the Britannia group occurred to the knowledge of Furry. He was an illiterate man, without any means or any access to capital, while Boscowitz had; it would have been difficult if not impossible for any one to interest capital in these claims unless he could hand over a controlling interest; and at the time of the alleged reduction of interest the value of the claims was of a highly speculative character."

In the first place it was not necessary that Leopold should rely upon Furry's verbal promise to accept a reduction of his interest; for, as I have said, there was no reason why the whole agreement should not have been reduced to writing and signed by both parties. To my mind the very fact that Furry was never asked to sign and the further fact that not a suggestion seems to have been made to him at any time that he should surrender the earlier document of May, 1899, which clearly shewed his half interest, tend strongly to shew that the document

of June, 1900, was not accepted by Furry as a presently operative instrument to effect a reduction of his interest.

Then as to the Turner reduction of interest in the Britannia group being a precedent which Furry would naturally follow, it seems to me clear that the cases were not at all parallel. That Turner could see no similarity between them is apparent; for when, as he says, Furry told him he had agreed to reduce his interest he (Turner) called him an old fool. If indeed Furry thought that his agreement with Leopold was of the same character as the agreement made by Turner, he clearly must have expected that immediate development of the Empress group would be undertaken by Leopold. The fact was that the Britannia group had been taken hold of by capitalists and Turner thought it a good speculation to accept a 20 per cent. interest in that about-to-be-worked group instead of $10,000 in cash. If, as I think, Leopold led Furry to believe that active development (the great *desideratum* in the early life of a mineral claim) was to proceed at once, I can understand Furry's willingness to accept a reduction; but I must confess I cannot see any other reason for it. The throwing in of outlying fractional claims does not strike me as any adequate reason.

Then again, in order to give Leopold control, *i.e.*, the right to sell the whole property without regard to the wishes of his co-owners, a reduction of Furry's interest was not necessary nor would it be effectual to that end unless indeed the enterprise were to be put into the shape of a joint stock company, of which there is not the faintest hint. With a 20 per cent. interest Furry could just as effectively block a sale as with a 50 per cent. interest; so that the control was given to Leopold (if at all) not by the reduction of Furry's interest but by the specific provision that Leopold should have the absolute right to sell regardless of Furry's wishes.

In the view I take of the law governing this case, it was perhaps unnecessary to state my view of the facts at such length, but it is due to the learned Chief Justice that I should state clearly my reasons for differing (so far as I do differ) from his conclusions of fact; and the litigants moreover are entitled to know my view should the case go further.

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On the law: assuming for argument's sake that full effect should be given to the finding of fact by the learned Chief Justice, I am of opinion that both the Statute of Frauds and section 50 of the Mineral Act are a fatal bar to the enforcement of the document of the 2nd of June, 1900; and that, on the other hand, neither of them stands in the way of the enforcement of the earlier document of May, 1899, under which Oliver Furry took a half interest (non-assessable) in the Empress, Queen and Victoria mineral claims.

To deal with this last question first. The Furry half interest under the document of May, 1899, is asserted in the plaintiff's statement of claim (paragraph 4), and is admitted by Leopold Boscowitz in his statement of defence (paragraph 2). If, nevertheless, he may now attack that document, I think his attack must fail. The only point taken against it, so far as the Statute of Frauds is concerned, is that it was not signed by the party to be charged therewith. It was signed by Leopold Boscowitz thus: "J. Boscowitz & Sons." The facts were that the three claims stood recorded in the names of Joseph, David and Leopold Boscowitz respectively, and that "J. Boscowitz & Sons" correctly described and included them all. But the sole beneficial owner of the claims was Leopold, and he says positively that realizing his sole ownership he intended the signature "J. Boscowitz & Sons" as his signature. As a further matter of fact, Leopold afterwards got in what one may call the paper title; and in my opinion he cannot be heard to say that he was not the agent of Joseph and David so as to make the signature theirs as well as his, if it were necessary to go that far. Moreover, he impliedly contracted with Furry that he was their duly authorized agent: *Starkey* v. *Bank of England* (1903), A.C. 114, 72 L.J., Ch. 402, and should therefore make good to Furry any loss in interest which the latter might suffer by reason of the absence of authority to bind Joseph and David.

CLEMENT, J.

What then was the effect of the document? The learned Chief Justice says that it gave Oliver Furry no legal interest but "only a right in equity to a conveyance of the half interest." With all deference I cannot concur in this view. The still earlier document of November, 1898, uses the words "we hereby

give" and the later document of May, 1899, was not intended in any way to weaken the operative effect of the earlier, but was intended merely to make specific mention of the claims covered by the general words of that earlier document. The words "we hereby agree to give" in the later document must therefore, I think, be held to be words of present transfer: see *Hoofstetter* v. *Rooker* (1895), 22 A.R. 175; and Leopold was estopped from saying otherwise. The estoppel was fed when Leopold afterwards got in the "record" title, following upon which Furry duly recorded the transfer. In this view we have here an attempt to enforce in the teeth of the 50th section of the Mineral Act an instrument which, if effective at all, must be effective as a transfer from Furry of a 30 per cent. interest in certain mineral claims, and which is not signed by the transferror nor recorded.

But even if the agreement of May, 1899, is to be treated as an executory and not, as I think it is, an executed contract, the right in equity to a conveyance, as the learned Chief Justice puts it, is an interest in land within the Statute of Frauds. In my opinion, the interest of a free miner in his mineral claim is an interest in land and it can make no difference, so far as the Statute of Frauds is concerned, whether that interest is legal or equitable: see *Kelly* v. *Webster* (1852), 12 C.B. 283, 21 L.J., C.P. 163; *Ex parte Hall. In re Whitting* (1879), 10 Ch. D. 615, 48 L.J., Bk. 79.

That an executory agreement in writing satisfying the Statute of Frauds may be absolutely waived and abandoned by parol seems to be the law: see *Robinson* v. *Page* (1826), 3 Russ. 114, "but such a defence must be established with the greatest clearness and precision, and the circumstances of waiver and abandonment must amount to a total dissolution of the contract placing the parties in the same situation in which they stood before the agreement was entered into": *Robinson* v. *Page, ubi supra*; and see also *Price* v. *Dyer* (1810), 17 Ves. 356. Here there is no case, either on the pleadings or the facts, of a total abandonment of the agreement of May, 1899. All that is alleged is that that agreement "was subsequently varied by a document under seal dated the 2nd day of June, 1900, whereby the interest of Furry . . . was reduced and changed," etc. Such a document,

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not signed by Oliver Furry and so not satisfying the Statute of Frauds, cannot be set up to defeat, vary or modify Furry's rights under the agreement of May, 1899: *Price* v. *Dyer, ubi supra; Noble* v. *Ward* (1867), L.R. 2 Ex. 135, 36 L.J., Ex. 91; *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58, 2 L.J., K.B. 127; *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598, 44 L.J., C.P. 358. The proof which the Statute of Frauds renders indispensably necessary is not forthcoming: see *Maddison* v. *Alderson* (1883), 8 App. Cas. 467 at p. 473, 52 L.J., Q.B. 737.

Nor do I see any justification for treating this as a case of accord and satisfaction, for the document of June, 1900, is still executory; in other words, assuming a broken obligation under the agreement of May, 1899, there may have been accord, but there certainly has been no performance of the later agreement accepted in satisfaction of the earlier: see *Bayley* v. *Homan* (1837), 6 L.J., C.P. 309; *Gabriel* v. *Dresser* (1855), 24 L.J., C.P. 81; *Smith* v. *Trowsdale* (1854), 23 L.J., Q.B. 107.

If it be argued that the obligation under the later document was accepted in lieu of the obligation under the earlier, the short answer is that the later document cannot be enforced against Furry by reason of the Statute of Frauds, and so the earlier must stand: *Noble* v. *Ward, ubi supra.* Lord Blackburn in *Maddison* v. *Alderson, ubi supra,* speaks of the established rule "that a contract within the 4th section was not enforceable unless signed by or on behalf of the party to be charged, even though signed by the one party and accepted and kept by the other who was sought to be charged."

CLEMENT, J.

At the trial all parties united to storm the Furry position apparently leaving all questions *inter se* open. At all events no argument was addressed to us on any question other than the Furry interest. I think therefore we should merely set aside the judgment pronounced at the trial, declare the defendant Ira Furry, as administrator, etc., entitled to a half interest (non-assessable) in the Empress, Queen and Victoria mineral claims, and reserve liberty to all parties to apply. The defendant Ira Furry is entitled to his costs of the action and of this appeal.

Appeal allowed.

McDANIEL v. THE CANADIAN PACIFIC RAILWAY COMPANY.

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McDANIEL v. CANADIAN PACIFIC RY. Co.

Railways—Railway Act, 1903 (Dominion), Sec. 237, Sub-Sec. 4—"Animals at large upon the highway or otherwise," meaning of—Section 199—Pleading—Amendment.

Plaintiff's animals were set at large to pasture in the open country, and were killed at a place where the Company were not bound to fence:—

Held, that he could not invoke the aid of section 237, sub-section 4 of the Railway Act, 1903.

Decision of FORIN, Co. J., affirmed, MARTIN, J., dissenting.

APPEAL from the judgment of FORIN, Co. J., in two consolidated actions tried before him at Nelson on the 27th and 28th of November, 1906.

The plaintiff claimed damages for the loss of certain animals, killed on the track of the defendant Company. At the trial the learned County judge found that the land adjoining the track where the animals were lost, for some four or five miles is not settled, improved or enclosed land, and that the plaintiff had allowed the animals to run on this land without attempting to control them. His Honour therefore held that plaintiff could not recover under section 199 of the Railway Act, 1903, on account of the Company's neglect to fence, nor, having allowed his cattle to run uncontrolled, could he invoke section 237.

Statement

The appeal was argued at Victoria on the 16th of January, 1907, before MARTIN, MORRISON and CLEMENT, JJ.

S. S. Taylor, K.C., for appellant (plaintiff), cited section 237, sub-section 4 of the Railway Act, 1903 (Dominion). The phrase "animals at large upon the highway or otherwise" means "or otherwise at large": see *Arthur* v. *Central Ontario R. W. Co.* (1906), 11 O.L.R. 537; *Bacon* v. *Grand Trunk R. W. Co.* (1906), 12 O.L.R. 196.

Argument

Davis, K.C., for respondent (defendant Company): The passing of section 237 does not affect the Canadian Pacific Railway; we are governed by the Act of 1879.

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Taylor, refers to respondent's dispute note. This point was not raised at the trial. We are relying on the Railway Act of 1903, and he cannot be allowed now to raise his charter when the point was not raised before.

Davis: Either at the trial or on appeal if there is a point as to which no question of fact arises, the Court will allow an amendment. There is no question of fact here: see *Stilliway* v. *Corporation of City of Toronto* (1890), 20 Ont. 98.

Argument

It is not negligence on the part of the railway if cattle are killed when the owner allows them to get on the track: *Canadian Pacific Ry. Co.* v. *Eggleston* (1905), 36 S.C.R. 641. Also see sections 190, 198, 199, 200, 201 and 237. The Court must look at all these sections when dealing with the protection of the railway and live stock. Section 237 applies to horses or cattle killed on the track, assuming of course that they are killed at a place where the Company is bound to fence. Here we were not bound. See *Arthur* v. *Central Ontario R .W. Co.* (1906), 5 Can. Ry. Cases, 318; *Bacon* v. *Grand Trunk R. W. Co.* (1906), *ib.* 325.

Taylor, in reply.

Cur. adv. vult.

23rd March, 1907.

MARTIN, J.:

MARTIN, J.

On this appeal from the County Court of West Kootenay the respondent seeks to set up for the first time two defences which were not among the many defences raised by the lengthy amended dispute note in the Court below, nor was any application ever made to that Court for leave to further amend so as to raise them. One of these proposed defences is the alleged "negligence or wilful act" of the plaintiff under section 234, sub-section 4 of the Railway Act, 1903; and the other is that under the defendants' special charter no general railway Act since 1879 has any application to it, and consequently it is exempt from the liability sought to be imposed on it by said section. This is the same point which is now standing for further argument before this Court on an appeal from my judgment in the *Northern Counties Trust Investment, Ltd.* v. *Canadian Pacific Ry. Co.* The appellant objects to these defences being now raised as being a contravention of the

statutory County Court Rule No. 159 under section 165 of the County Courts Act as follows:

"No defendant, whether by original action or counter-claim, shall be entitled to use or rely upon any ground of defence, set-off or counter-claim other than those stated in the dispute note or reply, without the leave of the Judge, to be granted upon such terms (if any) as may appear just."

This, as I said in *Gelinas* v. *Clark* (1901), 8 B.C. 42, 1 M.M.C. 428, is "a useful rule" and has frequently been given effect to. In that case it was applied by this Full Court (McColl, C.J., Irving and Martin, JJ.) even to a question of jurisdiction open on the face of the record, as well as to a question of fact, abandonment. The learned counsel for the present respondent there took the ground that "if the objection to jurisdiction is not taken in the dispute note, it is waived." It is unnecessary to allude here to the cases I noted at p. 433, but it is proper to point out that the decision in *Gelinas* v. *Clark* was again and recently approved and followed by this Court in *Gabriel* v. *Jackson Mines, Ltd.*, unreported, decided on November 9th, 1906, by Irving, Martin and Morrison, JJ., wherein an application to raise for the first time on appeal (from the same Court now appealed from) several questions of fact and of law going to the whole root of the matter was unanimously refused. I then in substance said as explanatory of the above decisions and of our ruling in that case: "This is not an appeal from a court of original jurisdiction but one of statutory and inferior jurisdiction, and the rule has been treated by us as different—even as to a waiver of jurisdiction. The County Court is supposed to be a poor man's court and finality and expedition are aimed at."

MARTIN, J.

This Court has laid it down in *Jordan* v. *McMillan* (1901), 8 B.C. 27 at p. 28, that it is bound to follow its own decisions (see also *Clabon* v. *Lawry* (1898), 2 M.M.C. 38) and I am unable to perceive why a defendant should now be allowed to set up at the eleventh hour a railway statute when he would not heretofore have been permitted to invoke, say, the Statute of Frauds, or of Limitations, and consequently I am of the opinion that the present defendant (respondent) should be, as others similarly situated have been, confined to the record since he neglected to apply to the learned judge below for the necessary amendment.

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During the hearing below the plaintiff's counsel repeatedly refused to be drawn into the question of negligence, as is shewn, *e.g.*, on pp. 59, 60, 61, 63, 64 and 65 of the appeal book, and though the defendant's counsel did apply to amend the pleadings if necessary on the one point of "injury sustained by reason of the construction of the railway" he refrained from doing so on any other, which supports the appellant's present attitude. Such being the case, I do not think this Court should be drawn into a speculation regarding evidence which might have been given on non-existent issues. The appellant's counsel assured us that if negligence had been in issue he had other witnesses to call, and I do not see how in the circumstances we can refuse to accept this statement. The case of *Stilliway* v. *Corporation of City of Toronto* (1890), 20 Ont. 98, cited by the respondent, does not support his contention, for leave was there asked for; and further it was not a County Court case. I have not overlooked the remarks of Mr. Justice DUFF in *Stone* v. *Rossland Ice and Fuel Co.* (1906), 12 B.C. 66, but in the first place they are *obiter dicta* for the point was not raised or mentioned on that appeal; and, in the second place, he does not refer to the prior decision of this Court in *Gelinas* v. *Clark* nor to the special practice of the County Court.

MARTIN, J.

I turn then to the sole remaining question, *viz.*: the meaning and effect of the words "or otherwise" in said sub-section 4. Now if I were called upon to construe for the first time this language in the light of all the sub-sections of section 237, which stands by itself under the heading "Animals at large" I should not hesitate to put upon it that meaning which seems to me to be the manifest intention of Parliament, *viz.*: "Animals at large upon the highway or otherwise at large." In the case at bar this construction includes the plaintiff's animals and he would be entitled to recover if the Company did not establish the defence open to it under the latter part of the section. This section came into force on February 1st, 1904, and several cases on it have been cited to us, decided in the following chronological order—*O'Donovan* v. *Canadian Pacific Ry. Co.* (Jan. 10, 1906) *per* Cumberland, Co. J., of Minnedosa, Manitoba; *Arthur* v. *Central Ontario R. W. Co.* (March 10, 1906), 11 O.L.R. 537, 5 Can. Ry.

Cases, 318; *Bacon* v. *Grand Trunk R. W. Co.* (May 1, 1906), 12 O.L.R. 196, 5 Can. Ry. Cases, 325; and *Carruthers* v. *Canadian Pacific R. W. Co.* (Oct. 22, 1906), 4 W.L.R. 441.

The first of these cases is a County Court decision in favour of the defendant Company; the second and third on the facts as there given support the plaintiff's contention; while in the fourth there is much that the defendant is entitled to rely on. Seeing that there is such a conflict of authority in courts whose decisions are not even binding on us, the only thing to do is to give effect to my own opinion as above stated. All the courts are agreed in one thing, *viz.*: that Parliament has been for years extending the liability of railway companies in this respect and the only question is as to the extent it has gone. There has to my mind been a change in the law which must be recognized, and I cannot see that the clear liability imposed by the new sub-section can be cut down by reading it with section 199 so as to restrict its application to cases where there is a liability to fence. The omission of the words "or otherwise" after "highway" in sub-section 1 and the unqualified expression "got at large" in the eighth line of sub-section 4 support this view. "If" as was said in the *Bacon* case, "the law presses too hard upon the railway companies, it is for the Legislature to interfere."

MARTIN, J.

It follows that the appeal should be allowed with costs.

MORRISON, J.: I entirely agree with the judgment of the learned County Court Judge. The plaintiff's own evidence shews conclusively that he exercised no kind of supervision or control over his horses and cattle. It goes further and in my opinion precludes any chance of there having been a breach on the part of the defendant of any statutory obligation which led to or caused the accident.

MORRISON, J.

Having regard to the scope of the Act I would fancy that there is a duty cast as well upon the plaintiff as upon the defendant to safeguard the travelling public from accidents of this kind.

I would dismiss the appeal.

CLEMENT, J.: I would dismiss this appeal.

CLEMENT, J.

Mr. *Taylor* admits his inability to sustain these (consolidated)

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actions otherwise than under sub-section 4 of section 237 of the Railway Act. It seems to me that the plaintiff's own evidence shews that the animals killed were at large through the wilful act of the plaintiff himself. He had no enclosure upon his own place within which to keep these animals; he simply turned them loose to pasture on the unfenced countryside. This is perhaps not a case of animals at large through the "negligence" of the owner; but these animals clearly "got" at large through the plaintiff's "wilful act" in turning them loose as I have said. The plaintiff s own evidence shewing this, it seems idle to discuss where the onus lies. It can scarcely be seriously contended that the defendants should prove the fact over again by evidence formally called for the defence.

I express no opinion upon the point taken by Mr. *Taylor* that the words "or otherwise" near the beginning of the section are to be construed as meaning "or otherwise at large." I simply assume in his favour that this is the correct interpretation of those words. If they mean "or otherwise upon the highway," as Mr. *Davis* contends, the plaintiff could not invoke the section at all, as there were no highways in the locality in question here. Nor would it be proper to express any opinion upon the contention put forward by Mr. *Davis* that the sub-section in question cannot apply except in localities where there is the statutory obligation to fence under section 199. I base my decision solely upon this: that assuming sub-section 4 to apply, the plaintiff's own evidence puts him out of court. And, with all deference, I find myself unable to concur in the view expressed by my brother MARTIN that the defendants should not be allowed to urge this defence. It seems to me that the judgment of the learned County Court Judge really proceeds upon the same ground as that upon which my opinion is based and all such amendments of the record must, I think, be taken to have been made as were necessary to present the point upon which, as I have said, the judgment below really proceeded.

CLEMENT, J.

Moreover, in this particular case, there can be no pretense of unpresented testimony which might by any possibility shew the facts to be other than they now appear upon the record (I mean of course, as to this particular point) and I must confess

my mind revolts at the idea of allowing this plaintiff to take money from the defendants' pockets to which he is, on his own shewing, not by law entitled.

Appeal dismissed, Martin, J., dissenting.

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RE CROW'S NEST PASS COAL COMPANY, LIMITED ASSESSMENT.

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Assessment—Appeal from Assessor to Court of Revision—Powers of Court of Revision—Assessment Act, 1903, Cap. 53; Amendment Act, 1905, Cap. 50.

The jurisdiction of the Court of Revision is confined to the question whether the assessment was too high or too low.

APPEAL from the judgment of the Court of Revision and Appeal for the Fort Steele Assessment District, dated the 26th of January, 1906. The facts are set out in the reasons for judgment of CLEMENT, J.

Statement

The appeal was argued at Victoria on the 9th of January, 1907, before IRVING, MORRISON and CLEMENT, JJ.

Bodwell, K.C., and *A. H. MacNeill, K.C.,* for the appellant Company.

Maclean, K.C., D.A.-G., for the Crown.

27th April, 1907.

IRVING, J.

IRVING, J., concurred in the reasons for judgment of CLEMENT, J.

MORRISON, J.

MORRISON, J.: The Legislature in dealing with the assessment of properties passed the Assessment Act, 1903, Amendment Act, 1905, and in that Act unimproved lands seem to be classified under three heads, *viz.:* "wild land," "coal land" and "timber land," and "coal land" is again classified into Class A and Class

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B for purposes of taxation. Section 32 of the Act of 1905, enacts with particularity the form to be adopted by the assessor in preparing the Assessment Roll and he is confined to the divisions set out in this section. Columns 11 to 17 of Part 1 are designated for the respective classes of unimproved properties including that for the sub-class A of coal land. In order to perform his duties in compliance with this section it is incumbent upon the assessor to determine the nature and value of the different classes of property to be entered upon this tabulated roll. In so doing he may invoke the aid of those interested, yet he need not rely on any information so furnished him but may proceed, and, in fact, if he has doubts as to the correctness of such information, it is his duty to proceed independently of it. The assessor in this case in making out his roll placed certain acreage in the "wild land" column and the remainder in the "coal land Class A" column. He accordingly valued and fixed the tax of those respective areas. From this assessment the Company appealed on the ground of over-valuation and the improper classification as wild land and the Court of Revision amended the roll by eliminating the wild land entry and placed the whole area assessed in the column devoted to "coal lands Class B" at a valuation of $1,000,000. The Company appeals to this Court from that decision as well as from the assessment as made by the assessor.

MORRISON, J.

In my opinion the Court of Revision has no jurisdiction to amend the assessment roll in the manner above stated, having regard to the decision of the Judicial Committee of the Privy Council in *Toronto Railway* v. *Toronto Corporation* (1904), A.C. 809. The classification of the land into wild land, timber land and coal land is not a question of valuation. Take the case of "timber land"—section 4, sub-section 12*b*. of the Act, 1905, defines it. There we see that it is a case of inspection of the quantity or extent of the growth of timber upon the land, and in case the timber is removed, its fitness for agricultural, pastoral or commercial purposes, regardless of valuation. If the assessor is satisfied from his own inspection and the other information available that certain areas to be taxed are not coal lands or timber lands he may designate them as "wild land"

having regard to section 3, sub-section 12, and with that feature of the roll the Court of Revision has no power to deal. If upon being satisfied that lands are "coal lands" then he may classify the lands as being of Classes A or B, and in so classifying he proceeds not upon the value but upon the physical conditions prevailing. The fact that the Legislature has enacted that the latter class shall bear a higher rate of taxation than the former is not in itself evidence of their respective values. So that this classification is not one of valuation at all. If that view be right I cannot understand upon what authority the Court of Revision can proceed to invade those exclusive functions of the assessor in respect to classification not based essentially upon valuation. If the foundation for the jurisdiction to assess is absent as indicated by their notice of appeal, then the Company may question the assessment in an action, and I therefore do not think they may come to this Court *per saltum* on any such grounds.

I would allow the appeal from the decision of the Court of Revision with costs.

CLEMENT, J.: The assessor classified the Company's lands (227,944 acres in all) as consisting of "wild land" 163,944 acres and "coal land" 64,000 acres.

The Company had paid to the Government $55,509.04 as taxes and royalties on their product of coal and coke for the year ending 30th June, 1905; and although this fact had not been brought to the assessor's notice in the particular way prescribed by the statute, he recognized it as entitling the Company to have placed in Class A such part of their lands as would be covered by an area to be determined as set out in section 2, sub-section 12*a*. This area would comprise 222,036 acres, but as the assessor had set down only 64,000 acres as "coal land" he placed the whole of it in Class A.

The Company appealed from this assessment to the Court of Revision upon the grounds "that the valuation is excessive and that a great part of the lands are improperly classed as 'wild land.'" The Court of Revision gave effect to the Company's contention as to the impropriety of classifying any part of the

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Company's lands as "wild land," and classified the entire area as "coal land," placing upon it a valuation of $1,000,000. The learned judge, however, assumed jurisdiction to review the assessor's action in recognizing the Company's claim to take the benefit of their payment of the taxes and royalties on their product of coal and coke and, because the Company had not given notice of the payment strictly in the mode prescribed, refused to recognize any right on the Company's part to have any part of their land placed in Class A. In the result, therefore, the Company is held liable to pay the 2 per cent. tax upon "coal land," Class B, valued at $1,000,000, $20,000.

The Company now appeals to this Court and it seems to me that the first thing to be done is to determine the limits of the jurisdiction of the Court of Revision, our jurisdiction, sitting in appeal, being clearly no wider than that of the Court appealed from.

The provisions of the Assessment Act, 1903, as to appeals to the Court of Revision are, so far as here material, identical with those of the Ontario Assessment Act (R.S.O. 1897, Cap. 224) which came before their Lordships of the Privy Council in *Toronto Railway* v. *Toronto Corporation* (1904), A.C. 809, and as to which they say (p. 815):

"It appears to their Lordships that the jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable."

CLEMENT, J.

It is necessary, I think, to see just what were the facts in that case in order to appreciate the scope of the decision. The Assessment Commissioner of the City of Toronto assessed the real property of the street railway company at a certain figure, which admittedly included the company's cars. The company's personal property was by law exempt from taxation and an appeal was taken by the company to the Court of Revision and in the end to the Court of Appeal for Ontario upon the ground that the cars were personal property and so exempt. Upon these appeals the company failed, the Court of Appeal finally holding that the cars were real property and so not exempt.

The company then brought action claiming a declaration that the cars were personal property and this was the action which finally reached the Privy Council, their Lordships holding that the order of the Court of Appeal upon the assessment appeal was not the decision of a Court having competent jurisdiction to decide the question (realty or personalty) so as to entitle the City to plead that decision as an estoppel in the action. Of course their Lordships were not concerned, nor are we here, with the other ground of appeal given by the statute, *viz.*: that a person has been wrongly inserted on or omitted from the roll.

It would strike one, at first blush, that a complaint that certain property has been improperly included in an assessment is a complaint that the complainant is "assessed too high" or, in other words, is "overcharged." A holding to the contrary must involve the proposition that the only question open on appeal to the Court of Revision is this: Is the assessment too high or too low, as a matter of valuation only? And, in my opinion, that is the effect of the decision of the Privy Council. If so, it relieves us at once from any embarrassment arising from our own decision in *Re Assessment Act and Nelson & Fort Sheppard Ry. Co.* (1904), 10 B.C. 519, as we must, I think, be governed by the decision of the Privy Council given, as it happens, one week later.

I am fortified in the view I take of the scope of the decision in question by a careful examination of certain cases in the Courts of Ontario (Upper Canada) which, to my mind, makes it clear that the marked differences of opinion among the judges there really turned upon the question as to the construction to be given to the words "assessed too high or too low," or (as it is expressed in another place) "undercharged or overcharged." In favour of the wider construction are such cases as *Corporation of Toronto* v. *Great Western R. W. Co.* (1866), 25 U.C.Q.B. 570; *Scragg* v. *The City of London* (1867), 26 U.C.Q.B. 263; and *Niagara Falls Suspension Bridge Co.* v. *Gardner* (1869), 29 U.C.Q.B. 194; while the narrower construction which would limit the question to one of valuation merely is upheld in *Great Western Railway Co.* v. *Rouse* (1857), 15 U.C.Q.B. 168; *Municipality of London* v. *Great Western R. W. Co.* (1858), 17

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U.C.Q.B. 262; *Nickle* v. *Douglas* (1875), 37 U.C.Q.B. 51; and *The City of London* v. *Watt & Sons* (1893), 22 S.C.R. 300. The opposing views are, perhaps, best illustrated by reference on the one hand to the judgment of the majority of the Court (Draper, C.J., and Hagarty, J., Morrison, J., dissenting) as delivered by Hagarty, J., in *Scragg* v. *The City of London, ubi supra*, and, on the other hand, to the judgment of Robinson, C.J., in *Great Western Railway Co.* v. *Rouse, ubi supra.* Reference to all the cases cited will indeed disclose that many learned judges have thought that the existence of jurisdiction in the assessor would suffice to give the Court of Revision jurisdiction to review his action, but the language of the Privy Council above quoted shews clearly that this is not a correct view of the law. Of course the Legislature could clothe the Court of Revision with full power of review, but here it has not done so.

The jurisdiction then, of the Court of Revision in this case, being limited as above indicated, the learned judge of that Court had, in my opinion, no right, nor has this Court any right, to interfere with the action of the assessor in treating the Company as entitled to the benefit of the payment of the taxes and royalties upon their coal and coke product for the year. The assessor's action in that respect had nothing at all to do with any question of valuation.

CLEMENT, J.

On the other hand, the classification of the Company's lands into "wild land" and "coal land" was a matter essentially of valuation. It is practically conceded on all hands that the lands are all "coal land" within the meaning of the statute, that is to say, they constitute one large area owned by the Company "for the special purpose of mining coal therefrom and not held or used for any other purpose." The value of such an area rests intrinsically upon the fact that it is or is supposed to be underlaid, more or less, with coal. The difference between such an area and an area of "wild land," with no such wealth or supposed wealth underground, is essentially one of value; and, so thinking, I am of opinion that the Court of Revision had jurisdiction to alter the assessor's classification in that regard. Otherwise the absurd result would follow that the assessor's classification would stand and the Company would pay a 4 per

cent. tax on a very large area, which as a matter of fact is "coal land" and properly to be assessed upon its value as such. Taking, for the moment, the valuation put upon these lands by the Court of Revision as correct, the assessor's valuation ($1 per acre) would be increased more than four fold; and the Company, the assessor's valuation standing, would pay a 4 per cent. tax upon that increased valuation.

For these reasons I conclude that the whole area should be treated as "coal land," 222,036 acres in Class A, and 5,908 acres in Class B. I think we should affirm in this latter respect what I take to have been the view of the assessor or, perhaps I should put it, I would disaffirm the action of the Court of Revision in interfering with the assessor's view upon this point.

Then as to the valuation. It is to be noted that no contention was put forward before us that the Court of Revision could not increase the assessor's valuation without an appeal on the part of the Government; and, on the other hand, that this Court is not asked by counsel for the Government to increase the valuation put upon the property by the Court of Revision. After a careful perusal of all the evidence I cannot see any ground for a reduction. Section 51 of the Act prescribes the principle to be followed in arriving at a valuation of property for purposes of assessment. The Company's officers put forward in evidence fine-spun theories of value based upon producing power, etc., for which the section gives no warrant; while at the same time counsel for the Company succeeded apparently in choking off evidence as to a matter most germane, in my opinion, to the inquiry, namely as to the extent of the demand for and sale of Government coal land at $10 per acre. The assessor and the learned judge below both based their valuation upon the saleable value of just such property as the Company here owns, and I cannot see any warrant for saying that the Company's lands are not worth $1,000,000, exclusive, of course, of all improvements upon the lands. Any assessment of such a property otherwise than *en bloc* is not in my opinion feasible. Indeed the Company in this case practically offered it to the assessor to be assessed as one block of coal land.

I arrive then at this result, that the Company's lands were

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correctly valued at, say, $4.38 per acre; and I do not hesitate to say (although this Court has, as I have said, really no jurisdiction to deal with the matter on this appeal) that 222,036 acres should be placed in Class A, and the balance, 5,908 acres, in Class B. The statute fixes the rate in each case and the amount of the tax which the Company should pay is now a mere matter of computation.

CLEMENT, J.

The Company having substantially succeeded are entitled to the costs of this appeal. They were obliged to come to this Court to correct the error of the Court of Revision in assuming jurisdiction to deal with the question of classification as between Class A and Class B.

Appeal allowed.

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JACKSON v. DRAKE, JACKSON & HELMCKEN.

Practice—Questions put to judgment debtor—Whether marginal rule 610, Supreme Court Rules, 1906, displaced by Arrest and Imprisonment for Debt Act, R.S.B.C. 1897, Cap. 10, Sec. 9—Supreme Court Act, B.C. Stat. 1903-4, Cap. 15, Secs. 108 and 109.

Under rule 610, of the Supreme Court Rules, 1906, the debtor must answer all questions affecting his property anterior to the recovery of the judgment.

Section 19 of the Arrest and Imprisonment for Debt Act has not been displaced by rule 610.

Statement

APPEAL from an order of IRVING, J., at Chambers, in Victoria on the 24th of January, 1907, directing that the defendant attend as a judgment debtor and answer certain questions as to his present ability to pay the judgment debt and as to his estate and property at the time the debt for which the judgment in the action was obtained, was incurred. The judgment in question in the action was obtained on an account stated, dated the 2nd

of November, 1903, and the defendant on this examination set up that he was not compellable to go beyond that account in giving a statement of his assets; in short, that the date of the account stated was the date the debt upon which the judgment recovered was incurred, and he might be questioned as to his assets as from that date.

The appeal was argued at Victoria on the 1st of February, 1907, before HUNTER, C.J., MARTIN and CLEMENT, JJ.

Peters, K.C., for appellants (defendants): The order appealed from is in reality made under the Arrest and Imprisonment for Debt Act, and an examination under that Act can no longer be held. But even if that statute is still in force, it is confined to the time when the cause of action arose, and here the cause of action commenced at the date of the account stated. To answer the questions as directed by the learned judge below would mean that we would have to account for all the moneys we had received back to ten years before the date of the account stated. The examination is to be confined to what the debtor actually has, not what he has had ten years before. His present ability to pay is the subject of the examination. Under the rule he can only be punished for contempt, of which he can purge himself by obedience; he cannot do this under the statute, although for the same offence. It is too onerous to ask a man to go back ten or twelve years and say what he has done with his money.

Argument

Prior, for respondent (plaintiff): There is no limit of time within which the debtor may be examined: see *Ontario Bank* v. *Mitchell* (1881), 32 U.C.C.P. 73. We are entitled to ask questions with regard to any matters relevant to the issue: An. Pr. (1907), p. 570; *Republic of Costa Rica* v. *Strousberg* (1880), 16 Ch. D. 8. It is quite clear that the two modes of procedure are existing. He cited *Switzer* v. *Brown* (1869), 20 U.C.C.P. 193; *Watkins* v. *Ross* (1893), 68 L.T.N.S. 423. We have here two consistent enactments: Hardcastle, 3rd Ed., p. 331, Maxwell, 4th Ed., pp. 247, 260, 263. The special statute as to procedure would not be repealed by the general enactment: *Bullen* v. *Moodie et al.* (1863), 13 U.C.C.P. 126 at p. 138; *Drosdowitz* v. *Manchester Fire Assurance Company* (1898), 6

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B.C. 269; *Griffiths* v. *Canonica* (1896), 5 B.C. 48. In this case there has been a waiver on the part of the debtor for he has submitted himself for examination.

Peters, in reply: The question of waiver does not apply here, because we were bound to attend as part of this order is perfectly good.

Cur. adv. vult.

27th April, 1907.

HUNTER, C.J.: Two points were taken by Mr. *Peters* in support of this appeal. The first one was that rule 610 had displaced section 19 of the Arrest and Imprisonment for Debt Act by reason of the fact that section 109 of the Supreme Court Act enacts that the rules are to regulate procedure and practice in the matters therein provided for. Examination however of the section and the rule will shew that they do not cover the same ground. The section deals only with final judgments, the rule with both judgments and orders; the examination under the section may be before any person named in the order, but under the rule it must be before a judge or an officer of the Court; the procedure in the case of a contumacious debtor under the section is by way of committal, while under the rule it is by way of attachment. It seems to me that the procedure under the rule is not inconsistent with or repugnant to that under the section, but alternative, and that both ought to be regarded as enabling and not as antagonistic to each other. Suppose a judgment debtor resides at Hazelton. If only the rule were in force it would appear that he would be compelled to attend for examination at some other place, the nearest available being about 400 miles away, which might work an unnecessary hardship; but under the Act he might be examined at Hazelton.

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The section, then, being still in force, it seems to me impossible to answer the reasoning of Wilson, C.J., in *Ontario Bank* v. *Mitchell* (1881), 32 U.C.C.P. 73, and I think that the sum of the matter is that the debtor is at the mercy of the cross-examiner, subject only to the control of the Court whose duty of course it is to see to it that the process is not used maliciously or oppressively, or for ends foreign to the proper purpose of the

examination. But even if the section were no longer in force, I think the reasoning of the Court in the case already cited applies equally to the rule, and that under the rule the debtor must answer questions regarding the acquirement and disposition of his property anterior to the recovery of the judgment.

The appeal must be dismissed.

MARTIN, J.: First it is contended that the effect of the new rules of 1906 (in force on and from May 1st, 1906) is to make a complete code of and on the practice and procedure of the Court under sections 108-9 of the Supreme Court Act, and that since rule 610 deals with the examination of judgment debtors, section 19 of the Arrest and Imprisonment for Debt Act, R.S.B.C. 1897, Cap. 10, which deals with the same subject-matter must be deemed to be repealed. Now, for a long time it has been the practice of this Court to grant orders under section 19 the same as that appealed from, despite the fact that rule 610 has existed since January 1st, 1893, as rule 486 of the rules of 1890, concurrently with section 11 of the Execution Act, Cap. 42, of the Consolidated Statutes of B.C. 1888, which on the revision of the statutes in 1897 became substantially said section 19. The fact that by such revision no change was made in the practice of the Court of granting orders under both the rule and the section, makes a strong case for the retention of the practice and the late re-enactment of the rule 486 as 610 evinces to my mind no intention of interfering with the two established remedies. Of course if the rule and the section covered precisely the same ground and attained identical objects even the unusual circumstances I have mentioned could not save the inference in favour of repeal by the later rule which it is conceded has the force, by virtue of said sections of the Supreme Court Act, of a statute. But though under the rule the examination is a "cross-examination of the severest kind"—*Republic of Costa Rica* v. *Strousberg* (1880), 16 Ch. D. 8—so as "to make a judgment debtor tell what assets he has to satisfy the judgment"—*Watkins* v. *Ross* (1893), 68 L.T.N.S. 423 (*per* Lindley L.J.), and may be resorted to in aid of equitable execution—*Hamilton* v. *Brogden* (1891), W.N. 14, yet, as will be seen later, it is not of so wide a

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scope as that under the section and the consequences may differ widely, for the judge has exceptional and often salutary powers under section 15 which is incorporated with section 19.

The general rule on the subject is thus stated in Maxwell on Statutes, 4th Ed., pp. 247-8:

"But repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute-book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention."

Having regard to the course of legislation already noticed I do not think we should be justified in overturning the established practice on these examinations which may both be usefully resorted to according to the object and scope of the investigation the creditor has in view.

Then as to the second ground of appeal. I think we should follow the judgment of the Ontario Court of Common Pleas, *in banc*, in *Ontario Bank* v. *Mitchell, supra*, which is directly in point.

The appeal should be dismissed with costs.

CLEMENT, J.

CLEMENT, J.: It seems to me that section 19 of the Arrest and Imprisonment for Debt Act may very well stand side by side with marginal rule 610 of the Supreme Court Rules, 1906. Assuming, however, that the statutory provision has been in effect repealed by the rule, I think an examination under the rule should be given the very widest latitude. The debtor's protection against an unreasonable or unduly harassing examination is in the last resort in the Court, and I do not think we should attempt to lay down in advance any narrowing rule as to the scope of such an examination. This must be left for determination in each particular case; and I think the ruling of my brother Irving as to the scope of the examination in the case before us is well within a proper construction of the rule.

I would dismiss the appeal.

Appeal dismissed.

REX v. BRIDGES *ET AL.*

IRVING, J.
(At Chambers)

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Summary conviction—Habeas Corpus—Canada Shipping Act, R.S.C. 1906, Cap. 113, conviction under section 287—Disclosure of offence in warrant of commitment.

It is essential in a conviction under section 287 of the Canada Shipping Act, to state that the act charged was wilfully committed, and the omission to do so is fatal to the validity of the conviction.

The King v. *Tupper* (1906), 11 C.C.C. 199, and *Ex parte O'Shaughnessy* (1904), 8 C.C.C. 136, followed.

MOTION for the discharge of five prisoners convicted under sub-section (*e.*) of section 287, Canada Shipping Act, R.S.C. 1906, Cap. 113. The men (five) were charged with "continued wilful disobedience to lawful commands," and a sixth man "wilful disobedience to any lawful command," and upon conviction they were committed to gaol. The warrants of commitment stated the offence for which the men were committed to be that they "did unlawfully continue to disobey the lawful commands of the master of the said vessel," and in the sixth case "did unlawfully disobey the lawful commands of the master of the said vessel." Heard before IRVING, J., at Chambers in Victoria the 30th of April, 1907.

Statement

Lowe (*Moresby & O'Reilly*), for the motion: Wilfulness, which is an essential ingredient of the offence charged, is not disclosed, and the word unlawful by itself is not sufficient: see *The King* v. *Tupper* (1906), 11 C.C.C. 199 and *Ex parte O'Shaughnessy* (1904), 8 C.C.C. 136.

Argument

Morphy, contra.

Judgment

IRVING, J., *held* that the conviction was bad and ordered the prisoners discharged.

Order accordingly.

CLEMENT, J.
(At Chambers)

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BRADLEY v. YORKSHIRE GUARANTEE AND SECURITIES CORPORATION, LIMITED.

Practice—Joinder of defendants—Action for rectification of agreement for sale of land.

In an action for the rectification of an agreement for sale of a certain lot, it developed that plaintiff had dealt with one L. assuming to act as agent for the defendant Corporation, who, on discovery, denied his authority to act as their agent:—

Held, that plaintiff had a right to add L. as a party defendant, as, should it transpire that L. was not a duly authorized agent of the owners, plaintiff might have a right of action against him personally.

Statement

APPLICATION to add one C. A. Lett as a party defendant and set up a claim against him in the alternative for damages for breach of warranty of authority. Heard before CLEMENT, J., at Chambers in Vancouver on the 30th of April, 1907. The action as originally framed was for rectification of a certain agreement for sale between the plaintiff and defendant Corporation by striking out the words "lot 10" and inserting "lot 11" on the ground that said agreement had been signed under a mutual mistake of fact. The parties had been brought together and the preliminary negotiations in connection with the sale had been conducted by Lett, but the defendant Corporation in answer to certain interrogatories denied that he was their agent, hence the present application, which came on before MORRISON, J., and was directed by him to be disposed of by the trial judge.

Argument

Macdonell and *Creagh*, in support of the application, cited *Child* v. *Stenning* (1877), 5 Ch. D. 695; *Honduras Railway Co.* v. *Tucker* (1877), 2 Ex. D. 301; *Bennetts & Co.* v. *McIlwraith & Co.* (1896), 2 Q.B. 464; *Lasher* v. *Tretheway* (1904), 10 B.C. 438; *Sanderson* v. *Blyth Theatre Company* (1903), 2 K.B. 533; *Frankenburg* v. *Great Horseless Carriage Company* (1900), 1 Q.B. 504 at p. 509; *Bullock* v. *London General Omnibus Co.* (1907), 76 L.J., K.B. 127.

C. B. Macneill, K.C., and *Pugh, contra*, cited *Sadler* v. *Great Western Railway Co.* (1896), A.C. 450; *Thompson* v. *London County Council* (1899), 1 Q.B. 840.

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CLEMENT, J.: In this case, I have come to the conclusion I should make the order that the plaintiff asks for. I have examined the authorities, and in one aspect of this case it seems to me to come exactly within the case of *Bennetts & Co.* v. *McIlwraith & Co.* (1896), 2 Q.B. 464. The plaintiff here says that she bought what we will call lot A, from Lett, who assumed to represent the owner of the lot. She says that acting upon that—I disregard for the moment the written agreement, altogether—she entered into possession of the lot, and has made improvements on it. She may, therefore, if Lett's agency be established, be able to make out a case, possibly, of part performance of the agreement, entitling her to succeed in recovering the lot which she says she really did buy. Apart from that possible state of facts, it is difficult to see how she could succeed in getting further relief than a mere recission. If the fact be as she states, that she never consented to purchase the property—call it lot B—covered by the agreement drawn up, she would then possibly succeed in having that agreement set aside, and get back the purchase money, and the parties would be as if no agreement had ever been made; but, in the other aspect, if she insists upon her right to get the lot which she says she bought, then the case comes as it seems to me, within the principle of *Bennetts & Co.* v. *McIlwraith & Co.* If it should turn out that Lett was not the agent of the owners, so as to bind them then she might have a right of action against him. Now *Bennetts & Co.* v. *McIlwraith & Co.* was just exactly that case reversed. There the action was commenced against the agent, the plaintiff apparently assuming at that stage that the agent had acted without authority. Afterwards, in the course of the action, documents turned up which led him to believe that an agency really did exist; and he then applied to add the principal, and the order was made. As I say, that was the converse case, exactly, to this; and it is pointed out in that case that the order was one not under rule 4, but

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really under rules 7 and 11. And it is further pointed out that *Smurthwaite* v. *Hannay* (1894), A.C. 404, which was a decision under rule 1, did not in any way affect the authority of the earlier case of *Honduras Railway Co.* v. *Tucker*, and the Court of Appeal in 1895 thought that case to be still good law. On the authority of those two cases, I think I shall make the order asked for.

Order accordingly.

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WILLIAMS v. CANADIAN BANK OF COMMERCE

WILLIAMS v. CANADIAN BANK OF COMMERCE.

Banks and banking—Rate of interest—Agreement to pay more than statutory rate—Bank Act, Sec. 80, Dom. Stat. 1890, Cap. 31.

Section 80 of the Bank Act does not prevent a bank from entering into a contract to be paid a higher rate of interest than 7 per cent.; and if, under such contract, interest is paid in excess of said rate, it cannot be recovered back.

ACTION to recover part of the interest paid by the plaintiff to the Bank, tried before HUNTER, C.J., at Vancouver on the 4th of May, 1907, the plaintiff claiming under section 81 of the Bank Act to recover the difference between 7 per cent. per annum and 24 per cent. per annum, the latter being the rate charged to him, under an agreement contained in a letter written by him to the Bank.

Statement

At one time the plaintiff owed the defendant for principal and interest, approximately $36,000, and to secure payment of the same, the Bank held a mortgage on the plaintiff's mining property. The plaintiff procured a purchaser for the mining property, and requested the purchaser to pay to the Bank, out of the purchase moneys, the amount claimed by it, in order to secure a release of the mortgage.

The principal money and interest were accordingly paid to

the Bank. The plaintiff stated it was paid under protest. The evidence for the Bank was that the amount was paid voluntarily, and the Bank produced a document signed by the plaintiff, shortly after the mortgage moneys had been paid to the Bank, in which the plaintiff authorized the Bank to apply the amount so paid into the Bank in payment of his indebtedness.

Donaghy, for plaintiff.
Davis, K.C., for defendant Bank.

HUNTER, C.J.: In my opinion, this action must be dismissed. The first question to decide is as to the meaning of section 80 of the Bank Act, which provides that "the bank shall not be liable to incur any penalty or forfeiture for usury, and may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per cent. per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank; and the bank may allow any rate of interest whatever upon money deposited with it."

I observe by the notes to this section in McLaren's work, that the question came up for decision in the Court of Appeal for Quebec, in the case of *Massue* v. *Dansereau* (1865), 10 L.C.J. 179; and it was there decided by a majority of three judges against two that where money was paid voluntarily in excess of the legal rate, it could not be recovered back. Speaking for myself, I agree with the majority in that case. I see nothing in the language which drives me to the conclusion to hold that a stipulation or contract to take a higher rate of interest is made illegal. The sole effect of the section, as far as I can see, is to render such a contract unenforceable. It would follow, then, that if the contract is not made illegal, if the Bank and the customer choose to enter into such a contract, they may do so; and if, under such contract, interest in excess of the rate of 7 per cent. per annum is paid, then, on ordinary principles, it could not be recovered back.

Judgment

Now with respect to the other questions raised: As to the question of estoppel, I agree with Mr. *Donaghy* that the recitals in the contract do not constitute in strictness an estoppel, but merely are recitals as to the then existing amount of indebted-

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ness. But the letter of December 7th shews conclusively that there had been an agreement or understanding come to between the parties on September 2nd, as to what the amount of the indebtedness was; and it is there stipulated that if the amount calculated at the rate of 12 per cent. comes to a larger sum than $36,000, then the plaintiff is to make good the difference; and if it falls short, the Bank is to make good the difference. That, to my mind, is a clear agreement arrived at between the parties with full knowledge of all the circumstances, that the indebtedness was to be calculated at the rate of 12 per cent.; and, as I have already said, I see nothing in the statute to render such a contract stipulating for 12 per cent. illegal. That contract has been carried out, and under the authority to which I have referred, as well as in my own opinion, the money cannot be recovered back. The action will therefore be dismissed with costs, including the costs of the commission.

Judgment

Action dismissed.

BROWN v. BROWN.

HUNTER, C.J. (At Chambers)

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May 17.

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Divorce—Alimony, whether grantable to wife obtaining a divorce on account of impotence.

It is no objection to granting permanent alimony that the wife has obtained a decree for divorce on the ground of impotence.

APPLICATION by the wife for permanent alimony, heard by HUNTER, C.J., at Chambers in Vancouver on the 10th of May, 1907.

Macdonell, for the applicant.

Davis, K.C., contra.

17th May, 1907.

HUNTER, C.J.: This is an application for permanent alimony in a divorce suit tried by my brother MORRISON, in which a decree *nisi* was granted to the wife because of impotency.

Mr. *Davis* opposes the application on the ground that when a decree is obtained for this cause, there is no jurisdiction to grant permanent alimony, as there never was a valid marriage, and in support of his argument, refers to cases where it was held that there was jurisdiction to grant alimony *pendente lite* and contends that the inference is that the jurisdiction is confined to such alimony.

It is clear, however, that by the law of England a marriage which is annulled on the ground of impotency is not void *ab initio* but voidable only at the instance of the aggrieved spouse: *A.* v. *B.* (1868), L.R. 1 P. & D. 559; *Turner* v. *Thompson* (1888), 13 P.D. 37.

Judgment

In 14 Cyc. 767, there is a reference to a case of *Chase* v. *Chase*, 55 Me. 21, in which it appears to have been decided that when the decree is based on impotency the Court has no jurisdiction to grant permanent alimony, but as the report is not available I am unable to say if it throws any light on the subject or whether it is merely an authority on the construction of a Maine statute. In any event, it could not prevail against the English decisions.

Reference, if necessary, to the Registrar.

Application granted.

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DE LAVAL SEPARATOR COMPANY v. WALWORTH.

Statute, construction of—Companies Act, 1897, R.S.B.C. 1897, Cap. 44, Sec. 123—Registration of Company—Penalty.

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Section 123 of the Companies Act, 1897, although it penalizes the carrying on of business within the Province by non-registered companies, does not avoid contracts entered into within the jurisdiction.

Semble, the forwarding of goods to an agent to be sold by him in his own name, is not a transaction within the prohibition of section 123.

Quære, whether the creating within the jurisdiction of an obligation which is to be performed without the jurisdiction is carrying on business within the jurisdiction within the meaning of the section.

Statement

ACTION tried before HUNTER, C.J., at Vancouver on the 28th of March, 1907.

Davis, K.C., and *Marshall,* for plaintiff Company.

Craig, for defendant.

17th May, 1907.

HUNTER, C.J.: Action on promissory notes payable at Winnipeg given in settlement of balances owing by the defendant on account of separators furnished by the plaintiffs.

The sole defence insisted on at the trial was that the notes were illegal and void by reason of the fact that the plaintiffs being an extra-provincial Company had not registered under section 123 of the Companies Act, and that the taking of the notes was a carrying on of business in contravention of that section. The defendant also counter-claimed on the same ground for a declaration that a conveyance of lands given by way of collateral security was void. The machines were forwarded from Winnipeg under a written contract executed in British Columbia by the defendant, by the Winnipeg agent of the Company who was then in British Columbia, and the notes were signed by the defendant in British Columbia and forwarded to Winnipeg, being made payable at that place and were given in settlement of the defendant's indebtedness on account of the machines.

Judgment

If the contract had been adhered to, it would have been a nice question to determine whether in point of law the defendant was merely an agent for sale of the machines, or whether he was the purchaser; and while the scale would seem to turn in favour of the latter view, as it was admitted that the defendant could give what credit he chose to the customers; that he took the lien notes in his own name; and that he was not paid the salary provided for by the contract; yet it is unnecessary to come to any final conclusion on this point as I think that the plaintiffs were not carrying on business within the meaning of the section assuming that Walworth was only an agent for sale.

It would be difficult, if not impossible, to state accurately and at the same time exhaustively what would constitute a carrying on of business, but I do not think that where goods are forwarded to an agent for sale, and sold by him in his own name, that is a transaction within the prohibition; and in any event I very much doubt whether the creating within the jurisdiction of an obligation which is to be performed without the jurisdiction can strictly be said to be a carrying on of business within the jurisdiction within the meaning of the prohibition.

But I prefer to rest my judgment on the ground that the section does not in terms avoid contracts entered into within the jurisdiction, although it penalizes the carrying on of business by non-registered companies.

It was argued that as the statute enacts that no extra-provincial company shall carry on business unless licensed or registered, the Legislature meant to prohibit the making of any contracts within the jurisdiction by unregistered companies, and not merely to penalize the failure to register, and of course if the language necessarily implies such a prohibition, the contention must be allowed; but I do not, however, think that this is the necessary implication.

The case most relied on was *Bensley* v. *Bignold* (1822), 5 B. & Ald. 335. In that case it was held that the plaintiffs, who were printers, could not recover for printing a pamphlet because their names did not appear on the pamphlet in accordance with the statute of 29 Geo. III., which enacted a forfeiture of

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£20 for every copy distributed without the names printed as required.

Whether the reasoning assigned in the judgments would be accepted by the English courts of to-day I very much doubt. It seems to me to be in conflict with the general principle insisted on in the House of Lords in *Bank of England* v. *Vagliano Brothers* (1891), A.C. 107 and *Salomon* v. *Salomon & Co.* (1897), A.C. 22; and by the Judicial Committee in *Robinson* v. *Canadian Pacific Railway Co.* (1892), A.C. 481 at p. 488, as well as by the Supreme Court of the United States in the case cited by Mr. *Davis* of *Fritts* v. *Palmer* (1889), 132 U.S. 282, that the Court is not at liberty to insert language in an Act of Parliament which is not to be found there, and also with that which is only an illustration of the general principle, *viz.:* the special proposition stated by Jessel, M.R., in *In re International Pulp and Paper Company* (1877), 6 Ch. D. 557 at p. 560, and by Brett, M.R., in *Attorney General* v. *Bradlaugh* (1885), 14 Q.B.D. 667 at p. 687, and enforced by the House of Lords in *Wright* v. *Horton* (1887), 12 App. Cas. 371, to the effect that where a statute creates a new obligation and enacts a consequence for the breach of it, that is the only consequence.

Judgment

At any rate, I must apply these principles to the interpretation of the enactment in question, and in doing so I can find no language which, either expressly or by necessary implication, imposes any other consequence than the one prescribed; and I think this view is fortified by a comparison of the enactment with other similar enactments in the Revised Statutes which, according to Lord Westbury in *Boston* v. *Lelievre* (1870), L.R. 3 P.C. 157 at p. 162, and Lord Watson in *Belize Estate and Produce Company* v. *Quilter* (1897), A.C. 367 at p. 372, may be construed collectively as being one great Act or code of law.

In the case of dentists, medical practitioners, barristers and solicitors it is made unlawful in terms to practise or carry on business without having a licence from the proper authority, and there can be no doubt from the language used that there is the additional consequence that no action will lie for any charges or fees or goods supplied; while on the other hand in the case of trades licences although to carry on business without

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a licence is made an offence, there is no similar provision barring suits to recover, and failure to register a partnership is not a good defence to an action for work done by the partnership: *Smith* v. *Finch* (1906), 12 B.C. 186.

The question is, not whether carrying on business without a licence is prohibited or made illegal, for that is conceded, but what is the consequence? Applying the foregoing principles and comparing this with similar legislation, I am led to the conclusion that the Legislature has not imposed the consequence contended for. The intention is to penalize the abstract or general, but not to invalidate the concrete or particular.

Judgment

Judgment for the plaintiff, with costs.

Judgment for plaintiff.

THE EASTERN TOWNSHIPS BANK *ET AL.* v. VAUGHAN *ET AL.*

FULL COURT
1907
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EASTERN TOWNSHIPS BANK v. VAUGHAN

Waters and water rights—Riparian owners—Effect on water record of abandonment of pre-emption.

V. and M. held separate pre-emption records, and, as partners, a joint water record, dated January, 1888. In October, 1889, they formally abandoned their separate pre-emptions and relocated the same area as partners, obtaining in due course a pre-emption record to it in their joint names. The water record was left unchanged, standing in the names of V. and M.:—

Held, on appeal (reversing the decision of MORRISON, J.), that when V. and M. abandoned their pre-emptions the water record obtained in connection therewith lapsed.

APPEAL from the decision of MORRISON, J., in an action tried before him at Grand Forks on the 15th and 16th of May, 1906. The material facts on which the decision of the Full Court turns sufficiently appear in the headnote and the reasons for judgment of MARTIN, J.

Statement

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EASTERN TOWNSHIPS BANK v. VAUGHAN

The appeal was argued at Victoria on the 17th and 18th of January, 1907, before HUNTER, C.J., MARTIN and CLEMENT, JJ.

S. S. Taylor, K.C., and *Hanington*, for appellants (plaintiffs).
Davis, K.C., for respondents (defendants).

Cur. adv. vult.

24th April, 1907.

HUNTER, C.J.: There being no material facts in dispute, the decision of this appeal turns on the nature of the records which are the subject of the suit.

It was held by Begbie, C.J., in *Carson & Eholt* v. *Clark & Martley* (1885), 1 B.C. (Pt. 2) 89 at p. 195, that where a pre-emptor abandons his pre-emption he cannot continue to hold a water right recorded for use in connection therewith in gross, and so far as I can see this view was not dissented from by any one of the appellate judges, and is of the greater weight as his judgment was delivered prior to the passing of the amending Act of 1886. It is indeed somewhat difficult to see how the Legislature could ever have been supposed to have intended to allow any person who was not a riparian owner to abstract water from a stream to the possible disadvantage of riparian owners, except for such necessary purposes as cultivating some specified land *bona fide* occupied by the holder of the right which could not otherwise be cultivated. It is, I say, difficult to suppose that the Legislature ever intended that such persons should retain such rights as separate assets, and it would be in violation of the first principles of statutory construction to hold that the common law rights of riparian owners were thus destroyed or impaired beyond what the reasonable interpretation of the statute calls for, and in my opinion nothing turns on the first section of the Act of 1886 which was only declaratory so far as concerned the nature of the right.

HUNTER, C.J.

Accordingly it follows that when Vaughan and McInnes abandoned their pre-emptions, the water records obtained in connection therewith lapsed, and therefore it becomes unnecessary to discuss the other points. A somewhat analogous case may be found in *The National Manure Company* v. *Donald* (1859), 28 L.J., Ex. 185.

The plaintiffs are entitled to a declaration of priority with costs here and below.

MARTIN, J.: To the grounds upon which the plaintiffs attack the validity of the defendants' water record objection is primarily taken that the plaintiffs have no status, but whatever may be said on this point it has no application to the contention of the plaintiffs that, even admitting the original validity of the record, it ceased to exist when the defendants abandoned their pre-emptions on the 28th of October, 1889. This is the most important point in the case, and it depends upon the meaning that is to be given to the group of sections 43-7 under the heading "Water" in the Land Act, 1884, Cap. 10, and section 1 of the Land Act, 1886, Cap. 11.

The defendants Vaughan and McInnes held separate pre-emption records, and, as partners, a joint water record, dated 20th January, 1888. On October 28th, 1889, they formally recorded their abandonment of their individual pre-emptions, relocated the same area as partners, and on the same day applied for and recorded it as a new pre-emption in their joint names to be enjoyed in partnership. No proceedings were taken in regard to the water record which was allowed to stand in the name of "Vaughan and McInnes." The affidavit they took and recorded at the time on applying for the new pre-emption record stated that the land was "unoccupied and unreserved Crown land within the meaning of the Land Act . . . . and we have staked off and marked such land in accordance with the provisions of the Land Act . . . . ," etc., etc.

Section 12 of the Land Act, 1884, provides that:

"The occupation in this Act required shall mean a continuous *bona fide* personal residence of the pre-emptor, his agent, or family, on land recorded by such settler . . . . ."

In the affidavit to be taken by sections 5 and 6 of said Act is this clause: "My application to record is not made in trust for, on behalf of, or in collusion with any other person or persons, but honestly on my own behalf for settlement and occupation," which occurs in the said affidavit of defendants.

By said sections 5 and 6 it is provided that "if the applicant shall in such declaration make any statement knowing the same

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to be false he shall have no right at law or in equity to the land the record of which he may have obtained by the making of such declaration." I cite the foregoing to shew the importance that is to be attached to the statements in the affidavit and in view of them, and of the evidence of Vaughan, it is impossible to say that the original pre-emptions were not as a fact abandoned.

The appellants' contention is that the defendants' water record could only exist in connection with their pre-empted lands, even granting that a joint water record could be used for distinct pre-emptions standing in individual names; in other words, that no one under the Act in question could hold a water record without holding lands under section 43, and that upon his abandoning all his interest in lands, his water record lapsed. The whole tenor of the said group of sections is relied upon as establishing the intention of the statute in this respect. In answer, it is urged that though there was a technical abandonment yet the hardship would be so great that the Court should avoid if possible giving full effect to appellants' contention; that once a statutory water record comes into existence the intention to make it appurtenant to the land must be clear; and that there was no intention in those days when water was abundant and settlers few to restrict its use to any particular parcel of land or for any limited period, or a continuous period; that section 1 of 1886 if it applies, is in favour of the defendants because the abandonment was tantamount to a conveyance to the Crown and upon the issuing of the new pre-emption record to the defendants the old water record would vest in them; but that the section does not apply, and what happened in effect was a transfer of equities from the individuals to the partnership, or to the Crown with a transfer back and a recognition by the Crown, in which no one else is concerned, that each of the defendants had a mutual interest in said record as well as in the lands.

MARTIN, J.

After a careful consideration of the said sections I have come to the conclusion that it is impossible to disguise the fact that it was the manifest intention of the Legislature to restrict the holding of an agricultural water record to those persons mentioned in the opening words of section 43, *viz.*: "Every person

lawfully entitled to hold land under the Act . . . and lawfully occupying and *bona fide* cultivating lands," and the whole enactment is framed on that assumption. Indeed it is otherwise impossible to give due effect to such expressions as: "divert so much and no more unrecorded . . . water . . . from . . . . any stream, lake or river adjacent to or passing through such land"; "reasonably necessary for such purposes"; "constructed a ditch for conveying the water to the place where it is intended to be used"; "lawfully occupying and *bona fide* cultivating as aforesaid," etc., etc. And the test of this view may perhaps be found in section 47, because, even assuming that a person other than a land-owner had obtained a water record he could not have the right of entry on the lands of others to effectuate said record for that only "may be claimed by any person lawfully occupying and *bona fide* cultivating as aforesaid." The whole of this section, and indeed the 45th, clearly contemplates the ownership of some land on which the record is dependent. The word "divert" also is a somewhat peculiar one in that it has a continuous signification, and differs in this respect from the act of recording which is done once and for all. So that any person who has once exercised the right to record water in connection with his land given him under section 43 has done all in that respect that he ever can do, but in exercising the right to divert he is continuously invoking the assistance of the statute for the preservation of rights based upon occupation and cultivation.

Again, take section 45. Only full effect to it can (in a case like the present of user for agricultural purposes) be given to the holder of a water record who is also a landowner, for the ditch conveying the water to the land (place) "where it is intended to be used" could not be enlarged as therein provided if the land in connection with which the ditch had been originally constructed was abandoned, for there was no longer in existence any place (land) where the water was "intended to be used"—(*cf.* section 44 as to the notice "specifying all particulars . . . . including direction," . . . . etc.) Otherwise the ridiculous result would be that though a former owner would have no land, yet he would be able to keep in existence a water record reduced by his own act to possibly a mere nominal efficiency. And a further

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like result would be that a pre-emptor could record a water right in connection with his pre-emption, abandon that pre-emption the following day, and though not doing one hour's work in furtherance of the water record, keep it alive indefinitely to harass his neighbours and compel them or intending settlers requiring water to buy him out, who would be at his mercy, for, by section 46 "priority of right to any such water privilege in case of dispute shall depend on priority of record." It seems to me that before recognizing rights so detrimental to the public welfare as being created by this statute we should have some language to shew that the Legislature contemplated them, but everything points to the contrary view I have before expressed. As was said by the Supreme Court of Canada in a recent water case from the Yukon—*Klondyke Government Concession* v. *McDonald* (1906), 38 S.C.R. 79, *per* Duff, J., at p. 91:

> "We ought not, unless compelled by intractable language, to attribute to the legislative authority an intention to promulgate a scheme so obviously futile, and a construction leading to that result must, I think, be rejected."

MARTIN, J.

With respect to section 1 of 1886, it is not necessary, from my standpoint, to consider it; but I may say that I should find some difficulty in applying it to this case, for an abandonment of an interest is not, in any way that has been suggested, tantamount to a transfer or conveyance of it. A man who intends to transfer his property necessarily maintains his interest therein up to the very moment the other party acquires that interest; but when he abandons his property he does so because it is his desire that all his interest therein may then and there terminate.

In my opinion, therefore, the defendants' record ceased to exist on the abandonment of the pre-emptions and the plaintiffs are entitled to a declaration of the validity of their record and an injunction against the defendants. Nothing was said about damages before us.

The appeal should be allowed with costs.

CLEMENT, J.

CLEMENT, J., concurred with HUNTER, C.J.

Appeal allowed.

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Shipping—Seamen's Act, R.S.C. 1886, Cap. 74, Sec. 52—Jurisdiction of County Court—Wages of sailor—Term of hiring—Accrual of wages de die in diem—Desertion—Forfeiture of wages.

A County Court judge has jurisdiction in an ordinary action for wages of a seaman to try a claim for more than $200 where the plaintiff has a good demand at common law; that is, where his cause of action is complete without the aid of the statute. Section 52 of the Seamen's Act merely creates a concurrent tribunal for securing a speedy settlement of claims for wages.

Plaintiff shipped for a voyage of three months. The period expired before the voyage was completed, and while the ship was calling at a port, he went ashore, without leave, to seek legal advice. While thus absent the ship sailed:—

Held, that he could not be classed as a deserter.

APPEAL from the decision of IRVING, J., in an application to him for a writ of prohibition to the County Court judge of Victoria in an action by a seaman on a claim for wages, $200.25; and from the judgment of LAMPMAN, Co. J., in the same action, tried at Victoria on the 13th of July, 1906.

Statement

The facts are sufficiently set out in the reasons for judgment of LAMPMAN, Co. J.

Moresby, for plaintiff.

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

20th September, 1906.

LAMPMAN, CO. J.

LAMPMAN, Co. J.: The plaintiff sues the defendant Company, which owns the steamer Salvor for $200.25, being the amount of his wages as seaman for the period from the 18th of February to the 18th of May, 1906.

The plaintiff was engaged to serve as seaman on board the Salvor under articles signed on the 18th of February, 1906; the articles stated:

"The several persons whose names are hereto subscribed and whose descriptions are contained herein, and of whom.....are engaged as sailors, hereby agree to serve on board the said ship, in the several capacities

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expressed against their respective names, on a voyage for wrecking purposes from Victoria, B. C., and the Pacific Coast of Canada to the coast of Eastern Alaska and to and fro as may be requisite and at the master's option.

"Voyage not to exceed three months.

"Final port of discharge, Victoria, B. C.

"And the crew agree to conduct themselves in an orderly, faithful, honest and sober manner, and to be at all times diligent in their respective duties and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers in everything relating to the said ship and the stores and cargo thereof, whether on board, in boats, or on shore; in consideration of which services to be duly performed, the said master hereby agrees to pay to the said crew as wages the sums against their names respectively expressed, and to supply them with provisions according to the scale on the other side hereof."

In the column of the schedule headed "Amount of wages per week or calendar month," the plaintiff's wages were inserted as being $2.25 per day, the words "week or calendar month" in the printed form being struck out.

On the cross-examination of the plaintiff he admitted that he had been paid on account of his wages $30 or over and as the amount for which he could get judgment was clearly less than $200 Mr. *Taylor* moved to have the action dismissed on the ground that there was no jurisdiction in the County Court to entertain it, and cited in support of his contention *Beattie* v. *Johansen* (1887), 28 N.B. 26.

LAMPMAN, CO. J.

The plaintiff kept no statement of how his wages account stood, and after seeing him and Mr. *Taylor* (who was prompted by Mr. Bullen sitting by him), arrive at $37.50 as being the amount which he had been paid, I am satisfied that plaintiff did not have a clear idea of the amount, and I am not surprised that in the plaint he claimed the full amount of his wages, leaving it to the defendant to shew at the trial what had been paid. Thus on the face of the proceedings the County Court has jurisdiction, even assuming it has none where the claim is under $200. But *Beattie* v. *Johansen* is against, rather than in favour of Mr. *Taylor's* contention; it is of course a clear authority that in New Brunswick the County Court has no jurisdiction to entertain a statutory claim for less than $200; Cairns' claim is not statutory, and the majority of the Court were inclined to

the opinion that the County Court had jurisdiction in such a case, although the amount was under $200. In this Province, where it has been repeatedly enunciated from the Supreme Court Bench that the County Court is the appropriate tribunal to try actions involving amounts like that in dispute in this action, I should think that unless it appeared very clearly from the legislation that there was a want of jurisdiction, it would not be held to exist.

The plaintiff's service commenced on the 18th of February, and the Salvor proceeded to Alaska for the purpose of bringing the steamer Mariechen, wrecked off the Alaskan coast, to Esquimalt. About a week before the 18th of May, the Salvor arrived off Juneau with the Mariechen in tow. At Juneau considerable work had to be done on the Mariechen, and both steamers took on coal. On the 17th of May the plaintiff, who had in previous summers worked at White Horse and wanted to go there again, told the captain of the Salvor that his time was up and that he wanted his money; the captain refused to pay him off, and said that as they were on the homeward journey he must complete it. Plaintiff was not satisfied with this, and after quitting work on the afternoon of the 18th he went ashore at 6 o'clock in order to consult a lawyer and find out what his rights were. At this time plaintiff was working on the Mariechen which was at the Treadwell wharf about two miles from Juneau. He saw a lawyer that night, but could not get back to the Mariechen as the ferry had stopped running when he was finished with his legal adviser. The next morning he and Cameron missed the first ferry, and while at the wharf they saw (about 7 a.m.) the Salvor towing the Mariechen away, and they were left at Juneau. Counsel for the defence endeavoured to shew in cross-examination that plaintiff had no intention of going back but that he expected to libel the Salvor during the day. Plaintiff on his cross-examination said he did not intend to go back to work but that he was going back to make another trial at getting his money, and that either he or another seaman named Doyle would come ashore at 10 o'clock to see the lawyer; afterwards to me he said he did intend to go to work even if he did not get his pay. I think he did intend to go back, but I

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do not suppose he really knew whether or not he would go to work when he did get back; he would decide after his interview with the captain; besides he had arranged to communicate with his lawyer after seeing the captain. If he had gone back and refused to work he would not have been subject to the penalties for desertion.

Under these circumstances I do not think it can be successfully contended that plaintiff was a deserter, and hence under the statute (R.S.C. 1886, Cap. 74, Sec. 91) he would not be liable to forfeit his wages already earned. Nor do I think there has been a forfeiture within the decisions founded on the general maritime law. In coming to these conclusions I have been guided by the principles set forth in *The Westmorland* (1841), 1 W. Rob. 216; and *Button* v. *Thompson* (1869), L.R. 4 C.P. 330. It does not seem to me that the action of Cairns amounted to desertion any more than did the actions of the seamen in those cases. The question is whether the plaintiff is entitled to recover wages at the stipulated amount per day for the days he actually worked although he did not complete the whole term of service (*i.e.*, assuming for the sake of argument that the defendant's contention that the contract was not at an end at the expiration of three months is correct) in consequence of his own negligence in being left behind at Juneau. The contract here differs from that under consideration in *Button* v. *Thompson* in only one respect, and that is that here the rate of pay is daily, and there it was monthly; and it seems to me that plaintiff's daily wages became vested and a debt at the end of each day of service, and that as the action was not brought until after the termination of the voyage, plaintiff is clearly entitled to recover.

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There was some contention at the trial as to whether shore leave was stopped the night that plaintiff went ashore; the captain of the Salvor said that he gave orders to the mate that there was to be no shore leave, and Cook, the diver, said he heard the mate call out that there was to be no shore leave; Cairns says he knew nothing about the order. I do not think it would have made any difference in his actions if he had known. If at the end of three months plaintiff was entitled to

quit he is entitled to judgment without question, but as I am of the opinion he is entitled to recover even if he were bound until the voyage was completed, it is not necessary for me to give my opinion in regard to this phase of the case. In 1866 I notice that in *Button* v. *Thompson* the length of voyage was stated as "not expected to exceed," etc.

The evidence of the plaintiff on his examination for discovery was put in at the trial.

On the 9th of August, 1906, application for a writ of prohibition was made to IRVING, J., who gave the following decision:

This is an application for a writ of prohibition to be addressed to the judge of the County Court of Victoria to restrain him from proceeding with a certain action brought by one Cairns against the B. C. Salvage Co. for $200.25 for wages alleged to be due him as a seaman employed on board the defendant's ship Salvor. The application is based on the provisions of section 52 of chapter 74, which section, it is argued, deprives the County Court judge of all jurisdiction in this case.

In the first place, it is to be observed that the amount sued for is in excess of the amount named in the statute; but passing that, the question arises, "Has the plaintiff any right to resort to any tribunal except that created by section 52?"

In *Beattie* v. *Johansen* (1887), 28 N.B. 26, a seaman brought his action in the County Court for the recovery of a sum of money which at common law he could not recover; King, J., said that section 52 was the only remedy open to him, and that the Legislature intended the Court created by section 52 to be the only remedy for wages where the amount claimed did not exceed $200. Three other judges, namely, Allen, C.J., Tuck and Palmer, JJ., while agreeing with King, J., as to that particular case, took a different view as to the jurisdiction of the County Court. In their opinion the County Court retained its jurisdiction in cases where the plaintiff had a good demand at common law, that is to say, that where his cause of action was complete without the aid of the statute, he could sue in the

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County Court in the usual way. I think the opinion of the three judges ought to be followed.

The application is refused with costs.

The appeals were argued at Victoria on the 31st of January, 1907, before HUNTER, C.J., MARTIN and CLEMENT, JJ.

W. J. Taylor, K.C., for appellant (defendant Company), raised the point of the jurisdiction of the County Court judge to deal with the case: see section 52 of the Merchant Shipping Act. The claim here is indorsed for $200.25, thus barely taking it out of the jurisdiction.

The plaintiff was bound to complete the voyage: *The Triumph* (1860), 5 Ir. Jur. 381. He had no right to wages at common law unless he completed the voyage: *Beattie* v. *Johansen* (1887), 28 N.B. 26. The County Court judge was in error in holding that there was a common law right to wages without completing the voyage: *Cutter* v. *Powell* (1795), 2 Sm. L.C. 1, 3 R.R. 185; *Hulle* v. *Heightman* (1802), 2 East, 145.

Peters, K.C., for respondent (plaintiff): We invoked the ordinary jurisdiction of the County Court and sued for a debt. Where at common law we had a right of action for the amount claimed, we were not bound to follow the statute. Neither section 56 nor 57 of the Merchant Shipping Act has any application to us, because the County Court is not referred to in those two sections. *Beattie* v. *Johansen, supra*, was a case where the seaman had no right of action at common law. See also *Brown* v. *Vaughan* (1882), 22 N.B. 258.

Argument

As to leaving the ship, *Cutter* v. *Powell, supra*, is not applicable; we were to be paid so much per day: see *Button* v. *Thompson* (1869), L.R. 4 C.P. 330, where the wages vested and became a debt at the end of each month; here it was the end of each day. Section 91 provides specifically as to forfeiture. In short, we claim we have a *prima facie* common law right of action not depending on the Merchant Shipping Act or the Seamen's Act.

Taylor, in reply.

[*Per curiam:* We think there was jurisdiction, Mr. *Taylor*, and would like to hear you on the merits.]

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Desertion is not so much in the act as in the intention. This man, although he gave twenty-four hours' notice that he intended to leave, yet left the ship against the wish of the captain. He seemed to think that because the three months were up, he had an absolute right to leave. Therefore he left with the intention of deserting; being a deserter he forfeited his wages. The uncertainty of the termination of these shipping contracts is an incident that must be taken into consideration.

Moresby, for respondent: The judge below should not have received any evidence of desertion. The note in the log was made May 31st, some days after the event. That, and the testimony of the captain, is the only evidence of desertion. This was objected to at the trial. The making of the entry in the log at the time is a condition precedent to forfeiture. He referred to sections 228 and 256 of the Merchant Shipping Act, and cited *Frontine* v. *Frost* (1802), 3 Bos. & P. 302. A seaman is entitled to every benefit that can be extended to him to shew that he is not a deserter, and here the evidence at the best only shews him to be absent without leave: see Smith's Mercantile Law, 591 and 603. The master did not make him out a deserter until the arrival of the ship at Victoria. There was no copy of the articles posted in the forecastle pursuant to section 120 of the Merchant Shipping Act. Further, as to intention, plaintiff left his clothes and belongings on board. There was no sign of the vessel's early departure. He cited as to what constitutes desertion, Abbott, 241, 275; *The Two Sisters* (1843), 2 W. Rob. 125; *Ealing Grove* (1826), 2 Hag. Adm. 15; *The Roebuck* (1874), 2 Asp. M.C. 387; *The Westmorland* (1841), 1 W. Rob. 216; Pritchard's Admiralty Digest, 2,181 and 2,184.

Argument

Taylor, in reply.

Cur. adv. vult.

27th April, 1907.

HUNTER, C.J.: The facts appear in the judgment of the learned trial judge.

HUNTER, C.J.

The point as to the jurisdiction of the County Court was disposed of at the hearing. For my part I can find nothing in the statute ousting the ordinary jurisdiction of the Court; it

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merely creates a concurrent tribunal evidently with the object of securing a more speedy settlement of claims for wages than would often be possible if only the County Court could be resorted to.

With respect to the construction of the contract, I think that the plaintiff was bound to serve for the entire voyage no matter how long it took. It is impossible for anyone to predict how long a voyage will last; it may take weeks or months longer than anyone would anticipate owing to a break-down of the tackle or machinery, or to stress of weather; but I am unable to concede that a sailor can stop work at sea on the ground that his time was up no matter how long it takes to reach port, although, no doubt, he would have a *quantum meruit* claim for serving beyond the stipulated time.

As to the other point, however, I am not prepared to differ from the learned trial judge in his view that the plaintiff could not, on the evidence, be convicted as a deserter. It was not wholly unreasonable in the particular circumstances for the plaintiff to say that he did not intend to bind himself for more than the three months, especially as he was engaged in coasting service, but while I think that this view is unsound, other judges might be of a different opinion, and he was quite within his rights in seeking advice as to his position.

HUNTER, C.J.

As to the so-called entry of desertion in the log, it is clear that it was not made in accordance with the statute, and was therefore inadmissible.

I think the appeal must be dismissed.

MARTIN, J.: I confess I find it somewhat difficult in the circumstances of this case to satisfy myself on the point of desertion on which the appeal depends. It is, however, a question of fact which the learned County judge has determined on conflicting evidence in favour of the plaintiff, and I cannot bring myself to say he reached an erroneous conclusion. In determining the intention of the plaintiff his demeanour in the witness box would, in this case particularly, be of assistance to the judge.

MARTIN, J.

The appeal therefore should be dismissed with costs.

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CLEMENT, J.: I strongly incline to the view that the governing clause in the ship's articles so far as the length of engagement is concerned is the clause "voyage not to exceed three months." I prefer, however, to base my judgment upon this short ground that the learned trial judge, after hearing the plaintiff subjected to a severe cross-examination, acquitted him of the charge of desertion. His evidence, it may be, is not consistent in all its parts, but in the case of a highly penal provision such as the present, I think the finding of the trial judge on this question of fact ought not to be disturbed without the very clearest reasons for so doing.

I would dismiss the appeal.

Appeal dismissed.

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Constitutional law—Legislation by Dominion Parliament—"Property and civil rights"—Animal Contagious Diseases Act, 1903, Dom. Stat. Cap. 11.

The Animal Contagious Diseases Act, 1903, is *intra vires* of the Dominion Parliament.

Statement

ACTION for damages and for an injunction to restrain the defendant, a veterinary inspector of the Department of Agriculture of Canada from interfering with or destroying three horses of the plaintiff, tried before MORRISON, J., at Vancouver on the 31st of May, 1907.

The action arose in consequence of an outbreak of glanders amongst horses in Vancouver, in respect of which the defendant was sent from Ottawa to enforce The Animal Contagious Diseases Act, 1903, and the regulations of the Department. The defendant made a test of the plaintiff's horses and finding symptoms of glanders quarantined the horses until the final

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tests could be made. Prior to the date for the final test, the plaintiff commenced this action and obtained an injunction until the hearing of the action. The plaintiff by his pleadings raised the question that The Animal Contagious Diseases Act, 1903, of Canada is *ultra vires* of the Parliament of Canada, and that Provincial Legislatures alone have the power to legislate on the subject and have so legislated in British Columbia.

Kappele, for plaintiff: The Province has exclusive control of all legislation which affects property and civil rights and the Act of the Dominion is *ultra vires* in that by its operation it attempts to take possession of the plaintiff's property and destroy it, which is clearly an invasion of civil rights, the plaintiff having done nothing of a criminal character. Again, the Province has the right to legislate and has legislated against contagious diseases of animals and has assumed to control the spreading of disease amongst animals by appointing a staff of inspectors, making rules and regulations, etc.

Argument

H. J. Duncan, for defendant: The Parliament of Canada have power under section 91 of the B. N. A. Act to legislate on any subject relating to the "peace, order and good government of Canada," which is not within the classes of subjects assigned exclusively to the Legislatures of the Provinces, and while section 92 gives to the Legislature an exclusive right to legislate "on property and civil rights in the Province," such exclusive right cannot be said to exist because an Act of Parliament in its operation incidentally affects either "property or civil rights": *Valin* v. *Langlois* (1879), 3 S.C.R. 1 at p. 15. Also, see Lefroy, at p. 494 and the meaning of "property and civil rights" discussed in Lefroy, at p. 752 *et seq.*; see also *Fielding* v. *Thomas* (1896), A.C. 600 and *Russell* v. *The Queen* (1882), 7 App. Cas. 829 at p. 839. The Act in question does not infringe the right of the Province to legislate. The Province may legislate and in this matter has done so, and could if it so desired enforce its legislation if the Dominion neglected or refused to enforce its Act. The Dominion power, however, is paramount, and once its Act is in actual operation through its officials, the power of the Provincial authorities is suspended: *Regina* v. *Taylor* (1875),

36 U.C.Q.B. 183 at p. 206, cited in Lefroy's Legislative Power in Canada, p. 353.

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Macdonell, for the Attorney-General for Canada, adopted the argument for the defendant.

26th June, 1907.

MORRISON, J.: This is an action brought by the owner of three horses which were suspected of being afflicted with glanders and upon which a test known as the "Mallein test" was applied by the defendant, a Dominion Government veterinary inspector acting pursuant to the provisions of an Act of the Parliament of Canada, cited as The Animal Contagious Diseases Act, 1903. The plaintiff fearing that his horses so tested were about to be destroyed by direction of the defendant, applied for and obtained an order enjoining the defendant from further testing or detaining the horses in question until the trial of this action.

The case coming on before me for trial, counsel for the plaintiff and defendant together with counsel representing the Attorney-General for the Dominion of Canada, consented to confine the argument to the question of the constitutionality of the said Act. Mr. *Kappele*, for the plaintiff, contends that property and civil rights in the Province are affected, in which case the Provincial Legislature has exclusive jurisdiction, under subsection 13 of section 92 of the B. N. A. Act; and that section 95 of the said Act does not apply to this case, inasmuch as "horses" are not included within its scope. That the term "animal" does not include "horses" but only refers to those animals used for human food; that "agriculture" has reference solely to the tillage of the soil. He further contends that the defendant's horses were quarantined, and proceeded to argue that there is no such thing as domestic or local quarantine; that, as he says, only foreign or imported animals may be quarantined. Again, he raised the point that, although the Dominion Parliament can pass laws as to criminal matters, that cannot have been the intention in the present Act, because in this instance the plaintiff, if prosecuted, has no opportunity to defend himself for non-compliance with the Act. And he concludes by citing the Provincial Contagious Diseases (Animals) Act, as ground upon which I would be justified in declaring the Federal Act uncon-

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stitutional. Some of those contentions as applicable are to me most novel, not to say startling, and with not one of them can I agree.

In answer to the first point, the words used by Sir Montague E. Smith, in delivering the judgment in *Russell* v. *The Queen* (1882), 7 App. Cas. 829 at pp. 838-9, may be aptly applied:

"What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense those words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain Acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded."

The subject-matter dealt with here is one of general concern affecting the whole of Canada, and it is contemplated by Parliament that the legislation should be uniform. That an officer of the Government decides to invoke the provisions of the Act in any particular Province does not make it a local law for that particular Province.

Judgment

Dealing with the second contention, I cannot support the narrow meaning sought to be put upon the words "agriculture" and "animals." Parliament does not define the words, and even if it did, it might be held that it only meant the definition to include certain things which might otherwise have been in doubt: *Smith* v. *Coles* (1905), 22 T.L.R. 5 at p. 7.

Section 95 of the B. N. A. Act enacts that

"In each Province the Legislature may make laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any law of the Legislature of a Province relating to Agriculture or to Immigration shall have

effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

There is what may be termed Provincial Agriculture and Federal Agriculture. And this legislation is in relation to Federal Agriculture, and as such is *intra vires* of the Dominion Government.

Nowhere, nor at any time, am I aware that "agriculture" has been held or known to refer only to those things that grow and derive their sustenance from the soil. As to the definitive of the word "animals," it must be abundantly clear what the Act means thereby, when one considers the fact that any limitation to its meaning was swept away by the amendment of 59 Vict., Cap. 13, and the repeal of 1903, 3 Edw. VII., Cap. 11.

The inspector in the present case was not acting under the Act Respecting Quarantine, nor were the enactments of that statute invoked, but under The Animal Contagious Diseases Act, 1903.

In my opinion The Animal Contagious Diseases Act, 1903, is *intra vires* of the Dominion Parliament.

Judgment for defendant.

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BRYCE *ET AL.* v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Shipping—Collision—Overtaking vessel, duty of—Onus on overtaken vessel to keep proper look-out—Inevitable accident—Stopping and reversing—"Narrow channel," what constitutes.

Evidence—Whether expert witnesses may be heard where Court is assisted by assessors.

On July 21st, 1906, between 11½ and 13 minutes after two p.m., the steamer Princess Victoria (length 300 feet, speed 19 to 20 knots) belonging to the defendant Company, collided with and sank the steamer Chehalis (length 59.3 feet, speed about 9 knots) both vessels being on their way westward out of Vancouver Harbour. The Princess Victoria's point of departure was her usual berth on the south side of the harbour; the Chehalis left from the north side, or North Vancouver, and both vessels proceeded through the Narrows, the Chehalis going first and crossing the channel diagonally towards the south shore so as to take advantage of the slack water and avoid the incoming tide. The day was fine and clear with a light westerly breeze, and there were three vessels in the Narrows at the time, *viz.*: the two steamers and a small gasoline launch. The Chehalis was in view of the Princess as soon as the latter was steadied on her course after leaving the wharf, and was three points to starboard about three-quarters of a mile off. There was a strong tide, about eight to nine knots, coming through the Narrows, and against the vessels. The launch came into view of the Princess as the latter swung into the tide at Burrard Shoal, and the launch was then about 100 yards west of Brockton Point and steering for the south shore, and on the port bow of the Princess. The latter, after rounding the point and swinging slowly to port, was steadied within half a point so as to avoid the launch, and then headed straight down and through the Narrows, the intention being to pass between the Chehalis and the launch, which at that time were some 250 yards apart. After being so steadied, two whistles were blown by the Princess to indicate to the Chehalis that the Princess would pass her on the port side. At the moment this signal was given, the Chehalis changed her course at least three to four points from west to southward, bringing her across the bows of the Princess. The engines of the latter were at once stopped and reversed at full speed, but the speed she was making through the water and the effect of the tide on the Chehalis brought both vessels together, and the Chehalis was swept under the Princess' starboard bow and sunk. The

speed of the Princess at the moment of impact was four or possibly five knots through the water, though making no headway over the ground:—

Held, that the master of the Princess Victoria gave the signal indicating his course at the earliest time consistent with the position of the vessels, and that he did not neglect to take any proper precaution which a prudent and skillful navigator should have taken in the circumstances.

When the Court is assisted by nautical assessors, whose duty it is to advise on matters of nautical skill and knowledge, the evidence of witnesses, tendered for expert testimony purely, will not be received.

The Kestrel (1881), 6 P.D. 182 at p. 189, followed.

ACTIONS tried before MARTIN, J., and two nautical assessors at Vancouver on the 6th, 7th, 8th, 9th and 11th of February, 1907; argument taking place at Victoria on the 15th. The facts are sufficiently set out in the headnote and the reasons for judgment.

Statement

Bowser, K.C., Martin, K.C., Peters, K.C., Schultz and *Donaghy*, for plaintiffs.

Bodwell, K.C., Davis, K.C., and *McMullen*, for defendant Company, cited, as to the duty of an overtaking vessel: *Long Island R. Co.* v. *Killien* (1895), 67 Fed. 365; *Oceanus* (1875), 18 Fed. Cas. 564 at p. 566.

Keeping a look-out: *City of New York* v. *New York & E. R. Ferry Co.* (1904), 130 Fed. 397; *The Lackawanna* (1903), 120 Fed. 522; *The C. J. Reno* (1903), 121 Fed. 149; *Fox* v. *The Charles H. Senff* (1892), 53 Fed. 669; *The Steam Ferry-Boat Hackensack* (1880), 5 Fed. 121; *The Coe F. Young* (1891), 49 Fed. 167; *The General Gordon* (1890), 63 L.T.N.S. 117; *The Ellen Holgate* (1875), 8 Fed. Cas. 509 at p. 513.

Argument

As to keeping the course: *The "Agra" and "Elizabeth Jones"* (1867), L.R. 1 P.C. 501; *The Saragossa* (1892), 7 Asp. M.C. 291; Marsden, p. 453; *SS. "Cape Breton"* v. *Richelieu and Ont. Nav. Co.* (1905), 36 S.C.R. 564 at p. 575; *Wilson* v. *Canada Shipping Co.* (1877), 2 App. Cas. 389; *The Tasmania* (1890), 15 App. Cas. 223; *The Banshee* (1887), 6 Asp. M.C. 221 at p. 223; *The Highgate* (1890), 62 L.T.N.S. 841; *The Dakota* (1895), 68 Fed. 507; *The Aurania and The Republic* (1886), 29 Fed. 98; *"The Jane*

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Bacon" (1878), 27 W.R. 35; *The "Sunnyside"* (1875), 91 U.S. 208; *The Cayuga* (1871), 14 Wallace, 270; *The "Esk" and The "Niord"* (1870), L.R. 3 P.C. 436; *The Seaton* (1883), 9 P.D. 1; *The City of Macon* (1899), 92 Fed. 207; *The Ship Cuba* v. *McMillan* (1896), 26 S.C.R. 651 at p. 659.

As to inevitable accident: *The Schwan* (1892), P. 419; *The Thames* (1875), 2 Asp. M.C. 512; *The Bywell Castle* (1879), 4 P.D. 219 at p. 226; *The Sisters* (1876), 1 P.D. 117; *The Virgil* (1843), 2 W.R. 201 at p. 205.

As to stopping and reversing: *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Company* (1880), 5 App. Cas. 876; *The "Theodore H. Rand"* (1887), 12 App. Cas. 247; *The Beryl* (1884), 9 P.D. 137; *The "Ceto"* (1889), 14 App. Cas. 670 at p. 685; *The Stanmore* (1885), 10 P.D. 134 at p. 136; *The "Rhondda"* (1883), 8 App. Cas. 549 at p. 557; *The "Free State"* (1875), 91 U.S. 200 at p. 203; *The Scotia* (1871), 14 Wallace, 170 at p. 181; *SS. Cape Breton* v. *Richelieu and Ont. Nav. Co.* (1905), 36 S.C.R. 564.

Argument

Cur. adv. vult.

22nd May, 1907.

MARTIN, J.: Though a large amount of evidence was adduced at the trial, yet the more this case is considered the clearer does it become that it is not of a complicated nature.

So far as regards the course, speed and signals of the Princess Victoria, I accept the account of her officers as being substantially correct, and since it is admitted that she was an overtaking vessel within the meaning of article 24 of the Collision Regulations, the main question is, did she perform the duty then cast upon her by said article and article 23, *viz.*: to "keep out of the way of the other vessel," and "on approaching her, if necessary, slacken her speed or stop or reverse?"

Judgment

It cannot be plausibly urged that the speed of the Princess after she rounded Brockton Point—about six to seven knots over the ground—was in the circumstances excessive, and beyond doubt there was ample room for her to have passed between the launch and the Chehalis. Captain Griffin, who gave his evidence in a straightforward manner which favourably impressed the

Court, estimated the distance between the two smaller vessels at about 250 yards, and though it is notoriously difficult to estimate distances on the water; and other witnesses made it less, yet even Dean, the engineer of the Chehalis, who was a manifestly biased witness, in answer to the question, "If he (Griffin) had been on a comparatively straight course, there was lots of room between your boat and the launch for him to pass through?" said, "Of course there was; he was trying to do that; the tide chucked him over on to us."

The plaintiffs' main case, in effect is, that in the effort to avoid running down the launch, which at one time was steering a somewhat erratic course, the Princess failed to continuously observe the course of the Chehalis until she had got into perilous proximity to her, and that when she did give the two-blast signal followed up by the stopping and reversing of her engines, it was too late to be of any service.

On the other hand the defendant Company contends that the Princess did keep out of the way, but that the proximate cause of the accident was a sudden change in the course of the Chehalis, constituting an infringement of article 21 requiring her to "keep her course and speed."

I am satisfied that the officers in the pilot house of the Princess did keep a proper and continuous look-out and that at the time the two blasts were blown she, having just then freed herself from the anticipation of any danger from the launch close to her port bow, which had caused a momentary but immaterial deviation from her course, was steadied on a course W. by N. ½ N., within a quarter of a point, so as to just clear Prospect Point and take her straight down the Narrows, which course was, roughly, parallel to that of the Chehalis. Had these respective courses and speeds been maintained there was at that time no reason to anticipate any danger of collision, though the courses would probably have ultimately converged. I say probably only, because the master of the Chehalis admits that he was not steering a compass course and confessed his inability to lay it down on the chart. Indeed, his compass-box was, he says, shut up, and he explains, "I didn't lay down any course, except just with the eye; that is all, roughly."

Judgment

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"The only object you had in view was to leave the wharf, get out of the Narrows, and cross the tide in the easiest way for your ship? Yes, not to run anything down or get into the way of anything."

Being steadied then on this course, and having no reason whatever to expect that the Chehalis would change the course she was on, which offered the Princess ample room to pass without running any risk, the Princess gave the proper signal that she was directing, here equivalent to continuing, her course to the port side of the Chehalis, *i.e.*, that she was on a course which would pass the Chehalis on the port side, not that she was changing her existing course. But I find that while said blasts were being blown, or immediately thereafter, the Chehalis suddenly altered her course at least three to four points from west to southward, thus bringing herself across the bows of the Princess. Immediately upon this change of course being observed the engines of the Princess were stopped and reversed with the object of avoiding the Chehalis, but though at the time of impact her way was stopped over the ground, yet she was probably still making four, or possibly five knots through the water, with the result that the collision complained of took place, though the force of it was much reduced by these manœuvres, and the Chehalis was not struck by the Princess' stem but swept up against her in a glancing direction on her starboard bow.

Judgment

Though it is not for the defendant to supply the explanation of this sudden change in the course of the Chehalis which caused the accident, I have very little, if any, doubt that it was owing to the fact that Captain House, as he admits, only kept a look-out ahead, and I believe he was startled when he heard the signal and made a wrong movement of his wheel at a critical moment in the strong tide. There must have been something of the kind, for House did not take the position that he was thrown out of his course by an unforeseen eddy or current or otherwise. On the contrary, he was fully alive to the tide conditions that he was meeting and, he says overcoming, and asserted his ability to hold his ship to her course within six degrees (about ½ a point) against the tide; Dean also maintains "she was steady as a street car on the track." House says frankly that the reason why he kept no look-out astern was that in his opinion it was not neces-

sary for him to do so and that he was "perfectly regardless of what was coming up behind him," in fact "utterly indifferent." While the regulations do not specifically require a look-out to be kept astern, yet article 29, with the heading "No vessel under any circumstances to neglect proper precautions," in effect directs it to be done in special circumstances (as an example of which see the illustration given in *The "Illinois"* (1880), 103 U.S. 298) and I entirely agree with the strong opinion of the assessors who have had long personal experience of the locality in question, that Captain House cannot be exonerated in the special circumstances of this case, having regard to his course, the nature of the tide, the low power of his vessel (which after it struck the full force of the tide could not have been making more than two knots over the ground, and probably less) and the amount of shipping plying in the Narrows, for neglecting to take the eminently proper precaution of keeping a bright look-out in all directions when he was crossing the channel on his diagonal course from the north to the south shore thereof. The course chosen by him called for constant vigilance, and one of his own witnesses, Captain Newcombe, admitted that in the existing conditions it was his duty, and the duty of every captain so crossing that channel, to have kept a general look-out, *i.e.*, a look-out all round. In our opinion had that necessary precaution been taken this deplorable collision would have been averted, but in view of the fact that it was not the direct consequence or proximate cause of the accident, it becomes, strictly speaking, unnecessary to consider the full and exact extent of its contribution thereto. I here observe that *Steamship "Arranmore"* v. *Rudolph* (1906), 38 S.C.R. 176, to which reference is made, is merely a case where "the absence of a look-out clearly had nothing to do with the collision."

Judgment

On the whole case I find myself unable on the evidence and in the circumstances to take the view advanced by the plaintiffs' counsel, that the Princess Victoria acted rashly and ran so close to the Chehalis without warning as to put both vessels in dangerous proximity in the state of the tide. In the position that the three vessels then were, and at the speeds they were going, there was no reason why all three should not by the exercise of

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ordinary good seamanship have proceeded down the channel without any apprehension of danger of collision, nor would there have been one if the Chehalis maintained her course and speed. To hold otherwise on the facts would be like "being wise after the event," which as was said in *SS. "Cape Breton"* v. *Richelieu and Ont. Nav. Co.* (1905), 36 S.C.R. 564 at p. 575, "cannot be a guide for our decision." While it was admittedly the duty of the Princess Victoria to keep out of the way and "if necessary," but not otherwise (*The Anselm* (1907), 23 T.L.R. 378) to comply with article 23, and I am satisfied that she did comply with it just as soon as it became reasonable and proper for her to do so, which is all the article requires. Nor can I see that she was to blame for not having signalled before, even apart from the fact that she was entitled to assume that she had already been observed by the Chehalis; indeed if she had done so there would have been great danger of confusing the launch which was nearest to her and would naturally take the signal as being primarily applicable to her.

Having regard to the relative position in the channel of the three vessels after the Princess had rounded the point, the mid-channel course which she took was the only proper one for her to take as a matter of good seamanship, as I am advised, consistent with her own safety and it would be unreasonable to expect her to have gone to the north of the Chehalis, already on the northerly course, and under her stern.

Judgment

Some discussion arose as to the meaning of the expression "keep out of the way," in article 24, and the argument was advanced for the plaintiffs that this was an absolute direction which would not be satisfied by an unsuccessful attempt to do so. Such an extreme view, however, is at variance with the decision of the Court of Appeal in *The Saragossa* (1892), 7 Asp. M.C. 289, wherein it is laid down that no more than the exercise of reasonable care and skill is required of the overtaking vessel when the overtaken vessel deviates from her course.

Frequent references were made at the trial to article 25 dealing with "narrow channels," and it may be desirable to express my opinion on the point, as applied to the locality here in question. At Prospect Point where the First Narrows begin the

channel is about a cable in width and it expands, though irregularly, till at Brockton Point it is nearly five cables; at the point where the collision took place it is about four and a half cables. It is not easy to determine the expression "narrow channel" as used in the rule, but there are a number of decisions cited in Marsden on Collisions, 5th Ed., 441, and Roscoe's Admiralty Practice, 3rd Ed., 240. It is clear, however, that the question does not merely depend upon the width as seems to have been assumed in the very late case of *Steamship "Arranmore"* v. *Rudolph, supra,* where it is stated, apparently without argument, that a channel "over half a mile wide does not come under the heading of narrow water." With all due respect to that remark, which I regard as *obiter dictum,* I observe that it is said in *The Glengariff* (1905), 93 L.T.N.S. 281 at p. 283:

> "I do not think it has ever been laid down what is a narrow channel. There have been cases in which certain places have been held to be narrow channels, and in which definite decisions have been given on definite facts . . . ."

In *The Ship Cuba* v. *McMillan* (1896), 26 S.C.R. 651, a channel about four miles in length, with a mean width of about a mile and a quarter, was held to be a narrow one.

The question must therefore in my opinion be decided upon the special circumstances in each case and in determining it the amount of shipping must, *e.g.*, be taken into consideration, for it is obvious that what might be considered a broad channel for a small number of slow, low-powered vessels would not be so if a large number of fast and high-powered vessels constantly used it, as is the case here; the strength and nature of the tides also and their effect upon navigation and the configuration of the shores could not be ignored in arriving at a satisfactory conclusion. In so doing I note that all the surrounding circumstances were considered by the same Court in *The Ship Calvin Austin* v. *Lovitt* (1905), 35 S.C.R. 616, (1904), 9 Ex. C.R. 160.

Argument

Applying those guides to the case at bar I have come to the conclusion that the First Narrows from Prospect Point to Brockton Point (a distance of approximately one and a quarter sea miles) must be deemed to be a narrow channel within the meaning of said article. As a matter of precaution I have asked the

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assessors for their view of the matter and they are of the same opinion.

The meaning of the expression "safe and practicable" has been often considered and various definitions given according to the circumstances—see *e.g.*, *The Unity* (1856), Swabey, 101; *The Hand of Providence* (1856), *ib.* 107; *The Nimrod* (1851), 15 Jur. 1,201; "*The Panther*" (1853), 1 Spinks, 31 and *Lovitt* v. *The Ship Calvin Austin* (1904), 9 Ex. C.R. 160 at pp. 180-4, (1905), 35 S.C.R. 616, and it depends upon the evidence, but it is quite clear that on the facts of this case, and according to Captain House's testimony, it was on the day in question "safe and practicable" from any point of view, both as regards herself and other vessels, for the Chehalis to have kept along that north side of the narrow channel from which she started. The necessity for her crossing to the south side has not been made clear, and taken with the absence of a proper look-out, it is difficult to see how such a proceeding can be justified. Convenience is not enough: *The Tyenoord* (1858), Swabey, 374; *The Unity, supra; The Hand of Providence, supra;* and he had no business to take her there, as was the case in *The Perim*, cited in Marsden on Collisions, *supra*, wherein at p. 441, it is said:

Judgment

> "The re-enactment of the starboard side rule and its insertion in the regulations are of the utmost consequence to seamen. Any person in charge of a ship who navigates her on the wrong side of a narrow channel, besides being guilty of a misdemeanour, will almost inevitably subject himself and his owners to liability for any collision occurring when he is on his wrong side, unless it is proved that his being on the wrong side was unavoidable."

Though some evidence was given in support of the existence of a usage, practice or custom for vessels starting from the south side of the Inlet to keep along the same side of the channel on a course through the Narrows, yet nothing of the kind was established to my satisfaction in the case of vessels starting from the north side, and in my opinion nothing should be said to encourage such a practice in the latter case, which is decidedly dangerous unless the channel is clear and unobstructed and free from any apprehension of danger from any quarter. Nor do I wish it understood that I am satisfied with the evidence in favour of the former practice, nor have I considered, for it is at present

unnecessary, to what extent it might affect article 25. The subject is an intricate one and cases on it in regard to tidal rivers only, but not arms of the sea, will be found, *e.g.*, in Roscoe's Admiralty Practice, *supra*, 241, note (*v.*) and Marsden on Collisions, *supra*, pp. 441; cases in note (*l.*), 444-5; from note (*a.*) on said p. 444 it appears that the Court will if necessary ask the advice of the assessors on the point. It is enough to refer to what has already been said on the point, *viz.*, that the Princess that day having regard to the circumstances, was justified as a matter of good seamanship in taking the mid-channel course between the two other vessels, but she was nevertheless still bound to observe the general rules of navigation with respect to the Chehalis even though the latter was infringing article 25: *The Leverington* (1886), 11 P.D. 117; *The Ship Cuba* v. *McMillan*, (1896), 26 S.C.R. 651.

With respect to article 22, its consideration is, so far as is necessary, involved in that of the other articles which have already been fully dealt with. There was, in short, no breach of it by the Princess Victoria, she was not, properly speaking, "crossing ahead" of the Chehalis. The position was in reality very similar to that of one of those cases illustrated by Mr. Justice King in *The Ship Cuba* v. *McMillan*, *supra*, at p. 659, wherein he said:

Judgment

> "In such cases no statutory rule is imposed because, unless there is a change in the course of one or both of the vessels, they will go clear of each other, and no statutory rule is made to meet the case, but it is left to the operation of the rules of good seamanship."

As to article 28 and the signal to be given on going astern, it will be sufficient to say that though some questions were asked at the trial about it, no argument was advanced upon it, doubtless for the reason that the failure to give it in the circumstances could manifestly have no good effect whatever, but probably the reverse. Indeed, Mr. *Martin's* position was that after the whistle blew events followed so rapidly that there was no way of avoiding a collision.

On the whole case I am advised by the assessors that in their opinion the master of the Princess Victoria gave the signal indicating the continuation of his course to port at the earliest time

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consistent with the position of the vessels, and that he did not neglect to take any proper precaution which a prudent and skillful navigator should have taken, seeing that he was justified in assuming that the Chehalis would maintain her course and speed which then gave no reason to apprehend danger; and further that after the change in the course of the Chehalis he did not fail to execute any proper manœuvre, but on the contrary did all that could reasonably be expected of him in the circumstances. I am also advised by the assessors that if the Chehalis, after she had changed her course, had reversed her engines at the same time that the Princess did, the collision would in all probability have been averted, or its consequences minimized.

I entirely agree with these views.

The delivery of judgment has been delayed because at the argument reference was made to certain cases then pending before other Courts, the full reports of which, with some others, have since come to hand, *viz.*: *Richelieu and Ontario Navigation Co.* v. *Cape Breton SS.* (*Owners*) (1906), 76 L.J., P.C. 14; *Steamship "Arranmore"* v. *Rudolph, supra; The Steamship Albano* v. *The Steamship Parisian* (1907), 23 T.L.R. 344; *The Oravia* (1907), *ib.* 358 and *The Anselm, ib.* 378.

With the exception of the *Albano* case, these decisions do not call for remark other than what may have already been made. As regards the *Albano* case, though it is important and instructive on most of the articles involved in the case at bar and their origin and object, yet the circumstances are fundamentally different, the two ships there were approaching the same spot to take up pilots and the main question was different, the Parisian claiming exemption from the regulations because she arrived on the spot first with little motion. As an illustration, their Lordships, speaking of the speeds and courses of the two ships, say:

Judgment

"They were in fact converging on a spot on courses and at speeds which would probably bring them to that spot so as to present a danger of collision when they reached it . . . ."

In the case at bar the fact is exactly the contrary. So far as the Chehalis is concerned, these remarks point out her full duty:

"She was bound to comply with Article 21 and to keep her course and speed until she found herself so close to the Parisian that the collision could not be avoided by the action of the latter vessel alone . . . ."

Some rather severe strictures based upon the remarks of Lord Westbury in *The "Singapore" and The "Hebe"* (1866), L.R. 1 P.C. 378 at p. 380, were made upon the credibility of the master of the Princess Victoria because of certain erasures and interlineations in the book, written in pencil, described as the rough, or scrap log. But the learned counsel has failed to distinguish between that log which, as its name indicates, is of a preliminary or draft character and the official log of the vessel, likewise before us, written in ink and kept in a formal manner, being in fact the fair copy of the draft prepared by, in this instance, the master and signed by him. References to this official log and the statutes bearing on it will conveniently be found in Roscoe's Admiralty Practice, 3rd Ed., 355, 519, 522; and Williams & Bruce's Admiralty Practice, 3rd Ed., 420, note (*o*), 431-2. It is to an official log of this latter nature that the said remarks of Lord Westbury, which follow, would apply:

"It is, no doubt, of the highest importance that documents of this kind, having been originally drawn up in a given form, should have that form preserved, and that there should neither be erasure, obliteration, nor alteration, subsequently made. It is admitted by the counsel for the *Singapore* that the entry must be taken as it was originally, so that it would have been impossible for them to contend that the wind was north-north-east, seeing that the original entry was that the wind was northerly."

Judgment

It would be unreasonable to expect any man to draw up in exact language, without any changes whatever, an account of an occurrence such as the present, nor could he be expected to enter it in the official log without first having made a draft of it, either on a sheet of paper or in a note book of some kind. In drawing up his account of the matter, on the voyage to Victoria the same afternoon in the pilot house, the master admits that he made erasures and alterations, as he wrote, to cover slight inaccuracies or to satisfy himself as to the wording of it. This was done in the presence of the first officer, but not in consultation with him, and the scrap log was left in the pilot house for the purpose of being copied by that officer into the official log the same day in the ordinary course of duty, which was done. In such circumstances I see no occasion for any reflection being cast upon the master, either as regards the way the official log was prepared,

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or as regards his credibility. His full explanation is quite satisfactory to this Court.

During the trial a ruling on evidence was given which I was requested to mention in this judgment and consequently do so. The defendant tendered the evidence of several witnesses possessed of nautical skill with the object of having them express their opinion on the manœuvres of the two vessels and the proper action to be taken by them in the various positions under consideration, giving expert evidence in short. This was objected to as being against the practice of the Admiralty Court which relies for guidance in that respect on the skilled assessors it has summoned to its assistance for that purpose, and there is no doubt that the practice of that Court both in England and in Canada, including the Admiralty District of this Province, over which I have the honour to preside, is as thus contended for—see the following cases: *The Gazelle* (1842), 1 W. Rob. 471-4; *The Ann and Mary* (1843), 2 W. Rob. 189; *The "Velocity"* (1869), L.R. 3 P.C. 44; *The Earl Spencer* (1875), L.R. 4 A. & E. 433; *The Andalusian* (1877), 2 P.D. 231; *The Sir Robert Peel* (1880), 4 Asp. M.C. 321; *"The Marina"* (1881), 29 W.R. 508; *The Kestrel* (1881), 6 P.D. 182 at p. 189; *The Kirby Hall* (1883), 8 P.D. 71 at pp. 75-6; *The Assyrian* (1890), 6 Asp. M.C. 525 and *Harbour Commissioners of Montreal* v. *The SS. Universe* (1906), 10 Ex. C.R. 305. But it was urged that the practice of the Admiralty Court should not be followed in this Court and that in any event it was a matter for the exercise of discretion. As to the latter, in the exercise of any discretion I may have, I prefer to rely solely on the advice of the assessors whom I have summoned to assist me, and as to the former, it would, as a matter of practice, seem anomalous and inconsistent for this Court to borrow from the Admiralty Court its most useful practice in calling in assessors, and yet at the same time to largely defeat and nullify the object thereof by engrafting upon it expert testimony which must be adduced in Courts which have not the advantage of assessors. I find that I am not without a precedent in reaching this conclusion, for it was adopted in the case of *The Kestrel, supra,* by the President (Sir James Hannen) and Sir Robert Phillimore, assisted by nautical assessors, when

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sitting as a special Court of Appeal under the Shipping Casualties Investigations Act, 1879, on an appeal from the Wreck Commissioner. The President said, p. 189:

"I have been informed what the practice of the Admiralty Division is with respect to evidence of this kind, and it commends itself to my judgment, and I think that we ought to adopt it in these appeals. We have nautical assessors whose duty it is to advise us in these matters, and apart from other objections I can conceive that the admission of such evidence would inconveniently add to the length of the hearing in these cases. We refuse to allow the proposed witnesses to be called."

For the above reasons, and on the authorities cited, the evidence was rejected.

Judgment

There only remains for me the duty of giving effect to the foregoing findings and reasons by directing judgment to be entered in favour of the defendant.

Judgment for defendant.

REX v. FORD AND ARMSTRONG.

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Criminal law—Direction to jury—Assault committed by prisoner to recover money out of which he had been cheated—Whether he is guilty of robbery or assault.

Where the prisoner acted in the *bona fide* belief that he had been swindled, and, in the belief that he was entitled to retake the money, committed an assault for that purpose alone, and did retake the money, or a portion of it, in that sole and *bona fide* belief, the jury, on consideration of the facts, would be justified in acquitting him on a charge of robbery, although it was open to them, on the same facts, to convict for assault.

CRIMINAL trial before MARTIN, J., at the Clinton Spring Assizes, May 24th, 1907.

Statement

The defendants were charged with robbery. The evidence upon the trial shewed that the prisoner, Ford, and the complainant witness Lane, had spent the preceding night in gambling, and in the course of the game, as was alleged, Lane had cheated at cards, as a result of which Lane won over $600 from the

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accused Ford. After the termination of the game it was suggested to Ford that he had been cheated in the game and thereupon, assisted by Armstrong, he proceeded between 7 and 8 in the morning to the place where the complainant was encamped, assaulted him and took from him a large part of the money lost in the game, but left with him designedly a considerable amount in cash and securities, which he could also have taken if so disposed. Upon the trial before MARTIN, J., after the above facts and others had appeared in evidence,

Argument

Howay, for the prisoner, asked the Court to charge the jury that if they were satisfied that the accused believed that the complainant contrary to section 442 of the Code, had deprived him of his money by cheating him in the game, and in that belief had assaulted him for the purpose of recovering said money won through such cheating, the crime of robbery had not been committed. The fact that the accused Ford took care to leave with the complainant a substantial balance in his favour on the accounts between them, negatived the intent to rob: Archbold's Criminal Pleading, 22nd Ed., 410-14; *Rex* v. *Holloway* (1833), 5 C. & P. 524; Russell on Crimes, 6th Ed., Vol. 2, p. 85.

Maclean, K.C., D.A.-G., for the Crown: Even if this were so the jury must still convict for common assault at least.

Howay: That depends upon the facts.

Judgment

MARTIN, J., instructed the jury that if on all the facts before them they were satisfied that both the accused acted in the *bona fide* belief, even though mistaken, that Ford had been swindled out of his money in the manner alleged, and that they were entitled to recover it, and did commit the assault and retake the money, or a portion of it, in that sole and *bona fide* belief (which question the jury would determine by a consideration of the facts, and primarily in this case by certain actions of the accused at the time of the assault, which the learned judge reviewed), then they would be justified in acquitting the accused of the charge of robbery, though it was open to them on the facts to convict on a charge of assault, aggravated or common, according to the view they took thereof.

Verdict of common assault.

WESTFALL v. STEWART AND GRIFFITH.

CLEMENT, J.

1907

May 13.

WESTFALL v. STEWART AND GRIFFITH

Land Registry Act—Unregistered deed—Validity of, as against assignment for creditors — Construction of contract — Agreement to indemnify indorser.

Notwithstanding section 74 of the Land Registry Act, Cap. 23 of 1906, an unregistered deed confers a good title upon the grantee as against a registered assignment for the benefit of creditors of the grantor, if the grantee, or any one claiming under him, can subsequently effect registration.

A deed conveyed land to a party as security to indemnify him from loss in respect of his indorsement of a promissory note:—

Held, that it secured him and his estate in respect of every subsequent indorsement of any other note, whether by way of renewal or as collateral security in respect of the same debt.

ACTION tried at Nelson before CLEMENT, J., on the 13th of May, 1907.

The plaintiff sued as administratrix of the estate of John Westfall, deceased, and asked for a declaration that a certain deed given by the defendant Griffith to John Westfall was in effect a mortgage, and as such liable to be foreclosed, notwithstanding that the same had not been registered in accordance with the provisions of the Land Registry Act when the defendant Griffith made an assignment for the benefit of his creditors to the defendant Stewart.

Statement

The defendant Griffith being the registered owner of certain lands in Trout Lake City, induced John Westfall to indorse for his accommodation a promissory note for $850, which note was discounted by his Bank. To secure Westfall for his indorsement, Griffith executed and delivered to Westfall a deed, absolute in form, of the land in question, receiving from him the following memorandum:

"July 8th, 1905.

"James Griffith, Esq., Trout Lake.

"Dear Sir:—I hereby acknowledge that I have this day received from you the deed of Lots 22, 23, 12 and 13 Bk. 51 Trout Lake as security for my

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indorsement of your note for $850.00, and I hereby agree to reconvey said lots to you on your payment of said note.

"Yours truly,
"J. W. Westfall."

The deed was not registered. When the promissory note matured, $100 was paid on account, and a new note given for $750, payable to the order of John Westfall, indorsed by John Westfall by his attorney H. B. Baker, and delivered to the Bank. When the latter note matured, a further sum was paid on account and again a note was given by Griffith, dated the 15th of January, 1906, payable three months after date to the order of John Westfall at the Imperial Bank. This note was indorsed by John Westfall by his attorney H. B. Baker and delivered to the Bank. Before the last mentioned note had matured John Westfall died on the 29th of January, 1906, and letters of administration of his estate were granted to the plaintiff. On the 17th day of April, 1906, one day before the maturity of the last mentioned note, a note was given by the defendant Griffith, reading as follows:

"Trout Lake, B. C.,
"April 17th, 1906.

"Three months after date I promise to pay to the order of the estate J. W. Westfall at the Imperial Bank of Canada, Trout Lake ($665.00), six hundred and sixty-five dollars, value received.

"James A. Griffith."

Statement

This note was indorsed by the plaintiff in the following words: "Clara G. Westfall, administratrix of J. W. Westfall estate" and delivered to the Bank. The following day the note of the 15th of January, 1906, matured and was protested, and when the note of the 17th of April matured it was also protested. An application was made to register the plaintiff as owner in fee of the lands in question under the deed given to John Westfall, which application the Registrar refused. On the 27th of June, 1906, the defendant Griffith made an assignment to the defendant Stewart for the benefit of his creditors, which assignment was deposited in the land registry office on the 17th of July, 1906. A further application to the Registrar was thereafter made on behalf of the plaintiff to register the deed, together with the memorandum, signed by Westfall, of July 8th, 1905, as a mortgage, which application the Registrar refused on the ground that

the title to the land had passed to the defendant Stewart as assignee for the benefit of Griffith's creditors. The County Court judge, however, on application to him, directed that such registration be made and the deed was thereupon registered as a charge. Stewart as assignee for the benefit of creditors, now claimed the property on behalf of the estate of the defendant Griffith, free from any claim on the part of the plaintiff.

R. M. Macdonald, for defendant Stewart: By section 74 of the Land Registry Act, no estate or interest passed under the deed to John Westfall until the same was registered. Before that time the title to the property had passed to the defendant Stewart under the assignment from Griffith for the benefit of his creditors. Registration should not therefore have been made or allowed, and though made by order of the County Court judge, could not divest the defendant Stewart of his title as trustee for Griffith's creditors.

[CLEMENT, J.: Section 74 of the Land Registry Act will some day have to be construed by the Court of Appeal. Meanwhile, though with some hesitation, I shall hold that in the circumstances of this case, registration having as a matter of fact been effected, the benefit thereof must refer back to the delivery of the deed. The assignee can stand in no better position than the assignor. He therefore took his assignor's estate subject to the contingency of the plaintiff's being able to effect registration.] Argument

Further, the deed given to Westfall was security only for the one indorsement upon the original note. This deed was not given to secure a debt, but to indemnify Westfall in respect to a certain specific contract of indorsement. The subsequent indorsement of the other and different notes was not contemplated in the memorandum of the 8th of July, 1905. These indorsements may or may not have been binding on Westfall. Considerations as to the validity of Baker's power of attorney and many other considerations which might be suggested would apply to these latter indorsements, which would have no application to the original indorsement in respect to which this deed was given. The security was expressly to indemnify Westfall against a specific liability which in its nature was not absolute, but merely

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conditional. There is no justification for extending it by implication to indemnify him or his estate in respect to other indorsements which are necessarily subject to other conditions and considerations.

S. S. Taylor, K.C., and *O'Shea,* for the plaintiff, were not called upon.

CLEMENT, J.: I hold that the agreement set out in the memorandum of the 8th of July, 1905, must be construed as not only securing against liability upon the indorsement of the original note, but upon every other indorsement by or in behalf of Westfall, or his estate, in respect of the same debt, whether by way of renewal or collateral security or otherwise.

Judgment

Judgment will be given for plaintiff declaring that the deed in question, coupled with the memorandum of July 8th, 1905, constituted a mortgage and had priority over the assignment for the benefit of the creditors and judgment for foreclosure as asked.

Judgment for plaintiff.

STEPHENSON v. STEPHENSON AND STEPHENSON.

FULL COURT

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June 11.

STEPHENSON v. STEPHENSON

Mining law—Hydraulic lease—Pleading—Dispute note—Special defence—Free miner's certificate—Recorded interest—New defence on appeal—Jurisdiction.

Defence setting up failure to comply with the provisions of the Placer Mining Act must be specifically pleaded, *e.g.*, lack of a free miner's certificate and failure to record interest.

Unless exception is taken at the trial to the jurisdiction of the County Court, it will not be entertained on appeal.

Gelinas v. *Clark* (1901), 8 B.C. 42, 1 M.M.C. 428, followed.

Decision of CALDER, Co. J., affirmed on the facts.

APPEAL from the judgment of CALDER, Co. J., of the County Court of Cariboo (mining jurisdiction), in an action tried before him at 150 Mile House on the 17th of October, 1906.

The action arose out of conflicting interests in a hydraulic mining lease on which certain findings of fact were upheld, but the case is reported only on the points raised at the argument on appeal by counsel for appellants (defendants).

Statement

The only dispute note filed was this:

"DISPUTE NOTE.

"I intend to defend this action on the following grounds. That the complainant abandoned his interest in the property, also there never was any agreement *re* payment of any wages except bed-rock payment.

"Dated this 27th day of September, 1906.

"G. E. Stephenson,
"Defendant."

Judgment was given in favour of the plaintiff, and the defendants appealed, the appeal being argued at Victoria on the 11th of June, 1907, before IRVING, MARTIN and CLEMENT, JJ.

Argument

Bloomfield, for the appellants (defendants): The judgment cannot stand because, *inter alia*, it is not shewn that the plaintiff had a free miner's certificate, which is the root of his right to any mining interest, and the Court will of its own motion require this proof; each party must give "affirmative evidence of title," nor can he have any interest in

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the subject-matter of this action because he has no recorded interest in writing as required by chapter 38, section 31 of the Placer Mining Act Amendment Act of 1901.

[*Per curiam:* Did you raise this question in your dispute note?]

The defendant appeared in person in the Court below, and should on that account be given the benefit of greater consideration.

[*Per curiam:* We are all agreed that we cannot hear you on this point. You should have set up these defences in the Court below; we cannot entertain them now. The provision as to giving affirmative evidence of title is found only in relation to lode claims, not placer, in section 11 of the Mineral Act Amendment Act, 1898. The presumption from the dispute note here is that the defendants were satisfied on these points and only intended to oppose the plaintiff on the grounds set up therein.]

Argument

Wilson, K.C., on the same side: With the permission of the Court, I wish to take a point which has just occurred to me *viz.:* that the County Court had no jurisdiction as appears on the face of the proceedings.

[MARTIN, J., referred to *Gelinas* v. *Clark* (1901), 8 B.C. 42, 1 M.M.C. 428.]

This is not an obscure question of jurisdiction; it appears on the face of the statute.

Martin, K.C., for respondent, not called upon.

Per curiam: We all think that the learned County Court judge has given a proper judgment in this matter, and see no reason for disturbing it.

Judgment

Appeal dismissed.

OPPENHEIMER v. SWEENY *ET AL.*

MARTIN, J.
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Nov. 15.

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July 17.

OPPENHEIMER v. SWEENY

Agreement—Construction of—Partnership—Arrangement between creditors of partnership and executors of deceased partner as to division of a particular asset.

An agreement was entered into between two creditors of a partnership concern and the executors of a deceased partner that on the recovery of a certain sum of money due the partner, it should be divided: two-thirds to the said creditors and one-third to the daughter of the partner. In an action by another partner:—

Held, on appeal (affirming the decision of MARTIN, J.), that the plaintiff was entitled to the one-third retained by the executors for the benefit of the daughter.

APPEAL from the judgment of MARTIN, J., in an action tried before him at Vancouver on the 16th and 17th of October, 1906.

The action arose out of the business dealings of Oppenheimer Brothers, Limited, and was brought by the plaintiff, widow of a brother of David Oppenheimer, deceased, to effect payment to her of one-third of the amount received by the defendants from the Bank of Montreal and the Canadian Bank of Commerce under a certain agreement dated the 7th of September, 1901. This agreement, which was entered into between the two Banks (which were heavy creditors of the partnership), and the defendants Sweeny and Isaac and Solomon Oppenheimer, executors of the will of David Oppenheimer, was, in effect, to authorize the Banks to take proceedings to recover an amount earned by David Oppenheimer in his lifetime from Sperling & Co., of London, in respect of the sale to them of certain street car and lighting franchises, the proceeds, when recovered, to be divided into three equal parts; one to the executors of the will of David Oppenheimer as trustees for the benefit of his daughter Flora, and the other two-thirds to be divided equally between the two Banks. The amount was duly recovered from Sperling & Co., and the division was made in pursuance of the terms of the agreement, and it was the intention of the trustees to pay the one-third to the daughter, when plaintiff commenced her action, basing her

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claim on an agreement between the partners of Oppenheimer Brothers (of which firm the husband of the plaintiff was a member), in which it was agreed that the parties thereto should be equal partners in all property standing in their names, either jointly or severally. She therefore set up that the agreement between the executors and the Bank was invalid.

Martin, K.C., for plaintiff.
Wilson, K.C., for Sweeny and S. Oppenheimer.
Marshall, for Flora Oppenheimer.

23rd October, 1906.

MARTIN, J.: First, I am satisfied that David Oppenheimer acted in the transaction in question on behalf of the partnership, and though his name only appeared throughout its various stages, yet the two co-partners were equally interested and liable to account and to adjust profits and losses.

Second, though David's executors properly received his one-third share of the money recovered on the settlement of his action against Sperling & Co., under the agreement of September, 1901, yet the provision therein contained that said executors should pay it to the daughter is one that they cannot rely upon in answer to the plaintiff's claim, and the money received for such share must be administered as part of his estate.

Third, so far as regards any claim of the Bank of Montreal under the guarantee of December 14th, 1897, the evidence shews that David's estate is now free from liability thereon.

MARTIN, J.

Fourth, as regards any claims of the two Banks under the agreement of September, 1901, whatever the indebtedness to them may have been, it is clear that by the agreement it was nevertheless arranged, despite such indebtedness, that the proceeds were to be distributed in the manner indicated, and there is no evidence of any other liability of David to them.

Fifth, there only remains the question as to what is the position of the plaintiff as regards her one-third partnership interest in the one-third share of the partnership estate, now held by David's executors, and it is urged that it cannot be paid to the plaintiff direct, thereby simply dealing with it as her specific interest in the partnership, but that before it can be distributed

the accounts between the three partners must be taken and that Isaac must be added as a party to this action. To this it is answered that since there is no evidence of any outstanding disbursement in connection therewith, nor of any debts exclusive of the claims of the two Banks already dealt with, therefore a direction for an account is unnecessary. But in view of Lord Westbury's remarks on the meaning of "trustee" in *Knox* v. *Gye* (1872), L.R. 5 H.L. 656, 42 L.J., Ch. 234, and other remarks therein on the estate of a deceased partner, I do not at present see how that can be done, though before finally determining the point I should like to have the assistance of further argument thereon, because it was, I now find, not sufficiently dealt with at the hearing.

15th November, 1906.

After further argument and consideration of the point reserved, I have come to the conclusion that in the circumstances the proper order to make is that the defendants, the executors, do pay to the plaintiff one-third of the moneys received by them as above mentioned, and there will be judgment accordingly.

The appeal was argued at Victoria on the 11th and 12th of June, 1907, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

Wilson, K.C., and *Bloomfield*, for appellants (defendants).
Martin, K.C., for respondent (plaintiff).

Cur. adv. vult.

On the 17th of July, the judgment of the Court was delivered by

HUNTER, C.J.: Notwithstanding Mr. *Wilson's* strenuous argument, I am unable to see any ground for interfering with the judgment.

The plaintiff, Lena Oppenheimer, brings an action for her share of moneys collected by the executors, and now in their hands, in a proceeding instituted by them on behalf of their deceased partner David, in respect of a claim which was admittedly a partnership and not an individual claim, and the only defence put forward by the executors is that they had agreed under seal with the two chief creditors of the partnership that the moneys in question should be paid to David's daughter Flora.

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It was urged by Mr. *Wilson* that even assuming this agreement could not bind Lena's interest, at most the executors could not be sued in this action as the money had become impressed with a trust in favour of Flora, but that the only remedy now open to Lena was an action for a *devastavit*. The answer is that what David could not do his executors could not do, and it is clear that David could not have excluded Lena, by any such agreement to which Lena was not a party, from her share of the fruits and created himself trustee thereof for Flora, and the moneys not having yet reached Flora's hands, the cause of action is the ordinary one for money had and received.

It was also urged before us that as there may be outstanding debts, at any rate the judgment should be varied. As far as concerns the two creditors in question, it is clear that they are estopped by the agreement from any claim against this fund, and as far as any other debts are concerned, no such case was raised in the pleadings, nor is there any suggestion of it in the evidence.

Judgment

No doubt the executors entered into the agreement with the Banks, and have defended Flora's claim to the fund under the idea that they were saving something for her out of the wreck, but I fail to see in what way they have succeeded in extinguishing the interest of Lena. The appeal should be dismissed.

Appeal dismissed.

EMERSON v. SKINNER.

FULL COURT
1907
June 5.

EMERSON v. SKINNER

Practice—Adding parties defendant—Rules 1 and 1,026 Supreme Court Rules, 1906—Proceedings in replevin.

By the Supreme Court Rules, 1906, proceedings in actions for replevin are made uniform with those in other classes of actions.

Decision of MORRISON, J., affirmed.

APPEAL from an order of MORRISON, J., made at Chambers in Vancouver on the 11th of February, 1907, adding two parties defendant in an action of replevin.

Statement

The appeal was argued at Victoria on the 5th of June, 1907, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Argument

L. G. McPhillips, K.C., and *Shaw*, for appellant (plaintiff): Chapter 63 of the statutes of 1899, Sec. 4, the Replevin Act, under which the action is brought, gives the Lieutenant-Governor in Council power to make rules, but no rule has been made as to joinder of parties. Before the Judicature Act a defendant could not be added in the action: Archbold, 10th Ed., 1,493-1,495; *Campan* v. *Lucas* (1881), 9 Pr. 142; *McGregor* v. *McGregor* (1898), 6 B.C. 258. A defendant cannot be added in an action that is commenced by an affidavit which must set out the facts and state the parties: see Schedule 1 to the Act; when also a bond must be given to the sheriff which must be assigned to the defendant mentioned in the bond: sub-section 1 of section 6, Schedule No. 2; the added defendant has no rights under the bond: sub-section 7 of section 6. See also Cobby on Replevin, 304. In tort an action is complete against one joint tort feasor and the defendants cannot be joined: see *Moser* v. *Marsden* (1892), 1 Ch. 487; *McCheane* v. *Gyles* (*No. 2*) (1902), 1 Ch. 911. A defendant can object to the joinder of another defendant: *Thompson* v. *London County Council* (1899), 1 Q.B. 840.

A. D. Taylor, and *Mason*, for respondent (defendant): We are the plaintiff and ask for the joinder of these party defendants in order to protect our rights as against those persons. The

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Replevin rules are intended to deal only with initial proceedings, but once they are commenced it is the same as in an action and rule 1,026 is operative and applies to an action in replevin.

McPhillips, in reply.

HUNTER, C.J.: Speaking for myself, I think the appeal ought to be dismissed. As far as I can gather, Mr. *McPhillips'* argument is based mainly upon the contention that a replevin action is not within the sweep of the ordinary rules regarding Supreme Court actions. I think that contention is clearly untenable.

The first rule of the Supreme Court rules says:

"All actions which have hitherto been commenced by writ, and all suits which have hitherto been commenced by bill or information, or by citation or otherwise in Probate, in the Supreme Court of British Columbia, shall be instituted in the said Court by a proceeding to be called an action."

There is no doubt that the old form of procedure which was commenced by writ of replevin, was a procedure by itself, and was subject to very technical rules. But I think it is quite clear, having regard to that rule, and to rule 1,026, it was the intention of the Supreme Court rules to reduce the proceedings in replevin to the same status as other proceedings; to make actions for replevin uniform with all other species of actions. And by a later statute the writ of replevin itself was abolished, and an order for replevin substituted. And thereafter an action for replevin is to be commenced by writ of summons. Under the Supreme Court rules it applies equally with other actions.

HUNTER, C.J.

Then, it was for Mr. *McPhillips* to shew that he was prejudiced by the order to add these parties as defendants. Two parties have been added as defendants. He objects that other defendants ought not to be added. His position is entirely different from the position of a plaintiff who is seeking to add. It seems to me that it is for him to make out to the satisfaction of the Court that being a defendant himself he is prejudiced in some way, or otherwise hampered by the addition of the other defendants, or in some way legally prejudiced by the addition of the other defendants. And I fail to see in what way he has been prejudiced. It has not been attempted to alter the bond which

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was taken in his interest, and of which he would be the sole assignee in the event of the proceedings being determined in his favour.

It comes to this, as far as I can see, it is a mere question of relief, the particular relief taken against his client under the Act, under the rules, and it seems to me that in view of that, it would be a failure of justice, where, as in this case, we see that the cause of action is clearly a just one against three persons, if we fail to allow the three persons to be brought before the Court.

HUNTER, C.J.

IRVING, J.

IRVING, J.: I am of the same opinion.

CLEMENT, J.

CLEMENT, J.: I concur.

Appeal dismissed.

BROHM v. BRITISH COLUMBIA MILLS, TIMBER AND TRADING COMPANY.

CLEMENT, J.
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Crown lands, sale of—Crown grant issued of lands covered by timber lease—Renewal of timber lease subsequent to issue of Crown grant.

Plaintiff obtained a Crown grant to certain lands, to the timber on which a lease for 21 years had been previously given. The grant from the Crown was silent as to the timber lease. At a date subsequent to the said grant, the timber lease had to be surrendered for renewal under the provisions of the Land Act:—

Held, that the rights given the grantee under his Crown grant were subject to the existing timber lease, and that the lessees did not lose their priority by taking a renewal under the Act.

Statement

THE defendants claimed the right to the timber on lot 1,531, group 1, New Westminster District, under a lease to the Moodyville Lands and Sawmill Company, Limited, from the Crown, dated the 27th of July, 1892, for 21 years, which had been duly assigned to the defendants, and under renewal dated the 27th of July, 1902, this renewal being given in pursuance of section 7 of

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chapter 30, passed in the year 1901, known as the Land Act Amendment Act, 1901, this renewal lease being for the residue of the term granted by the original lease. The plaintiff claimed to be the owner in fee simple of the property in question and of the timber thereon under a grant from the Crown dated the 19th of July, 1898, founded upon pre-emption record granted to the plaintiff on the 6th of June, 1893, this pre-emption record having been granted subsequent to the original lease and so assigned to the defendants, and the Crown grant being issued to the plaintiff during the term of and without in any way being made subject to the said lease. Therefore, the plaintiff claimed that he was entitled to the timber, and that in any event the lease having been surrendered in July, 1902, under the provisions of section 7 of chapter 30, in order to obtain a renewal, his Crown grant from the date of the surrender became operative and absolute.

As against this contention, the defendants set up that the pre-emption record and Crown grant were of no force and effect and conveyed no interest in the lands to the plaintiff, as the lands were not open to pre-emption under the Land Act, they not coming under the description of the words "Crown lands" in that Act, which means "all lands of the Province held by the Crown without encumbrances," and that the defendants' lease being in existence at the time of the pre-emption record, this constituted an encumbrance which prevented the lands from being the subject of pre-emption, relying on the judgment of DUFF, J., in *Capital City Canning Co* v. *Anglo-British Columbia Packing Co.* (1905), 11 B.C. 333; and, secondly, the plaintiff's ownership under his Crown grant was subject to the defendants' right to enter upon the property and cut and remove the timber by virtue of their lease: *Contois* v. *Bonfield* (1875), 25 U.C.C.P. 39 at p. 41. That the giving up of the old lease for the purpose of obtaining a renewal under the Act did not deprive them of this right, that the new lease being for the residue of the term, the plaintiff's position was not changed, the object of the section being to give a lessee the absolute right to renewal, and that the surrendering of the existing lease required by the

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section did not give the grantee from the Crown any further rights than existed before the surrender.

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G. G. Duncan, for plaintiff.
C. B. Macneill, K.C., for defendants.

CLEMENT, J. (oral): I find it unnecessary to express any opinion on the first point, as I think it clear that the rights of the grantee under his Crown grant were subject to the lease existing at the time that grant was given; and the lessees did not, in my opinion, lose their priority by taking a renewal under the Act. The surrender was *pro hac vice* only.

Judgment

NEVILLE v. KELLY BROTHERS AND MITCHELL, LIMITED.

MORRISON, J.
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FULL COURT
June 7.

NEVILLE
v.
KELLY
BROTHERS
AND
MITCHELL

Master and servant—Injury arising out of and in the course of employment—Serious or wilful neglect.

While engaged in chipping the burs from a steel plate with a cold-chisel, the plaintiff was injured by a piece of the steel so chipped off, striking him in the eye and destroying its sight:—

Held, on appeal, affirming the decision of MORRISON, J., that the injury was an accident within the meaning of the Workmen's Compensation Act, 1902.

APPEAL from the decision of MORRISON, J., on a case stated in an arbitration under the Workmen's Compensation Act, 1902, heard before him at Vancouver on the 21st of February, 1907. The facts and arguments appear in the reasons for judgment of MARTIN, J.

Statement

Harper, for the applicant.
W. S. Deacon, for the respondents.

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MORRISON, J.: I think the arbitrator is right in finding that the plaintiff's injuries were caused by an "accident" within the meaning of the Workmen's Compensation Act.

The injury arose out of and in the course of his employment without any serious or wilful neglect on his part. I do not think it would serve any useful purpose for me to elaborate this opinion in view of the recent decisions on this very point.

To do so would only be justified in attempting to meet the arguments of the learned counsel for the defendants, which arguments, in my opinion, are "entirely over the heads of Parliament, of employers, and of workmen": *Fenton* v. *Thorley & Co., Limited* (1903), A.C. 443 at p. 452.

The appeal was argued at Victoria on the 7th of June, 1907, before IRVING, MARTIN and CLEMENT, JJ.

W. S. Deacon, for appellants (respondents in the arbitration).
McCrossan and *Harper*, for respondent (applicant).

IRVING, J.

IRVING, J.: In this case we have expressed our views so fully during the course of Mr. *Deacon's* argument, it seems hardly necessary to repeat them. His contention is that the plaintiff being employed in an occupation, the intention of which was to make steel fly, there was a liability of this occurrence —I will not use the word accident—of this occurrence taking place—it was an expected liability naturally resulting from the occupation the man was engaged in; and therefore it was not an accident. Now it seems to me that an accident is something that is fortuitous and unexpected, something that may or may not necessarily occur. The accident in this case was the coming together, after flying, of a piece of steel, with the man's eye in a particular spot in such a way as to cause this injury. I agree with the decision of the judge below, that this is an accident within the meaning of the statute.

MARTIN, J.

MARTIN, J. (written reasons handed down later): While engaged in chipping the burs from a steel plate with a cold-chisel the plaintiff, who on the evidence is a competent workman and was at the time properly discharging his duty, was injured

by a piece of the steel so chipped off, striking him in the eye and destroying its sight. It is contended that this is not an accident within the meaning of the Act, because such an injury is alleged to be a common, if not usual, result of this employment and nothing of an accidental nature intervened between that employment and the injury.

Now, in the first place, there is no satisfactory evidence as to the extent of the danger to the eyes from this employment, or even any estimate as to the percentage of workmen so injured. The plaintiff says such an occurrence "may not happen again for fifty years." Gibson says, "That accident may happen any moment, and it might be a thousand years again before an accident of the same kind would occur." Thomas Neville (plaintiff's brother) says:

"You have had experience in chipping steel? Yes, sir.

"You think if a man took a hammer and chisel to chip burs off that edge, if he was reasonable, careful and using ordinary care, and not gazing round, but paying attention to what he was doing, a piece of that steel would be likely to fly up and strike him in the eye? It would.

"You think that might happen with anybody? That might happen with anybody; yes, sir."

Boles says he "would consider an accident like this liable to happen any time," but he had never been so injured, though he had had experience in that work and was engaged on it in the same machine shop when plaintiff was injured. Jordan says he has never seen any one working at this occupation with one eye only, and would not employ such a workman, because "if he had only one eye, and would be likely to lose the other eye, then he would be totally blind and no use for anything." Bickerton, the defendants' foreman, says:

"Do you think a man with one eye could chip steel? Well, I have known men in the business with one eye. I don't know I ever seen them chipping steel, in particular.

"How do you mean, you have seen them in the business with one eye? I have seen them working at bridge and structural work."

Now, what is there in the foregoing to enable us to say that what happened here was not an accident? It seems peculiar that if steel chippers must contemplate as one result of the performance of their duty the loss of one or both eyes, that the defendant should have made the following statement:

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"Is there any precaution that you can think of, that you can take to prevent steel which is being chipped, from flying up in that way? Not that I am aware of, no."

The plain answer to this is that goggles with suitable guards might be worn as is done in many other occupations when the eyes have to be protected. The very fact that no evidence was given regarding any custom in the matter of protecting the eyes shews that the danger to them from the occupation is not so great as has been contended for, and as the King's Bench Division recently said in a case under the Employer's Liability Act on the meaning of the word "workman": "In construing Acts of Parliament the judges of the Queen's Courts must use their own knowledge of the various employments existing throughout the realm": *Smith* v. *Associated Omnibus Co., Ltd.* (1907), 23 T.L.R. 381.

Though it is, for the reasons pointed out by Collins, M.R., in *Steel* v. *Cammell, Laird & Company, Ltd.* (1905), 7 W.C.C. 9, not easy to define "accident," yet this case clearly comes within the decision in *Thompson* v. *Ashington Coal Company* (1901), 3 W.C.C. 21, wherein Smith, M.R., said, pp. 22-3:

"If any one were to kneel down in a drawing-room and a needle ran into his knee, that would clearly be an accident. It is said that that case is not like the present because it is a natural thing, when a man is working in a small seam of coal such as the deceased worked in, that a piece of coal should run into his knee. But what happened was fortuitous and unexpected. It seems to me that the mere statement of the case is enough to shew that what happened was an accident."

MARTIN, J.

And as Lord Justice Matthew put it in *Boardman* v. *Scott & Whitworth* (1901), 4 W.C.C. 1 at p. 2:

"I think that in determining the question whether the injury has been caused by an 'accident' or not, we must discriminate between that which must occur and that which need not necessarily occur in the course of the employment. If the thing must happen it is not an accident, but, if it need not happen, then there is the fortuitous element, and there is an accident."

It is worthy to be noted that in *Barrett* v. *Kemp Brothers* (1904), 6 W.C.C. 78 and *Powell* v. *Mayor, Etc., of Ashton* (1905), 7 W.C.C. 77, which were cases of an eye being injured by a flying piece of material in breaking road metal, the fact that this had all the elements of an accident was not even disputed. Here the cause of the flying piece entering the eye was that the work-

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man did not hold his chisel at exactly the right angle to make the piece fly clear of him, or because of some undue hardness or defect in the metal or in the chisel, or for other causes, might be suggested which would be equally accidental, for as Lord Robertson said in *Fenton* v. *Thorley & Co., Limited* (1903), A.C. 433 at p. 452, "the word 'accident' is not made inappropriate by the fact that the man hurt himself."

It follows that the appeal should be dismissed.

CLEMENT, J.: I concur. I quite agree with the language of Mr. Justice MORRISON in his judgment below. While Mr. *Deacon's* argument has been very interesting to listen to, as said in the *Thorley* case, it is rather above the heads of the ordinary workmen for whom the Act was passed. The "man on the street" would, I think, unhesitatingly say that Neville met with an accident.

CLEMENT, J.

Appeal dismissed.

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NORTHERN COUNTIES v. CANADIAN PACIFIC RY. CO.

THE NORTHERN COUNTIES INVESTMENT TRUST, LIMITED v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—General and special legislation affecting—Dominion and Provincial—Negligence—Damages caused by sparks from engine—Limitation of action for damages—"By reason of the construction and operation of the railway"—Consolidated Railway Act, 1879 (Dominion), Railway Act, 1903 (Dominion)—Canadian Pacific Railway Company's charter—Interpretation Act, R.S.C. 1906, Cap. 1.

In an action for damages caused by sparks from a railway engine, the Railway Company claimed the benefit of section 27 of the Consolidated Railway Act, 1879, which was incorporated into their charter by Parliament. Said section 27 provides, in part, that all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained:—

Held, on appeal, *per* HUNTER, C.J., and CLEMENT, J., that by virtue of section 20 of the Interpretation Act (Dominion), the Railway Act, 1903, applies to the Canadian Pacific Railway.

Per IRVING, J.: The general Railway Act of 1879, notwithstanding its repeal by subsequent general legislation, governs the Canadian Pacific Railway.

APPEAL from the judgment of MARTIN, J., in an action tried before him and a special jury at Vancouver on the 25th, 26th and 27th of October, 1906.

Statement

At the trial, evidence was given on behalf of the plaintiffs to the effect that the defendants' engine running along the right of way of the defendants, caused sparks to fall to the said right of way; that the said engine, by reason of the negligence of the defendants was defective and out of repair, by reason of which it threw sparks to a greater extent than an engine properly constructed would do; and that the railway lands upon which the said engine was running had dry grass and weeds lying thereon, on which the fire caught and from which it was communicated to the plaintiffs' lands adjoining the right of way.

On the evidence a verdict in favour of the plaintiffs for $2,500 was given by the jury.

Martin, K.C., and *Craig*, for plaintiffs.

C. B. Macneill, K.C., and *McMullen*, for defendant Company.

21st November, 1906.

MARTIN, J.: The motion for judgment on the verdict of the jury is opposed on the ground that the action is barred because it was not brought within six months as required by section 27 of the Consolidated Railway Act of 1879, which the defendants claim the benefit of. The negligence found consisted in allowing an accumulation of inflammable material on the right of way and the user of a defective engine, resulting in a fire spreading from the right of way to plaintiffs' property.

The first point raised is as to whether or not, apart from the question of limitation of action hereinafter dealt with, this damage comes within the expression "by reason of the railway," used in said section. In my opinion it does, quite irrespective of the reasoning in *McCallum* v. *Grand Trunk Railway Co.* (1871), 31 U.C.Q.B. 527, which, however, I shall follow, if I am not prevented by any decision to the contrary which is binding on me. It is contended that the case of *The North Shore Railway Company* v. *McWillie* (1890), 17 S.C.R. 511, is such a decision, and in support of this view *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R. W. Co.* (1905), 10 O.L.R. 419, is cited. But it clearly appears at pp. 430-1 of that report that the Ontario Court of Appeal did not regard the judgment of Mr. Justice Gwynne as binding, because, as the other judges in it say, the question before them was one of fact purely; hence the remarks of the said learned judge amount only to an *obiter dictum*.

Then as to the second point. Before the defendant Company obtained its charter by Cap. 1 of 44 Vict. (1881), certain provisions of the Consolidated Railway Act (1879), including the section in question, were by section 2, sub-section 2, declared to be applicable "to every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada, and shall, so far as they are applicable to the undertaking, and unless they are expressly varied or excepted by the Special Act, be incorporated with the Special Act, form part thereof, and be construed therewith as forming one Act."

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When the Company subsequently got its charter this section was substantially inserted in the incorporating Act as No. 17 as follows:

"The Consolidated Railway Act, 1879, insofar as the provisions of the same are applicable to the undertaking authorized by this charter, and insofar as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith."

One of the provisions then incorporated into the defendants' charter was section 27 above considered, which limited the time to six months within which an action of this kind could be brought. There has been no change in this respect in the Company's charter, but the general Act has been amended, first, it is said, in 1888, Cap. 29, Sec. 287, so as to extend said time to one year, and the provision now stands as section 242 of the Railway Act, 1903.

It is contended by the defendant Company that the amendment to the general Act has not altered its special Act and reliance is placed upon the remarks of Lord Justice Brett in *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63 at p. 69, wherein he says:

"But there is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect a second."

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And though there has been no decision in this country expressly on the point, yet it is pointed out that in *Zimmer* v. *Grand Trunk R. W. Co.* (1892), 21 Ont. 628, Mr. Justice Robertson, at p. 632 stated, in considering a similar argument, "As a general rule I think this contention must be upheld," and though there was an appeal (19 A.R. 693) yet that point did not come up for consideration and so his view still stands. In the recent case of *Headland* v. *Coster* (1905), 1 K.B. 219, the Master of the Rolls at p. 227, cites the language of Lord Selborne in *Seward* v. "*Vera Cruz*" (1884), 10 App. Cas. 59 at p. 68, which tends to support the defendants' contention though the remarks were primarily directed to repeal by implication. He said:

"Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed,

altered or derogated from merely by force of such general words without any indication of a particular intention to do so."

Mr. *Davis* argues that the very fact that section 17 was inserted in the charter, though it already existed substantially in the general Railway Act, is an indication of an intention to preserve special rights and, having regard to the special nature of the Company's undertaking, in my opinion the contention is at least plausible, even though, as Mr. *Martin* points out, difficulty may be experienced in its full application to other sections in the Act of 1879 and their amendments. The result is that the plaintiffs' motion for judgment must be refused and judgment will go on the cross-motion of the defendants, dismissing the action.

It seems unfortunate that this strictly legal point could not have been raised and decided at an early stage in the action, thereby saving much expense, and I was almost tempted to say that I gave effect to such a defence with some reluctance (if a judge is permitted to have any in the discharge of his duty) when I noticed that in a case of this same nature, *McCallum* v. *Grand Trunk Railway Co., supra,* Chief Justice Hagarty said (pp. 533-4):

"I think it a most sensible provision that requires all such suits to be brought within six months."

The appeal was argued at Victoria on the 4th of June, 1907, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Argument

Maclean, K.C., D.A.-G., on the point of constitutional law involved: There is nothing exempting the Railway Company from liability to the general law for damages. By this limitation provision Parliament has restricted the right of the public in coming to the Court for redress. The Railway Company should not have any law peculiar or different from any other person or body. The question involved here is not one incidental to the construction or operation of the railway.

Martin, K.C., for the appellant Company (plaintiffs): Assuming that it is within the power of the Dominion to enact this limitation section, the cause of action, not being incidental to the construction and operation of the railway, does not come within

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it. The mere leaving of dry grass on the right of way is sufficient: *The Grand Trunk Railway Company of Canada* v. *Rainville* (1898), 29 S.C.R. 201; see also *The North Shore Railway Company* v. *McWillie* (1890), 17 S.C.R. 511 at p. 514.

[HUNTER, C.J.: That decision was on the language "by reason of the railway"; this is "by reason of the construction and operation of the railway."]

It makes no difference. "By reason of the railway" means "by reason of the construction and operation of the railway": see *Roberts* v. *The Great Western Railway Co.* (1856), 13 U.C. Q.B. 615; *Follis* v. *The Port Hope, &c., Railway Co.* (1859), 9 U.C.C.P. 50; *Auger* v. *Ontario, Simcoe & Huron Railway Co., ib.* 164; *Prendergast* v. *The Grand Trunk R. W. Co.* (1866), 25 U.C.Q.B. 193; *Anderson* v. *Canadian Pacific R. W. Co.* (1889), 17 Ont. 747 at p. 756; *Browne* v. *Brockville and Ottawa R. W. Co.* (1860), 20 U.C.Q.B. 202; *Brown et al.* v. *Grand Trunk Railway Co.* (1865), 24 U.C.Q.B. 350; *McCallum* v. *Grand Trunk Railway Co.* (1870), 30 U.C.Q.B. 122; *Kelly* v. *Ottawa Street R. W. Co.* (1879), 3 A.R. 616; *Conger* v. *Grand Trunk R. W. Co.* (1887), 13 Ont. 160; *Carty* v. *City of London* (1889), 18 Ont. 122; *McArthur* v. *Northern & Pacific Junction R. W. Co.* (1890), 17 A.R. 86; *Sayers* v. *B. C. Electric Ry. Co.* (1906), 12 B.C. 102; *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R. W. Co.* (1905), 10 O.L.R. 419 at p. 427; *May* v. *Ontario and Quebec R. W. Co.* (1885), 10 Ont. 70; *Carpue* v. *London Railway Co.* (1844), 5 Q.B. 747; *Palmer* v. *Grand Junction Railway Co.* (1839), 4 M. & W. 749 at p. 767.

Argument

This Railway Company is bound by the Dominion Railway Act at present in force, that of 1903. The effect of the judgment is that all railways will be subject to the state of the law under which they were incorporated. It cannot be considered possible that the whole scheme of railway legislation is changed with respect to this particular railway. Had Parliament intended that the Canadian Pacific Railway should not be subject to the Railway Commission, there would have been a special clause in the 1903 Act exempting the Company. He also referred to *Fensom* v. *Canadian Pacific R. W. Co.* (1904), 8 O.L.R. 688.

Davis, K.C. (*McMullen,* with him), for respondent Railway Company (defendants): The Dominion Government has full and absolute control of Dominion railways, and Parliament can, if it choose, legislate that no action whatever shall be brought against a Dominion railway: see *Levesque* v. *New Brunswick Railway Co.* (1889), 29 N.B. 588. There is a limitation of time for bringing actions against railways in England.

The language "by reason of the railway," has been held by the judges in Ontario to bear the same meaning as that used in the English Acts, *i.e.*, acts done in pursuance of the powers conferred by the statute. It is settled law in Ontario that the phrase "by reason of the railway," applies to a case like the one at bar; it is settled in New Brunswick by the *Levesque* case, and in the Territories by *Walters et al.* v. *Canadian Pacific R. W. Co.* (1887), 1 Terr. L.R. 88. See also *Gaby* v. *Wilts Canal Company* (1815), 3 M. & S. 580; *Kent* v. *The Great Western Railway Company* (1846), 16 L.J., C.P. 72; *Hammersmith, &c., Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171 at p. 196. The following authorities shew that the section does not apply in cases of omission, and that "by reason of the railway" applies to the present case: *Holland* v. *Northwich Highway Board* (1876), 34 L.T.N.S. 137; *Burton* v. *Corporation of Salford* (1883), 11 Q.B.D. 286; *Graham* v. *Mayor, &c., of Newcastle-upon-Tyne* (1893), 1 Q.B. 643; *Blakemore* v. *The Glamorganshire Canal Company* (1829), 3 Y. & J. 60; *Webb* v. *Barton Stoney Creek Road Co.* (1895), 26 Ont. 343.

Argument

We do not take the position that the general Railway Act does not apply to the Canadian Pacific Railway Company. That Company is in the same position as any other company holding a special charter; that is to say, the general Railway Act applies insofar as it is not changed by the special charter. We say the Railway Act of 1879 was read into the Canadian Pacific Railway Company's charter, and any subsequent change in the general railway legislation, repugnant or contrary to that charter does not apply. The limitation was six months in the 1879 Act, which was read into our charter; it is now twelve months. The latter does not apply to us. See both the contract and the

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statute, section 21. As to the meaning of "incorporate," whether it signifies "printed in," or merely a reference, see *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63 at p. 69; *Gaslight and Coke Company* v. *Hardy* (1886), 17 Q.B.D. 619 at p. 621; *In re Wood's Estate* (1886), 31 Ch. D. 607 at p. 615.

Martin, in reply.

Cur. adv. vult.

12th July, 1907.

HUNTER, C.J., concurred in the reasons for judgment of CLEMENT, J.

IRVING, J.: By the first section of the Canadian Pacific Railway Company's Act, 1881 (44 Vict., Cap. 1), the contract between the Company and the Government of Canada is approved and ratified.

By the second section provision is made for the issue to the promoters of a charter conferring upon them the privileges embodied in the schedule to the said contract, which charter is to have the same force and effect as an Act of Parliament.

By section 22 of the contract it is provided:

"The Railway Act of 1879, insofar as the provisions of the same are applicable to the undertaking referred to in this contract, and insofar as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of incorporation to be granted to the Company, shall apply to the Canadian Pacific Railway."

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By section 4 of the charter it is enacted:

"All the franchises and powers necessary or useful to the Company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the Company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them."

By section 17 of the charter it is enacted:

"The Consolidated Railway Act, 1879, insofar as the provisions of the same are applicable to the undertaking authorized by this charter, and insofar as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith."

As to the words "incorporated with," Lord Esher said in *In re Wood's Estate* (1886), 31 Ch. D. 607 at pp. 615-6:

"It is to put them into the Act of 1855, just as if they had been written into it for the first time. If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes, therefore, those sections of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855."

By the 27th section of the Consolidated Railway Act, 1879, it is enacted:

"All suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained, or if there be continuation of damage, then within six months next after the doing or committing such damage ceases, and not afterwards; and the defendants may plead the general issue, and give this Act and the Special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by the authority of this Act and the Special Act."

By an Act passed in 1883, 46 Vict., Cap. 1, Sec. 1, the following alteration in the Interpretation of Statutes was made (possibly to meet the rule of construction referred to by Brett, L.J., in *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63 at p. 69):

"And where any Act or part of an Act is repealed, and other provisions are substituted by way of amendment, revision or consolidation, any reference in any unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject matter as such repealed Act or enactment: Provided always, that where there is no provision in the substituted Act or enactment relating to the same subject matter, the repealed Act or enactment shall stand good and be read and construed as unrepealed, insofar, but insofar only, as may be necessary to support, maintain or give effect to such unrepealed Act, rule, order or regulation."

By (1888) 51 Vict., Cap. 29, Sec. 287, the period of limitation was altered from six months to one year.

The first question is this: Does the amendment of 1883 (now section 20 of the Interpretation Act, 1906) apply to the Canadian Pacific Railway Company's charter Act of 1881? The first thing that strikes me is that if it does you will have an amendment made in 1881 by statute of a contract made in October,

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1880, because it is impossible to hold that the Act of 1881 does amend the Canadian Pacific Railway Company's special charter Act and does not amend the contract. It seems to me that once the fact is stated the answer is clear beyond question.

Without going into the external circumstances of the case as indicated by the preamble to the Canadian Pacific Railway Company's Act of 1881, it is impossible to suppose that the Crown contemplated passing an Act for the alteration of the contract of 1880: see *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, *per* Blackburn, L.J., at p. 969.

I do not suggest that the Parliament of Canada had not power to do so, but that canon of construction which declares that a statute must not be deemed to take away or extinguish the right of the contracting party, unless it appears by express words or by plain implication that it was the intention of Parliament so to do, is applicable to the amendment of 1883 and the proposed extension of the period of limitation. The constitutional question in my opinion is settled by the decision of the Judicial Committee in *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1907), A.C. 65, in favour of the Railway Company notwithstanding that civil rights are to some extent involved.

As to the third point—the limitation clause (section 27) of the Consolidated Railway Act, 1879, relates to "suits for indemnity for any damage or injury sustained by reason of the railway."

IRVING, J.

The question is, is this action within the provisions of section 27? The section being in restraint of a man's common law right, must be strictly construed.

The facts of the case are as follows: [already set out in the statement.]

The opinion of Gwynne, J., in *The North Shore Railway Company* v. *McWillie* (1890), 17 S.C.R. 511 at p. 513, supports the appellant's case, but Mr. *Martin* frankly admitted that if *Kelly* v. *Ottawa Street R. W. Co.* (1879), 3 A.R. 616, was good law, his case was hopeless. *Kelly* v. *Ottawa Street R. W. Co.* was decided in 1879 by the Court of Appeal in Ontario, on the authority, so far as two of the judges were concerned, of *Auger* v. *The Ontario, Simcoe & Huron Railway Co.* (1859), 9 U.C.C.P. 164, decided by Draper, C.J., Richards and Hagarty, JJ., and *Browne* v.

Brockville and Ottawa R. W. Co., 20 U.C.Q.B. 202, decided in 1860 by the Queen's Bench (Robinson, C.J., McLean and Burns, JJ). Morrison, J., concurred. He had in 1870, sitting with Adam Wilson, J., delivered a judgment in *McCallum* v. *Grand Trunk Railway Co.* (1870), 30 U.C.Q.B. 122. That judgment was affirmed on appeal in 1871 by a Court consisting of Draper, C.J., Richards, C.J., Hagarty, C.J., Wilson, J., Mowat, V.-C., Gwynne, J., Galt, J, and Strong, V.-C. A decision by such eminent judges should, in my opinion, be followed until overruled by competent authority. The opinion of Gwynne J., was not the decision of the Supreme Court, nor was it given after full argument on the point in question.

I think the appeal should be dismissed.

CLEMENT, J.: The Railway Act, 1903, was the Act in force when the plaintiffs' cause of action arose; and the plaintiff Company contends that if there be any statutory limitation of the time within which action should be brought, it is that mentioned in section 242, *viz.*: one year. If that be so, it will not be necessary to consider the other questions argued before us, for this action was brought within the year. It was not brought, however, within six months, and the defendant Company contends that in their particular case there is a six months' limitation. The contention more fully stated is this: that by section 17, Schedule A. to the defendant Company's charter of incorporation (44 Vict., Cap. 1), the then general Railway Act (1879) was, with certain exceptions and modifications, incorporated into and still forms part of the defendant Company's charter; that one of such provisions was the section (27) of the Railway Act, 1879, which limited to six months the time within which, as the defendant Company contends, such an action as this should be commenced; that, in other words, the subsequent amendment, embodied now in section 242 of the Act of 1903, by which the time limit was extended to one year, does not apply to or affect the defendant Company.

It seems to me that section 20 of the Interpretation Act (R.S.C. 1906, Cap. 1) is a complete answer to this contention. The section provides—omitting immaterial matter—that "When-

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ever any Act or enactment is repealed, and other provisions are substituted by way of amendment, revision or consolidation, any reference in any unrepealed Act to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment"; and it is only "if there is no provision in the substituted Act or enactment relating to the same subject-matter" that the repealed Act is to stand good so as to give due effect to the unrepealed Act. As the word "substituted" is expressly made to cover amendment as well as re-enactment, the section seems to shatter completely the defendant Company's position.

It is to be regretted that this section was not brought to the attention of the learned trial judge, nor to ours. While, therefore, the appeal must be allowed, it will be without costs. The plaintiff should get the costs of the action.

Apart from this express enactment, I should be prepared to hold that the incorporation in the Canadian Pacific Railway Company's Act of the Consolidated Railway Act, 1879 (with certain exceptions, modifications, etc.), was simply a compendious method of saying *ex abundantia cautaea*, that as to matters not specially dealt with in the Canadian Pacific Railway Company's Act the Company was to be neither an outlaw nor a law unto itself, but was to be subject to the general railway law. If then Parliament in its wisdom should afterwards see fit to change the general law, it would seem most inexplicable that such change, presumably reasonable and proper, should not apply to the defendant Company alone of all the railways under federal jurisdiction. In other words, the application to the Canadian Pacific Railway of the Consolidated Railway Act, 1879, was not *special* legislation within the spirit of the authorities cited on behalf of the defendant Company.

CLEMENT, J.

Appeal allowed, Irving, J., dissenting.

CHINESE EMPIRE REFORM ASSOCIATION v. CHINESE DAILY NEWSPAPER PUBLISHING COMPANY, LIMITED *ET AL.*

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CHINESE EMPIRE REFORM ASSOCIATION *v.* CHINESE DAILY NEWSPAPER PUBLISHING CO.

Company law—Non-trading corporation created under the Benevolent Societies Act, R.S.B.C. 1897, Cap. 13—Libel of, whether actionable.

A non-trading corporation, having the right to acquire property which may be the source of income or revenue, the transaction of the business incidental thereto creates a reputation, rights and interests similar to those of an individual or a trading corporation, and must have the same protection and immunities, and be given the same remedies, in case of injury, as a trading corporation.

ACTION tried before MORRISON, J., at Vancouver on the 11th of July, 1907, for libel, brought by the plaintiff Association.

Statement

A point of law was raised on the pleadings as to whether such an action was maintainable by an association formed under the Benevolent Societies Act, and not being a purely trading corporation which could be injured in its business and reputation by being libelled.

Davis, K.C., for plaintiff Association.
Sir C. H. Tupper, K.C., and *Boak*, for defendant Company.

Judgment

MORRISON, J.: This is a point of law raised upon the pleadings. The plaintiff is incorporated under the Benevolent Societies Act, being chapter 13 of the Revised Statutes of British Columbia for the purpose, among others, of educating and benefitting the Chinese people in this Province. The defendant, the Chinese Daily Newspaper Publishing Company, Limited, has its head office in the City of Vancouver, carrying on the business of a newspaper called the "Wa Ying Yat Po," printed in the Chinese language and circulating amongst the Chinese throughout British Columbia. The other defendants are the Editor and Managing Director respectively of the paper.

The issue of this paper appearing on the 21st day of March this year and other days in that month contained an article

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published in the Chinese language, purporting to be signed by a number of Chinamen, members of the plaintiff Association, which article it is alleged is libellous, and that the said names were fraudulently attached thereto. Damages are sought in respect of the alleged libel contained in this article so published and circulated.

The question is whether the action is maintainable. Paragraph 12 of the statement of defence reads as follows:

"The defendants will object that the statement of claim does not disclose any cause of action, and that the plaintiffs being a corporation incorporated under the Benevolent Societies Act of British Columbia for the objects and purposes specified in the said Act cannot sue in its corporate capacity in respect of the words mentioned and referred to in the said 4th and 5th paragraphs of the said statement of claim, with the meaning or meanings or in the sense alleged. The defendants will further object that the said words were not actionable without proof of special damage and that none is alleged."

It is contended in support of the defendants' point thus raised that special damage in a case of this kind must be alleged and proved by the plaintiffs, inasmuch as the Corporation is one created under the Benevolent Societies Act, and is a non-trading Company, and that the principle applicable to the case of a trading corporation being libelled in the way of its business or trade is not applicable in the case of a non-trading or so-called benevolent corporation. Several cases were cited in the attempt to support that contention, *viz.*: *South Hetton Coal Company* v. *North-Eastern News Association* (1894), 1 Q.B. (C.A.) 133, 63 L.J., Q.B. 293; *Mayor, &c., of Manchester* v. *Williams* (1890), 60 L.J., Q.B. 23; *White* v. *Mellin* (1895), 64 L.J., Ch. (H.L.) 308; *Cox* v. *Feeney* (1863), 4 F. & F. 13.

Judgment

In my opinion no such differentiation is drawn in those cases between trading and non-trading corporations. A non-trading corporation has the right to acquire property which may be the source of income or revenue. And the transaction of the business incidental thereto creates a reputation, rights and interests, in no essential respects different from that of an individual or a trading corporation. They may be enhanced or destroyed. Counsel for the defence would have the principle enunciated in those cases confined to instances where the

Corporation was injured in the way of its business or trade, using the words synonymously. But I do not read into those learned judgments that limitation. For a trading corporation may be injured as to its property without being injured as to its trade and *vice versa*. True, if a trading corporation is injured in the way of its business in the sense that its profit dividend making power is crippled it may maintain an action, but the cases do not go further and say that in the case of injury to property a remedy lies only in favour of a trading corporation, and that other corporations are precluded from maintaining an action for libel unless they prove special damage. Non-trading corporations have their affairs, their business, their interests respecting property which must have the same protection and immunities and the same remedies in case of injury thereto as a trading corporation. The same principle applies to both, and what clearer authority could be cited for that proposition than the case of *South Hetton Coal Company* v. *North-Eastern News Association* above referred to, which settles the law that an action for libel will lie at the instance of a corporation for a libel tending to injure its reputation in the way of its business without proof of special damage. It affirms the principle that a corporation is in no respect on a different footing from an individual as to its right to sue for a wrong against it. Subject, of course, to the limitation that there are certain things which a corporation cannot obviously do, such as murder, incest, adultery, etc., which crimes, if charged against it, would be such utter nonsense that it could not maintain an action in respect to such charges, it being impossible for a corporation to commit those offences. The allegations would be held as so much idle abuse, not injuriously affecting it.

Judgment

The case of the *Mayor, &c., of Manchester* v. *Williams, supra*, is not apposite. There the imputations were personal, and the property of the corporation was not affected. It might well be that charges such as were made there might result in the Council being depleted of aldermen, but then there was the full statutory power and machinery provided for a contingency of that kind whereby perhaps a better and more capable council

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would be elected to perform the necessary duties on behalf of the public. That is not an authority for saying that had the municipal property or finances been injuriously affected by the statements complained of, the action could not be maintained. The point was not that it was a non-trading corporation, and therefore the action was not maintainable, but rather that there was no injury done to its property or business. The grievance was a personal one—a charge of corruption against the personnel of the council, which did not and, in a rational sense, could not even tend to depopulate the municipality, thereby affecting its property. In the present case the tendency of the article in question is to prevent not only new members joining the plaintiff Corporation, and the public from dealing with it, thus exposing it to liabilities and embarrassments wholly subversive of the due exercise of its statutory powers, but tending to seriously injure its property and reputation—in short, completely removing its means of existence.

The case of *White* v. *Mellin*, *supra*, turns on the well-settled point that an action for or in the nature of a slander of title will not lie unless the statement complained of is false and false to the knowledge of the defendant, and has caused special damage. That case, I submit, has no analogy to the case now under consideration.

Judgment

The Benevolent Societies Act empowers a company organized pursuant to its provisions to have a Common Seal, and continued succession. It may contract and be contracted with, sue and be sued, plead and be impleaded, answer and be answered unto in all Courts and places, and in all actions, suits, complaints, matter and causes whatsoever. Upon incorporation it is introduced into the business community fully organized and equipped with by-laws and regulations, and with responsible management and facilities, enabling it to transact business appertaining to its corporate functions and powers. It becomes a body corporate and politic, having all the powers, rights and immunities vested by law in such bodies; section 4, sub-section 6. And section 8 enacts as follows:

"The members of any society, or branch society, incorporated under this Act may, in the name of the society, or branch society, or in the

name of the presiding officer, or other officer or officers thereof, acquire and take by purchase, donation, devise or otherwise, and hold for the use of the members of the society, or branch society, and according to the by-laws, rules and regulations thereof, all kinds of personal and also real property in this Province; and the same, or any part thereof, from time to time may sell or exchange, mortgage, lease, let, or otherwise dispose of, and with the proceeds arising therefrom may from time to time acquire other lands, tenements, and hereditaments and other property, either real or personal."

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I am of opinion that the action is maintainable.

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

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Master and servant—Employers' Liability Act—Injury to servant—Knowledge of workman—Negligence—Contributory negligence—Proximate cause of injury.

Jury, questions to—Failure of judge to submit—New trial.

Plaintiff, while engaged in replacing on their track some cars which had run off, was struck through a car becoming released on a down grade, and was thrown on a set of exposed cog-wheels some nine or ten feet to one side of where he was working. He lost the use of his arm in the cogs. His duties did not usually bring him in contact with the machinery which caused his injury, nor had he any control over or concern in its working:—

Held, that the leaving of the cogs unguarded was the decisive cause of the accident, and whether that was negligence in the particular circumstances was properly left to the jury.

The only object in submitting questions to a jury is to ascertain if they apprehend the case; but if the judge does not submit questions, it is no ground for a new trial, if he has properly instructed the jury on the law.

Statement

APPEAL from the judgment of CLEMENT, J., in an action tried before him and a jury at Nelson on the 12th to the 15th of February, 1907, when a verdict was returned in favour of the plaintiff, who, when injured on the 5th of June, 1906, was

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dumpman in charge of No. 1 dump on the defendant Company's tipple at Coal Creek.

This tipple is a steel structure 600 feet long, extending across Coal Creek valley, handling the coal from each side of the valley. The process is: The coal is brought from the mines on to the tipple floor, which is 30 feet above the Canadian Pacific Railway track in the bottom of the valley. The coal then passes into the revolving dumps, two cars at a time. These cars after being emptied are shot out of the dump by the incoming two full cars. As the emptied cars leave the dump they pass down an eighteen per cent. grade, at the bottom of which is an automatic switch. They pass by this switch up a kick-back grade, where they lose their impetus and return down the kick-back grade to the automatic switch, and automatically switch on to the return track, passing on the downward grade to the mine from which they came, the intention of the whole arrangement being to save labour. Each one of these dumps handles about a thousand cars per day, working only a portion of the time. The cars are six feet four inches long, the trucks about three feet and running on a three inch track. It frequently happens that the cars will jump the track under varying conditions.

Statement

In the case at bar, as the two cars were dumped at the revolving dump by the incoming full cars, one was knocked by the dumpers against the other, and as they went down the eighteen per cent. grade they jumped the track. Plaintiff Snow, being the man in charge of that dump, cut off his power, and came around the work way on the outside of the dump, but within the tipple and the outgoing end of the dump. He ordered three of the men with him to assist in putting the cars on the track. They first placed upon the platform upon each of the rails running on the eighteen per cent. grade the car closest to the end of the outgoing No. 1 dump. This car they pushed out to a space about four feet long and practically level. They did not, however, place the wheels on the rails. They then went down to the next car for the purpose of lifting it on to the track. They stood it up on its wheels and into the right position to be lifted on to the rails. It was then at a point

about two-thirds of the way down the eighteen per cent. grade. Snow lifted this car up by placing his back against it. In this position he was standing on the grade platform, which at that point extended beyond the rails about one foot. He was one foot above the return track, and nine feet four inches away from and almost directly opposite the cog-wheels of the No. 2 dump, in which his hand was afterwards caught. The first car was then pushed to the outgoing end of the No. 1 dump.

It was charged that he did not push it sufficiently far so that it would stay there, and it was also charged that he did not put a sprag, or piece of wood, in the wheel, which was the general custom in this mine. It was further charged that sprags were placed near or on the track for the purpose of blocking the cars on the tipple. He admitted that had he spragged the wheel, and if the car was pushed sufficiently tight against the outgoing end of the No. 1 dump, it would not have come down. But by reason of his not having done so, it came down the grade, hit the car which was lying on the track, that is, the second car above the platform, and shot him across from the platform on which he was standing to the return track, and into the revolving cogs of the No. 2 dump opposite. These cog-wheels were not guarded by any shield. Plaintiff lost his arm in the cogs.

Statement

The defendant Company claimed that the cog-wheels were not part of the "way" in which the plaintiff was working at the time of the injury; and that, for any proper use of the "way" in which he was working he would not by any possibility get into contact with these cog-wheels. The defendant Company also set up that he was the author of his own injury; that the *causa causans* was not the cog-wheels being unguarded; that they were simply the instrument producing the personal injury; but that the real accident and the real cause was the negligent placing of the car first pushed up to the outgoing end of the No. 1 dump and the omission to sprag the wheel. The evidence went to shew that the plaintiff had worked one month on the No. 2 and five months on the No. 1 dump, and was familiar with the machinery.

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CLEMENT, J., in his charge to the jury, said, in part: "I think we can now appreciate pretty well what the dispute is. You heard some discussion as to whether or not the matter should be submitted to you in the form of questions. I have no doubt many of you have acted on juries before and some of the things I may say you will have heard before. You understand that under our system of administration of justice the jury is the sole judge of the facts. Eminent judges have said that a judge presiding at a trial of this sort is entitled to tell the jury his view of the facts. In this particular case I think it is better that I should entirely abstain from any indication of my view of the facts. But in applying the law to the facts as you, the jury, find them you must take your law from me; that is our system of administering justice. In this particular case my own view is that the facts are within a reasonably narrow compass and that it will conduce to a better administration of justice if I leave the question entirely to you whether you will find a verdict for the plaintiff or the defendants.

"The plaintiff starting an action of this kind, the burden of proof is upon him; he undertakes to shew that these defendants have been guilty of negligence and that that negligence has caused him injury. Negligence in the eye of the law is a breach of duty, and what we have to consider first here is what is the duty which employers in the position of the defendants owe to workmen in the position of the plaintiff? In the addresses of counsel it appears that there is no difference of opinion between them upon that point, and I may state to you shortly that an employer is under a duty to provide reasonably safe machinery. If you consider it under the Employers' Liability Act, the law is that a piece of machinery may do its work admirably, and yet be defective in that it subjects the workmen to unreasonable risk. Now the plaintiff must put his finger upon some act or omission of the defendants which constitutes a breach of their duty to him. In this case the address of counsel for the plaintiff might lead you to infer that he relies upon the negligence of the defendants in connection with their system; I mean as to the running of the cars and the absence of guard-rails and so on. I want to say to you as a matter of law that

Statement

so far as that being a cause of the injury suffered by Snow, it is not the proximate cause within the meaning of the law. I do not say that you are to eliminate those things from your view, but I do say that you are not to find the defendants guilty of negligence causing the injury to Snow by reason of the fact that they had these defects in their system, if you consider them defects.

"Leaving that out of the question as the proximate cause of the injury suffered by Snow, the only thing that is left really is whether or not the defendants were negligent in supplying and keeping running that electric motor with the unguarded cogs. It seems to me that on the question of fact the case really comes down to that. Under all the circumstances of this case, were the defendants guilty of negligence in leaving those cogs unprotected? You have the facts as to how the business is run, and in that connection I think you are entitled to take into consideration the actual way in which the work was being carried on. It was admitted on all hands that cars occasionally got off the track; I will not put it any stronger than that. The result is that workmen in the course of their work had to go along what is called the return track for the purpose of lifting these cars on to the track again, and so would naturally pass and repass along in front of where this motor was running. That being the position, the case is one of knowledge on the part both of the employer and employee. The position of the motor with those unguarded cogs was a matter of notoriety and must be taken to have been known to the Company. It was undoubtedly known to the plaintiff. In considering the question of negligence therefore, as I say, you must consider whether there was a breach of duty on the part of the defendants towards Snow. In connection with that you may have heard used the phrase, '*Volenti non fit injuria*'; that simply means that an employer cannot be held to owe a duty to an employee to guard against risks which the workman has undertaken to run. It has been laid down that if a workman knows of defects in machinery, and notwithstanding his knowledge and appreciation of the danger continues to work, that is a fact from which the jury may infer that he agreed to run that risk; the

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position then is that it is a matter of agreement between the employer and the workman, and judges have laid it down that it is for the jury to say whether or not under the circumstances of the case the workman did agree to run the risk. The fact that he knew of the danger is not conclusive, but it is for you considering all the circumstances here in determining whether or not the plaintiff voluntarily assumed the risk in connection with those cogs. By way of illustration I might say that a circular saw is a very dangerous machine. It is well known that owing to the use that is made of that saw it is practically impossible to guard it. For that reason a jury might infer that a man working in a saw-mill had agreed to accept that risk. The presumption would not be so strong in the case of a piece of machinery that might easily be guarded. Where the workman might consider that his chances of ever being near that machine were very slight the jury might say: 'Taking the circumstances into consideration we cannot find that the workman agreed to run that chance.' So far as that particular defence is concerned therefore, I do not think I can put the matter to you more fully than I have done. That is a defence that is open to the employer. He can say: 'I have not been guilty of any negligence or breach of duty towards this man, because he has practically agreed with me to run the risks that exist in connection with this certain piece of machinery.'

Statement

"So you have to consider first whether as against Snow the use by the defendants of those unguarded cogs was a matter of negligence. If you say yes to that question, then the next question is, was that negligence the cause of the injury sustained by Snow? As to that the law is, that if in the course of the plaintiff's case it appears that the negligence of which he complains was really not the cause of the injury, but his own negligence, then the judge would take the matter in his own hands and dismiss the action. Here I have not done so because I think that is a question of fact upon which you have to pass. I do not think I can say as a matter of law that the cause of the injury to the plaintiff was his own negligence. But the matter comes up in another way under the defence of contributory negligence. If you find that there was negligence on

the part of the defendant Company, and that *prima facie* that negligence caused the injury to Snow, then there is the further inquiry, did Snow by any act of negligence on his part contribute to the injury? Now that is a question of fact. Was Snow negligent? You have had the facts on that point brought before you and I think you appreciate the situation without any further review from me. It is argued on the one hand that the act of the plaintiff in leaving that car up at the outlet of the dump No. 1 as he did was negligence. On the other hand it is argued on the facts that taken in connection with the way the work was performed, the rush, the fact that these other three men apparently united with him in thinking it was safe up there, it was not negligent. These are conflicting views which you must consider and determine which is correct. If you find that was negligence, however, that is not sufficient to disentitle Snow to recover; that negligence must be a contributing cause of the injury and in that connection the law is, I think, that if notwithstanding Snow's negligence (I am assuming for the sake of argument that the action of Snow in leaving that car there was negligent), presuming that, could the defendants by any act on their part have prevented Snow's negligence from leading to this injury. That you see almost gets us into arguing in a circle, because, no doubt, if it was the duty of the Company to guard these cogs, then the result of Snow's negligence (if it was negligence) would not have led to this injury. I was almost prepared to charge you as a matter of law that there was not any evidence here of contributory negligence sufficient to leave to you, but the authorities are that the question of contributory negligence is one for the jury, and for that reason counsel have argued the matter *pro* and *con* and I have stated to you as clearly as I can the different views you may possibly take of the facts. But what I say is, that you must be satisfied that the negligence on the part of Snow (if any) was such that nothing the Company should have done would have prevented him meeting with the accident he did.

Statement

"I do not think of anything further on the legal aspect of the matter that I should lay before you. As I have said, you are the judges of the facts, but I wish to impress upon you that

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in deciding upon your verdict on the facts as you find them you must take the law as given to you by me. It is owing to the fact that judges have sometimes thought that juries have disregarded the law as laid down by the judge that the practice of inflicting questions on the jury grew up; so the Court could be sure that the jury had really decided the various questions of fact that arose and had not given a verdict by chance. So in this case I am paying you the compliment of believing that you will take the law as I have laid it down and apply it to the facts as you find them. It is then for you to say whether your verdict shall be for the plaintiff or the defendants.

"As to damages, Mr. *Macdonald* has stated that he does not ask for more than would be allowed under the Employers' Liability Act. Perhaps he is wise in taking that course. I do not know that I need add anything to what counsel have said there. Under the section you have a right to give up to $2,000, in any case. But you have the right under the other branch, should the amount be larger, to give the larger amount. 'The amount of compensation recoverable under this Act shall not exceed . . . . or $2,000.' I think counsel practically have not differed as to the way you should look at that. Take a dump boss in this Province, during the last three years what would the average earnings of a man in that position be? that is the sum which if you find for the plaintiff you should award in this case.

Statement

"*Taylor*: That is the maximum.

"The Court: Yes, it is not to exceed that. There is no minimum.

"So just to boil it all down, the questions for you to consider are: first, were the defendants guilty of negligence? As to that I think the point is, were they guilty of negligence in not putting guards on those cog-wheels? If you say that under the circumstances they acted reasonably in leaving those wheels unguarded, then you find a verdict for them. If you find they were guilty of negligence as against Snow, then the question is one of defence; was Snow in such a position in reference to his knowledge and appreciation of the danger existing that you find as a fact that he undertook to take that chance? If you

find that that is a defence then your verdict will be for the defendants. If you get past that point and find so far in favour of the plaintiff, the next question is: was Snow under the circumstances shewn guilty of contributory negligence? first was he guilty of negligence on the facts? secondly, was such negligence contributory negligence within the meaning of the authorities? As I have said, to be contributory negligence it must be the proximate cause; the actual cause of the injury in this case undoubtedly was the cogs themselves in the last resort, but if the cogs and the negligence of Snow together constituted the real cause of the injury, then Snow was guilty of contributory negligence, but as I said the law is, that notwithstanding the negligence of the plaintiff, if the position was such that a reasonable course of conduct on the part of the Company would have obviated any risk of accident to Snow through his negligence, then, notwithstanding Snow's negligence, the Company is liable."

Statement

The appeal was argued at Victoria on the 13th and 14th of June, 1907, before HUNTER, C.J., IRVING and MORRISON, JJ.

S. S. Taylor, K.C., for appellant (defendant) Company: As to the contention that there was a defect in the "way," such defect must have amounted to an unsafe condition. These cogs were not a defect in the way where plaintiff was working at the time. As to contributory negligence on the part of the plaintiff, there was ample level space to hold the car securely at the outgoing end of No. 1 dump. Snow says he used a piece of coal to block the wheel; no evidence of anyone having seen him do it. In any event the coal is soft, friable, dusty, and would not stop a car. Further, there is no evidence as to the absence of any sprags at that particular spot; on the contrary there is every room for inference that there were some. Even if there were not, Snow should have held the car and sent a man back for some. There was no one ever hurt in those cog-wheels before. The primary cause of the accident was those cog-wheels. This was not an accident within the meaning of "accident" in the Employers' Liability Act. The slipping away of the car was the direct cause of the accident. Plaintiff's

Argument

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coming into the cogs was an incident. The whole cause of the accident took place before the cogs entered into the matter at all: *Adams* v. *Lancashire and Yorkshire Railway Co.* (1869), L.R. 4 C.P. 739 at p. 741. The extent of the employer's duty is to guard things that are manifestly dangerous to reasonable men: see also *Davey* v. *London and South Western Railway Co.* (1883), 12 Q.B.D. 70 at p. 71 *et seq.*; *Dominion Iron and Steel Co.* v. *Day* (1903), 34 S.C.R. 387; *Dominion Iron and Steel Co.* v. *Oliver* (1905), 35 S.C.R. 517 at p. 525.

[IRVING, J., referred to *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41.]

Plaintiff admits that had the car not come down, or had he spragged it, he would not have been hurt: see *Williams* v. *Birmingham Battery and Metal Company* (1899), 2 Q.B. 338; *Canada Foundry Co.* v. *Mitchell* (1904), 35 S.C.R. 452 at p. 453. This is a clear case of *volens* on the part of the plaintiff; he had full knowledge of the situation; it was broad daylight and he was the boss on that job.

Questions should have been submitted to the jury. We submit this subject to the Court being against us on the other points.

[HUNTER, C.J.: The only object in submitting questions is to find out if the jury apprehend the case. But it is not ground for granting a new trial if the judge does not submit questions. If a judge does not submit questions, it is incumbent upon him to cover the law of the case, and that is why a great many judges are in favour of answering questions.]

Argument

Martin, K.C., for respondent (plaintiff): This is clearly a common law action, and the charge of the judge is quite within the authorities. It was incumbent on the Company to have those cogs protected, and there would be no difficulty in putting a moveable cover on them. As to whether the negligence complained of must be some new act, see *Brenner* v. *Toronto R. W. Co.* (1907), 13 O.L.R. 423. The plaintiff was not the boss; he was merely a man in charge of the dump, with three men to assist him, but was not really the boss. There was a dispute as to whether this particular car was up close to

the dump; also as to whether the boss, Sandles, would allow sprags lying around at that particular place.

Taylor, in reply.

Cur. adv. vult.

1st August, 1907.

HUNTER, C.J.: The facts appear in the judgment of my brother Morrison which I have had the advantage of reading, and there is no need to repeat them.

In my opinion the question comes down to this: Could the defendants have reasonably anticipated the likelihood of an accident happening such as happened the plaintiff? No doubt it was of a highly peculiar character, but was it such that the defendants were blameworthy for not having provided against it? The engine of mischief was distant between nine and ten feet from the place where the plaintiff was projected towards it, and although I might have had considerable difficulty by reason of this fact in concluding that the defendants were guilty of negligence *quoad* the plaintiff in leaving the cogs unguarded, I am unable to go so far as to say that there was no case to go to the jury.

With respect to contributory negligence I think there was evidence on which the jury could reasonably reject this defence, and in any event I think it is immaterial whether or not there was any such negligence, as the leaving of the cogs unguarded was the decisive cause of the accident and whether that was negligence in the particular circumstances was, as already said, properly left to the jury.

There being a finding against contributory negligence which cannot be assailed, we are relieved from the necessity of considering whether there was any error in the learned judge's charge on the question of so-called "ultimate" negligence, and this brings me to say a word about *Brenner* v. *Toronto R. W. Co.* (1907), 13 O.L.R. 423, so much relied on by the respondent. With great deference to the learned judge who delivered it, I think the leading judgment in that case unnecessarily further complicates a subject which is already complex enough. In the ordinary action for negligence causing personal injuries, the question always is what was the decisive cause of the accident,

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which, if due to negligence, may be due to the negligence of the plaintiff or of the defendant, or to the concurrent negligence of both, and while it may be difficult in the particular case to determine whose was the decisive act of negligence, I do not think that the solution of the problem receives any real aid by attempting to segregate and classify the various acts of negligence which are alleged to have been committed by either party and to have led up to the mischief.

I think the appeal should be dismissed.

IRVING, J.

IRVING, J., concurred with HUNTER, C.J.

MORRISON, J.

MORRISON, J.: The injuries in respect of which damages are sought by the plaintiff were received whilst he was at work controlling trains of small cars or tubs, which carried the coal from the mine up into an elevated portion of a large building. His work consisted of standing at a lever by which he would cut off those cars by twos and let them run into a dump, which worked automatically. The cars, upon getting into this dump, would upset, depositing the coal into receptacles placed below, and then resume their upright position, whereupon the plaintiff would cut off two more loaded cars and let them run into the dump, forcing out at the other end the two empty ones, which, continuing on the same track, proceeded down a grade on to a switch-back, returning out of the building on a down track in the direction whence they came. During the course of a working day, there would be about a thousand cars pass through the dump in this manner. After the empty cars left the dump and proceeding over what is called a knuckle, a rather level portion of the track, they struck a steep grade, and in the course of a day there would be seven or eight go off the track, and sometimes, as at the time of the accident, turn over. In addition to attending the lever in question, the plaintiff was instructed by the defendants to replace those cars, and in so doing had the assistance of several other men. These cars had to be replaced very quickly, and during the busy hours there was very little time, as it necessarily delayed the work of dumping. Across from the track on which the empty cars were running after leaving the dump was machinery containing

cog-wheels, exposed on the side towards this track. This machinery was nine feet away. The plaintiff had no control or supervision over it, and its proximity and exposed condition were known to the defendants.

On the occasion complained of, several of the empty cars went off the track at the bottom of the grade, and the plaintiff and the other men pushed one of them up the grade, close to the dump, and left it there, not on the rails, but on the planks on which the rails were laid, and braced it with a lump of coal, the only available means of blocking it, according to the plaintiff's evidence, as was usual to the knowledge of the defendants. Whilst engaged in putting the other car, which had been overturned, on the track, the car above broke away, and coming down struck the car which the plaintiff was replacing and threw him across the switch-back track against this machinery, and in an attempt to protect himself he put out his arms, one of his hands getting between the cog-wheels. Before the machinery was stopped his arm was drawn in and lacerated so that it had to be amputated. He now claims damages on the ground of the defendants' negligence, in that the plant and machinery of the defendants was defective and unsafe, and that there were no appliances whereby one car after being replaced could be secured on the track above the men at work replacing the other to prevent its breaking away and coming upon them, as alleged here. And that the place where the plaintiff was obliged to work was in close proximity to unguarded cog-wheels, used by the defendants in operating an adjoining dump.

The defendant alleges contributory negligence.

The fact that the cars left the rails so frequently seems to me some degree of defect raising a presumption of negligence, and this defect was, of course, known to the defendants, for apparently it was the assigned duty of several workmen to replace them, and where there is a defect in works, ways or machinery, there must necessarily be a risk to those engaged in or immediately about them, a risk which is imminent or proximate, or, as it were, running with the defect. Now the risk in this particular job arose from the defect in that part of the defendants' works which necessitated the plaintiff putting

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those cars on the track and pushing them up that grade. The imminent risk which he ran was that of one or more of those cars coming back on him, whilst engaged in replacing the other on the track below, and injuring him there and then. As against that proximate contingency, he was apparently able to protect himself by various precautions and feats of agility. Can it be said, in circumstances such as existed in this case, that he assumed as well the risk of being thrown nine feet across another track against machinery having those exposed revolving cogs, which in no way was connected with his part of the work, and over which he had no control or supervision? He was projected against them, and in using the means of defence with which nature endowed him, the injury was inflicted. Was there negligence on the defendants' part in leaving those cogs unprotected in such close proximity to the plaintiff's work? An element that may be considered in that connection is the simplicity and inexpensiveness of the contrivance necessary to afford that protection. In a concern of the magnitude of the defendant Company that expense would be almost infinitesimal.

And are not indifference, thoughtlessness, a disregard for details, failure to anticipate the probability of exposed cogs causing injury to their workmen, all forms of negligence? Even assuming that the plaintiff was negligent in and about his own particular work, the immediate result of that negligence did not injure him. He was not injured by the car which it is alleged he handled negligently. If that were so I could discern some breadth in the line of defence. Whether he was escaping from the risk which he saw eventuating, as he was entitled to do, or, what amounts to the same thing, if in consequence of the position he adopted in lifting the car on the track, so that should the upper car come down he could not be crushed, but thrown to one side or on the ground away from the car, receiving, at most, a jar, there was nothing done as against which he might not provide and which he might not reasonably have expected, always assuming that he undertook those risks. But can he be held reasonably or at all to have had present in his mind or to have taken the additional risk of being injured by machinery, negligently exposed, as the jury believed, and

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not under his control? The position and conduct of the defendants must be just as closely scrutinized as that of the plaintiff. An employer who assigns work to an employee involving risk to life or limb must neither place traps into which a man may fall in his endeavour to escape, nor allow them even to exist. All this, however, was for the jury to consider, and in my opinion it was put fairly to them by the learned trial judge, and they found there was no contributory negligence on the plaintiff's part.

As to the negligence of the defendants, there was evidence which the jury believed to shew that there were no sufficient appliances furnished the plaintiff with which to replace those cars when they jumped the track, which was in such a defective condition that cars frequently left it. That those conditions were known to the defendants, who ignored them, the jury also believed. I think the learned trial judge put the question of negligence and contributory negligence fairly to the jury.

MORRISON, J.

I would dismiss the appeal.

Appeal dismissed.

REYNOLDS v. McPHAIL.

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Practice—Stay of execution pending appeal to Full Court—Order 58, r. 16—Security for costs—Discretion.

Under Order 58, r. 16 of the Supreme Court Rules, 1906, the granting of a stay of execution pending an appeal to be taken, is a matter of discretion to be exercised upon the facts of each particular case.

Statement

MOTION by the defendant to stay execution pending appeal to the Full Court on giving security for amount of judgment debt. The taxed costs had been paid by defendant to plaintiff's solicitors on their undertaking to refund if the appeal should

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be successful. Heard at Vancouver before CLEMENT, J., on the 20th of September, 1907.

A. D. Taylor, for defendant.

J. A. Russell, for plaintiff.

21st September, 1907.

CLEMENT, J.: Our marginal rule 880 is an exact copy (even to styling our Full Court "the Court of Appeal,") of the English rule which was under consideration in (*e.g.*) *The Annot Lyle* (1886), 11 P.D. 114, 55 L.J., P. 62, and *Attorney-General* v. *Emerson* (1889), 24 Q.B.D. 56, 59 L.J., Q.B. 192. These two cases, in my opinion, emphasize the principle that under this rule it is a matter of judicial discretion to be exercised upon the facts of each particular case, whether a stay of execution shall or shall not be granted pending appeal. There is no "usual rule." On the one hand, it is not as of course that a stay should be ordered because the plaintiff has or is offered security for his judgment debt; nor, on the other, that the Court will impose as a term of the stay that such security be given, or indeed any term, if the case be otherwise a proper one for ordering a stay. In homely phrase, each case must stand upon its own bottom. Here there are no facts before me beyond the bare fact that judgment has been pronounced against the defendant and that he has taken the usual steps to perfect his appeal. That he is ready and willing to give security for the judgment debt as a condition of the stay is not, as I read the cases, in itself a sufficient reason for the stay, which would—as put by Bowen, L. J., in *The Annot Lyle, supra*—"deprive the successful litigant of the right to the immediate fruition of the judgment in his favour." That right he holds subject to the exercise of a sound judicial discretion under marginal rule 880; and here I have no facts upon which I can exercise any such discretion in the defendant's favour.

Judgment

The application must be dismissed with costs; without prejudice, however, to a fresh application upon further material. Such an application should I think be made preferably to the trial judge.

Application dismissed.

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Will, construction of—Description of legatee—"To my wife"—Bigamous marriage, presumption of.

Evidence taken on commission—Discretion of trial judge to dispense with reading in full, or to accept a statement of its effect.

In December, 1873, the plaintiff, Annie J. Marks, then aged 21, was returning from a visit to Detroit. Whilst waiting at the Windsor depot she made the acquaintance of the deceased, A. J. Marks, then a widower. After an acqaintance of an hour or so, she decided to go with him by train to Stratford, during which time the couple became engaged. She did not return to her home in Kincardine, but waited for a few weeks, when she received and accepted a request from him to meet her at Brantford. They went thence to Buffalo, where she contended they were married. After a short absence they returned to Kincardine, where they kept house as man and wife until the spring of 1876, when he sold the furniture, kept the proceeds and left her, but returned in the fall of 1877. During his absence he did not provide for her support. He lived with her until the spring of 1878, when he left for Winnipeg. They apparently parted on friendly terms; she did not request to be taken with him; they did not correspond with each other; she made no demand for support from him and he gave her none. In 1895 he returned to Kincardine, but did not visit her, although he visited her mother and sister and made enquiries concerning her. He died in October, 1904, but commencing in January of that year, he opened a correspondence with her. These letters were produced at the trial by her. In all of these communications he addressed her as "Dear friend" and she replied in the same way. In 1888 she lived with a man named Frankboner in Michigan, assumed his name and went as his wife.

For the purposes of this action she had visited Buffalo, but was unable to discover any record of her marriage. She gave evidence to the effect that no public records of marriages in Buffalo were kept before 1878. She could not trace the witnesses, the hotel where she was married having been destroyed, and the minister being dead. She also gave evidence that deceased had taken possession of her marriage certificate in 1878, but his son swore that he had searched through all his father's papers in vain for the certificate, or any evidence that the plaintiff had ever been the wife of A. J. Marks.

In November, 1903, nearly two years after his marriage to the defendant, Susan Elizabeth Marks, deceased wrote to plaintiff Annie, stating that he had obtained her address from her sister. He then addressed

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her as "Dear friend," and this correspondence continued until August, 1904, she sending in one of the letters her photograph, with "A. Frankboner" written on the back. In a letter from the deceased to her he spoke of the time "you and I were one" at Tift House in Buffalo. This is the only reference to their former relations. At the trial plaintiff's sister and cousin swore to having seen the paper supposed to be the marriage certificate, but neither witness remembered the contents of the document.

Deceased married Susan in March, 1902, at Nelson, B.C., prior to his opening up correspondence with Annie, and during this period he also, when absent, wrote to Susan, but always addressed her as "my dear wife" and signed himself "your loving husband." He made his will at Nelson on the 6th of May, 1904, leaving to "my wife" $50 per month during her lifetime payable out of his estate.

It is on this clause in the will that action was brought, it being contended that the marriage to Susan was a bigamous union and that the legacy ought therefore to go to Annie, who set up her alleged marriage in 1873:—

Held, on appeal, affirming the decision of HUNTER, C.J. (MARTIN, J., dissenting), that there was nothing in the evidence to displace the presumption that the deceased had not committed bigamy in marrying Susan in 1902, and that she was the person designated in the will as "my wife" and "my said wife."

Whether all the evidence taken upon commission in an action shall be read at length, or read in part, and stated in part, or stated by counsel at the trial, is a matter in the discretion of the trial judge.

Statement

APPEAL from the judgment of HUNTER, C.J., in an interpleader action on the construction of a will, tried before him at Nelson on the 31st of October, 1906.

The facts are sufficiently set out in the headnote, and the arguments in the reasons for judgment.

R. W. Hannington, for plaintiff.
S. S. Taylor, K.C., for defendant.
R. M. Macdonald, for the trustees under the will.

The appeal was argued at Victoria on the 17th and 18th of June, 1907, before IRVING, MARTIN and MORRISON, JJ.

Cassidy, K.C., for appellant (plaintiff).
S. S. Taylor, K.C, for respondent (defendant).
Lindley Crease, for the trustees under the will.

Cur. adv. vult.

18th July, 1907.

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IRVING, J.: The defendant went through the marriage ceremony with one A. J. Marks in 1902 at Nelson, B.C., and lived with him from that date until the day of his death on the 8th of October, 1904.

After probate of his will, dated 6th May, 1904, by which he left "to his wife," without naming her, a sum of $50 per month, had been granted to the executors therein named, the plaintiff came forward and alleged that she was the wife of the deceased testator, having been married to him in Buffalo, N.Y., on the 22nd of December, 1873.

To establish her case the plaintiff undertook to prove (1.) her marriage with the deceased; (2.) that it was not dissolved; (3.) that deceased knew that she was alive at the time of the making of the will.

The defendant has the benefit of having in her favour a presumption that the testator would not be guilty of bigamy. She has also in her favour the rule of law which for the security of marriage requires "clear, distinct and satisfactory" evidence to rebut the presumption of the legality of her marriage.

We have from the testator by his open marriage with the defendant in 1902 the most positive assertion that a man can make that he was then an unmarried man. We have in his will (executed 6th May, 1904), a declaration in effect that he was the husband of one wife. It is impossible to suppose that he, then in bad health, could have been so cruel as to prepare a document leaving a devise for two persons to struggle for after his decease.

IRVING, J.

The case for the plaintiff is that, after a very brief courtship, she left her home in Kincardine on the 22nd of December to meet the deceased and that he and she were married the same day in Buffalo, N.Y.

As to this marriage she is the sole witness in this Court. She is unable to produce any records or give with any satisfactory precision the names of the clergyman or of the witnesses. Nor does she shew by independent evidence that no register of marriages was kept, or was not required to be kept, in Buffalo in

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the year 1873. She says she was married, but says the janitor of the church told her it was not registered.

In the *Dysart Peerage Case* (1881), 6 App. Cas. 489, where A attempted to set up a marriage with Lord Huntingtower, then deceased, who had, subsequent to the marriage with A, gone through the ceremony of marriage with B, and which ceremony, being formal and regular in every respect, would be valid, unless Lord Huntingtower was incapable of marrying on the ground that he at the time had a wife then living, Lord Blackburn said, pp. 510-11:

"The burthen of proof is on those who in any proceeding assert a marriage; when the proceeding is delayed till after there has been a second marriage that onus is greatly increased. The man who, having a living wife, goes through the form of marriage with another woman in England, whether the first marriage was regular or irregular, if it was valid, commits the crime of bigamy, and is liable on conviction to seven years' penal servitude. Those who allege that a man has committed a crime have the onus of proof cast upon them, for the presumption of law is always in favour of innocence. I think, however, that Lord Huntingtower's general conduct was such as to reduce that presumption in his case to a minimum. But the effect of establishing a prior marriage would also be to reduce the lady, who had *bona fide* contracted the second marriage, from the position of a legal wife to that of an injured woman who has innocently committed adultery, and to reduce the children, if any, of the second marriage from the *status* of legitimate children to that of bastards. Painful as those results would be, they form no reason why the tribunal that has to decide the question should shrink from doing their duty and finding the fact according to the truth, if the evidence is such as to lead them to the conclusion that a valid first marriage existed; but they do, in my opinion, afford very good reason for increasing the onus of proof which lies on those who allege the first marriage, though there is evidence which, if believed, would establish it, unless that evidence is in the opinion of the tribunal of such weight as to satisfy that onus. This observation goes rather to the weight of the testimony required as a matter of common sense, than to the law as to what is admissible."

IRVING, J.

Lord Watson said, at p. 535:

"The burden of proving the alleged marriage of 1844 rests, of course, upon the Petitioner; but I venture to doubt whether the onus, which is always incumbent on the party alleging an irregular marriage, is increased by the mere fact of the other spouse having subsequently thought fit to contract a regular marriage. If the Petitioner, immediately after his marriage with Miss Burke became known to her, had brought a suit against Lord Huntingtower for restitution of conjugal rights, and had, in

that action, adduced evidence sufficient, apart from any question of second marriage, to prove her own marriage to Lord Huntingtower, I am disposed to hold that the same evidence would have been sufficient to sustain the validity of that marriage, as in a question with the innocent wife and children of the second. But the second marriage is, in all such cases, an important circumstance, which may, when taken in connection with the conduct of the party challenging it, give rise to a presumption against the reality of the first marriage; and it is a material fact in the present case, that these proceedings have been instituted by the Petitioner thirty-six years after the marriage which she seeks to set up, and nine-and-twenty years after Lord Huntingtower's marriage to Miss Burke. It is obvious that, through the delay which has thus occurred, a great deal of testimony bearing on the alleged marriage of 1844, which would have been available seven or eight and twenty years ago, has been necessarily lost."

Again, pp. 535-6:

"In these circumstances I am of opinion that the *status* which the wife and children of the regular marriage of 1851 have so long been permitted to enjoy without molestation, raises a strong presumption in favour of their legal right to that *status*, and casts a corresponding onus upon the Petitioner. Wherever the evidence leaves room for reasonable doubt your Lordships ought, in my opinion, to presume in favour of William John Manners, and against the Petitioner and her son, Albert Edwin."

To these citations I add the following from Lord Watson, shewing that it is not impossible for the plaintiff in this case to prove a marriage, p. 538:

"I see no reason why the direct and uncontradicted testimony of the person alleging the marriage, if corroborated to some extent by the indirect testimony of others, and supported by the facts and circumstances of the case, should not receive effect. But it will always be necessary, in a case of that kind, to test very strictly the statements given in evidence by a woman interested in establishing that she held and holds the honourable *status* of a wife, and not the degrading position of a mistress."

This case comes before this Court on appeal from the learned Chief Justice, who found in favour of the defendant, on an issue directed to be tried between the parties to ascertain whether the plaintiff Annie or the defendant Susan was entitled to receive the benefits so devised.

The plaintiff asks for a new trial on the ground that the issues were not tried out; alternatively for judgment. Before the trial came on the plaintiff and three witnesses had been examined on commission. On the opening of the trial counsel for the plaintiff made a statement of the evidence so taken and

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then proceeded to call his witnesses. The defendant's counsel at the outset stated that he did not dispute that the plaintiff and A. J. Marks had lived together for a period extending over three years. The plaintiff called one witness, a son of the deceased by a former marriage, whose evidence did not assist the plaintiff in any way. The Chief Justice, after hearing this evidence, was asked if he would have read out the depositions to make out the case, to which he replied, "You have told me what they shew." He said in effect they shewed that the plaintiff and A. J. Marks were married by a minister named Hotchkiss in Buffalo; that she had searched for the witnesses and had been unable to find them; and that co-habitation and repute were made out; but notwithstanding this evidence, if the ceremony of marriage with the defendant was proved, in his opinion, the plaintiff must fail. The defendant then went into the box, and it was established, as I have said before, that she went through the ceremony of marriage with Marks on the 19th of March, 1902, in Nelson, B.C.; that prior to her marriage with him, *viz.*: in 1895, Marks had informed her that he had been married to a woman and he was not sure if she was dead; that in letters written to her by the deceased in the month of May, 1904, the same month in which his will was made, he had written to her as "My dear wife" and signed the letters from "Your loving husband A. J. Marks." These letters are dated the 11th and 15th of May, 1904, both written within ten days after making the will in question.

IRVING, J.

The Chief Justice gave judgment for the defendant on the ground apparently that the presumption, referred to in the *Dysart Peerage Case, supra*, that the man would not be guilty of bigamy was not displaced, or, in other words, that the plaintiff had failed to prove satisfactorily that the marriage had taken place in Buffalo.

Reference was made to the 3rd sub-section (*b*) of section 307 of the Criminal Code, and it was argued that as Marks could not be convicted of bigamy the presumption relied upon by the Chief Justice did not apply, but the doctrine of presumption of innocence is not limited to criminal law. It extends to every phase of a man's life. We must not assume

that he was willing to incur the moral guilt of going through a marriage ceremony with the defendant when he had not made enquiries as to the plaintiff. To escape this moral guilt it would be necessary for him, having regard to the facts that he had deserted her, and that her mother and sisters were still living to his knowledge at or in the neighbourhood of Kincardine, to have made enquiries there before marrying the defendant.

The ground of appeal most strongly pressed upon us was that the Chief Justice by not reading the evidence had not really tried the case. With reference to that I propose only to say a few words, because it is not necessary, in view of the opinion I have formed on the facts, to dwell at any length on this particular point. The evidence taken on commission was opened by counsel for the plaintiff, with what degree of fulness I am, of course, unable to say, but from the remarks made by the Chief Justice it is quite apparent that he fully grasped what that evidence amounted to. It was intended to establish by her own unsupported evidence a prior marriage, and there was corroborative evidence of co-habitation. In my opinion it is not necessary in every case that all the evidence should be read to or by the judge. Each case must depend upon its own circumstances, and as the trial judge has a wide discretion given him in questions of this kind, in many cases it will be sufficient if it be stated to him. I am not able to say that this discretion was in this case improperly exercised. It was not as if he had dismissed the action on counsel's opening on what he (counsel) expected to give in evidence. Here the judge had a resume of the evidence actually given by plaintiff and her witnesses, and after that he proceeded to hear the oral evidence offered on both sides. This distinguishes this case from *Fletcher* v. *London and North Western Railway Co.* (1892), 1 Q.B. 122, where the judge struck too soon. In appeals before this Court evidence frequently is stated and not read. Even in a criminal case judges exercise a discretion: see *The Queen* v. *Cooper* (1875), 1 Q.B.D. 19 at p. 21, where certain letters were proposed to be put in evidence against the prisoner. The Court admitted the said letters, two were read and all the others taken as read, and

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were commented on by counsel. The Court of Crown Cases Reserved found no fault with this practice. Again, in *Regina* v. *Frost* (1839), 9 Car. & P. 129 at p. 138, an instance will be found where the prisoner having been given in charge, the first count of the indictment was read to the jury at length; at the suggestion of the judge, Tindal, C.J., the reading of the indictment at length was discontinued and the substance of the remaining count stated only.

In the case of *Reg.* v. *Bertrand* (1867), L.R. 1 P.C. 520, where on a new trial the witnesses were sworn and their evidence on the first trial read over to them, and they were then asked whether what was read was true, this method was disapproved of by the Lords of the Privy Council, but they said occasions might arise when the practice there resorted to would be permissible.

Having read the stenographer's notes of the discussion between the Chief Justice and the counsel for the plaintiff, I do not think there was a mistrial. In *Robinson* v. *Rapelje, Sheriff* (1848), 4 U.C.Q.B. 289 at p. 293, Robinson, C.J., said with reference to the exercise of discretion of a trial judge:

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> "Many slight deviations from the general course are sanctioned at trials under the pressure of particular circumstances that arise. Both parties in their turn have need of such latitude occasionally, or the real truth of a transaction would be sometimes shut out from view; such exceptions to the mere course of conducting a trial cannot be made the ground of granting a new trial, unless they have in the particular case led to injustice."

See also Thayer's Preliminary Treatise on Law of Evidence, p. 530.

Whether all the evidence taken on commission should be read at length or whether read in part and stated in part or stated by counsel in my opinion is a matter in the discretion of the trial judge, and for that reason I think the application for a new trial on that ground should be refused.

The next question to determine was, assuming that the practice followed by the Chief Justice was wrong, should we now try the case or send it back for a new trial. It was suggested that it would be inconvenient for this Court to try the case, but it seems to me to be our duty to dispose of it in

that way if possible, and not to send it back for a new trial: *Street* v. *Dolsen* (1857), 14 U.C.Q.B. 537. It will be necessary to refer to the facts in detail.

The plaintiff's story is that in 1873, when a young woman of 21 years, returning from a visit to some friends in Detroit to her home in Kincardine, Ontario, she was detained for an hour or two at the railway station in Windsor, Ontario; that there, in the station, she made the acquaintance of the deceased, who was employed as a painter by the railway company; that they travelled in the train together as far as Stratford; that in those few hours the intimacy had reached such a point that he proposed marriage to her; that she went home; that he wrote to her; that she met him on the 22nd of December at Brantford, Ontario, by arrangement; that they went from there to Buffalo, where they were married in the Tift House, a hotel in Buffalo, by a Baptist minister in the presence of the landlord and a lady and gentleman who were brought in as witnesses. The Rev. Dr. Hotchkiss was the name, she thinks, of the minister, the name of the lady and gentleman was Schummel or Schimmel; that after the marriage ceremony a certificate of marriage was signed by herself and Marks and the witnesses and clergyman, and handed to her, and she handed it to Marks, who put it in his pocket; that they stayed there a few days and then returned to Kincardine to her father's house, where Marks was received by the family as her husband; that there was some little talk about the regularity of the marriage and that in 1874 she produced and shewed this certificate to her friends. Two of these persons now come forward and say that they remember seeing it or hearing it read. They corroborate her story that they were recognized by everybody in Kincardine as man and wife; that she and Marks remained in Kincardine (where her father seems to have been a respectable man with some property); they lived together in that town until 1876, when he left her for a short time, that is until the autumn of 1877, when they again lived together. In the spring of 1878 he left her, going to Manitoba and the North-West Territories, since which time she has not seen him. To continue her story, after her father's death, which occurred in June, 1878, she left Kincardine and

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went to the State of Michigan, where she resumed her maiden name (Macklen) and in 1886 made the acquaintance of a man named Frankboner. After some time she and Frankboner, without going through a marriage ceremony, lived together as man and wife, and in 1888 she assumed his name and lived with him as his wife until the time of his death in 1897. Between 1878 and 1897 she made three visits to her mother, who was living at Kincardine. Two before and one after she went to live with Frankboner as his wife in 1888.

Now during all this time Marks had been in the West, but had gone back to Kincardine in the year 1892 and had called upon her mother and family, but he did not then see the plaintiff, though it is reasonable to infer that he had heard of her from her people. She admits that she had no communication with him whatever until the 19th of November, 1903, when she says she received a letter from him which she tore up and did not answer. She received a second letter, so she says, dated February, 1904. Then she says that after receipt from him of a third letter, written in March, 1904, she sent him a photograph, on the back of which she had written these words:

"If you recognize this, send me one in return to me, Box 178, Schoolcraft, Mich., Kal. County. Annie Frankboner."

The surname is not very distinctly written.

This photograph was found in his possession after his death. The three letters above mentioned are not produced, but she did produce a letter dated 22nd April, 1904, which is as follows:

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"Nelson, B.C., April 22, 1904.

"Annie Fanklan, (*sic*)
"Schoolcraft,
"Michigan.

"Dear Annie,—Your letter received was very glad to hear from you sorry to see you loock so bad, you have change very much since I seen you last. I hope you will soon loock like your self again soon. I have sent you my photo in return for yours. *It is very hard fro me to make out your name and if I have spelt rong I think you will shore to get it,* any way has my name is on the envelope, you will that I put your address on the photo. I havd ad a sick winter first the grippe then the bronchitis then catarrh so you can see that I have ad a time of it. I have ad the very of helth before and as soon has the wether gets warm I will be all O.K. again. I hope so anyway, if though that I should not I would go to California for a month or so, but I hope that I shall not have to go thare

as I will be very bisey this summer at one of my mines getting out ore. I hope this letter will find you feeling better, shall be very glad to here from at any time.

"Your friend,
"A. J. Marks."

"P. S. Have sent you a paper.
"A. J. M."

The following letters were also produced:

Marks to Annie, 10th May, 1904, written from Spokane; Marks to Annie, 7th June, 1904, written from Nelson.

It will be convenient to mention again that the date of the will is the 6th of May, 1904.

To continue the list of letters: Marks to Annie, 9th July, 1904; 24th July, 1904; 6th August, 1904; 31st August, 1904. In all of these it is to be observed that he addresses her as "Dear Annie" and signs himself "Yours truly," "Your friend," and in one of which, the letter dated the 6th of August, 1904, he uses this expression, "You know that when you and I were one I never let pleasure interfere with business."

A. J. Marks died in October, 1904. After his death Annie continued to address letters to him. Two of these are produced, but nothing turns on them; then on the 11th of January, 1905, Annie addressed the following letter to Susan, the defendant:

"Lorne, Ont.
"Bruce Co.

"Dear Madam,—I received your letter inform me of Alford deth it was a sad blow to me. I see by your letter that you are not awar who I am. You say you have my pictur in the sam place in your house. did A. J. not inform you who I was. I think not I was waten in U.S. for him to meet me thar, I cood not see what keep him until I got your letter. Why did the Burial tak place in Spokane, the home was in Nelson. Now if you want to know why I write this way I will inform you in my next an how long have you been Mrs Marks? There is a mistery in this that I shall fathum. You ask me what the oldes daughter name was, thay names are all in our family bibel, if it is thare. I shall be pleas to hear from you soon I remain your respectful

"Annie J. Marks."

"Address Lorne
"Bruce Co. Ont.

"P.S.—Do you know the sun's address I have lost trach of him. I wood like his address if you have it I shall be in Nelson some time in the near future. You will hear from me before then.

"Yours truly,
"Annie."

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This was followed up by a letter dated February, 1905, in which she states for the first time distinctly what her position is, namely, that she is the wife of A. J. Marks, and that she intends to take proceedings to claim rights, as he has never had any divorce from her.

From her letter of February, 1905, it will be observed that she at the outset puts forward the case that it could only be by proceedings in divorce that her position could be altered. This circumstance is also in her favour. So too is the fact that on a photograph Marks has written "Mrs. Marks." Some question was raised at the trial as to whether these words "Mrs. Marks" were indeed written by Marks, but a comparison of the signatures to his letters with the writing in question establishes the point beyond doubt. Observe in all his signatures the curious way he has of writing M. with four downstrokes. This photograph was produced by Alfred E. Marks (a son of the deceased by a former marriage) and having regard to the frayed condition of the edges of Ex. N. or rather that end of it which bore the words "Mrs. Marks" and the witness's volunteered explanation that it had been in his pocket from May to October, I would place no confidence in his testimony whatever, but both parties seem to accept as a fact that Marks had been married to a lady who had died in London, Ontario, in 1871, by whom he had three children.

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In a case of this kind it is necessary to test very strictly the evidence of a woman putting forward a claim of this kind.

The difficulty is to find anything by which the truth of her statements as to the marriage can be tested. Her story and that told by her witnesses is consistent with the state of affairs the defendant is willing to admit, *viz.*: that the plaintiff and deceased lived together, but that there was no marriage. It is as to the marriage ceremony that I should like to have some corroboration before I give judgment depriving the defendant of her position as the lawful wife of the testator.

The one who seeks to disturb an apparently existing relation must shew that he or she has clear ground for doing it; instead of being aided by presumptions he (or she) will have all presumptions against him (or her).

In mere questions of property where there has been a long enjoyment, Courts will protect the possessor by entertaining presumptions in support of his right, but in favour of recognizing the tie of marriage these principles are strengthened by other considerations besides mere respect for the existing state of things. The decision of this Court as to the sufficiency of the proof required to deprive the defendant of her position of wedded wife will affect all like cases in which the rights of property alone are not involved. Where the peace and reputation of families, the integrity of the most intimate social relations are concerned, it is but right to presume that the relation of the parties is in fact what it has always appeared to be, until conviction is forced upon the Court by clear and conclusive evidence.

The absence of independent evidence of some person familiar with the system of celebration and registration of marriages in Buffalo is not without significance. Her evidence as to inquiries made in Buffalo is not satisfactory—a vague statement that she saw the janitor at some church adds nothing to the case. The poor woman seems to have undertaken this search unassisted—in my opinion a task quite beyond her. However that may be, the point is that there was no testimony but her own at the trial as to the efforts made to obtain documentary proof of the marriage. Her failure to obtain it establishes nothing. Her whole life after 1878, when Marks deserted her, down to 1897, when Frankboner died, and during the correspondence with the deceased down to the year 1905, is subversive of the theory that they were legally married. One must remember the saying of Sir William Earle—a tribunal trying questions of fact ill performs its duty if it adopts every statement on oath not contradicted by counter-testimony. Her own conduct outweighs the presumption which would arise from the facts as to which she is able to produce corroboration.

When I read the indorsement on the photograph, "If you recognize this send me one in return," I found some difficulty in believing the statement made by the plaintiff that before she had sent that photograph to the deceased she had received from him three letters and that she herself had written one to him.

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The language of the indorsement does not bear that idea out It rather imports that she had not heard from him nor he from her. It reads more like an offer or attempt on her part to re-open communications with a person from whom she had not heard for a long time than, as she would have us believe, a continuation of an established correspondence.

Turning to his letter of the 22nd of April, 1904, the language suggests that there had been a letter from her, either with or separate from the photograph; the expression "your letter received" would be applicable to the communication on the back of the photograph, or there might have been a letter; but the whole language negatives the idea that there had been any correspondence on his part previous to the receipt of that photograph, or the letter (if any).

If he had obtained, as she says he did, from her sister (Mrs. Griffith) her address, and had written to her three letters in November, 1903, and February and March, 1904, how is it that he addresses this letter, 22nd April, 1904, to "Annie Fanklan" (that was not her maiden name) and why does he say "it is very hard for me to make out your name" (referring without doubt to the photograph)? A look at the indistinct surname on the photograph will shew at once the name "Franklan" was an imitation of the badly written Frankboner, and hence it was that he was afraid he had "spelt rong."

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Whatever her motive was for inventing these earlier letters, I do not know. It may have been that she was anxious to suggest that this correspondence had been opened by him and not by her or that it had been going on for some time before the will was made, and so lay a more certain foundation for the argument that she was the person referred to in the will as "my wife"; or it may have been for some other reason. But whatever it was, I cannot accept her story on this point.

Having come to that conclusion on that point, what weight can I give to her other testimony? Can it be said that she has established the fact of her marriage with "clear, distinct and satisfactory evidence?"

But assuming that she was regularly married in Buffalo and that Marks in 1892 had been misled into supposing that she had

obtained a divorce from him before assuming the name of Frankboner, in my opinion she is not the person referred to as "my wife."

If Marks was under the impression that the plaintiff had been divorced from him, he would not use the word "wife" when referring to her. If he was indeed advised of the true condition of affairs, then the question who was designated as "my wife" is best answered by the language he himself uses in his correspondence with the plaintiff and defendant respectively.

In May, 1904, the month in which the will was prepared, he wrote to the plaintiff as "Dear Annie" and subscribed himself as "Your friend"; to the defendant he wrote as "My dear wife" and subscribed himself "Your loving husband."

There is one other point I want to refer to. Mr. *Taylor* suggests that if we are of the opinion that the evidence is sufficient to establish the plaintiff's case as against the defendant, we should now permit him to go back for a new trial in order that he may give in evidence the testimony of Mr. Crease, who prepared the will. I do not think we should do so, as the point was not pressed by counsel: *Whitehouse* v. *Hemmant* (1858), 27 L.J., Ex. 295.

MARTIN, J.: A preliminary question and a serious one was raised by the appellant's counsel, before going into the various points of fact and law which were argued before us. He contended (to quote almost his exact words), that "the case had not been tried, because the plaintiff's counsel at the trial was not allowed to present his case," and "*ex debito justitiæ*, it should be tried."

This contention is founded on paragraph 6 (d.) of the notice of appeal, wherein the ground of complaint is set out as follows:

(d.) In refusing to listen to argument on behalf of the plaintiff or to allow her counsel to cite any authorities in support of her contentions.

In support of this position we were referred to pp. 131, 132, 136-155, of the appeal book, wherein that portion of the proceedings referable to this complaint is set out.

It appears that after the plaintiff's case had been closed and one witness had been examined for the defence, the defendant's

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counsel proposed to call another, when, after some discussion, the learned Chief Justice said to him:

"The Court: I do not think you need go on. I see nothing to displace the presumption afforded by the marriage certificate, and this man did not commit bigamy in marrying this woman."

Upon which the plaintiff's counsel sought before judgment was announced to address an argument to the Court in arrest of it, and the following discussion took place:

"Mr. *Hannington:* I would like to argue——

"The Court: There is no need to argue further.

"Mr. *Hannington:* On a question of law.

"The Court: There is no question of law.

"Mr. *Hannington:* I have a large number of authorities which I submit are exactly contrary to your Lordship's ruling.

"The Court: You had better reserve them for the appeal Court.

"Mr. *Hannington:* Does your Lordship refuse to hear me?

"The Court: I have come to the conclusion that there is nothing to displace the violent presumption that this man did not commit bigamy in marrying this woman in 1902."

After a discussion on costs, judgment was formally pronounced and later entered for the defendant.

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The learned trial judge was, with all due respect, clearly mistaken in saying there was no question of law to argue. We have listened for many hours to the discussion of several of such questions arising out of the facts before him.

In my opinion, the contention of the appellant that at the trial her counsel was not allowed to properly present her case is established by the above extracts from the proceedings. Counsel has a right of audience to a reasonable extent (according to circumstances), on the law as well as on the facts, and to deprive him of either of them is at once contrary to natural justice and the universal practice of the Courts of this country. To refuse a litigant that right is to deny him that fair trial which is his, *ex debito justitiæ*, as counsel put it.

It is the duty of the trial judge to listen to argument on all relevant points, to consider it, and to give a judgment thereon. That duty is not discharged by forcing a litigant to go to the

Court of Appeal and there, after much expense and delay, have the first opportunity of presenting an argument which ought, in the first place, to have been entertained and passed upon by the trial judge. The plaintiff's counsel had the same right of audience at the trial as on appeal, and why he was refused that right which he claimed to the full extent necessary consistent with respect for the Court, is unexplained. The position is a trying and delicate one for counsel to be placed in when the judge takes a very strong view, as here.

Such being my view, it is unnecessary to consider the further point of a somewhat similar nature (notice of appeal 6c.) which the appellant's counsel urged at length (and supported by said references, particularly p. 137):

"6. (c). In refusing to hear or consider the evidence of the plaintiff and her witnesses taken under commission, and tendered by the plaintiff, in proof of her marriage to the said deceased (although such evidence was not objected to by the defendant)."

And it is likewise unnecessary to consider the further questions that arose upon the evidence, for to do complete justice between these litigants, there should be a trial *de novo* of the whole case. Indeed, the truth is, as counsel concisely put it, that there has so far been no trial in the legal sense of that term.

As to the costs of this appeal, they must follow the event, as there is no valid reason to deprive the appellant of them. It is true that it was not at the instance of the respondent that the learned judge adopted the course complained of, nor did the respondent endeavour to support or justify that course before us. It was the act of the Court alone done *ex mero motu*, and at first blush it might be thought that the respondent could disclaim it, and escape the unfortunate consequences. But that is not the law, as appears by the unanimous decision of the Ontario Court of Appeal in *Mills* v. *Hamilton Street R. W. Co.* (1896), 17 Pr. 74, wherein the trial judge *ex mero motu* refused to hear additional evidence in support of the defence, on the ground (erroneous as it turned out), that he had heard sufficient on which to warrant his non-suiting the plaintiff. On appeal the non-suit was set aside, whereupon the respondents (defendants) urged that they should be absolved from costs, "because the learned

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judge had, as it were, taken the matter into his own hands at the trial, and non-suited the plaintiff against the wish of the defendants, who desired to give all their evidence and complete their case." But the Court was unanimously of the opinion "that nothing has been shewn by the respondents which should induce us to depart from the general rule that the successful appellant should have his costs of the appeal." It is true that the case is one from a County Court; but the judgment goes on to shew that such practice is "applicable to all appeals since the introduction of the Judicature Act," and the matter is now governed in this Court by rule 976 of the Supreme Court Rules, 1906.

A further direction was made in that case regarding the payment of the costs below by the respondents, but that apparently is based upon some Ontario practice respecting appeals from the County Court, and is not in accord with the usual order made by this Court in directing a new trial, which is that the costs of the former one shall abide the result of the new, which order should be made, I think, in this case.

There are certain remarks in the same case regarding a new trial not being necessary where all the evidence is before the Court of Appeal, which are in accord with our general practice, but they do not apply to the present case (which is based upon a deeper and graver principle), for in the Ontario case the learned judge went wrong in thinking he had enough evidence to non-

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suit on, and therefore erroneously refused to hear further evidence; but he at least applied his mind to what was before him and did not refuse to hear counsel. In the case at bar, however, the learned judge went much further and entirely refused to listen to counsel on the law—thus denying him his complete right of audience, without which there can be no legal trial, and thereby infringing that fundamental principle of justice in regard to which it was observed in *Ex parte Evans* (1846), 9 Q.B. 281, "In the superior Courts by ancient usage persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented." The plaintiff's counsel herein was "prevented" from fully presenting his client's case, and that was a curtailment of his rights to practise to the full extent allowed

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by law which (with all due respect) cannot, in my opinion, be justified.

The appeal should be allowed with costs as above stated.

MORRISON, J.: The main ground of appeal herein is that there was a mis-trial because the learned trial judge dispensed the reading *in extenso* of the evidence of the plaintiff taken on commission. From the transcript of the proceedings at the trial, and from what was stated before us by counsel, I am of opinion that the trial judge properly exercised his discretion in obviating the necessity for hearing read that evidence. I would dismiss the appeal.

Appeal dismissed, Martin, J., dissenting.

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Husband and wife—Moneys advanced by husband to enable wife to purchase land—Resulting trust, evidence to establish—Sale of land by wife—Notice by husband to purchaser—Payment by purchaser to wife after notice—Recovery by husband of amount paid—Lien of wife for moneys of her own used in purchasing property—Reference.

In an action by a husband against his wife for a declaration of trust, the evidence shewed that the wife had received from the husband the money for the purchase of a homestead, the conveyance of which was taken in the wife's name. A purchaser from her received notice that she was not a widow, and notwithstanding that, before completing the agreement for sale, he received notice from the husband's solicitors warning him, he did complete it:—

Held, that there was a resulting trust in favour of the husband.

A purchaser in the foregoing circumstances, proceeding to anticipate the agreement for sale by accepting an immediate conveyance:—

Held, that plaintiff should recover from the purchaser the amount of purchase money which he had paid to secure such immediate conveyance.

ACTION for a declaration of trust and to recover from defend-

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ant Parsons $1,750, paid by him to defendant Dudgeon. Tried before IRVING, J., at Victoria, on the 10th and 11th of May, 1907. The facts appear in the reasons for judgment.

Helmcken, K.C., and *Peters, K.C.*, for plaintiff.
A. E. McPhillips, K.C., for defendant Dudgeon.
Wootton, for defendant Parsons.

11th July, 1907.

IRVING, J.: The plaintiff is the husband of the defendant Dudgeon. The plaintiff alleges that on 21st November, 1889, the defendant Mrs. Dudgeon, with money supplied to her by him, obtained from the trustees of the Work estate a conveyance of a piece of property, and that afterwards on 5th December, 1906, she sold it to the other defendant, Parsons. The plaintiff's case against Mrs. Dudgeon is that she was a trustee for him by reason of the fact that he had advanced the purchase money. His case against Parsons is that he (Parsons), having notice of this trust before he had completed the contract by payment, should have refrained from paying the balance of the consideration money, $1,750, to Mrs. Dudgeon until the question of trust or no trust was settled.

The first question to be determined is whether there was a resulting trust in favour of the plaintiff.

The leading case on resulting trusts, *Dyer* v. *Dyer* (1788), 2 Cox, 92, decided in the Exchequer Court, stated the clear result of all the cases to be that the trust of a legal estate taken in the name of any person results to the man who advances the purchase money, but, as this resulting trust arises from an equitable presumption, it may be rebutted by parol evidence shewing that it was the intention, at the time of the purchase, of the person who advanced the purchase money that the person to whom the property is conveyed should take for his or her own benefit. The person who pays the money cannot alter such intention at a subsequent period. A purchase by a father in the name of his child, or by a husband in the name of his wife, is a "circumstance of evidence" which displaces the equitable presumption of a resulting trust. The fact that such a relationship exists is indicative of an intention on the part of the husband or father to benefit the wife or child, but this circumstance of

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evidence may, in turn, be met with other evidence tending to shew a contrary intention.

In the present case the husband gave evidence to the effect that the advance was not intended for the benefit of the wife.

But before proceeding to examine his evidence I would draw attention to some Canadian decisions. In 1873 the Court of Appeal in Ontario had before it, for consideration, the case of *Owen* v. *Kennedy* (1873), 20 Gr. 163. The case was heard before Chancellor Spragge, who said, p. 166:

"The plaintiff's position is, that there was a resulting trust fn favour of Burwell. The conveyance was to a wife, and the presumption is, that it was by way of advancement, but this presumption may be rebutted, by parol, by a declaration made by the settler before or at the time of the conveyance."

The Chancellor found in favour of the plaintiff, as it was shewn to his satisfaction that the conveyance was not intended by way of advancement to the wife simply, but as a provision for the husband and wife for life with remainder to the children of the settler.

From this decision an appeal was taken. On that appeal the Chancellor sat, with Draper, C.J., Hagarty, C.J., Morrison, J., Mowat, V.-C., Galt, J., Gwynne, J., and Strong, V.-C. On the appeal the appellants shifted their ground. Chancellor Spragge, after referring to the trial, said, p. 172:

"I held the plaintiff entitled to rebut the presumption that the conveyance to the wife was intended by way of advancement to her, by parol. I believe the correctness of this is not questioned. . . . The question now made is, that what the evidence establishes is not that the purchase moneys were provided by Burwell, by reason of which a resulting trust would arise in his favour; but that the purchase moneys were provided in part by Burwell, in part by his wife, and in part by his daughter."

The appeal was dismissed (Gwynne, J., dissenting). Strong, V.-C., said, p. 178:

"The land having thus been bought with the money of Lewis Burwell, and the conveyance having been made to his wife, there would, in the absence of proof to the contrary, be a presumption arising from the relationship of husband and wife, sufficient to counteract the trust which ordinarily results when property is purchased and paid for with the money of a person other than that one to whom the conveyance is made. It is, however, open to the plaintiff claiming under Lewis Burwell to rebut the presumption of advancement by parol proof that such was not the intention of

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the purchaser at the time the conveyance was made; and I am of opinion that the evidence shews very clearly that the intention to advance did not exist."

In 1873 Spragge, C., heard the case of *Wilde* v. *Wilde*, 20 Gr. 521. The action was brought by the father against his two sons. The case made by the father on the pleadings was that the father was to be the purchaser of the premises; that, when paid for, the land was to be the property of the defendants (the sons); but the plaintiff, the father, was to have the control of the property for his life, and he and his wife and family were to live on and be maintained out of the property. The son John took a conveyance of the premises to the father and mother for life, to be divided between himself and his brother William upon the death of his parents. At the trial John did not deny that his father and mother were entitled to a home on the premises so long as they lived, but he claimed that he was the purchaser for himself. The Chancellor gave judgment for the plaintiff, but on the case coming on to be heard before himself sitting with his two Vice-Chancellors he was overruled. The view taken by the Vice-Chancellors was that an express trust in favour of the plaintiff and the son John had been made out, but on account of the 7th section of the Statute of Frauds such express trust could not be judicially recognized. In their opinion, the plaintiff was seeking to establish, as a resulting trust, a trust of a different and more onerous character. They were of opinion that the plaintiff could not be permitted, in the face of his own evidence of an actual trust, to fall back upon a legal implication of a trust of a totally different nature. Strong, V.-C., puts it this way, p. 534:

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"Therefore I consider the law to be, that a man who seeks to enforce an express parol trust, which out of his own mouth and by his own oath he proves to have been the declared intention of the parties, can never insist upon enforcing a trust by operation of law."

He however assumed for the purposes of his judgment that this case of resulting trust was open to the plaintiff. Dealing with the case on that footing, he found that the father and the son John had worked the place together for some years on shares; that at the time of the purchase in November, 1870, they held it under a lease; that John was the person who signed the preliminary contract; that of the $1,000, the first payment on account,

$564, was paid by John; $300 by the father, and $136 came from a purse held by the mother, to which both parties contributed; that the agreement was with John, who gave the mortgage to secure the balance of $2,000. In fact, nearly two-thirds of the money paid was John's money or raised upon his credit, and the balance had been contributed by the father. He then proceeds, p. 536:

"Taking this, however, to be the proper view of the evidence, it does not establish any right by way of resulting trust in the plaintiff. There can of course be no doubt but that a trust results where two or more persons, in determined proportions, advance the purchase money of land which is conveyed to one, as was decided in *Wray* v. *Steele* (1814), 2 V. & B. 388. Where, however, it is impossible to determine the proportions in which there has been contribution to price, as here, it is impossible that there can be any trust by operation of law, for the Court cannot determine the interest. Upon this, authority, if any is needed, is clear. I refer to *Crop* v. *Norton* (1740), 2 Atk. 74, decided by Lord Hardwicke, a case which seems to be exactly in point, and has never been overruled, and to *Re Ryan* (1868), Ir. R. 3 Eq. 222, in which *Crop* v. *Norton* was expressly followed. At all events the inevitable inference that the defendant John Edward Wilde was beneficially interested in the money in his mother's hands, coupled with the other circumstances of his own large advance, independently of his father and the family altogether, and his coming under the liability of the mortgage covenants, would, to revert to the first point I observed upon as arising on the evidence, be conclusive to my mind as shewing that he was a beneficial purchaser, and not a trustee either actually or by legal implication."

Blake, V.-C., was of opinion that, p. 540:

"There may have been money advanced by the father and mother to John, but if so, it was an advance to him by them, in respect of which John may be their debtor, but this money, when it went into the hands of the vendor, was received as the purchase money of him whose it then was, and who was to and did become, according to the statement and agreement of all parties, the purchaser of the premises."

This action seems to me to resemble in a great many points the case I have under consideration, and had not these eminent judges disagreed, the authority of *Wilde* v. *Wilde*, whichever way it was decided, would have been of very great weight. But they differed in two respects. As to the law of resulting trusts, Strong, V.-C., was of opinion that, p. 537:

"Where, however, it is impossible to determine the proportions in which there has been contribution to price, as here, it is impossible that there

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can be any trust by operation of law, for the Court cannot determine the interest."

Spragge, C., admitted that the authorities cited by Strong, V.-C., tended to shew that in such case there would be no resulting trust in favour of the father, but he thought that it might be ascertained by inquiry in the Master's office; but he added, p. 541:

"If it is intended to carry the doctrine to this extent, that where land is purchased with moneys, a portion of which only, belongs to the party who takes a conveyance to himself, and the residue to another person, there is no resulting trust in favour of that other person, I am not prepared to assent to it."

Again on the facts of the case, Spragge, C., thought, p. 543:

"That what has been advanced by the father, and what has been furnished from the profits of the farm, were in no sense advances to John, to enable him to buy the farm, but were moneys of the father furnished by him as part of the purchase money on his own behalf, as purchaser on his own behalf or at least joint purchaser with John of the farm."

Strong and Blake, V.-CC., thought that a large portion, if not the bulk of the purchase money was found by John himself.

Then in 1886 the Court of Appeal of Ontario had before them the case of *Sanderson* v. *McKercher* (1886), 13 A.R. 561, on appeal from Armour, J., who had given judgment in favour of the defendant. The majority of the judges, Burton, Patterson, and Osler, JJ.A., came to the conclusion that the judgment was wrong and reversed it. Hagarty, C.J.O., thought it was right, and in the course of his judgment cited with approval the remark of Strong, V.-C., in *Wilde* v. *Wilde*, that where it is impossible to determine the proportions in which there has been contribution to price, as here, it is impossible there can be any trust by operation of law, for the Court cannot determine the interest. That case was taken to the Supreme Court of Canada, where the judgment of Armour, J., was restored (1888), 15 S.C.R. 296. Ritchie, C.J., and Taschereau, J., say for the reasons given by Hagarty, C.J., although they did not refer particularly to the remark in question. Strong, J., at p. 298, said:

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"The law is clear that in order to raise a resulting trust the party asserting it must be able to shew that at the time of the completion of the purchase he either actually paid, or came under an absolute obligation to pay, the whole or some ascertained proportion of the price."

In the present case the plaintiff says that in 1889 there were

some four or five children, the result of his marriage; that he had then been for some time in receipt of good wages, $75 per month; that he saw Mr. Haynes, of Heisterman & Haynes, the agent for the Work estate, and made the arrangement with him for the purchase of this piece of property, then wild land, at $600 per acre; $200 or $250 was to be paid in cash, balance on time; that during all this time he had been handing to his wife his wages; that he himself was engaged from early in the morning till late at night, and for that reason he handed his money to his wife, with which she was to pay the household bills and manage affairs generally; that he paid to her the whole of the $600 which she used in purchasing this property. He paid to her the first instalment: to make up the full amount thereof he had to borrow $50; that she attended to the remaining payments. These were paid out of the household money that he handed to her; and she obtained the deed from Haynes in her own name; that he saw the deed when she first got it; that he did not read it, but was quite satisfied when she had it; that they put up a small house, which he paid for; and later on a larger house was put up. He continued to supply money from time to time until it became necessary to raise some $800 on mortgage, when, of course, the property being in her name, she executed the mortgage.

Now, her story is, that all the moneys given to her by him were a gift to her, and that she used this money so given to her, and some other moneys of her own received from her father and from other sources, and bought the land for herself. I cannot believe that it was ever intended that this property when purchased should become the absolute property of the wife, or that she should be in a position to sell it without regard to his wishes in any way. I believe that it was intended it should be held by her as a home for him and his family. Her story goes too far, and I am unable to accept it.

The result is that I accept the statement made by the plaintiff. That some of her money may have been put in that $600 is not at all unlikely, but her evidence is so unreliable that I cannot accept it.

I am speaking now of the original $600. Later on she bor-

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rowed money on mortgage, pledging this property and her own credit, and the money she obtained was used in building a house on the property. What was done afterwards by them would not affect his right to the real estate, although she may be entitled to a lien for all moneys advanced by her.

I come to the conclusion, therefore, that the money with which this property was purchased was the plaintiff's money, purchased for his own benefit, and a resulting trust arises in his favour. An inquiry can be held before the Registrar as to the money advanced by her.

That being so, we now come to the case against Parsons. It appears that in the end of November, Parsons agreed to purchase the property for $3,500, half down, and the balance in one year, with interest. He paid $1,750, and came to the premises on the evening of the 4th . . . . to take possession. As he was moving in, the plaintiff came home, and then for the first time learned what was being done. Some trouble ensued. The plaintiff informed the defendant Parsons with more or less distinctness that the property belonged to him, and he would not allow Parsons to take possession. On the morning of the 5th he caused a formal letter to be written to Parsons notifying him of his (plaintiff's) claim. This letter was delivered at the office of Messrs. Lee & Fraser, who were carrying through the transaction, but did not actually reach the defendant Parsons' hands until after he had paid over the balance, $1,750, and obtained from Mrs. Dudgeon a conveyance of the land. The arrangement between Parsons and Mrs. Dudgeon, by which he took an immediate conveyance, was intended by them to forestall any action of the plaintiff, and under these circumstances I think the plaintiff has a right to recover from Parsons the $1,750, but, as the question of Mrs. Dudgeon's lien has to be considered, it must be paid into Court.

IRVING, J.

Costs of action up to payment of $1,750 to be recovered by plaintiff against Parsons and Mrs. Dudgeon. Subsequent costs and further directions reserved.

Judgment for plaintiff.

IN RE VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY, AND MILSTED.

CLEMENT, J. (At Chambers)

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Sept. 27.

IN RE VANCOUVER, VICTORIA AND EASTERN RAILWAY CO.

Practice—Costs of application for warrant for possession—Railway Act, 1903 (Dominion), Secs. 193, 217 and 219, Sub-Sec. 1.

Where a railway company, under its powers to expropriate land, obtains a warrant for possession, and the amount awarded the owner in subsequent arbitration proceedings is less than the amount at first offered by the Company, the costs of obtaining the warrant for possession shall be borne by the owner.

APPLICATION to confirm the taxation of the Railway Company's costs in an arbitration under the Railway Act respecting right of way where the amount allowed by the arbitrators was less than the amount offered by the Company under section 193 of the Act, sub-section (*b*). Heard before CLEMENT, J., at Chambers in Vancouver on the 27th of September, 1907.

Statement

The Railway Company had applied for and obtained a warrant for possession of the lands prior to the arbitration under section 217 of the Act. The owner objected to payment of the costs of obtaining the warrant, claiming that under section 219, sub-section 1, the costs of obtaining the warrant were only payable by the Company under the circumstances mentioned in said sub-section, and that the owner was under no liability under any circumstances to pay such costs. The taxing officer allowed them to the Company and the owner appealed.

Brydone-Jack, for the owner.
Reid, for the Company.

Judgment

CLEMENT, J., confirmed the taxation, following *Re Shibley and Napanee, T. and Q. R. W. Co.* (1889), 13 Pr. 237.

HUNTER, C.J.
(At Chambers)

1907

May 27.

STEVES
v.
MURCHISON

STEVES v. MURCHISON.

Practice—Directions—Particulars—Discovery—Distinction between.

The true function of particulars is, not to give discovery, but to enable the opposite party to properly frame his pleading.

Statement

SUMMONS for particulars in an action for an accounting between the parties, heard before HUNTER, C.J., at Chambers, in Vancouver, on the 17th of May, 1907. Plaintiff, who was the owner of a livery establishment as a going concern, and also certain premises rented as a butcher shop, handed over the properties to defendant to carry them on during plaintiff's absence, defendant to have the profits arising from the livery establishment for his trouble, but to pay all taxes, rates and insurance; and to return the whole in as good condition as when handed over to him, together with any natural increase of the horses, and to account for the rent of the butcher shop. In the alternative defendant was to pay plaintiff the value of the livery establishment, or the difference in value at the time of resuming. The action was founded on a claim that all the horses and vehicles were not returned, that the premises were in a damaged condition, that the insurance was not paid as agreed, and that defendant had not accounted for the rent received. The agreement was an oral one. Defendant applied for particulars of the number of horses, vehicles and other outfit handed over to him, with a statement of their value; of the taxes, rates and insurance to be paid by him as alleged, and of the rent collected and amounts unaccounted for.

Argument

Ladner, in support of the application.

J. A. Russell, contra, referred to *Augustinus* v. *Nerinckx* (1880), 16 Ch. D. 13; *Blackie* v. *Ormaston* (1884), 28 Ch. D. 119 at p. 123; *Kemp* v. *Goldberg* (1887), 36 Ch. D. 505; *Carr* v. *Anderson* (1901), 18 T.L.R. 206.

27th May, 1907.

Judgment

HUNTER, C.J.: With rare exceptions, the defendant is not

entitled to discovery before he puts in his defence and the true function of particulars, when necessary, is to enable the other party to properly frame his pleading and not to give discovery: *Augustinus* v. *Nerinckx* (1880), 16 Ch. D. 13.

Here with the possible exception of the enquiry as to what insurance the defendant neglected to pay, the defendant is really asking for discovery under the guise of particulars and there ought to be no difficulty in drawing a defence to this statement of claim.

The application is also, with the exception mentioned, in the teeth of the decision of the Court of Appeal in *Carr* v. *Anderson* (1901), 18 T.L.R. 206.

Judgment

The defendant may have the particulars asked for in paragraph 4 of the notice; but as he succeeds in only a small portion of his application, I will direct under rule 998 that the plaintiff be allowed $5 for his costs in any event.

Order accordingly.

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B. C. LAND AND INVESTMENT AGENCY, LIMITED v. FEATHERSTONE *ET AL.*

Assessment—Flat rate—Authority of Dyking Commissioners to fix—Compliance with statute—Drainage, Dyking and Irrigation Act, R.S.B.C. 1897, Cap. 64.

In assessing certain lands under the provisions of the Drainage, Dyking and Irrigation Act, the Commissioners fixed upon a flat rate, reaching their conclusion from their personal knowledge of the lands, extending over many years, and without making a personal inspection:—

Held, on appeal (HUNTER, C.J., dissenting), that the assessment so made was good.

Decision of MORRISON, J., affirmed.

Statement

APPEAL from the judgment of MORRISON, J., in an action tried before him at Vancouver on the 21st of December, 1906. The facts are set out in the reasons for judgment of MORRISON, J.

L. G. McPhillips, K.C., and *Laursen*, for plaintiff Company.
J. A. Russell, and *Pottenger*, for defendants.

22nd February, 1907.

MORRISON, J.: The plaintiffs, land owners within the new Lulu Island Slough Dyking District, move against a certain assessment made by the defendants who are commissioners for the said district. The commissioners, pursuant to their powers in that behalf, assessed the plaintiffs' lands which are unimproved. The plaintiffs allege that in so assessing their lands they proceeded on a wrong principle and accordingly appealed to the Court of Revision therefrom, which confirmed the assessment. They then bring this action to set aside the assessment. The preponderance of evidence at the trial satisfied me that the defendants in making this assessment were familiar with the nature and value of the lands in question, and estimated and had due regard to the benefit to be derived by the plaintiffs from the dyking of this property. I am not prepared to gainsay the opinions as sworn to of the commissioners who are resident farmers and selected for their especial knowledge of the lands

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and the benefits to be derived from dyking, unless displaced by equally strong and reliable evidence. The question involved is one essentially of valuation of the benefit to be gained by dyking. The Act deals with lands subject to overflow. Provision is made whereby foreign water will be excluded. The dyke being provided, then it rests with the owner to take advantage of that facility and drain or otherwise improve his land which in consequence of the dyke has been to a certain extent benefited. The commissioners' duty is to ascertain as nearly as may be the extent of that benefit. The owner who has had his lands improved before the dyke is erected is benefited in having his improvements protected. The owner whose lands are not yet improved is placed in the position of effectively improving his lands to the same extent as his neighbour and is estimated to be benefited accordingly. I have no doubt that the principle underlying dyking, drainage and irrigation legislation is to encourage and require immediate settlement, improvement and cultivation of lands. If owners of unimproved lands within dyking districts can escape adequate taxation by simply letting their lands lie idle in a state of nature, when they can afford to do so, then there is in my opinion a premium put upon non-cultivation and settlement.

As far as I can ascertain from the evidence, I think this a proper assessment and should stand. I would therefore dismiss the action with costs.

The appeal was argued at Victoria on the 10th and 11th of June, 1907, before HUNTER, C.J., IRVING and CLEMENT, JJ.

L. G. McPhillips, K.C., and *Heisterman*, for appellant (plaintiff) Company: We say the commissioners in making a flat rate have done wrong; they have not made a proper assessment. They are bound to assess according to values; they should have inspected the land and ascertained the levels. It is not a matter of discretion; the statute must be followed. Here the commissioners have made a rule of their own: *Williams et al.* v. *Taylor* (1863), 13 U.C.C.P. 219. Then they are also wrong, under section 43, in making a flat rate, because part of our lands could not be benefited by this dyking scheme. See also *Doe dem.*

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McGill v. *Langton* (1852), 9 U.C.Q.B. 91; *Municipality of T. of London* v. *G. W. R. W. Co.* (1859), 17 U.C.Q.B. 262; *Re Assessment Act and Nelson & Fort Sheppard Ry. Co.* (1904), 10 B.C. 519 and *Re Kaslo and Slocan Railway Company Assessment, ib.* 536.

J. A. Russell, for respondents (defendants): There was no mistake or omission by the commissioners, and no evidence brought by the other side as to what would have been a proper assessment. We submit that the assessors have acted strictly in accordance with the statute. As to part of the lands not being benefited, the evidence is that these back lands would be practically valueless without this drainage scheme.

HUNTER, C.J.

HUNTER, C.J.: The different members of the Court have made up their minds about this appeal, but they are not unanimous. For my part I am inclined to agree with the contention put forward by Mr. *McPhillips*. I think the evidence shews that the assessment was of too perfunctory a character, and that the care which ought to have been taken in assessing these parcels was not taken. I should think it would have been a reasonable and simple method for these commissioners to have gone over these parcels and examined them with some degree of care, and come to some conclusion, discussing the matter among themselves, as to what portion of the land would be benefited by the dyke, and what portion would not be benefited. Some such proceeding as that would be necessary to shew a proper compliance with the Act, but apparently nothing of that kind has been done. However, as two members of the Court are of an opposite view, of course the appeal will be dismissed.

IRVING, J.

IRVING, J.: I think that, having regard to the fact that these commissioners were men of at least eighteen years' experience in Lulu Island, and that the total area that they were to assess was limited to forty thousand acres, there was no necessity for them to go and visit each field in turn, but they were sufficiently alive to their duties when they sat down and discussed the matter, without going on to the fields; just exactly as we are able to discuss whether there was a proper assessment without going on the fields. I think they did all that was necessary.

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And it must be remembered that in a valuation of this kind there must be a certain amount of give and take. One hundred and sixty acres, you can only deal with it in the rough. And the evidence has shewn that they have taken a flat rate for the appellants' property.

I think the fact that nobody else has appealed except these two people, with their comparatively small acreage, 160 acres out of four thousand, is a good test of the fairness of the assessment.

CLEMENT, J.: I agree with the view expressed by my brother IRVING. The statute says that the determining factor practically is the question of benefit. Now, where an assessment is made in advance before the course of events has shewn just how the benefit has in fact accrued to the various parties, it must necessarily be a very rough and ready affair. And where these local men, with many years' residence in the localities, using their personal knowledge after examination, as they say, of nearly every acre of the tract covered by the dyking system, form their judgment, taking into consideration the quantity of land, quality and the benefit to be derived, I do not think the Court should set aside what they have done, or can say it is, as a matter of law, not in compliance with the statute to fix a flat rate.

CLEMENT, J.

Appeal dismissed, Hunter, C.J., dissenting.

IRVING, J.

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FULL COURT

Aug. 1.

IN RE MOLONEY

IN RE MOLONEY AND THE CORPORATION OF THE CITY OF VICTORIA.

Municipal law—By-law, validity of—Jurisdiction of Council over liquor traffic—Sunday closing—Saloons—Hotel bar-rooms—Distinction between—Liquor Traffic Regulation Act, R.S.B.C. 1897, Cap. 124, Sec. 7—Municipal Clauses Act, B.C. Stat. 1906, Cap. 32, Sec. 50, Sub-Sec. 100, and Sec. 205, Sub-Sec. (d).

A liquor licence by-law provided that upon information of an infraction of its provisions by a holder of a licence, he might be summoned to attend the next meeting of the Licensing Commissioners to make application for a renewal of his licence. It was contended that the holder could not be compelled to make application for a renewal until the expiry of his licence:—

Held, that the Council had authority to pass such an enactment under sub-section (*d.*) of section 205, Municipal Clauses Act, Cap. 32, 1906.

Held, also, that a provision to enforce, *inter alia*, the closing of hotel bar-rooms during such hours of the night as may be thought expedient, was bad as exceeding the powers conferred by section 50, sub-section 122 of said chapter 32.

Hayes v. *Thompson* (1902), 9 B.C. 249, followed on this point.

APPEAL from the decision of IRVING, J., at Victoria on the 6th of May, 1907, on the hearing of a rule *nisi* to shew cause why By-law No. 503 passed by the Municipal Council of the Corporation of the City of Victoria should not be quashed in whole or in part for illegality. The By-law was for the regulation of licensed premises and of applications for liquor licences and their issue and provided that all licences should be held subject to the regulations thereof.

Statement

All the clauses were attacked, some on the ground that it was beyond the powers of the Municipal Council to enact such regulations, and others on the ground that they were ambiguous and unreasonable, but those clauses which require to be noticed, and which were dealt with by the Court, are sufficiently set out in the reasons for judgment of the Full Court.

Higgins, in support of the rule.

W. J. Taylor, K.C. (*Mason*, with him), *contra.*

28th May, 1907.

IRVING, J.

IRVING, J.: . . . . In my opinion the Provincial Parlia-

ment, by section 205 of the Municipal Clauses Act, 1906, has conferred on the City Council full authority to prescribe the conditions imposed by the by-law in question.

By section 184 the Board is forbidden to issue licences (which expression includes the granting of a new licence, the transfer or renewal of a licence) unless prior to the granting of the new licence or the authorization of the transfer or renewal, the applicant has fully complied with the provisions of any by-law passed under its authority with reference thereto, that is to say, with reference to the issuing of licences, using that expression as above set out.

The by-law in question seems to me to do exactly what was intended by Parliament should be done by the Council. It instructs the Board as to conditions upon which they can grant and informs the applicants of the terms upon which they can obtain and hold a licence, or a renewal or transfer of their licence.

According to Lindley, L.J., this is the proper duty of a by-law: *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (1892), 3 Ch. 242 at p. 252.

"A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called 'by-laws'".

As to the suggestion that certain clauses of the by-law are unreasonable, the general considerations which ought to be borne in mind in dealing with this question, were stated by Lord Russell, C.J., in *Kruse* v. *Johnson* (1898), 2 Q.B. 91 at pp. 99 and 100:

"I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be

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regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent, or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested."

And by Sir F. H. Jeune, at p. 104:

"Three considerations appear to me to apply with especial force to such an authority, dealing with such subject-matter. First, the case is wholly different from that of manorial authorities, or of trading corporations, such as dock or railway companies, who often have a pecuniary interest in their by-laws, or even of such a municipal corporation as might be supposed to have trade interests involved. Secondly, such an authority as a county council must be credited with adequate knowledge of the locality, its wants and wishes. Thirdly, the opportunity afforded by legislation for a request for reconsideration, and an appeal to high authorities, by members of the public shews that any by-law which comes into force has secured at least the acquiescence of those whom it affects. Cases may be imagined in which, in spite of these considerations, this Court, acting in the discharge of its undoubted powers and duty, might feel compelled to hold a by-law made by a county council invalid on the ground that it was unreasonable. But, when a question of the requirements and wishes of the locality is involved, this Court should, I think, be very slow to set aside the conclusions of the local authority."

IRVING, J.

Then as to the argument that certain matters dealt with in the by-law were already dealt with by Parliament, I extract the following from the judgment of Sir F. H. Jeune, in *Thomas* v. *Sutters* (1900), 1 Ch. 10 at p. 16:

"If a by-law provided that something should be legal which the public law had declared to be illegal or *vice versa*, it might well be said that the by-law could not set itself up against an Act of Parliament. But there is nothing of that kind in the present case. As the Master of the Rolls has pointed out, the Act of 1867 deals with traffic regulation, and it provides that three or more persons assembled together in a street for betting shall be deemed to be obstructing the street. That provision was intended solely for the purpose of keeping the streets clear. It may be that the present by-law goes beyond that, but I cannot see any objection to it, even

if it does go somewhat beyond that Act. An Act of Parliament speaking for the whole country renders certain things illegal. It does not at all follow that a by-law speaking for a particular locality may not make some more stringent regulations with the same object. That, as it seems to me, is perfectly within the competency of the local authority. When an Act of Parliament has forbidden certain things to be done in certain places, it seems to me perfectly consistent with that that a municipality, with regard to their particular locality, should go somewhat beyond the Act, not contravening its spirit, but carrying it out, and making regulations somewhat wider than those to be found in the Act. That is really what has been done in this case."

The application to quash is refused.

The appeal was argued at Victoria on the 18th and 19th of June, 1907, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

Higgins, for the appellant: Section 3 and sub-section 2 of section 13 are invalid. The first-mentioned section requires the licence-holder to make application for the renewal of his licence before it expires. The licence-holder has a vested interest in the licence until it expires on the date specified by the Municipal Clauses Act. There is no authority conferred on the Council to pass a by-law compelling the Licensing Commissioners to refuse a renewal of a licence before the licence expires.

The power to cancel liquor licences is vested in the Board of Licensing Commissioners by the statute, which is a body constituted by the statute, and it has a wide discretion conferred upon it by the statute.

Argument

Section 205, sub-section (*d.*) of the Act, which enacts that the Council may pass by-laws "for regulating and cancelling licences before the expiration of the time for which the same were issued," applies only to licences other than liquor licences. When the statute gives power to the Council to pass by-laws respecting the Board of Licensing Commissioners such power is conferred in express terms.

Said sections 3 and 13 of the by-law prohibit the Board from exercising the discretion vested in the Board by sections 191 and 203 of the Act. At the most a power to regulate is given the Council, but the by-law in express terms prohibits the Board from exercising any discretion: *Toronto* v. *Virgo* (1896), A.C. 88.

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By section 3 the Council seeks to control the Board of Licensing Commissioners by resolution, whereas under the statute such control, if any exists, must be invoked by by-law.

Sections 5, 10 and 12 of the by-law are bad, because these sections are made to apply to hotel and shop premises, which premises are not included in the list of premises which the Council can control as specified in the statute.

Section 6 of the by-law is *ultra vires* in providing that no female customer shall be permitted to come upon or remain in saloons or bar-rooms. There is no power vested in the Council to debar a certain class from licensed premises: *In re Barclay and the Municipality of Darlington* (1854), 12 U.C.Q.B. 86 at p. 96. See also *Regina* v. *Levy* (1899), 3 Ont. 403.

Section 7 is *ultra vires* insofar as it closes hotel bar-rooms and saloons in the hours of morning and on Christmas Day. Section 50, sub-section 122, is the only enactment providing for the closing of licensed premises and the closing power of the Council is thereby limited to "ordering and enforcing the closing of saloons during such hours of the night and on Sundays as may be thought expedient."

Where by statute a municipal council is given power to make by-laws in certain specific cases it can only make them in such cases, for such power given by the statute implies a negative that it shall not make by-laws in any other cases: *Child* v. *Hudson's Bay Company* (1723), 2 P. Wms. 207 at pp. 208 and 209; Dillon on Corporations, 4th Ed., at pp. 392 and 393.

Argument

As specific power is given to the Council to close saloons, it cannot close hotel bar-rooms: *Hayes* v. *Thompson* (1902), 9 B.C. 249 at p. 253. For the same reason the Council cannot order the closing of saloons in the hours of the morning and on Christmas Day: *Forsdike* v. *Colquhoun* (1883), 11 Q.B.D. 71.

The restrictions mentioned in section 7 are not made a condition under which the licensee holds his licence. A penalty is prescribed for any breach of such regulations.

Eberts, K.C. (*Mason*, with him): The licence is taken by the holder subject to the conditions imposed: *Thomas* v. *Sutters* (1900), 1 Ch. 10 at p. 16; *Kruse* v. *Johnson* (1898), 2 Q.B. 91 at p. 99.

Cur. adv. vult.

1st August, 1907.

The judgment of the Court was delivered by

HUNTER, C.J.: Appeal from a judgment of my brother IRVING, refusing to quash the Liquor Licence Regulation By-law, 1907, recently passed by the Corporation of the City of Victoria.

The by-law was impugned on a considerable number of grounds both below and here, but I will deal only with those which require to be noticed.

Clause 3 of the by-law provides as follows:

"Upon information had of the infraction of any of the regulations herein contained by any holder of a retail liquor licence, any Licensing Commissioner or the Board may, and at the request of the Council by resolution, the Board shall cause at least seven days' previous notice in writing to be sent to the holder complained of requiring him to attend the next regular Court of Licensing Commissioners, and there make application for an order of renewal of his licence on the expiry thereof."

This was assailed on the ground that it was not competent to enact a law requiring a licence holder to make an application for renewal before its expiry on the ground that a complaint had been made against him for infringing the regulations, in other words, that he had a vested interest in the licence until the time came for renewal, and that it was only on an application for renewal that he could be deprived of the licence. It is unnecessary to say more on this point than that sub-section (*d.*) of section 205 of the Act of 1906 seems clearly to authorize the regulation in question.

Clause 5 is clearly a clause regulating the character of the premises in which liquor may be sold, and may be supported under sub-section 100 of section 50 of the Act.

Clause 6 was attacked so far as it prohibits female customers. If the prohibition is understood to be confined to the supplying of liquor to females to be drunk on the premises, I think it may be supported under sub-section 91 of section 50 (the prevention of vice clause); but if it purported to prevent the purchase of liquor by women to be taken away from the premises, then I think it would be *ultra vires.* I think, however, that it is intended to apply only to the case of females consuming liquor on the premises, and therefore that it is *intra vires.*

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Clause 7, which orders the closing of saloons during certain hours was also impeached.

The only portion of the Act which in terms deals with closing licensed premises is sub-section 122 of section 50, which empowers the "ordering and enforcing the closing of saloons during such hours of the night and on Sundays as may be thought expedient." It is obvious that this does not empower the closing of hotel bar-rooms at any time, or the closing of saloons during any other hours or days than those specified, but it was argued that the more general provisions of the Act empowering the regulation of licences supplied the needed authority. If that were so, there would have been no need for sub-section 122 at all, but I think it cannot be denied that when the Legislature enacted sub-section 122, the subject of closing especially engaged its attention, and that it advisedly abstained from extending the power to hotel bar-rooms and closing saloons at other hours. It would have been easy to insert "and hotel bar-rooms" after "saloons" and "and holidays" after "Sundays," and to have said "such hours" instead of restricting it to "such hours of the night" if such was the intention; and as stated in *Hayes* v. *Thompson* (1902), 9 B.C. 249 at p. 253:

Judgment

> "There are obviously good reasons for keeping saloons closed during Sundays, and the late hours of the night, which do not necessarily apply to hotels, as the hotel is the home or the house of the guest while he stops there, and he may be in the bar-room during such hours for perfectly legitimate social purposes, or with a view to his own comfort and convenience."

And I might add, to order the closing of bar-rooms would be, in the case of some hotels where the bar-room is the only available sitting room, to very seriously incommode both the proprietor and his guests. A power to regulate the sale of liquor may be derived naturally and easily from a general authority to regulate liquor licences, but a power to order private buildings to be closed either in whole or in part is a power of a very drastic character, importing a power to interfere with the private use and enjoyment of property, and is not I think to be inferred from the use of general language when in the same Act there is a clause specially dealing with such power.

There is, moreover, the circumstance not to be overlooked that

no unmistakable change in the law on this subject has been made since the decision in *Hayes* v. *Thompson*, which took place in 1902.

I think, therefore, that clause 7 is invalid so far as it requires the closing of saloons outside of the hours between sunset and sunrise on week days and during the day of Christmas Day and so far as it applies to hotels.

Clause 9 is, I think, within the scope of the authority conferred by section 205.

So far as concerns clause 13, it is of course invalid as far as it purports to enforce the invalid portions of clause 7, and it would also be invalid *pro tanto* if it purported to penalize the sale or disposal of liquor during prohibited hours, which is expressly provided for by sub-section 1 of section 7 of the Liquor Traffic Regulation Act, but I do not gather that this was the intention.

The position in short is (as explained in *Hayes* v. *Thompson*) that section 7 of the Liquor Traffic Regulation Act is an enactment relating to the sale or other disposal of liquor during prohibited hours, and not to the closing of the premises, and the only enactment empowering the closing of the premises is sub-section 122 of section 50 of the Municipal Clauses Act, and if this is kept in mind there ought to be no difficulty in framing a by-law that will, in these matters at any rate, be within the limits of the powers conferred. With the question of the policy or expediency of any particular provision the Court has of course nothing to do.

Judgment

Other points were suggested rather than argued, but as Mr. *Higgins* was not concerned to argue them in the interests of his client, it is unnecessary to discuss them.

As both parties succeed in part and fail in part, there ought to be no costs either here or below.

Judgment accordingly.

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POWER *ET AL.* v. THE JACKSON MINES, LIMITED.

Attachment of debts—Moneys due to judgment debtor under mining contract—Attachment by judgment creditors—Mechanics' liens—Order directing issue—Liability of garnishees to lien-holders.

On service of garnishee orders under the Attachment of Debts Act, 1904 (Cap. 7), the garnishees admitted a debt owing to the judgment debtor, but asked the protection of the Court as against mechanics' lien-holders claiming the fund. Thereupon an order was made directing the garnishee to pay the fund into Court to abide the determination of an issue between the attaching creditors and the lien-holders. In this issue the lien-holders failed, and proceeded upon their liens against the property:—

Held, by the Full Court, that the garnishees were not estopped from requiring an issue between themselves and the attaching creditors to ascertain what, if anything, was owing by the garnishees to the judgment debtor at the time of the service of the garnishee orders.

APPEAL by judgment creditors from an order of FORIN, Co. J., dated the 19th of March, 1907, at Nelson, directing the trial of an issue to determine whether any moneys were owing, accruing due, or payable by the garnishees to the judgment debtor at the time garnishing orders were served, and, if so, what amounts.

Statement

The appellants, a number of tradesmen, in the months of August and September, 1905, brought action against one Cortiana, on their several accounts for goods sold and delivered. In each of these actions garnishee-orders were served upon the Jackson Mines, Limited, to attach moneys alleged to be owing from the Jackson Mines to Cortiana under a contract for mining ore. Under this contract Cortiana was to be paid a percentage on the value of the ore produced, and a large quantity of ore had been mined and delivered to the Jackson Mines. In answer to the garnishee orders served upon them the Jackson Mines filed and delivered a pleading, identical in each case, as follows:

"1. The said garnishees admit that at the time of the service of the garnishee summons herein, there was due and payable to the said defendant under a certain contract made between the said defendant and said garnishees bearing date April, 1905 (and to which contract the garnishees

will refer), the sum of $202.78, and there was due on open account at the time of said service between the said defendant and said garnishee the sum of $29.91, making a total of $232.69, which amount, less solicitors' charges, the said garnishees are willing to pay according to the direction and under the protection of the Court, as against any other claim or claims, whether under mechanics' liens or otherwise.

"2. The said garnishees admit that under the said contract there will accrue due and become payable to the said defendant further sums of money from time to time as the company receive payment for ore that may be sold and which has been mined by the said defendant, but subject to the retention pursuant to the terms of said contract by the said garnishees of 15% of moneys so received for three months after such receipt, and as to the said moneys that may be so received as aforesaid, said garnishees will be ready, when the same become due and payable, to pay such moneys over according to the directions of the Court and under the protection of the Court as to such payment or payments as against any other claim or claims whether under mechanics' liens or otherwise.

"3. The said garnishees repeat paragraphs 1 and 2 hereof, and say that L. Gabriele and twenty-two other workmen have by summons issued out of this Court on the 3rd day of August, 1905, commenced an action as mechanics' lien claimants against the garnishees herein, to enforce mechanics' liens in the sum of $3,730.40 against the properties of the said garnishees, and which said summons has been duly served upon said garnishees, and the said garnishees, while ready or willing under the order or direction of the Court, to pay over all sum or sums of money that may be properly due and payable or that may accrue due and become properly payable to the said defendant under said contract, ask, in such payment or payments, for the protection of the Court as against the said claims of the said Gabriele *et al.*, mechanics' lien claimants.

"4. The said garnishees repeat paragraph 3 hereof and reserve the right to set up a claim for damages for breach of said contract as against said defendant."

Statement

The plaintiffs thereupon signed judgment against Cortiana, and on 11th December, 1905, made application for an issue between themselves and the Jackson Mines, Limited, to ascertain what, if anything, had been attached by the garnishee orders. Upon that application, counsel for the Jackson Mines admitting that moneys were owing to Cortiana, but asking for the protection of the Court as between the attaching creditors on the one hand, and employees of Cortiana, who had registered mechanics' liens against the property of the Jackson Mines, on the other hand, an order was made:

"That the said garnishees do pay to the Registrar of the County Court at Kaslo, B. C., all moneys due or accruing due under the contract between

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the said garnishees and said judgment debtor and referred to in said dispute note and that such payments be so made to the said Registrar when and so often as any moneys shall accrue due and become payable to the said judgment debtor by the said garnishees under the said contract.

"It was further ordered that all moneys so paid by the said garnishees to the said Registrar should remain in a separate fund subject to the determination of the issue directed, and subject to further order of the Court."

In pursuance of that order the garnishees from time to time paid money into Court on account of shipments of ore as the values were ascertained, and an issue was directed between the garnishing creditors on the one hand and the lien-holders on the other to determine their conflicting claims to the fund in question. This issue was decided at the trial in favour of the lien-holders, but upon appeal that decision was reversed and the lien-holders were declared to have no claim upon the fund whatever. The attaching creditors thereupon moved for payment out of Court to them of the moneys in Court in the order of service of their several garnishees. This application was argued on the 7th of March, 1907, before FORIN, Co. J., who refused the application, and at the request of counsel for the Jackson Mines, Limited, ordered an issue between the attaching creditors and the Jackson Mines, Limited, to ascertain what, if anything, had been attached by the garnishee orders. Against this order directing an issue, the attaching creditors appealed taking the ground that the Jackson Mines having in their pleading admitted the existence of an attachable debt, and having claimed, as stake-holders, and received, the protection of the Court in respect to that debt, having assumed the sole responsibility for contesting the validity of the mechanics' liens, and having invited the attaching creditors and the lien-holders to contest their several claims to the fund, they, the Jackson Mines, would not now be allowed to dispute their liability, which, under section 12 of the Attachment of Debts Act is necessary before the Court could direct an issue between the attaching creditor and the garnishee. They further claimed that the money already in Court should be paid out to the first attaching creditor and subsequent ones in order so far as it would go.

Statement

The appeal was argued at Vancouver on the 24th and 25th of April, 1907, before IRVING, MARTIN and MORRISON, JJ.

Sir C. H. Tupper, K.C., for appellants.
W. A. Macdonald, K.C., for respondent.

18th June, 1907.

IRVING, J.: Appeal from the order of FORIN, Co. J., of 19th March, 1907. The appellants are a number of tradesmen, who in August or September, 1905, obtained judgment against one Cortiana for goods sold and delivered, etc. In the course of their litigation with Cortiana they served a number of garnishee summonses on the respondent Company, with which Company Cortiana had made a contract, dated April, 1905, to mine ore for them from their mine. Payment for his services was to be made. Cortiana failed to pay his workmen and they, on 7th September, 1905, filed mechanics' liens against the respondents' mineral claims. At the end of August, 1905, the defendants had received under the contract the sum of $202.78 on Cortiana's account. The Company also owed him the sum of $29.91 on open account.

In September or October, 1905, the respondent Company in answer to garnishee summonses filed the following dispute note: [Already set out in the statement].

On the 5th of December, 1905, the plaintiffs applied to the County Court judge for an order

"For judgment against the above named garnishees for the amount of the plaintiff's claim and costs . . and for an order that any third party claiming any interest in the moneys due from the said garnishees to the said defendant and attached or sought to be attached in this action do appear and state the nature and particulars of their claim upon the same."

The County Court judge made the following order: [Already set out].

Under this order $1,676.74 has been paid into Court. On the same day (5th December), the County Court judge made another order directing that an issue be tried between the workmen and the present appellants to determine whether the workmen had by virtue of their liens any claim on the moneys paid or to be paid into Court under the first mentioned order. The respondent Company was not a party to the second order, and rightly so, as the question to be decided in that issue was wholly collateral to the first order.

From this second order an appeal was taken, and the Full Court being of opinion that under section 12 the lien-holders

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could have no possible right to the moneys, directed (April 23rd, 1906), that the judgment on the issue (which issue had been tried in the meanwhile), be entered for the defendants therein, the present appellants. But the Full Court did not determine that the appellants were entitled to the moneys, or what was to be done with the moneys. This decision left the position of the respondent Company untouched. It decided nothing except that the lien-holders could not assert a claim to this money. On the 20th of January, 1906, the lien-holders got judgment (subject to the liability of the defendant Company to more than six weeks' wages being established). On 28th January, 1907, the respondent Company took out a summons for (1.) Directions as to the disposition of the moneys paid into Court. (2.) Determining whether the liens of the said lien-holders attached for more than six weeks' wages. (3.) And also for determining what, if any, moneys were due from the said Jackson Mines, Limited, to each of the said creditors of Cortiana. (4.) An order directing such accounts and enquiries as might be deemed necessary.

Before this summons came on to be heard, the appellants, on 5th March, 1907, served notice of motion for an order for payment out of Court to them, the said judgment creditors, of the amount of their respective judgments out of the money paid, or to be paid into Court under the first order of 5th December.

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On 7th March these two applications came on to be heard. The contention of the respondent Company was that until the accounts had been taken between the Company and Cortiana, and Cortiana and the lien-holders claiming under him, it would be impossible for anyone to say what sum was liable to be attached by the present plaintiffs. This, says the learned counsel for the creditors, amounts to an argument that there was no attachable debt. Perhaps it does—but it is also an argument that the amount of the debt is not yet ascertained and therefore the time is not ripe to make any order with reference to the disposition of the moneys: *Barnett* v. *Eastman* (1898), 67 L.J., Q.B. 517.

As the learned County Court judge rightly observed, the order of the Full Court was intended to place and did place all

parties in the same position as they were on the 5th of December, after the order for payment in had been pronounced and before the order for the issue between the lien-holders and creditors was made.

Holding that view, he dismissed the application for payment out by the judgment creditors, and directed that the judgment creditors (present appellants) and the respondent Company should proceed to the trial of an issue to determine whether any moneys were owing, accruing due or payable by the garnishees to the judgment debtor, Cortiana, at the time the respective garnishing orders were served, and if so, what amounts. From this judgment the present appeal is taken.

In my opinion, the judgment should be upheld, because the Company cannot be liable to Cortiana or the garnishors claiming under him for any greater sum than the Company owes Cortiana.

The amount due to Cortiana cannot be ascertained until the amount of the judgments of the lien-holders have been ascertained. The Company, when they have paid these judgments, will have a right to set off the amount thereof against Cortiana. In my opinion, the dispute note is sufficient to satisfy section 12, 1903-04.

Sir Charles Tupper cites *Randall* v. *Lithgow* (1884), 12 Q.B.D. 525; but the difference between the course followed there by the insurance company and the course adopted by the respondent company is this—the insurance company permitted an order to be made against them. Here the mining Company have appeared and stated all the facts which would enable the judge to determine what order he should make. On these facts he thought fit to make an order directing that the moneys received from the smelter should be paid into Court. The first order of 5th December, in my opinion, should not be regarded as an ultimatum so far as the Company was concerned. It was intended for the preservation of the fund until the rights and equities of all parties could be determined. This is abundantly manifest from the last part of the order. I think, therefore, the learned County Court judge was right in refusing to pay over to the appellants the money in Court without regard to the state of accounts between the Company and Cortiana. Whether he

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should at that juncture have directed an issue or adjourned the summons until the question of the liability of the Company to the lien-holders had been finally settled is a matter upon which I entertain some doubts, but I think this appeal should be dismissed with costs.

MARTIN, J.: By the order appealed from, dated March 19th, 1907, an issue is directed between the judgment creditors (appellants) and the garnishee (respondent) to try the question as to "whether any moneys were owing, accruing due, or payable by the garnishee to the judgment debtor at the time the respective garnishee orders were served, and if so, what amounts," etc.

It is objected that in the face of the garnishee's admissions of liability to the judgment debtor contained in the dispute note of 23rd October, 1905, such an issue is unnecessary and cannot now be directed unless the garnishee wished to set up its sole reserved right against the debtor on an alleged counter-claim for damages under section 4, but we are informed it does not desire to do so.

In reply, it is argued that the dispute note is, taken as a whole, nothing more than a general invocation of the protection of the Court, and therefore I have carefully considered it, with the result that I am unable to take that view. If it had been the original intention of the garnishee to take such a position it is to be regretted that it was not set up in such plain and simple language as to convey that sole impression, and not, as it undoubtedly has done, to tend to mislead other parties interested. In my opinion, it is not open to the garnishee to advance inconsistent contentions on the record as it now stands. The note on pp. 55-6 of Cababe on Attachment of Debts (1900), supports the appellant's argument.

MARTIN, J.

We are, however, asked to allow the matter to be re-opened and, in effect, the dispute note to be amended, and in view of the recent decision of this Court in *McDaniel* v. *Canadian Pacific Ry. Co.* (1907), 13 B.C. 49, I do not see how we can refuse to do so, but it must be on terms, which I think are properly suggested in Cababe, *supra, i.e.*, the garnishee should pay all the costs occasioned by its error up to this time, including those of this appeal.

It is unfortunate that the matter by reason of said dispute note has got into such a confused state, but the only way that I can see to extricate it, without establishing a bad precedent, is by doing strict justice between the litigants.

The appeal should therefore be allowed with costs, with leave to the respondent to amend on above terms.

MORRISON, J., concurred with IRVING, J.

Appeal dismissed, Martin, J., dissenting.

RE JOHNSTON.

Extradition—Forgery—Production of forged document—Insufficiency of evidence without such production.

The basis of a charge being false pretence, and that false pretence being contained in a written document, unless a foundation be laid by secondary evidence to make out a *prima facie* case, the document itself must be produced.

APPLICATION for a writ of *habeas corpus* in an extradition proceeding, heard before CLEMENT, J., at Vancouver on the 9th of August, 1907.

A charge of obtaining money under false pretences was laid against R. C. Johnston by the prosecuting attorney of Skagit County at Mount Vernon, Washington, and upon that charge a warrant was issued. The false pretence alleged was that Johnston in his capacity as train master on the Great Northern Railway, in collusion with the white foreman of one of the track gangs and a Japanese foreman or bookman of the same gang (the gang being composed of whites and Japanese), falsified the time rolls by means of adding fictitious Japanese names thereto, the moneys paid by the Railway in respect of these fictitious names on the time rolls being collected by the Japanese foreman and divided amongst the three participants. The warrant issued

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under the Extradition Act was based on the Skagit County warrant and Johnston was apprehended in British Columbia. At the hearing evidence was given by the white foreman amounting to a confession, and by the Japanese foreman in the shape of an affidavit (amounting also to a confession) who had been arrested in Mount Vernon and was in custody there. The time rolls shewing the dummies were not produced at the hearing, but they were being sent from St. Paul. CANE, Co. J., who took the hearing, held that the evidence was sufficient for a committal without the time rolls and committed the accused for extradition. The prisoner then applied to CLEMENT, J., for a writ of *habeas corpus.*

Farris, for the prisoner.
Burns, for the State of Washington.

12th August, 1907.

CLEMENT, J.: Various grounds were urged in support of this motion, but I find it necessary to consider but the one. The basis of the charge being a false pretence upon which money was obtained from the Company, and that false pretence being contained in a written document, the document itself must be produced in order to make out even a *prima facie* case, unless of course a foundation is laid for secondary evidence of its contents, which has not been done here. *Re Harsha (No. 1)* (1906), 10 C.C.C. 433, commends itself to me—if I may say so—as good law, and it covers this case. The prisoner must, I think, be discharged.

Judgment

Application allowed.

TAYLOR AND TAYLOR v. THE CORPORATION OF THE CITY OF REVELSTOKE.

FULL COURT
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TAYLOR v. CITY OF REVELSTOKE

Municipal law—Health Act, R.S.B.C. 1897, Cap. 91—Isolation of infected premises by Medical Health officer—Liability of Municipal Council for expenses of maintaining quarantined premises and inmates.

Where a Medical Health officer (appointed by a City Council), acting in pursuance of a Provincial statute, places a quarantine on a building and its inmates within the limits of a City Municipality, the latter cannot be held liable for the cost of provisioning and heating the building during the period of isolation.

APPEAL from the decision of FORIN, Co. J., in an action tried before him at Revelstoke on the 15th of August, 1907.

The plaintiffs kept a lodging house. A lodger on the premises was found infected with diphtheria, and the Medical Health officer placed a quarantine on the house and its inmates, among whom there happened to be at the time one of the plaintiffs, Mrs. Taylor. She did not usually reside in the house. Before and after the quarantine was placed, the patient was attended by his own physician. The Medical Health officer, although acting under arrangement with the City, performed his duties under the provisions of the Health Act, and subject to the directions of the Provincial Board of Health, to whom he reported all cases. The premises were purely for rooming purposes, without any culinary or similar housekeeping facilities. There was some evidence that the Medical Health officer had promised to see that provisions were sent around, but he had not done so. The learned County Court judge gave judgment for the plaintiff in $191.45, out of a claim of $290.

Statement

The defendant Corporation appealed, and the appeal was argued at Vancouver on the 14th of November, 1907, before HUNTER, C. J., IRVING and MORRISON, JJ.

Martin, K.C., for appellants (defendants): There is no liability attaching to the City. Plaintiff's remedy is against the people

Argument

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for whom she performed the services. There is no evidence that she was directed by any quarantine or other officer of the City to do this work. The accident of infection brought about the quarantine, and quarantine necessarily entails loss on the parties concerned. People must have food and shelter when in quarantine, just as at other times. If the City is liable for the claim made here, it would be equally liable to the parties for loss of time. The Medical Health officer is controlled in his duties by the Provincial authorities, and therefore this is a matter of Provincial law.

He was stopped.

Argument

W. A. Macdonald, K.C., called upon for respondents (plaintiffs): The Medical Health officer is appointed by the City. He made use of plaintiffs' premises as a pest house; and if he creates a certain building into an isolation hospital, that implies carrying on a hospital. It is the duty of the City to provide a proper isolation hospital. There was no such building, and having used the one in question here, they are bound to meet the cost of maintaining it as such *pro tem.*

[IRVING, J., drew attention to the decision of this Court mentioned in the preamble to An Act for the relief of Andrew Astrico, of Victoria, Cap. 8, C.S.B.C. 1877.]

Judgment

Per curiam: There does not seem to be any ground upon which a promise can be implied so as to support this judgment. The Medical Health officer acted under the general policy of the Provincial statute, and in the absence of any evidence of a promise by the Municipality to indemnify this lady, it is difficult to see what remedy she has against the Corporation.

Appeal allowed.

STEVENSON v. SMITH.

CLEMENT, J.

1907

July 29.

STEVENSON v. SMITH

Principal and agent—Authority of agent—Delegation of authority—Receipt given in name of agent's firm, signed by a clerk—Statute of Frauds.

An agent "thereunto lawfully authorized" within the Statute of Frauds, cannot delegate his authority.

An agent who, at the time of making a contract, has failed to bind his principal by a written note or memorandum within the statute, cannot sign an effectual note or memorandum after his authority as agent to sell has been withdrawn.

ACTION tried before CLEMENT, J., at Vancouver on the 29th of July, 1907, for specific performance of an agreement in writing dated the 4th of April, 1905, wherein the plaintiff alleged that the defendant, through his agents, Rand Bros., agreed to sell the defendant lot 3, block 27, district lot 192, City of Vancouver, for the sum of $1,500, payable as therein provided. The defendant, who was the owner of this property, listed same for sale with E. E. Rand (member of a firm, Rand Bros.) with whom he was personally acquainted, for the purpose of selling, the authority being in writing, as follows:

Statement

"Until further notice you may sell for me subject to the terms of the contracts under which I hold and on my account lots 1, 3 and 4/31192 and lot 3/32/192 at the price of $1,750 per lot terms ¼ cash, balance 1 and 2 years at 7%; also lot 2/27/192 at $1,350 and lot 3/27/192 at $1,500.00 terms ¼ cash balance 6, 12 and 18 months at 7%; also lots 3 to 14 inclusive block 4, D.L. 302 for $8,500 terms $3,000 cash balance 6, 12 and 18 months 7% interest. On whatever business you do in regard to the above I will allow you 5% commission up to $5,000 and 2½% for amount over."

On the 4th of April, 1905, Rand Bros., by their clerk, purported to sell to the plaintiff the property in question, receiving from him on account $100 and giving him a receipt for same, as follows:

"$100.00.

"Rand Bros.
"Real Estate and Insurance Agents.
"Vancouver, B.C., April 4th, 1905.

"Received from A. E. Stevenson the sum of One hundred dollars ($100.00) for deposit on Lot 3, Block 27, D. L. 192, at $1,500.00 terms ¼ cash bal. 6, 12, 18 Mo. at 7%.

"Rand Bros.
"F."

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STEVENSON v. SMITH

On the 10th of April, and before he had received advice of the sale, the defendant notified his agent, E. E. Rand, by wire, to withdraw this property from the market.

The defendant in his statement of defence set up that he had appointed E. E. Rand as his agent for the purpose of selling, and not Rand Bros., and relied on the Statute of Frauds.

Argument

Wilson, K.C., for the defendant: As E. E. Rand had been appointed agent he could not delegate that authority to Rand Bros., much less to their clerk, by whom the deposit receipt in question was given.

Martin, K.C., contra.

Judgment

CLEMENT, J.: In the absence, as here, of any evidence from which it might be legitimately inferred that the clerk in the agent's office who signed the receipt was in fact himself the owner's agent, the signature of such a clerk is not that of an agent "thereunto lawfully authorized." To express it otherwise, an agent "thereunto lawfully authorized" within the Statute of Frauds cannot delegate his authority.

Nor can an agent who, at the time of the making of the alleged contract, has failed to bind his principal by a written note or memorandum within the statute, sign an effectual note or memorandum after his authority as agent to sell has been withdrawn. I express no opinion as to the sufficiency otherwise of the receipt in question.

Action dismissed with costs.

Action dismissed.

BOLE v. ROE AND ABERNETHY.

FULL COURT
1907
Nov. 28.

BOLE
v.
ROE AND
ABERNETHY

Water Clauses Consolidation Act, 1897, Secs. 36 and 39—"Decision," meaning of, as used in section 39—Time for taking appeal.

In a proceeding under the Water Clauses Consolidation Act, 1897, before the County Court judge, on appeal from the Water Commissioner, the respondents objected, *inter alia*, to the jurisdiction of the learned County Court judge, who overruled the objection and proceeded with the hearing, reserving his decision on the petition generally. Respondents appealed within the 21 days given in section 39 as the time within which an appeal must be taken from the decision of any Supreme or County Court judge on any proceeding under the Act:—

Held, by the Full Court, that the term "decision" as used in section 39 means final disposition of the whole case before the judge on appeal from the Water Commissioner.

Statement

APPEAL from a ruling of CANE, Co. J., in a proceeding before him under the Water Clauses Consolidation Act, 1897, commenced before him at Vancouver on the 8th of August, 1907. The facts are set out in the headnote.

The appeal was argued at Vancouver on the 28th of November, 1907, before IRVING, MARTIN and CLEMENT, JJ.

Argument

Harris, K.C., for appellants (respondents to the petition before the Court below).

Martin, K.C., for respondents, here objected that no ground of appeal to the Full Court existed at the present stage of the hearing. The appeal book discloses that no decision has yet been given by the learned County Court judge: see section 39 of the Act. There is only one appeal provided for, and that we submit is from the final adjudication of the case by the judge below.

Harris: Our objection to the judge's jurisdiction below went to the root of the whole matter, and in order to save ourselves we had to appeal within the 21 days allowed by section 39. He cited *Belcher* v. *McDonald* (1902), 9 B.C. 377 and *Lang* v. *Victoria* (1898), 6 B.C. 117.

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IRVING, J.: I think the objection of Mr. *Martin* is well taken. The case of *Belcher* v. *McDonald* was one where there were separate causes of action, and cannot have any application to this case where only interlocutory rulings are objected to. The word "decision" in section 39 means the final disposition of the whole case, and an appeal has to be taken within 21 days from such final disposition. I think reason and convenience require that we should read in the section for "decision," "final disposition," and this is borne out by the language that the appeal from that decision shall be dealt with by this Court in the same way as an ordinary appeal from a final judgment.

MARTIN, J.

MARTIN, J.: I think, reading sections 38 and 39, that the statute contemplates one decision.

CLEMENT, J.

CLEMENT, J.: I also agree.

Appeal dismissed.

HUNTER, C.J.
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REX v. FOUR CHINAMEN

REX v. FOUR CHINAMEN.

Criminal law—"Disorderly house" defined—What constitutes—Criminal Code, Sec. 228.

REX v. FOUR CHINAMEN

The term "disorderly house" in section 774 of the Code, includes any house to which persons resort for criminal or immoral purposes, and therefore includes a common gaming house.

Statement

APPLICATIONS to quash convictions for being keepers of a common gaming house, recorded by the Police Magistrate of Vancouver, assuming to exercise jurisdiction under section 774 of the Code. Heard before HUNTER, C.J., at Vancouver on the 20th of November, 1907.

Farris, in support of the application.
Killam, contra.

23rd November, 1907.

HUNTER, C.J.

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HUNTER, C. J.: The chief ground, and the only ground, on which I reserved judgment was that the expression "disorderly house" in the section does not include gaming house, but is confined to houses of the same character as houses of ill-fame.

Judicial opinion is at variance on the subject: the Appeal Court in Quebec has adopted this view in *The Queen* v. *France* (1898), 1 C.C.C. 321, while it has been held by DRAKE, J., in *Ex parte John Cook* (1895), 3 C.C.C. 72, and by Craig, J., in the Yukon that the phrase includes common gaming houses.

In my opinion the term "disorderly house" has acquired in criminal jurisprudence a definite legal meaning and that it includes any house to which persons resort for criminal or immoral purposes and it is immaterial that the house is conducted quietly so as not to disturb the neighbours.

Section 228 of the Code singles out certain classes of disorderly houses, *viz.*, bawdy houses, gaming houses and betting houses, and provides that their keepers shall be liable on conviction on indictment to a year's imprisonment, while other classes of disorderly houses, such as disorderly inns, places of entertainment, etc., are left to be dealt with by the common law; and I think this is sufficient to shew that in the mind of the Legislature the phrase has the wide general meaning alluded to.

Judgment

There is nothing in the point that the phrase "keeping or being an inmate or habitual frequenter of" is more commonly associated with the idea of bawdy houses, as the words may be read distributively, while the argument that the language is redundant cuts both ways, as from one point of view "disorderly house" is unnecessary, while from the other point of view "houses of ill-fame, or bawdy-houses" is unnecessary.

Applications dismissed.

FULL COURT

1907

Nov. 18.

BANK OF MONTREAL v. THOMSON

BANK OF MONTREAL v. THOMSON.

Practice—Special indorsement on writ—Order III., r. 6—Order XIV.

Where a party is placed in the position of having judgment signed against him summarily, he is entitled to have sufficient particulars to enable him to satisfy his mind whether he should pay or resist.

APPEAL from an order of FORIN, Co. J., sitting as a Local Judge of the Supreme Court, at Chambers, in Nelson, on the 1st of August, 1907.

Statement

Plaintiff made an application under Order XIV. for judgment for $2,056.48, amount alleged to be due upon an indorsement on a promissory note and a guaranty. The affidavit in support of the application referred only to the note. Particulars, being ordered, were delivered, but not verified, and they included the guaranty. They also shewed that certain moneys had been paid, which had been appropriated on account of the guaranty, and judgment was given for $1,382.04, and leave given to amend the indorsement on the writ by adding thereto the particulars delivered.

The appeal was argued at Vancouver on the 18th of November, 1907, before HUNTER, C. J., MORRISON and CLEMENT, JJ.

Argument

W. A. Macdonald, K.C., for appellant (defendant): We object to the indorsement as being insufficient and defective. Under Order XIV. plaintiff must shew strictly what he claims to enable the Court to give judgment. There is no verification of the claim by affidavit. Subsequently certain particulars are filed, which, instead of substantiating the claim made in the indorsement, shew an alleged indebtedness for a different and smaller amount. This is not permissible under Order XIV. He referred to An. Pr. 1907, p. 116; *Lloyd's Banking Co.* v. *Ogle* (1876), 1 Ex. D. 262; *Fruhauf* v. *Grosvenor and Company* (1892), 61 L.J., Q.B. 717; *Union Bank of Halifax* v. *Wurzburg & Co.* (1902), 9 B.C. 160.

He was stopped.

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Senkler, K.C., for respondent (plaintiff Bank), called upon: Under Order XIV. in the new Rules, it is now discretionary with the judge to give judgment, and he may amend at the hearing. Here the indorsement is correct under the rule, coupled with the particulars as delivered. The latter shews the amount due, and for which we received judgment. Defendant has never alleged by affidavit in reply that he is not indebted, and in the absence of such denial we are entitled to proceed.

HUNTER, C.J.

HUNTER, C.J.: This appeal must be allowed as the indorsement offends against the rule laid down by Cockburn, C.J., in *Walker* v. *Hicks* (1877), 3 Q.B.D. 8. It was incumbent on the plaintiff to give full particulars of all payments that had been made and of how they were appropriated, so as to enable the defendant to see whether he should pay or resist. The affidavit was also defective, as it did not verify the debt due under the guaranty.

Appeal allowed and unconditional leave given to defend.

MORRISON, J.
CLEMENT, J.

MORRISON and CLEMENT, JJ., concurred.

Order accordingly.

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WORLD P. & P. Co. v. VANCOUVER P. & P. Co.

THE WORLD PRINTING AND PUBLISHING COMPANY, LIMITED v. THE VANCOUVER PRINTING AND PUBLISHING COMPANY, LIMITED.

Practice—Costs—Successful party—Power to deprive him of costs—"Good cause"—Marginal rule 976—Distinction between the English and the British Columbia Rules.

In an action for libel between two newspapers, arising out of statements as to their respective circulation, the trial judge found on the facts that the statement made by the defendant newspaper was not established; but he came to the conclusion that there had been no special damage suffered by the plaintiff newspaper in consequence of the statement, and gave judgment dismissing the action without costs:—

Held, that under the rule governing costs in British Columbia, as distinguished from that in force in England, the trial judge must find good cause for depriving a successful party of his costs; and here there was not such good cause.

Statement

APPEAL from the judgment of CLEMENT, J., in an action tried before him at Vancouver on the 11th and 12th of July, 1907. The action arose out of a statement published in a number of issues of The Vancouver Daily Province, a newspaper the property of the defendant Company, to the effect that its "net, paid, month to month, year in and year out circulation" was "more than double that of any other evening paper in Vancouver." The two papers in question were the only evening publications in Vancouver. The learned trial judge, on the evidence, came to the conclusion that at the time of the publication of the article complained of, the circulation of The Province was not double that of The World, its only evening contemporary, but being of opinion that no damage had been proved, he dismissed the action without costs. Defendant Company appealed on the ground that it had been deprived of its costs without good cause.

Martin, K.C., and *Wintemute*, for plaintiff Company.
Davis, K.C., and *C. B. Macneill, K.C.*, for defendant Company.

CLEMENT, J.

CLEMENT, J.: I have had an opportunity to consult authori-

ties and to ponder over the principles involved in this very important case, and having come to a decided opinion, I can see nothing to be gained by reserving judgment. With regard to the question of fact whether the circulation of The Province is double that of The World or not, objection is taken that the facts proved before me are not legally admissible evidence. I do not find it necessary to come to a decided opinion upon that point. If I may say so, off hand, I think the facts have been proved, and subject to the doubt, I find as a fact that at the time of the publication of the article complained of, the circulation of The Province was not double that of The World.

Upon the legal question I have come to a clear opinion that the action is not maintainable. The ordinary rule of law is, that in order to entitle a plaintiff to succeed damage must be proved. There are certain exceptions. Take for instance an action of slander—there are well known exceptions where special damage need not be alleged or proved. In a case of libel, the law, owing to the permanent character the libel takes, either in writing or pictures or something of that sort, infers that damage will follow, and absolves the plaintiff from the necessity of proving special damage. This case, however, I think, is clearly not a case of libel. Upon reading the statement of claim I was inclined to think that the plaintiff was putting forward this case: that by naming the figures of the respective circulations and coupling that of The World with that of The Province was simply politely saying that The World made a lying statement as to its circulation. If that had been the case I should certainly have held that an action for libel would lie; but the proof is not upon that line. Mr. *Martin* has laid down the broad proposition that for one newspaper to say that its circulation is double that of another paper, and, conversely that the circulation of that other paper is less than half that of the paper publishing the article, constitutes a libel if untrue. That is what struck me as peculiar at the very opening of this case. It seemed to me that the ordinary position of the parties in a libel action was reversed, and the plaintiff was taking upon himself the burden of proving the falsity of the statement complained of.

As I take it, the basis of an action of defamation is an attack

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upon character or conduct. I do not think in this case there is an attack upon character or conduct. It is too late in the day now, I think, to say that in that respect a corporation is not exactly in the same position as an individual. A corporation may have conduct and character and may pursue a certain line of conduct, and in respect of that may be libelled or slandered. However, as I say, this is a case in which I think there is as the text books say, *injuria sine damno.* A wrong may be done—a moral wrong—in the publication of an untrue statement with regard to the circulation of these two papers; but unless special damage is alleged and proved, I think no actionable wrong has been done. The issue of fact being decided in favour of The World and the issue of law in favour of The Province, I think justice will be done by dismissing the action without costs. [See reporter's note in *Attorney-General* v. *Garner* (1907), 76 L.J., K.B. 965 at p. 969.]

CLEMENT, J.

The appeal was argued at Vancouver on the 22nd and 25th of November, 1907, before HUNTER, C.J., IRVING and MORRISON, JJ.

Argument

Davis, K.C., for appellant (defendant Company): There is no evidence properly admissible which would warrant the judge finding the facts against us, and there is no finding of facts against us. And even if the evidence were properly admissible, and even if the trial judge did find that our circulation was not double that of the plaintiff newspaper that would not be "good cause" on which he would be justified in depriving us of our costs. The learned judge was probably proceeding upon *Lyne* v. *Nicholls* (1906), 23 T.L.R. 86. See also *Bostock* v. *Ramsey Urban Council* (1900), 2 Q.B. 616 at p. 627. The general rule is in *Huxley* v. *West London Extension Railway Co.* (1889), 14 App. Cas. 26. There is considerable distinction between depriving a successful plaintiff of his costs and a successful defendant; the former is the instigator of the action: the latter is forced into Court: see *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501. As to event, see *Field* v. *Great Northern Railway Co.* (1878), 3 Ex. D. 261; *Myers* v. *Defries* (1879), 5 Ex. D. 15 and 180; *Lund* v. *Campbell* (1885), 14 Q.B.D. 821; *Hawke* v. *Brear* (1885), *ib.*, 841. As to "good cause" see *Jones*

v. *Curling* (1884), 13 Q.B.D. 262; *Argent* v. *Donigan* (1892), 8 T.L.R. 432.

On the point of improper motive in publishing the statement complained of, he cited *Forster* v. *Farquhar* (1893), 1 Q.B. 564; *Farquhar* v. *Robertson* (1889), 13 Pr. 164, and *Blank* v. *Footman, Pretty & Co.* (1888), 39 Ch. D. 678 at p. 684.

The only issue here is whether or not such a libel has been committed as to make a maintainable cause of action. Here the costs have never been taxed, and until a party knows what his costs are, how can he say he is deprived of them?

Martin, K.C. (*Wintemute*, with him), for respondent (plaintiff) Company: The Court cannot assume jurisdiction by referring the matter to the Registrar to tax the costs and in that way get the appellants into Court. All there is to be considered here is the question whether there was or was not any "good cause" to justify the learned trial judge in coming to the decision he did as to costs. We submit there is no appeal from his finding; it is the same here as in an appeal from the verdict of a jury. He cited *Harnett* v. *Vise* (1880), 5 Ex. D. 307; *Bostock* v. *Ramsey Urban Council* (1900), 2 Q.B. 616; *Estcourt* v. *Estcourt Hop Essence Co.* (1875), 10 Chy. App. 276; *Sutcliffe* v. *Smith* (1886), 2 T.L.R. 881; *Argent* v. *Donigan* (1892), 8 T.L.R. 432; *O'Connor* v. *The Star Newspaper Company, Limited* (1893), 68 L.T.N.S. 146.

Argument

Davis, in reply.

The judgment of the Court was delivered by

HUNTER, C.J.: The Court is agreed that this appeal should be allowed. Whatever may be said in support of this judgment under the English procedure as to costs, it cannot be maintained under the rules as they stand in our own Court. I think the learned judge below overlooked the fact that our law as to costs is different from the English law. Under the English rule he would have had a very large discretion, but under our rule, to deprive the successful litigant of costs he must find good cause. So far as I am able to observe from the learned judge's reasons, he not only did not find that there was good cause, but evidently thought there was not good cause, but bases his judgment on the

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fact that the plaintiff was right on the facts and the defendant on the law. In this case there was simply a controversy between two newspapers as to which of them has the greater circulation and the statement made by The Province was not such as to justify litigation, at any rate in the absence of proof of special damage. If we were to hold that there existed good cause in this case, it would not be difficult to find good cause in any case; in other words it would be easy to render the rule a dead letter.

Appeal allowed.

HUNTER, C.J.
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Dec. 18.
REX v. McHUGH

REX v. McHUGH.

Criminal law—Jurisdiction of Indian agent, also acting as Justice of the Peace—Committal for offences under the Indian Act.

An Indian agent, acting in a magisterial capacity, in committing an accused person for an offence under the Indian Act, must shew on the warrant of commitment, the district in which such Indian agent is acting.

APPLICATION for a writ of *habeas corpus* on the ground that no jurisdiction was disclosed on the face of the warrant. Heard before HUNTER, C.J., at Victoria, on the 18th of December, 1907.

Statement

The prisoner was confined in the Provincial gaol at Victoria under a warrant dated the 10th of December, 1907, by W. M. Halliday, a Justice of the Peace for the County of Nanaimo and the warrant recited the fact that the prisoner was on the said date "convicted before the undersigned, one of His Majesty's Justices of the Peace in and for the said District or County of Nanaimo, for that he the said Michael McHugh did at Campbell River in the County of Nanaimo on Sunday, December the eighth instant, unlawfully supply an intoxicant to wit: gin to an Indian of the Salmon River Tribe, ..." The warrant was signed:

"W. M. Halliday,
"J. P., Indian Agent."

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Lowe (*Moresby & O'Reilly*), for the motion, cited *Regina* v. *Ackerman* (1883), 1 B.C. (Pt. 1), 255; 2 Hawk. P.C., Cap. 16, Sec. 13; 2 Hale, P.C. 122; *In re Peerless* (1841), 1 Q.B. 143; *Christie* v. *Unwin* (1840), 11 A. & E. 373 at pp. 378-9; *Johnston* v. *O'Reilly* (1906), 12 C.C.C. 218; *Regina* v. *McAuley* (1887), 14 Ont. 643. The justice as such could not convict the prisoner, because under section 135 of the Indian Act, Cap. 81, R.S.C., only two justices have jurisdiction; and if the warrant is to be upheld the same should expressly recite the fact of the conviction of the accused before the functionary alleging to have made the warrant as an Indian Agent—an Indian Agent being under the Act equal to two justices. But there is the further ground that, even assuming that the warrant is otherwise good by reason of the words "Indian Agent" being added, and that the justice had convicted the accused in that capacity, still he was bound to specify his jurisdiction by shewing for what district he acted as Indian Agent.

Argument

Helmcken, K.C., contra.

HUNTER, C.J.: Inferior Courts must shew their jurisdiction on the face of their warrants. In this case the mere addition of the words "Indian Agent" to the signature was not sufficient, but the justice should have specified in the body of the commitment the district for which he was Indian Agent, as it is only by virtue of his office as Indian Agent that he had jurisdiction.

Judgment

Application granted.

FULL COURT
1907
Nov. 28.

W. D. HOFIUS AND COMPANY v. THE LENORA, MOUNT SICKER COPPER MINING COMPANY, LIMITED *ET AL.*

HOFIUS & Co. *v.* LENORA

Practice—Dismissal of action as frivolous and vexatious—Application to make party plaintiff a company already party defendant—Fraud, allegation of.

On an application to dismiss an action as frivolous or vexatious, if the plaintiff does not answer the affidavits filed in support, they must be taken as true.

APPEAL from an order made by HUNTER, C.J., at Chambers in Victoria, on the 23rd of January, 1906, refusing an application for an order dismissing the plaintiffs' action as frivolous and vexatious.

Statement

In November, 1905, the defendant Company borrowed money from one Thorne, and gave a mortgage to secure repayment. Certain payments had been made on account of this loan, when the Company applied to the defendants Bryden and Tupper, trustees of the Dunsmuir estate, for a loan of $55,000, who, instead of taking a mortgage direct, took an assignment of the Thorne mortgage, which it was intended should be kept alive as security. A creditor of the Company attacked the transaction, and failed. Then the plaintiffs commenced suit, raising the same issues, namely, that the Thorne mortgage was fully paid off. Before delivery of the statement of claim, defendants Bryden and Tupper applied to have the action dismissed, on the ground that such an action could only be brought by the Company, whereas the Company was a defendant. Plaintiffs then offered to amend by making the Company plaintiff, and were given seven weeks to obtain leave to do so from the winding up judge, or in default, the action be dismissed. They did not obtain this leave, but filed a statement of claim, in which fraud was alleged. Defendants filed affidavits alleging *bona fide* advance of the money in question, but HUNTER, C.J., before whom the application was argued, dismissed same and allowed the matter to go down to trial. Plaintiffs' application to add the Lenora Company as

plaintiff, was also dismissed. Defendants Bryden and Tupper appealed.

The appeal was argued at Vancouver on the 28th of November, 1907, before IRVING, MORRISON and CLEMENT, JJ.

Sir C. H. Tupper, K.C., and *Griffin*, for appellants: Plaintiffs filed no evidence in support of their application, and did not cross-examine defendants on their affidavit. Unless the judge is satisfied that the case can be made a triable one, and if the plaintiffs have pinned their faith on one point, which they have abandoned, then we are entitled *ex debito* to a dismissal of the action.

He cited and referred to An. Pr. 1907, p. 312; *Dawkins* v. *Prince Edward of Saxe-Weimar* (1876), 1 Q.B.D. 499; *Republic of Peru* v. *Peruvian Guana Company* (1887), 36 Ch. D. 489; *Lawrance* v. *Norreys* (1890), 15 App. Cas. 210; *Willis* v. *Earl Howe* (1893), 2 Ch. 545 at pp. 551 and 554; *Fletcher* v. *Bethom* (1893), 41 W.R. 621; *Remmington* v. *Scoles* (1897), 2 Ch. 1; *The Manar* (1903), 72 L.J., P. 64; *Salaman* v. *Secretary of State for India* (1906), 75 L.J., K.B. 419.

Argument

Whiteside, for respondents (plaintiffs): *Cooper* v. *Yorkshire Guarantee Corporation* (1904), 11 B.C. 97, is conclusive here. Evidently the learned Chief Justice was not of the impression that the action was obviously unsustainable: see *Davy* v. *Garrett* (1878), 7 Ch. D. 473.

[MORRISON, J.: How do you distinguish *Lawrance* v. *Norreys?*]

We are not bound to defend the action by affidavit on an application of this kind.

Tupper, in reply: *Cooper* v. *Yorkshire Guarantee Corporation*, *supra*, is not applicable here; an inferential allegation of fraud is not permissible.

IRVING, J.: I think I am bound by the decision in *Cooper* v. *Yorkshire Guarantee Corporation* (*supra*), and for that reason would dismiss the appeal.

IRVING, J.

MORRISON, J.: Speaking for myself, I think the case of *Lawrance* v. *Norreys* (*supra*), bears a striking similarity to this, and

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the language at p. 219 in the report of that case is very appropriate here. *Cooper* v. *Yorkshire Guarantee Corporation* is not quite analogous. I would allow the appeal and dismiss the action as against these appellants.

CLEMENT, J.: I agree with my brother MORRISON. According to the authorities cited, affidavits are admissible on such an application as this. If so, they must be answered or taken as true. Here there is no affidavit even of belief on the part of the plaintiff in the case which he has set up in his statement of claim.

Appeal allowed, Irving, J., dissenting.

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LEWIS AND SILLS v. HUGHES

LEWIS AND SILLS v. HUGHES.

Vendor and purchaser—Contract for sale of land—Option—Sufficient description—Parol evidence—Specific performance—Statute of Frauds.

A written agreement to sell "lots 16, 17, block 196, district lots . . ." must be taken to refer to land belonging to the vendor, and is a sufficient description within the Statute of Frauds to make extrinsic evidence admissible for the purpose of identifying the land and shewing the subject-matter of the negotiations between the parties.

Plant v. *Bourne* (1897), 2 Ch. 281, followed.

Statement

APPEAL from the judgment of MORRISON, J., in an action tried before him at Vancouver on the 7th of February, 1906. The facts sufficiently appear in the reasons for judgment.

Martin, K.C., and *Baxter*, for plaintiffs.
Cowan, K.C., and *Reid*, for defendant.

22nd February, 1906.

MORRISON, J.

MORRISON, J.: In this action the plaintiffs claim specific performance of an alleged agreement for sale of certain lots in

the City of Vancouver, given by G. A. Barrett & Co., who are sought to be held as agents of the defendant for that purpose.

G. A. Barrett & Co. are one of the army of enterprising real estate agents in the City of Vancouver and the defendant is the owner of the property in question who listed it with Barrett & Co. for sale. On the 23rd of October last, G. A. Barrett of that firm gave the plaintiffs an option in the form and words following:

"Vancouver, B.C., Oct. 23rd, 1905.

"Received from Lewis & Sills the sum of twenty-five dollars payment in part for agreement of sale to purchase lots 16, 17, block 196, district lots. Full price $2,000. Terms $500 cash balance half yearly payments of $500 with interest at 7 per cent. Cost of Deed to be $5.00. Option good till November 4th 1905.

"G. A. Barrett & Co."

This was on Monday. Three or four days afterwards Barrett called at the plaintiffs' place of business and a conversation took place between him and the plaintiff Lewis about which there is conflicting evidence, but, substantially, it would appear that Lewis chided him with selling him "shop-worn goods," meaning thereby that the lots were not suitable for the purposes for which he had at the time of purchase intended, and that he had acquired other lots adjoining which suited him better. This circumstance was urged upon me on behalf of the defendant as being an abandonment of the contract. With this contention I do not agree. However, it seems that on the Saturday following, that is the 28th of October, Barrett for the first time after giving the option in question saw the defendant Hughes, who for the first time knew of the option, to which he says he objected. On the 2nd of November, the plaintiff Sills went to Barrett & Co's office prepared to complete the purchase pursuant to the option, when Barrett assured him he would complete the sale. Barrett after this again came to the plaintiffs' place of business and informed them that he had sold the lots in question. On the 4th of November plaintiff Sills made a tender pursuant to the option to Barrett.

On the 3rd of November the plaintiffs' solicitor called on the defendant Hughes, exhibited the option from Barrett & Co., and told him Barrett & Co. had sold the lots to the plaintiffs, in

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reply to which Hughes said Barrett was his agent; to see him, as he had everything to do with the matter. The solicitor saw defendant Hughes again on the 7th of November and made a tender pursuant to agreement. In reply Hughes told him that Barrett had full authority to do everything and declined to sign the agreement or take the money. Hughes in his examination for discovery admitted that Barrett was his agent.

Hughes did not at any of those interviews or otherwise inform the plaintiffs that he had repudiated what Barrett had done. He stoutly denies that Barrett & Co. were his agents for the sale of the property. On cross-examination he admitted he did not know much about the real estate market and that he relied on Barrett & Co., who, he said, are competent, live real estate men. Barrett likewise denies that he had any direct authority from Hughes to sell, and his explanation as to why he had not inserted in the option that it was given subject to approval by his principal is not consistent; in fact quite unsatisfactory.

It is significant that Barrett alleges that he had told the plaintiffs the bargain was off before Hughes' alleged repudiation. In patching his evidence together with that of Lewis, it would appear that after the first conversation at plaintiffs' store Barrett immediately sold the lots, finding that evidently there was a sharp rise in values since the date of his option. Then when Hughes was seen on Saturday following it seems to be most consistent with the whole evidence that that circumstance was the real cause of dissatisfaction rather than the price originally arranged in the option, and that the first conversation with plaintiffs in their store was seized upon by both defendant and Barrett as a pretext to get away from their agreement.

Having regard to the evidence, I find there was no abandonment of the option of the plaintiffs. That Barrett & Co. were the agents of the defendant Hughes for the purpose of effecting a sale without submitting the agreement for approval to the defendant.

The evidence let in to describe particularly and ascertain the property dealt with, taken together with the option, constitute a valid and binding agreement which should be specifically

performed: *Borland* v. *Coote* (1904), 10 B.C. 493, 35 S.C.R. 282. Judgment for the plaintiff.

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The appeal was argued at Vancouver on the 27th and 28th of April, 1906, before HUNTER, C.J., IRVING and DUFF, JJ.

Cowan, K.C., and *Reid*, for appellants.
Martin, K.C., and *McLellan*, for respondents.

Cur. adv. vult.

On the 31st of July the judgment of the Court was delivered by

DUFF, J.: I see no ground for disturbing the learned trial judge's finding that Barrett & Co. were the agents for the defendant for the purpose of selling the property in dispute, and consequently the only question requiring discussion is whether the memorandum mentioned in the pleadings satisfies the requirements of the Statute of Frauds.

The point is, can the memorandum be so read that the description of the property referred to in it can be applied to lots 16 and 17, block 106, district lot 196, City of Vancouver? The description contained in the memorandum (lots 16 and 17, block 106) is such that the plaintiffs are obliged to invoke the aid of extrinsic evidence for the purpose of applying it to the property described.

Judgment

In such a case, it is important to keep in view the principle governing the admissibility of extrinsic evidence. "It must be steadily borne in mind that the Statute of Frauds was not enacted for cases where the parties, either in person or by agents, have signed a written contract, for in those cases the common law affords quite as sufficient a guarantee against frauds and perjuries as is provided by the statute. The intent of the statute was to prevent the enforcement of *parol* contracts . . . . unless the signature of the defendant to *some* written *note* or *memorandum* of the agreement could be shewn. The existence of the note or memorandum presupposes an antecedent contract by parol, of which the writing is a note or memorandum": Benjamin on Sales, 5th Ed., 233. The question then is,

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Is there a sufficient note or memorandum of the oral agreement upon which the action is based? In this case, that is to say, is there a sufficient note or memorandum of an oral agreement on the part of the defendant to sell to the plaintiff the property described in the pleadings? We must therefore ascertain the meaning of the language used in the memorandum. We do not wish to learn what the parties agreed to orally; or what the parties intended to say in the memorandum; or what they understood it to mean. The question is not what they meant to say, but what is the meaning of that which they did. If the language in the memorandum—construed with the assistance of such aids as the law permits us to use for such a purpose—discloses an agreement of the character sued upon, it is sufficient—not otherwise. We cannot, for example, regard the oral admissions of the party given in evidence, or in other circumstances.

The rule is thus stated by Lord Campbell in *Macdonald* v. *Longbottom* (1859), 1 El. & El. 977, at p. 983:

"I am of opinion that, when there is a contract for the sale of a specific subject-matter, oral evidence may be received for the purpose of shewing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract. Now Stewart, the defendant's agent, had a conversation before the contract with one of the plaintiffs, who stated what wool he had on his own farm, and what he had bought from other farms. The two together constituted 'his wool'; and, with the knowledge of these facts, the defendant contracts to buy 'your wool.' There cannot be the slightest objection to the admission of evidence of this previous conversation, which neither alters nor adds to the written contract, but merely enables us to ascertain what was the subject-matter referred to therein."

Judgment

"You cannot offer evidence to prove intention as an independent fact": *Rossiter* v. *Miller* (1878), 3 App. Cas. 1,124 at p. 1,153, per Lord Blackburn, but "extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about": *Bank of New Zealand* v. *Simpson* (1900), A.C. 182 at p. 187. In the last-mentioned case, Lord Davey, in delivering the judgment of the Judicial Committee of the Privy Council, quoted from Blackburn's Contract of Sale, the following passage, p. 188:

"The general rule seems to be that all facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to shew that the writer intended to use the words bearing a particular sense are to be rejected."

In this case it is conceded that Barrett & Co., who were agents for the sale of real estate in the City of Vancouver, had this property on their lists for the purpose of procuring a purchaser. Barrett says: "These lots were left in my hands to secure a purchaser." And it is further admitted that Barrett stated to Lewis that these lots were in his hands for the purpose mentioned.

It is stated by Lewis, and is not contradicted, that some lots were pointed out to him by Barrett. He says:

"The lots, I think they suited us. He pointed them out to me, I knew pretty well where they were. We wanted water front lots."

I think the fair meaning of these words, reading them in view of the evidence given generally throughout the trial, is that Barrett pointed out to Lewis the lots referred to in the pleadings, and not simply that he pointed out the lots they were negotiating about. I am not sure that it matters much, however, which of these constructions is to be put upon these words, because if you take together the facts that the lots described in the pleadings were in Barrett's hands to procure a purchaser; that Barrett informed Lewis of this and pointed out some lots to Lewis; and almost immediately after the memorandum referred to in the pleadings was executed; the inference, I think, is that the lots which were pointed out were the lots described in the pleadings.

Judgment

The combined effect of the evidence of Barrett and Lewis clearly is, to my mind, that the lots described in the pleadings were the lots about which they were negotiating. It follows, I think, from the rule as stated in the authorities which I have quoted, that these circumstances may be taken into consideration in ascertaining the meaning of and in applying the description contained in the memorandum. We are not at liberty, however, to consider the question as *res nova*; the judgments of the Lords Justices in *Plant* v. *Bourne* (1897), 2 Ch. 281 at p. 286 *et seq.*, are conclusive that the Court must consider these circum-

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stances in construing a document like that before us. At p. 288, Lord Lindley uses this language:

"Now is this or is it not, when looked at, a sufficient description to let in this parol evidence to shew what the agreement referred to? That there was an agreement is plain enough. What is it that the agreement refers to? The answer to that is, it was the twenty-four acres of freehold land which they were talking about. Evidence to shew that is admissible; and if that is once admitted, there is an end of the case."

Lord Lindley's language may be thus paraphrased in this case—where it is admitted that these circumstances, to which I have adverted, may be looked at, it is not arguable that the description in the memorandum does not apply to the property described in the statement of claim.

Appeal dismissed.

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STAR MINING AND MILLING COMPANY, LIMITED LIABILITY v. BYRON N. WHITE COMPANY (FOREIGN).

Mining law—Extra-lateral rights—Trespass workings—Continuous or faulted veins—Conflicting theories.
Evidence—Inspection—Onus.

In a contest to determine the question as to whether a particular vein, called the Star vein, was continuous, or whether it was faulted by another vein styled the Black or Barren Fissure, the trial judge, after inspection of the mine, in the presence of an engineer chosen by each party, ordered certain work to be done with a view to ascertaining which theory was correct.

On inspection of this work the trial judge found that the facts that in three different places identically the same material was found in the Star vein and in the Fissure; that ore was found in the first 280 feet of the Fissure of the same character as that in the Star vein, and distributed over its entire width; that experiments destroyed the theory of junction or cut-off in all slopes and levels in the mine where it was alleged that such existed; that in all pits dug on the apex the same vein matter was visible; that assay ore was found in a pit on

the apex corresponding to the middle of the barren vein; that the defendants had followed up their vein into and along the Black Fissure for over 1,000 feet without cross-cutting were sufficient to warrant the conclusion that the two veins were continuous in fact, and that one vein did not fault the other; and outweighed the circumstance that the Fissure was barren for about 1,000 feet, and that it presented a shattered and contorted appearance in making a sharp curve around a dyke of porphyry.

Plaintiffs applied for an order directing further work be done on the ground that enough had not been done to establish their theory. This was refused, and plaintiffs appealed. The appeal was allowed, and further work directed to be done:—

Held, on appeal (MORRISON, J., dissenting), on the evidence furnished by the further work done under direction of the Full Court, that the defendant Company had failed to discharge the onus cast upon it to establish the identity and continuity of the vein in question.

Statement

APPEAL from the decision of HUNTER, C.J., reported in (1905) 12 B.C. 162.

The appeal was argued at Victoria from the 8th to the 23rd of April, 1907, before IRVING, MARTIN and MORRISON, JJ.

Davis, K.C., and *S. S. Taylor, K.C.*, for appellants (plaintiffs).
Bodwell, K.C., and *Lennie*, for respondents (defendants).

Cur. adv. vult.

23rd November, 1907.

IRVING, J.: This is, in one sense, an appeal from the Chief Justice, but owing to the turn events took after he had delivered his judgment, we are called upon to decide the case upon evidence not adduced before him.

The plaintiffs, who are the owners of the Rabbit Paw and Heber Fraction mineral claims, issued a writ on the 31st of July, 1901, to restrain the defendants from trespassing on their claims, and for damages.

IRVING, J.

The defendants justified the trespass complained of under the authority of section 31 of the Mineral Act, 1891, which conferred upon them certain extra-lateral rights in respect of a vein which extended through their two claims called the Slocan Star and Silversmith respectively.

The plaintiffs' case, as put forward at the trial held in February, 1904, was that this vein in respect of which the defendants

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claimed their extra-lateral rights, had been "faulted" by a fissure vein near the westerly end line of the Slocan Star mine, and that the defendants' vein instead of being a continuous vein consisted of two separate and distinct veins, *viz.:* the Slocan Star vein, broken as already stated at the westerly end of the Slocan Star claim and the Silversmith vein; the connecting or intermediate portion running north and south, they said, was a fault fissure, which from the colour of its filling they called the Black Fissure.

There is also another section of the defendants' alleged vein to be mentioned, *viz.:* that portion lying to the west of the so-called Black Fissure, and connecting it with the Silversmith vein. This portion, the plaintiffs say, is not vein matter, nor mineralized in any way.

The trespass complained of was committed in June, 1900, and consisted of taking ore from the stopes to the west of the end line of the Slocan Star mineral claim.

The defendants alleged in evidence that they were not aware that they had gone beyond their end line until October, 1900. At that date little or no work had been done on the Silversmith claim; on the Slocan Star claim the apex pits had not been continued to the north-west beyond pit 19; levels 1, 2 and 3 were as they are to-day; No. 4 tunnel had not been run into the Silversmith, nor had the upraise to pit 19 on the surface from No. 4 been run. No. 5 level had only reached a short distance into the Heber Fraction, say about station 21, and the winze was being sunk from the No. 5 level below, for prospecting purposes.

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When therefore, the Slocan Star people were informed that they were outside of the westerly end line of the Slocan Star in an ore-bearing vicinity, we can assume that there was some consideration given as to how this apparent trespass was to be justified. The statute conferring extra-lateral rights which would justify them going outside of their side lines gave them no excuse for going beyond the end line of their claim. Their justification must therefore be sought in shewing that they were following down on the dip of the Silversmith vein through the side lines of that claim; with a view to establishing this connec-

tion they, in the spring of 1901, commenced to trace the outcrop by digging the surface pits from pit 19 on, in a north-westerly direction so as to connect up, on the surface, the Slocan Star vein with the Silversmith vein, and in June they started to run No. 4 Silversmith tunnel in from station 48 in a south-westerly direction, and they continued to drift on their No. 5 level so as to connect the two claims underground.

At the date of the issue of the writ, 31st July, 1901, No. 4 level of the Star had reached station 18; the face of No. 5 level was at 21, No. 4 tunnel on the Silversmith would be in only some 100 feet or so. Looking at the case, as of that date, I cannot see that the defendants had at that time any evidence upon which they could substantiate the defence which they subsequently set up, *viz.:* that they as owners of the Silversmith mineral claim were entitled under the extra-lateral rights given to that claim by section 31, to the veins or lodes in the Heber Fraction lying to the west of the Slocan Star end line. I think this is a fact of some importance, because work done after writ issued or after trespass committed, should be scanned with some degree of suspicion. I do not want to press this principle too far, but in considering an argument put forward by the defendants' leading exponent, Mr. Elmendorf, in support of his contention that the Slocan Star was a continuous vein, *viz.:* that the best proof of continuity was that the ore bodies in the Silversmith have been reached by the miners running No. 5 drift without any connection from above to guide them and no knowledge of where the ore existed (at 52-3 on No. 5 Silversmith), notwithstanding the very irregularity of form of the drift itself, one should remember that although the workings in a mine (Lindley on Mines, 2nd Ed., p. 572, Sec. 318), made in mining operations and not in support of litigation, are generally important as evidence of any facts which may be inferred from them; that inference cannot be drawn with confidence where the work has been done after litigation for purposes of the action.

IRVING, J.

After the writ was issued there was an application for an injunction and some affidavits filed. Those proceedings have been referred to in connection with Mr. Oscar White's credibility. As that matter will be dealt with later, it will be sufficient to

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state now, that in resisting that application, he (Oscar White) on the 31st of August, 1901, made an affidavit that the total amount of ore taken from the ground claimed by the plaintiffs did not exceed the net value of $500; and that Byron White in an affidavit of same date, said the amount of ore excavated in all from the ground of the Rabbit Paw and Heber Fraction amounted to, in his belief, the sum of $500. This statement by Byron White, as to value, was based on information furnished by Oscar White.

In the autumn of that year the defendants discovered considerable ore in No. 4 Silversmith, about 140 feet from the portal, between stations 11 and 13. At that time the drift which was being run in a northerly direction from the Heber Fraction had reached station 29, on the No. 5 level.

The pleadings closed on the 25th of November, 1901. They were of the most general character and gave no indication of the theory that the plaintiffs intended to set up at the trial, but, during the examination of Mr. Harris, for discovery, in October, 1903, before trial, an indication of the plaintiffs' line of attack was given. He then expressed an opinion that the Slocan Star vein, instead of turning to the north, continued on in a straight line across the porphyry dyke, and that the Rabbit Paw claim had in this way caught the Slocan Star vein. According to his theory the Silversmith vein was an independent parallel vein some 850 feet to the north. After the plaintiffs' experts had obtained inspection of the mine (*viz.:* on 4th February, 1904), the theory that the Slocan Star vein continued straight on westerly was abandoned, and at the trial which opened on the 12th of February, 1904, the new theory of a fault fissure occurring at the bend was set up.

IRVING, J.

Their theory is that the defendants have by turning the levels run on the Slocan Star vein proper into the Black Fissure at the south turn, and at the north by following non-ore bearing planes and the stratification of country rock have given to their No. 5 level an appearance of continuity on ore or in vein matter between mineralized walls from east to west where in fact there is no real continuity.

The plaintiffs say that the wall of material in which the defend-

ants ran their drift between the winze and station B on the 5th level is the filling of the Black Fissure.

On the other hand, the defendants say that the drift on No. 5 level between the winze and B is in their vein, that the Slocan Star vein continues from the winze to B and there turns. The filling they say is vein matter, and that its crushed appearance is the result of movement in the vein, but the movement has not interfered with the continuity of the vein which they claim they have been following in their workings.

The defendants contend that there may be a fault in the vein, but that a fault in the vein does not necessarily prevent the vein from being continuous.

When the trial opened on the 12th of February, 1904, the defendants (upon whom the onus of proof is) began, and gave evidence of the stopes in question being on the dip of their vein, and of the continuity of their vein; but the pleadings being vague, Mr. *Bodwell* found some difficulty in dealing with his witnesses on re-examination.

He examined on behalf of the defendants Mr. Bruce White, the first superintendent of the defendants' mine; Mr. Oscar White, who succeeded Mr. Bruce White in October, 1898, and who was superintendent when the trespass complained of was committed; Mr. Cavanagh, a relative of the White's, and an assistant in the defendants' mine; Isaacson and Fox, two miners employed in the mine; Mr. Drewry, a land surveyor in the employ of the defendant Company; Mr. Twigg, another land surveyor; two foreign experts, Mr. Elmendorf, retained in September, 1903, and Mr. Parks, retained in September, 1901; and two local mine managers of experience in the Slocan district, Messrs. Sharp and Davys. With the exception of Mr. Twigg and the two local mine managers, the others were interested, either by direct pecuniary interest or sympathy in the success of the defendants' case.

The evidence of the defendants was directed to shewing the unbroken continuity of the vein from Sandon Creek to the westerly workings in the Silversmith claim.

They represented that the hanging wall of the vein could be followed on No. 5 level very plainly all through—Elmendorf, however, was more guarded, that coming north they were

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following their own vein; that their vein turns to the west at B; that at point C the hanging wall crosses the drift from the left or south side to the north right-hand side and comes out at D, and that their drift continues all the way from E to station 52 between mineralized walls.

The plaintiffs' contention was that the Slocan Star vein was cut off by the Black Fissure, which extended to the south and beyond the hanging wall of the Slocan Star vein, and that it was the Black Fissure that the defendants were following; that the Black Fissure does not turn at B, but continues on to X; that the material difference from the country rock that the defendants saw in running from B to C was Black Fissure material which they had to break through; and that there is no connection on ore between B and 52; and that the walls followed by them from B to 52 were mere non-mineralized planes.

On the opening of the plaintiffs' case, counsel stated that he would shew that from the winze or turn at the south end of No. 5 level to X at the extreme north, there existed a separate and distinct fissure, separate from the fissure containing the Slocan Star vein and separate from the fissure containing the Silversmith vein. It was not an ore-bearing fissure, but contained a filling having for its main constituent a soft crushed slate, of dark colour, on account of which they had designated it the Black Fissure; that in this fissure there was a 1,200 foot barren stretch; that the line run by the defendants as their vein was formed by uniting these three fissures into one; that this union brought about the peculiar contortions shewn in the northern and western parts of their level; that the defendants had neither walls nor ore to establish the continuity of their vein.

IRVING, J.

Then, after the cross-examination of Mr. Sizer had proceeded a certain distance on the 28th of February, counsel for the plaintiffs referring to the issue of fact which had been gradually developed during the trial, and fully stated by Mr. Sizer, proposed that certain work should be done and that that work should determine the issue. This was agreed to in a more or less indefinite way, but the examination of witnesses proceeded. Like the evidence on behalf of the defendants it was, in the main, the testimony of experts and persons interested in the result and at

the close of it, the judge seems to have felt that he was not then in a position to give a decision and that therefore some further work was necessary. It was accordingly arranged that some work should be done under the superintendence of a Mr. Parish, but owing to illness, Mr. Parish had to resign and so matters remained at a standstill until December, 1904, when the Chief Justice himself, accompanied by the leading experts on each side, paid a three days' visit to the mine. This inspection by the judge accompanied by the experts, I see by the decree, was a consent arrangement. I think it is to be regretted that counsel did not also attend, for, instead of adhering to the plan originally agreed upon, *viz.:* that work should be done to test the soundness of Mr. Sizer's contention that there existed three separate fissures, the Chief Justice thought it would be sufficient to enable him to reach a conclusion if a drift was run from C to a point 27 feet east of D, or as it has been called D minus 27, that is, instead of testing Sizer's Black Fissure theory, which test required a drift through the Star hanging wall with cross-cuts at the south and a cross-cut at X (two experiments which Mr. Sizer said would either prove or disprove his theory), a wholly different piece of work was directed to be done. As to this work and why it was ordered at this particular place I shall refer later. To the substitution of this one piece of work for that originally agreed upon, objection was taken at once by the plaintiffs. In January, 1905, while the new work, *i.e.*, the drift from C to 27D was being run, an application for other work was made and that application was renewed in May, 1905, about which date the Chief Justice, accompanied this time by Mr. Oscar White, the defendants' manager, and Mr. Fowler, an expert retained by the plaintiffs, made a second examination of the mine. To both of these applications there was a refusal, with the result that on the 25th of July, 1905, when the case came on again for what has been called the second trial, the work, for the doing of which the hearing in February, 1904, had been adjourned, was still undone. Once more the plaintiffs applied for further experimental work, but this was not granted and the trial proceeded and judgment reserved.

At the close of the trial the same application was made for

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more experimental work, with the same result; and in the end judgment was given in favour of the defendants (12 B.C. 162).

The learned Chief Justice proceeded on the ground that the 5th level shews that the vein was continuous, and that between C and D27 there was a clearly defined hanging wall and the characteristic vein filling which was to be found in the Slocan Star and Silversmith was to be found in the cross-cut run between those points by his direction in December, 1904.

From that judgment an appeal was taken to this Court and at the same time an appeal from the interlocutory decision refusing to allow the experimental work to be done was also taken. After argument, this Court came to the conclusion that the plaintiffs should have been allowed to have the work done which they contended was necessary for the proper presentation of their case, and we therefore set aside the judgment of the learned Chief Justice and directed the work to be done, at the places mentioned by Mr. Sizer in his examination in February, 1904.

The parties to the action selected a Mr. Zwicky as a proper person to have the management of the work and under him it was proceeded with and finished about February, 1907, and the case came on before us in April last.

Some question has been made as to the convenience of the course adopted. Perhaps it has thrown on this Court a greater amount of work than we expected, but it seems to me to have been the only satisfactory solution of the problem we have had to deal with, and as for precedent, we have our own action in *Hopper* v. *Dunsmuir*, and also the *Stanley Park Case*. And I see that the Judicial Committee of the Privy Council has, instead of remitting a case to the Court at Shanghai, allowed evidence (taken it is true on commission), to be presented to them in the first instance: see *Bank of China, &c.* v. *American Trading Co.* (1894), A.C. 271.

IRVING, J.

Looking back now, I feel that we would have experienced the very greatest difficulty in following the complicated details of this case, if we had proceeded in the ordinary way.

Before proceeding with the statement of facts of the case as developed before us, I would like to observe with reference to a contention mentioned by Mr. *Bodwell* that he had a judgment in

his favour and that it was for the plaintiffs to upset it. I do not look at it in that way. In our opinion, the case before the learned Chief Justice had not been fully tried, and, therefore, we directed that there should be practically a new trial. It would be altogether out of reason to regard a judgment which had been reached, at any rate in our opinion, without full opportunity to plaintiffs to establish their case, as a judgment shifting the onus from the defendants, on whom it was originally cast, on to the plaintiffs.

From the reasons for judgment given by the learned Chief Justice it is apparent that he relied very much on his own inspection of the premises as he was, after having made such an examination, able to decide which of the experts was right and which was wrong.

Since then, we have had the advantage of the additional work and verbal evidence on both sides, and although we should pay due regard to the opinion of the witnesses formed by the Chief Justice, yet it is for us to form our opinion as to their credibility.

The new work consisted of three separate undertakings, one at the south where the plaintiffs had said the Slocan Star vein was cut off and terminated by the Black Fissure. The middle piece where the defendants had asserted the No. 2 vein would be found, to which vein they attributed certain ore found in the Black Fissure. And the northerly piece of work which the plaintiffs had said would demonstrate that the wall of crushed material did not stop or turn at B, but continued on to X and beyond.

The new work at the south, in my opinion, completely established the theory contended for by the plaintiffs as to the separate existence of the Black Fissure. It shewed positively beyond question that the hanging wall on No. 5 level and the stopes immediately above it, was not continuous, but that a fissure with a filling similar to that found in the Black Fissure, ran out to the south. Mr. Elmendorf admitted that the plaintiffs had exposed by the new work a fissure 28 feet broad and some 98 feet in length, running through the hanging wall of the Slocan Star vein. This fissure was exposed at a point where

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a certain amount of ore had been left in a corner, and where Mr. Elmendorf had pointed out to the Chief Justice on his first visit, that there was no evidence of a fissure extending out to the south.

The new work at the north, in my opinion, demonstrates beyond question that a fissure extends from B to X, and as it confirms the testimony given by the plaintiffs' experts on that point, I see no reason for not accepting their opinion that it is the same fissure which is exposed by the new work to the south. It completely disposed of the evidence given by the defendants' witnesses that the cross-cut B to X was driven in country rock.

Had the Chief Justice heard the testimony adduced before us, I am sure that he would not have felt confident in accepting Mr. Elmendorf's expert testimony as more reliable than that given by Mr. Sizer. Elmendorf's action in persuading the Chief Justice not to accede to Sizer's request to have certain work done, in my opinion, is cogent evidence of partizanship. An opinion on a technical matter formed under such guidance can be of little value, and when in the light of subsequent evidence, that guide admits that he was mistaken, still less. I have therefore no hesitation in saying that in these circumstances we are not bound, in any degree, by the opinion formed at the view taken by the learned Chief Justice.

IRVING, J.

The contention put forward by the defendants at the trial that the vein turned at B, was also, in my opinion, disproved. Mr. Boehmer, a new expert introduced by the defendants on the hearing before us, thought that the rear turn was at station 38, and that the vein indications seen in the neighbourhood of B, C and D43 were foot fractures of the same vein; but his evidence has not shaken my confidence in Messrs. Sizer and Fowler, a confidence reached after hearing their oral testimony before us and reading their evidence before the learned Chief Justice.

In view of some of the expressions used by the Chief Justice in his reasons for judgment, I thought it proper to go through the evidence taken before him with the very greatest care, and to make some observations with regard to the witnesses examined before him.

In considering that testimony it will be necessary therefore

to refer to the evidence given at the trial before him in February, 1903, and again before him at what has been called the second trial, held in July, 1905, and also to the evidence given before this Court in April, 1907.

At the point where the A drift was afterwards run, the plaintiffs' expert (Sizer) at the first trial had insisted that the wall running into the angle on the right hand or west side was different from that on the left or north side. The Chief Justice was not able to recognize the difference, nor did Mr. Elmendorf at that time, but I understand now that he (Elmendorf) admits he was mistaken.

Passing along the 5th level we come to B. In February, 1904, Mr. Oscar White had said that he knew that he was at the turn of the vein, that he really began to turn at A, 30 feet south of B, but in order to shew that there was no sign of a vein or anything "out there," that is, to the north of B he continued the drift to X. He said that he expected (this is in December, 1902), that it would be contended at the trial that there was a vein running in from the north-east across the line BX, and to meet that contention he determined to run this cross-cut B. Now, the distance from B to X is 35 or 40 feet; the pleadings had been closed for nearly a year, and the trial was liable to take place at any time. They knew they had a large body of ore, 12 feet wide in No. 4 Silversmith about station 9, but Mr. Oscar White says that they decided on 15th December, 1902, to discontinue the turn commenced at A and to run the cross-cut B to X some 40 feet in length. They abandoned something that would affirmatively establish their case, to disprove by negative evidence some contention they anticipated the plaintiffs might set up. This story does not commend itself to me, nor does it appear to have found favour with the learned Chief Justice when it was told at the trial. He seems to have received the impression that the defendants had "fumbled" in tracing their vein at this point, and that after over-running the scent they had harked back to 41, which is about 100 feet north of the spot Oscar White says he recognized as the turn of the vein and ran the drift 41 to 43 to connect with the Silversmith ore which they knew existed on No. 4 level. I do not

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know why it was that station 41 was selected as the starting place for the tunnel that was run to the west from 41 to 43, but the reasons given by Mr. Oscar White for going on to X, and subsequently turning to the west at 41 instead of at B, do not satisfy me. To me it looks as if they saw no indication of a turn at B. But this inconsistency alone is not sufficient to justify me in rejecting Oscar White's evidence.

This cross-cut B to X the defendants at the first trial said was not in the vein, but was in hard slate. Having completed that evidentiary work by timbering it up they took their men out and started them, about the end of December, 1902, at station 41, running 140 feet westerly to station 43, not on the vein. This work took about two months to run, so that in February, 1903, they were at 43, but as yet they had not shewn any connection on ore (by following the vein, which they said turned at B), so they ran back from station 43 to B (reaching B in March, 1903), and at the same time continued drifting, first to the south, then to the south-east, then to the south-west, then to the south or south-west from station 50 to station 52, where sometime about September, 1903, they struck a large body of ore.

At the first trial (February, 1904) the defendants' witnesses were strong in their assertion that the vein turned at B.

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The plaintiffs, on the other hand, insisted that at B there was no sign of a turn; that the soft fissure filling continued down past B on the left hand upper side, and that a cross-cut at X would establish that fact; that cross-cut was made by Zwicky, and Elmendorf found there a seam of the softer material 18 inches wide.

Cavanagh before us was not prepared to deny that the fissure extends to X. Mr. Oscar White thinks the Black Fissure does not extend to X.

That there are two feet of crushed material, he will admit, and that there is a well-defined wall running north and south. Now, it must be remembered that from 41 down to X was run under Oscar White's superintendence, and the lagging erected from B to X was put up by him in order to prevent this very filling coming in on him and his men.

I have carefully read the evidence in this case, and I have come to the conclusion that I can place no confidence in Mr. Oscar White's testimony. I have already referred to his explanation, or excuse, for running down to X past B where they subsequently made the drift turn, and I now mention some other incidents. His statement in an affidavit used in resisting the application for an injunction that they had not taken ore from the ground in dispute to an amount in value of $500 net, was misleading, as he could only reduce it to that sum by making deductions, *i.e.*, cost of development and cost of mining and cost of concentrating, he was not warranted in making, unless he expressly stated that he was making such deductions. Again, his statement that he was not aware that there was ore in the bottom of the winze is past belief. Again, as to the intermediates below 5, he was not candid. Again, his explanation of his reading the Ruth map is more than nonsensical. I accept Harris' story that Oscar White told him there was no ore between levels, and I do not accept Oscar White's explanation. I therefore refuse to believe his story that when he was at B he thought that the vein or material he had been following up from the south, turned to the west at B.

It is my opinion that when he ran past B he was still seeking the turn in the fissure, and that he harked back only when he found he was getting so far to the north that he could not expect to connect with the ore which he knew existed in the Silversmith. In my opinion, his evidence is not entitled to any credence and I reject it; and all work carried on by him, or done under his orders, I regard with suspicion. The ability of his men to carry into execution his designs is shewn by the way in which they covered up the gaping mouth of a cross-cut so that, so far as the eye was concerned, it was impossible to tell that there ever existed anything but solid wall and lagging in front of it. It is unfortunate for him that a pile of dirt was left at the entrance to the cross-cut B to X, when so much turned on the question of the continuation of the wall of material along that line.

Again, it is unfortunate that the lagging should have been so tight in the intermediate below 5 that it had to be removed in order that the plaintiffs' experts might point out the crevice

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they expected to find there—and still more unfortunate that they did find it.

Again, it was unfortunate that a considerable quantity of ore was left in a corner, and that subsequently this very place should be selected to establish the fact that the hanging wall of the Slocan Star was cut by the wall of soft black fissure material.

Another circumstance to be noted is that just prior to the trial fixed for July, when an inspection of the premises might reasonably be anticipated, the intermediate below 5 was so blocked up with ore that Mr. Sizer was not able to examine it. It was on this occasion also that the pile of dirt before referred to prevented Mr. Fowler examining from B to X.

These extraordinary things have occurred too frequently to be undesigned, and I have reached the conclusion that under the management of Mr. Oscar White the ore was manipulated in two places at least to shew an apparent turn in the walls where there was in fact no turn.

How Mr. Elmendorf came to say, as he did, that the vein turned at B, and that the drift run from B to X was wholly in country rock, and that there was no continuation beyond B of the material they had been following up to B, I cannot understand. It is possible that he was deceived by the appearance of the turn of the drift at B and did not examine the extension from B to X with due care. However that may be, his evidence before us as to the turn at B is not satisfactory.

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In my opinion, the wall of material through which the defendants ran their No. 5 level continues on to X without any turn at B and the drift 44, E, D, C and B, is not in ore. There is no ore in it; it is a mere fracture or fissure in the slate. I am satisfied that when Mr. Oscar White and his men passed B they saw no indication of a turn at B. That point was adopted later, when having run the drift 41 to 43 they found a non-mineralized fracture or cleavage leading in a north-easterly direction, which fracture being followed to D minus 27, brought them out at B.

Returning to the inspection by the Chief Justice: Passing on from B, they entered the drift that was driven back from 43, that is, it was driven from the west to B.

Mr. Fowler has taken a photograph of the roof here, shewing that there is no indication of any turn.

Mr. Elmendorf, at the trial in February, 1904, was not positive that he saw the vein between B and C, but between C and D he did. He saw the hanging wall of the vein.

When the Chief Justice visited the mine in December, 1904, he was not at all satisfied with what he saw in this drift; he was, as I understand it, following up the indications of vein matter, and after he had passed some feet into the B, C, D drift, he observed a change, and as a consequence a new drift or level was run to the north of the old drift.

Mr. Sizer had, in February, 1904, said, speaking of the old drift, "the drift from B to C goes through the Black Fissure and passes on into country rock." This would indicate that there would be a radical change to be found as soon as you got some feet to the west of B, and there can be no doubt but that that change was plainly visible to the Chief Justice; and the fact that in December, 1904, he ordered the new drift shews that Sizer's evidence, given in February, 1904, as to the condition of things there, was more accurate than Elmendorf's, who said that the vein was more or less visible all the way between C and D.

The trace of the vein having been lost, the new drift was ordered. It began on the east in Black Fissure material and was carried to a point 27 feet east of D. That point would be selected as the place where, in the opinion of the Chief Justice, the vein would again be visible in the old drift.

Now, at the trial in July, 1905, the Chief Justice seemed to think that Sizer had agreed to point D minus 27 being selected. Sizer says he had not, and from Mr. Elmendorf's evidence it is clear that Sizer did not take any part in selecting D minus 27, because Elmendorf mentions station D, which is some 27 feet to the west of the point selected, as one of the places Sizer said there were no indications of vein.

Well, leaving that disagreement of recollection between the Chief Justice and Sizer—I come to another: Elmendorf says (after speaking of the ordering of this new drift C to D minus 27):

"We passed along in the direction of D, and at some point between E and 43 (or D and 43) the question of continuing on (westerly) into the

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Silversmith workings came up, and Mr. Sizer acknowledged from that point on to the end was Silversmith. For that reason it was not considered necessary to visit that portion of the mine, so that portion was not visited by his Lordship."

This acknowledgment, if proved, I would regard of considerable importance. In the first place it was a complete backdown from the position sworn to at the first trial. If the leading expert admitted that from station 43 on the 5th level, on to the west was Silversmith vein it would only be necessary for the defendants to prove the connection between station 43 and B to dispose of what the plaintiffs called a series of cross-cuts through country rock. This is very clearly pointed out by Mr. Elmendorf.

Now, turning to Sizer's evidence, I find that he does not deny that at a certain place he did admit that from that point, whichever point it was, he believed the 5th level was run in vein material, which he called the Silversmith. But that point he fixes at 50 or 51—51 he thinks. He asserts that all around from station 43 to 50-51 was not in the vein, he re-stated the view he had expressed at the first trial, *viz.:* that the drift was in no sense any part of the vein.

At p. 1,803 the Chief Justice puts this question:

"His Lordship: The Silversmith vein you are satisfied exists from D27 inwards? No, my Lord, I did not make that acknowledgment, and I don't make it now. I don't think there is any evidence of vein all around that turn, which is all the way from D to station 50.

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"How is it point D27 came to be chosen as the point to which this work was to be done? Because Mr. Elmendorf, as I understood it, convinced your Lordship that the vein was to be found up to that point connecting from the other direction.

"My idea, Mr. Sizer, is that you hadn't any doubt of it at that time? I had the greatest doubt about there being any vein whatever at D, or at D27 and around that turn.

"You mean this turn running from 44 to 50? Yes, I tried to point out without being impertinent in the matter that a vein could not take that circular shape and connect by any possibility on its dip with the same vein in No. 4 Silversmith, and the work that has been done since in the way of mining is convincing proof to me that that portion from 44 around to 50 is entirely outside of the vein.

"You are speaking now of this new work in the Silversmith? The new work on the Silversmith that was put on the map yesterday."

Now, this is a very unfortunate position of affairs. One expert says the admission was made with reference to all the drift west

of some point between E and 43 or D and 43, both of which are at some distance west of D27. The other expert (the person who is alleged to have made the admission), says the admission was made as to the drift west of station 50-51 (the next turn of the drift to the south). The judge seems to have been of the opinion that the admission was made as to a third place, *viz.:* D27, for he very pertinently asks Sizer, "How is it that D27 came to be chosen as the point at which this work was to be done?"

Now, how is this dispute to be settled? Not by the judge's recollection, as he does not agree with either of the experts. The conflict between them must be determined by their own evidence.

On the face of it, Mr. Elmendorf's statement seems extraordinary, because Mr. Sizer had at the trial in February, 1904, taken such strong grounds, asserting that there was another Black Fissure at 43.

Mr. Elmendorf's story is that the original plan was that after examining the eastern portion of the Star mine they were to inspect the western portion of No. 5 level around this drift into the Silversmith. In the extract I have given from his evidence it will be seen that he states they did not proceed on No. 5 level further west than station 43. From his evidence I find that on the second day's inspection there is nothing to establish that they went any further than 43. On the third day they went, as arranged, to the Silversmith tunnel and that portion of the mine.

In the cross-examination by Mr. *Bodwell* of Mr. Sizer we find the following, no doubt with reference to the place where the admission was made:

"Will you say on your inspection with his Lordship the Chief Justice and Mr. Elmendorf you went on to point 50? Yes.

"That you went beyond 45? That is my recollection, that we went as far as 50?

"Have you a note of that? No, I made no note of it.

"You are not in a position to speak definitely? I am depending on my recollection.

"My instructions are different. But you are positive of this that you did not admit that from D27 on there was a vein and that it was the vein you have called the Silversmith?

"His Lordship: Where is point 52?

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"Mr. *Bodwell*: Point 52 is in that new drift.

"His Lordship: Don't you remember being at 52?

"Witness: I went to 52 and saw that new drift at the time of the inspection, but my recollection is that you did not go there.

"His Lordship; My recollection is different.

"Witness: I did not make any positive statement about that, I said we went as far as 50 anyway, if we went to 52 we certainly passed 51.

"His Lordship: There is ore to be found at 52 to 51 at the face of the drift.

"Witness: Then that proves we did go there."

That piece of evidence evidently taken from the Chief Justice's notes taken on the spot, seems to shew that they did not stop at 43, but proceeded as far as 51 or 52, where ore was found at the face of the drift. This corroborates Sizer's contention that they went on to 51, and as both experts are agreed that when the admission was made it was determined not to go any further, I have come to the conclusion that the admission made by Sizer was applicable only to the portion of No. 5 level west of station 50, and that Mr. Elmendorf is mistaken.

This is a matter of considerable importance, because the defendants, relying on this admission, gave no further evidence as to the drift being in the vein after passing D or E going westerly. I am not satisfied that it is.

The learned Chief Justice does not refer expressly to this incident in his final judgment, but he says in effect that in selecting D27 as the westerly point for his cross-cut he was guided by what the two experts, Sizer and Elmendorf, had said when he made the examination in December, 1904.

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As I have already said that was, in my opinion, a misapprehension on his part, and I cannot help thinking it was in consequence of these two disagreements that Sizer's testimony was regarded by the Chief Justice as too elastic to be reliable.

From questions interposed by the learned Chief Justice at the hearing held in July, 1905, it would seem that the presence of slickensides in the drift from C to D minus 27 was strong evidence that that drift was run in the vein. I refer to his questioning Elmendorf, Sizer and Fowler, as to this.

Now, if that was his idea, I think he was in error. It is true that Elmendorf, in February, 1903, spoke of slickensides being

found in veins; but Fowler and Sizer both said in July, 1905, that slickensides can be found in any place of movement in the country rock; and Cavanagh says the same thing. Elmendorf does not rely on slickensides. Slickensides is a miner's term for the striæ, furrows or polished surfaces covering the walls of fissures and sometimes the surfaces of bed rock. They result from the friction of two portions of rock moving one against the other under great pressure. The phenomenon seems to be not uncommon. It may result from the friction of the mass of a vein moving in a fissure. Slickensides are not necessarily an indication of vein matter. In the following example noted by James D. Dana, not only the fissure walls, but small bits of rock are slickensided:

"In the Triassic of East Haven, Conn. (on the borders of New Haven), the successive beds of red granite sandstone . . . . have been shoved over one another upward along the plane of bedding, producing great slickensided surfaces; and these surfaces have generally a very thin and hard white coating, apparently due to ground up feldspar. In the same region . . . . there are also ordinary faults with slickensided walls; and in many places the rock is in fragments, and all the fragments, even those no larger than the hand, indicate participation in the movement by the slickensides which cover them": See James D. Dana's Manual of Geology (1895).

Having regard to the statement of the learned Chief Justice, that after having viewed this work between C and D27 and after hearing further evidence, he was satisfied that the 5th level shews the continuous vein, it is of importance that attention should be drawn to this point. If the learned Chief Justice had conceived the idea that the presence of slickensides necessarily indicated vein matter, he would no doubt regard this drift as in vein matter, and would have another reason for disbelieving Sizer's testimony.

Before us, Mr. Sizer gave his evidence in a satisfactory way, and the conclusion I have arrived at with reference to him is that he is a close and accurate observer of facts and of good memory, and not desirous of misleading the Court.

Leaving that subject, and turning to Mr. Fowler's testimony as to the work done from C to D27, which he visited in July, 1905, just a day or so before giving his evidence at the second trial, he says:

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"From B to C you are cross-cutting the black fissure. The new drift has on its left hand side going in a wall or plane, and between this wall and the old drift there is a pillar some 6 or 7 feet (separating the old from the new drift). Near the east end of this pillar is the hanging wall of the Black Fissure."

This hanging wall he says passes across the old and new drifts and goes on to the north.

Now, I turn to Mr. Oscar White on this point. It is another instance of his willingness to mislead the Court.

He was being cross-examined (July, 1905) as to the new work, C to D27, and having stated that there was only one wall, which was on the left hand side going in, that is on the south side; then he is asked: "Are you sure the wall is not on the right side of the drift as you go in?" To which he replies, "Yes, I am sure." I now give the questions and answers:

"There is no wall on the right hand side as you go in from C? What kind of a wall?

"Well you have said there was only one wall, I want to know what side it is on? On the left hand side from C going in.

"And that is the only wall? Where we started at C there is—

"There is a wall on the right hand side as well as the left? Yes.

"And when you get a little way in the wall on the right hand side disappears? We didn't follow that.

"When it disappears on which side is it? The right hand side.

"It goes out on the right hand side? Yes."

Now, why did he deny that there were *two* walls revealed by this work? The significance of his suppression of the existence of this wall was shewn to some extent when Fowler and Sizer gave their evidence in July, 1905. Sizer's is as follows:

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"You heard Mr. White's evidence in which he said there was something that had the appearance of a wall running off out of that new drift to the north. What is that? That is the hanging wall of the Black Fissure."

In connection with this subject it will be convenient to give Mr. Elmendorf's evidence:

"Did you find any other wall going off to the south in that drift? Going off to the south in that drift.

"Yes, north I mean. At what point?

"At any point? No sir; there is nothing I consider a wall crossing that drift to the north, if that is what you mean.

"You saw nothing that looks as much like a wall as what you call a wall? No sir, there is a block of porphyry in there, but nothing that looks like a wall going in that direction."

Oscar White saw the wall, denied its existence, but afterwards acknowledged it.

Mr. Elmendorf, after demanding particulars, is able to say "there is nothing there that I consider a wall."

The evidence given before this Court after the work was done by Zwicky shews every reason for believing that there was a wall. And it is by the light of that evidence that I think it was so unfortunate that Mr. Oscar White allowed the cross-cut B to X to be blocked up, right on the eve of the trial in July, 1905.

There seems to me to be established an absolute cut off between this wall which the plaintiffs call the hanging wall of the Black Fissure and all west of it. Mr. Fowler's evidence is most clear on that point, and I accept it.

To the Chief Justice at the mine in July, 1905, he said, "There is absolutely no connection between the plane under which the new drift has been run, and what was to the east of the hanging wall of the Black Fissure."

To the Chief Justice, at the trial, he said in answer to the question:

"What in your opinion negatives conclusively the theory that this is a continuous vein C? As far as I have seen the absolute disconnection between what lies west of point C and what lies east of point C by reason of that limiting plane which I find to continue across the old drift and the new drift ordered to be made by your Lordship. That to my mind is the chief disconnection between everything to the west of what we call the black fissure and everything to the east."

He denies that there is any vein matter to be found west of C, although admitting that the new drift is run on a plane and that something in the nature of slickensides is to be found there.

He was then asked as to 43 to 50 and replied:

"I didn't examine it particularly closely, I didn't see anything that was remarkable or worthy of any special attention at the time; I didn't see any vein matter.

"From 43 to 50 in that tunnel or drift, that work from 43 to 50, is that in your opinion any part of the fissure which has been followed down from the turn which we call the Black Fissure? Certainly not.

"Is that work from 43 to 50 any part, in your opinion, of the Silversmith vein shewn over on these workings in the Silversmith ground? Certainly not."

It may not be out of place to mention that this examination of Fowler followed that of Sizer, who had just denied making the

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damaging admission imputed to him by Mr. Elmendorf, the order of events being as follows:

December, 1904, alleged admission by Sizer.

May 12th, 1905, inspection by Chief Justice with Fowler and Oscar White.

July 23rd, 1905, inspection by Elmendorf, Fowler and Sizer. Whether Elmendorf and Sizer visited this mine together I cannot say, but Sizer and F. did. It is impossible to suppose that Sizer would not have communicated to Fowler the fact that he had made the admission attributed to him, if he had indeed made it.

26th July, Elmendorf gives evidence of alleged admission "as he understands it." Sizer denies having made such admission.

28th July, Fowler gives this answer as to the drift from 43 to 50: "I didn't examine it particularly closely."

This answer to my mind shews that Fowler had not been made aware until after his inspection of the mine in July that this alleged admission had been made by Sizer. That fact and the simplicity of the answer strengthen my belief that Mr. Sizer never made, or even supposed that he had made, the admission imputed to him. Mr. Fowler, a mining engineer, residing in this Province since 1889, with nine or ten years' experience in the Slocan country, and who at one time was familiar with the workings of the Ruth mine—a mine only a few hundred feet to the north of the mine in question in this action, is, of all the witnesses, except Mr. Oscar White and Mr. Harris, whose experience in the Slocan country is also considerable, by virtue of his long familiarity with the surrounding country, entitled to speak with most weight.

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For these reasons I think the defendants' case has failed. The judgment should therefore be reversed, with costs here and below. The judgment of this Court should direct an enquiry as to the amount of ore taken, and contain a declaration that the Slocan Star location does not give to the defendants any rights to the west of the west end line of that claim, and that the vein or lode on the Silversmith location has not been shewn to extend to the Rabbit Paw or Heber Fraction. There should be an injunction also, but the terms of the judgment had better be spoken to later.

MARTIN, J.: Two questions are submitted by the defendant Company (appellant) for our consideration, one of fact and one of law. If the former is determined in its favour the latter becomes immaterial, therefore I shall deal with the former.

At the outset I find myself in an unusual position, for though nominally sitting as a judge of appeal, yet this Court has for many days been discharging the functions of a Court of first instance, of a jury in fact, during the hearing before us (from the 8th to the 23rd of April, inclusive) having taken a great mass of oral evidence, amounting when extended to 675 typewritten pages.

This from every point of view undesirable, and I trust not-to-be-repeated departure from the practice in the case of non-reception of evidence by the trial judge, places the parties and the Court in a peculiar position, for we have no finding of fact to assist us, because the evidence we took, and which is quite inextricably interwoven with that taken at the trial, was not before the trial judge, so the issues are open and must be found by us. Such an unusual state of affairs affects the case seriously, because the usual onus thrown upon the appellant to "shew the judgment appealed from is wrong" is absent: see *Inverarity* v. *Hanington*, April 27th, 1907 (unreported), and the authorities therein cited; and on the other hand the original onus cast upon the plaintiff to prove his case is as strong as ever, and as important.

The extent to which this latter onus goes in cases of this nature has been considered in many American cases to which we have been referred and which we must look to for guidance since this difficult and distinct branch of our mining law came direct from that country, and there has been some difference of opinion in applying it to various circumstances. But in a case such as the present I adopt the following remarks of Hallett, D.J., in *Leadville Mining Co.* v. *Fitzgerald* (1879), 4 Morr. 380 at p. 385, cited in Lindley on Mines, 2nd Ed., Vol. 2, Sec. 866, wherein the whole question is ably considered:

"Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can shew a clear title to it as a part of some lode or vein having its top and apex in other territory . . . . In other words, we may say that there is a presump-

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tion of ownership in every locator, as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one else shall shew by preponderance of testimony that such deposits belong to another lode having its top and apex elsewhere."

In Snyder on Mines (1902), Vol. 1, Sec. 783, it is, I think, accurately stated after a review of the cases:

"While, as we have seen, this extra estate is given to every locator of a mineral vein and confirmed by the patent, if he obtains one, it is strictly upon the condition that he so establish his lines upon the surface as to include whatever portion of his vein he desires to mine outside the vertical planes of his surface ground, for, however right or wrong the law may be, and notwithstanding there is a severance of estate, as we have seen, the rule is firmly established that the common law maxim applies, and that agreeably thereto until a better right is shewn, he who owns the surface is presumed to own all beneath."

And in Barringer & Adams on Mines (1900), the conclusion is reached (pp. 442-3) that:

"The presumption in the first place is that all minerals found within his boundary planes belong to the owner of the claim. And upon a stranger claiming the right to mine inside of these planes rests the burden of proving that he is mining upon the dip of a vein whose apex is outside of the claim, and within a claim belonging to him. That is, in order to establish his right and justify the apparent trespass, he must prove that he is the legal possessor of the vein which he is following. If he fails to establish both of these points he is a trespasser."

And see also p. 458.

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The circumstances of the case at bar are such that, as Lindley says, Sec. 866, p. 1,592:

"It devolves upon the defendant company to establish: (1.) The existence of an apex within the boundaries; (2.) The identity and continuity of the vein from its top or apex within such boundaries to the point in dispute."

In regard to No. (2) Lindley observes, Sec. 615, p. 1,112:

"The legal identity or continuity of a vein on its downward course, as well as on its longitudinal course underneath the surface of adjoining lands, presents at times the most serious questions encountered in the administration of the mining law. It is impossible to describe any definite rule as to what degree of continuity or identity in a legal sense the miner must establish when he invades property adjoining the location containing the apex of the vein. Each case presents its own peculiar features. Reports of adjudicated cases rarely present general discussions of this feature of the mining law, nor are the facts usually stated with such detail as to enable the practitioner to utilize the case as a precedent. The infinite variety of

structural conditions encountered in the practical operation of mines renders it highly improbable that a case in one locality can be safely relied upon as a precedent in a case arising in another place."

And he goes on to discuss certain general principles as illustrated by leading cases. At a trial of this kind in the American Courts, these questions of fact are left to a jury, and the judge's charge is frequently given in full in the law reports. Our duty therefore, acting as a jury, is to charge ourselves of the facts before us and return a verdict thereon. In such circumstances, as I have before now stated, I do not think it is a good practice or otherwise profitable to attempt to give here a critical analysis (and anything short of that would be quite useless), of all the great mass of conflicting evidence of fact and theory that has been adduced, and on this point I refer to *Leadbeater* v. *Crow's Nest Pass Coal Co.* (1904), 2 M.M.C. 145, wherein I said in a coal mining case, p. 148:

"In support of these conflicting theories a great body of evidence was adduced in a trial lasting more than three consecutive weeks, and even if it were desirable for me to do so when discharging the functions of a jury on pure questions of fact (and I do not think it is), it would be almost an impossibility to attempt to review in detail all the evidence which I have listened to and weighed in a trial of such duration and complexity of fact, though not of issue."

All therefore that I propose to say is that the defendant Company has failed to discharge the onus cast upon it to satisfy me, as a jury, regarding the identity and continuity of the vein in question. Though Mr. *Bodwell* presented his case to the best advantage, yet it did not carry me beyond the doubtful stage and consequently I think the only safe course to adopt is to confine the defendant to his own ground as against the plaintiff.

The appeal should, in my opinion, be allowed.

MORRISON, J.: This is an action for damages and an injunction against the taking of ore from the plaintiffs' mineral claims known as the Rabbit Paw and Heber Fraction.

Markedly divergent theories were advanced at the trial, and when it was deemed advisable that the workings and condition of the mine should be inspected, the learned trial judge, accompanied by two engineers selected by the respective parties hereto, visited the mine, ordered certain additional work to be

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done, and then had a second view. From the voluminous evidence before us, I gather that a thorough inspection was made. At the close of the evidence following this view of the *locus in quo*, counsel for the plaintiff requested that further work be done on the ground that not enough had been done to establish his theory, and that without additional work as indicated by him, it was useless for him to proceed with his case. This was refused, and the learned judge then gave the judgment appealed from, which is a result mainly of his inspections. Upon appeal to this Court, such leave, however, was given the plaintiffs to have certain further work done, and to advance if necessary, such further evidence as the parties might be advised respecting the issues as developed at the trial. Pursuant to this leave, the work was done by a Mr. Zwicky, and in due course, his evidence and that of the chief witnesses at the trial, as well as the evidence of a Mr. Boehmer, an American expert, was given before us on this appeal.

From a close reading of the proceedings on appeal, I cannot discover any tangible evidence. It is all highly theoretical, not to say rhetorical, and the arguments of counsel were equally vituperative.

With regard to the position in which the plaintiffs' counsel considered he stood at the close of the trial, it seems to me necessary for him to adduce evidence of a nature much stronger than before, to establish his theory. If this new evidence does not add to, but simply re-affirms the previous evidence, it is not enough.

MORRISON, J.

Otherwise, giving the fullest effect to both sides apart from the question of onus, which I submit now is on the plaintiff, the net result would be as before, one theory opposed by the other. But with this difference: that the defendant is supported by the opinion of the learned trial judge based mainly upon his inspection, and so should prevail with us.

I joined in the order for the performance of the new work solely in the belief created by the strenuous argument of counsel that the new work would clearly demonstrate the contention of the plaintiffs, and had I anticipated that the result would be to afford a breathing spell for a resumption of the wonderful dis-

play by clever experts of theories as to the formation of the earth's interior, I should have hesitated before concurring.

The leading respective experts appear to be men of ability who advanced diametrically opposite scientific theories. They assumed that position before the trial judge and maintained it steadfastly in giving their evidence on appeal.

The trial judge, however, not only heard their theories, but as it were, saw those theories worked out. One who hears a man tell how he performed a certain piece of work is not in so favourable a position to determine the nature of the work performed as if he saw him do it, or saw the work after it was done.

For my part, I find it as difficult to appreciate the value of the voluminous evidence in this case, as it is to understand the extent, trend and course of the different subterranean formations by handling the small fragments of "rock" produced as exhibits and about which there is such a hopeless divergence of scientific opinion.

The proof must be clear and unmistakable. And in respect to this new work ordered by us to be done, I do not think it is either. The evidence is so perplexing, that taking it alone, one must arrive at the conclusion urged upon us by the plaintiffs by a process of guess work and surmise. Indeed so inconclusive is this new evidence that a view by this Court is as necessary as it was by the trial judge.

This may not be an inopportune time to emphasize the necessity for a change in the law whereby a view by the judge and two assessors shall be conclusive as to questions of fact, leaving an appeal only on questions of law.

I would dismiss the appeal.

Appeal allowed, Morrison J., dissenting.

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BAGSHAWE v. ROWLAND

BAGSHAWE v. ROWLAND.

Principal and agent—Contractor and employee—Sale of land—Remuneration—Finding a purchaser, able, ready and willing to purchase—Added terms by vendor.

In an action by an agent to recover the amount of his commission, he must shew that he has produced to the principal a purchaser ready, willing and able to enter into a binding agreement to purchase; and the agent is entitled to his commission if, the parties having been shewn to be agreed upon the terms, the sale is subsequently prevented by the fault or default of the vendor.

Grogan v. *Smith* (1890), 7 T.L.R. 132, *per* Lord Esher, M.R., followed.

APPEAL from the judgment of IRVING, J., in an action tried before him at Victoria on the 7th, 8th, 9th and 10th of May, 1907.

Statement

The facts are set out in the reasons for judgment of the learned trial judge.

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

A. E. McPhillips, K.C., for defendant.

IRVING, J.: In an action by an agent, it is the duty of the agent, in order to earn his commission, to shew that he got a purchaser, an actual purchaser, not merely a person who might become a purchaser, but one who will enter into a contract binding him to purchase the property. If a plaintiff shews that he has obtained a person who is ready and willing to enter into a binding contract he is also entitled to recover his commission if they were really agreed on the terms of the contract, if the sale was prevented from becoming a binding contract by reason of the fault or default of the defendant in refusing to make the agreement valid and binding.

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That is an extract from Lord Esher's judgment in *Grogan* v. *Smith* (1890), 7 T.L.R. 132.

As illustrated in the case of *Gilmour* v. *Simon* (1906), 37 S.C.R. 422, there is a clear difference between appointing an agent to find a purchaser and appointing some person to make a contract. Now in this case the plaintiff claims that he was appointed to find a purchaser simply, not to enter into a

contract. It seems to me, having regard to what took place out at Rowland's house, that he did then employ Bagshawe to find a purchaser on a commission.

At the first interview Rowland stated simply that he would take $500 net for the property. He then marked the boundary on a paper map, and Bagshawe said that he would add $25 an acre to cover his commission, making it $525 an acre; Rowland did not then object to this proposition. It is said that this proposal by plaintiff shewed that he was a volunteer, and that Rowland, not being anxious to sell, was not bound. To my mind, after the arrangement had been arrived at between them that Rowland should sell at $500 net, and that the property should be listed at $525 to cover the commission, it does not make any difference from whom the first request emanated. The relation, the contractual relation of principal and agent, was established then and there between them. It was arranged at that time that he would sell 110 acres; no reserve of any kind was mentioned. In a few days, on the 14th, Bagshawe returned with two men, apparently purchasers, to view the property.

They drove up to the house and got Rowland. They drove down the road with him some little distance. Rowland was not very anxious to accompany them; said that he had at home a better map than that at which they were looking. It was accordingly arranged that he should go back and get this map. Bagshawe accompanied him back to his house, where he gave Bagshawe the map, and he also permitted him to write down from his dictation the following:

"110 acres, $500 in cash, $525 per acre, $5,000 when papers are signed. $5,000 in six months, balance 1, 2 and 3 years, in equal instalments, 6 per cent.; will release on payment of half of purchase price."

Now those were the terms that he handed him. I say handed, because, by standing there and dictating them, and agreeing to them, and letting the other man take them away, he practically handed them to Bagshawe. In effect he said, go and make the bargain; find a purchaser on those terms.

Armed with this document Bagshawe returned to the men who were still looking at the property. They expressed them-

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selves as satisfied with the property and terms, and they agreed to buy. They said they were ready and willing to buy, and as soon as they arrived in town deposited with Bagshawe a cheque for $500 to bind the bargain or as a mark of their good faith. In my opinion he had found purchasers who were willing to buy on the terms prescribed by Rowland.

From the evidence which has been given here, it seems to me that they were able, as well as willing, to carry out the contract.

Shortly after Bagshawe returned to his office, Rowland came in and there saw the cheque for $500. Bagshawe told him what had been done. Bagshawe read something to him out of a book, that was a receipt, and not an agreement for sale. Rowland then said that it was all right, but said he wanted to go down to see his solicitor, Mr. Walls.

Allen's evidence confirms the testimony given by Bagshawe in this respect. He says that Rowland told him that the $500 was there, that his face was beaming with pleasure and satisfaction at having effected a sale at a good price; that the sale had been made through Bagshawe, who had sold this property, 110 acres, for $500 an acre, and that he had got $500 on account, $5,000 was to be paid when the agreement was completed, and that Bagshawe had made the sale. Now Rowland, although contradicting Allen in some points, does not deny that he said that Bagshawe had made the sale.

IRVING, J.

Now, stopping here, that seems to me to establish the plaintiff's case. These are the terms that Rowland had prescribed. They were taken in writing, handed to Bagshawe, who was then about to go down and shew the property in order that he might arrange the sale with these men; and if approval were necessary—I think perhaps approval is necessary—Rowland subsequently came into Bagshawe's office, said yes, I accept that. That, I think, was an end of the matter. So far as Bagshawe was concerned, he had then earned his commission, and he need not have gone down to Mr. Walls' office or done anything more. What took place at Mr. Walls' office does not in my opinion affect Bagshawe's right to his commission.

[The learned judge here dealt at length with the negotiations which took place in Mr. Walls' office.]

What took place afterwards was this: when the others went out, Mr. Walls or Rowland called Bagshawe back, and Rowland wanted to know what about that extra $25; how are you going to get that? It was simply because so much of the cash then in sight was being diverted from his pocket and into the pockets of Bagshawe that Rowland upset the whole transaction —that fact, and the fact that there was a better offer made to him the following day. I am satisfied that it was for that reason alone Rowland prevented Bagshawe from earning his commission. He refused to make the agreement valid and binding. The story that it was on account of the fact that Rowland had given a receipt is only a subterfuge. It was not on that account; it was because he could not bear to see so much of the first instalment going to his agent—that fact, plus the other fact that he had a better offer, caused him to change his mind.

It was suggested that Bagshawe was trying to bind Rowland when he, Rowland, was not willing. I do not think that is the true statement of the case at all. I think Rowland was very willing to sell; in fact, in the first interview, he intimated that he had possibly made a mistake in not accepting a smaller price that had been offered him before. Further than that, it is said that Bagshawe behaved improperly, wrongly, in what he did with reference to giving and changing these receipts, and it was suggested that it was a corrupt transaction. I do not see it in that way at all. It seems to me that a comparison of these two documents, B-4, *re* the interview in Walls' office, and B-5, written after that interview, that what Mr. Bagshawe was trying to do was to bring his receipt into line with the arrangement arrived at in Mr. Walls' office, and that he was recalling, as it were, the first receipt. As a matter of fact I think he had no business to issue a receipt on those terms, but what he was trying to do, it seems to me, was an honest endeavour to protect Rowland as far as he could. This is apparent when the changes between the two documents are observed. He put in, owing to the alteration in the number of acres brought about by Rowland claiming a reserve, the words "more or less"—not very artistic, but in my opinion it shews his *bona fides*. The

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original term was that Rowland would release on payment of half the purchase price; Mr. Walls says that the arrangement reached in his office was that the release was to be made $525 per acre on amount sold. Mr. Bagshawe puts in, in his second receipt, a clause, he shall not release until after one-half the purchase price has been paid and after $500 per acre had been paid on amount sold.

On the 16th, Bell and his partner went out to Rowland's. Then Mr. Rowland once more increased his demands; this time he wanted, instead of a reserve of two chains, three chains. Coming to town that day he heard about the re-receipt and then he wrote a letter refusing to have anything more to do with Bagshawe and the proposed purchasers.

There will be judgment for the plaintiff with costs.

The appeal was argued at Vancouver on the 12th and 13th of November, 1907, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

Argument

A. E. McPhillips, K.C., for appellant (defendant): Not only is there a conflict of testimony as to area, but we charge absolute misconduct on the part of the plaintiff and we therefore submit he is not entitled to recover. There was no bargain to sell. Bagshawe was a mere volunteer. Then the purchasers came and added terms, to which defendant's consent was necessary. It was incumbent on Bagshawe to shew that the parties he introduced were competent to carry out the sale, and in this respect alone he did not discharge his duty as agent. He cited *Mackenzie* v. *Champion* (1885), 12 S.C.R. 649; *Calloway* v. *Stobart Sons and Co.* (1904), 35 S.C.R. 301; *Henry* v. *Gregory* (1905), 22 T.L.R. 53; *Gilmour* v. *Simon* (1906), 37 S.C.R. 422; *Grogan* v. *Smith* (1890), 7 T.L.R. 132; *Hamer* v. *Sharp* (1874), L.R. 19 Eq. 108; *Chadburn* v. *Moore* (1892), 61 L.J., Ch. 674; *Salomons* v. *Pender* (1865), 34 L.J., Ex. 95; *Andrews* v. *Ramsay & Co.* (1903), 2 K.B. 635, 72 L.J., K.B. 865.

W. J. Taylor, K.C., for respondent (plaintiff): *Calloway* v. *Stobart Sons and Co., supra*, is distinguishable from the facts here. The plaintiff has produced purchasers willing and able

to purchase on the precise terms of the vendor. There is a definite, precise contract for $25 per acre.

[HUNTER, C. J.: There is the bare agreement that if you get a purchaser, there is $25 an acre in the deal for you. The question, then, is, did he produce a purchaser, able and willing to purchase on those terms?]

Plaintiff did every act necessary to bring the parties together; he did bring them together and the purchasers were ready, willing and competent to carry out the sale. Having gone so far, he earned his commission.

McPhillips, in reply.

Cur. adv. vult.

On the 28th of November, the judgment of the Court was delivered by

CLEMENT, J.: As intimated by the learned Chief Justice during the argument, it is in my opinion a misnomer to call the contractual relationship between the plaintiff and defendant a relationship of agent to principal. It is more correct to say that the plaintiff was employed by the defendant to perform certain services for reward. He was not appointed an agent to sell, but was employed to find a purchaser on certain named terms. The learned trial judge has found as a fact (*a*) that the plaintiff did find purchasers ready, willing and able to buy on those terms, and a careful perusal of the evidence has failed to raise in my mind any serious doubt as to the correctness of this finding.

Judgment

He has also found these further facts: (*b*) that the defendant accepted those purchasers; (*c*) that the terms, including some added terms insisted on by the defendant, were agreed to; (*d*) that the sale went off through the sole fault of defendant: findings, in my opinion, sufficiently justified by the evidence. The case therefore is exactly within the language of Lord Esher, M.R., in *Grogan* v. *Smith* (1890), 7 T.L.R. 132. We are thus relieved from considering whether the initial finding of fact (*a*) would, if it stood alone, entitle the plaintiff to recover, a question upon which there has apparently been some difference of opinion: see *Calloway* v. *Stobart Sons and Co.* (1904), 35 S.C.R.

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301; *Mackenzie* v. *Champion* (1885), 12 S.C.R. 649. No point was made before us that by the judgment under review the plaintiff will receive his reward in full at once rather than in instalments, as would have been the case had the deal not been called off by the defendant.

I cannot see any misconduct on plaintiff's part to disentitle him to recover. I think the learned trial judge correctly disposed of this branch of the case. I would dismiss the appeal with costs.

Appeal dismissed.

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WILLIAMS v. HAMILTON

WILLIAMS v. HAMILTON AND FORBES & FRANKLIN.

Vendor and Purchaser—Contract for sale of land—Offer—Acceptance—Correspondence.

Defendant, being in Montreal, and owning property in Vancouver, instructed his agents to obtain a purchaser at $1,400, offers to be first submitted to him. They received an offer and gave a receipt for a deposit of $25, "price $1,400; $900 or $950 cash, balance C.P.R., subject to owner's confirmation," and telegraphed defendant: "Deposit on Lot Kitsilano, $1,400. Wire approval and instructions." Defendant wired in reply: "$1,400 O.K. Letter instructions," at the same time writing that his papers were in the bank and could not be obtained until his return to Vancouver; that he wanted $1,400 net to him, and if this was satisfactory he would complete the transaction on his return to Vancouver:—

Held, that there was no concluded bargain between the parties.

Held, also, that the defendants F. & F. had not represented that they were, nor assumed to act as, the owner's agents.

Statement

ACTION against the defendant Hamilton for specific performance of a contract for the sale of land, and alternatively against the defendants Forbes & Franklin for damages for false representation of authority to make a contract of sale on behalf of

the defendant Hamilton. Tried before HUNTER, C.J., at Vancouver on the 23rd of October, 1907.

The defendant Hamilton was the owner of the property in question and had instructed Forbes & Franklin, real estate brokers, to obtain a purchaser at the price of $1,400, it being understood that any offer received by them was to be submitted to him for acceptance. The plaintiff made an offer of $1,400 to Forbes & Franklin and paid them a deposit of $25 and received the following receipt:

"Vancouver, January 31, 1907.

"Received from Williams & Murdoff the sum of $25, deposit on lot 2, block 222, D.L. 526. Price $1,400. $900, or $950, cash, balance C.P.R. subject to owner's confirmation.

"Forbes & Franklin, *per* J. Forbes."

Forbes & Franklin then telegraphed to the defendant Hamilton at Montreal as follows: "Deposit on Lot Kitsilano, $1,400. Wire approval and instructions," to which Hamilton replied as follows: "$1,400 O.K. Letter instructions."

On receipt of this telegram by Forbes & Franklin they shewed it to the plaintiff and it was arranged that the matter should stand until the receipt of Hamilton's letter.

Statement

On the 1st of February, the same date as his telegram to them, Hamilton also wrote to Forbes & Franklin stating that his papers were in the bank and could not be got until his return to Vancouver, that he wanted to get $1,400 net to him after payment of the agents' commission, and that if this was satisfactory to the proposed purchaser he would complete the transaction on his return to Vancouver.

Macdonell, and *Brown,* for plaintiff: The receipt given by Forbes & Franklin to the plaintiff is a contract of sale subject to owner's confirmation. The owner did confirm the sale by the telegram to Forbes & Franklin which was communicated by them to the plaintiff, thereby making a binding contract. The letter by which Hamilton attempted to add a new condition is of no effect, a binding contract having already been made.

Argument

Craig, and *Bourne,* for defendants Hamilton and Forbes: The receipt is not a contract. It is to be construed as if Hamilton had signed it himself, agreeing to sell subject to his own

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confirmation, which is only a statement that he will sell if he decides to do so. The receipt is only an acknowledgment of money deposited with an offer of purchase and to be held pending the owner's decision whether he would enter into a contract or not. The telegram of Hamilton is not an acceptance of plaintiff's offer. It is only a statement that the price is satisfactory and leaves other terms to be settled afterwards: *Bohan* v. *Galbraith* (1907), 13 O.L.R. 301. Forbes & Franklin had no authority to bind Hamilton by signing a receipt: *Hamer* v. *Sharp* (1874), L.R. 19 Eq. 108; *Rosenbaum* v. *Belson* (1900), 2 Ch. 267; *Chadburn* v. *Moore* (1892), 61 L.J., Ch. 674; *Prior* v. *Moore* (1887), 3 T.L.R. 624.

Argument

The receipt and telegram, not being connected by internal reference, are not a sufficient memorandum within the Statute of Frauds: Leake on Contracts, 4th Ed., pp. 176-7. The terms of sale are not sufficiently set out in the receipt.

MacGill, for defendant Franklin: Forbes & Franklin never represented that they had any authority to bind Hamilton, and no case has been made out against them.

HUNTER, C. J.: In my opinion the case against Hamilton may be disposed of on the short ground that there was no concluded agreement.

The receipt of the 31st of January would seem to be merely a memorandum of an offer to buy the property for $1,400, of which $900 or $950 was to be paid in cash. It is elementary law that to have a binding contract the offer must be accepted *simpliciter*. The same day the owner's agents wired the owner as follows: "Deposit on Lot Kitsilano fourteen hundred. Wire approval and instructions," to which the following reply was received: "Fourteen hundred O.K. Letter instructions." At this point it is clear there is no concluded bargain, as the owner did not know how much was to be cash, nor did he know the other terms of the offer. There is, in short, only a statement that he assents to the only term of the offer which has been communicated, and is sending a letter of instructions. It appears by the letter, which was not produced, that he instructed the agents that the $1,400 was to be net to him, but if an acceptance

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simpliciter of the offer had been proved, I think it must be plain that the buyer would have been entitled to a conveyance on payment of the $1,400, and that the owner would have had to pay any commission himself.

There must, however, be judgment for the defendant Hamilton with costs; judgment must also go for the other defendants with costs, as it is clear that they never represented that they had authority to sell as the owner's agents, nor did they in fact assume to do so.

Judgment for defendants.

RE W. P. ELLIS & CO.

CLEMENT, J.
(At Chambers)
1907
Nov. 14.
RE ELLIS & CO.

Statute—Bills of Sale Act, 1905, Sec. 11—Time for registration, extension of—Protection of intervening rights—Delay caused by inadvertence.

A company, domiciled in Toronto, Ontario, took a bill of sale on goods in Grand Forks, British Columbia. It was not possible to send the instrument to Toronto and have it returned for filing with the Registrar with the affidavit of *bona fides* within the five days required by section 7, sub-section 2, of the Bills of Sale Act, 1905:—

Held, that, in the order granting an extension of time for filing the instrument, there should be a provision protecting intervening rights.

Statement

APPLICATION under section 11 of the Bills of Sale Act, 1905, to extend the time to register a bill of sale, heard by CLEMENT, J., at Chambers, in Grand Forks, on the 14th of November, 1907.

The mortgagee was a company domiciled in Toronto, Ontario, and it was impossible to forward the bill of sale to them in order to have the affidavit of *bona fides* completed and returned within the five days required by the Act.

Argument

H. C. Hanington, in support of the application: The document was prepared in a great hurry and the affidavit now before the Court shews that the conveyancer who drew it up

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had it in his mind that the powers of the judge were the same now as under said chapter 32, section 10, R.S. B.C. 1897, and the amendment of 1903-4, and when forwarding the bill of sale to Toronto, he wrote to the mortgagee that the impossibility of receiving back the papers within the five days would entitle them to an extension of time to register.

Argument

The fact that the conveyancer was unaware of the limited jurisdiction of the judge under section 11, as shewn by the affidavit filed, would cause the omission to register this bill of sale to be due to inadvertence within the purview of the decision in *In re Jackson & Co., Limited* (1899), 1 Ch. 348, 68 L.J., Ch. 190, where it was held that the omission to file a contract pursuant to section 25 of the Companies Act, 1867, owing to the ignorance of the parties of the provisions of the Act, will be deemed an inadvertence within the meaning of section 1, sub-section 1, of the Companies Act, 1898.

Judgment

CLEMENT, J.: There must be a provision protecting intervening rights: see *In re Ehrmann Brothers, Lim.* (1906), 75 L.J., Ch. 817, and the order will be made on those terms.

Order made.

ROBERT WARD & COMPANY, LIMITED LIABILITY *ET AL.* v. GEORGE WILSON.
W. H. MALKIN COMPANY, LIMITED, GARNISHEE.

CLEMENT, J.
1907
Nov. 14.

ROBERT WARD & CO. *v.* WILSON

Practice—Attachment of debts—Creditors' Relief Act, 1902, Sec. 35, application of—Priority of attaching creditors.

In a dispute between a number of attaching creditors for the moneys paid into Court by garnishees:—

Held, that such moneys should be paid to the sheriff for distribution under the provisions of the Creditors' Relief Act.

APPLICATION on behalf of the plaintiffs, whose attaching orders were served on the 4th of September, 1907, for payment out to them of the moneys in Court paid in by the W. H. Malkin Company, Limited. Subsequent attaching creditors resisted the order on the ground that the Creditors' Relief Act applied, and the money should be paid to the sheriff to be distributed *pro rata*. Heard before CLEMENT, J., at Vancouver, on the 10th of November, 1907.

In this matter a number of actions were commenced against one George Wilson, and against George Wilson and George Howe, carrying on business as George Wilson & Company, and attaching orders before judgment were served on the W. H. Malkin Company, Limited, who obtained an order allowing them to pay money into Court, which they did. Robert Ward & Company, Limited Liability, were the attaching creditors whose process had been first served, but as they had signed judgment against George Howe only, they did not appear. Peter Scott, Fong Lew, Alexander Morrison, A. T. Graham and Samuel Levy and W. H. Lockley had served their attaching orders on the 4th, and James Quinn and David Wilson had served theirs on the 10th of September, 1907.

Statement

Donaghy, for the prior attaching creditors.
Reid, for the subsequent attaching creditors.

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CLEMENT, J.: The moneys in Court should, I think, be paid to the sheriff to be held by him for distribution under the Creditors' Relief Act. That Act abolishes priority among creditors by execution from the Supreme and County Courts, and section 35 indicates how that principle is to be worked out in respect of that part of the debtor's assets which consist of debts due to him. That section, as Mr. *Reid* pointed out, does not consist of a main clause with sub-sections, but is really a group of sections dealing with this matter of attachment of debts. Clauses 2 and 3 seem to me to provide for every possible case, where the sheriff himself is not the moving party. The plaintiffs, who ask here for payment out to themselves, were, it is true, not judgment creditors when they obtained the original attaching order, but that order becomes really operative in their favour only when they become judgment creditors. The debts attached were attached to answer the judgment to be recovered—section 3, Attachment of Debts Act—so that these plaintiffs fairly, I think, come within the phrase "any judgment creditor, who attaches a debt," in clause 3 of section 35. Even if I am adopting a too benevolent construction of section 35, the fact remains that we have the legislative declaration abolishing priority among creditors by execution. The applying creditors here are not entitled *ex debito* to an order for payment out to them of the moneys in Court: see *Martin* v. *Nadel* (1906), 75 L.J., K.B. 620. Moreover, Vaughan Williams, L.J., lays it down in that case that garnishee proceedings are a process of execution. On this ground, therefore, I think I am justified in making the order I have indicated. But before the money is paid out to the sheriff, the costs of the applying plaintiffs and of the plaintiffs at whose instance the fund is directed toward the sheriff's hands should be taxed and paid out to those parties.

Judgment

Order accordingly.

CRANBROOK POWER COMPANY v. EAST KOOTENAY POWER COMPANY.

CLEMENT, J.
1907
Nov. 25.
CRANBROOK POWER CO. v. EAST KOOTENAY POWER CO.

Waters and water rights—Jurisdiction of Gold Commissioner—Change of point of diversion, application for—Water Clauses Consolidation Act, 1897, Secs. 9, 27, 84.

The defendant Company, which held a record for 25,000 inches of water out of the St. Mary's River, granted on the 8th of May, 1906, applied, under section 27 of the Water Clauses Consolidation Act, 1897, to the Assistant Commissioner at Cranbrook, to change the point of diversion. This was opposed by the plaintiff Company, who held a record, granted on the 20th of October, 1906, for 5,000 inches of water out of the St. Mary's River at the new point of diversion applied for by the defendant Company. The Commissioner decided that he had jurisdiction under section 27, but upon it appearing that the defendant Company had taken certain proceedings under section 84, *et seq.*, to have their undertaking approved by the Lieutenant-Governor in Council, the Commissioner ruled that his jurisdiction was voided by these proceedings. They appealed under section 36 and afterwards withdrew, and they also withdrew their application to the Lieutenant-Governor in Council, and secured an appointment from the Gold Commissioner to proceed again with the application for a change of point of diversion. On motion by the plaintiff Company for prohibition:—

Held, that the Commissioner had jurisdiction to entertain the application.

Statement

APPLICATION for a writ of prohibition to issue to a Commissioner under the Water Clauses Consolidation Act, 1897, argued at Vancouver before CLEMENT, J., on the 22nd of November, 1907. The facts are set out in the headnote.

S. S. Taylor, K.C., for plaintiff Company.
Smith, for defendant Company.

25th November, 1907.

Judgment

CLEMENT, J.: I agree with the Gold Commissioner, and substantially for the reasons advanced by him, that he has jurisdiction to entertain an application for a change in the point of diversion fixed by the water record of a power company. The

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contention put forward by the applicants practically amounts to this, that in the case of a new record—as distinguished from one obtained by purchase or expropriation—the application therefor, when made by a power company, must be made to the Lieutenant-Governor in Council; in other words, that section 84 of the Water Clauses Consolidation Act, which purports to deal with such applications, incorporates into Part IV. of the Act only section 9 of Part II. and section 9 has regard only to the giving of notice of intention to apply. Certainly the reference to section 9 can hardly be called a happy one. Section 84 speaks of it as a section dealing, not only with the application for, but with the acquisition and use of water records; amongst others, of water records for mining purposes. Strictly speaking, section 9 does not deal with any of these matters. It has reference, as already noted, solely to the giving of notice of intention to apply. There seems, therefore, nothing for it but to treat the reference in section 84 as a reference to all those sections of Part II. which deal with the application for and the acquisition and use of water records: *falsa demonstratio non nocet.* The reference in section 84 is, I think, as I have stated; and the *falsa demonstratio* is in pointing to section 9 as a section covering the matters really referred to, when in truth it is merely introductory to the group of sections which deal with those matters. In giving this construction to section 84 I am, I think, adopting the only course which will make the provisions of Part IV. work out in harmony. Section 84 being thus construed, section 27 which gives the Gold Commissioner power to change the point of diversion is to my mind clearly a section dealing with the "use" of a water record. Section 9, it may be noted in passing, has reference to an application to the Gold Commissioner, and no modification of it is suggested by section 84 to fit the view put forward by the applicants that the application in a case such as this must be made to the Lieutenant-Governor in Council.

Judgment

Of course if Part IV. contained clauses dealing with these matters the position might be different.

But as I read sections 85, 86 and 87 the Lieutenant-Governor in Council is nowhere given power to grant water records. He

may (section 86) firstly, approve the undertaking as submitted, or secondly, may limit (*a*) the area within which, etc., or (*b*) the amount of unrecorded water which the power Company may record, etc.; and (*c*) generally may impose such terms, etc. Nothing here about granting a record; but if the terms imposed in or by the certificate of the Lieutenant-Governor in Council necessitate a change in the water records, section 89, sub-section 2, directs the Gold Commissioner to make the necessary amendments in "the water records acquired by the power company." This all comports with the idea that the "record" consists of entries in a book kept for that purpose by the various Gold Commissioners in the different sections of the Province: section 2. Then, again, if the record is to be granted by the Lieutenant-General in Council one would expect to find provisions as to notice being given by public advertisement or otherwise of the time and place when and where the application would be heard; instead of which the first public notice is by advertisement of the certificate after its issue. Then and not necessarily before then, interested parties may come forward and get a hearing before the Lieutenant-Governor in Council under section 92.

Judgment

All this, I think, shews clearly that the Lieutenant-Governor in Council does not deal with applications for water records under Part IV. All matters connected with the application for the acquisition and use of water records remain to be dealt with by the Gold Commissioner under the appropriate sections of Part II., subject only to the possible imposition of modifying terms by the Lieutenant-Governor in Council when his certificate of approval is sought for the undertaking.

The application must be dismissed with costs.

Application dismissed.

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HAREL v. HANDLEY

HAREL *ET AL.* v. HANDLEY.

Statute, construction of—Liquor Licence Act, 1900, Cap. 18, and 1906, Cap. 26—Appeal from Commissioners to County Court Judge—Notice of—Signature of notice by party affected—Necessity for—Proof of decision appealed from—Number of licences—Proof of— Trial de novo—Population.

(1.) In an appeal from the decision of Commissioners under the Liquor Licence Act, 1900, proof of such decision is not necessary.

(2.) It is not necessary that the notice of appeal be signed by the party or parties affected by the decision.

(3.) The appellant is not called upon to prove that the Commissioners have exhausted their authority by having granted the full number of licences.

(4.) Section 11A. of the Act, as enacted by Cap. 26, 1906, contemplates an actual population of 1,500 before a fourth licence may be granted.

Statement

APPEAL from the decision of a board of Commissioners under the Liquor Licence Act, 1900, heard before WILSON, Co. J., at Fernie on the 30th of September, 1907. The points in controversy are set out in the headnote and reasons for judgment.

A. I. Fisher, for appellants.
Eckstein, for respondents.

Judgment

WILSON, Co. J.: In this matter certain preliminary objections have been raised which I will deal with now. The point was first raised that the notice of appeal and proof of service thereof having been presented and no other evidence being adduced by the appellant, the appeal was not properly before the Court, as there was no evidence of the decision of the Court below. After consideration I do not think that point well taken. The notice of appeal itself sets forth the decision of the Court below and in addition the Act apparently does not contemplate anything but the notice of appeal having been given. The appeal lies provided the notice of appeal is given and my view is that the Act has been complied with in this case.

A second point is raised that there is no proof that the notice of appeal is signed by any party affected by the decision of the

Board. On this point, my view is that the two provisoes of section 42 of the Act deal with two distinct methods of procedure. The first proviso deals with a reconsideration by the Board, and in that case must be applied for by some person affected, but the second proviso deals with an appeal to the County Court, and has no reference to, nor is it in any way governed by, the preceding proviso. Each proviso is independent and has to be worked out alone.

A third preliminary point is raised that there is no proof adduced by the appellant as to the number of licences at Hosmer. The contention is that this should be adduced in the first instance. This contention seems incorrect, as the appeal on being launched becomes absolutely a trial *de novo* and after the applicant proves that he has taken the necessary steps to procure a licence the appellant can then adduce his proof, admitting everything else to be in order, that the full number of licences have been granted and that the Board has no further power. That is not a fact which the appellant must prove in the first instance, but is rather a ground of defence to be advanced in opposing the granting of a licence.

On the merits I am of opinion that section 11A. of the Act contemplates an actual population of 1,500 before any additional or fourth licence can be granted. The power seems to be expressed shortly as follows: "Only three licences shall be granted until the population exceeds five hundred," and thereafter the Act says, as I take it, "Only one licence for each additional one thousand of population." The intent to my mind was to give the commissioners power to grant three licences in small localities up to 500 of a population and that that number would be sufficient until the population had reached 1,500. The limitation of their power is in the latter part of the section and the first part must be read as subject to the latter, and that part is the restricting and governing part. Such being my view, I think the appeal must be allowed. The respondent, of course, is not prejudiced as to any renewal of his application on proof that the population is such as to warrant the granting of the licence.

Judgment

Appeal allowed.

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HUGGARD v. NORTH AMERICAN LAND AND LUMBER COMPANY *ET AL.*

Practice—Fixing of venue—Application for order made in regular way—Case necessary to be made out.

Where the usual order for directions names the place of trial, a subsequent application to change the venue will not be entertained; at all events where there has been no intervening alteration of conditions.

Statement

APPLICATION to fix venue of trial, argued before CLEMENT, J., at Chambers in Vancouver on the 8th of November, 1907. The usual order for directions was applied for, and it directed, *inter alia*, that the place of trial be at Nelson. After the close of the pleadings, defendants moved to fix the place of trial at Fernie.

Argument

W. A. Macdonald, K.C., in support of the application.

S. S. Taylor, K.C., contra: An order for directions has been taken out, duly entered and not appealed from, and is therefore final. This order fixes the venue. Our rule as to trial and venue is different from the English rule. See marginal rule 425. See also the note to that rule in (1905), Y.P., p. 396.

Judgment

CLEMENT, J.: The order of FORIN, Co. J., standing, this application must fail. No case is set up of changed conditions, so that I need express no opinion as to the inherent jurisdiction of the Court to change the place of trial should such a change of conditions occur after the making of the first order.

Application dismissed.

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WATT v. WATT

Divorce—Jurisdiction—Supreme Court—Divorce and Matrimonial Causes Act, 1857 (Imperial)—How far in force in British Columbia—Stare decisis.

(1.) The Divorce and Matrimonial Causes Act, 1857 (Imperial), is not in force in British Columbia, and the Supreme Court of British Columbia has no jurisdiction to grant a divorce *a vinculo.*

(2.) The decision in *S*—— v. *S*—— (1877), 1 B.C. (Pt. 1) 25, not being the decision of an appellate tribunal, nor of the Supreme Court sitting *in banc*, is not technically binding on the Court, even when constituted of a single judge.

(3.) The view taken by BEGBIE, C.J., in *S*—— v. *S*——, *supra*, adopted in preference to that of the other members of the Court (CREASE and GRAY, JJ.)

(4.) The rule *stare decisis* does not apply, more particularly as the question is one of jurisdiction.

Semble, if the Court has jurisdiction it may be exercised by a single judge sitting as the Court.

THE petitioner sued for divorce on the grounds of adultery and cruelty of respondent.

She, the petitioner, was formerly the wife of one John Dundas, who is still living in British Columbia, and has obtained a divorce from him in the State of Washington after some months' residence there.

Statement

The respondent in his answer denied both cruelty and adultery and further pleaded that petitioner was not his wife, because her divorce from Dundas was invalid. By counterclaim he asked for a declaration that petitioner was not his wife.

The hearing came on before CLEMENT, J., at Vancouver on the 24th and 25th of July, 1907.

The respondent admitted facts sufficient to constitute cruelty under the Divorce and Matrimonial Causes Act. All other facts were in issue.

At the conclusion of the evidence, CLEMENT, J., without discussing or hearing argument on the merits, expressed a doubt as to the Divorce and Matrimonial Causes Act, 1857, being in

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force in British Columbia, and, if in force, whether one judge could hear a divorce cause. He therefore directed argument on the question thus stated, and on the further question whether the points mentioned were settled by authority binding on him, to come on before him on the 1st of October, 1907. He also directed the petitioner to notify the Solicitor-General for Canada and the Attorney-General for British Columbia. This argument was adjourned from time to time and came up on the 8th of November, 1907.

The Attorney-General for Canada was not represented.

Wilson, K.C., for the Attorney-General for British Columbia, submitted that is not competent for a single judge to deny jurisdiction. It was originally confirmed by two judges out of three sitting together, and while at that time not exercising appellate jurisdiction, it was still a decision of the Court *in banc.* The jurisdiction then has been exercised for a period of 30 years by every judge who has sat upon the bench, with the exception of two, namely, DAVIE, C.J., and MCCREIGHT, J., who declined to exercise the jurisdiction from religious motives. Consequently no cases of this kind were ever brought before them during the time that they sat on the bench and the other judges of the Court exercised the jurisdiction. It is submitted that the wildest confusion would arise, if, after the exercise for a number of years by a number of judges of a particular jurisdiction it were then ultimately disputed, not by a Court of Appeal, but by a single judge of co-ordinate jurisdiction. This subject was very fully dealt with in *Palmer* v. *Johnson* (1884), 13 Q.B.D. 351 at p. 354, which put an end to a very curious conflict of opinion between Jessel, M.R., and Vice-Chancellor Malins. See also *The Queen* v. *Victoria Lumber Co.* (1897), 5 B.C. 288 at p. 296, where there are gathered together a number of cases in which it was said that the Court of Appeal had overruled its own decisions, but if these cases be examined it will be found that there has been some point omitted to be present to the mind of the Court or the judge or that the Court overruling the decision of the former one has been strengthened by increasing the number of

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the judges, as in *Fortescue* v. *Vestry of St. Matthew, Bethnal Green* (1891), 2 Q.B. 170, overruling *Vestry of St. Mary, Islington* v. *Goodman* (1889), 23 Q.B.D. 154.

Thorogood v. *Bryan* (1849), 8 C.B. 115, it is true, was after some years overruled by *The Bernina* (*2.*) (1886), 12 P.D. 58, but *Thorogood* v. *Bryan* had been frequently doubted, and Lord Esher, M.R., points out that the judge upon whose casual dictum it was decided was not himself satisfied with the decision, and it is submitted that the whole of the cases mentioned in *The Queen* v. *Victoria Lumber Co.*, *supra*, when carefully examined, are no authority for the proposition that one Court can overrule the decision of another Court of co-ordinate jurisdiction: see observation of Herschell, L.C., in *Pledge* v. *Carr* (1895), 1 Ch. 51 at p. 52. The Court in that case was invited to overrule *Vint* v. *Padget* (1858), 2 De G. & J. 611. Lord Herschell said: "We cannot overrule *Vint* v. *Padget*, for that was a decision of a Court co-ordinate in jurisdiction with ourselves": see also the observations of Lord Esher, M.R., in *Philipps* v. *Rees* (1889), 24 Q.B.D. 17 at p. 21. The view there expressed was taken in the Supreme Court of Canada with respect to a judgment believed by the profession to be unsound: *Burrard Election Case* (1901), 31 S.C.R. 459. See also the language of Lord Esher, M.R., in *In re Wallis: Ex parte Lickorish* (1890), 25 Q.B.D. 176 at p. 180, when invited to overrule a decision that had stood for 30 years. It is submitted that this is not a case of overruling decisions which have been acted on for so long, but of one judge declining to follow the decisions of all the judges of the Court as before mentioned (except two) for 30 years.

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In our own Court see *Jordan* v. *McMillan* (1901), 8 B.C. 27, where the Court followed a former unreported decision, although it was argued by counsel that subsequent decisions in the Privy Council had shewn that the Court was in error. In *Scott* v. *Scott* (1891), 4 B.C. 316, the Full Court, while deciding that it had no jurisdiction to entertain an appeal in matters of divorce, the Chief Justice, in giving the judgment of the Court, said: "We have neither the power nor the inclination to discuss the decision of *S*——— v. *S*——— or to impugn it in any way." If the Full Court has no power to impugn the judgment in

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S——— v. *S*———, it is submitted that neither has a judge of first instance.

The question of the exercise of divorce jurisdiction is exhaustively discussed by Crease and Grey, JJ., in *S*——— v. *S*——— (1877), 1 B.C. (Pt. 1) 25. It is submitted that the error into which the learned Chief Justice has fallen is in assuming that the main purpose of the Divorce Act was the creation of a special tribunal. It is submitted that the main purpose of the Divorce Act was to confer upon the subject a right that never before existed, namely, the right to a divorce. The creation of the Court is merely the machinery by which that right may be exercised and the Act further goes on to provide also the terms upon which that right may be exercised. The analogy is that set out by the majority of the Court in *S*——— v. *S*———, *supra*, namely the Act relating to probate, curiously enough passed in the same session of the Imperial Parliament, and acted upon in British Columbia ever since the foundation of the colony. This Act also created a new right and then provided machinery for its exercise. With the necessary changes in point of detail this Act has been followed in British Columbia since its foundation. Again there is Sir George Turner's Act, 15 & 16 Vict., Cap. 86. This Act has also constantly been followed with the necessary changes in point of detail. A number of statutes of the like kind might be mentioned. The most important perhaps of all is the Habeas Corpus Act, in which the jurisdiction is distinctly conferred upon certain judges, mentioning them by name—Lord Chancellor or Lord Keeper, or any of His Majesty's Justices either of the one bench or of the other, or the Barons of the Exchequer of the Degree of the Coif. Upon the question of whether judgments in divorce are judgments *in rem* he referred to: *Bater* v. *Bater* (1906), P. 209; *Ogden* v. *Ogden* (1907), P. 107.

Argument

Woodworth, for respondent: The Supreme Court of British Columbia has jurisdiction to grant the divorce: *Lawless* v. *Chamberlain* (1889), 18 Ont. 296. In any event the respondent is before the Court and that Court has jurisdiction to make the

declaration he asks for: Supreme Court Act, Sec. 9; Supreme Court Rules, Sec. 1; Divorce Rules and B.C. Stat. 1906, Cap. 14; *Regina* v. *Roblin* (1862), 21 U.C.Q.B. 352. The Divorce Act in part is in force even though some sections are inapplicable and though local circumstances are not the same: *Regina* v. *Roblin*, *supra*; *Hesketh* v. *Ward* (1867), 17 U.C.C.P. 667 at pp. 686, 690; *Doe d. Hanington* v. *McFadden* (1836), 2 N.B. 260.

J. A. Russell, for petitioner, cited the Act and reviewed the cases.

[CLEMENT, J., referred to *Chichester* v. *Mure* (1863), 32 L.J., P. 146].

Cur. adv. vult.

10th November, 1907.

CLEMENT, J.: I see no reason why a judge should apologize at any time for a speedy delivery of judgment. And, in this particular case, the issues involved are of such vital importance, not so much perhaps to the immediate parties as to many others confronted now with disquieting possibilities of undeserved opprobrium that as speedily as may be those issues should come before a Court empowered to deal with finality upon them. In this case, if ever in any, *interest republicæ ut sit finis litium*, so that, having reached a considered opinion, I feel it my duty to dispose of the case at once in order that there need be no delay in carrying it to appeal.

Judgment

In *S*——— v. *S*——— (1877), 1 B.C. (Pt. 1) 25, the one case in which is discussed the question with which I have now to deal, the then three judges of the Court (BEGBIE, C.J., GRAY and CREASE, JJ.) sat, not *in banc*, nor as an appellate tribunal, but in supposed conformity with the requirements of the Divorce and Matrimonial Causes Act of 1857, to hear a petition for a decree of nullity of marriage on the ground of impotency. The two puisne judges held that they had jurisdiction in the premises. The Chief Justice dissented. Owing, as I am given to understand, to his refusal to join in the exercise of the alleged jurisdiction, the view put forward by Mr. Justice GRAY that one judge sitting alone could exercise the full powers of the Court was adopted in practice and has since been uniformly followed.

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If I do not discuss at length the views expressed by the learned judges in *S*——— v. *S*———, it is not because I have not carefully considered them. When first called upon to exercise jurisdiction in divorce, I was at once struck by the fact that the jurisdiction, if it exists, is unhappily in one way so fettered and in another so unfettered as to place a judge in a very unenviable position. Tied down to the law of 1858, he has none of the safeguards which now obtain in England against collusive actions—I mean the granting in the first instance of a decree *nisi* and the reference of the case to the King's Proctor for investigation and, if necessary, intervention; while on the other hand, as the Full Court has held in *Scott* v. *Scott* (1891), 4 B.C. 316, there is no appeal from his decision to any tribunal in this Province. This very unsatisfactory state of affairs led me to an anxious consideration of the whole question of the Court's jurisdiction and to ask at the first opportunity that counsel should discuss the point. At my suggestion the Provincial Government has instructed counsel to argue in support of the Court's jurisdiction. I have endeavoured to keep an open mind throughout Mr. *Wilson's* able argument; but if I may say so without offence, he has advanced nothing that I had not already carefully debated in my own mind. Since the argument I have read with care all the cases he cited and many others. In the result the view I take is so decided that, for the reasons above indicated, I should give judgment at once.

Judgment

I assume for the purposes of this judgment that the jurisdiction of this Court prior to 1871 was and still is of the widest character, *viz.*, as stated in Sir James Douglas' proclamation of June, 1859, establishing the Court, "jurisdiction in all cases, civil as well as criminal, arising within the Province." But an enactment creating a Court and defining its jurisdiction does not usually, and it did not in this instance, add to the existing body of substantive law. It provides usually, and it provided in this instance, a tribunal to safeguard and enforce such rights only as exist under the substantive law from time to time in force. So that usually and in this instance we must look elsewhere for the substantive law.

Admittedly there is no legislation emanating from a British

Columbia Legislature prior to the date (1871), when British Columbia became a Canadian province, dealing specifically with the subject of the dissolution of marriage. And, of course, there could be none since that date, divorce being one of the matters assigned to the exclusive ken of the Federal Parliament. And that Parliament has passed no Act on the subject. But the contention is that the law of England, civil and criminal, as it existed in November, 1858, was introduced at an early date into British Columbia, and that the law of England so introduced into British Columbia included a law on the subject of divorce. If so, it would clearly be the right and duty of this Court to uphold and enforce whatever rights and remedies existed under or were provided for by that law. The question of course is: Was any such law introduced?

To solve this question it is necessary to consider in the first place the language of the enactment by which English law was introduced into British Columbia. By proclamation of the 19th of November, 1858, Sir James Douglas, Governor of the Mainland Colony of British Columbia, ordained that "the civil and criminal laws of England as the same existed at the date of said proclamation and so far as they were not from local circumstances inapplicable to the Colony of British Columbia, were and should remain in full force within the said Colony," subject of course, to future legislation. After the union of the island and mainland colonies the above provision was extended to the united colony.

Judgment

I am of the opinion—at all events I assume—that the use of the double negative throws the burden on him who asserts that a given English law, statutory or other, of date prior to 1858, was not introduced into British Columbia. He must establish the affirmative proposition that the law in question was "from local circumstances inapplicable to British Columbia."

This drives one at once to an examination of the English law on the subject of divorce as it stood in November, 1858. So far as concerns the question of a dissolution of marriage by judicial decree—which is all I have to deal with—the examination is necessarily limited to the Divorce and Matrimonial Causes Act of 1857. Prior to the passage of this Act no such judicial decree

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was possible; no Court had jurisdiction in the premises; only the omnipotence of Parliament could dissolve the marriage tie. What then was the law embodied in the Act of 1857?

Here again we have an enactment, one large purpose of which was to create a Court and define its jurisdiction. Insofar as it follows out this purpose it is essentially local. The Court was to be composed from time to time of judges occupying certain positions on the bench of existing English Courts, and it was to have the jurisdiction theretofore exercised by the Ecclesiastical Courts in England and certain new and additional jurisdiction. The Ecclesiastical Courts of England, it may be noted, had no counterpart in the colonies: *In re the Lord Bishop of Natal* (1864), 3 Moore, P.C.N.S. 115. It really seems idle to labour further the proposition that insofar as the Act of 1857 was limited to the creation of a Court it was a purely local law clearly inapplicable to British Columbia.

But substantive law is sometimes (*e.g.*, in the Judicature Acts) found among the clauses of a statute the main purpose of which is to create a Court, and to some extent that is the case in the Act of 1857, now under examination. Having created an exceptionally strong Court to take over the jurisdiction theretofore exercised by the Ecclesiastical Courts, it was deemed expedient to withdraw divorce legislation from Parliament—practically, though of course not legally—and to elevate a moral right to legislative favour into a legal right enforceable in a court of justice. But not in any of the ordinary Courts; only in this exceptionally strong Court, and in it only when constituted in an exceptionally strong way of three judges, of whom the judge of the newly created court of probate was to be one. The Act did undoubtedly, I think, create a new right as between husband and wife in England but, in my opinion, only *sub modo*. That new right was so inseparably incidental to and bound up with the jurisdiction of an essentially local Court that I cannot bring myself to view it as other than itself essentially local. It is impossible, in my opinion, to segregate the bare right to a judicial decree from the local conditions as to its enforcement. Those local conditions did not and could not exist in British Columbia. Sir William Grant's description

Judgment

of the Mortmain Act, *Attorney-General* v. *Stewart* (1817), 2 Mer. 143 at p. 160, might well, it appears to me, be taken as a pen picture, accurate in every detail, of the Divorce and Matrimonial Causes Act of 1857:

"In its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for purposes of local policy, complicated with local establishments, and incapable without great incongruity, of being transferred as it stands into the code of any other country."

Attorney-General v. *Stewart*, was approved of and followed in the House of Lords: *Whicker* v. *Hume* (1858), 7 H.L. Cas. 124, 28 L.J., Ch. 396.

In short, I am of the opinion that the law enacted by the Divorce and Matrimonial Causes Act of 1857 was from local circumstances wholly incapable of application to British Columbia; and I cannot bring myself to hold that the establishment by colonial enactment, couched in general terms, of what I may call an ordinary Court with general jurisdiction throughout the colony was intended or would suffice to make it an extraordinary Court with the extraordinary, almost revolutionary, jurisdiction of the lately created English Divorce Court.

I might suggest, without going further than mere suggestion, a somewhat analogous question: Could the Colonial Court exercise jurisdiction in bankruptcy, as the phrase was understood in England, without a local colonial law on the subject? And I might refer to *L'Union St. Jacques de Montreal* v. *Belisle* (1874), L.R. 6 P.C. 31, for a definition or description of bankruptcy as a conception dependent upon legislation. So, in my opinion, was the right to a judicial decree dissolving marriage dependent upon and conditioned by the legislation which created it.

Judgment

One question, not touched upon in *S*——— v. *S*——— appears to me to have an important bearing. If the jurisdiction contended for exists, does a decree of divorce pronounced by this Court confer a right to re-marry? Evidently a most vital question, the final solution of which ought not to be delayed for one moment longer than necessary. This question of the right to re-marry after decree is discussed in the carefully considered

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judgment of Sir Cresswell Cresswell (speaking for the Full Court) in *Chichester* v. *Mure* (1863), 32 L.J., P. 146 at p. 151.

The right, then, is a statutory right under section 57. But section 57 depends upon and must be read with section 56. Section 56 is a section unequivocally local, providing for an appeal to the House of Lords. No such appeal lies from any Colonial Court. The right to re-marry arises only upon the expiration of the time for appeal, "but not sooner." Is that time in the case of a decree of this Court to be fixed, by analogy, with reference to the time within which a final appeal may be taken to the Privy Council? What was that time in 1858? What is it now? This is an incongruity greater, it seems to me, than any in the mind of Sir William Grant when he used the language quoted above from *Attorney-General* v. *Stewart*, and makes it impossible for me to think that the law enacted by the Divorce and Matrimonial Causes Act of 1857 was other than inapplicable in British Columbia, when such a vital matter as the right of re-marriage would be left to depend on the arbitrary adoption of a doubtful analogy.

Judgment

There is, in my opinion, no authority binding me to decide contrary to my own deliberate conviction as to what is the law. In the only case (*Scott* v. *Scott*, above referred to) before an appellate tribunal, it was unnecessary to consider the larger question. The Full Court held that it at all events was without jurisdiction in divorce. It is unnecessary to cite authority for the proposition that want of jurisdiction can never be cured by reiterated instances of its exercise, or, perhaps I should say, of attempts to exercise it. *Ex nihilo nihil fit.* To this case the principle of *stare decisis*, valuable rule of expediency as it undoubtedly is, can have little application. The question, however, can never, being a question of jurisdiction, be decided short of the Privy Council, or better still, by legislation. But I realize fully the responsibility I shoulder in giving effect to my own view in face of many decrees pronounced by British Columbia judges. Against that I may put these facts: (1.) that this question of jurisdiction has never, so far as I can learn, been considered in any case other than *S*——— v. *S*——— and, incidentally, *Scott* v. *Scott*; (2.) that at least three very able judges

in British Columbia have, as is well known, declined to exercise this jurisdiction; and (3.) that no attempt has ever been made, so far as I know, to invoke the aid of the Courts in Manitoba or the North-West Territories along this line, notwithstanding the fact that the law of England as it stood in 1870 was introduced there in terms almost identical with those of Sir James Douglas' proclamation. I might add that the course taken by Sir Gorell Barnes in *Dodd* v. *Dodd* (1906), P. 189 would seem to be a precedent for the course I have felt myself bound to take in this case. He declined under the circumstances of that case to follow the reported decisions of two eminent judges of co-ordinate jurisdiction.

It becomes unnecessary, in the view I have taken, to express any opinion on the question as to how the jurisdiction is to be exercised, if it exists. It seems to me, however, that if the right to a judicial decree of dissolution created by the Act of 1858 became the right of a spouse in British Columbia by virtue of the Douglas proclamation, it was a right to be enforced by the ordinary procedure of the Court as laid down in the Rules of Court promulgated by BEGBIE, C.J. That he made no specific provision for proceedings in divorce cases shews this, at least, that he, co-eval, as Mr. Justice GRAY expressed it, with the law in British Columbia, had no notion that the English Divorce Matrimonial Causes Act of 1857 had operative effect in British Columbia. And until after 1872, when the Court at length consisted of three judges, no attempt was made to invoke the provisions of the Act.

Judgment

The petition is dismissed, but without costs. I may, I think, be pardoned for expressing in the strongest possible terms the hope that those charged with the oversight of the administration of justice in this Province will take forthwith such steps as may be necessary to have this delicate question promptly set at rest.

Petition dismissed.

HOWAY, CO. J.

1908

Jan. 4.

McLEAN v. DOVE

McLEAN v. DOVE.

County Court—Practice—Costs—Review of taxation—Scales "over $10 to $25" and "over $250 to $500"—Amount recovered by means of the action.

Plaintiff claimed $333.19 for certain cattle sold to defendant, who pleaded tender of $300 and payment into Court, and not indebted as to the remainder of the claim. Judgment for plaintiff was given for $320. The taxing officer allowed costs on the scale "over $250 to $500":—

Held, on review of the taxing officer's ruling, that the amount recovered by means of the action being only $20, the costs should have been taxed on the scale "over $10 to $25."

Statement

APPLICATION for review of the Registrar's ruling on taxation of the plaintiff's bill of costs. On the taxation the defendant contended that the bill of costs should be taxed on the scale applicable to "over $10 to $25," and not on scale "B" of the costs "over $250 to $500." The Registrar ruled against the defendant, who appealed under marginal rule 596, County Court Rules, 1905. In the action the plaintiff claimed $333.19 for certain cattle sold to the defendant. The defence was a plea of tender of $300 and payment of the same into Court, and not indebted as to the remainder of the claim. On the trial judgment was given for plaintiff for $320. The appeal from the Registrar was argued at New Westminster on the 23rd of December, 1907, before HOWAY, Co. J.

Argument

Reid, for the application: The amount really recovered in the action was only the excess of the amount for which judgment was given over and above the amount tendered before action, and paid into Court with the defence, and the costs should be taxed on the scale applicable thereto: *Dixon* v. *Walker* (1840), 7 M. & W. 214; *James* v. *Vane* (1860), 29 L.J., Q.B. 169.

Bole, K.C., contra.

4th January, 1908.

Judgment

HOWAY, Co. J. [after stating the facts as above set out]: The matter now comes before me on the question whether the costs shall be taxed on scale "B," being the scale applicable "where the subject-matter or the sum recovered exceeds $250 and does

not exceed $500," or on the scale applicable to amounts "over $10 to $25." Did the plaintiff recover $320 or $20?

It was admitted at the trial that the tender of $300 was duly and legally made. If the amount tendered is a "sum recovered," then scale "B" is applicable; but if not, then the other scale is applicable. It has been held that the word "recovered" applies to "all cases in which the plaintiff obtains his debt or damages by means of the action": see *Cowell* v. *Amman Colliery Co.* (1865), 34 L.J., Q.B. 161 and *Boulding* v. *Tyler* (1863), 32 L.J., Q.B. 85.

The question, therefore, turns on the point whether money duly tendered and subsequently paid into Court as provided by the rules is recovered "by means of the action." Was it necessary for the plaintiff to bring his action to recover the $300? Manifestly not. He could, and should, have accepted the amount tendered and gone on to trial for the balance of his claim: Bacon's Abridgement, Tender (B), 522.

"If a party takes a sum properly tendered, he does not thereby compromise his future claim for more": *Peacock* v. *Dickerson* (1825), 2 Car. & P. 51; *Mitchell* v. *King* (1833), 6 Car. & P. 237; *Sutton* v. *Hawkins* (1838), 8 Car. & P. 259; *Greenwood* v. *Sutcliffe* (1892), 1 Ch. 1. It is, however, contended that the plea of tender, not being in bar of the action, the plaintiff, if successful, recovers the full amount, and not merely the excess. Is this so? In support of the proposition a number of authorities were cited, but eliminating those which deal with payment into Court (a totally different matter and governed by different considerations altogether), two cases remain pertinent to the question, *Crosse* v. *Seaman* (1851), 10 C.B. 883, 11 C.B. 524 and *Cooch* v *Maltby* (1854), 23 L.J., Q.B. 305. The former, a decision of the Court of Common Pleas, is opposed to an earlier decision of the Exchequer Court, *Dixon* v. *Walker* (1840), 7 M. & W. 214, but was followed by Wightman, J., in the latter case. In 1860, the whole question, and these conflicting decisions, came before the Court of Queen's Bench in *James* v. *Vane*, 29 L.J., Q.B. 169, 2 El. & El. 882, That Court unanimously held that the amount recovered is merely the excess. Speaking of *Cooch* v. *Maltby*, Crompton, J.,

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says, p. 888: "The prior decision (*Dixon* v. *Walker*) is more correct than the later" (*Cooch* v. *Maltby*). Blackburn, J., in the Law Journal report uses much the same language. The practical effect, so far as I can see, is that the two cases relied on above are overruled. They are not cited in any recent text books on the subject; and are marked disapproved in Dale & Lehman's Overruled Cases, 1,011. It is not the practice to cite disapproved or overruled cases without explanation.

If the plaintiff had accepted the amount tendered before action he would have recovered but $20; shall he by refusing the tender be allowed to take advantage of his own wrong and thereby increase the costs? I think, clearly not. Is it true that in a claim for say $520, for goods sold, if a dispute arises as to $10 and all money except that in dispute is tendered, that that dispute cannot be litigated except at the risk of costs on the scale of $500? The only cases which ever lent any support to such a contention are overruled as mentioned above.

The real matter in dispute is the excess, but the plaintiff by refusing the tender brings an action nominally for the whole sum. In such a case, as Hill, J., says in *James* v. *Vane*, "He brings his action, as to the amount tendered, causelessly, and must take the consequences of his own fault"; and Blackburn, J., adds: "It is clear that he cannot be said to recover it (*i.e.*, the tendered money) by means of the action."

Judgment

The matter is not advanced by Order XXXIX., r. 13, as that brings us back to the question, what is the amount recovered? Neither Order XXXIX., r. 14, nor Order IX., r. 13, touch the point at all. I only mention these, as they were cited in the argument. So far as I can find the rules are silent on the point.

However, I think the principle of *James* v. *Vane*, followed in *Scott's Pneumatic Tyre Co.* v. *Northern Wheeleries Cycle Co.* (1899), 2 I.R. 34, and cited with approval in the Yearly County Court Practice, 1907, p. 69, applies and that if money be paid into Court with defence of tender, the plaintiff only recovers in the action the excess, if any.

The costs will therefore be taxed on the basis of "over $10 to $25" (*viz.*: $5 and disbursements) as the amount recovered by means of the action was but $20.

There will be no costs to this application.

Application allowed.

DE LAVAL SEPARATOR COMPANY v. WALWORTH. (No. 2.)

FULL COURT
1908
Jan. 17.

DE LAVAL SEPARATOR CO. v. WALWORTH

Principal and agent—Right of principal to recover—Contract of agency—Illegality—Contract prohibited by statute, enforceableness of.

The general rule that persons who enter into dealings forbidden by law must not expect any assistance from the law, is not applicable so as to exonerate an agent from accounting to his principal by reason of past unlawful acts or intentions of the principal collateral to the agency. If the money is paid to him in respect of an illegal transaction, he is bound to pay it over, provided that the contract of agency is not itself illegal.

The making of the contract of agency in this case was not a "carrying on business" by an unlicensed extra-provincial company within the meaning of section 123 of the Companies Act.

Decision of HUNTER, C.J., upheld on different grounds.

Statement

APPEAL from the decision of HUNTER, C. J., in an action tried before him at Vancouver on the 28th of March, 1907 (reported *ante.* p. 74).

The appeal was argued at Vancouver on the 21st of November, 1907, before IRVING, MORRISON and CLEMENT, JJ.

Argument

Martin, K.C., and *Craig*, for appellant: In this case, Walworth was a *del credere* agent. He accounted to the Company for the purchase price of the goods, and the property in the goods is retained by the Company until he pays for them. It was a clear case of doing business within the Province.

Davis, K.C., for respondent (the De Laval Separator Company): The defendant Walworth has received money belonging to us; he has given notes for this money, and is now bound. He cannot set up the defence now put forward. The goods in question were ordered by telegram or letter, and shipped out here; therefore the Company never carried on business here. Even if defendant was acting as agent for the Company, that would not be carrying on business here. He cited *Tenant* v. *Elliott* (1797), 1 Bos. & P. 3; *Farmer* v. *Russell* (1798), *ib.* 296;

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Sykes v. *Beadon* (1879), 11 Ch. D. 170 at p. 194; *Bridger* v. *Savage* (1885), 15 Q.B.D. 363; *Grainger & Son* v. *Gough* (1896), A.C. 325.

Here the question is whether the prohibition in the statute is for the protection of the revenue or for the protection of the public.

Martin, in reply.

[See argument in *Northwestern Construction Company* v. *Young*, *post*, 297.]

Cur. adv. vult.

17th January, 1908.

IRVING, J.

IRVING, J.: In my opinion this appeal should be dismissed. The plaintiffs' cause of action is that the defendant has received money for them. As a general rule, persons who enter into dealings forbidden by law must not expect any assistance from the law. This is the case not only in contracts, but also in cases of tort: see *Fivaz* v. *Nicholls* (1846), 2 C.B. 501, 513; but the general rule is not applied so as to exonerate an agent from accounting to his principal by reason of past unlawful acts or intentions of the principal collateral to the matter of the agency. The cases are collected in Pollock, 362. Even if the money is paid to him in respect of an illegal transaction, he is bound to pay it over provided that the contract of agency is not itself illegal: *Bousfield* v. *Wilson* (1846), 16 M. & W. 185.

In this case the agency business had stopped or been abandoned, and the defendant settled up his accounts with the plaintiffs by giving the notes sued on.

MORRISON, J.

MORRISON, J., concurred.

CLEMENT, J.

CLEMENT, J.: The defendant insists that he was the plaintiffs' agent. As such, taking him at his word, he received to their use the moneys represented by the notes sued on. He cannot, in my opinion, set up as against his principals that the moneys were received by him as the proceeds of illegal sales made by him. In addition to the cases cited by Mr. *Davis* on this point, I refer to *Bousfield* v. *Wilson* (1846), 16 L.J., Ex. 44; *Sharp* v. *Taylor* (1849), 2 Ph. 801; *Williams* v. *Trye* (1854), 23 L.J., Ch. 860 at p. 863, *per* Lord Romilly, M.R.; and *De Mattos* v.

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Benjamin (1894), 63 L.J., Q.B. 248. I can see no principle on which it can be said that the contract between the plaintiffs and the defendant by which he was appointed their agent was itself illegal. The making of that contract was not "carrying on business," nor did it necessarily contemplate or involve an illegal carrying on of the Company's business.

These considerations differentiate this case, in my opinion, from those in which the contract sued on was a contract entered into in evasion of statutory law, such as, *e.g.*, *Booth* v. *Hodgson* (1795), 6 Term Rep. 405; *Knowles* v. *Haughton* (1805), 11 Ves. 168; *Battersby* v. *Smyth* (1818), 3 Madd. 110. Such contracts the Courts will not enforce. See also *Sykes* v. *Beadon* (1879), 11 Ch. D. 170.

I would dismiss this appeal with costs.

Appeal dismissed.

NORTHWESTERN CONSTRUCTION COMPANY v. YOUNG.

CANE, CO. J.
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NORTHWESTERN CONSTRUCTION CO. v. YOUNG

Statute—Construction of—Companies Act, 1897, R.S.B.C. 1897, Cap. 44, Sec. 123—Registration of company—Penalty.

An unlicensed extra-provincial company, carrying on business within the Province, sued for a balance due on a contract to deliver building stone, entered into within the Province. The defence advanced was that, by reason of section 123 of the Companies Act, the contract was illegal and void:—

Held, on appeal, reversing the decision of CANE, Co. J., that as the act to be done in pursuance of the contract was prohibited by statute, the contract was therefore unenforceable.

De Laval Separator Company v. *Walworth* (1907),13 B.C. 74, overruled.

APPEAL from the decision of CANE, Co. J., in an action tried before him at Vancouver on the 16th of March, 1907. The facts are set out in the reasons for judgment.

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Bowser, K.C., for plaintiff.
Craig, for defendant Young.

30th May, 1907.

CANE, Co. J.: This is a claim by the defendant Company, incorporated under the laws of the State of California, one of the United States of America (a foreign nation), for the purpose of quarrying and supplying stone in and for use in British Columbia and other places, against the defendant Young, a contractor residing at and carrying on business in the City of Vancouver, for stone supplied.

The parties have agreed upon the amount, if any, owing to the plaintiff, and the only question I am called upon to decide is one raised by the defendant in his dispute note, *viz.*: there was no contract between the parties, and if any such contract did exist it was void by statute, and relies upon section 123, Cap. 44, R.S.B.C. 1897. This section reads as follows:

"Unless otherwise provided by any Act, no extra-provincial company having gain for its purpose and objects shall carry on any business within the scope of this Act in this Province unless and until it shall have been duly licensed or registered under this Act, and thereby become expressly authorized to carry on such of its business as is specified in the licence or certificate of registration, and no company, firm, broker or other person shall, as the representative or agent of, or acting in any other capacity for any such extra-provincial company, carry on any of its business within this Province until such company shall have obtained such licence or certificate of registration; and any such company which fails or neglects to obtain such licence or certificate of registration, shall incur a penalty of fifty dollars, recoverable upon summary conviction for every day during which it carries on business in contravention of this section," etc.

CANE, CO. J.

The plaintiff Company through its counsel admits that it did not comply with this clause in the statute and at the time of entering into the contract was an extra-provincial Company doing business in this Province contrary to the demand of this statute, but contends that while the Company is liable to the penalty prescribed in the statute, that is all; that the statute is not prohibitive, but only penalizing; that it is enacted for revenue purposes only.

Mr. *Craig* for the defence submits that the clause is absolutely prohibitive and that the plaintiffs by their neglect are barred from seeking the assistance of the Court in enforcing such

contract or any money under it, and cites several cases in support of his contention, *viz.: Bensley* v. *Bignold* (1822), 5 B. & Ald. 335, where a printer was required to affix his name to any book before its publication: *Shaw* v. *Benson* (1883), 11 Q.B.D. 563 and *In re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, where companies composed of more than twenty members were required to be registered before carrying on business for gain: *Bonnard* v. *Dott* (1906), 1 Ch. 740 and *Victorian Daylesford Syndicate, Limited* v. *Dott* (1905), 2 Ch. 624, where a money lender must be registered before carrying on any business. In all these cases the statutes were clearly made with the direct intention of protecting the public and not merely for the collection of revenue.

It is necessary in interpreting this section to consider the whole statute, chapter 44, R.S.B.C. 1897. This is known as An Act for the Incorporation and Regulation of Joint Stock Companies and Trading Corporations, and embraces the law of incorporating companies in British Columbia, as well as setting forth the time and conditions on which companies incorporated outside the Province may come in and do business here. It sets out what fees are to be charged upon companies being incorporated in this Province according to the amount of capital involved, as it sets out on what terms extra-provincial companies may be registered here.

It is for me to decide on reading that whole statute if this section 123 is absolutely prohibitive of companies doing business in the Province without conforming to the statute, or did the Legislature intend that companies incorporated outside the Province should pay some compensation to the Government by way of licence in order to compete with companies who had already paid the fees of incorporation here.

I think the intention of the Legislature was not to prohibit, but to force a taxation in this way upon extra-provincial companies.

The Province of Ontario in 1897 had a statute very similar to this, but for some reason in 1900 amended the Act by adding a paragraph, "and so long as it remains unlicensed under this

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Act shall not be capable of maintaining any action, suit or other proceeding in any Court of Ontario"; and in order not to close the Courts to such foreign dealers altogether the Legislature of Ontario added a proviso, that if such company subsequently obtained a licence, such suit or action could be maintained as if such licence had been granted before the institution thereof: see judgment of Mr. Justice Street in *Bessemer Gas Engine Co.* v. *Mills* (1904), 8 O.L.R. 647.

In the interpretation of this statute I will be guided by the judgments and expressions of the learned judges in the following cases, which I think remove my difficulty without any doubt.

In *In re International Pulp and Paper Company* (1877), 6 Ch. D. 556 at p. 560 Lord Jessel, M.R., said:

"It is a well-known principle that where an Act of Parliament imposes a penalty on the doing or omitting to do a particular thing that is the only penalty."

Then in the following year the same learned judge in *Re Globe Iron and Steel Co.* (1878), 48 L.J., Ch. 295 at p. 298, says:

"If a man is directed to do an act, and does not do it, and is made liable to a penalty by Act of Parliament, equity has no right to add an additional penalty. On the contrary, the ordinary principle of equity is to relieve from penalties and forfeiture, but in no case, that I know of, to inflict them."

CANE, CO. J.

Again in *Attorney-General* v. *Bradlaugh* (1885), 14 Q.B.D. 667, Mr. Justice Brett, at p. 687, says:

"Wherever an Act of Parliament imposes a new obligation, and in the same Act imposes a consequence upon the non-fulfilment of that obligation, that is the only consequence."

I think this principle of interpretation is plain, and I must hold that the contract is not void and the plaintiff is entitled to judgment for $1,347.30 and costs.

The appeal was argued at Vancouver on the 21st of November, 1907, before IRVING, MORRISON and CLEMENT, JJ.

Argument

Martin, K.C., and *Craig*, for appellants: The question is whether the prohibition in section 123 of the Companies Act has the effect of rendering illegal and void any contract entered into in this Province by such a Company. We set up that as the contract is illegal in both these cases, the plaintiff cannot

recover. Outside companies must not carry on business in this Province unless they disclose to people likely to have transactions with them that they have complied with the various provisions of sections 127, 128 and 129. These are all provisions in the public interest.

He cited: *Bartlett* v. *Vinor* (1692), Carth. 251 at p. 252; *Gallini* v. *Laborie* (1793), 5 Term Rep. 242; *Law* v. *Hodson* (1809), 11 East, 300; *Langton* v. *Hughes* (1813), 1 M. & S. 593; *Bensley* v. *Bignold* (1822), 5 B. & Ald. 335; *Fennell* v. *Ridler* (1826), 5 B. & C. 406; *Forster* v. *Taylor* (1834), 5 B. & Ad. 887; *Smith* v. *Sparrow* (1827), 4 Bing. 84; *Armstrong* v. *Armstrong* (1834), 3 Myl. & K. 45; *Cope* v. *Rowlands* (1836), 2 M. & W. 149; *Fergusson* v. *Norman* (1838), 5 Bing. N.C. 76; *M'Kinnell* v. *Robinson* (1838), 3 M. & W. 434; *Ritchie* v. *Smith* (1848), 6 C.B. 462; *Cundell* v. *Dawson* (1847), 4 C.B. 376; *Barton* v. *Piggott* (1874), L.R. 10 Q.B. 86; *In re Cork and Youghal Railway Co.* (1869), 4 Chy. App. 748 at p. 758; *In re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137; *Shaw* v. *Benson* (1883), 11 Q.B.D. 563; *Jennings* v. *Hammond* (1882), 9 Q.B.D. 225; *In re Ridgway* (1885), 15 Q.B.D. 447; *Melliss* v. *Shirley Local Board* (1885), 16 Q.B.D. 446; *Bonnard* v. *Dott* (1906), 1 Ch. 740; *Victorian Daylesford Syndicate, Limited* v. *Dott* (1905), 2 Ch. 624; *Brown* v. *Moore* (1902), 32 S.C.R. 93; *Taylor* v. *Gas and Coke Company* (1854), 10 Ex. 293; *The Gas Light and Coke Company* v. *Turner* (1839), 5 Bing. N.C. 666; *Smith* v. *Mawhood* (1845), 14 M. & W. 452; *Wetherell* v. *Jones* (1832), 3 B. & Ad. 221; *Lewis* v. *Bright* (1855), 4 El. & Bl. 917; *Learoyd* v. *Bracken* (1894), 1 Q.B. 114.

Argument

Barker, for respondent (The Northwestern Construction Company): This contract was made in California, where the Company is incorporated. The fact of making the contract in California, and effecting delivery of the article contracted for within the jurisdiction, does not bring the Company within the jurisdiction: *City of Halifax* v. *McLaughlin Carriage Co.* (1907), 39 S.C.R. 174; *The City of London* v. *Watt & Sons* (1893), 22 S.C.R. 300. The Companies Act does not bear so much on carrying on business, as its failure to take out a licence.

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See section 7 of the Act, chapter 11 of 1902, amending the original Act in this connection shews that the imposition of the penalty is a matter purely between the Company and the Government. He cited *Robson* v. *Bigger* (1907), 76 L.J., K.B. 248; *Lodge* v. *National Union Investment Company, Limited* (1907), 1 Ch. 300; *Smith* v. *Finch* (1906), 12 B.C. 186, and referred to *Edison General Electric Co.* v. *Canadian Pac. Nav. Co.* (1894), 36 Pac. 260 and *Jarvis-Conklin Mortgage Trust Co.* v. *Willhoit* (1897), 84 Fed. 514.

17th January, 1908.

IRVING, J.: I have had an opportunity of reading the exhaustive judgment of my brother CLEMENT. In my opinion this statute is to be decided by the ruling in *Brown* v. *Moore* (1902), 32 S.C.R. 93, as the Act in question here has a prohibition in express terms, and a penalty for contravention.

IRVING, J.

I would allow the appeal.

MORRISON, J.: The point involved in this appeal is whether section 123 of the Companies Act, being chapter 44 of the Revised Statutes of British Columbia, prohibits the making of contracts within British Columbia by unregistered unlicensed extra-provincial companies.

The plaintiff, an unlicensed extra-provincial company carrying on business within the Province, entered into a contract with the defendant to deliver building stone for use in the City of Vancouver. The claim in the action is for the balance due on that contract, and the defence set up is that the contract is illegal and void by reason of the 123rd section of the Act.

MORRISON, J.

The learned County Court judge, who tried the case, gave judgment for the plaintiff, following the judgment of the learned Chief Justice in the case of *De Laval Separator Co.* v. *Walworth*, on this branch of the case.

From a comparison of section 123 with the various enactments in respect of which the numerous cases cited in support of the plaintiffs' contention arose, a material difference of phraseology will be found. If this difference in the form of the language is kept in view the force of those authorities as applied here may well be doubted.

Take for instance, *Smith* v. *Mawhood* (1845), 14 M. & W. 452. The question turned on the construction of sections 25 and 26 of the Excise Licence Act, 6 Geo. 4, c. 81. Section 25 required the tradesman to place his name of a certain length and size of letter over the door of his place of business and in default he was to forfeit a penalty. Section 26 imposed a penalty upon every dealer in a certain commodity who did not take out the prescribed licence. In *Learoyd* v. *Bracken* (1894), 1 Q.B. 114, the Stamp Act in question required every one who made or executed any contract note chargeable with duty and not duly stamped to forfeit a penalty. The forfeiture of the penalty in these cases was of course held to be the only consequence following default of compliance with the statutory requirements. And so a line of cases, including *Brown* v. *Duncan* (1829), 10 B. & C. 905; *Wetherell* v. *Jones* (1832), 3 B. & Ad. 221; *Johnson* v. *Hudson* (1809), 11 East, 180; *Foster* v. *Oxford, &c., Railway Co.* (1853), 13 C.B. 200.

On the other hand take section 123 of our Companies Act. It reads as follows: [Already set out.]

The language is imperative that no unregistered or unlicensed extra-provincial company shall carry on any business. That is, if it is not licensed or registered "it is not a company the law will recognize; it is illegal in that sense; it is a prohibited thing, and the law cannot take notice of it, except perhaps in a penal point of view": *per* Lindley, L.J., in *In re Padstow Total Loss and Collision Assurance Association* (1882), 51 L.J., Ch. 344 at p. 353.

The words of the section are plain, and apt and to my mind convey the clear intention of the Legislature to prohibit any act of business within the jurisdiction by unlicensed or unregistered extra-provincial companies: to prevent them from entering into any business obligations here.

Before an extra-provincial company has any legal status in the Province, it must be, as it were, reincorporated here. There is no such entity known here as an unlicensed extra-provincial company. Unlike the enactments whose construction was involved in the cases cited by the plaintiffs' counsel where individuals and concerns were excluded from transacting certain

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specified kinds of business, section 123 does shut out a certain class from transacting in any way any kind of business of whatsoever nature; the object of the Legislature being to protect the public by compelling those companies seeking to come and do business within the Province to disclose the scope and nature of their powers. For, by section 127 of the Act, they must first file a true copy of their charter and regulations, shewing that they have authority to carry on business in British Columbia; and that they are in existence, and legally authorized to carry on business under their charters. The judgment of Buckley, J., in *Victorian Daylesford Syndicate, Limited* v. *Dott* (1905), 2 Ch. 624, approved in *Bonnard* v. *Dott* (1906), 1 Ch. 740, is very much in point.

If the provision is not prohibitive, then it must be held that the Company may continue to transact business, and in so doing the only consequence would be the forfeiture of the penalty. It is conceivable then that a company could well afford to pay the penalty and not register. But suppose the section did not impose a penalty, could it still be contended that there was no consequence following a violation of the enactment? Surely not: Bowen, L.J., in *Melliss* v. *Shirley Local Board* (1885), 16 Q.B.D. 454.

MORRISON, J.

Although the point was not raised before us, I am constrained to ask how the imposition of the alleged penalty here can be effected? Was it really the intention of the Legislature to retain this part of the section, which may have been left over from the old Act by inadvertence of the draftsman? But assuming the existence of a penalty, then the object is to punish the offending company, and it implies a prohibition so as to render the contract void: *Mitchell* v. *Smith*, cited in *Smith* v. *Mawhood*, *supra*, at p. 464. And if the intention of the Legislature was to prohibit the doing of any act of business it makes no difference whether it is for revenue purposes or not. There may be prohibition rendering a contract void even for revenue purposes: *Smith* v. *Mawhood*, *supra*. Still the scope of the whole Act precludes the notion that the section is merely a revenue regulation.

This is not a case where an Act created an obligation and

provides for the enforcement of it in a specified manner, in which case the rule is that performance cannot be enforced in any other manner: *Doe dem. The Bishop of Rochester* v. *Bridges* (1831), 1 B. & Ad. 847 at p. 859. Cases of that kind presuppose the company is existing and properly domiciled in the jurisdiction. In the case before us there is no obligation imposed on an extra-provincial company which is not licensed. The obligations attach when it is properly licensed, whereupon it becomes recognized, having a status to receive the protection of the State as well as to subject and submit itself to the jurisdiction. It does not follow that the plaintiff Company would be licensed in any event upon application.

And if not licensed, how can it be ascertained whether the objects of the Company are or are not lawful, or that in fact it has any corporate existence. Is it in any worse position after being refused a licence than it is in acting without applying for one?

Further, the section does not seek to regulate a company already authorized to do business here. It is in this respect that so many if not all the cases relied on by the plaintiffs' counsel can be differentiated.

The Legislature by the Companies Act provides for certain artificial creations (as Lord Halsbury puts it in *Salomon* v. *Salomon & Co.* (1897), A.C. 22 at p. 29) called companies. And those companies obviously must be brought into existence before attempting the performance of any functions. Those contemplated by our Legislature may be roughly divided into two main classes, *viz.:* Provincial or domestic and extra-provincial or foreign companies. It again is obvious that the main, if not sole object of those creations is the transaction of some kind of business for gain. As to whether a company coming under either class has been validly created or not, can be determined by reading the Act and applying the ordinary canons of construction. In this case that can be done, and the construction contended for by the defendants' counsel be supported without adding to or taking from the requirements of the statute, or violating the general principle followed in the *Bank of England* v. *Vagliano Brothers* (1891), A.C. 107 or *Salomon* v. *Salomon &*

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Co., supra. As in the case of provincial or domestic companies, there is no legal entity, no legal existence until evidenced by incorporation as provided by the Act, so in regard to extra-provincial or foreign companies there is no legal entity or legal existence, until registered or licensed or reincorporated pursuant to the Act.

A word as to *Bensley* v. *Bignold* (1822), 5 B. & Ald. 335, upon the reasoning in which the learned Chief Justice threw some doubt in *De Laval Separator Co.* v. *Walworth.* In view of the fact that this leading case has been cited with approval in England and in Canada, at least down to so recent a time as the case of *Brown* v. *Moore* (1902), 32 S.C.R. 93, I cannot help concluding that it may be safe to assume it is still good law.

MORRISON, J.

It seems then clear that this action must fail because the act to be done pursuant to the contract is prohibited, and the contract is therefore unenforceable: *Cope* v. *Rowlands* (1836), 2 M. & W. 149; *Smith* v. *Mawhood* (1845), 14 M. & W. 452; *Staffordshire Financial Company* v. *Hunt* (1907), W.N. 258.

The appeal should be allowed with costs.

CLEMENT, J.: Touching the question of their prohibitive effect, penal statutes may be grouped into four main classes:

A. Those which simply forbid the doing of a thing without more; *e.g., In re Padstow Total Loss and Collision Assurance Association* (1882), 51 L.J., Ch. 344; *Jennings* v. *Hammond* (1882), 51 L.J., Q.B. 493; *Shaw* v. *Benson* (1883), 52 L.J., Q.B. 575; in all of which the thing prohibited was held illegal.

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B. Those which forbid the doing of a thing under penalty for doing it; *e.g., Bensley* v. *Bignold* (1822), 5 B. & Ald. 335; *Stephens* v. *Robinson* (1832), 2 C. & J. 209; *The Gas-Light and Coke Company* v. *Turner* (1839), 9 L.J., C.P. 75, (1840), 9 L.J., Ex. 336; *Melliss* v. *Shirley Local Board* (1885), 55 L.J., Q.B. 143; *Brown* v. *Moore* (1902), 32 S.C.R. 93; in all of which also the thing prohibited was held a thing illegal, out of which no right of action could arise. The case at bar falls within this class.

Foster v. *Oxford, Worcester and Wolverhampton Railway Company* (1853), 22 L.J., C.P. 99, appears at first sight to be

opposed to this current of authority. If really so, it cannot, in my opinion, stand in the face of *Melliss* v. *Shirley Local Board, ubi supra.* It was relied on by Cave, J., in the Court below (54 L.J., Q.B. 408), but was apparently treated as distinguishable in the Court of Appeal. The words "no director shall be capable of being interested in any contract" were held in *Foster's* case not to be prohibitive of the contract; in *Melliss'* case the words were "officers employed by the local authority shall not in anywise be concerned or interested in any bargain or contract," and these words were held to be prohibitive of the contract, rendering it illegal.

C. Those which command a thing to be done under penalty for not doing it; *e.g., Cope* v. *Rowlands* (1836), 6 L.J., Ex. 63; *Fergusson* v. *Norman* (1838), 8 L.J., C.P. 3; *Cundell* v. *Dawson* (1847), 17 L.J., C.P. 311; *Ritchie* v. *Smith* (1848), 18 L.J., C.P. 9; *Victorian Daylesford Syndicate* v. *Dott* (1905), 74 L.J., Ch. 673; *Bonnard* v. *Dott* (1906), 75 L.J., Ch. 446; in all of which the failure to obey the statute was held to render the contract illegal; and *Smith* v. *Mawhood* (1845), 15 L.J., Ex. 149; *Wright* v. *Horton* (1887), 56 L.J., Ch. 873; *Attorney-General* v. *Bradlaugh* (1885), 54 L.J., Q.B. 205; *Learoyd* v. *Bracken* (1894), 1 Q.B. 114; in which the liability to pay the penalty was held to be the only consequence attending a disregard of the statutory requirements.

D. Those which enact a penalty simply for doing or not doing a thing, without words of express prohibition or command; *e.g., Taylor* v. *Crowland Gas and Coke Company* (1854), 23 L.J., Ex. 254; *Barton* v. *Piggott* (1874), 44 L.J., M.C. 5; in both of which the act done was held illegal, giving rise to no right.

It is only in respect of classes C and D that any question of interpretation can really arise. Only where the intention of the Legislature as to the exact matter in question has to be sought by implication is it necessary and proper to consider the scope and policy of the enactment; whether, for example, the Act is one passed for revenue purposes merely or for other purposes of public policy as well. But such considerations can have no place where the enactment is clothed in words which in their usual grammatical meaning are words of express prohibition.

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Such words, in my opinion, we have here: "No extra-provincial company . . . shall carry on any business . . . unless and until," etc. It is hard to imagine more precise and unambiguous language. The performance by the plaintiff Company of the contract sued on was in its every step a carrying on of their business in British Columbia without the required licence or registration in clear disregard of a statutory prohibition, and being therefore illegal can give rise to no right of action against these defendants.

As the view I take is opposed to that expressed by the learned Chief Justice in *De Laval Separator Company* v. *Walworth* (1907), 13 B.C. 74, it is I think due to him, as well as to the learned County Court judge below, to say that *Brown* v. *Moore, ubi supra,* which appears to me to be directly in point and decisive of this case, was not cited to either of them. It should also I think be noted that the *dicta* of Sir George Jessel, M.R., and Brett, M.R., upon which the learned Chief Justice relied, cannot be taken as accurate statements of general law, if the cases grouped above in classes B and D were correctly decided; and they are not, moreover, in accord with the decision in several of those grouped in class C, notably the recent money-lenders' case in the Court of Appeal, *Bonnard* v. *Dott, ubi supra.* The *dictum* of Brett, M.R., was uttered in January, 1885, and may have been in his mind when he gave judgment in the following December in *Melliss* v. *Shirley Local Board, ubi supra,* "After struggling against the conclusion to which I have been obliged to come": see 16 Q.B.D. at p. 451.

CLEMENT, J.

The enactment in question here, treated as conditionally prohibitive legislation, is, I think, *intra vires* of the Provincial Legislature, not having relation to "trade and commerce": see *Citizens' Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96, and *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348, but rather to "property and civil rights in the Province."

I would allow the appeal with costs and dismiss the action as against all defendants with costs: see *Challoner* v. *Township of Lobo* (No. 2) (1901), 1 O.L.R. 292.

Appeal allowed.

CABLE v. SHIP "SOCOTRA."

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Admiralty law—Wages of seaman left in port en route—Lawful discharge, what constitutes—"Left behind"—Merchant Shipping Act, 1894, Sec. 166 (1.), 1906; Secs. 30, 31, 32, 36, 37, 38, 39.

Plaintiff, who shipped for a voyage from Shields, England, to Victoria, B.C., and return, was left at Los Angeles for medical treatment and remained in hospital there for 50 days. The master left with the British Vice-Consul at Los Angeles on the 18th of July, a certificate of discharge under section 31, but this was not filled out until the 22nd of August, when plaintiff called at the Consulate. The master also made an error in computing the amount of wages due. In an action for recovery of wages:—

Held, that, in the circumstances, the leaving of the certificate with the "proper authority" was a sufficient "giving" thereof to satisfy section 31, but as there had been an error, though unintentional, in computing the wages, thus necessitating plaintiff bringing action therefor, he was entitled to his costs.

ACTION by a seaman for wages, tried by MARTIN, Lo. J.A., at Victoria on the 2nd and 5th of November, 1907. The facts are set out shortly in the headnote, and at length in the learned trial judge's reasons for judgment.

Statement

Lowe (Moresby & O'Reilly), for plaintiff.

Peters, K.C., for the ship.

8th November, 1907.

MARTIN, Lo. J.A.: With respect to the opening objection to the right of the plaintiff to invoke the aid of this Court, based upon the bar set up by section 165 of the Merchant Shipping Act, 1894, because the claim is under £50, I am of the opinion that Mr. *Lowe's* contention is correct, *viz.:* that the facts clearly bring it within the fourth exception to that section, and therefore the action is properly brought.

Judgment

The ship is a British bottom, registered at Glasgow, and is on a voyage from Shields to Los Angeles (California), Seattle, Victoria, and back to Shields, from which last port she sailed on the 26th of January last. The plaintiff shipped for the whole

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voyage as cook and steward, at £5 per month, and was left behind at Los Angeles on the 18th of July for the reason that he was admittedly unfit and unable to proceed to sea because of illness, being at that time in the hospital, wherein he was detained 50 days, owing to an accident to his leg that he sustained in the cook's galley, which injury was aggravated by the fact that he had for some time been suffering from varicose veins, which necessitated an operation in the hospital at Los Angeles.

I pause here to say that I am satisfied that the charges he makes against the master or mate for neglect of duty, either as regards the supply of sufficient oil to light the galley or as regards humane attention to him after his accident, are not, in my opinion, based upon anything substantial.

It is claimed by the plaintiff that he has never been lawfully discharged and is therefore still on the ship's articles and entitled to his wages to the date of the writ.

In answer to this the defendants rely on section 166 (1.) of the Merchant Shipping Act, 1894, as follows:

> "Where a seaman is engaged for a voyage or engagement which is to terminate in the United Kingdom, he shall not be entitled to sue in any court abroad for wages, unless he is discharged with such sanction as is required by this Act, and with the written consent of the master, or proves such ill-usage on the part or by authority of the master, as to warrant reasonable apprehension of danger to his life if he were to remain on board."

Judgment

If therefore the plaintiff has not been "discharged with such sanction as is required by this Act" (see section 36 of 1906 for procedure) he cannot maintain this action, seeing that both the voyage and his engagement are to "terminate in the United Kingdom," unless he "proves such ill-usage," etc. This he has attempted to do, but I need only say that he has failed to convince me that there is any good ground therefor. The consequence of this is that unless he was discharged, despite his contention to the contrary, his action must be dismissed. But the defendants contended that he was both duly discharged and left behind under sections 30, 31, 32, 36, 37, 38 and 39 of the Merchant Shipping Act, 1906.

First, in regard to the question of leaving behind. This is a

procedure and matter quite distinct from that of a discharge, as is clearly shewn by said sections, particularly Nos. 158, 36 and 37, and I have no difficulty in coming to the conclusion here that the proper sanction was obtained to leave the plaintiff behind, and that consequently and by operation of section 158 the service terminated (as to which *cf. Sivewright* v. *Allen* (1906), 2 K.B. 81) on the 18th of July, and that the plaintiff, as the section provides, is "entitled to wages up to the time of such termination, but not for any longer period." It was urged on behalf of the plaintiff that this procedure was dependent upon the delivery by the master, to the proper authority, of "a full and true account of the wages due to the seaman," under section 37, and that if such an account were not delivered the proper authority could not grant the necessary certificate. It is admitted that the account made out by the master was incorrect, and I find that he should have allowed the seaman $1.70 more than he did.

After a careful consideration of all the various sections which might throw light on this matter, I have come to the conclusion that this is not the proper construction of the Act, for the granting of the certificate is clearly in the nature of a judicial act of the authority, under section 36, which stands apart from, and is to be determined before any question arises as to the duty of the master regarding the payment of wages under the following section, 37. Indeed, it must be so, as this case illustrates, for the question as to whether or no the plaintiff was, in the opinion of said authority, fit to proceed to sea could not from any point of view be dependent upon the amount of his wages. The fact that he did lie in the hospital for 50 days shews how impossible it would be to give effect to a contrary view, for it would defeat the intended remedy.

Judgment

Then, second, with regard to the discharge. I am satisfied on all the evidence that the master duly obtained the sanction of the proper authority, under said section 30, to discharge the plaintiff, and my observations with respect to leaving behind apply in principle to this procedure. And I find that the master did in fact make out a certificate of discharge for the seaman as required by section 31, though in view of the not unreasonable

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uncertainty of the master in regard to the signature, on exhibit 7, purporting to be his, I am not satisfied that said exhibit 7 is the original discharge, but since it was obvious that the uncertainty of the master was, as he explained, largely due to the strange fact that the certificate, exhibit 7, was dated the 22nd of August instead of the 18th of July, on which date the master left it with the Vice-Consul, it may be that after all it is really the original certificate, though signed in blank by the master on 18th July, and the otherwise unaccountable date (which not unnaturally created the uncertainty) is the day upon which the Vice-Consul filled in the blank and gave it to the plaintiff when he called upon him after leaving the hospital, which in fact would be the 22nd of August, because the plaintiff says he went there on the 3rd of July and stayed there 50 days. This document, moreover, is the same which the Consul-General at San Francisco says, in his letter of September 30th to the shipping master here, was left with him by the plaintiff. However, be that as it may, I am satisfied, as has been said, that a proper certificate was made out, and I should be inclined to think, if anything turned on the point, that in the circumstances the leaving of such certificate with "the proper authority" (here the Vice-Consul) was a sufficient "giving" thereof to the seaman to satisfy said section 31.

Judgment

The result is that had the master left the correct account and amount of wages with the proper authority the plaintiff would have had no claim upon the ship, for all the master's obligations would have been discharged under and by virtue of sections 38 and 39. Unfortunately, however, the master made a slip which, though an honest one, nevertheless placed the seaman in a position of embarrassment, and the fact is that he has never yet had deposited to his credit in the hands of any proper authority or formally tendered to him, either in California or here, the full amount of the balance of his wages, and consequently he was justified in refusing to accept the offer of $13.65 in full settlement of his demands. Indeed, nothing has yet been paid into Court to satisfy his claim and it is plain that the defendants cannot invoke the statute to support an insufficient deposit of wages, and therefore the plaintiff is entitled to judgment for

$15.35, being the balance of the amount that should have been paid to him on the 18th of July when his engagement terminated by operation of section 158.

With respect to costs, though the matter is small in amount, yet it is not so in principle, and difficult questions were raised which are of general importance to masters and seamen. Though the plaintiff is obviously of a peculiar disposition and did not create a favourable impression in the witness box, and has advanced extreme claims, both legal and on the merits, which have been disallowed, yet at the same time he was undoubtedly placed in a very perplexing position by the neglect of the master (though quite unintentional) to perform his statutory duty and make out a correct account of his wages, which, I may say, is a matter wherein great care should be taken to see that the mariner is allowed everything that is justly due to him. If he is not, this Court should, I think, in pursuance of its general policy to protect to every reasonable extent the interests of mariners, give him his costs of recovering his wages in full, however trifling the amount, unless there are stronger reasons than are to be found in this case for depriving him of them.

Judgment

Judgment for plaintiff.

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WALSH v. HERMAN

WALSH v. HERMAN.

Foreign court, jurisdiction of—Judgment obtained in an undefended action for statute-barred claim.

Judgment was given against defendant in Ontario in January, 1906, on a claim arising out of a promissory note signed in 1898. The action was undefended, although defendant was duly served in British Columbia. He left Ontario in 1899 for Winnipeg and afterwards came to British Columbia, where he has since resided. Plaintiff sued in British Columbia on this judgment, and at the trial evidence was given of a payment made after the British Columbia action had been commenced:—

Held, by the Full Court, following *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1894), A.C. 670, that defendant had acquired a British Columbia domicile, and was not subject to the Ontario Courts.

Held, also, following *Bateman* v. *Pinder* (1842), 11 L.J., Q.B. 281, that the payment made could not operate to defeat a plea of the statute of limitations; and that it was a mere conditional offer of compromise which was declined.

APPEAL from the judgment of CANE, Co. J., in an action tried before him at Vancouver on the 23rd of May, 1907. The facts are shortly set out in the headnote.

Statement

The appeal was argued at Vancouver on the 29th of November, 1907, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

A. D. Taylor, for appellant (plaintiff).

Macdonell, for respondent (defendant).

Cur. adv. vult.

17th January, 1908.

HUNTER, C.J.

HUNTER, C.J.: I will read the judgment of my brother CLEMENT and myself. This is an action on a foreign judgment for $350.13, recovered by the plaintiff against the defendant on January 23rd, 1906, in Ontario. The writ of summons was served on the defendant personally in British Columbia, but he entered no appearance and the judgment went by default. Two defences were raised: first, that at the time of the issue and service of the writ he was neither resident nor domiciled in Ontario;

second, that recovery on the note on which the judgment is founded was barred by the law of Ontario at the time the writ issued.

As to the first defence, I think it is good, as the Courts of Ontario do not appear to have had any jurisdiction over the defendant. It is not in dispute that the defendant left Ontario in 1899, and after staying six months in Winnipeg went on to Vancouver, where he has remained ever since, and while the evidence is meagre, I think the proper inference is that he had acquired a British Columbia domicile before the issue of the Ontario writ. The case is not one where the party is alleged to have acquired a foreign domicile, but where he has merely shifted from one British jurisdiction to another under the same general government; and the circumstances which would warrant the inference of a change of domicile within British dominions only would not necessarily warrant the inference of a change to a foreign domicile. If, then, he had changed his domicile the Ontario Court had clearly no jurisdiction: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1894), A.C. 670; *Deacon* v. *Chadwick* (1901), 1 O.L.R. 346; *Vezina* v. *Newsome* (1907), 14 O.L.R. 658; *Emanuel* v. *Symon* (1907), 24 T.L.R. 85.

It is not necessary in this view to consider the second defence.

With reference to the plaintiff's application to amend made at the trial and renewed before us, it appears that the original cause of action has long since been statute-barred, and that the plaintiff's only hope of success is in having the $25 payment made by defendant as detailed in the evidence held to be a payment on account of the original indebtedness. But the learned trial judge evidently considered that the payment in question was made under such circumstances as to rebut any implied new promise on the defendant's part to pay the balance of that original indebtedness; and, in my opinion, we cannot on the evidence say that what transpired was anything more than a conditional offer to compromise which was declined. That the circumstances surrounding a payment such as was made here may rebut the implication seems clear: see *Friend* v. *Young* (1897), 2 Ch. 421, in which Stirling, J., collects the cases.

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Moreover, the payment in this case was made after writ issued in this action and *Bateman* v. *Pinder* (1842), 11 L.J., Q.B. 281, is clear authority, not weakened so far as I am aware by any subsequent decision, that such a payment cannot operate to defeat a plea of the statute.

Appeal dismissed with costs.

MORRISON, J.: This is an appeal from a judgment of the senior judge of the County of Vancouver in an action tried without a jury. The plaintiff sought to recover from the defendant the sum of $350 on a judgment obtained in the District Court of the Provincial Judicial District of Rainy River, Ontario, on the 23rd of January, 1906.

On the 25th of April, 1898, the defendant signed a promissory note for $240 in favour of the plaintiff at Kenora in the said judicial District, which fell due in two months, *viz.:* the 25th of June, 1898. At that time the parties were both domiciled and resident in Ontario. The defendant left Ontario in 1899 and in that year took up his residence in Vancouver, where he has resided ever since.

On the 19th of December, 1905, the writ in the Ontario action was issued, and served on the defendant in British Columbia, but he did not enter appearance in that action. Judgment was in due course entered, and an exemplification thereof forwarded to British Columbia and suit commenced thereon in January, 1906. The defendant in his defence alleges that at all material times he was domiciled and residing in British Columbia. That neither at the time of the commencement of the suit in Ontario, nor at any time during its continuance was he resident or domiciled in that Province or subject to the jurisdiction of its Courts. That he did not appear to that suit nor agree to submit to the jurisdiction of the Ontario Courts, and the judgment of that Court was in consequence not binding on him.

MORRISON, J.

Upon the trial in the County Court of Vancouver on this judgment it was given as evidence by the plaintiff that the defendant had made a certain payment after the British Columbia action was commenced, which the plaintiff claims was

a payment on account of the claim which by the way the defendant alleged in his defence was barred by the Statute of Limitations of Ontario. There is a conflict of evidence on this matter, and although the learned judge did not give any reasons for the judgment which he gave in favour of the defendant, it is clear he found on this point as a fact in favour of the defendant.

The point of the appeal, however, which was particularly and forcibly raised is that under the above circumstances the judgment of the Ontario Court is binding here. In the case of *Emanuel* v. *Symon* (1907), W.N. 236, reversing Mr. Justice Channel's judgment in the same case reported in (1907), 1 K.B. 235, the effect of a foreign judgment was fully considered by the Court of Appeal. Lord Justice Buckley in the course of his judgment says that in actions *in personam* there are four cases in which the Courts will enforce a foreign judgment: (1.) where the defendant was a subject of the foreign country in which the judgment was obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the party as plaintiff subjected himself to the jurisdiction by beginning the action in that country; (4.) where he had contracted with the other party to submit to the forum in which the judgment was obtained.

The defendant here does not come within any of those cases. The only ground, if it may be so called, left to the plaintiff seems to me to be the proposition that the Courts of Ontario have jurisdiction over the defendant in respect of an obligation made by him whilst he was a resident in that Province—which proposition cannot be maintained in view of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1894), A.C. 670. Nor does the case of *Becquet* v. *MacCarthy* (1831), 2 B. & Ad. 951, help him, for the Court of Appeal has just held that that case cannot now be considered good law. Apart from that the facts were not the same in that case as in this, for there the defendant was shewn to have owned real property in the foreign country, which circumstances apparently led to the contention on the plaintiff's part as to the existence of jurisdiction on that account.

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In the recent case of *Vezina* v. *Newsome & Co.* (1907), 14 O.L.R. 658, it was held that the defendant company not having had any office or agent in the Province of Quebec at the time the action arose, or when they were served with the writ of summons, the judgment obtained there must be treated as a nullity in the Courts of Ontario.

MORRISON, J.

Here there is an entire absence of evidence that the defendant in any way was subject to the jurisdiction of the Ontario Courts from the commencement of the action in the Courts of that Province until the present time.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff (appellant): *Bird & Brydon-Jack.*

Solicitors for defendant (respondent): *Macdonell, Henderson & Jones.*

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ANGLO-AMERICAN LUMBER COMPANY v. McLELLAN.

Company law—Sale of shares—Resolution of company empowering president to sell—Note given for purchase price—Note and shares placed in bank in escrow pending payment of the note—Allotment.

Defendant purchased 50 shares in plaintiff Company, giving his note for $5,000 therefor, payable 10 days after date, signing at the same time an application for the shares. There was some evidence of an arrangement between defendant and the president of the Company that defendant was to be employed as a foreman by the Company, and that if he proved unable to perform the work, the president would take back the shares and refund the money. Apparently there was no formal allotment of the shares by the Company, beyond a resolution empowering the president to dispose of the shares, but the president placed the shares and the note in escrow in the bank, the shares to be delivered up on payment of the note:—

Held, that upon the signing of the application and the delivery of the note, the defendant became the owner of the 50 shares, with power to forthwith validly assign them to anyone else, or to have bound himself to do so on the issue of the certificates if the Company's articles of association required indorsement of the certificates; and that there was no notice of allotment necessary.

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ACTION tried before HUNTER, C.J., at Vancouver on the 5th of December, 1907. The facts appear in the reasons for judgment.

J. A. Russell, for plaintiff Company.
Craig, for defendant.

28th January, 1908.

HUNTER, C.J.: This is an action on a promissory note for $5,000 dated May 17th, 1907, made by the defendant to the order of the plaintiffs, payable 10 days after date at their office, Vancouver. The defendant says that he notified the president of the Company before its due date that it would not be paid.

It is common ground that the note was signed and given in payment for 50 shares of stock in the Company, and an application for said shares was signed by the defendant contemporaneously with the giving of the note.

It is also not in dispute that the note was placed in the Company's bank with 50 shares deposited in escrow and to be delivered on payment of the note to the defendant; nor was there any notice of allotment.

The plaintiffs allege that the defendant, after inspection of a balance sheet and making inquiries, purchased the shares as an investment, and that there was also an arrangement whereby the defendant was to enter the employ of the Company as yard foreman at $100 per month. The defendant alleges that his application to take the shares was contingent on his remaining in the employment, and that if he found he was not equal to the work he could give it up, and that the president, with whom the negotiations all took place, would take the shares over from him and refund the moneys. There does not appear to have been any formal allotment of the shares by the directors, but according to the evidence the president was empowered by a resolution to dispose of the shares, and I see no reason to suppose that the shares were not validly issued, nor in fact is any such defence raised in the pleadings. There was, however, the defence raised in the pleadings that the defendant was induced to give the note by the misrepresentations of the president of the Company, but this defence has not been substantiated.

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Now, had there been nothing more in the case than the receipt of the note on the one hand, and on the other hand delivery to the defendant of the shares or a notice of allotment, I apprehend there would be no doubt that so far as concerned the Company the defendant would not have been in a position to recede, and would have been liable on the note, and if he had any action at all it would have been against the president. In other words, the sale would have been complete, as the application, so-called, would in reality have been merely the formal acceptance of an offer by the Company through the president to sell the shares, and no notice of allotment would have been necessary.

But it may be said that the Company saw fit to attach conditions which it is not shewn were assented to by the defendant. The note was payable at their office, and the defendant was told the shares would be allotted immediately. But the note was put in the bank with the shares which were to be delivered to the defendant only on payment, without the knowledge or assent of the defendant. How then is it open to the Company to say that the defendant, who had got nothing for his promise to pay, cannot withdraw from the transaction, he having neither received the shares nor any notice of allotment? Suppose the defendant had become bankrupt before the maturity of the note, and that the Company had not yet delivered the shares, or sent notice of allotment, would not the Company have claimed to have had a right to return the note and to decline to complete the transaction? Then if the Company could have withdrawn, why should not the defendant be in the same position? Why should not the act of the Company in putting the note in the bank and the shares in escrow preclude it from alleging that the sale became complete and irrevocable on delivery of the note?

Judgment

I think the answer to all this is that it is not an uncommon occurrence for both parties to a transaction to be under an erroneous opinion as to their legal position, and to believe that they are in one relation to each other while in point of law they are in quite a different relation.

Here, I think that upon the signing of the application, so-

called, and the delivery of the note, the defendant became *eo instanti*, the owner of the 50 shares, and that no notice of allotment was necessary, as the president had full power to sell the shares and the numbers of the certificates would of course be immaterial. What the defendant bought and at that moment acquired was 50 invisible choses in action called shares in this Company. He could, I apprehend, have forthwith validly assigned them to anyone else, or if the articles of association required a valid assignment to be made by indorsing the certificates, have at any rate immediately validly bound himself to effectually transfer them when the certificates issued; in other words, he had the complete *jus disponendi* the moment he delivered the note and could at any time have forced the Company to deliver the certificates, and the latter's only remedy would have been recovery on the note. How then can it make any difference that the president of the Company, either with or without the authority of the Company, but without the assent of the defendant, undertook to deal with the certificates by putting them in escrow?

If the defendant was damnified by the act of the president in so dealing with the defendant's property, his claim would be against the president, or the Company as the case might be; but how can such action, even if assented to or authorized by the Company, be a good ground for the defendant refusing to pay the note when the shares had in law become his property?

I think there should be judgment for the plaintiffs with costs, but whether or not it should be on condition of the delivery of the certificates is a matter on which I prefer to hear counsel before coming to a decision.

Judgment for plaintiffs.

[NOTE.—There was no further argument, as the certificates were delivered before the judgment was issued.]

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CORTESE v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Railway Act, R.S.C. 1906, Cap. 37, Sec. 254, Sub-Sec. 4—"Locality," meaning of—Obligation of railway to fence—Animals killed by train.

Plaintiff's animals were killed on defendants' track, the right of way of which passed in front of his land. There was no fence erected on this portion of land, either by the railway company or plaintiff. The north end of the plaintiff's ranch was within 800 yards of the municipal limits of Fernie. There were about two acres of the ranch with a frontage of 450 feet on the right of way, and about 200 feet off was an enclosure used as a goat pen, about 20 by 30 feet. There was also a potato patch of about three-quarters of an acre, and a moveable fence separating this patch from a grassy portion. This, together with a piece of fencing along a waggon road, but not reaching the right of way by some 225 feet, was the only fencing on the ranch. There was evidence of scattered places in the vicinity, some being fenced and others not, but with unfenced and unoccupied land intervening:—

Held, by the Full Court, reversing the holding of WILSON, Co. J. (CLEMENT, J., dissenting) that as the land in question *per se* could not be classed as a settled or inclosed locality, there was no obligation on the Company to fence its right of way in the absence of an order from the Board of Railway Commissioners to do so; and that their contiguity to the limits of an incorporated town did not constitute the lands a portion of the settled locality of such town.

Having regard to the powers given the Board of Railway Commissioners by section 254 of the Railway Act, and particularly the language of sub-section 4, the word "locality" must be construed without reference to the proximity of town limits.

Statement

APPEAL from the decision of WILSON, Co. J., on a case stated in an action before him at Fernie on the 22nd of March, 1907. The material facts are set out in the headnote.

A. I. Fisher, for plaintiff.

Ross, K.C., for defendants.

30th May, 1907.

WILSON, CO. J.

WILSON, Co. J.: In this matter a stated case has been pre-

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sented and I have taken a view of the premises. I find that the animals for the loss of which this action is brought, escaped from the plaintiff's land onto the defendants' railway track by reason of there being no fence along the railway track and that they were there killed by one of the defendants' trains.

If the Company defendants are required to fence in that locality, I think they are liable under the Act, as I cannot find that the animals got upon the track through the negligence, wilful act or omission of the owner and I will follow *Bacon* v. *Grand Trunk R. W. Co.* (1906), 12 O.L.R. 196, as to defendants' liability, no matter from where the animals escaped upon the Company's premises. It seems to me the intention of the Act was to fix a general liability on the defendants unless they were not required to fence.

What might be described as the general locality around Fernie, standing alone, does not come within the Act, but the locality immediately adjoining might do so by reason of its proximity to Fernie. If what is described as the "locality" of Fernie does not extend further than the limits of the City of Fernie, the land adjoining might readily be described as not being in a settled and inclosed locality. The word improved would not apply to the locality. If the locality within the Act is governed by the City limits, then the lands lying west of the City standing alone could not come within the Act as a settled and inclosed locality. But in my view the lands to the west, including the plaintiff's, come within the limits of the settled locality of Fernie, and although the plaintiff's lands are not inclosed, they are fenced to an extent, and being settled, I find they form a part of the community of Fernie. But in any case the onus is on the defendants to shew that they come within the exception to the Act (that is, that they are not required to fence in this case), and there being a general duty cast upon them, I will find for the plaintiff with costs.

WILSON, CO. J.

The appeal was argued at Vancouver on the 29th of November, 1907, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

Argument

Davis, K.C., for appellant (defendant) Company, relied in the circumstances here on sub-section 4 of section 254 of the

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Railway Act (Dominion). In the absence of an order of the Board of Railway Commissioners the Company is not bound to fence in this instance. He cited *Phair* v. *Canadian Northern R. W. Co.* (1905), 5 Can. Ry. Cases, 334 at p. 337; *Schellenberg* v. *C.P.R.* (1906), 16 Man. L.R. 154.

Burns, for respondent (plaintiff), cited *Canadian Pacific Ry. Co.* v. *Carruthers* (1907), 39 S.C.R. 251, (1906), 16 Man. L.R. 323; and as to the meaning of locality, *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1.

Cur. adv. vult.

17th January, 1908.

HUNTER, C.J.: In this case the learned trial judge had a view, and came to the conclusion that the lands lying outside of the City limits, including the lands in question, could not be classed *per se* as a settled or inclosed locality, but as he considered them to be part of the "locality" of Fernie he gave judgment for the plaintiff. In this I think he was in error. Lands within the limits of a municipality other than a rural municipality are obviously governed by wholly different conditions than lands without those limits. Suppose there had been a rural municipality adjoining Fernie embracing the lands in question, I apprehend no one would ordinarily speak of them as being in the locality of Fernie, unless he meant by that to describe them as being in the neighbourhood of Fernie. But "locality" is obviously not used in the sense of neighbourhood, but to describe a portion of territory larger at any rate than a single homestead or farm. I agree with the learned trial judge that the onus is on the Company in this class of case to shew that it is not liable to fence, and I think that the Legislature by the use of the elastic word "locality" intended to leave it to the Court to say in the particular case, having regard to all the circumstances, whether the Company should have fenced. And I think that the word "either" is used distributively, that for instance the Court could say where there is a settled valley on one side of the line and a vacant mountain on the other, that the railway might in the circumstances fulfil its obligations if it fenced only the valley side of the line. Here I think the learned judge went wrong in considering that "locality" means neighbourhood

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or vicinity, and as his finding of fact that the *locus in quo* could not by itself be classed as a settled or inclosed locality has not been successfully assailed, the appeal should be allowed and the action dismissed with costs.

MORRISON, J.: The point of this appeal is as to the construction of sub-section 4 of section 254 of the Railway Act, being chapter 37 of the Revised Statutes of Canada, 1906.

The sub-section reads as follows:

"Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates and cattleguards unless the Board otherwise orders or directs."

The plaintiff owns and occupies land situate about a half mile from the corporate limits of the mining town of Fernie in East Kootenay and adjoining the defendants' railway track.

In August last some hogs and goats of the plaintiff were killed by the defendants' train opposite the plaintiff's said lands.

The matter in dispute came before the learned County Court judge on a case stated. The findings therein are not as explicit or precise as one would wish, but taking them as they are, together with the learned judge's findings after a view, in my opinion it is quite clear that the lands in question were not inclosed as contemplated by the Act. Apart from the meaning which he attached to the word "locality" he does not doubt that the defendants are entitled to invoke the above provision of the Act. So that the question is reduced to the meaning of the word "locality" and so counsel argued before us.

The learned judge holds that the plaintiff's lands, on account of their proximity to the town of Fernie, are in what he terms the "settled locality of Fernie." I do not think the word "locality" as used in the Act can be applied to an incorporated town. The section in no way applies to an incorporated town or city, and it is not permissible to read into this section any such limitation as stated by the learned judge.

Parliament gave the Board of Railway Commissioners the power to order fences to be built in localities, such as this one, which are within the meaning of sub-section 4 and which are

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contiguous to towns or other densely settled communities. There is, of course, no suggestion that in this instance any such order was made.

In this case, having regard to the whole of section 254 and the power in sub-section 4 given the Board to order fences to be built, the word "locality" must be construed without any reference to the proximity of those lands to the town of Fernie.

The appeal is allowed with costs.

CLEMENT, J.: Apart from the difficulty there is in fixing what area is covered by the word "locality," a meaning must be found, if possible, for the adjectival phrase "in which the lands on either side of the railway are not improved, settled or inclosed."

To begin with the words "the lands": Do they mean all the lands? That is to say, must all the lands fall within the category of lands not improved and inclosed or not settled and inclosed before the railway Company can claim exemption from the burden of fencing? I think they must, as there seems to be no warrant for, or method of, fixing any less proportion as sufficient. It is perhaps idle to speculate as to the reason why the Legislature should insist that the whole area, whatever it may be, embraced within the "locality" should consist of lands not settled, etc. One can only suggest that if in the "locality" any of the inhabitants have found it necessary to fence their dwellings and crops against cattle and other animals, the public travelling through that same "locality" must be taken to need protection "to prevent cattle and other animals from getting on the railway," as it is expressed in sub-section 2.

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Then again the expression "on either side of the railway" is one not easy of interpretation; but on the best consideration I can give to it I think "either side" is an ordinary English idiomatic expression meaning "both sides," and that the whole phrase is not limited to lands actually contiguous to the right of way. I am led to this latter conclusion chiefly by the presence of the word "inclosed," which is not in any way applicable to a piece of land one side of which abuts upon an, *ex hypothesi*, unfenced right of way.

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On the facts set out in the special case I am of opinion that the "locality" through which the railway runs at the point in question here is not such a locality as is referred to in sub-section 3 of section 254 as I read it. Having regard to the fact that the obligation to fence is imposed in order, as above indicated, to keep cattle—animals of a well-known roving tendency—off the track, I am not prepared to say that the learned County Court judge has placed too large an area within the "locality" or that he was wrong in finding that that "locality" embraces within its bounds the southerly outskirts of the City of Fernie. But, be that as it may, it is quite clear on the facts that a much smaller area might have been taken as forming the "locality" proper to be considered here, without bringing it within the exemption clause. It appears from the stated case that on the ranch itself in question there was at the time of the occurrences complained of an enclosed potato patch of some three-quarters of an acre.

I would dismiss the appeal.

Appeal allowed, Clement, J., dissenting.

Solicitors for plaintiff: *Lawe & Fisher.*

Solicitors for defendants: *Ross & Alexander.*

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LABELLE v. BELL

LABELLE v. BELL.

County Court—Statute, construction of—Liquor Licence Act, 1900, B.C. Stat. 1906, Sec. 2, Hotel licence granted by Commissioners—Appeal to County Court judge—Trial de novo—Number of householders—Onus of proof—Interpretation of "population actually resident"—Floating population.

The onus of proving that the petition called for by section 22 of the Liquor Licence Act, 1900, does not comply with the provisions of the Act is on the petitioner.

Where a man enters into the employment of another person for an indefinite period he thereby becomes, within the meaning of the Liquor Licence Act, actually resident.

APPEAL from the decision of Licence Commissioners granting a retail liquor licence to one, Hugh Bell, at Hosmer. Heard at Fernie on the 23rd of December, 1907, before WILSON, Co. J.

Statement

Hosmer is a small coal camp situate about eight miles north of Fernie on the Canadian Pacific railway, and up to within a few months of the date of this appeal had a population of about 150 or 200 persons, when the Canadian Pacific Railway commenced active operations in developing their coal mines, which at the time of hearing this appeal were still in the development stage, that is, no coal had yet been mined or shipped from the camp. About the same time, the Great Northern Railway Company commenced the construction of their line from Fernie to Michel, which line runs within about half a mile of Hosmer. The Canadian Pacific Railway Company also had a large number of contractors at work putting up buildings and making ready for the building of coke ovens. On the strength of this population Bell applied to the Commissioners and was granted a fourth licence and an appeal was immediately taken to the County Court judge. According to the evidence submitted by the applicant, the population exceeded 1,500, but in order to arrive at this figure, it was necessary for him to add all the railway men working within a radius of three miles of Hosmer on the construction of the railway and also some 200 men working in the mills and lumber camps in and around Hosmer, some of the camps being as far distant as two and

three miles. It was admitted by both parties on the appeal that the population actually resident in the Town of Hosmer did not reach more than 250 to 300 persons.

A. I. Fisher, for appellant.

Sherwood Herchmer, for respondent.

WILSON, Co. J.: In this matter I have come to the conclusion that the decision of the Licence Commissioners shall be affirmed.

Two of the main objections raised to the granting of the licence were, first, that there are three licences already at Hosmer, and the population was not sufficient to warrant the granting of an additional licence, following the amendment of 1906; and, second, that the petition for the licence was not sufficiently signed.

In dealing with the issues I must to an extent decide them together. At and around Hosmer there is a large population of the come to-day and go to-morrow variety. Counting the entire population within a three-mile radius from Hosmer, it seems to me there is now a population of 1,500, and the only doubt in my mind was whether or not this being what might be called a floating population, could it come within the Act as being a population actually resident. I think that where a man enters into the employment of another person for an indefinite period he thereby becomes part of the population actually resident, and the presumption is that he is such when once he enters on the employment until the contrary is shewn to me. In other words, the presumption is in favour of his being actually resident once he enters such employment, and that is a presumption that must be rebutted by parties opposing the licence. Such being my view, I will decide that the population exceeds 1,500, and therefore warrants the issue of a fourth licence.

Judgment

In dealing with the other point, as to the petition being insufficiently signed, I have more doubt. The Act is very peculiarly drawn, and it apparently contemplates a permanent residence in the same premises. I can hardly believe that that was the intention of the Legislature in framing the section, as undoubtedly they wish the petition signed by what they define

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as a householder, and surely their view must have been only to include such persons as had occupied premises in the locality for a period of three months. But, as the section is drafted, it can undoubtedly be interpreted only one way, *i.e.*, that the party must occupy the same premises for a period of three months preceding the date of his signing the petition. That being my view of the section, it necessarily follows that a great number who have actually occupied premises in Hosmer for a period of three months prior to the date of the petition are not necessarily householders within the meaning of the Act, as they have not occupied the same premises for that period. Eliminating those from the list, it becomes a question of doubt whether or not the petition is properly signed, and in that case I will give the benefit of the doubt to the applicant, in whose favour the Commissioners have already decided.

The appeal will be dismissed with costs.

Appeal dismissed.

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March 28.

REX v. GARVIN

Constitutional law—British North America Act, Sec. 91—Adulteration Act, R.S.C. 1906, Cap. 133, Sec. 26—Provincial Health Regulations, Sec. 20—Ultra vires.

Section 20 of the Provincial Government Regulations governing the sale of milk and the management of dairies, cow sheds and milk shops, is *ultra vires*, as being repugnant to the Dominion legislation on the same subject.

MOTION to quash a conviction by the acting police magistrate of Vancouver, who fined defendant for having in his possession milk intended for sale which did not have the minimum composition required by section 20 of the Provincial regulations governing the sale of milk and the management of dairies, cow sheds and milk shops, passed by the Lieutenant-Governor in Council under the provisions of the Health Act, R.S.B.C. 1897, Cap. 91, heard by CLEMENT, J., at Vancouver, on the 24th of March, 1908.

Statement

Craig, for the motion.

J. K. Kennedy, contra.

28th March, 1908.

CLEMENT, J.: Various objections were urged against this conviction, but I find it necessary to express a decided opinion upon one only, as will appear.

I think it must now be taken that Provincial regulation, and even prohibition, of the traffic in particular commodities is *intra vires* (as relating to a matter "of a merely local or private nature in the Province") so long as such traffic is dealt with in its local or provincial aspect: *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73. But at the same time if such traffic has or acquires a larger national aspect, it may properly be dealt with by federal legislation under the "peace, order and good government" clause of section 91 of the British North America Act: *Russell* v. *The Queen* (1882), 51 L.J., P.C. 77, as explained in *Ontario Attorney-General* v.

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Dominion of Canada Attorney-General (1896), 65 L.J., P.C. 26 at p. 33, and to the extent to which the ground is covered by such federal legislation, Provincial legislation is inoperative; if of earlier date than the Federal it is overriden and ceases to be law, at least so long as the federal Act remains in force; if of later date it is *ultra vires*. The result is the same in either case; the Provincial enactment is not law.

The traffic in milk has to some extent been the subject-matter of Federal legislation; and it was not suggested that the clauses of the Adulteration Act (R.S.C. 1906, Cap. 133), which deal with milk are not within the competence of the Parliament of Canada. Such a contention, it seems to me, could not be successfully maintained so long as the authority of *Russell* v. *The Queen* is maintained, for the quality of an article of food of such universal consumption throughout Canada as milk is as much a matter of large national concern as the liquor traffic dealt with in *Russell* v. *The Queen*. By section 26 of the Adulteration Act, it is provided that the Governor-General in Council shall fix the standard of quality and the limits of variability in the constituent parts of any article of food. I have not been referred to the order in council by which this imperative duty was performed in the case of milk, but the defendant here admitted before the learned magistrate that his milk had failed to reach the standard set by the federal authorities. At all events, if the duty of fixing the standard rests with the Governor-General in Council, it cannot be undertaken by or under the authority of Provincial legislation, and section 20 of the Provincial Regulations is therefore *ultra vires*, and this conviction, based solely upon that section, must be quashed, with costs.

Judgment

Conviction quashed.

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Jury, withdrawal of case from—Slander—Actionable words—Meaning of language uttered—Proof of special damage—Defamation—New trial.

In an action of slander for words used imputing an offence, which though non-criminal, and not being an indictable offence under the code, yet affects a person's status as a public officer, the plaintiff is entitled to have the case go to the jury without making out a *prima facie* case of special damage suffered.

APPEAL from the decision of CLEMENT, J., in an action for slander, tried before him and a special jury at Vancouver on the 4th of November, 1907. The slander alleged was spoken by the defendant to one S., and was: *er hat unnatuerlichen Geschlechts verkehr mit einem Maedchen gehabt* (being translated, "he had had unnatural intercourse with a girl"). The conversation was carried on in German. At the trial, S. in his evidence, used the expression "he shall have made perverse things with a girl." Plaintiff held the office of German Consul. In taking the case from the jury and dismissing the action, the learned trial judge said:

Statement

"I do not think there is any case to go to the jury. One has to exercise a little common sense, of course, with regard to the way in which an expression is used. It is for me, of course, to say whether the words used in that conversation between S. and A. are capable of having the meaning that the plaintiff attributes to them. I think they were incapable of that meaning. Taking it as you (to *Sir C. H. Tupper*) say, that he was repeating stories he had heard, they were repeated, according to S. in such a way that he had no idea that an unmentionable offence had been suggested, but this other bestial matter which he understood had been referred to. I do not think A. in his examination for discovery, is to be pinned down to the English words, "unnatural connection." I gather, rather, from that, he had been told by these people the same story he told to S.; and the story he told to S. I certainly do not think was capable of conveying the intimation that the defendant had been guilty of the unmentionable offence. With regard to the other point, I have already intimated, taking the words with that meaning, it is not under our Code an indictable offence. That being the offence, it was necessary, of course, for the plaintiff, in order to succeed in the action, to have proved special damage. There is no pretense, of

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course, of any proof of that description; and for that reason, I think the case must be withdrawn from the jury, and the action will be dismissed with costs."

The appeal was argued at Vancouver on the 2nd and 3rd of December, 1907, before HUNTER, C.J., IRVING and MORRISON, JJ.

Argument

Sir C. H. Tupper, K.C., for appellant (plaintiff): S.'s altering the expression "unnatural" to "perverse" in his evidence at the trial denoted a change of heart. The question for the judge in an action for slander is, could the words alleged or relied on, in any sense be capable of a defamatory and actionable meaning; for the jury, what were the words actually used and what is the meaning of them to a person of ordinary understanding: Odgers on Libel and Slander, 4th Ed., 108; *Hankinson* v. *Bilby* (1847), 16 M. & W. 442 at p. 444; *Colman* v. *Godwin* (1872), 3 Dougl. 90; *O'Brien* v. *Marquis of Salisbury* (1889), 54 J.P. 215; *Australian Newspaper Co.* v. *Bennett* (1894), 63 L.J., P.C. 105; *Marks* v. *Samuel* (1904), 2 K.B. 287; *Alexander* v. *Jenkins* (1892), 61 L.J., Q.B. 634; *Macdonald* v. *Mail Printing Co.* (1901), 2 O.L.R. 278 at p. 281; *Cameron* v. *Overend* (1905), 15 Man. L.R. 408. It is actionable to repeat a rumour: *Watkin* v. *Hall* (1868), 37 L.J., Q.B. 125 at p. 129.

Davis, K.C., and *Abbott*, for respondent (defendant): There was no publication; the words used were not slanderous because they were understood in a different way. What S. understood could not bear a slanderous imputation. This was all spoken in German, between two men; there cannot be publication without a hearer; and a person who cannot understand what is being said cannot be called a hearer. There is also no evidence of malice.

Tupper, in reply: There is every evidence of malice on the part of A. He cited *Daines* v. *Hartley* (1848), 18 L.J., Ex. 81.

Davis: Here the language is ambiguous; in *Daines* v. *Hartley* it was obviously defamatory.

Cur. adv. vult.

17th January, 1908.

HUNTER, C.J.

HUNTER, C.J.: Action, tried with a special jury for slander, by the plaintiff, who was the Imperial German Consul for Vancouver.

The slander is alleged to have been uttered in the German tongue, to wit: "*er hat unnatuerlichen Geschlechts verkehr mit einem Maedchen gehabt,*" or words of that import, and to divers persons, but there was the testimony of only one person, W. S., to whom the words were spoken.

The ordinary meaning of these words in English is: "He had unnatural sexual intercourse with a girl." The learned trial judge withdrew the case from the jury on the ground that S. stated that he understood the language not to impute a criminal offence, but a form of vice which is not struck at by the Code; and also on the ground that the defendant's statements made on discovery in English that he had heard that the plaintiff had had unnatural intercourse, did not shew that he had conveyed the idea to S. that the plaintiff had committed a criminal offence, but rather had indulged in the non-criminal form of vice alluded to.

No special damage was proved and therefore the case divides itself into two branches: first, whether there was evidence to go to the jury on which they might reasonably find that it was suggested that the plaintiff had committed the criminal offence; and if not, then, whether to impute indulgence in the other vice was not *per se* actionable as touching the plaintiff's enjoyment of his office as German Consul.

With regard to the first question, it was undoubtedly proved by the defendant's own admission that he related to S. a story that the plaintiff had been guilty of unnatural intercourse. It seems to me that under these circumstances the proper course was for the parties to shew by the evidence of witnesses skilled in the English and German tongues what would naturally be understood by the expression used; and that the evidence of S. as to what he understood, was inadmissible unless the defendant could shew that there was something to prevent the words from conveying their ordinary meaning: see *Harrison* v. *Bevington* (1838), 8 Car. & P. 708 *per* Abinger, C.B., in argument; *Rainy* v. *Bravo* (1872), L.R. 4 P.C. 287 at p. 295; *Daines* v. *Hartley* (1848), 3 Ex. 200. It would then be for the jury to find what was the meaning conveyed; and even if the skilled witnesses differed, and a proper foundation were laid for the admission of

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S.'s evidence, it would not follow that the jury would be bound to accept the non-criminal interpretation.

On the second branch I think the plaintiff was entitled to have the case go to the jury in any event, on the ground that to impute the non-criminal bestiality referred to clearly touched the enjoyment of the plaintiff's office as German Consul; and it would be, in my opinion, to use Lord Brougham's epithet in *Lynch* v. *Knight and Wife* (1861), 9 H.L. Cas. 577 at p. 594, a barbarous state of the law if a plaintiff in such a position had to prove special damage, for it is impossible to suppose that if the German Government considered that there was any foundation for such a report, the plaintiff would not be deprived of his office at once, as such depravity would of course cause him to be boycotted by all decent society.

In *Starr* v. *Gardner* (1843), 6 U.C.Q.B., O.S. 512, it was held by a divided Court that to impute incest to a paid exhorter of the Methodist Church was actionable without proof of special damage, on the ground that the tendency of such an imputation was to cause the plaintiff the loss of his position, and, for my part, I think that both the law and the common sense of the matter would compel the Court so to decide. On the other hand, in *Breeze* v. *Sails* (1863), 23 U.C.Q.B. 94, it was held not actionable without proof of special damage, to say of a Methodist preacher "that he kept company with a prostitute for a length of time." *Starr* v. *Gardner*, *supra*, was apparently not cited, nor does it clearly appear from the report that the defendant meant that the plaintiff was keeping the woman's company while he was a preacher, and if it was before he became a preacher, then *Hopwood* v. *Thorn* (1849), 8 C.B. 293 at p. 314, cited by the Court, would possibly be applicable, as, *non constat*, his conduct after he turned preacher might have been quite exemplary. In any event I have serious doubts as to the justice of the decision. I have not overlooked the fact that it does not clearly appear in the present case that the conduct alleged is stated to have taken place after the plaintiff's appointment as consul, as even if it were alleged to have taken place before his appointment, I think the plaintiff would still have his action, without proof of special damage, as he would even then be in danger of losing his office

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on account of the repugnance shewn by society to persons under such a stigma. To be generally reported as having been guilty at any time of either kind of conduct alluded to, would be to put the plaintiff out of the pale of society. I have not found any case of the kind in question here, but I do not think the law is unequal to the occasion, for, in my opinion, if one may coin a maxim, *lex crescit et debet crescere.*

As to the question of privilege I do not see that there was any duty on the defendant to disclose the matter to S., and I see nothing to take the case out of the class of volunteered communications.

HUNTER, C.J.

In my opinion, there ought to be a new trial, with liberty to both parties to amend their pleadings as they may be advised. The plaintiff is entitled to the costs of the appeal, and the costs of the former trial should abide the result.

IRVING, J.

IRVING, J., concurred with HUNTER, C.J.

MORRISON, J.

MORRISON, J.: The plaintiff is the Imperial German Consul in the City of Vancouver. The defendant is an ex-officer of the German army, and carries on the business of a real estate agent in the same city.

The defendant in the fall of 1906, was appointed joint agent with the plaintiff for one Brockhausen, a German gentleman of means sojourning in Vancouver, to invest certain moneys in real estate here.

About this time S., who had been German Vice-Consul in Guatemala a few years previously, arrived in Vancouver and in due course called upon the plaintiff at the consulate, and offered to aid him in his consular duties without remuneration, in order to become acquainted and to get his footing, which aid was accepted. No other relation existed between them, and whilst S. was so engaged, the defendant came to him, and told him that the plaintiff had a bad reputation in the city, and that he heard he had had unnatural intercourse with a girl some time ago. From the evidence it appears that the defendant had been told this by one Allen, and also by one Webb, seven or more months before he had told S. It seems he told S. in the latter part of December, about the time differences were existing between

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himself and the plaintiff over the Brockhausen moneys. In the early part of 1907 the feeling between the plaintiff and defendant grew more intensely antagonistic, owing to defendant having acted independently of the plaintiff in some transactions in which plaintiff considered he should have had an interest, and the formal breach occurred when Brockhausen wrote them a joint letter from abroad, in which he dropped the plaintiff, and gave his power of attorney to defendant to deal exclusively with his investments, and from that letter, it appeared that Brockhausen knew of the differences between plaintiff and defendant, and as the plaintiff had never communicated with Brockhausen, he assumed that defendant had been doing so. The defendant then told plaintiff that he had been hearing the rumours about him as above. S. also disclosed to the plaintiff that the defendant had told him the rumours. Thereupon, this action was brought. At the trial, the evidence of the defendant and S. on discovery and *de bene esse*, respectively, was put in, in which they both swore that the words used by the defendant were, that the rumour was that "plaintiff had had unnatural intercourse with a girl." The conversations between the defendant and S. were in German. The source of defendant's information was in English from Allen and Webb, and those same words were used. S., however, when called by the plaintiff, in his evidence at the trial, used a different expression, namely, "He shall have made perverse things with a girl"—which I take him to use interchangeably with the other expression, "unnatural intercourse." And in examination at the trial he attempts to define what he understood, particularly, by the expressions. As to this phase of the case I shall refer later on.

MORRISON, J.

The plaintiff in his evidence swore that the expression used by the defendant in telling him of the rumours against him was "unnatural *sexual* intercourse with a girl."

Another witness who was called, was the minister of the German Church in Vancouver, who said that the defendant, in the course of several conversations in the same spring, had told him of the consul's bad reputation, and that perhaps, he, the defendant, would make application to the Foreign Office, looking to the removal of the consul.

This is substantially the evidence for the plaintiff. In cross-examination, S. was asked:

"Q. You have given us a translation of those exact words 'He shall have made perverse things with a girl' . . . . You described it as being what is meant by (using an expression which was amplified by counsel, and which, although suggesting a scandalous and heinous vice or enormous sin, it was contended did not come within the meaning of any of the crimes against morality defined in our Criminal Code)? Yes.

"Q. Now, what did you mean by that answer? Well ——

"Q. You did not mean (naming an indictable offence), or anything of that kind? No—let me see—well, I really don't know."

At the close of the plaintiff's evidence, counsel for the defendant pressed to have the case withdrawn from the jury, and the learned trial judge did so, holding that the words used did not impute the commission by the plaintiff of an indictable offence, and as the plaintiff did not prove special damages, his case failed.

With the utmost deference to the learned judge, I cannot accede to that view. The defendant is an educated German, thoroughly conversant with the English language. He was told the rumour by an English-speaking person. He repeated those exact words in German, to another person conversant with English, who in turn deposed to those exact words in English.

Objection was raised as to the admissibility of S's evidence, as quoted above, where he attempts to explain what he understood to be the meaning of the words in question. But admitting that that evidence was properly received, of which I have grave doubts, having regard to *Daines* v. *Hartley* (1848), 3 Ex. 200 at p. 205 and *Barnett* v. *Allen* (1858), 3 H. & N. 377, *et seq.*, yet it was essentially a matter for the jury to determine the degree of credit to be given S's evidence, when he sought to restrict or euphemize the expression. Plaintiff's counsel urges that defendant's evidence as to the words used, should not be governed by the restricted meaning put upon them by S., but that they should be taken to mean what they say. But the learned judge says, in the course of his remarks, granting the non-suit, "I do not think A. in his examination for discovery, is to be pinned down to the English words 'unnatural connection.'" Now, it seems to me that once you get away from the plain English term, you are then in the realm of ambiguity, and although the Court is not

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bound to consider itself ignorant of every usage of mankind, or of most vagaries of human nature, yet, I think, when as here, it is asked to enter into a consideration of the several unspeakable distinctions inconceivable to the ordinary sane mind, of the expression used and the meaning attached thereto by S., it is going further than the demands of morality justify.

The jury might well take a view quite different from the learned judge, as different persons might take different views as to the credibility of S. They might well hesitate to seek aid from one who treats as a joke such forms of vice as suggested by those expressions used by him—to say nothing of the opinion they might form as to his bias for the defendant, particularly when it is remembered that the restrictive meaning sought to be given the alleged slander by defendant might be held by the jury to be an afterthought, considering the lapse of time between the discovery evidence and that at the trial. Taking the words on their face, and applying the knowledge supposed to be possessed of the criminal law of the country as contained in our Code, where the various crimes against morality are defined, can it be contended that those words alleged to have been used by the defendant to S., would not convey to the ordinary fair-minded man hearing them, the imputation of an indictable offence? Indeed the rule appears to be, as propounded by Holt, C.J., that, "Whenever the apprehension of the hearers and the meaning of the speaker was scandalous, the words shall be taken in their worse sense."

MORRISON, J.

Reverting now to the admissibility of S.'s examination, *supra*, the judgment of Pollock, C.B., in *Daines* v. *Hartley*, *supra*, at p. 205, seems exactly in point. There a witness who had heard the conversation complained of, was asked as to a certain expression, "what did you understand by that?" and the question in that form was not allowed. The judgment proceeds: "We are of opinion that the question could not be so put . . . ."

And again in *Hankinson* v. *Bilby* (1847), 16 M. & W. 442 at p. 445, the same learned judge says:

"Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to, might form a different judgment on the subject."

Now, in the expression "unnatural intercourse with a girl," the word "unnatural" is what might be called the criminal equation of the phrase. That word is almost identical in German. S. in his examination at the trial:

"Q. What would the words be for unnatural intercourse? In German?
"Q. Yes? Unnatural, unnatuerlich."

Then he said those words would convey the same meaning as the word "perverse." To go further and ask what he understood the meaning to be of those obviously plain words whether in German, or English, seems to me to be open to the objection raised in *Daines* v. *Hartley*. For a witness, through whom it is sought to restrict the meaning of alleged slanderous words must be presumed to be in possession of some knowledge respecting the matter not known to the Court or jury, governing the meaning to him of the phrase. And before he can be asked his understanding of the words, this extra-exclusive knowledge must be disclosed first. Nor do I think it matters that this question was put to the witness after he had given a different form of expression in which the word "perverse" appears instead of "unnatural," unusual as that application of the word "perverse" may be.

However, leaving that phase of the case, there is surely some evidence to go to the jury as to the use of scandalous words imputing, to use the learned judge's expression, "a bestial matter" against the plaintiff in his office of consul, an office of great dignity, and one in which the incumbent is called upon to perform functions of a high social degree. Again counsel transports one to the extremest limits of credulity, when asked to hold that the law affords no protection in an action of this kind to a man holding the plaintiff's position in the community of whom the words as interpreted by S. are alleged to have been spoken without first proving special damage. The communication has not been shewn to have been privileged, nor can I discern any evidence whatsoever of the occasion being so. The evidence does not appear to disclose that the defendant owed any duty, legal, social or moral to S. He does not appear to have had any interest in making the communication to S., nor S. any corresponding interest in receiving it. It may be that the jury would

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find that the communication on the defendant's part was purely voluntary. Even if the defendant were actuated by a missionary desire to protect S.'s morality, yet that commendable, though improbable, impulse does not justify him in overlooking the grave wrong to which he was subjecting the plaintiff.

But even should it be held that the occasion was privileged, yet can it be said that there is not some substantial evidence of malice to go to the jury.

The question is, in what sense would the words be reasonably understood: *Barnett* v. *Allen, supra.* What meaning would the words used convey to the mind of reasonable, fair men, who heard them; not what meaning they conveyed to the mind of a man whose receptive faculties were from childhood tuned to the salacious converse of libidinous acquaintances. To say of a man that he has had sexual intercourse against the order of nature with a girl, means only one thing to the average man, and when it is proven that those words were used under the circumstances alleged in this case, then the plaintiff, in my opinion, makes out at least some sort of a case proper to be left to the consideration of the jury.

MORRISON, J.

I would allow the appeal.

Appeal allowed.

Solicitors for appellant (plaintiff): *Tupper & Griffin.*

Solicitors for respondent (defendant): *Abbott & Hart-McHarg.*

MULLER v. SHIBLEY.

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MULLER v. SHIBLEY

County Court—Statute, construction of—Woodman's Lien for Wages Act, R.S.B.C. 1897, Cap. 194, Sec. 3—"Woodman," meaning of.

Defendant hired a team of horses from plaintiff for certain logging operations, and, on default of payment for the use of the horses, which were driven by a man employed by defendant, plaintiff filed a lien against the logs for the amount due:—

Held, that plaintiff was not a woodman within the meaning of the statute.

Statement

APPLICATION to set aside a lien filed under the provisions of the Woodman's Lien for Wages Act, argued before HOWAY, Co. J. at New Westminster on the 28th of January, 1908.

Ladner, for the application.

McQuarrie, contra.

HOWAY, Co. J.: It was conceded on the argument that the application turns upon the point, whether the item "hire of two teams of horses" (which admittedly does not include any service rendered by the plaintiff, but merely represents the amount due by the defendant for the services of the plaintiff's horses under the contract between them), comes within section 3, R.S.B.C. 1897, Cap. 194.

I am of opinion that it does not, and that the plaintiff having performed no work on the logs himself, is not entitled to claim a lien under this Act.

A woodman had no lien at common law for labour in cutting, hauling and driving logs to market, as, though his labour increased the value of the timber on which it was bestowed, the nature of the employment was inconsistent with retention of possession, which is the foundation of a common law lien: *Roberts* v. *Bank of Toronto* (1894), 21 A.R. 629.

Judgment

In this state of the law, the Woodman's Lien for Wages Act, 1895, was passed, and in considering whether a contractor like the plaintiff is entitled to a lien under it, the evil aimed at, and the short title of the Act, and possibly the marginal notes to the

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sections may be looked at: Hardcastle on Statutes, pp. 112, 215, 216; *Heydon's Case* (1584), 2 Co. Rep. 18. The Act, being in derogation of the common law, should not be extended beyond the cases specially provided for: Holmstead on Mechanics' Liens, p. 3; *Haggerty* v. *Grant* (1892), 2 B.C. 176.

The short title of the Act, "Woodman's Lien for Wages Act," indicates that it only protects the worker himself, the wage-earner. The form of statement of claim of lien in the schedule bears out this view. I do not think that a person supplying a team of horses for use in logging under a contract thereby becomes a "woodman." If so, a machinery depot supplying a donkey engine under a similar contract, or a hardware company supplying cables, blocks and similar equipment, under a similar arrangement would be entitled to liens as being "woodmen." The marginal note to section 3, lends colour to the view that only actual labourers have a lien.

The Legislature in defining the word "person" is particularly careful to indicate workers directly or indirectly engaged in the labour of getting the logs to market. The amendment made by 1905, Cap. 57, to section 2, sub-section 2, points in the same direction. See, too, *Davidson* v. *Frayne* (1902), 9 B.C. 369. Although there are similar statutes in Ontario, Quebec and Manitoba, and in some of the American States, I cannot find that the point has arisen there. See, also, Tremeear's Conditional Sales, 233, *et seq.*; Phillips on Mechanics' Liens, Sec. 515. However, holding that our statute gives no lien to a contractor such as the plaintiff, I set aside the lien, without prejudice to any other remedy the plaintiff may have against the defendant: see section 31.

Judgment

The plaintiff must pay the costs of this application.

Application refused

[NOTE:—See *Dallaire* v. *Gauthier* (1903), 24 Que. S.C. 495, C.A.D. (1904), 170.

REAR v. THE IMPERIAL BANK OF CANADA.

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Banks and banking—Presentment of customer's cheque to the wrong clerk—Direction by such clerk to present the cheque to another clerk taken as refusal to pay—Action for damages for such refusal.

Jury, evidence sufficient to go to—Withdrawal of case from—Prima facie case.

A clerk from one bank presented at another bank a cheque of a customer of such last mentioned bank, but at the wrong ledger-keeper's wicket, and was directed to present it at another wicket. There was no evidence that this was done, and a telegram was sent out by the first mentioned bank that the drawer of the cheque had no account:—

Held, on appeal (IRVING, J., dissenting), that the trial judge was right in taking the case from the jury and dismissing the action for want of sufficient evidence.

APPEAL from the decision of CLEMENT, J., in an action tried before him, with a jury, at Vancouver, on the 9th of July, 1907.

Statement

Plaintiff, a customer of the Vancouver branch of the defendant Bank, drew a cheque in Seattle for $1,227.50 and gave it to a person there in connection with a business transaction. The payee negotiated the cheque with the First National Bank, which in turn forwarded it to the Vancouver branch of the Canadian Bank of Commerce for collection. The latter bank in the regular course of business sent the cheque, by one of their clerks, to the Imperial Bank. This clerk presented the cheque to a clerk in the Imperial Bank in charge of the savings ledger and the A to K ledger, who directed him to present the cheque at the L to Z wicket. There was no evidence that this direction was followed, and in consequence the Bank of Commerce sent a telegram to Seattle stating that plaintiff had no account. At the same time, and by the same clerk, another cheque of the plaintiff's was presented, drawn on the Bank of Montreal, Vancouver, and the Imperial Bank clerk suggested that in addition to presenting the cheque in question in the action to the L to Z ledger-keeper, he also present it at the Bank of Montreal. The cheque in dispute was written on a Bank of Montreal, Nicola, B.C., form, with the words "Imperial Bank of Canada," substituted

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for "Bank of Montreal," and "Nicola" crossed out but no place of payment mentioned. The defendant Bank had no branch at Nicola. At the trial on the close of the plaintiff's evidence, the learned judge withdrew the case from the jury and dismissed the action for want of sufficient evidence.

The appeal was argued at Vancouver on the 25th of November, 1907, before HUNTER, C.J., IRVING and MORRISON, JJ.

W. S. Deacon, for appellant (plaintiff).

Joseph Martin, K.C., and *Craig*, for respondent (defendant Bank).

Cur. adv. vult.

17th January, 1908.

HUNTER, C.J.: The plaintiff's claim is for damages for wrongfully refusing to cash the plaintiff's cheque.

It was admitted that there were sufficient funds, and that the cheque was duly drawn and indorsed, and the sole defence is non-presentment.

The only evidence as to the presentment was that of the manager of the defendant Bank, who, in answer to interrogatories, stated that a clerk from the Bank of Commerce shewed the cheque to one West, a clerk of the defendant Bank in charge of the savings ledger and the A to K ledger, and that West told him to present it to the clerk in charge of the L to Z ledger; that it was not presented to such clerk, who was the only clerk to whom it could be duly presented. Neither West nor the Bank of Commerce clerk was called, but Mr. *Deacon* insisted there was enough to go to the jury when he proved that the cheque was produced to West and that in consequence of what transpired the Bank of Commerce sent a telegram to Seattle where the payee then was, stating that the plaintiff had no account. But what the Bank of Commerce did was clearly *res inter alios*, and all that was shewn, therefore, was that the cheque was presented to a clerk who, according to the only evidence given on the subject, was the wrong clerk.

HUNTER, C.J.

The contention that, without more, a direction by one clerk to present the cheque to another clerk might reasonably be found by the jury to amount to a refusal, is in my opinion untenable;

it would be just as arguable to say that a jury might find that a cheque had been dishonoured which had been presented to the janitor or charwoman. It would be difficult, if not impossible, especially in the case of an incorporated bank, to carry on a banking business in orderly fashion if the bank could not require the customer or payee to present his cheque to a particular clerk.

As, therefore, the jury could not reasonably have found that the Bank had acted unreasonably in requiring the cheque to be presented to a particular clerk, I think the dismissal was right.

IRVING, J.: In this case the plaintiff argues that the conduct of the defendant Bank in authorizing the Bank of Commerce to telegraph in the afternoon of Saturday to the holders of the cheque that it had been paid, is an admission by conduct from which the jury might properly infer that the cheque had been indeed presented at their Bank. Had the jury so found, I do not think we could have set the verdict aside on the principles laid down in *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193 at p. 207; *cf.* also *Leith* v. *O'Neill* (1860), 19 U.C.Q.B. 233 at p. 235. I therefore think the case should have been allowed to go to the jury.

Bowen, L.J., in *Davey* v. *London and South Western Railway Co.* (1883), 12 Q.B.D. 70 at p. 76, said:

"It is not because facts are admitted that it is therefore for the judge to say what the decision upon them should be. If the facts which are admitted are capable of two equally possible views, which reasonable people may take, and one of them is more consistent with the case for one party than for the other, it is the duty of the judge to let the jury decide between such conflicting views."

Now, from the admitted facts in this case could reasonable people draw different inferences from them?

In the edition of Byles on Bills (issued in 1891) now in the library, I find the following cases cited in support of the proposition that it is not necessary to prove presentment by direct evidence, but the defendant's part payment or promise to pay after the bill or note is due, is *prima facie* evidence of presentment: *Croxon* v. *Whitehall Worthen* (1839), 5 M. & W. 5, an action brought by the indorsee against the maker; defence (*inter alia*) that the note had not been duly presented.

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At the trial, the plaintiff gave no direct evidence of its presentment, but two letters were put in, in which he asked for indulgence, and stated that he had been drawn into making the note by Hill, the indorser. The plaintiff also gave in evidence a promise by the defendant to pay the note by instalments.

Defendant moved for non-suit. Abinger, C.B., says:

"The defendant is the party to pay the note, which he has made payable at a particular place; as against him, therefore, it appears to me that his subsequent promise admits all that was necessary to entitle the plaintiff to recover."

Parke, B., was of the same opinion.

Alderson, B.:

"The defendant is supposed to know the law; he knows, therefore, that he is not liable unless the note has been duly presented; with that knowledge he undertakes to pay it. Is not that evidence for the jury that he knows it has been presented?"

This case followed *Lundie* v. *Robertson* (1806), 7 East, p. 232, an action on a bill. The defendant when applied to for payment said he had no cash by him then, but if the witness would call again and bring the account with him, he (defendant) would pay it. Lord Ellenborough, after making the statement of fact, as above, continued:

"Now, when a man against whom there is a demand promises to pay it, for the necessary facilitating of business in transactions between man and man, everything must be presumed against him. It was, therefore, to be presumed, *prima facie*, from the promise so made that the bill had been presented for payment in due time and dishonoured, and that due notice had been given of it to the defendant. But taking the subsequent conversation as connected with the former, the only limitation of it would be, that the defendant stated that he had not had regular notice of the dishonour; but even that objection was waived in the same breath; for the defendant said, that as the debt was justly due he would pay it. Then it stands on the first conversation as an absolute promise to pay the bill; thereby admitting (for I do not put it on the ground of waiver of any objection to the non-presentation of the bill in due time as existing in fact) that there did not exist any objection to his payment of the bill; but that everything had been rightly done. That supersedes the necessity of the ordinary proof."

IRVING, J.

In *Greenway* v. *Hindley* (1814), 4 Camp. 52, "Lord Ellenborough considered that the defendant's acknowledgment was a sufficient foundation from which the jury might infer the facts stated in the declaration."

Campbell v. *Webster* (1845), 2 C.B. 258, an action against the maker of a bill by the payee. Plea that the bill had not been duly protested. At the trial some difficulty arose as to the proving of the protest; thereupon certain letters written by defendant were put in and relied on, either as a waiver of a protest or as evidence that a protest had been duly made, Erle, J., told the jury that the letters were evidence whence they were at liberty to infer that the bill had been protested. The jury found for plaintiff. On the return of a rule for a new trial, Tindal, C.J., at p. 265, said:

"And the question is, whether the evidence given at the trial on the part of the plaintiff was properly received, the jury correctly directed upon it, and the conclusion they came to right. The rule seems to me to be properly laid down in the case of *Patterson* v. *Becher*, 6 J. B. Moore, 319, which goes to the very foundation of the objection here. The way in which Richardson, J., there states the law upon the subject, appears to me to be perfectly correct. 'It has been decided,' he says, 'in *Rogers* v. *Stevens*, that a promise to pay, after a bill or note becomes due, will dispense with proof of notice of dishonour. So, it will dispense with the proof of protest; as it will amount to an admission, on the part of the defendant, that the plaintiff had the right to resort to him upon the bill.' That is, if, when payment is demanded, the party omits to avail himself of the preliminary objection of want of protest, or of want of notice, it is a question for the jury whether he does not thereby admit that all the steps that are essential to create liability in him, have been duly taken."

Coltman, J., p. 267:

"An admission of liability is enough to warrant the jury in inferring, that all the steps necessary to create such liability have been duly taken."

IRVING, J.

Maule and Erle, JJ., delivered opinions to the same effect.

In *Cordery* v. *Colvin* (1863), 14 C.B.N.S. 374, the bill was payable at the defendant's house. On its becoming due the plaintiff took it there and shewed it to the defendant's wife. Subsequently the plaintiff promised to pay it. This was held by Erle, C.J., and Byles, J., evidence from which the jury might, if they thought proper, infer that the defendant had notice.

These two last mentioned cases are cited in Taylor on Evidence as admissions by conduct, par. 805, page 521 (1897 Ed.), and it is to be observed that in all cases the admissions are made between the parties to the note or bill (as the case may be), and the question of waiver is more or less mixed up with the bald question of fact. In the present case the plaintiff is trying to sheet

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home to his banker the fact that the cheque in question was duly presented and there is no question of waiver involved.

The cases cited are not exactly on all fours with the present case, but the reasoning I think is applicable.

MORRISON, J., concurred with HUNTER, C.J.

Appeal dismissed, Irving, J., dissenting.

Solicitors for plaintiff: *Wade, Deacon & Deacon.*
Solicitors for defendant Bank: *Martin, Craig & Bourne.*

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KIRKLAND v. BROWN.

Practice—County Court, appeal from—Time for taking—Delivery of judgment and taking out formal order for—Order xxiii., rr. 1, 4.

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The time for taking an appeal from an ordinary judgment of the County Court to the Full Court commences from the date of the delivery of judgment, and not from the date of taking out the formal order.

A judgment in replevin is not a special judgment under Order xxiii., rule 1.

Statement

APPEAL from a judgment of YOUNG, Co. J., in an action of replevin, delivered by him at Atlin on the 11th of July, 1907. Plaintiff, in whose favour judgment was given, did not take out the formal order for judgment, relying on an entry of the cause by the registrar in the record book, pursuant to rule 1 of Order xxiii. On the 29th of October, 1907, defendant had the formal order drawn up and entered, and on the 18th of November, 1907, served notice of appeal upon plaintiff's solicitor.

The appeal was heard at Victoria on the 22nd of January, 1908, before IRVING, MARTIN and MORRISON, JJ.

Argument

Aikman, for respondent, raised the preliminary objection that the Court had no jurisdiction to hear the appeal on the ground

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that the notice of appeal was served after the expiration of three months (the time limited by section 90 of the Supreme Court Act) from the date of the delivery of judgment, as in the County Court the time began to run from the date of the delivery of judgment and entry of the same by the registrar in the cause book, and that therefore the respondent was too late.

W. P. Grant, for appellant.

Judgment

Per curiam: No further order for judgment was necessary, and all that the successful party had to do was to apply for a warrant of possession.

Appeal dismissed.

CASTLEMAN v. WAGHORN, GWYNNE & CO.

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Company law—Transfer of shares—Necessity to procure registration of transfer—Duty of vendor—Consideration, failure of.

Plaintiff instructed a broker to purchase certain shares for him. The broker did so, and drew on plaintiff for the purchase money, the draft being indorsed by a member of the defendant firm, and the share certificate being attached to the draft. Plaintiff honoured the draft and received the shares, but on being informed that the indorsement on the share certificate was not in the handwriting of the transferor, James Boecher, forwarded the certificate to the Company's office. The Company's manager, after some negotiation with the witness to the indorsement, John Boecher, handed him the certificate. He disappeared. The Company refused to register the transfer of the shares to the plaintiff, who sued to recover the amount paid for the shares, and for damages:—

Held, affirming the decision of MORRISON, J. (IRVING, J., dissenting), that the broker's duty was satisfied when he handed over the certificates, *ex facie*, properly indorsed, and that there was no obligation on him to procure the registration of the transfer.

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CASTLEMAN v. WAGHORN, GWYNNE & Co.

APPEAL from the judgment of MORRISON, J., in an action tried before him at Vancouver on the 28th of January, 1907. The facts are sufficiently set out in the headnote.

Stuart Livingston, and *Garrett*, for plaintiff.
J. A. Russell, and *Pottenger*, for defendant Company.

25th February, 1907.

MORRISON, J.: The plaintiff, who is a commission broker residing in Ottawa, instructed one Amess, another broker, residing in Vancouver, to purchase for him stock in the Diamond Vale Coal and Iron Mines, Limited, at a price not to exceed 35 cents per share, and reference was made in that behalf to another firm of brokers other than the defendants. Amess, ascertaining that the defendants held some of the stock required, sought them out and purchased 3,400 shares at 32½ cents, Amess not having the purchase money in hand, Gwynne, one of the defendant firm, indorsed a draft drawn by Amess on the plaintiff for an amount equivalent to 35 cents per share, which draft was duly honoured by the plaintiff and he received the shares.

The manager of the Diamond Vale Company, who was in Ottawa at this time, was seen by the plaintiff, who shewed him the certificate of the shares in question and upon perusal advised the plaintiff that the signature purporting to be that of the original owner and which appeared upon the transfer indorsement was not that of the transferor. And it was then arranged between them that the plaintiff forward the certificate to the Company's office in Vancouver, for which city the manager was about to depart, in order that it would be there as against his arrival. The certificate arrived at the Diamond Vale Company's office in due course of mail and upon the manager's return he communicated with the witness to the indorser's signature, John Boecher, to whom after a conference respecting the signature he gave the certificate. John Boecher disappeared with the certificate, and no trace of him or the certificate has since been found. An advertisement was in due course inserted in the local and Seattle papers stating that the certificate in question had been cancelled, and that a new one had been issued in lieu thereof.

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That new certificate does not, of course, bear any signature to the indorsement, and in the absence of the original, there is no satisfactory evidence in what other respects it differs from that document. The Company refused to transfer the stock on their books to the plaintiff, and upon his making a demand upon the defendants for a refund of the money paid them in respect of the shares bought by Amess, they in turn also refuse. He now brings his action for a return of the amount of the Amess draft indorsed by the defendants, and for damages.

The plaintiff has entirely failed to prove that the defendants knew, or had reason to know, that Amess was the agent of the plaintiff in the transaction, or indeed that he had any connection with him in the matter. On the contrary, from the evidence on behalf of the plaintiff, it was shewn that Amess had bought for less than he received from his alleged principal, and the purchase was made by and for Amess himself, from which, contrary to the meaning of his instructions, he made a profit out of his alleged principal, the plaintiff.

MORRISON, J.

The entire transaction upon which the action is based was between the defendants and Amess and there is no privity of contract that I can discern between the plaintiff and defendant, I therefore do not consider it necessary to decide the several other points argued before me, nor am I now concerned about what remedy, if any, the plaintiff may have in respect to his purchase of those shares.

I dismiss this action with costs.

The appeal was argued at Vancouver on the 3rd and 4th of December, 1907, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Stuart Livingston, for appellant (plaintiff), cited *Kimber* v. *Barber* (1872), 8 Chy. App. 56; *Re The East Wheal Martha Mining Company* (1863), 33 Beav. 119; *Ireland* v. *Hart* (1902), 1 Ch. 522 at p. 528; *Sheffield Corporation* v. *Barclay* (1905), A.C. 392; *Wilkinson* v. *Lloyd* (1845), 14 L.J., Q.B. 165.

Argument

J. A. Russell, for respondents (defendants): There is no authority, on the evidence, to Amess to act as agent; he purchased the stock for himself; and we had no idea whom he was buying for. Our position is that the action should have been

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against Amess. He cited and referred to *Watson* v. *Swann* (1862), 11 C.B.N.S. 755 at p. 768; *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339 at p. 349; *Pole* v. *Leask* (1863), 33 L.J., Ch. 155 at p. 161.

Livingston, in reply.

Cur. adv. vult.

17th January, 1908.

HUNTER, C.J.: On the argument I understood Mr. *Livingston* to admit that he had to contend that it was the duty of the vendor to procure registration of the shares, and that he could not maintain that the certificates were not duly transferred by the transferor through the medium of his wife as amanuensis.

HUNTER, C.J.

The proposition contended for cannot be supported on the cases, which shew that under the ordinary contract the vendor's duty is at an end when he transfers in due and proper form and does nothing to interfere with the registration of the transfer: *Stray* v. *Russell* (1859), 28 L.J., Q.B. 279; *London Founders Association* v. *Clarke* (1888), 20 Q.B.D. 576; *Hooper* v. *Herts* (1906), 1 Ch. 549.

Here there is the additional feature that the buyer had the opportunity of inspection before paying the draft.

I would dismiss the appeal.

IRVING, J.: The plaintiff sues for the return of his money on the ground of failure of consideration, and also on the ground that the defendants shared with his, plaintiff's, agent a secret commission. The second ground fails, as there is no evidence to support this charge.

IRVING, J.

On the first ground: plaintiff, who was in Ottawa, had presented to him there a demand draft for $1,190, drawn by the defendants and one F. G. Amess. Attached to the draft were two share certificates, one for 3,000 shares issued to James Boecher and the transfer signed by James Boecher; the other for 400 shares; concerning these 400 shares no trouble has arisen.

As to the 3,000 shares, these had been bought through Amess for the plaintiff at 32½ cents, and when the draft was cashed the defendants received in respect thereof the sum of $975.

By the Articles of the Company—which document, governing

as it does the transfer of shares, we must look to for the terms to be implied in a contract for sale of shares—the instrument of transfer of a share shall be signed by the transferor, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in respect thereof: Article 25 (*cf.* 15, Table A). By Article 24, every transfer must be in writing and in the usual common form, and must be left at the office, accompanied by the certificate of the shares to be transferred, and such other evidence (if any), as the directors may require to prove the title of the intending transferor.

It is the duty of the transferee to obtain recognition of himself as shareholder, but in my opinion the plaintiffs by annexing to the draft the certificate indorsed with the name of James Boecher, represented that the signature thereon was that of James Boecher himself. The ordinary contract by the seller on the bargain and sale of registered shares of a company is that the seller shall execute a valid transfer of the share and hand it to the transferee.

If the transferee is not furnished with a valid transfer then the defendants have not performed what they agreed to perform.

It is said that there is no duty on the vendor to procure registration. I agree, but my point is that the vendor must hand to the purchaser something that he (the purchaser) can get registered. For example, to take an extreme case, handing a forged signature to a transfer, or an unsigned transfer, would not be compliance by the vendor with the terms of his contract.

In this case, the signature to the transfer was not in the proper handwriting of James Boecher. The evidence at the trial is all one way. His wife says she wrote it, at his request, just before he died, and that her son, at her request, after her husband's death, sold the shares to the defendants. The will of her late husband has not been proved.

Having regard to the 24th and 25th articles which require the signature of the transferor to appear on the transfer, can it be said that the defendants have given the plaintiff a valid transfer of the shares.

At common law if A authorizes B to sign for him, the signature so made is A's signature, but there are cases in which a

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statute may require personal signature, *e.g.*, *Hyde* v. *Thomson* (1836), 2 Bing. N.C. 776; *Toms* v. *Cuming* (1845), 7 Man. & G. 88; *Miles* v. *Bough* (1842), 3 Q.B. 845.

In my opinion, the words "signed by the transferor" in Article 24 standing by themselves, mean personal signature. A comparison of the signature in the Company's books with the separate signature as transferor, is obviously the most convenient and usual safeguard the officers of the Company have in making a transfer; other precautions are also taken: see *Simm* v. *Anglo-American Telegraph Company* (1879), 5 Q.B.D. 188 at pp. 194-5 as to duty of company. The Company has seen fit to prescribe certain regulations for its own protection, and shareholders must abide by these.

IRVING, J.

The plaintiff, having paid the draft drawn on him by the defendants, applied to the Company for registration of the transfer and was refused. He then brought this action. I think he is entitled to recover $975 on the ground of failure of consideration.

CLEMENT, J.

CLEMENT, J.: This case may be disposed of on one very short ground. Counsel for the appellant conceded that his case must fail if he cannot establish this proposition, that on the sale of shares in an ordinary limited company it is the duty of the vendor upon request to procure the registration of the transfer upon the company's books, and that failure to perform this duty entitles the vendee to treat the contract as at an end and to sue for the return of the purchase price. I think this proposition cannot be supported. *Wilkinson* v. *Lloyd* (1845), 14 L.J., Q.B. 165, turned upon a special clause in the company's regulations which, as put by Fry, C.J., in *London Founders Association* v. *Clarke* (1888), 57 L.J., Q.B. 291, at p. 294, "made the consent of the directors a condition precedent to the transfer." This last case, following *Stray* v. *Russell* (1859), 28 L.J., Q.B. 279, (1860), 29 L.J., Q.B. 115, seems to me to settle the law in a sense contrary to that contended for by the plaintiff. See also *Skinner* v. *City of London Marine Insurance Corporation* (1885), 54 L.J., Q.B. 437 at p. 439 and *Hooper* v. *Herts* (1906), 75 L.J., Ch. 253. It was urged that *Stray* v. *Russell, supra,* and the cases

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following it depended upon the usages of the London Stock Exchange, but those usages were put forward merely to shew that it was a term of the bargain that the purchase price should be paid before the time for registration had arrived. That was clearly a term of the bargain here; the share certificate and transfer were attached (C.O.D.) to the draft for the purchase price. The plaintiff did not deem it incumbent on him to shew that the transfer was ineffectual otherwise than for want of registration; the evidence points the other way.

The appeal should be dismissed with costs.

Appeal dismissed, Irving, J., dissenting.

Solicitors for appellant: *Livingston, Garrett & King.*
Solicitors for respondents: *Russell, Russell & Pottenger.*

LEVY v. GLEASON.

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Municipal law—Municipal Clauses Act, B. C. Stat. 1906, Cap. 32, Secs. 13, 19, 20—Alderman—Property qualification of.
Land Registry Act, B. C. Stat. 1906, Cap. 23, Sec. 74, effect of.

A candidate for alderman in the City of Victoria had, prior to his nomination, conveyed away the lands on the alleged ownership whereof he claimed qualification under section 13, sub-section (*b.*) of the Municipal Clauses Act, but the conveyance remained unregistered. In an action to establish disqualification, and for penalties under section 20 of the Act:—

Held, that the effect of section 74 of the Land Registry Act, Cap. 23, 1906, is to make registration of conveyances taking effect after the 30th of June, 1905, a *sine qua non* of the vesting of any interest, legal or equitable, in the grantee.

Falconer v. *Langley* (1899), 6 B.C. 444, considered.

Statement

ACTION against defendant under section 20 of the Municipal Clauses Act, 1906, for having sat and voted as an alderman for

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the City of Victoria, although not legally qualified to do so. Tried before HUNTER, C.J., at Victoria on the 22nd of July, 1907.

Belyea, K.C., for plaintiff.
R. T. Elliott, for defendant.

HUNTER, C.J.: The facts are not in dispute. The defendant in his statement of qualification for the purposes of the election which took place on January 17th, 1907 (January 14th being nomination day), stated that he was qualified as being the registered owner of lot 1, block 34, Fernwood, of the assessed value of $550 as to land and of $2,500 as to improvements, and also of five other lots in respect of which he applied to be registered as owner on January 5th, 1907. On December 12th, 1906, he had duly conveyed the first mentioned lot to Hugh R. McIntyre in consideration of the sum of $320, which he received the same day. The grantee applied on December 14th to have his conveyance registered in the Land Registry Office and paid the required fees, but on January 9th, by arrangement with the defendant, Mr. McIntyre withdrew his application in accordance with section 37 of the Land Registry Act, the defendant recouping him the sum of $1.50, which was retained by the office on the withdrawal, he retaining his deed and the defendant the purchase money. On the 23rd, *i.e.*, after the election, Mr. McIntyre, who went into possession about the middle of January, again applied for registration and became the registered owner.

Judgment

If it were not for section 74 of the Land Registry Act of 1906, I would have to accede to Mr. *Belyea's* argument that I am bound by the decision of the Full Court to hold that this transaction divested the defendant of any beneficial ownership in this parcel and therefore that he was disqualified at the time of his election, the law *quoad hoc* being in other respects unchanged since this decision.

But I see no escape from Mr. *Elliott's* contention that the effect of section 74 of the Land Registry Act is to make registration of conveyances taking effect after June 30th, 1905, in accordance with the Act a *sine qua non* of the vesting of any interest, legal or equitable, in the grantee, and as Mr. Gleason remained the registered owner at the time of his election he has

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satisfied the new interpretation which must now be put on the qualification requirements.

The new Act now makes it no concern of any stranger to the transaction as to what its real nature may be; for all purposes *quoad* such stranger the registered owner is the only owner, beneficial or otherwise, although no doubt rights capable of enforcement by the Courts may be created *inter partes* by unregistered instruments.

I think the defendant must have judgment with costs.

Judgment for defendant.

FALK v. SWENSON.

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Sale of land—Conveyance—Rectification—Mistake in description—Excessive acreage—Insufficiency of evidence upon which to order rectification—New trial.

Plaintiff purchased from one Peterson one-half of a piece of land, said to contain 82 acres, being a portion of lot 119, group 2, New Westminster District. The description and the conveyance of the land, which were drawn by a real estate broker who was neither a solicitor nor a surveyor, purported to state the metes and bounds, but declared the parcel to contain 41 acres more or less. There was also a mortgage of the parcel given by plaintiff, containing the same description as the deed, and drawn by the same person. The deed was registered without any description. Plaintiff sold to defendant on the basis of there being 41 acres, and the same description was used. Defendant inspected the property both before and after the sale, had no idea that the acreage was any more than stated, and so admitted at the trial. There was up to this time no proper survey of the subdivision, beyond a middle line drawn by a surveyor with a view to dividing the land into halves. Defendant on seeing the location of this line perceived that it excluded him from a piece of cleared land which he alleged was on his half. The surveyor, on this, ran another line, the plan from which shewed that defendant had within his line some 48 instead of 41 acres. Neither the surveyor, the draftsman of the conveyance, nor the parties could say that the

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original parcel contained 82 acres. The learned trial judge came to the conclusion that there was a mutual mistake, and directed the rectification of the conveyance:—

Held, on appeal, that there was a lack of conclusive evidence as to the true area of the original parcel on which to direct the rectification of the deed, and that there should be a new trial.

Statement

APPEAL from the judgment of MARTIN, J., in an action tried before him at New Westminster on the 2nd and 3rd of May, 1907. The facts are shortly stated in the headnote.

The appeal was argued at Vancouver on the 14th and 15th of November, 1907, before HUNTER, C.J., IRVING and MORRISON, JJ.

Argument

Davis, K.C., and *Whealler*, for appellant (defendant): The surveys mentioned in the evidence were made about a year after Falk had bought from Swenson. This action is really brought by Falk for the benefit of Peterson (from whom he purchased in the first instance), and as Falk has conveyed away all the interest he ever had, he has now no status. There being no deceit or fraud alleged, Peterson could not bring the action Unless the parties want to be replaced in their original position, there can be no rescission or rectification. Here there is a conveyance intervening and it is impossible to replace the parties in their original position. Swenson was a *bona fide* purchaser without notice and as against him there can be no rectification. There was a registered title to that piece of land according to a description, and we bought that title.

Joseph Martin, K.C., for respondent (plaintiff): Swenson is a trustee for Falk. He got something he never bought or expected to buy, and he is not entitled to hold it simply because there is a mistake in the conveyance. It is fraudulent to admit that he did not intend to buy this land, yet holds on to it. He bought an indicated piece of land, and the deed is not in accordance with the bargain; when he registered the deed, he thought he was registering a deed to 41 acres.

Cur. adv. vult.

17th January, 1908.

HUNTER, C.J.

HUNTER, C.J.: In this appeal I concur in the view that there should be a new trial.

IRVING, J.: I have read my brother MORRISON'S judgment and agree with him that there should be a new trial on one of the grounds mentioned by him, *viz.*: that as the evidence does not establish what the true area of the whole lot is, it is perfectly impossible to say what property not intended to be included, was in fact included in the conveyance to Swenson. There are several conclusions of fact mentioned by him to which I do not wish to be understood as assenting.

I would like the parties to this action to consider the following before they proceed to a new trial. In an action for rectification, there must be something to rectify the deed by, *per* Lindley, J., in *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C.P.D. 145 at p. 154, and *cf. Murray* v. *Parker* (1854), 19 Beav. 305; *Price* v. *Ley* (1863), 4 Giff. 235; *Bradford* v. *Romney* (1862), 30 Beav. 431.

IRVING, J.

In a case of this kind it is not sufficient for the plaintiff that the defendant is in possession of a greater area than he expected to buy; the Court should be able to see by the proposed rectification that one of the parties is not being deprived of the very thing he contracted for. Above all things in cases of reforming a deed it is essential that the extent of the proposed alteration should be clearly defined and ascertained by evidence contemporaneous with or anterior to the deed.

MORRISON, J.: The suit herein was brought to rectify a deed in which the area intended to be conveyed was, it is alleged, incorrectly described whereby the defendant had conveyed to him some 6 1-10 acres too much.

The parcel in question is known as a portion of lot 119, group 2, New Westminster District, said to contain 82 acres, and was formerly owned by Coulthard, Malins & Graeme, a firm of brokers in New Westminster, who sold it to one Peterson. Peterson in 1900, by a memo drawn by Coulthard & Co. agreed to sell a half of this land to the plaintiff, and in that memo the area of that half is put at 41 acres.

MORRISON, J.

On the 27th of February, 1902, Peterson executes a deed to the plaintiff of this half, the deed being drawn by Coulthard, who states he got the instructions from which he drew the descrip-

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tion therein and the plan attached, from Falk and Peterson. This description thus composed by Coulthard sets out the area to be conveyed in metes and bounds with some particularity, and then triumphantly concludes by declaring that the parcel so conveyed contains 41 acres more or less; whereas, as a matter of fact now it is said to contain 48 acres.

In recalling Coulthard's evidence, where he says he made the description in this deed of the 27th of February from plaintiff's instructions, it is well to remember that on the 4th of February nearly a month previously, Coulthard or some member of his firm, drew a mortgage from Falk to a Mrs. Walker containing this identical description. Both Peterson and Falk are foreigners engaged in fishing, and they had not the advantage of professional advice or service—Coulthard not being either a solicitor or surveyor. They seem to have relied upon Coulthard, who does not deny that he understood the land was to be divided equally into 41 acres a portion. This deed was duly registered without any correction being made in the description. In 1904, the plaintiff and defendant negotiated respecting this land when the area was mentioned as 41 acres, and a price was fixed of $35 per acre for 41 acres. The deed was drawn containing the same description as in Falk's deed, and the money paid by the defendant. The sum of $1,400 appears in the evidence as the amount paid over, but this is explained by the fact that there were taxes and doubtless interest, etc., paid by the defendant for the plaintiff. The preponderance of evidence is that 41 acres was held out to be the area owned by Falk, and that Swenson so understood. It is also quite certain that Swenson visited and inspected the property before and after he got his deed, and must be held to have known pretty exactly what he was buying, and that he had no idea that the area was anything more than 41 acres, and as he said at the trial, he does not know now that it is.

MORRISON, J.

There is no evidence that a survey of the 82 acre lot was made before Swenson bought. Hill, a surveyor whose evidence is most unsatisfactory, ran a middle line, but he only understood there were 82 acres, and that his instructions were to run a middle line, which he did, and then made a plan dividing this alleged

82 acres into equal parts of 41 acres each. Swenson upon seeing where this centre line ran, claimed that as it came in on some clearing which he said was on his half, the line must be wrongly run. Hill then, for the first time, read Swenson's deed, and told him that according to that description, the line was not in the right place, and following Swenson's deed Hill ran another line, and made a plan accordingly, shewing for the first time that Swenson had within his line 48 instead of 41 acres. Swenson then steadfastly held to his description as newly disclosed to him, and hence the action. The learned trial judge gave judgment for the plaintiff, and from that judgment is this appeal.

The difficulty which presents itself at once is the lack of conclusive evidence as to the true area of the original parcel assumed to contain 82 acres. The only witness to whose evidence we can look for assistance on the point is Mr. Hill. But his evidence is so inconclusive that it is of little value. He admits that in some forgotten manner he understood it contained 82 acres. Coulthard who drew the deed and made the plan which appeared in all the instruments, does not know. In short there is nothing to preclude us from assuming that upon a proper survey the parties hereto may not still have an equal division as originally intended, be that 41 acres or 48 acres.

There is no doubt the parties were *ad idem* as to the 41 acres. The defendant agreed to buy 41 acres. He thought he had got 41 acres. There was the exact intention of the plaintiff to sell 41 acres, and the exact intention of the defendant to buy 41 acres. This intention existed mutually at the time the deed was executed.

Now if there was precise and exact evidence which would enable us to decree the form into which the deed ought to be brought in order to set it right according to the real intention of the parties, there would be no difficulty, because the case presents all the other tests required in seeking rectification of a deed.

But on the evidence it must be said with the utmost deference that it is quite impossible to decree exactly and precisely the form to which the deed ought to be brought in this case.

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Much as it is to be regretted, the case should go back for a new trial.

New trial ordered.

Solicitor for appellant: *A. Whealler.*
Solicitors for respondent: *Martin, Weart & McQuarrie.*

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IN RE
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Railway—Expropriation of land—Obstruction of water supply following expropriation—Compensation for loss of water.

Arbitration—Award—Section 209, Railway Act, R.S.B.C. 1897, Cap. 163—Amount in dispute.

Water Clauses Consolidation Act, 1897, R.S.B.C. 1897, Cap. 190—Absence of water record—Spring rising on land and creating water course—Riparian rights.

In an arbitration to determine the amount to be paid to the owner of land expropriated by a railway company, the arbitrators found for the owner as compensation for the land, $2,950, and for loss of water supply from a spring, obstructed in consequence of such expropriation, two of the arbitrators awarded the sum of $1,200. The third arbitrator returned a finding against any compensation for deprivation of the water in the absence of a water record:—

Held, that the owner was entitled.

Where the three arbitrators agreed on the amount of compensation for land taken, and the third returned a separate finding dissenting, on the construction of a statute, from giving compensation for deprivation of a water supply, and an appeal was taken:—

Held, on objection raised to the appeal as being based on an insufficient amount in dispute, under section 209 of the Railway Act (Provincial) that there was only one award given, and the appeal was properly brought.

The owner of land on which there is a spring or stream has rights therein to the exclusion of all other persons not holding records under the Water Clauses Consolidation Act, 1897.

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APPEAL from the award of arbitrators appointed under the provisions of the Railway Act, Cap. 163, R.S.B.C. 1897, at Vancouver on the 17th of June, 1907. The facts are fully set out in the reasons for judgment of IRVING, J.

The appeal was argued at Vancouver on the 27th of November, 1907, before IRVING, MARTIN and CLEMENT, JJ.

Reid, for appellant Company.

Brydone-Jack, for respondent, raised the preliminary objection that the amount in dispute was not sufficient to give the Court jurisdiction to hear the appeal. See section 209, Railway Act, R.S.B.C. 1897, Cap. 163. The amount in dispute on this appeal is only $1,200. The sum awarded for compensation for the land, $2,950, is separate from that awarded for the water, $1,200.

Reid, contra: The award is one award, $2,950 plus $1,200; as to the latter item one arbitrator dissents. We had no other recourse than to come to the Full Court.

Per curiam: We are agreed that it is one award and that the appeal is properly brought.

Reid, on the merits: This is a natural watercourse, as so found by the arbitrators, and the water being subject to appropriation under the Water Clauses Consolidation Act, is therefore not a subject of compensation under the Railway Act. He referred to and cited Brown and Allan on Compensation, 2nd Ed., pp. 130, 139, *Jenny Lind Co.* v. *Bradley-Nicholson Co.* (1883), 1 B.C. (Pt. 2), 185; *Martley* v. *Carson* (1889), 20 S.C.R. 634 at p. 654; *Dudden* v. *Guardians of Clutton Union* (1857), 1 H. & N. 627; *Mostyn* v. *Atherton* (1899), 2 Ch. 360.

Argument

Brydone-Jack, for respondent: It was quite competent for the arbitrators to find that the respondents are farmers depending on the springs in question here, which have been taken by the Railway Company. This is not a water right within the Provincial control; the land is situated within the Dominion railway belt: see *Canham* v. *Fisk* (1831), 2 C. & J. 126. This water was conveyed with the land to the Dominion. The term "spring" is unknown in the Water Clauses Act, and at the point where this water rises it is part of the land: see *Taylor* v.

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Corporation of St. Helens (1877), 6 Ch. D. 264 at p. 273; *McNab* v. *Robertson* (1897), A.C. 129 at p. 134. The real benefits to the owners of the land would be lost by a finding depriving them of the ownership of the water.

Reid, in reply: The Dominion Government here is in the same position as a private individual. If there are riparian rights, the case should be sent back to the arbitrators.

Cur. adv. vult.

17th January, 1908.

IRVING, J.: This is an appeal under section 209 of the Railway Act against the decision of arbitrators, who by their award, dated 17th June, 1907, found that the amount of compensation to be paid to the respondent for the right of way was $2,950 and the sum of $1,200 in respect of the water supplied on the said premises. The three arbitrators were appointed "to determine the amount of compensation payable in connection with all the estate and interest of the respondents in the lands and hereditaments therein referred to." All three were able to agree that the land should be allowed at $2,950, but they differed as to the compensation payable by reason of the obstruction of the spring of water situate on the said land. Two of them thought that $1,200 should be allowed in respect of the loss of the water; the third, however, came to the conclusion that the respondent was entitled to nothing as the right to the said water was vested in the Provincial Government, the respondent having obtained no water record. The spring in question is situate on the plaintiffs' land, and until it reaches the dignity of a stream is as much part and parcel of the land as the sod or the trees that grow thereon. It is part of the inheritance and passes with it. After it makes for itself a course and becomes a stream it comes within the provisions of the Water Clauses Consolidation Act, but even then if application were being made by any person under that Act, the respondent's rights, in my opinion, ought to be considered under sections 13 and 14. The judgment of the Privy Council in *The Esquimalt Water Works Co.* v. *The City of Victoria* (1907), A.C. 499 at p. 505, contains an expression from which it is to be inferred that application to the Commissioner for a record is only necessary when the person is desirous of using water in excess

IRVING, J.

of ordinary riparian rights. In my opinion the plaintiff has rights in the spring, and she has not lost them by failing to obtain a record under the Water Clauses Consolidation Act.

I would dismiss the appeal.

MARTIN, J.: This is an appeal from one portion only of the award of the arbitrators, *viz.*: that relating to the spring in question, in regard to which two of the three arbitrators find as follows:

"And we, R. D. Rorison and A. E. Beck do find and award in respect to the water supply, and the only water supply, on above property that such supply is afforded by a natural spring of running water arising thereon of excellent quality and never-failing flow and of more than sufficient capacity for the full requirements of all reasonable uses that such supply affords to a farm of the dimensions owned by Hannah Mary Milsted and of which the said owner shall be deprived by reason of the construction of the railway by the above company the sum of $1,200.

"And we further find that no water record has been granted thereon."

The third arbitrator dissents from said finding, for the following reasons:

"And I Frederic Howay for myself do find and award in respect of the said water supply that no water record having been granted to the owner in respect of the said spring and the running stream therefrom the owner is entitled to no compensation therefor as the right to the said water is vested in the Provincial Government."

It is, at the outset, to be observed that the above are the only facts before us and our decision must be founded thereon, and they must be taken by us to be as stated, *i.e.*, found by the majority of the arbitrators; nor can we speculate upon unknown conditions or wander from the record.

According, then, to the admitted facts, the respondent was fortunate enough to have on that part of her property taken for railway purposes by the appellant a natural spring which was the only source of a necessary and reasonable supply of water, and was of "excellent quality and never-failing flow and of more than sufficient capacity for the full requirements of all reasonable uses" for her farm.

This water supply is clearly considered by the arbitrators in its character of a "natural spring," and though the fact is recited that it is of more than sufficient capacity for such needs, yet there is nothing to lead us to suppose that they dealt with or

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valued it from any other point of view, such as, for example, that of a stream as distinguished from a spring within the meaning of well-known cases which are conveniently cited in Coulson on Waters (1902), pp. 58 *et seq.* Nor is there anything before us that would justify our reviewing the amount of their award. Obviously such a spring would be of considerable value.

Such being the facts, the sole remaining question necessary to be determined is, whether or no such a natural spring is within the scope of the Water Clauses Consolidation Act?

Sections 4 and 5 of that Act provide that:

"4. The right to the use of the unrecorded water at any time in any river, lake or stream, is hereby declared to be vested in the Crown in the right of the Province, and, save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water from any river, watercourse, lake or stream, excepting under the provisions of this Act, or of some other Act already or hereafter to be passed, or except in the exercise of the general right of all persons to use water for domestic and stock supply from any river, lake, or stream vested in the Crown, and to which there is access by a public road or reserve.

"5. No right to the permanent diversion or to the exclusive use of the water in any river, lake, or stream shall be acquired by any riparian owner, or by any other person, by length of use or otherwise than as the same may be acquired or conferred under the provisions of this Act, or of some existing or future Act."

The corresponding section in the Federal Irrigation Act, R.S.C. (1906), Cap. 61, is:

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"6. The property in and the right to the use of all the water at any time in any river, stream, watercourse, lake, creek, ravine, canon, lagoon, swamp, marsh, or other body of water shall, for the purposes of this Act, be deemed to be vested in the Crown, unless and until and except only so far as some right therein, or to the use thereof, inconsistent with the right of the Crown, and which is not a public right or a right common to the public, is established.

"2. No person shall divert or use any water from any river, stream, watercourse, lake, creek, ravine, canon, lagoon, swamp, marsh or other body of water, otherwise than under the provisions of this Act, except in the exercise of a legal right existing at the time of such diversion or use."

Though it may be contended that the language in the latter section is more far-reaching than the former, yet it is clear that all bodies of water are not included therein, *e.g.*, an ordinary well. And, to my mind, it is equally clear that a spring, properly so-called and distinguished from the stream which may or

may not flow therefrom (that depending upon the volume of water and the character of the surrounding soil and country) is something which is unaffected by the Act.

Such being the conclusion I have reached, it is unnecessary to consider the question of the application of the Water Clauses Consolidation Act to the rights of the Federal Government within the railway belt in this Province. And it is likewise unnecessary to seek to place an interpretation upon or to inquire into the real meaning of the introductory expression used by their Lordships of the Privy Council in the case of *The Esquimalt Water Works Company* v. *The City of Victoria* (1907), A.C. 499, (1906), 12 B.C. 302, 2 M.M.C. 480, *viz.*: "Under this Act, persons desirous of using water in excess of ordinary riparian rights, may by a procedure which it is unnecessary to detail, obtain . . . . a 'record' . . . . of the water which he seeks to appropriate." I shall content myself by saying that on this language, having regard to the other sections of the Act, various plausible contentions are manifestly open to argument, quite apart from the question of *obiter dictum*, and the application of the rule laid down in *Quinn* v. *Leathem* (1901), A.C. 495.

CLEMENT, J.: In the opinion of the Privy Council as evidenced by the *dictum* in *The Esquimalt Water Works Company* v. *The City of Victoria* (1907), A.C. 499, riparian rights exist in this Province, subject of course to be diminished or even totally wiped out by a water record granted under the Water Clauses Act: see *Klondyke Government Concession* v. *McDonald* (1906), 38 S.C.R. 79. In this case no such water record exists. The rights which the owner could, by virtue of her ownership and without any record, exercise in respect of the spring and stream upon her land to the exclusion of all others not holding water records, have been rendered valueless by the construction of the railway, and she is, I think, entitled to compensation. The arbitrators found that there was no water record at all in existence, and were therefore under no misapprehension as to the subject-matter dealt with by the award, *viz.*: the owner's riparian rights merely.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant Company: *Bowser, Reid & Wallbridge.*
Solicitors for respondent: *Bird & Brydone-Jack.*

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IN RE NAKANE AND OKAZAKE

IN RE NAKANE AND OKAZAKE.

Constitutional law—Dominion and Provincial legislation, conflict between—British Columbia Immigration Act, 1908—An Act respecting a certain Treaty between Canada and Japan, Dom. Stat. Cap. 50, 1907.

The provisions of the Immigration Act, 1908, are inoperative insofar as the subjects of the Japanese Empire are concerned.

APPEAL from the decision of HUNTER, C.J., on an application for a writ of *habeas corpus* in respect of two Japanese detained pursuant to the provisions of the Immigration Act, 1908.

Macdonell, in support of the motion.

Cassidy, K.C., for the Attorney-General of British Columbia, *contra*.

HUNTER, C.J.: Inasmuch as this matter is a very urgent one and having regard to all the public interests concerned, and inasmuch as I have come to a clear conclusion upon the only matter which it is necessary for me to decide upon the present application, I think I will be acting to the advantage of all concerned if I proceed to give judgment at once.

HUNTER, C.J.

It is, as I understand it, admitted at the outset that the applicants here are subjects of the Emperor of Japan, and they come to Court questioning the validity of their detention under the Act, which has been recently passed by the British Columbia Legislature, which for the sake of brevity I shall refer to as the Natal Act.

Now, so far as I can see, it is not necessary on the present occasion to consider how far this so-called Natal Act is repugnant to the provisions of the Canadian Immigration Act.

I have only to consider on the present occasion, it seems to me, how far the provisions of this Act interfere with or nullify the Act known as the Japanese Treaty Act, which was passed in 1907 by the Parliament of Canada. Now that Act recites the Treaty which exists between the Imperial Government and

the Japanese Government, and proceeds to enact that the provisions of that Treaty are sanctioned—that being the expression that is used in the Act—

[*Cassidy, K.C.* (interrupting): The Convention is sanctioned—not the "provisions," but just the Convention.]

Well, I do not understand that there is any substantial distinction. That is not my view. The learned counsel for the Province raises the point that this is mere "schedule," and that as the Canadian Parliament saw fit to enact only that, they approved of the Convention that was contained in this schedule.

To my mind, the fact that the provisions are contained in the schedule neither adds to nor subtracts from the efficacy of the law. It has been laid down time and again by eminent jurists, for instance by Lord Justice Brett, in *Attorney-General* v. *Lamplough* (1878), 3 Ex. D. 214, that it is immaterial whether an enactment is contained in the schedule, or in the body of the Act, but although in the schedule, they are as much a part of the Act as if contained in the body of the Act. Now, I think it must be plain that when the Dominion Parliament sanctioned this Treaty between the Imperial Government and the Emperor of Japan, they intended to make the provisions of that Treaty a part of the law of Canada.

And then the only question is, have they that power? I have no doubt under the combined operation of section 132 and section 96 of the British North America Act that the Dominion Parliament did have that power. Section 95 provides that the Parliament of Canada has power from time to time to make laws in relation to agriculture in all or any of the Provinces, and in relation to immigration in all or any of the Provinces, and any law of the Legislature of the Province relative to agriculture or immigration shall have effect in and for the Province so long and so far only that it is not repugnant to any Act of the Parliament of Canada; and the other section empowers the Parliament of Canada to make any law necessary or proper to secure the performance of Canada's obligations as a part of the Empire; in other words, to confirm by positive law that which otherwise would rest on convention or agreement only.

That being so, the question at once comes up as to whether

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the provisions of the Natal Act in any way nullify, or are contradictory to the provisions of the Act of the Parliament of Canada, which is known as the Japanese Treaty Act.

The provisions of the Natal Act lay down certain conditions upon which any person seeking to enter the Province may enter, which conditions must be complied with before admission is granted. Among those conditions is the requirement by which a person shall, if requested to do so by the Immigration Officer, write out in English, or any language of Europe, an application to the Provincial Secretary to the effect set out in a certain schedule.

When we come to compare the provisions of the Japanese Treaty Act with those of the Natal Act, we find it is agreed that the subjects of either of the contracting parties shall have full liberty to enter, travel or reside in any of the dominions or possessions of the other contracting party, and shall enjoy full protection for person and property, etc.

It will be observed that the language is "the subjects," not such subjects as may be permitted by any Province, that is to say, all the subjects, except of course such subjects as are excluded by the authority of the Parliament which is granting the right; and we find that in the Canadian Immigration Act the Dominion Parliament has specified certain classes of people who shall be debarred from entering into the country, and there is no limitation or mention made as to their nationality, or source of origin, but anyone coming within any of these special classes is debarred, whether of Japanese or Chinese or any other nationality. And as the Canadian Immigration Act must be read together with the Japanese Treaty Act, the joint effect of those two Acts is that the subjects of the Emperor of Japan, other than those coming within those specified classes, shall have the full right and liberty to enter, travel or reside in any part of this Dominion.

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Therefore as the power of the Province to pass immigration laws is conditioned upon such laws not being repugnant to those passed by the Parliament of Canada, it follows that to the extent to which the Natal Act is inconsistent with the Canadian legis-

lation to that extent it is inoperative, and therefore the applicants are entitled to their discharge.

Cassidy: With regard to the discharge of the accused, I suppose they could be discharged, or if your Lordship will say that they should be discharged on their own recognizance to come up in the event of a judgment being reversed.

No, I have no power to make any order except an unconditional order. You have the right to appeal to the Full Court, and they can make an order for their seizure and remand into custody in the event of their coming to the opposite conclusion. I find that there is absolutely no warrant for their detention. They are peaceable and law-abiding subjects of the Japanese Empire, and as far as I can see they have a good right of action against someone, but of course that is not before me now.

HUNTER, C.J.

Macdonell: Then the order will go for costs?

Cassidy: I don't see why.

HUNTER, C. J.: Why should these people be deprived of their costs? They have been illegally detained. Are they not as much entitled to it as you would be if you had been seized? The applicants will be discharged with costs.

The appeal was argued at Victoria on the 24th of February, 1908, before IRVING, MORRISON and CLEMENT, JJ.

Cassidy, K.C., for the Attorney-General.

Macdonell, and *Elmer Jones*, for the respondents, were not called on.

25th February, 1908.

IRVING, J.: This is an appeal from the Chief Justice who on a writ of *habeas corpus* released two Japanese who were detained under a warrant of commitment given under the provisions of the British Columbia Immigration Act, 1908.

IRVING, J.

The Chief Justice came to the conclusion that the Immigration Act, 1908, was not applicable to the subjects of the Emperor of Japan.

The British Columbia Immigration Act, 1908, is founded on powers conferred by section 95 of the British North America Act upon the Provincial Government. By that section it is declared as follows:

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"95. In each Province the Legislature may make laws in relation to agriculture in the Province, and to immigration into the Province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any of the Provinces, and to immigration into all or any of the Provinces; and any law of the Legislature of a Province relative to agriculture or to immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

It is to be observed that under section 95 the legislation of the Province shall have effect in a Province "so long and as far only as it is not repugnant to any Act of the Parliament of Canada."

By a statute, assented to on the 30th of January, 1907, entitled An Act respecting a certain Treaty between Canada and Japan, it is recited that a Convention was signed between the United Kingdom and Japan concerning commercial relations between Canada and Japan, and subsequently ratifications of the said Convention were exchanged. It then declared that the Convention, which is set forth in the schedule to the Act, was "thereby sanctioned."

By Article 1 of the Treaty referred to in the convention, it is provided that:

"The subjects of each of the two high contracting parties shall have full liberty to enter, travel or reside in any part of the dominions and possessions of the other contracting party."

On behalf of the Province it is said that this Act, to which I have referred, is not an Act or a statute at all, and that the Dominion Government, even if it had power to sanction or give effect to this Treaty, have not done so. With regard to their power to give effect to the Treaty, the answer is to be found in the 132nd section of the British North America Act, as follows:

IRVING, J.

"132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries."

Then the question remains, has the Imperial Government in the Act given effect to the Treaty? The language is, "The Convention, etc., set forth in the schedule is hereby sanctioned." That seems to be a very apt and proper way of giving effect in Canada to all the terms of the Treaty. Without an Act giving effect to the Treaty there would be no binding law governing the officials of this country. The word "sanction" signifies to

ratify a decree or ordinance—in an extended sense to make anything binding. In itself, it conveys the idea of authority by the person sanctioning. It is the lending of a name, an authority or an influence in order to strengthen and confirm a thing. It may not be out of place to give the following quotation where it is used by Addison:

"Men of the greatest sense are always diffident of their private judgment until it receives a sanction from the public."

That Act, I think, is a complete answer to the present appeal. It is not possible that there can be two legislative bodies having equal jurisdiction in this matter, and where the Dominion Parliament has entered the field of legislation, they occupy it to the exclusion of Provincial legislation.

I would dismiss the appeal.

MORRISON, J.: The only point seriously argued before us is whether 6 & 7 Edw. VII., Cap. 50, intituled An Act Respecting a Certain Treaty Between Canada and Japan, which purports to sanction the convention between the United Kingdom and Japan respecting commercial relations between Canada and Japan, has given its provisions the force and effect of a law of Canada.

Mr. *Cassidy* seems to me to have taken much higher ground than the nature and circumstances of this case justify. If the Convention in question were a high Treaty dealing with the more grave and important political and diplomatic questions which sometimes concern nations, his forceful and ingenious argument would be quite appropriate.

The Anglo-Japanese Convention, however, is a Convention Treaty dealing with a subordinate question wherein the high contracting parties are bound to observe the stipulations contained in the Treaty, and as those stipulations are respecting Canada's commercial relations with Japan, the obligation is imposed upon Canada to take legislative action, which obligation was discharged by the enactment above referred to, without which sanction the Courts of this country could not enforce the provisions of the Treaty.

The provisions of the Treaty affect the whole of Canada as

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well as the whole of Japan, and both parties thereto contemplated uniformity in their enforcement.

Therefore, the provisions of this Treaty, thus sanctioned by Canada, being in harmony with the existing Federal enactments respecting immigration, must be taken as a law of Canada touching immigration. That being so, is the British Columbia enactment, known as the British Columbia Immigration Act, 1908, repugnant to it? In my opinion, it is in every sense of the term. Although the subject of immigration in some respects and for some purposes falls within the jurisdiction of the Provincial Legislature, yet where there is already an enactment on the subject by the Federal Parliament, it must be shewn that the Provincial legislation is in furtherance or aid of the Federal legislation. And in doing so, regard must be had to the character, nature, and scope of the Federal enactment.

The exercise of the power given the Federal Parliament by sections 132 and 95 of the British North America Act completely destroys any effect the Provincial Act was intended to have as far as the subjects of Japan are concerned.

I entirely agree with the learned Chief Justice upon this point, the only one adjudicated upon by him, and upon which the appeal arises.

CLEMENT, J.: I agree entirely with the learned Chief Justice and my brothers IRVING and MORRISON on the one real point of these appeals. To my mind the case for the appellant Attorney-General is hopeless; so hopeless that I feel constrained to express my regret that it should ever have been thought proper to attempt to enforce the British Columbia Immigration Act, 1908, as against these respondents.

CLEMENT, J.

We live under a Federal system of government. With regard to certain matters the Canadian people speak as a unit, while as to other matters we speak separately, and, if we choose, diversely by Provinces. The system was brought to birth only after long travail. The minds of our best men were long occupied in fixing upon the proper line of diversion between matters of general or Canadian concern and matters of more immediately local or provincial concern, and the result of their labours as embodied

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in the British North America Act should be loyally recognized and respected. No doubt honest differences of opinion may exist in many cases as to where the line is drawn by that Act, or as to the question on which side of the line a particular matter should properly fall. But to suggest doubt where no real doubt exists, and particularly as to matters apt to inflame, is not, in my judgment, to be commended. Such a matter we have here. This matter of Japanese immigration has been dealt with properly, that is to say constitutionally, by the Parliament of Canada; and I must say that, to my mind, it smacks strongly of disloyalty to our settled form of government when the authorities of one Province undertake to override and render abortive the will of the people of Canada—*et quorum pars magna nos*—constitutionally expressed in an Act of the Parliament of Canada; and when they even make bold to forbid the honourable observance of our solemn engagements with a foreign power.

CLEMENT, J.

I should perhaps add that I express no opinion as to the effect, each upon the other, of the Japanese Treaty Act and the Dominion Immigration Act.

I would dismiss the appeal with costs.

Appeal dismissed.

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SCOTT v. MILNE

SCOTT v. MILNE.

Sale of land, agreement for—Time of the essence—Rescission—Laches.

In an agreement for the purchase of land, with possession, purchaser covenanted, *inter alia*, giving vendor power to enter and determine tenancy on default, and that notice of default addressed to purchaser at Vancouver, B.C., should be sufficient. Purchaser having become in default, and his address changeable, vendor wrote to a firm of brokers who were in communication with him, after two demands for payment of moneys in arrear, desiring them to instruct purchaser of the cancellation of the agreement:—

Held, affirming the judgment of CLEMENT, J., at the trial, that the time allowed purchaser was not a waiver of the right of rescission under the agreement.

Statement

APPEAL from the judgment of CLEMENT, J., in an action tried before him at Vancouver on the 13th of December, 1907. The action was for specific performance of a contract for the sale of land, entered into by the plaintiff. At the trial, the learned judge came to the conclusion that the plaintiff was not entitled, time being, by express stipulation, of the essence of the contract. The learned judge also stated, in part, that "the purchaser made default in payment of the instalment due in November, 1906, and that default having continued for more than 30 days thereafter, the vendor exercised the option allowed her, and on February 4th, 1907, gave notice that the contract was at an end. In the interval she did nothing which, in my opinion, raised any equity in the purchaser's favour. As said by the learned Chief Justice in *Peirson* v. *Canada Permanent* (1905), 11 B.C. 139 at p. 141:

"'The contention of the plaintiff virtually amounts to this, that he was given . . . . days' grace to pay the money.'"

"To treat what took place here as a waiver of the vendor's right to rescind would be to penalize forbearance. The action will be dismissed with costs."

The appeal was argued at Victoria on the 10th of January, 1908, before HUNTER, C.J., IRVING and MORRISON, JJ.

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L. G. McPhillips, K.C., for appellant (plaintiff): On the face of the document sued on here, time is not of the essence, although it is so stated; and even if defendant had the right to cancel, she has not done so, as the letter to Dow, Fraser & Co. is written to them as her agents. The evidence is that the parties intended to go on, and there are not present the essentials referred to in *McCord* v. *Harper* (1876), 26 U.C.C.P. 96 at p. 104. The letter from defendant dated the 28th of December, 1907, asking that the amount overdue be forwarded at once, is a waiver. He referred to *Czuack* v. *Parker* (1904), 15 Man. L.R. 456 at p. 467; *Smith* v. *Wallace* (1895), 1 Ch. 385 at p. 390. Promptness in exercising the power of cancellation is essential: *Monro* v. *Taylor* (1848), 8 Hare, 51 at p. 62; *Hudson's Bay Company* v. *Macdonald* (1887), 4 Man. L.R. 480 at p. 482; *Peirson* v. *Canada Permanent* (1905), 11 B.C. 139; *Harris* v. *Robinson* (1892), 21 S.C.R. 390; *Webb* v. *Hughes* (1870), L.R. 10 Eq. 281. Defendant holding under an agreement for sale herself, and not being in a position to give title, could not demand payment.

Argument

[HUNTER, C.J.: Your previous payments would be a waiver of that objection].

Bird, for respondent (defendant).

Cur. adv. vult.

25th February, 1908.

HUNTER, C.J.

HUNTER, C.J.: Action for specific performance of an agreement for sale of land by the purchaser against the vendor. The price was $650, $100 down, and the balance in $50 instalments payable at the office of Dow, Fraser & Co., Vancouver, quarterly on May 10th, 1906, and thereafter until paid, with interest at seven per cent.; arrears of overdue principal and interest to bear said rate of interest after, as well as before maturity. Other provisions were: examination of title to be at the purchaser's expense; certificate of title to be conclusive evidence of title; purchaser to have possession until default; purchaser attorns and becomes tenant at will at a rent equivalent to the amount of the instalments of purchase money and interest on the due dates until final payment; power to enter and determine tenancy on default; covenant by purchaser to give up possession peaceably on default; covenant by purchaser to pay up arrears on demand;

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covenant by vendor not to determine tenancy so long as payments are punctual. The concluding clauses are as follows:

"It is further agreed that any notice which may be given by the vendor to the purchaser under or in respect to these presents may be given by handing same to the purchaser or by posting the same by pre-paid post registered letter addressed to Mr. Israel Scott, Vancouver, B.C., and such notice shall be deemed to have been given on the day on which it is posted.

"And it is expressly agreed by and between the parties hereto that this agreement shall not be registered or recorded as a charge or otherwise against the said premises."

The payments were made up to and including that due on August 10th, 1906. The next (November) payment fell into arrear, and on December 28th, Mrs. Milne, by her husband, requested payment of the amount in a letter addressed to the plaintiff Israel Scott at Vancouver. No answer was received from Scott, who at this time was almost ubiquitous, having shifted from Elgin to Brandon and then to Winnipeg. On February 2nd, Mrs. Milne, who had moved to Victoria, telegraphed Dow, Fraser & Co., who had prepared the agreement, and who were acting at this time as agents for Scott, asking for a cheque if the money had been paid; and the money not coming to hand, Mrs. Milne notified Dow, Fraser & Co. by letter dated February 4th, to instruct Scott that the agreement was cancelled. On February 21st, the Grand View Land & Trust Co., the *alter ego* of Dow, Fraser & Co., by Dow, wrote Mrs. Milne, saying that they had a power of attorney from Scott, and tendering her their cheque for $115.20, being the amount of two overdue instalments and interest, which was promptly refused and returned by Mrs. Milne on the ground that the agreement was at an end. I gather from a letter of February 26th from Dow to Scott that the latter had been duly apprised of the state of his affairs from time to time, and the former expresses regret that his letters had not been answered sooner as a great deal of trouble would have been saved.

HUNTER, C.J.

I think the learned judge was right in concluding that there is nothing in the case to shew any equity to relief.

From the admissions of Dow it appears that Scott knew that Mrs. Milne held the property under an agreement for sale on

which her payments were periodically due about 10 days previous to Scott's payments to her, and this circumstance alone is sufficient to shew that the essence clause was no empty form, but in accordance with the express intention of the parties, and also shews the reason for its insertion. Mr. *McPhillips* argued that time should not be considered of the essence because of the provision for interest on arrears; but in the cases he cited there was no specific stipulation making time of the essence, and I adhere to what I said on this point in *Peirson* v. *Canada Permanent* (1905), 11 B.C. 139 at p. 140. The case resolves itself, then, into the simple one of neglect to make provision for the payments with the result that the vendor exercised her undoubted right to rescind after pressing for payment and waiting for nearly two months after her right to rescind arose, but without result.

Mr. *McPhillips* laid great stress on the presence of the attornment clause and argued that as this created the relation of landlord and tenant he had the right to call on the Court for relief against forfeiture as for the non-payment of rent. No doubt the power of the Court to relieve for non-payment of rent is very extensive, and in many cases is *ex debito justitiæ* as shewn in *Newbolt* v. *Bingham* (1895), 72 L.T.N.S. 852; but in my view that clause merely provides an ancillary private remedy and is quite consistent with the express right of rescission provided by the agreement in case of default in payment. We must look at the circumstances surrounding the making of the agreement which is on a common printed form, and it is plain that the rescission clause must have attracted the particular attention of the parties as the number of days default, in this case 30, had to be agreed upon and filled into the printed form.

HUNTER, C.J.

Mr. *McPhillips* also argued that as the notice clause provides that any notice may be given by handing the same to the purchaser or by posting a letter addressed to Israel Scott, Vancouver, and that unless one of such modes was adopted then any notice to Scott was ineffectual. This is clearly untenable; the object of the clause is to protect the vendor and not to hamper him; it is enough if the purchaser has authentic information by any channel that the vendor has cancelled the agreement, and there can be no reasonable doubt that Scott knew through his

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agent that the vendor was pressing for payment, and so far as I can see nothing occurred before the refusal to accept the cheque to raise any equity in his favour.

I would dismiss the appeal.

IRVING, J., concurred.

MORRISON, J.: The defendant, Mrs. Milne, in her agreement with the plaintiff stipulated by apt and express words that time should be of the essence of the contract. From the evidence before us, I am of opinion that it was essential to Mrs. Milne that the instalments should be promptly paid, for she had arranged the dates of payment to synchronize with dates of payments which were accruing due from her to another party, to meet which she relied upon the instalments from the plaintiff. That being so, I think the term as to time being of the essence of the bargain went to the root of the contract.

But it is contended that there was an extension or waiver of this stipulated time. How can the plaintiff take advantage of his own delay in making the payment in question? He made no request for an extension. The defendant Mrs. Milne did nothing to justify him in assuming he was to get any extension. He left the jurisdiction without making any provision for the payment upon the due date. All Mrs. Milne did was to exhibit solicitude for the payment, and when satisfied it was not forthcoming, proceeded to enforce her rights which arose automatically under the agreement upon plaintiff's default. This delay was entirely for the convenience and benefit of the plaintiff. The property was acquired for speculative purposes. This was in mind of both parties when the contract was made. Notice of the rescission was given in the most effective manner available at the time, *viz.:* to Messrs. Dow, Fraser & Co., who were in communication with the plaintiff. There does not appear to be anything that happened to create an equity in plaintiff's favour. The defendant did nothing to lead the plaintiff into the belief that her rights would not be strictly enforced. Further, there is no evidence to shew it would be inequitable to enforce them: *Morton and Symonds* v. *Nichols* (1906), 12 B.C. 485 at p. 488, and cases there cited.

MORRISON, J.

To hold that this essential term of the contract was varied it must be shewn that it was so varied by both parties as explicitly as it was made. It seems to me that if effect is given to the contention of plaintiff's counsel we would be making a new contract between the parties.

Upon comparing the cases cited by plaintiff's counsel with the present case, it will be seen that the nature of the subject-matter of the contracts there was essentially different. Some of them are collected in *Mersey Steel and Iron Co.* v. *Naylor, Benson & Co.* (1884), 9 App. Cas. 434.

Lord Blackburn in that case says:

"The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and substantial consideration for my performance is defeated by your misconduct.'"

I think the judgment of the learned trial judge is right, particularly so since no peculiar, or in fact any hardship follows, inasmuch as the plaintiff gets thereby a return of his deposits already made.

Appeal dismissed.

FULL COURT

1908

April 10.

REX v. SMITH.

Criminal law—Evidence—Proof of blood relationship on charge of incest.

REX v. SMITH

On a trial for incest, the only evidence against the accused was that of the child, a girl of 11 years, and of a woman who had known accused and the girl living together as father and daughter for some seven or eight months. This evidence was not rebutted:—

Held, on appeal, affirming the decision of WILSON, Co. J., that this was not sufficient proof of relationship to justify a conviction.

APPEAL, on a case stated, from the holding of WILSON, Co. J., in a trial before him in the County Court Judge's Criminal Court at Revelstoke on the 25th of February, 1908. The portion of the case stated material to this report was as follows:

Statement

"The only evidence given as to the relationship of parent and child was that of the girl herself who stated that the man in the prisoner's dock (the accused) was her father, and also the fact that for seven or eight months the accused and the child lived together apparently as father and daughter. I held that that was not sufficient proof of relationship and on that ground the prisoner should be acquitted."

The appeal was argued at Vancouver on the 10th of April, 1908, before HUNTER, C.J., IRVING and MORRISON, JJ.

Argument

Maclean, K.C. (D.A.-G.), for the Crown: The girl swears the accused is her father, and another witness swears that the two lived together as father and daughter. That evidence, not being rebutted, amounts to a legal certainty until displaced.

Macdonell, contra.

HUNTER, C.J.

HUNTER, C.J.: I think the learned County Court judge was perfectly right in holding that the relationship should be fully proved. The only evidence to be considered here is that of the child herself, which is not conclusive.

IRVING, J.

IRVING, J.: I have a different opinion. In my view it was competent for the learned judge to convict on the evidence before him. In criminal cases it is only necessary that the evidence should be sufficient beyond reasonable doubt.

MORRISON, J.

MORRISON, J., concurred with HUNTER, C.J.

Appeal dismissed, Irving, J., dissenting.

ARMSTRONG v. ST. EUGENE MINING COMPANY.

FULL COURT
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ARMSTRONG
v.
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MINING CO.

Workmen's Compensation Act, 1902, Cap. 74—Arbitration—Case stated by arbitrator—Referred back by Full Court—Further case stated to single judge—Jurisdiction of judge to entertain and refer back to arbitrator—Opinion stated by judge in referring back.

On a case stated in an arbitration under the Workmen's Compensation Act, 1902, the Full Court referred the question back to the arbitrator to make definite findings of fact and have the questions of law clearly formulated. Upon the reference back, the case was re-stated to a single judge, and the learned judge to whom the questions were submitted found that they were questions of fact, and referred the matter back to the arbitrator to "proceed with the arbitration":—

Held, on appeal, that there was jurisdiction for such an order; that the arbitrator had not finished his work, and that he is not *functus officio* until the award is made.

APPEAL from the decision of CLEMENT, J., on a case stated submitted to him by WILSON, Co. J., acting as arbitrator under the Workmen's Compensation Act, 1902, argued at Cranbrook on the 18th of March, 1907. The question had been already before the Full Court, and was sent back to the arbitrator to make definite findings of fact, and have the questions of law clearly formulated. On the hearing consequent on this order, objection was raised and a case was stated by the learned arbitrator, which came before CLEMENT, J. The case stated and the questions submitted were, in part, as follows:

Statement

"That in case a jam occurred in the ore-chute, at or near which he (deceased) was working, to break the same, and if a jam did occur as suggested in paragraph 6, it was his duty to break it; that the proper method to break the jam was to stand on a bulkhead outside of the main ore-chute, and loosen the jam with a crow-bar, pick or shovel; that on the date of the death of the said Frank W. Smith the bulkhead was protected by a partition or railing about three feet in height, and if deceased had remained on the bulkhead, no accident could possibly have happened; that there is no evidence whatsoever as to how the deceased came to his death, but while there are other ways, the accident might have happened, in my opinion the probability is that the deceased, finding a jam in the chute, at the junction of the wing-chute and the main ore-chute, climbed over the parti-

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tion or railing into the chute, and that while he was in such position the ore jam loosened, and carried the deceased to the bottom of the chute, burying him in the rock and muck, whereby he was killed. No tools, such as shovel, pick or crow-bar, were found in the chute.

"The questions I direct to be submitted are:

"(1.) Was the death of the said Frank W. Smith caused by accident arising out of and in the course of his employment?

"(2.) Was the deceased, Frank W. Smith, guilty of serious and wilful misconduct or serious neglect?"

On this case, CLEMENT, J., gave the following written reasons, and referred the matter back to the learned arbitrator to "proceed with the arbitration":

In my opinion, the questions submitted are not questions of law, but questions of fact, to be determined by the learned arbitrator himself upon consideration of all the surrounding circumstances. Upon each question it is true there is no direct testimony, but this does not preclude the arbitrator from drawing reasonable inferences of fact from the actual facts in evidence. In the somewhat similar state of facts disclosed in the recent case of *Johnson* v. *Marshall, Sons & Co.* (1906), 75 L.J., K.B. 868, the County Court judge evidently drew the inference of fact which the applicant desires should be drawn here, namely, that the accident arose out of and in the course of the deceased's employment, and no appeal upon that point was taken. The evidence is before me in the evidently compressed shape of the arbitrator's notes, and although perhaps reference should not be had to them upon what is practically a stated case, I have perused them with some care, and I do not hesitate to say that I should have no difficulty in finding as a legitimate inference of fact—that the accident in this case arose out of and in the course of the deceased's employment, and negatively that it was not attributable solely to the serious and wilful misconduct or serious neglect of the deceased workman.

Statement

In answering the first question, the carelessness, negligence, or even misconduct of the deceased is entirely beside the mark. Was he about his master's business, or was he for purposes of his own doing something outside of his work when the accident happened? That is the question, and as I have intimated, it is here a question of fact.

As to the second question, it is to be borne in mind that the

onus is on the respondents to satisfy the arbitrator affirmatively that the deceased was guilty of serious and wilful misconduct or serious neglect, to which alone the accident was attributable.

Of course any expression of my opinion on the facts is "legal impertinence" and is in no way binding on the learned arbitrator. He is the sole judge of the facts, and being of opinion that the questions he has submitted are questions of fact which he alone is competent to decide, I refer the matter back to him in order that he may proceed with the arbitration. Cost of the submission to abide the result of the arbitration.

Statement

The respondent Company appealed from this order to the Full Court on the grounds (1.) that there was no jurisdiction for the order, (2.) that the learned judge should not have remitted the case with a statement of his opinion, (3.) that he should not have directed what were questions of fact for the arbitrator to decide.

The appeal was argued at Vancouver on the 14th of November, 1907, before HUNTER, C.J., IRVING and MORRISON, JJ.

Argument

Sir C. H. Tupper, K. C., for the appellant Company: We say the direction is wrong, as, under it, the arbitrator is not bound to do one particular thing, *viz.:* formulate questions of law clearly and make distinct findings of fact, as he was directed to do by the order of the Full Court; on the contrary, he may proceed with the arbitration, take new evidence and give a final finding. We also submit that the learned judge should not, in remitting the case, have stated his opinion, and we feel that he has misapprehended the effect of *Johnson* v. *Marshall, Sons & Co.* (1906), 75 L.J., K.B. 868. We ask that the matter be sent back to the arbitrator to restate the case.

L. G. McPhillips, K.C., contra.

Cur. adv. vult.

On the 22nd of January, 1908, the judgment of the Court was delivered by

Judgment

MORRISON, J.: The Full Court ordered that "the special case be referred back to the arbitrator that he may make definite findings of fact, and to have the questions of law clearly formu-

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lated." Upon a reference back, the arbitrator restated the case in the following form: [As set out in the statement.]

These alleged findings came before CLEMENT, J., who delivered the judgment appealed from in which he rightly found that the questions submitted were questions of fact to be determined by the arbitrator, subject, of course, to the rule of law that findings of fact must have evidence to support them. And he in turn referred the matter back "to the arbitrator in order that he may proceed with the arbitration." The main ground raised before us is that there was no jurisdiction for this order. The short answer to that ground is that the arbitrator has not finished his work.

The proper course in stating a case is for him to find, not only that the deceased met his death by accident, whilst in the employment of the defendant, as he has done, but to go further and find as a fact (a) whether or not that accident arose out of and in the course of that employment; (b) that the deceased was guilty or not guilty of serious and wilful misconduct, or serious neglect, and then allow or disallow compensation as the case might be. Whereupon it could be determined, if a case were stated, whether there was evidence upon which those findings could be upheld, and as to whether the arbitrator did or did not misdirect himself. The arbitrator is not *functus officio* until the award is made.

Judgment

The arbitrator did not comply with the order of the Court, and the learned judge was right in sending the matter back. Had there been a proper case stated, then this Court doubtless could have obviated the necessity for referring it back, and thus save the extra costs entailed.

The appeal is dismissed.

Appeal dismissed.

Solicitors for appellant: *Harvey & McCarter.*

Solicitor for respondent Company: *G. H. Thompson.*

BRIDGMAN v. HEPBURN.

IRVING, J.
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BRIDGMAN v. HEPBURN

Sale of land—Principal and agent—Introduction of purchaser—Commission—Engagement to procure purchaser at a given figure—Sale subsequently at a lower figure to the same person.

H. being pressed by his mortgagees, applied to B. to procure a loan of $58,000. Negotiations to that end by B., and also further efforts to procure a sale of certain of the property for $56,000, failed. Subsequently the person with whom B. was negotiating was introduced by his (the prospective purchaser's) banker to the agent of the mortgagees, and a sale was brought about for $50,000, H. paying the agent a commmission. In an action by B. against H. for a commission for having first introduced the purchaser :—

Held, on appeal, affirming the judgment of IRVING, J., at the trial (MORRISON, J., dissenting) that B. was engaged to find a purchaser at a certain figure, and having failed to do so, he was not entitled to a commission on a sale, although made to the person originally introduced by him.

Per HUNTER, C.J.: When, *prima facie*, the agreement is to pay a commission on a named figure it is for the agent to shew in the clearest way that the intention of the parties was to pay a commission on any figure at which the sale goes through.

APPEAL from the judgment of IRVING, J., in an action tried before him at Victoria on the 10th of December, 1907.

The facts are stated shortly in the headnote and at length in the reasons for judgment of the Full Court. Statement

Bodwell, K.C., and *J. H. Lawson, Jr.*, for plaintiff.
R. T. Elliott, for defendant.

IRVING, J. [orally]: In April of this year the defendant came to Mr. Bridgman's office and asked him to get $58,000 on a loan. That, Mr. Bridgman was not able to do, and the matter fell through. But Mr. Bridgman introduced him to Mr. Meredith, who was willing to make an arrangement with him on other terms. But that also fell through. Hepburn was in considerable difficulties and he was being pressed by the Finlayson estate to sell his property. The person applying the pressure was Mr. Jones, who was one of the executors, and who was also a real estate agent. IRVING, J.

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It appears that after these arrangements between Bridgman and Meredith had fallen through, or possibly while they were happening, Meredith went to Jones, and they had some conversation about the matter. On one day, I should imagine somewhere about the 30th, Bridgman and Hepburn met on the corner of Bastion and Langley streets, and Hepburn said, "Why don't you get your man to buy those two pieces at $56,000?"—referring to the two pieces. Hepburn adds that he said something more, namely, "you have only got an hour or a couple of hours to do it in." I think Hepburn is mistaken about that; in fact, I am sure he is, because Bridgman, it appears, went to see Meredith with this $56,000 proposition, and Meredith said no, that $46,000 or $48,000 was quite sufficient, and it was after then that Meredith went to Jones and authorized his offering $45,000; and Jones spent some time running to and fro before he was able to get any answer from Hepburn; and finally Hepburn said that he would take $50,000, which offer Jones carried to Meredith; and that was accepted, and went through. Bridgman sues for three per cent. commission; three per cent. was the sum named by Bridgman and Hepburn at the time they discussed the $56,000.

But as I understand the law applicable to this, it is that you can employ a real estate agent just as you can employ anybody else, you can stipulate what the price will be, or that there shall be no price at all, except under certain conditions. And I think that the stipulation in this case was, that Bridgman should find him a purchaser at $56,000 to earn his commission.

IRVING, J.

I have referred to the judgment of Perdue, J., in *Aikins* v. *Allan* (1904), 14 Man. L.R. 549; it seems to me to be quite consistent with what I believe to be the law. The broker's authority in this case can be limited and was limited, to obtain a certain amount. It can be limited in that way, either as to amount or as to time; and in the absence of any arrangement his authority may, subject to the ordinary requirements of good faith, be revoked.

Now then, in this case it seems to me that the limitation placed upon that was that Bridgman should find him a purchaser at $56,000. If he found him a purchaser at that sum, then he would be entitled to his commission. But as he failed to find a

purchaser at that sum, I think the action must be dismissed.

The appeal was argued at Victoria on the 21st of January, 1908, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

Bodwell, K.C., for appellant (plaintiff).

Luxton, K.C., and *R. T. Elliott, K.C.*, for respondent (defendant).

Cur. adv. vult.

25th February, 1908.

HUNTER, C.J.: The facts in this appeal are simple and, for the most part, not in dispute.

On April 23rd last the defendant, being pressed by mortgagees, requested the plaintiff to procure a loan of $58,000 on four properties in the City of Victoria. The plaintiff introduced the matter in his office to Meredith, a capitalist, who said he did not wish to lend but would go and look at the properties. On the way back they met Hepburn, to whom Meredith was introduced by the plaintiff, and they discussed an offer by Meredith to lend the money on certain terms, which offer, after consideration, was declined. A few days later, it transpired that there was some defect in the title to one of the properties, tenders having been advertised for by the mortgagees, Hepburn suggested to Bridgman that he should try to get Meredith to purchase two of the properties, one known as the Lighthouse Saloon and the other as the Prince of Wales Saloon, hereinafter referred to as the saloons. The price named by Hepburn was $56,000, and according to the plaintiff he agreed to pay three per cent. commission. Meredith, however, would not give $56,000, but Bridgman says he thinks he stated he would give $46,000. At any rate the sale was not put through at $56,000.

About this time Meredith, through his banker, had got into negotiation with Jones, the agent for the mortgagees; and these negotiations culminated in the purchase by him of the saloons for $50,000, from Hepburn, who paid Jones a commission.

There is no evidence to shew that Hepburn expressly agreed with Bridgman to pay a commission on any sale that might be effected with Meredith. All that appears is that Bridgman communicated a request for a loan, and an offer of sale at

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$56,000, in respect of which Hepburn agreed to pay a commission, both of which offers came to nothing.

Mr. *Bodwell*, however, contended that when Hepburn agreed to pay a three per cent. commission on $56,000, he thereby also agreed to pay a commission on any lesser sum at which the sale went through, and this although the final negotiations were completed through the other agent, Jones; and for this proposition he cited the following remarks credited to Lord Watson in *Toulmin* v. *Millar* (1887), 58 L.T.N.S. 96 at p. 97:

"When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations."

This speech of Lord Watson is not to be found in the report of the case in the Law Reports; and it is evident from that report that the Lords decided the case on the ground that the Court of Appeal and Divisional Court were wrong in setting aside a verdict for the defendant who resisted an agent's claim for a commission. The remarks of Lord Watson are therefore *obiter dicta*; but even if they were not, I do not think that he intended to lay it down as an unvarying rule that where an intending vendor names a price and agrees to pay a commission on that price, he *ipso facto* obligates himself to pay a commission on a lesser sum. It is in all cases a question of intention, and I quite concede that there might well be a case in which the Court could see from the circumstances surrounding the negotiations that it was the real intention of the parties that the agent should receive a commission whatever the amount realized might be, and that the price given the agent was only a working basis, in other words, that the agreement was, to pay in the event of sale, and not in the event of sale at a specified price.

HUNTER, C.J.

But I deny the right of any Court to imply an obligation to pay in the event of a sale when the only evidence before it is

that of an obligation to pay in the event of a sale at a named price, as nothing would be better calculated to introduce doubt and insecurity into the law of contract. When *prima facie*, as here, the agreement was to pay a commission on a named figure, it is for the agent to shew in the clearest way that the real intention of the parties was that he should receive a commission on any figure at which the sale goes through. Therefore, in all cases the agent will, if prudent, before he introduces his customer have a clear understanding as to whether he is to get a commission on a named price or on the figure at which the sale goes through.

The above is sufficient to dispose of the appeal, but assuming an agreement to pay on any figure at which the sale went through, there is another ground which, as at present advised, I think is also fatal to the plaintiff's case, although it is not necessary to come to a final conclusion. What was the contract? Was it to pay a commission for the introduction of the purchaser, or was it to pay a commission in the event of the sale going through by reason of the plaintiff persuading the purchaser to buy? Here again I think it is for the plaintiff to shew what the contract was, but the matter is left in doubt, and according to Bridgman's own testimony Hepburn said: "Why don't you get your man to purchase the other two properties?" While I admit that a jury might find either way, I must say that if it were left to me to find what the agreement was I should be strongly inclined to think that the word "get" implied that the plaintiff was to be paid a commission only in the event of the purchaser being persuaded to buy through the efforts of the plaintiff; in other words, that he was not merely to find the man who ultimately purchased, but that he was also, in real estate parlance, to work up the sale, and this especially as it is undeniable that Hepburn was at his wits' end for money, and was so to the knowledge of the plaintiff. If so, the plaintiff did not earn the commission, as if he did not actually drop the matter after the refusal of the $56,000 offer, the sale was at any rate finally brought about by Jones.

HUNTER, C.J.

I would dismiss the appeal.

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MORRISON, J.: The defendant was the owner of certain properties in Victoria over which the Finlayson estate held a mortgage, A. W. Jones being trustee and agent for the estate. This property was advertised for sale pursuant to the mortgage, payments having been long overdue and the defendant, though urged, seemed unable to meet them. Whilst in this predicament he went to the plaintiff, Bridgman, a real estate and financial agent, hoping to secure a loan to obviate the sacrifice of his properties under a mortgage sale. This proposition for a loan fell through and very shortly after a sale was effected to one Meredith who had been introduced to Hepburn, the defendant, by the plaintiff. It is in respect to the commission claimed upon that sale that the action was brought.

The dates material to the issue as far as can be gathered from the evidence are as follows:

On the 23rd of April, 1907, the defendant Hepburn instructed the plaintiff Bridgman to negotiate a loan on all his encumbered properties for $58,000. Bridgman thereupon sought out Meredith, a client of his, to whom Hepburn was introduced and all three inspected the properties. Then Meredith, with a view of making arrangements for financing the proposition which he was seriously considering, went to his banker, Mackenzie, who called up by telephone Messrs. Pooley, Luxton & Pooley, solicitors for the Finlayson estate and through them also communicated with Jones, the agent for the estate. It may be stated parenthetically that Jones was also carrying on the business of a real estate agent. From these interviews it was made clear to Meredith by Jones and the solicitors that the estate wanted the cash and that without delay. The same evening Meredith went again to his banker, Hepburn accompanying him, but was not present at their interview, Meredith now being fortified with the knowledge that Hepburn was forced in regard to the disposal of his properties. This all occurred on the 23rd according to Meredith's evidence. After the lapse of a few days the matter of the loan fell through. In the meantime Meredith had met Jones about the 25th or 26th of April, being introduced by Mackenzie, who seems to have been assisting Meredith in getting as advantageous terms as possible in his negotiations respecting

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the property. At no time from Bridgman's introduction does he relinquish the idea of acquiring an interest of some sort in those properties, as he says himself where he could get it cheapest. Having ascertained, through Mackenzie, Jones' connection with the Finlayson estate, he began dealing with him, Hepburn being present on occasions. And during these negotiations with Jones, Hepburn went to Bridgman and asked him to try and get Meredith to buy, mentioning the price at $56,000. Now what took place between the plaintiff and defendant is the determining incident of the case. To quote from Bridgman's evidence:

"Where did you see him again and what was the occasion of that interview, and what took place? I met Mr. Hepburn in Bastion street.

"About how long afterwards would that be? I cannot fix the date beyond that it was after the tenders had been opened. I met him at the corner of Langley and Bastion streets, and had a conversation with him, and he told me that there was a hitch in—with regard to the sale of the property under the tenders, that there was some defect in his title to the Pither & Leiser building, that there were some deeds missing relating to the title to a portion of that property, a gore or slice of the property, to which the title deeds could not be found and in consequence the tenderer had withdrawn his tender, or the person who was buying had withdrawn.

"Then what else? And he said that he was being pressed by the Finlayson estate; and he asked me—he said 'Why don't you get your man (referring to Meredith) to purchase the other two properties?' He mentioned the price, said $56,000. And we discussed the question of commission. He said 'you must not be hard on the commission.' I said that I thought that three per cent. would be reasonable, and he agreed to three per cent. commission.

"Agreed to a three per cent. commission? Yes.

"What did you do in consequence of that conversation? I saw Mr. Meredith and put the matter before him; and he said he would not give $56,000 for the property, but he mentioned a figure, I don't remember exactly whether it was 46 or 48, I think $46,000 he said he would give for the property. And he went on to say that at any rate it would be necessary for him to see what financial arrangements could be made, and that he would go and see the trustee of the Finlayson estate."

Hepburn's version is:

"Mr. Jones came to see me and says, 'I can get you $50,000 for those two properties'—although I am getting a little ahead; you see the Grand theatre in the meantime was sold out of that property, there were four properties, and the Grand theatre sold for $12,500, there was a commission of $500 on it, and $12,000 was paid into the account of the Finlaysons, I

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think it was $11,800 was paid in; in fact, I am positive of it—for which I got credit on the mortgage. That left a balance of $46,200.

"Go ahead? Now then, when the other two pieces of property—it had to be sold for to cover up the $46,000; and when Mr. Jones got me the offer of $50,000 from Mr. Meredith, which I did not know who made the offer or anything about that part of it, I never knew until after Mr. Jones had got authority from me to dispose of it; and when Mr. Jones told me that night, he says, 'My people are going away, and this thing has got to be fixed up to-night.' So I went straight from there to Mr. Bridgman for to see if he could not do something, and on my way down I ran across this man Meredith, and I went right straight from there to Mr. Bridgman's office and he was not in; I started to go down to Mr. Pooley & Luxton's office and I met him in Bastion Square at the corner. I says to him, I says, 'If you can sell this property inside of two hours for $56,000' I said, 'you can go ahead and do it, and I will allow you a commission on it of $1,500.'

"Mr. *Elliott:* Then what took place? I went into—I went back to Mr. Bridgman's office and he said he couldn't do anything. I went from there to Mr. Jones and the two of us went down to Luxon and Pooley's office, and I gave him authority to sell the property for $50,000."

As to the other parties, Meredith disavows any intention of having retained any agent. He was endeavouring to get the properties on the best terms to himself and with that object he dealt with Jones *qua* agent for the Finlayson estate. He was not dealing with him as an independent real estate agent. He frankly admits that Bridgman was the medium through whom he was introduced to the defendant and his property.

MORRISON, J.

The defendant occupied a peculiar situation of dependence. He was in jeopardy, and not in a position to make a special arrangement or contract with the plaintiff. But rather went to him, and in effect said, help me with Meredith—get him to buy the remaining portions—the property will be sold, and I must at least raise the amount due under the mortgage, but try and get your man to give $56,000. When Bridgman then saw Meredith again, the latter was reasonably certain he would get the property for less than that figure, and so he declined to give it, but again the inference is that were it not for Bridgman's efforts in seeking this maximum price, Meredith would not have raised to $50,000; that Hepburn would have declined to consider Meredith's first offer of $46,000 and would instead take his chance on a forced sale under the mortgage.

As to what would be the position had the defendant kept away from the plaintiff after the negotiations for a loan fell through I am not now prepared to say, but his arrangement with him for a sale to Meredith, it seems to me, linked the previous retainer and introduction to the second contract constituting a continuous retainer and one introduction, which introduction was the efficient cause in consummating a sale: *Millar, Son, and Co.*, v. *Radford* (1903), 19 T.L.R. 575 at p. 576. It was more than a dry introduction—it was the foundation on which the negotiations proceeded and without which they would not have proceeded—*Wilkinson* v. *Martin* (1837), 8 Car. & P. 1 at p. 5. In *Toulmin* v. *Millar* (1887), 58 L.T.N.S. 96, Lord Watson held that:

"When a proprietor with a view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given."

If the relation of buyer and seller is brought about by the act of the agent, he is entitled to his commission: *Green* v. *Bartlett* (1863), 14 C.B.N.S. 681 at p. 685.

Bridgman, in my opinion, was employed to bring about privity of contract between the plaintiff and defendant and I think, having regard to the circumstances peculiar to this case, he succeeded in doing so.

CLEMENT, J.: I think this appeal should be dismissed. I can see no good reason for disturbing the finding of fact by the learned trial judge that the contract of employment here was in no sense general, *viz.:* to find a purchaser, but was essentially particular, *viz.*: to find a purchaser at a named figure. The plaintiff made the attempt and failed, and so cannot recover.

In this view, it is unnecessary to consider the question how far or in what sense the actual purchaser, Meredith, was procured by the plaintiff. On the evidence, however, I should say that while the plaintiff's original introduction to Meredith of the subject of the availability of the property in question as a

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good mortgage investment may possibly have been a *causa sine qua non*, it was clearly not a *causa causans* of the sale which afterwards was brought about by Jones.

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Solicitors for plaintiff: *Bodwell & Lawson.*
Solicitors for defendant: *Pooley, Luxton & Pooley.*

Appeal dismissed, Morrison, J., dissenting.

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JULL v. RASBACH.

Principal and agent—Contract for sale of land—Want of authority of vendor's agent—Incomplete contract—Specific performance—Correspondence.

In viewing the relations or dealings between principal and agent, an unconditional authority to sell land should not be lightly inferred, but it should be clear beyond any reasonable doubt that such authority was conferred.

Statement

APPEAL from the judgment of MORRISON, J., in an action tried before him at Vancouver on the 28th of March, 1907. The facts are fully set out in the reasons for judgment of HUNTER, C.J.

The appeal was argued at Vancouver on the 26th of November, 1907, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Argument

Joseph Martin, K.C., and *J. A. Russell*, for appellant (defendant): We say that Coldwell was not an agent for sale, and also there was no acceptance. The mere fact of sending a telegram and receiving a reply stating a certain figure would be accepted did not constitute Coldwell an agent. His only real authority was to look for purchasers.

A. D. Taylor, for respondent (plaintiff.)

Cur adv. vult.

17th January, 1908.

HUNTER, C.J.: This is an action for specific performance of an agreement for the sale of land entered into between the plaintiff and one Coldwell, a real estate broker, alleged to have been the duly authorized agent of the defendant.

On May 31st, 1904, the defendant listed four out of the five lots in question, together with other properties, with the firm of Coldwell & Pothonier, real estate brokers, with instructions to them to put a value on them and return the list to him so that he might look it over and make any change he thought desirable. About a year later, in a letter to the firm, he amongst other things inquires what the prospects are for the property in question. In April, 1906, he writes saying he hardly thinks it advisable to sell just then, but asks what price they think he should get. In May of that year Coldwell brought the property to the notice of the plaintiff, whereupon the following memorandum was finally drawn up:

"Vancouver, B.C., May 17th, 1906.

"Received from T. F. Jull the sum of Ten 00/100 Dollars, being a deposit on Lot 10 Block 28, Lot 2 Block 31, Lot 3 Block 31, Lot 7 Block 34, Lot 11 Block 53 all in District Lot 540. Purchase price $1,000.00 terms ¼ cash, Bal. 6-12 & 18 months. Subject to the owner's approval.

"Jos. A. Coldwell

"$10.00 "Agent for C. Rasbach."

On the next day Coldwell wired the defendant as follows:

"Vancouver, B.C., May 18/6.

"Charles Rasbach,

"Herkimer, N.Y.

"Offered thousand quarter cash six twelve and eighteen months for five lots in five forty reply.

"J. A. Coldwell."

To which the defendant replied:

"Herkimer, N.Y., May 19th, 1906.

"J. A. Coldwell, 100 Hastings St.,

"Vancouver, B.C.

"Decided to hold but would take twelve fifty same terms.

"C. Rasbach."

And on the same day wrote as follows:

"J. A. Coldwell,

"Dear Sir,

"Telegram just received have wired you would take $1,250. I had made up mind not to sell these lots at present as they and two in Hastings Townsite are the only ones I have left in Vancouver, B.C. I don't think

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property will ever be any lower in the City. This price would hold good for only a short time, two or three others have been in correspondence with me in regard to these lots.

"Yours respectfully,
"C. Rasbach."

Shortly after the receipt of Rasbach's telegram of the 19th, Coldwell communicated its contents to Jull, who agreed to the $1,250 and Coldwell with Jull's assent altered the receipt accordingly, the words "subject to the owner's approval" also being struck out.

On the 21st Coldwell wrote to the defendant as follows:

"Vancouver, B. C., May 21st, 1906.

"C. Rasbach, Esqre.,
"Herkimer, New York.

"Dear Sir,

"My telegram to you offering $1,000.00 for five lots in Disirict Lot 540. Yours to me as follows: Decided to hold but would take twelve fifty same terms, signed C. Rasbach. My telegram of same date to you, five lots sold as per your telegram, letter following, signed J. A. Coldwell.

"The terms in first telegram was ¼ cash bal. in 6-12 & 18 months. Interest at 7% per cent. per annum.

"I enclose the agreement signed by Jull, please execute them and go before a Judge of a Court of Record having a seal with the blue form enclosod and have your signature properly attested and please also initial the corrections. Then return one to us or through our Bank which is the Bank of Hamilton and we will pay to your order the sum of $233.50 that is your portion of taxes to time of sale $16.50 and commission $62.50 making a total of $312.50.

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"I will find out about the different properties you state in your letter of May 12th and will let you know.

"Yours resp.
"Jos. A. Coldwell."

"Notice they have deducted amount of taxes."

On the 26th Rasbach wrote as follows:

"Herkimer, N.Y., May 26, 1906.

"J. A. Coldwell,

"Dear Sir,

"I have just received to-day an offer of nearly your offer for three of the lots in 540, Lot 10, Block 28, & Lots 2 & 3 in 31 the offer was $300 each $900. When this property is sold I hope you will be the one who can have the commission. What do you think of this offer? I will write the parties they can have the 3 for 1,000 or 5 for 1,600.

"Yours resp.
"C. Rasbach."

And again on the 29th as follows:

"Herkimer, N.Y., May 29, 1906.

"J. A. Coldwell,

"Dear Sir,

"I have just received this morning your letter and agreement of the 21st, which I am returning. I received but one telegram from you offering $1,000 for the lots, and I immediately answered and received no reply until this morning. Last Saturday I received letter from another party offering me $900 for the 3 Lots 1, 2 & 3 I wrote them the same as I did you stating I would accept $1,000 for the 3 or $325 each for the 5, $1,625. Under the circumstances your acceptance came to late. I hope you may be able to make sale of this property now on terms $325 each 1,625 for the 5 lots.

"Yours resp.

"C. Rasbach."

To the letter of the 26th Coldwell replied by telegram as follows:

"Vancouver, B. C., May 31, '07.

"Chas. Rasbach,

"Stationer, Herkimer, N.Y.

"Do not understand yours of twenty-sixth see my telegram of the nineteenth saying sold five lots as per your telegram sent the agreement on twenty-first.

"J. A. Coldwell."

I am unable to see anything in this correspondence or the testimony to shew that the defendant ever authorized Coldwell to sell the property, and in my opinion the latter was authorized only to communicate offers by prospective purchasers. An unconditional authority to sell at a named price carries with it the power to bind the principal by an open contract of sale, and as such a contract often subjects the principal to obligations which he would not on consideration be willing to assume, it should not be lightly inferred, but the evidence should shew beyond any reasonable doubt that it was conferred. It is unnecessary to go through the cases in detail as they will be found concisely reviewed by Buckley, J., in *Rosenbaum* v. *Belson* (1900), 2 Ch. 267.

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It may also be noticed that both Jull and Coldwell knew not only that the first offer of $1,000 communicated to Rasbach, but that the figure $1,250, which he said he would take, were both below the market price.

Coldwell, who was called for Jull, says:

"Mr. Jull said that he thought they were worth about $350 each when he bought them? Yes.

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"You agree that his valuation was correct, that they were worth about $350 each at that time? Yes, at that time."

In other words they were worth $1,750. Accordingly the proper inference is that Coldwell was not an agent for sale, but only an intermediary to communicate offers, as he would have been false to the interests of his principal if he knowingly on his behalf attempted to sell for materially less than what he knew he could get without his principal's assent, and the rule is that when a transaction may be viewed either in an innocent or tortious light, the former is to be accepted. But if Coldwell was Jull's agent, as might be argued from the evidence, then there was no agreement on the part of Rasbach to sell: *Harvey* v. *Facey* (1893), A.C. 552.

HUNTER, C.J.

The fact that Rasbach settled Coldwell's claim against him for $50 is of course irrelevant in this action.

Other points were raised during the argument, but in the view that I take it is unnecessary to discuss them. I would allow the appeal, and dismiss the action with costs.

IRVING, J.

IRVING, J.: I would allow the appeal. In my opinion the evidence does not shew a completed contract, nor authority to Coldwell from Rasbach to make a contract of sale—*Harvey* v. *Facey* (1893), A.C. 552, with which compare *Johnston* v. *Rogers* (1899), 30 Ont. 150, which is in point.

CLEMENT, J.

CLEMENT, J., concurred.

Appeal allowed.

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Practice—Summons for directions—Order for directions also fixing place of trial—Subsequent application for change of venue—Order XXX., rr. 1, 2—Finality of order under.

On a summons for directions the usual order was made, *inter alia* fixing the place of trial at New Westminster. There was nothing said as to venue, and no objection raised, on this application. Subsequently defendant applied to have the venue changed to Fernie, on the grounds of convenience of witnesses and the necessity for a view of the *locus in quo.* This application was refused:—

Held, on appeal (CLEMENT, J., dissenting), that the omission of the solicitor's agent to keep open the question of venue until he was properly instructed should not in the circumstances be permitted to work an undue hardship on the defendant.

Directions given under Order XXX., have not the finality of ordinary orders.

APPEAL from an order of MORRISON, J., at Chambers, in New Westminster on the 9th of January, 1908, refusing an application by defendant for a change of venue from New Westminster to Fernie. Plaintiffs took out a summons for directions in the usual way, and the usual order was made, no objection being entered to the fixing of the venue, and no reservation of the question being made by the defendant's solicitor's agent. Subsequently an application to change the venue was made by defendant on the grounds of convenience of witnesses and the necessity for a view of the *locus in quo.* MORRISON, J., before whom the summons was heard, dismissed it in view of the order for directions, including the fixing of the venue, already made. Defendant appealed.

Statement

The appeal was argued at Vancouver on the 8th of April, 1908, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Joseph Martin, K.C., for appellant (defendant).

Davis, K.C., for respondents (plaintiffs).

Cur. adv. vult.

29th April, 1908.

HUNTER, C.J.

HUNTER, C.J.: On the question of practice, especially as the question is *res nova* in the Full Court, I think the order made

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on a summons for directions has not the finality which usually attaches to orders made by the Court or a judge, but is an interlocutory direction which may be changed if the ends of justice require by the same or any other judge.

The title of Order XXX., itself indicates that what the judge does is not to make an order in the ordinary sense, but to give directions, and the directions are given in respect of matters as to which the solicitor may not be in full possession of the facts when the summons is heard, as it may be taken out at any time, and which are mere matters of procedure and which do not touch the rights of the parties. The design of Order XXX., in short, is to provide a more elastic and at the same time less expensive procedure in respect of the matters within its scope than the former system of distinct applications and orders, and I think we would be frustrating its object if we were to hold that a direction given under this order has the same finality as an ordinary order. Even under the old practice the Court did not feel itself hampered from changing a purely procedure order whenever the ends of justice required. In *Prestney* v. *Corporation of Colchester* (1883), 24 Ch. D. 376, it was held that a judge could change an order for production of documents, which had been made by another judge, from one place to another. Cotton, L.J., says at pp. 384-5:

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"In my opinion the judge must have a right in dealing with such a question, and in dealing with what has been directed by a previous interlocutory order, when new facts are brought before him to shew that following the precise directions of that interlocutory order will cause what he considers unnecessary inconvenience, or other injury to the parties, to give directions that notwithstanding the previous interlocutory order a different mode shall be adopted of carrying into effect the substance of the previous order. It would be very different if this were an interlocutory order in which the rights of the parties had been decided, then it is a case for appeal, and appeal only, and it must be prosecuted in the ordinary way. Here where it is merely directing the mode in which the plaintiffs are to avail themselves of the right of inspection, in my opinion the judge has a perfect right, and it is his duty, on new facts being brought before him which may render it necessary to do so for the purpose of the due administration of justice to make a new order, varying the form and giving a new direction as to the mode in which production shall be made. I have known it done frequently in my practice at the Bar."

It will be observed that he says "new facts." This does not

mean that new facts must have come into existence since the former order was made, but that they may be facts which were not brought to the attention of the judge who made the order as the case was that there were a large number of documents which it would be at once oppressive and risky to bring to the place originally named, but the fact had not been brought to the first judge's notice. Like instances in our own Court under the former practice will be found referred to in the case of *Alaska Packers* v. *Spencer* (1905), 11 B. C. 280 at p. 284.

Whether in the particular case after a solicitor has allowed a direction to be made without objection it should be changed depends altogether on the circumstances. Here it is sworn and not contradicted that unless the venue is changed the defendant will be put to extra costs amounting to upwards of $1,000, while the plaintiffs do not shew that the change will prejudice them, and it is also sworn that a view of the *locus in quo* distant a few miles from the proposed place of trial would be expedient. There is no countervailing material filed by the plaintiffs, but the case is merely one where they seek to keep the defendant at an undue disadvantage arising from the omission by the solicitor's agent to keep the question of the venue open until he had been properly instructed. If we were to refuse the relief asked for, we would simply be putting a premium on dilatory proceedings in connection with this class of summons, and at the same time confessing ourselves unable to prevent a mere interim direction which does not touch the rights of the parties from working an obvious injustice.

HUNTER, C.J.

In my opinion the appeal should be allowed with costs here and below, and the venue changed to Fernie.

IRVING, J.

IRVING, J., concurred with HUNTER, C.J.

CLEMENT, J.

CLEMENT, J.: In the Yearly Practice for 1908 at p. 326 it is stated "as a general rule that since the Jud. Act no Court, judge or master has any power to rehear, review, alter or vary any judgment after it is signed or order after it is made and drawn up" and the cases cited fully bear out this statement.

Several qualifications of this general rule are discussed, the only one pertinent here being that:

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"In the case of interlocutory applications and matters of mere procedure a judge or master has power in dealing with what has been directed by a previous interlocutory order, where new facts are brought before him, which shew that following the precise directions of that previous order will cause what he considers inconvenience or other injury to the parties, to give directions that, notwithstanding the previous interlocutory order, a different mode shall be adopted of carrying into effect the substance of the previous order."

In my opinion, the case before us does not fall within this exception; and it does not fall within the "slip rule" (Order XXVIII., r. 11) as it cannot be pretended that the provision in the earlier order that the trial should take place at New Westminster was a clerical mistake or an error arising from an accidental slip or omission.

But it is urged that under Order XXX., we have now a new form of judicial pronouncement, differing from a judgment, decree or order, *viz.*, a "direction" which is purely tentative and of no binding force as an adjudication. Since the decision of my brother MORRISON, the Yearly Practice for 1908 has come to hand and for the first time the statement appears (p. 344) that in England this view is taken of directions given under Order XXX. I gather that the "directions" given in England under this rule are not embodied in any formal order, but are simply entered on what one may describe as a "cause list." But however that may be, the learned authors of the Yearly Practice do not put the position higher than as expressed in the judgment of Cotton, L.J., in *Prestney* v. *Corporation of Colchester* (1883), 24 Ch. D. 376 at pp. 384-5. The effect of that judgment is correctly stated in the passage above cited from p. 327 of the Yearly Practice of 1908. There is no suggestion in the case before us of changed conditions or new facts, but simply that there was, not an unintentional, but a thoughtless agreement to the order as made. To open the matter anew on this suggestion is, and I speak with all deference, to encourage slipshod methods.

CLEMENT, J.

I would dismiss the appeal.

Appeal allowed, Clement, J., dissenting

Solicitor for appellant (defendant): *L. P. Eckstein.*
Solicitor for respondents (plaintiffs): *A. Whealler.*

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Criminal law—Charge to jury—Duty of judge to explain their legal powers—Right of jury to find for lesser instead of graver offence—Misdirection—New trial.

If the judge allows the indictment to go generally to the jury, it is not competent for him to withdraw from their consideration a verdict for any lesser offence which may be included in the indictment.

APPEAL by way of a case stated from the decision of MORRISON, J., in a trial for rape, tried before him and a jury at Fernie on the 23rd of October, 1907.

After the jury had retired, they came into Court again and asked: Could any other verdict be brought in if this man had carnal knowledge of this girl without her consent?

MORRISON, J.: I cannot tell you what represents consent. Take the evidence and consider all the circumstances. Consider the girl. Remember that you cannot bind evidence down to absolute accuracy as to times and details of that sort. I think Mr. *Herchmer* read in her former evidence that she said he lay on top of her for four hours. Here she said that was not so. Now that struck me as rather improbable, but your belief that that was improbable would not justify you in not believing he was there. If a grown, sensible, strong-minded and vigorous woman made that statement and you could shew that it was improbable, that might justify you in thinking the rest of her story was absurd. But you must have regard to the circumstances of the case.

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The jury: Could we bring in any other verdict if this man lay with this girl if she consented?

MORRISON, J.: If you believe she allowed him to have connection with her and she consented without fear or being influenced by his threats, then he did not commit the crime of rape. The question is entirely for you as to whether she consented to this treatment by fear or induced by threats of bodily

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harm, but in considering that have regard to the age of the girl and the surrounding circumstances.

The jury: Then there is no other verdict but guilty or not guilty?

MORRISON, J.: Practically it comes to that, it depends upon the view you take of the evidence. I might consider that it would be an extraordinary view for you to take, if you took any other view than guilty or not guilty, but it is possible that you might take the view that he simply assaulted her; did something to her, but did not penetrate. Or you might take the view that she knew all along what he was doing and wanted him to do it, and he did not threaten her. In that event you would have to bring in a verdict of not guilty.

The jury: Could we bring in assault, or indecent assault?

MORRISON, J.: If you believe he was there and assaulted her indecently that would repel the idea that he penetrated her, and therefore that he committed the crime of rape. Can you believe that, after seeing the girl and hearing the evidence? If you believe her evidence it would not be indecent assault, it would be rape. I am trying not to give you my own opinion, the matter rests entirely with you. I have a very strong opinion and should have no hesitation in saying what I should do if I were on the jury, but my opinion has nothing whatever to do with you if it conflicts with yours. In some cases it is justifiable for a judge to give his opinion of the evidence, but I do not choose to do it in this case. If it is your opinion that the crime of rape as you understand it has been committed here, do not hesitate to bring him in guilty. If, on the other hand, you do not believe the crime of rape as defined in the Code has been committed, it is your duty to bring him in not guilty. Personally, I do not understand why you should have any doubt about the matter, I do not see where a body of reasonable men hearing the evidence in this case have the slightest room for doubt as to their verdict either one way or the other. I have explained the law to you as best I can without perplexing you, or entrenching on your prerogative. Now, to use a common expression, it is "up to you." In the first place you may believe he went in there and had connection with her. Then the next point is, did she consent? But

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that is not enough. Then you must determine how she consented; did she do so because he threatened her and she was afraid of him? Take into consideration his conduct, the hour and manner in which she says he came there, the inexplicable influence one person can exert on another, remembering her age and appearance and his age and appearance and all the surrounding circumstances that you heard of. If you are satisfied that she consented through fear of his threats, then he is guilty and you must bring in a verdict to that effect on your oath. If, on the other hand, you do not believe that she consented through fear, and was glad to have him come there, and enjoyed it, and wanted to have connection with him, then the crime of rape has not been committed. It is a very serious matter whichever way you go, it is serious if you find him guilty, it is equally serious if you find him not guilty. You have your duty to perform. You are entirely your own judges.

Statement

The jury on this direction brought in a verdict of guilty.

The appeal was argued at Victoria on the 25th of February, 1908, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Joseph Martin, K.C., for the accused: The charge here was for a rape by violence, and not a fraudulent rape. In criminal as well as civil trials, the pleadings must give notice to the defendant of what he has to meet. Further, in this case the jury evidently desired to bring in a verdict of the lesser charge. They should have been instructed that they had that power.

Argument

Maclean, K.C. (D.A.-G.): The jury were sufficiently instructed as to the minor charges. In any event, it was not necessary to charge them minutely as to the different verdicts they might return. He referred to the following American cases: *Sparf and Hansen* v. *United States* (1895), 156 U.S. 51; *Robinson* v. *State* (1890), 11 S.E. 544; *State* v. *Estep* (1890), 24 Pac. 986; *People* v. *Barry* (1891), 27 Pac. 62; *State* v. *Casford* (1888), 41 N.W. 32.

Cur adv. vult.

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HUNTER, C.J.: Indictment for rape with a verdict of guilty. Among other objections to the learned judge's charge which

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this Court has been requested to pass on are the following:

"9. When the jury came in and asked if they were limited to a verdict of "guilty" or "not guilty" the learned judge erred in not informing them that they could bring in a verdict of indecent assault or common assault, or of an attempt to commit rape.

"10. When the jury asked if any other verdict could have been brought in if she consented, the learned judge should have stated the different verdicts possible under the indictment.

"11. When the jury asked if they could bring in assault or indecent assault, the learned judge should have said 'yes.'"

The learned judge was asked by the foreman whether the jury was limited to a verdict of "guilty" or "not guilty," and in effect, he withdrew from their consideration any other alternative. Hence is raised the bald question—Whether or not the judge can, because, in his opinion there should be either a verdict of guilty of the gravest offence charged in the indictment, or an acquittal, withdraw from the jury the consideration of any other verdict which may be open on the indictment?

The question has already been passed on by this Court in the case of an indictment for murder, and resolved in the negative: *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555. It also came up in the case of *Rex* v. *Sam Lock*, not reported, also an indictment for murder. But, as there was plainly evidence on the record on which the jury might have found manslaughter, a new trial was ordered as the judge had withdrawn manslaughter from the jury's consideration, and it was not necessary to decide the neat question.

HUNTER, C.J.

For my part, I adhere to what was said in *Rex* v. *Wong On and Wong Gow*, and am prepared to lay down the proposition without qualification that it is not competent to the judge, if he allows the case to go to the jury on the graver offence, to withdraw from their consideration a verdict for any lesser offence which may be included in the indictment. I think it is the duty of the judge to explain to the jury their legal powers; to point out to them all the possible findings open to them, no matter whether or not in his opinion it would be improper, illogical or grotesque for the jury to bring in any intermediate verdict. There is no middle course possible unless we are prepared to allow the judge to step into the jury box, which would eventually

jeopardize the independence of the tribunal to which alone our law has for centuries committed the duty of passing upon the issue between the Sovereign and the prisoner at the Bar. The judge is to inform and assist and not dragoon or shepherd the jury. If he may withdraw the power to find a minor offence, I see no reason why he may not withdraw the power to acquit. That the jury may legally find the minor offence—whatever may be the propriety of such a verdict—is clear from the fact that there is no means known to the law whereby either the Crown or the prisoner may have it set aside on the ground that they should have found the major offence. It may be that, in the opinion of the Court, they should have found the major offence, but how can it be said that the finding of a lesser offence, included in the graver offence is legally wrong? Again, the jury are sworn to find their verdict according to the evidence not according to the views of the judge. What does the evidence consist of? Not merely the words that fall from the lips of the witnesses, but their demeanour, the demeanour of the prisoner and, generally speaking, the whole atmosphere of the trial. Suppose the case of a servant accused of murdering her mistress. A fellow servant testifies to the screams. The judge is busy taking notes and does not catch the note of eagerness on the part of the witness to accentuate every circumstance that may be against the prisoner and gloze over anything that might be in her favour. But suppose the jury does so and, observing the demeanour of the prisoner—especially if there is a view—and knowing that she has had a clear record before this occasion, comes to the conclusion that there must have been sudden and extreme provocation, such as a charge of unchastity, to impel her to commit the act, can anyone say that the jury would be wrong in finding manslaughter; and yet there would not be a shred of evidence in support of such a verdict in the transcript of the proceedings, which alone would be before the Court of Appeal. How, then, is it possible for the Court of Appeal to be possessed of all the evidence either for or against the prisoner? And how, then, is it possible for it to say, with certainty, that the finding of the lesser, as opposed to the major, offence was wrong?

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The fallacy of the whole argument in support of a Court of Appeal confirming or condoning the withdrawal by the trial judge from the jury the consideration of an intermediate verdict lies then in the fact that in the nature of things the Court of Appeal can never have before it the evidence as it appeared at the trial.

Mr. *Maclean* laid much stress on the case of the *People* v. *Barry* (1891), 27 Pac. 62, as an example of a case in which it would be ridiculous to instruct the jury that they might return an intermediate verdict. The case was that the defendant was charged with assault with intent to rob, the evidence being that he and two others assaulted the complainant, the other two taking the money. His defence was that he saw the other two attacking the complainant and was helping him when the constable came up. A request by his counsel to the judge to charge the jury that they might find common assault was refused and confirmed on appeal on the ground that the evidence shewed that he was either guilty of assault with intent to rob, or of no offence at all. But, as the charge of assault with intent to rob, *ex necessitate*, includes assault, a verdict to the latter effect would not have been legally wrong, and was therefore plainly within the power of the jury to render. Moreover, for anything that case shewed, the prisoner may have participated in the attack without the motive of robbery, or may have been unaware that such was the others' intention. Or, as he was accused at the same time of having had two convictions for larceny against him, that may have moved him to set up a false defence. But the fact that the prisoner sets up a false defence—which may be done under evil advice, or from the fear that he is not going to have an unprejudiced trial, especially if he is a foreigner—while it may entail the penalties of perjury, does not debar him from his legal right to have all aspects of the case passed on by the jury.

HUNTER, C.J.

Take the *Sam Lock* case again. There the prisoner, a Chinaman, swore that he killed the deceased in self-defence. The jury did not believe this defence and the trial judge put the matter as if the issue were murder or self-defence, so that the prisoner was convicted of murder. As a matter of fact there was no eye

witness but there was an ear witness who heard quarrelling and scuffling, and the prisoner had a record for being law-abiding and peaceable for over 40 years. It was therefore clearly open to the jury under a proper charge to find provocation so as to reduce the charge to manslaughter, but both the Crown and the judge treated the issue as being that put forward by the prisoner, namely murder or self-defence, the Chinaman evidently preferring to take his chance of a capital sentence rather than go to the penitentiary. But, in my opinion, the Crown and the accused cannot, either with or without the sanction of the judge, enter into an undertaking, silent or express, that the trial is a duel to be conducted on the footing that the issue is to be either liberty or death, and it is the duty of the Crown not less than that of the judge himself, to see to it that all intermediate verdicts are considered by the jury, because the Crown as representing all the King's subjects, including the prisoner himself, has, or ought to have, a sleepless interest in securing the true and proper verdict, regardless of the prisoner's perjury and of his desire to stake his life against his liberty.

Mr. *Maclean* urged that it would be ridiculous in many cases for the judge to categorically go through all the possible minor verdicts open to the jury, but I see nothing ridiculous in fully informing the jury of their powers in respect of an issue which involves the life or liberty of the subject. Of course while the judge should do this there is nothing to prevent him from pointing out to the jury as forcibly as he thinks fit that the propriety of one or more such verdicts, as the case may be, would be open to question, so long as he does not go to the length of shutting out from their consideration any one of them.

Mr. *Maclean*, however, mainly relied upon *Sparf and Hansen* v. *United States* (1895), 156 U.S. 51; and *Gilbert* v. *The King* (1907), 38 S.C.R. 284. As far as concerns the former, I much prefer the reasoning contained in the very instructive judgment of Mr. Justice Gray to that of the majority opinion, and, as to the latter, I cannot accept it as authority for the proposition that the judge may deny the jury its power to consider an intermediate verdict, especially as Mr. Justice DUFF was a party to the decision in *Rex* v. *Wong On and Wong Gow.* I take it that the

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Supreme Court did not consider that the trial judge had gone to the length of directing the jury that they could not legally return manslaughter, but that he said, so far as he could see, such a verdict could not be returned on the evidence. Personally, I should have thought it was open to very grave doubt whether he did not go too far and would therefore have resolved the doubt in favour of the accused and sent the case to another jury. However that may be, in the present case the jury several times requested to be informed whether any other alternative than that of guilty or not guilty was open to them, the only reply being a strong expression of the learned judge's opinion that there was only one verdict which was warranted by the evidence, and therefore I think the learned judge, moved no doubt by the revolting circumstances of the case, encroached on the function of the jury by withdrawing from them their power to find a lesser offence. If he could legally do this, then I see nothing to prevent it eventually coming to pass that the jury in a criminal trial would be a mere machine to register the opinions of the judge, and the much-vaunted bulwark of liberty would become a mere shadow and a name.

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IRVING, J.

IRVING, J., agreed that there should be a new trial.

CLEMENT, J.

CLEMENT, J.: I agree that there should be a new trial on the ground that the charge of the learned trial judge was calculated to lead the jury to believe that if they failed to find the accused guilty of rape they would fall short of their plain duty. I do not think a judge is entitled to press a jury that far. The evidence points strongly to an offence under section 211 of the Code. No intimation of this was given the jury and I believe that if they had known that a verdict of not guilty on the charge of rape would not necessarily mean that the accused would go unwhipt of justice, their action on this indictment might have been different.

I am not prepared without further consideration to go to the length to which the learned Chief Justice has gone in his judgment just delivered. It seems to me that *Gilbert* v. *The King* (1907), 38 S.C.R. 284, stands in the way. However, I do not find it necessary to come to a definite conclusion on that point.

New trial ordered.

IN RE BEHARI LAL *ET AL.*

CLEMENT, J.

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March 24.

IN RE BEHARI LAL

Statute, interpretation of—Immigration Act, R.S.C. 1906, Cap. 93, Secs. 10, 26-30—Delegation of power under the Act.

The power conferred upon the Governor-General in Council by section 30 of the Immigration Act, to prohibit the landing of immigrants of a specified class, cannot be delegated to the Minister of the Interior.

MOTION for the discharge of a number of Hindus, upon the return of a writ of *habeas corpus*, heard at Vancouver by CLEMENT, J., on the 24th of March, 1908.

Statement

Brydone-Jack and *Woods*, for the motion.
Macdonell, for the Dominion Government.

CLEMENT, J.: The applicants are held in custody by the Immigration Agent at Vancouver with a view to their deportation because (as is alleged) they do not "come from the country of their birth or citizenship by a continuous journey and on through tickets purchased before leaving the country of their birth or citizenship." The right to detain them for the cause just specified is claimed under an Order of His Excellency the Governor-General in Council passed on the 8th of January last.

That Order in Council purports to be based upon the Immigration Act, 1907, and sections 10 and 30 are particularly relied upon as conferring upon His Excellency in Council the power to pass it.

Judgment

Before quoting from section 30, I shall refer to sections 26 to 29 (both inclusive) which all open with words of express prohibition: "No immigrant shall be permitted to land in Canada who," etc. These sections cover certain specified classes of immigrants. Then follows section 30 in these words:

"30. The Governor in Council may, by proclamation or order, whenever he considers it necessary or expedient, prohibit the landing in Canada of any specified class of immigrants of which due notice shall be given to the transportation companies."

I may say at once that in my opinion the Order in Council of

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8th January last must be upheld, if at all, under this section 30. Section 10 is the usual clause authorizing the framing of regulations for carrying out the Act and cannot be invoked to support a prohibition unless that prohibition be contained elsewhere in the Act, or in an Order in Council under the Act. Turning then to section 30, it empowers the Governor-General to prohibit, but it does not in terms permit the delegation of this power to any other person or body. And, in my opinion, nothing short of express words would avail to enable His Excellency in Council to delegate to another or others a power of this nature, the exercise of which is conditioned upon his consideration of its necessity or expediency.

This brings me to the Order in Council of 8th January last. Omitting immaterial matter it provides "that whenever in the opinion of the Minister of the Interior" certain conditions exist "immigrants may be prohibited from landing or coming into Canada unless," etc. Apart from the evident fact that this order does not prohibit but says that immigrants may be prohibited, etc.—meaning, I take it, that this may be done by immigration agents on instructions from the Minister of the Interior —it is an order expressly delegating to the Minister that duty to consider the necessity or expediency of the proposed prohibition which Parliament has in terms imposed upon His Excellency in Council and upon him alone. To paraphrase the language of Lord Coleridge, C.J., in *Cook* v. *Ward* (1877), 2 C.P.D. 255 at p. 262:

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"That was, in effect, the Governor-General in Council assuming to clothe the minister, a member of their body, with a power which the Parliament alone could clothe him with." See also *In re Leeds Banking Company* (1866), 1 Chy. App. 561; *Osgood* v. *Nelson* (1872), L.R. 5 H.L. 636; Interpretation Act, R.S.C. 1906, Cap. 1, Sec. 34 (7).

The applicants must be discharged from custody and are entitled to their costs.

Motion granted.

IN RE SADDJIRO MALSUFURO *ET AL.*

GRANT, CO. J.

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March 25.

IN RE SADDJIRO MALSUFURO

County Court—Statute, construction of—Naturalization Act, R.S.C. 1906, Cap. 77—Naturalization of Japanese, objections and opposition to—Procedure upon—Jurisdiction—Cross-examination of applicants.

By the amendments of 1903 to the Naturalization Act, the scope of the judge's duty, as limited by the decision in *In re Webster* (1870), 7 C.L.J. 39, is changed, and the judge, upon an opposition being filed, or an objection taken in open Court to the granting of the certificate, has power to take any necessary measures to satisfy himself as to the truth of the facts stated by the applicant, and of his fitness to become a British subject.

APPLICATION for certificates of naturalization for 12 Japanese, heard by GRANT, Co. J., at Vancouver on the 19th of March, 1908. The facts are set out in the learned judge's reasons.

Statement

Haney, and *Schultz*, for the applicants.

Lucas, contra.

25th March, 1908.

GRANT, Co. J.: Each of the above named applicants, through his solicitor, in accordance with the provisions of section 17 of the above Act, filed with the Clerk of the County Court of the County of Vancouver a written notice of intention to present at the March sitting a certificate shewing length of residence in Canada, the taking of the oaths of residence and allegiance, and of his being of good character, and their names were duly posted by the clerk as required by sub-section 2 of section 17.

Before the opening of the Court at which said certificates would be presented, objections to the naturalization of said aliens were filed by Edward Alexander Lucas, a British subject, with the clerk, on the following grounds:

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1. That the applicants are subjects of the Emperor of Japan, and are not free to swear allegiance to any foreign sovereign.

2. That the applicants do not intend to reside permanently in Canada.

3. That the applicants do not bear true allegiance to His Majesty, King Edward VII.

4. That the applicants have no conception of the nature of the oaths of residence and allegiance taken by them.

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5. That the said oaths of allegiance and residence as taken by the said applicants are not binding upon them.

6. That the applicants are making these applications for the purpose of entitling them to certain privileges granted only to British subjects and have no intention of becoming *bona fide* British subjects or of serving His Majesty the King.

Upon the opening of the Court when the said certificates were presented and the particulars thereof were openly announced the said objector through Mr. *F. G. T. Lucas*, his counsel, offered the same objections to the naturalization of said aliens and asked that a day be fixed for the cross-examination of said aliens upon their oaths of residence and allegiance.

This Court, as far as the purposes of naturalization were concerned closed its sittings for the month of March on the 9th of March when counsel for the objector again urged his objections to the naturalization of said aliens and asked for their cross-examination upon their said affidavits and for a hearing in a summary way of the matters of the said objections, and a day for same being set, counsel for the said aliens and objector were heard and the hearing in a summary way further adjourned for judgment upon the objection of counsel for the aliens that the Court has no jurisdiction in the matter; (a.) That the application is not a proper one; (b.) That the objections filed are not within the Act; (c) That if so they are not properly before the Court; (d.) That the objections as stated are not a proper subject for cross-examination; (e.) That the objector is not properly before the Court.

Judgment

As to the objections of counsel for the aliens to the jurisdiction of the Court and the nature and scope of the objections, the answer is found in the Act itself. Section 18, in part, says:

"At any time after the filing of any notice (that is of intention to present the certificate aforesaid) and previous to the sittings of the Court any person objecting to the naturalization of the alien may file in the office of the clerk an opposition in which he shall state the grounds of his objections."

By section 19, sub-section 2:

"Where no opposition has been filed to the naturalization of an applicant, and no objection thereto is offered during the sittings, the Court, on the last day of the sittings shall direct that the certificate of the applicant be filed of record in the Court."

And by section 22:

"The alien shall after the filing of such certificate be entitled to a certificate of naturalization duly authenticated under the seal of the Court."

By sub-section 3 of section 19:

"If such opposition has been filed or objection offered the Court shall hear and determine the same in a summary way, and shall make such direction or order in the premises as the justice of the case requires."

From the plain reading of the above sections, when objections are filed before, or taken during, the sitting of the Court, the Court shall hear and determine the same in a summary manner. To hear and determine the matter means to decide it upon the merits: *In re Madden* (1871), 31 U.C.Q.B. 333. It is optional with "any person" whether or not he will file an opposition or take an objection to the naturalization of an alien, but having taken or filed his objection to the naturalization of an alien, the Court must deal with the same upon the merits and make such direction or order in the premises as the justice of the case requires.

On the argument it was contended by counsel for the applicants that the objections were really an appeal from the justice of the peace or notary public in granting the certificate presented to the Court and that *In re Webster* (1870), 7 C.L.J. 39, was an authority that the Court could not go behind the said certificate and inquire whether the evidence upon which it was granted was sufficient; that it must be presumed that the official who granted it saw that the provisions of the Act had been complied with. While *In re Webster* seems to have been followed as an authority as to the weight to be attached to the certificates presented on the part of the applicant, counsel for the objector contends that the amendments to the Naturalization Act passed in 1903 and now being Chapter 77, R. S. C. 1906, especially sections 17, 18 and 19 have changed the law as it existed when the decision in *In re Webster* was rendered and that as the law now stands the judge not only has the right but should go behind the certificate of the justice or notary if necessary, to get at the real facts of the matter so as to be able to give the order which the justice of the case requires. By the Act of 1868 under which *In re Webster* was decided instead of the provisions now contained in sections 17, 18 and 19 aforesaid, it was enacted as part of section 5 thereof:

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"And if during such general sitting the facts mentioned in such certificate are not controverted, or any other valid objection made to the naturalization of such alien, such Court, on the last day of such general sitting shall direct that such certificate be filed of record in the said Court, and thereupon such alien shall be thereby admitted and confirmed in all the rights and privileges of British birth."

The effect of the decision in *In re Webster* was to make the judges little more than ministerial officers in carrying out the decrees of the justices of the peace and notaries as to who should become naturalized British subjects, and as might have been expected the most glaring irregularities occurred in obtaining the certificates of naturalization. These irregularities were brought to the attention of the Dominion Government in 1902 in the report of the Royal Commission on Chinese and Japanese Immigration where the following appears at page 357:

"It is certain that many who were naturalized never resided in Canada for one full year; some of them may have resided here during the fishing season only for a part of three years and yet hundreds of these men who had not complied with the law were granted naturalization papers and received their licence to fish."

With a knowledge of the gross irregularities as to the granting of naturalization papers in accordance with the decision in *In re Webster* the Naturalization Act of 1903 was passed. In sections 17, 18 and 19 is found for the first time in any Canadian Naturalization Act provision for filing with the clerk of the Court notice of intention to apply for naturalization papers, for posting up of a list of the names of the said applicants, for filing an opposition to the granting of naturalization to an alien, and for the Court hearing and determining the same in a summary way and making such directions as the justice of the case may require.

Judgment

It is permissible in the interpretation of the statute to look at the circumstances under which an amendment of the law is made in order to understand the objects aimed at by the Legislature: see Lord Halsbury in *Eastman Photographic Materials Company* v. *Comptroller-General of Patents, Designs and Trade Marks* (1898), A.C. 571 at p. 576; Thesiger, L.J., in *Yewens* v. *Noakes* (1880), 6 Q.B.D. 530 at p. 535; and to consider whether the statute was intended to alter the law or leave it as it was before. I cannot express myself more clearly than in the

words of Cozens-Hardy, L.J., in *In re A Debtor* (1903), 1 K.B. 705 at p. 710:

"As a matter of common sense, I ask, was the section intended to alter the law, or to leave it exactly as it stood before? The only answer must be that it was intended to alter the law."

To what purpose was the law to be amended? I should say to remedy the mischief or defect in the law as it was at that time being administered; that is, to prevent as far as possible the fraudulent naturalization of aliens. It is laid down in the judgment of the Court in *Shaw* v. *Great Western Railway Co.* (1894), 1 Q. B. 373, that there is a presumption that statutes passed to amend the law are directed against defects which have come into notice about the time when those statutes were passed. I think that when we consider the Act as it stood when *In re Webster* was decided, the frauds or irregularities perpetrated under it when administered in accordance with that decision, as shewn by the report of the Royal Commission and the recommendations made to said Commission of "giving to the judge to whom the J. P. or notary's certificate is presented the power to take such measures to satisfy himself that the facts stated in the certificate are true," and the Act as it now stands with the new provisions contained in sections 17, 18 and 19, the presumption is not only legitimate but irresistible that Parliament intended to change the scope of the judge's duty as circumscribed in the decision in *In re Webster* and to give the judge the power to take such measures as might be necessary to satisfy himself that the facts stated in the certificate presented to the Court are true and to inquire into the claims and fitness of the applicant to become a British subject.

Judgment

I therefore order that the certificates of the notary in these matters be not now filed and that the said applicants appear before this Court for cross-examination on their oaths of residence and allegiance taken herein and for examination on such other matters relating to the claim for naturalization as to the judge may appear necessary.

Order accordingly.

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EAST KOOTENAY LUMBER COMPANY v. CANADIAN PACIFIC RAILWAY COMPANY.

Agreement, construction of—Freedom from liability for damage a consideration—"Property," meaning of—General words—Ejusdem generis.

In consideration of the construction of a siding to their mill premises, plaintiff Company entered into an agreement with the Railway Company freeing them from liability for damage to the "siding or to buildings, fences or other property whatsoever" of the plaintiff Company "or of any other person." Two horses of the plaintiff Company, engaged in hauling a car from one part of the siding to another, were killed by being run down with a car sent on the siding by a flying switch:—

Held, reversing the finding of WILSON, Co. J., that the word "property" in the agreement was not confined to fixtures, buildings and rolling stock, and that the horses were properly included.

Statement

APPEAL from the judgment of WILSON, Co. J., in an action tried before him at Cranbrook on the 18th and 20th of April, 1907. The facts are set out in the reasons for judgment of the learned trial judge.

Harvey, and *M. A. Macdonald*, for plaintiff Company.
Gurd, for defendant Railway Company.

16th July, 1907.

WILSON, CO. J.

WILSON, Co. J.: This action was brought to recover damages for the loss of two horses of the plaintiffs killed by the defendants on a spur siding to the plaintiffs' mill.

The facts as I find them are as follows: The defendants were hauling and switching cars on the spur on the morning of the accident and prior to the engine leaving, the plaintiffs' yard foreman, Leitch, asked the defendants' yard foreman, Pushee, who was in charge of the train and crew if they were coming on the siding again that day. Pushee replied no, I won't bother you any more to-day. The plaintiffs' yard foreman then called to the teamster to get his team hitched to the car standing there and haul it to a point on the main line. I must find that Pushee heard this conversation between the teamster and Leitch. The

teamster then hitched his team to the car and was hauling it toward the main line, when the defendants' switch engine sent into the spur two cars by what is known as a flying switch. These two cars ran in a short distance, met the team hauling the other car and killed the horses. I find, therefore, that the plaintiffs' acted in a careful manner, that the defendants' foreman, Pushee, after the conversation with Leitch did not use due care and that it was solely by reason of that negligence that the accident happened. A question was raised as to the plaintiffs making a proper use of the tracks by using horses to haul cars. I find that the Company did not place cars in position as desired, and no stronger evidence could be adduced than the conversation between Leitch and the teamster in Pushee's presence, when he instructed the teamster to haul the car to another point. If the Company had been placing cars, surely the plaintiffs would not have had the car hauled to practically the other end of the yard. The car could not be moved by hand up the grade and I find it was a reasonably proper use of the track to have the car hauled by the team in the manner in which it was hauled and in so doing the plaintiffs used all reasonable care.

The defendants as a further defence claim that they are released from liability on the agreement between the parties. The section in that agreement that is relied on reads as follows:

"6. That the Railway Company shall not be responsible for any damage or injury to the said siding or to buildings, fences, or other property whatsoever of the party of the second part, or of any other person or persons whomsoever in or upon the said buildings and premises, by fire or sparks communicated from any locomotive or car of the Railway Company, or by any other cause, or for any other injury which may be done to such buildings, fences, property, or siding, by any locomotive, car or train of the Railway Company, or for any loss of the contents of any car which may have been placed on the said siding for the party of the second part; whether such damage or injury or loss be caused by defects in the plant or machinery of the Railway Company, or by the negligence or default of its agents or employees or otherwise howsoever; and the party of the second part will hold the Railway Company harmless against all claims of any person or persons whomsoever, for damages or injuries to or loss of any car or property which may be in or upon the said siding, buildings and premises; it being hereby declared that the assumption by the party of the second part of the risk of such damage or loss, and of the same being caused by defects in the plant or machinery of the Railway Company, or

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by the fault or negligence of its agents or employees is one of the considerations for the execution by the Railway Company of the present agreement, without which such execution would not have taken place. And the party of the second part will indemnify the Railway Company from all loss of or injury to any of its property or the contents of any of its cars while in or upon any portion of the said siding, buildings, and premises, caused otherwise than by the negligence of the Railway Company, its agents or employees. And the party of the second part will compensate the Railway Company for all loss or damage caused to it or its plant or rolling stock by any default of the party of the second part in the performance of any of the conditions contained in the present agreement to be performed by the party of the second part."

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Under that section it seems to me that the present accident was not taken in view, as the accident to the horses does not come within the purview of the section as it deals only with fixtures and rolling stock. After the careful argument by the defendants' counsel I cannot see my way clear to change my view and I therefore find that the plaintiffs are entitled to recover.

The appeal was argued at Vancouver on the 8th of April, 1908, before IRVING, MORRISON and CLEMENT, JJ.

Argument

Davis, K.C., for appellants (defendant) Railway Company: We are released from liability under clause 6 of the siding agreement. The *ejusdem generis* rule of construction is applicable here, and therefore horses are included in the term "property": *Anderson* v. *Anderson* (1895), 1 Q.B. 749; *In re Stockport Ragged, Industrial, and Reformatory Schools* (1898), 2 Ch. 687.

He was stopped.

Sir C. H. Tupper, K.C., called upon for respondents (plaintiff) Company: The agreement must be considered with regard to circumstances. It is putting upon it an extreme construction to say that even as regards their fixtures, plaintiff Company were to be at the mercy or caprice of the Railway Company's men. There was gross negligence displayed. The cars sent in on the switch which caused the damage were not for us, were not used by us, and were afterwards taken out and used elsewhere. The custom was for the Railway Company to

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notify us when they wanted to use the siding for their own purposes.

Davis, called upon as to wilful misconduct on the part of the Railway Company: There was no case made out or raised that the horses were killed intentionally. Negligence only was set up, and on the agreement we are relieved from the consequences.

IRVING, J. [after stating the facts]: The learned County Court judge came to the conclusion that the siding agreement, by which the Lumber Company undertook not to hold the Railway Company responsible for damages was inapplicable to the horses injured on this occasion, because, in his opinion, horses, being moveable property, did not come within the purview of the agreement. Upon that point we are all agreed that he was wrong. I think the appeal must be allowed.

MORRISON, J.: I concur.

CLEMENT, J.: I agree.

Appeal allowed.

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Landlord and tenant—Forfeiture of lease—Relief against Non-payment of rent excused by oral assurance—Authority of landlady's husband—Grounds against relief—Supreme Court Act, B. C. Stat. 1903-4, Cap. 15, Sec. 20, Sub-Sec. 7—Evidence—Costs.

Plaintiff, as lessee, and defendant, as lessor, on the 1st of January, 1906, entered into a lease for a term of five years, at a rental of $70 per month, in advance, with a proviso for forfeiture and re-entry after 15 days' default in payment of rent, together with an exclusive option of purchase on terms named. Plaintiff being absent in December, 1906, and up to the 23rd of January, 1907, inadvertently allowed the rent for January to fall into arrear, but on the latter date, tendered defendant, through her solicitor, she herself being inaccessible, the rent for January and February, and also offered to defray any costs incurred. Defendant had in the meantime, through her bailiff, taken and retained possession. There was evidence of an oral arrangement that in the event of the plaintiff's absence at any time the forfeiture clause for non-payment in advance would not be enforced:—

Held, following *Newbolt* v. *Bingham* (1895), 72 L.T.N.S. 852, that, no third party interests having intervened, plaintiff was entitled to relief against forfeiture, both as to the term and the option, and that, the case coming within Rule 976 of the Supreme Court Rules, 1906, plaintiff should also get the costs of the action.

Observations on the effect of section 20, sub-section 7, Supreme Court Act.

Decision of HUNTER, C. J., affirmed.

Statement

APPEAL from the decision of HUNTER, C. J., in an action tried before him at Vancouver on the 30th of April, 1st of May, and the 25th and 26th of June, 1907. The facts are fully set forth in the reasons for judgment of the learned trial judge.

Martin, K.C., and *Craig*, for plaintiff.

Davis, K.C., and *Godfrey*, for defendant.

22nd August, 1907.

HUNTER, C. J.: On the 1st of January, 1906, the plaintiff, as lessee, and defendant, as lessor, entered into a lease, in pursuance of the Leaseholds Act, of a dwelling house in Vancouver, for the term of five years. The rent reserved was $70 per month, payable in advance, and the lease contained a proviso for forfeiture and re-entry after 15 days' default in payment of rent,

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and an exclusive option of purchase for the sum of $11,500, $2,000 of which was to be paid in cash, $1,500 in one year from such payment, $1,000 in two years from said date, and the balance of $7,000 in 15 years from said date, the unpaid instalments to bear interest at six per cent. payable half-yearly, and the option to be a charge on the land. There was also a covenant by the lessee to conclude the purchase after payment of the $2,000, and to pay all rates and taxes after such payment.

Plaintiff, who is a person of means, being absent from the city during December, 1906, and up to 23rd January, 1907, by inadvertence allowed the rent for January, 1907, to fall in arrear, whereupon the defendant took possession by her bailiff, and has since kept possession, although on 23rd January, 1907, plaintiff duly tendered defendant, through her solicitor, she herself not being accessible, the sum of $140 for the months of January and February, 1907, and also offered to pay any costs incurred.

Plaintiff claims a declaration that the lease is a good, valid, and subsisting lease, and in the alternative that the forfeiture be relieved against; whilst the defendant contends that the lease was obtained through an unconscionable advantage being taken by the plaintiff and her son of the mental weakness of the defendant's husband, which weakness was known to them, and that she executed it under coercion caused by the fear that her husband's health would be seriously affected if she refused.

Prior to the lease in question, the plaintiff and her son had occupied the premises under a two years' lease which expired on the 20th of June, 1905, and which included the defendant's furniture, at the rent of $100 per month. This lease also contained an option of purchase up to its termination, for $12,600.

This possession was continued up to the time of the lease in question under a lease dated 1st July, 1905, and was to run for three years and three months, which did not include the furniture, the rent reserved being $65 per month, payable in advance, and there was no option of purchase.

The plaintiff, who seemed to me an eminently credible witness, although her memory was possibly at fault in one or two matters, says that during the negotiations for the lease in question the defendant's husband, who was acting for the defendant,

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brought it back to her executed by the defendant, but that on finding that it stipulated that the rent should be paid in advance she objected, saying that she was away a good deal and that it was a nuisance to be thinking of it every month, and that she preferred to pay every year or six months; to which Mr. MacAdam replied that she need not trouble herself on that account, that if she were out of the city the rent would be all right until she came back, and that she would never have any trouble in that way, She says she thinks her son and his wife were present at this interview, and that it was a repetition of one which had taken place in May, 1905, to which both MacAdam and Mrs. MacAdam were parties. When she left for the States in September, 1906, she sent a cheque for $210 to Mrs. MacAdam, being the rent for October, November and December, 1906; but not returning until the latter part of January, 1907, the rent being in arrear, her son on or about January 23rd, sent a cheque for $140, being the rent for January and February, 1907, which was refused by the defendant as already stated. According to the plaintiff there was also some discussion about painting the house and about the repairs, and upon Mr. MacAdam saying that he did not want the bother of the house she offered to pay $70 per month instead of $65 which she had been paying and look after the painting and repairs if she got the lease with the option, which was agreed to, she suggesting the option and MacAdam fixing the times and amounts, saying that he did not care how long it ran after a certain amount had been paid so long as they got the interest. The plaintiff had no discussion with Mrs. MacAdam in respect of the last lease, but on the former occasion in May, 1905, both Mr. and Mrs. MacAdam were anxious to sell for $10,000 and in December, 1905, Mr. MacAdam offered it for $10,500. She denies that there was anything to suggest that Mr. MacAdam was not competent to do business or that she was warned by either Mrs. MacAdam or Miss Hamilton that he was not in a condition to do business.

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The plaintiff's son who was living with her and contributed to the maintenance of the establishment, corroborates his mother's account of the assurance given by MacAdam before the signing of the last lease, and also testifies to an interview in the summer

of 1906, in which MacAdam repeated the assurance that they need not worry over allowing the rent to run over when absent from the city. It also appears that during the currency of the second lease the defendant wished to remove her furniture and that the house required painting, and that there was an arrangement come to whereby the plaintiff should not pay any rent after the removal of the defendant's furniture until the arrival of her own furniture; and under this arrangement no rent was paid during October, November and December, 1905; and evidently one reason for the parties entering into the new lease in January, 1906, was to start *de novo*, and was on account of the different arrangement arrived at about the painting by which the plaintiff undertook to do it before June, 1906, and according to both the plaintiff and her son the increased rent, which was stated to be the highest rent paid for an unfurnished dwelling in Vancouver, and the undertaking to do the painting was the consideration for the option of purchase. The son also states that Mr. and Mrs. MacAdam offered it to them for $10,000.

At the time the MacAdams moved out their furniture there was some dispute as to whether they were entitled to remove the andirons and shelves that fitted into the wall, and while the son denies that he threatened MacAdam with an action, at any rate they were not removed.

Mrs. W. F. Huntting corroborates the others as to the assurance about the overdue rent at the interview in May, 1905, and also says the MacAdams wanted to sell for $10,500 on practically the Hunttings' own terms, and further than one motive for obtaining the option was to prevent the bother of moving if they did not want to. She was not present at the negotiations in December, nor at any time when there was any warning given not to do business with MacAdam.

The main ground of defence on the facts was that MacAdam was, to the knowledge of the plaintiff and her son, incompetent to transact any business and that therefore there should be no rehabilitation of the lease because an undue advantage was taken of MacAdam's condition to coerce Mrs. MacAdam into executing the lease. In support of this defence Dr. Burnett was called, who stated that he began to attend MacAdam in 1900; that he

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died of senile dementia in December, 1906, at about 66 or 68 years of age; that towards the latter part of 1905 he saw him every week when he had dizzy spells and convulsions, three of which he attended; that he found his memory failing; that he was not fit to do business by reason of these attacks which caused brain congestion. He further says that senile dementia exists on the average to such an extent as to incapacitate for business about two years before death, and that it would be rare for a man to be able to do business a year before his death from that cause. On the other hand he says that at the end of 1905, "in a general way he could talk quite clearly"; "a person who did not know the significance of such things might not know that it meant anything more than a hesitancy in talking," and that he "never particularly talked any business with him."

Mrs. MacAdam says that she noticed a great change in her husband in the spring of 1905; that he had a seizure in May and from that time on was in very poor condition; that he was unkind, careless in his dress, and lost money; that his father was in the asylum, and that an aunt and uncle died in the same way. He spent money on the house without consulting her, and she was ignorant of the fact that he intended to rent it after the first lease expired and wanted to move into it herself. The reason why three years and three months was fixed on as the term of the second lease was that she thought if anything

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happened to her husband, and she wished to sell, she would be in a better position to sell in the fall than in the summer. She denies that at the interview in the spring of 1905 there was any arrangement made as stated by W. F. Huntting and the two Mrs. Hunttings about the overdue rent, and says that all that passed about selling was a sarcastic query by her as to whether Mrs. Huntting thought the place worth $10,000 and that the latter replied that she would not have it at any price. She also says that, shortly after the second lease was signed, she refused to sell the place for $12,000, and that in the presence of Miss Hamilton and Mrs. Huntting, junior, she asked Mr. Huntting to come to her if he had any business in connection with the house; that a few days afterwards she told the plaintiff that the doctors had warned her that her husband was liable to die

at any time in an attack, and to keep all business away from him, and that again a few days afterwards Mr. and Mrs. Huntting came to her house and in the course of a discussion as to putting in hardwood floors she again warned him that MacAdam was not capable of transacting business. Before she signed the lease in question she says she had a discussion with her husband, and that she strongly objected to signing it, but yielded when she found that it was causing him much worry and that he was likely to have a seizure.

Miss Hamilton knew MacAdam from the spring of 1904, and says that she noticed instances of impairment of memory; that he would say things one day and contradict them the next; that he talked of building a 10 or 12 roomed house with a 25 foot verandah for $800; that there was a conversation in October, 1905, at which Huntting and his wife, his mother and Mrs. MacAdam were present, in which the defendant told Huntting that she had refused an offer of $12,000 for the house and that she would not sell it at any price as she wanted to live in it; that on the same day she also asked him to come to her on any business in connection with the house as the doctors had said that her husband was not to be worried with business, and further, that there was some discussion about the things that Mrs. MacAdam was taking out of the house; and that Huntting threatened to put the matter in Court. She also says that shortly afterwards there was a discussion about putting in hardwood floors, when on Huntting saying that he would consult MacAdam, the defendant again told him that he was incapable of doing business. About the end of November, according to this witness, Huntting told MacAdam that he could collect $15 per day for the time he was at the hotel by reason of the house being left without any furniture. About this time she had a conversation with the plaintiff, who said on her remarking that MacAdam was not capable of doing business that that was not her affair, and that she had done her business with Mr. MacAdam, and Miss Hamilton admits that she never did any business herself with the deceased.

Mr. Gallagher, a real estate agent, states that in 1903 he had made an arrangement to go into business with the deceased

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under certain conditions, but found him incompetent to do business after two or three interviews, as his memory was failing and also on one occasion that he had an hallucination about his wife.

E. W. Leeson, a grocer, says that in the fall of 1905, he had a transaction in mining stock with the deceased, and that "he seemed to have lost the capacity of doing business or knowing accurately what he was doing"; but this may have been the consequence of a stroke that the deceased had recently received.

Another witness, Bell, says that he became acquainted with the deceased in August, 1903, and met him almost continuously up to his death; "there was something peculiar about him, not so much pronounced at that time, but subsequently. My first impression was confirmed that there was something strange about the man's train of thought, that he was not consecutive in ideas and sort of contradicted himself," and he "decided to put him in the suspense account, and not to indulge in any business ventures with him." But he is unable to say that, if he had adopted any of MacAdam's suggestions as to business investments, he would have made a bad investment.

Mr. Waterfall says that he had several business conversations with the deceased in 1905 and 1906; that he was infirm in body and rather inclined to be childish; but in cross-examination he admits that he talked rationally on most occasions, and that he never heard him make ridiculous statements; and that he would not go so far as to say it was not possible for him to do business during 1905. This witness also on being re-called to verify or correct a former statement, gave it as his opinion that it would be impossible for a stranger to have a business transaction with the deceased at the end of 1905 and January, 1906, without realizing that he was incapable, but I think the evidence is clearly inadmissible as being a matter for the Court and not the witness.

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Dr. Wright, a Presbyterian minister, knew MacAdam for three years before his death, and met him frequently, says that he talked usually more or less incoherently, and had visionary schemes, but admits that he has helped to work up the case and has no doubt about Mrs. MacAdam's having the right side of the case.

Mrs. MacAdam's sister also says he was incoherent, and that on one occasion (she could not say whether before or after the lease was signed) he wrapped his clothes up in separate parcels claiming that that made them handier to get at than on the hooks.

Lisle Wright, a nephew of the defendant, corroborates the defendant's account of the hardwood floor conversation, and also says that he heard Huntting ask MacAdam to see the Hudson's Bay Company, but that the latter said he could not enter into a lawsuit and told Huntting to go and see Mrs. MacAdam.

In rebuttal, Mr. Prescott, a real estate agent, says that the property was listed with him by the deceased in December, 1905, for sale at $11,500, but that he could not sell it on account of not being able to give possession. He did not observe any mental weakness in the conversation of the deceased although this was the only business transaction he had with him.

Mr. Jukes, manager of the Imperial Bank, met the deceased once in his bank in September, 1905, when he came in with Leeson to indorse the latter's note, and did not observe anything in his conversation to suggest incapacity, but did not pay very much attention as he was satisfied with Leeson's ability to meet the note.

W. W. Johnson, fire insurance agent, met deceased in June, 1905, when he called in to pay a premium, and noticed nothing unusual in his conversation. He talked intelligently and objected to the amount of the premium.

D. C. McGregor, insurance agent, knew deceased for a long time, met him two or three times during 1905, and once or twice in 1906, the last occasion being shortly before his death. There was nothing in his demeanour to suggest that he was irrational, nor anything rambling or incoherent in his conversation.

T. J. Smith, broker, had business relations with the deceased during 1904 and 1905, more or less up to the summer of 1906. Met him frequently at different intervals, considered him perfectly sane, but after the spring of 1904 he seemed unable to stand any business strain without doing himself considerable injury; would not entrust him with any business after 1905; did not treat his offer to sell the house for $11,000 seriously as he did not know whether Mrs. MacAdam was willing.

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In this conflicting state of the evidence, having regard to the fact that the burden is on him who asserts incompetency in an adult to prove it, I think it is impossible to say that it has been made out. But even assuming that it was, I am unable to find that knowledge of it was brought home to the plaintiff or her son. The question of the last lease was no new thing to either the Hunttings or the MacAdams, and while he might have shewn himself incapable of transacting business to which he was not accustomed, there was nothing about this transaction which, even assuming that his powers had considerably failed, he might not manage capably enough.

Moreover, it will be observed that even Mrs. MacAdam does not go so far as to say that any of the Hunttings were distinctly warned that he was mentally unsound, and assuming that one or more of them was told that he was not capable of attending to business, or that his life was endangered by his attempting to do business, that might easily be understood as a warning that he was physically, but not necessarily mentally, incompetent.

Furthermore, assuming either mental incapacity or want of authority known to the plaintiff, I think Mrs. MacAdam estopped herself from raising any such question when she allowed the executed lease to be handed to the plaintiff without any warning or protest.

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Sir Charles Hibbert Tupper, who acted as her solicitor in revising the lease, was called and testified that she and her husband came to him with the draft lease, and that on his drawing attention to the option MacAdam said abruptly and distinctly that the matter was settled and that as Mrs. MacAdam said nothing, he did not pursue the subject. Of course what passed could not be admitted as against the plaintiff, but it seems to me that if Mrs. MacAdam was averse to signing the lease, she should have signified to the plaintiff or her son either directly or through the solicitors, that she was not a free agent, and in that way apprised them that she was doing so under protest and reserving her rights, for as the Lord Chancellor says in *Vigers* v. *Pike* (1842), 8 Cl. & F. 562 at p. 652:

"A man who, with full knowledge of his case, does not complain, but deals with his opponent as if he had no case against him, builds up from

day to day a wall of protection for such opponent which will probably defeat any future attack upon him."

Even if clear notice that her husband was mentally incompetent, or that he had no authority to represent her had been given, and not merely that his health was precarious, or that he should not be worried with business, which is I think the only extent to which the evidence goes if accepted, it would, I think, have availed nothing in view of the fact that the lease signed by her was handed to the plaintiff without any accompanying protest, and *Sir Charles* cannot say that he gathered from anything she said that she objected to signing the lease.

As far as the evidence afforded by the lease itself is concerned, there is nothing intrinsically unconscionable or unfair in the option. The option is exercisable only by paying $2,000 in cash, another substantial payment of $1,500 is required in a year, and the balance is outstanding at 6%, which, considering the locality and the nature of the property, is good interest. So far as the price is concerned, no doubt property was rising at the time the lease was signed, but the property was offered for considerably less a few months before, and there is no certainty that its value may not fall very materially before the last payment is due.

With respect to the assurance alleged by the plaintiff to have been given that she need not worry about allowing the rent to run over if she were absent from the city, I see no reason to doubt that such assurance was twice given her before the lease in question was signed, and once by the deceased to the son after it came in force. In view of the fact that she was given to travelling and that the son was also contemplating a journey, it was a very natural question to ask for the purpose of getting an assurance one way or the other on the matter, and while the assurances given before the lease was signed may not found any equity to relief as being part of the negotiations which became merged in the covenant to pay in advance and the proviso for re-entry on default, still I think the assurance given the son after the lease was in force does afford a ground for relief, especially as the defendant took the benefit of three months' rent being paid in advance of the regular times of payment, which might well give the plaintiff reason to suppose that the defendant

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was not intending to insist strictly on the letter of the lease.

With regard to Mr. *Davis's* contention that the Court ought not to rehabilitate the lease as it contains an option of purchase I have not been referred to any case in which it has been so laid down in terms, and the case of *Coventry* v. *McLean* (1894), 21 A.R. 176, referred to by Mr. *Davis*, is not, I think, an authority for the proposition as, although it is somewhat difficult to say how far Mr. Justice Osler meant to go in his judgment, the case itself only decided that where the lease has expired from effluxion of time, at the time of the trial the Court could not restore it for the purpose of reviving an option of purchase contained in it, and I am at a loss to understand how the Court can by any judgment it gives work out jurisdiction to extend *in invitum* the time within which an option of purchase may be exercised, as obviously this would be to substitute a new agreement for that of the parties.

On the other hand, in *Newbolt* v. *Bingham* (1895), 72 L.T. N.S. 852, cited by Mr. *Martin*, it is laid down by the Court of Appeal that if the position is not altered so as to cause injustice, and if no interest of third parties has intervened, there is no longer any real discretion in the matter, but the Court must give the relief as a matter of course.

Here, so far from causing injustice by restoring the lease, in view of the conclusion that I have come to on the questions of fact, I would be causing injustice if I were to refuse to restore it as the option which was part of the consideration for the increased rent would be annihilated.

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As to the costs. Under the old practice in ordinary cases of neglect to pay the rent punctually the Court treated the matter as a suit for redemption, and the general rule was that the party seeking to redeem paid the costs. But it is pointed out by the Lord Chancellor in *Gerahty* v. *Malone* (1847), 1 H.L. Cas. 81 at p. 91, that this rule did not tie the hands of the Court, and that the Court might have regard to all the circumstances. Moreover, I think the action is within the scope of rule 976, and I cannot see any good cause for depriving the plaintiff of her costs, as I think the defendant had no solid ground for refusing the tender.

There will, therefore, be judgment for the plaintiff relieving against the forfeiture, with costs.

The appeal was argued at Victoria on the 19th, 20th, 21st and 24th of February, 1908, before IRVING, MORRISON and CLEMENT, JJ.

Sir C. H. Tupper, K.C., for appellant (defendant): We say this lease was obtained under circumstances which shewed no right to the relief sought: see *Howard* v. *Fanshawe* (1895), 64 L.J., Ch. 666; *Hare* v. *Elms* (1893), 62 L.J., Q.B. 187. As to the jurisdiction of the Court to relieve where peaceable possession has been obtained by landlord, see *Sloman* v. *Walter* (1784), 2 White & Tudor, 258. The Hunttings took advantage of their knowledge of MacAdam's condition: Watson's Compendium of Equity (1873), p. 87; *Coventry v. McLean* (1894), 21 A.R. 176; *Menzies* v. *Menzies* (1893), 24 Camp. R.C. 718 at p. 766; *Chinnock* v. *Sainsbury* (1860), 30 L.J., Ch. 409. As to an unfair bargain, *Falcke* v. *Gray* (1859), 29 L.J., Ch. 28. In the circumstances here, Mrs. MacAdam was in a helpless condition, and the Hunttings were aware of it.

Davis, K.C., on the same side: Our case is one of duress. Full notice of the condition of affairs was given the Hunttings. The term in the lease was ended, and the option gone.

Argument

Martin, K.C., for respondents (plaintiffs): A new lease would be fair and reasonable to both sides. Even if there was any idea of an undue advantage to Mrs. Huntting, it should be proved. It must be clear that the bargain is an unconscionable one. We are proceeding on the statute to be relieved from forfeiture, and we have merely to shew that we were willing to pay the rent. *Howard* v. *Fanshawe* (1895), 2 Ch. 581 is in our favour. See also *Buckley* v. *Bligle* (1884), 8 Ont. 85, *Hill* v. *Barclay* (1811), 18 Ves. 56; Bell's Landlord and Tenant, 582; *Newbolt* v. *Bingham*, (1895), 72 L.T.N.S. 852; *Coventry* v. *McLean* (1894), 21 A.R. 176; *Hughes* v. *Metropolitan Railway Co.* (1877), 2 App. Cas. 439 at p. 448; *North London Land Co.* v. *Jacques* (1884), 32 W. R. 283.

Tupper, in reply, cited *Mason* v. *Armitage* (1806), 33 E. R.

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204; *Longmate* v. *Ledger* (1860), 2 L. T. N. S. 256; *Ormes* v. *Beadel, ib.*, 308; *Cathcart* v. *Robinson* (1831), 5 Pet. 264.

Cur. adv. vult.

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IRVING, J.: In my opinion this appeal must be dismissed. With reference to the conclusions of fact arrived at by the learned Chief Justice, I am not prepared to differ with him in any way. The plaintiff, therefore, had an equity to have the lease renewed: *Hughes* v. *Metropolitan Railway Co.* (1877), 2 App. Cas. 439 at p. 448.

IRVING, J.

The only question is, should the relief against the forfeiture of the option to purchase be granted under section 20 (7) of the Supreme Court Act? It seems to me that the right to purchase was part and parcel of the contract of the lease, and that the lease having been restored on the ground that the defendant had given assurance that the rent would be accepted after its due date the option to purchase it would be restored.

MORRISON, J.: The only point on this appeal is one of relief against a forfeiture arising from a breach of the covenant to pay rent under a lease wherein the plaintiff was lessee and the defendant lessor.

The plaintiff has a son, a married man, and the head of a lumber concern of some magnitude—presumably an experienced man of business. The defendant had at the time of the incidents involved herein a somewhat aged, infirm husband. The period during which the breach occurred was at the time of the late rather frenzied condition of the real estate market.

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Neither the plaintiff's son nor the defendant's husband had any legal interest in the respective properties. However, the defendant alleges that she entered into the lease in question, the terms of which are claimed to be unconscionable, through the machinations, and under the undue pressure of the plaintiff and her son, exercised upon her through her husband, with whom they also dealt, and for whose mental and physical condition she was in constant fear, which fear led her, so she asserts, finally, to sign the instrument in question.

The learned trial judge has found on the facts against the defendant, and, notwithstanding the vigorous attempt of her counsel to get the Court away from those findings, I cannot see how that can be done in this particular case. On this point I cannot do better than quote from the judgment of Farwell, L. J., in *In re Wagstaff* (1908), 77 L.J., Ch. (C.A.) 190 at p. 192:

"In fact, in my opinion, if it had not been that the Court of Appeal had always resolutely set its face against reversing findings of fact depending on the demeanour of witnesses, the burden and expense of calling witnesses and having them cross-examined in Court would have become intolerable by this time, if they were to be disregarded and treated as mere paper evidence, which the Court of Appeal might deal with as though the judge of first instance had never seen the witnesses at all. We are, of course, bound in a case like the present, where counsel in their discretion and in the exercise of what they consider to be their duty press upon us to listen to the evidence; but speaking for myself, I do so always with the mental reservation that the truth is far more likely to be ascertained, when it depends on the credibility of A or B, by the learned judge in the Court below, than it is by any of us sitting here."

He has found that transactions and negotiations, which ultimately crystallized into the lease, were as alleged by the plaintiff. He has found there was no duress. This involves even disbelieving the defendant when she claims that out of solicitude for her infirm husband (which in itself does not amount to duress) she consented to sign the lease. In short, he found that the plaintiff's absence and non-payment of rent upon the due date were quite in accordance with the arrangements and understanding come to between the parties. He has found further that the position as between the parties has not altered so as to cause injustice and that there are no intervening interests of third parties: *Newbolt* v. *Bingham* (1895), 72 L. T. N. S. 852.

Prima facie the plaintiff is entitled to relief, and, as Courts in their inclination against forfeiture seize upon any positive act on the lessor's part from which an election to overlook the breach may be inferred, I think we must, in this case, in view of the trial judge's findings, disregard the attempt of the defendant to meet the relief here upon equitable grounds, and refuse to accede to her desire to have the full legal effect of her covenant as to payment of rent.

I would dismiss the appeal with costs.

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CLEMENT, J.: Our Supreme Court Act, Sec. 20 (7) clothes this Court with power "to relieve against all penalties and forfeitures" and the power carries with it, of course, the duty to exercise it in all proper cases. It is useless, perhaps, to protest against such paternal interference with men's bargains, but I must confess that to my mind it is—as put by Lord Eldon in *Hill* v. *Barclay* (1811), 18 Ves. 56 at p. 62—"taking a prodigious liberty with a contract" for any Court to say that the very result which the parties have agreed should follow a specified act or omission shall not follow. I have not attempted to trace the provision in our Act to its source, if it had any other than our own Legislature; but it certainly goes beyond any legislation in England or Ontario. The jurisdiction of the Court of Chancery in England to relieve a tenant against the forfeiture of his term for failure to pay his rent on the exact due date (though such forfeiture was expressly provided for in the lease) was too firmly settled in Lord Eldon's time to be disturbed, though, as he says, settled upon a principle "utterly without foundation." His vigorous protest had, however, this effect, that from that time forward the Courts in England have steadily denied their jurisdiction to interfere in the case of forfeitures arising from breaches other than the mere non-payment of rent: *Barrow* v. *Isaacs & Son* (1891), 1 Q.B. 417 at p. 425. It required legislation to enable the Courts to afford a tenant relief, from *e.g.*, forfeiture for breach of a covenant to insure; and later legislation has conferred jurisdiction in certain other cases. In cases not covered by legislation, relief can be extended in England, only on the ground of subsequently intervening equities, as well set forth by Mr. Justice DUFF in *Morton and Symonds* v. *Nichols* (1906), 12 B.C. 485 at p. 488. It is proper to note, too, in this connection that in the matter of relief against forfeiture for non-payment of rent, legislation in England was along the line of regulation and curtailment rather than of extension of the jurisdiction assumed by the Court of Chancery.

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However, it is not necessary, nor would it be proper, to attempt here any forecast as to how far our Legislature's radical extension of this Court's jurisdiction will carry us, or any general statement of the principles on which the Court should

act. For, as already indicated, this much is clear, that forfeiture for mere non-payment of rent on its due date has always been looked upon as a thing against which a Court of Equity should afford relief. That is the case we have before us and the very principle upon which we must relieve against the forfeiture so far as concerns the tenant-right (to use Mr. Justice Osler's expression in *Coventry* v. *McLean* (1894), 21 A.R. 176 at p. 181) compels us to relieve against the forfeiture so far as the option to purchase is concerned. The sponge must be passed over the slate and, upon the terms imposed by the Court being complied with, whatever (if any) they may be, the cause of offence is as if it had never been. Our statute was not specifically referred to on the argument before us, but it was contended—and the contention had some show of support in the language of the English Acts regulating, as intimated above, the exercise of jurisdiction in these cases—that no relief can be afforded when once the forfeiture has, as it were, become perfected by the landlord's entry into possession. But in *Howard* v. *Fanshawe* (1895), 64 L.J., Ch. 666, this contention was overruled, in my opinion properly, even under the English Acts. I do not see how the contention can be urged even plausibly under our statute. To give effect to it would rob the enactment of much of its remedial character and reduce the Court's jurisdiction to a merely *quia timet* basis. There is no hint of this in the very wide language of the Act.

Sir Charles Hibbert Tupper, however, contends that the plaintiff in this case can stand in no better position than a plaintiff seeking specific performance, and that the lease in question here was obtained under such circumstances and is of such a character that the Court should not decree specific performance of it. It is alleged, firstly, that the lease was obtained by duress; that the plaintiff, or her son for her, contrived to arrange the terms of the lease with the late husband of the defendant knowing that he was, through disease, of enfeebled intellect, and knowing, moreover, that if he once agreed to the terms his wife, the defendant, would be compelled either to agree or run the risk of killing her husband by an attitude of opposition to his wishes. This very serious charge the learned Chief Justice, after a

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patient hearing, has held to be unfounded and I cannot see my way to express any doubt as to the correctness of his finding. Then, secondly, it is said that the terms of the lease were unconscionable; that the option clause, particularly, was so unreasonable as to be in itself proof of over-reaching. It is difficult in such a case as this, where a very marked and large rise in values has taken place within the past two or three years in Vancouver, to avoid being "wise after the event," but on a careful perusal of the evidence I am not prepared to say that the figure named in the option was one at which no ordinarily intelligent man would be willing to sell this property in December, 1905.

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These grounds of defence—to some extent they are really one—must therefore fail, and I am unable to see on this record and this evidence any other ground for refusing the plaintiff the relief she asks.

The appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Tupper & Griffin.*
Solicitors for respondent: *Martin, Craig & Bourne.*

REX v. LABOURDETTE.

HUNTER, C.J.

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May 28.

REX v. LABOURDETTE

Criminal law—Indictment for concealing with intent to escape from prison—Attempt, and doing something with intent, to commit an offence—Difference between—Plea of guilty, when it may be struck out.

Where the accused was indicted for "concealing himself with intent to escape from the penitentiary":—

Held, that as the criminal act consists in an attempt to commit an offence, doing something with intent to commit the offence is not necessarily sufficient to constitute an attempt.

Where the accused pleads guilty to a charge, and it is disclosed that the indictment alleges only a fact which might or might not, according to the circumstances, be sufficient to prove an offence, the plea of guilty will be struck out.

Statement

CRIMINAL trial on an indictment for "concealing himself with intent to escape from the penitentiary," at New Westminster assizes before HUNTER, C.J., on the 28th of May, 1908.

Prisoner, undefended, on being arraigned, pleaded guilty.

McQuarrie, for the Crown, moved for sentence.

HUNTER, C.J.: Under what section of the Code are you proceeding?

Argument

McQuarrie: Section 72 makes it an attempt for anyone having the intent to commit an offence to do any act to accomplish his object.

HUNTER, C.J.: But the next sub-section shews that the criminal act consists in attempting to commit an offence and doing a thing with intent to commit an act is not necessarily enough to constitute an attempt.

McQuarrie: The Code does not require that an indictment should use technical language: it is enough if it informs the accused of what he is charged: section 852.

Judgment

HUNTER, C.J.: If he is charged with a criminal offence, but there is nothing in the Code making it an offence in itself for a prisoner to conceal himself with intent to escape; the only offence created is that of attempting to escape, and there is an

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obvious distinction between doing a thing with intent to commit an offence and attempting to commit the offence. For instance, A may load his gun with the declared intention of shooting B whenever he met him, but if he does not take his gun with him it would be vain to pretend that he had attempted to shoot B; or if he bought poison with the intention of killing B, but did nothing more, it would be impossible to say that he attempted to poison B. So if a prisoner conceals himself with the intention of escaping, that may or may not be sufficient evidence of an attempt according to the circumstances, but it is not an offence in itself. For instance, if the prisoner while locked up in his cell hid himself under his bed with the intention of escaping, it would in my opinion be an extraordinary thing to say that he had attempted to escape; while on the other hand, if he were found concealed near an open gate awaiting a chance to slip past the guard, that would be enough to warrant a conviction for an attempt.

Judgment

The plea of guilty will be struck out, and the indictment quashed on the ground that it does not state any offence, but only a fact which might or might not be sufficient according to the circumstances to prove an offence.

There is, of course, nothing to prevent the Crown from preferring an indictment for an attempt.

Indictment quashed.

PARROT *ET AL.* v. CHEALES.

HUNTER, C.J.

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May 26.

PARROT *v.* CHEALES

Practice—County Court action transferred to Supreme Court—Claim $140; counter-claim, $3,000—Time from which transferring order takes effect.

The order transferring an action from the County Court to the Supreme Court takes effect as soon as pronounced.

APPLICATION to set aside a transferring order in an action to recover $140 due on agreement for sale of land, brought in the County Court of Westminster. The defendant counter-claimed for $3,000 damages and recission of agreement, and as the counter-claim was beyond the jurisdiction of the County Court, a summons was taken out on the 6th of May, 1906, by the defendant's solicitor for transfer of the action to the Supreme Court, pursuant to section 72 of the County Courts Act. The summons being heard on the 8th of May, an order was made transferring the action to the Supreme Court. The order was drawn by the defendant's solicitor and approved on the 8th by the plaintiff's solicitor, then forwarded to the County Court judge for signature and received by the registrar at New Westminster on the 12th. The plaintiff's solicitor filed and served notice of trial in the Supreme Court on the 13th of May, for the assizes coming on the 26th of May, but the defendant's solicitor did not file or enter the order transferring the action until the 14th of May. A summons was taken out on the 18th of May by defendant's solicitor to set aside the notice of trial as premature and inadvertently served. On its coming up on the 20th before MORRISON, J., the matter was reserved for the trial judge and it came before HUNTER, C.J., on the 26th of May, 1908.

Statement

Bole, K.C., for the application.
J. D. Kennedy, contra.

HUNTER, C.J.: The order transferring the action to the Supreme Court was effective as soon as pronounced as is shewn

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by the fact that as soon as pronounced the time for appeal began to run. It was, moreover, received in the registry on the 12th and, although not served till the 14th, I think the Supreme Court became seized of the action the moment the order was pronounced, and that therefore the notice of trial was not premature although served on the 13th.

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BRYCE *ET AL.* v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Shipping—Collision—Overtaking vessel, duty of—Inevitable accident—Articles 22, 23, 24 and 25 Collision Regulations—Finding by trial judge with assessors, reversal of—Narrow channel—Wrong side—Duty of overtaken vessel to keep look-out astern—Onus of proof of contributing negligence of overtaken vessel—Damages, assessment of—Ante-dating of judgment.

In a collision action, there is, in order to establish contributory negligence, an onus on the overtaking vessel to shew that the overtaken one also violated the regulations and thereby contributed to the disaster:—

Held, on the facts in this case that such onus had not been discharged.

Per Hunter, C. J.: Article 24 of the regulations is meant to assure those on the overtaken vessel that they need not concern themselves with the movements of the overtaking ship provided the former keeps its course and speed.

The sole question being whether either or both vessels committed a breach of the regulations, the Court alone must decide, regardless of the opinion of the assessors.

Decision of MARTIN, J. (reported *ante* p. 96), reversed, IRVING, J., dissenting.

Statement

APPEAL from the decision of MARTIN, J., reported *ante* p. 96. The appeal was argued at Victoria on the 12th, 13th, 14th, 17th and 18th of February, 1908, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Martin, K.C., and *Bowser, K.C.* (*A.-G.*), for appellants (plaintiffs).

Bodwell, K.C., *Davis, K.C.*, and *McMullen*, for respondent (defendant) Company.

Cur. adv. vult.

29th April, 1908.

HUNTER, C.J.: Shortly after 2 p.m. on July 21st, 1906, the Princess Victoria, a steamship of 6,000 horse power and 21 knots, belonging to the defendant Company, left Vancouver on her regular triangular run to Victoria and Seattle. She took the nearest route to sea, *i.e.*, between Burnaby Shoal and Brockton Point, and entering the south side of the Narrows, after overhauling a small launch, almost immediately collided with the tug Chehalis which sank, and some nine persons were drowned. As the day was fine and clear, and as it cannot be disputed that the Princess Victoria was an overtaking vessel within the meaning of the regulations and was on the wrong side of the channel (it being admitted that the Narrows is a narrow channel) the onus is on the defendants to account for the occurrence. This they attempt to do by alleging that the Chehalis altered her course as the Princess approached and that if she had not done so there would have been no collision.

In support of this allegation there was the evidence of the officers of the Princess. Captain Griffin says that after he starboarded his helm to go around Brockton Point, he saw a motor launch, which according to First Officer Guns was behaving badly in her efforts to buck the tide, but owing to the course it was taking he could not go so far to port as he had intended, and had to steady up to prevent the Princess from running it down, in other words, he had to alter his course. This of course brought him nearer to the Chehalis, which he had observed crossing the Narrows before he rounded the point, and he says he gave two blasts to notify her captain that he was going to pass him on his port side, and that when in the act of giving the second blast he noticed the Chehalis make a sudden change in her course, taking her across the bows of the Princess. This statement conflicts with the entry in the scrap log (which was admittedly altered before the transfer to the ink log) and which stated as follows:

"Seeing Chehalis coming across our bows under a starboard helm making for the bight west of Brockton Point blew two whistles and stopped engines."

He also admitted on cross-examination that he did not know, as the log states, that the Chehalis was under a starboard helm.

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It is therefore evident that the account of the occurrence in the log is not to be relied upon, and it is also significant that the log does not suggest that the Chehalis had altered either her course or her speed. He also says that at the time of the impact his engines had been put full speed astern and that the speed had been reduced to three knots by water which would make the Princess going three knots astern by land, the current being six knots; but it seems to me that this is quite impossible having regard to the way in which the vessels collided and the angle of the collision. It must be obvious that if when going astern by the land there was a collision, there must have been plenty of time to have shot ahead clear of the Chehalis owing to the greatly superior speed of the Victoria.

Captain Griffin's evidence is in the main supported by Hilliard, the quartermaster, and Guns, first officer, acting as pilot. Sweet, a passenger on the Victoria, says that he first noticed the Princess running as he thought dangerously close to the direction taken by the launch, and that afterwards his attention was caught by the Chehalis coming across the bows of the Princess, having changed the direction of her course as he first saw it, but he admits in cross-examination that the apparent change might have been an optical illusion if the Princess had altered her course, and it is virtually admitted that the latter did so as she had to steady up and discontinue her course to port in order to avoid the launch. Grant, another passenger on the Victoria, thought it was the tide that brought the Chehalis across her bows, but is evidently mistaken in thinking that the Princess did not change her course to avoid the launch. Vilas, another passenger, says he was "watching the course of the launch and wondering if it would get out of the way in time to save its own neck. Of course we were travelling along at the time a pretty fast clip," and that as he stood looking at the launch to see if it got any of the wash from the Victoria, he heard the captain give two whistles and looked up and saw the Chehalis coming right under her bow. It will be noticed that none of these passengers say that they looked backwards at the track made by the Victoria as she was passing the launch to see if she had changed her course, and it is notorious that the ordinary observer on a

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moving object is almost certain to be under an optical illusion as to the motions or course of any other object, if he confines his attention to the other object as no doubt these persons did, being on the eve of a collision.

The only evidence that Captain House altered his helm, and the learned judge finds that he did alter his helm, was that of Lind, as none of the officers of the Victoria could say that they saw House shift his helm, in fact the quartermaster not only does not say so, but says that the Chehalis came across with the tide. But Lind clearly discredited himself by his free and easy swearing as where, for example, he swore to the fact that he saw the person steering the Chehalis throw his wheel to the right which immediately threw her to port, although it would have the contrary effect, because the attorneys agreed "that that statement of facts should prevail."

On the other hand, we have the evidence of Jones, the lighthouse keeper at Brockton Point, who says that he saw the launch about 400 yards west of the point and about 100 yards south of the Chehalis; and first saw the Victoria about 50 yards east of the Point, making the tug about 400 or 500 yards ahead of her. The Victoria was going full speed, and going closer to the Chehalis and he did not observe any change in her speed until she struck. This evidence, which was not broken down, is the evidence of a person on shore presumably indifferent between the parties, who had been watching these very waters for 17 years, and therefore far more capable of observing accurately what was going on than any passenger on either vessel.

Grove, the lighthouse keeper at Prospect Point, says he noticed that the Victoria seemed to be heading straight for the Chehalis, and that as soon as the sound of the Victoria's whistle had reached him the collision had taken place, and judging by the wash at the Victoria's bow she was going very fast.

Discarding then the evidence of the passengers on both sides as of little or no value on the question of a change in the course of the Chehalis, we have the evidence of the officers of the Victoria opposed by that of the officers of the Chehalis, as both House and Dean deny that she altered her course, while both the lighthouse keepers distinctly swear that the Victoria seemed

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to them to be going towards the Chehalis and not the Chehalis towards the Victoria, and there is the further circumstance that no plausible reason was urged why the Chehalis should have made the extraordinary change in her course as alleged.

There is therefore, in my opinion, no solid evidence to make good the onus on the Victoria to shew that House altered his helm so as to contribute to the collision, and if there was any alteration of the helm it was done in the effort to avoid the collision; and if there was in the course of the Chehalis, although not through the fault of the helmsman, then it was due to the tide which was one of the possibilities which Captain Griffin should have taken into account when overtaking a vessel which was barely able to cope with the current. Even the learned judge does not find that House altered his helm until after Griffin's signal, but according to the evidence of Cotton, a passenger on the Victoria, the two lighthouse keepers, Dean the engineer, and the plaintiff Bryce, the signal was almost immediately followed by the collision; in fact the latter says that he had not time to go and warn his wife, who was below; while House says that after hearing the signal he did not quite get his helm hard over when his vessel was struck.

In my opinion the evidence clearly shews that Captain Griffin soon found himself in difficulties when he entered the wrong side of the Narrows, which there was no reason for doing (except possibly to make up time, as he was late) especially as according to himself his vessel was easy to handle and he never saw a tide which had the least effect on her. On his port side he found a launch which was wobbling about in her efforts to get into the slack water, and on his starboard side he saw a small tug making across the Narrows evidently to get the advantage of the slack water, which under the circumstances she had a right to do. He should have at once, if necessary, slowed down or stopped and proceeded to the proper side of the channel astern of the tug. The initial fault was in rounding Brockton Point at full speed. If he chose to take that route he should have proceeded slowly with his vessel well in hand to anticipate any emergency; while if he chose to go at full speed, then he should have gone to the east of Burnaby Shoal until he

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opened up the Narrows and had a clear view of it as far as the entrance. But even though he did round the point at full speed I think he could have easily avoided the catastrophe by going over to the north side astern of the Chehalis; but the trouble was that in making up his mind to pass between the launch and the tug he miscalculated the combined retarding effect of the current and the steadying up of his ship to avoid the launch, and in my opinion the Victoria was solely to blame, having committed a breach of Articles 22, 23, 24 and 25 of the Regulations.

So far as concerns the suggestion that the Chehalis should have kept a look-out astern and was in fault for not doing so, I think that it is altogether unsound. Article 24 is more peremptory in its terms than almost any other, and in my opinion its object was to assure those on the overtaken vessel that they need not concern themselves about the movements of the overtaking vessel provided the former keeps its course and speed. It is obvious that if the leading vessel is to take into account the possibilities of miscalculation and error by the overtaking vessel and keep noticing her movements, it might by endeavouring to neutralize some supposed error precipitate the very result which it sought to avoid. The principle to be enforced is easy and simple and leaves no room for uncertainty, and it is that the rear vessel must keep out of the way of the one ahead.

With respect to the fault ascribed to Captain Griffin for having given only two blasts when he was about to go astern, I am not disposed to lay any stress on this as the mischief had then been done and it was of vastly more consequence at that moment to try to minimize the effect of his error than to trouble himself about the whistle.

I have not found it necessary to concern myself with the authorities as, in my opinion, on the facts there was a plain breach of plain regulations on the part of the Princess Victoria, and as stated the onus on her to make out that the Chehalis also violated the regulations and thereby contributed to the disaster has not been discharged.

It was insisted during the argument that we ought not to set aside the findings of the learned trial judge, concurred in as they

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were by the assessors. But in this case there was no question as to what was the proper manœuvre to make at any time, except possibly that the collision might have been avoided at the last moment if the Princess had thrown her helm hard over or put only one screw astern, in which case the assessors would be wrong. The sole question is whether or not either or both vessels committed a breach of the regulations, and this is a question which the Court alone must decide regardless of the opinion of the assessors.

In my opinion the appeal should be allowed with costs here and below, in favour of all the plaintiffs, but as my brother CLEMENT differs as to House, and my brother IRVING thinks that the appeal should be dismissed as to all the plaintiffs, the appeal will be allowed as to all except House.

As counsel for the appellants stated that in the event of the appeal being allowed they would not bring any more evidence as to the amount of compensation that should be allowed, we think that it is proper for us to assess the damages at once, which we do as follows:

To the plaintiff Bryce, suing for himself, $10,000.

To the plaintiff Bryce, suing as administrator of his wife, deceased, $5,000, to be apportioned as follows: $3,000 to himself, and $2,000 to the mother of his wife.

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To the plaintiff Benwell, for himself, $1,000.

For the loss of his son, $3,000, to be apportioned as follows: $1,500 for himself and $1,500 for his wife.

To the plaintiff Dean, $1,500.

To the plaintiff Crawford, for the loss of his son, $4,000, to be apportioned as follows: $2,000 for himself and $2,000 for his wife.

As to the plaintiff Yamaguchi, it was agreed that the question of compensation should stand to abide the result of the appeal, and this matter will be dealt with by a member of the Court at the convenience of the parties.

With regard to House, we have agreed to assess the damages at $2,000 in the event of another appellate tribunal coming to the conclusion that he is entitled to succeed to the full extent,

and in the meantime the question of the application of the Admiralty rule, as well as his costs, is reserved.

IRVING, J.: I think the conclusions reached by the learned trial judge are correct and that the appeal should be dismissed.

In my opinion the rate of speed of the Princess Victoria was not excessive; the course selected by her gave the Chehalis ample sea room had that vessel maintained her course; and having regard to the circumstances of the tide, the starboard-side being already occupied by the Chehalis, the power of the Princess Victoria, it would be unreasonable to have expected the Princess Victoria to have made a detour so as to enter the channel on the starboard-side, or, having entered it on the port side, to have gone across under the stern of the Chehalis. The accident was due to the Chehalis trying to cross the channel and then taking a sudden sheer to port under the combined influence of helm and tide.

CLEMENT, J.: As to all the appellant-plaintiffs, other than House, this appeal must, in my opinion, be allowed.

Deferring consideration of House's case, but assuming for a moment that he was guilty of negligence causing the disaster, that negligence is not imputable to the other plaintiffs: *Mills* v. *Armstrong—The Bernina* (1888), 57 L.J., Adm. 65: and as to them therefore the question still remains—Was the officer in charge of the Princess Victoria guilty of negligence causing the collision? For there may be two causes, both proximate, both simultaneously operative, of the one event. Where one of those causes is the negligence of the party suing, he cannot recover; but where it is the negligence, not of the plaintiff but of a third party, it cannot operate to screen the party sued, the enquiry then being, as I have indicated—Was the defendant also guilty of negligence? When the negligence alleged in a collision case is disregard of a statutory regulation, the further question in Canadian cases is, as pointed out in *The Ship Cuba* v. *McMillan* (1896), 26 S. C. R. 651 at p. 661, "whether the non-observance of the rule complained of did, or did not, in fact contribute to the collision."

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Reference is there made to *Cayzer, Irvine & Co.* v. *Carron Co.* (1884), 54 L.J., Adm. 18 (H.L.). In that case, which turned upon the Thames Navigation Rules, Lord Blackburn, at p. 22, says:

"In that case" speaking of *The Khedive* (1880), 5 App. Cas. 876—"the rule was a rule by statute, and it was enacted positively that if the rule was not obeyed the breach of it should in itself be deemed to be blame. When the statute imposing the rule is short of that, it is necessary to see that the actual transgression has been in fact the cause of the accident to some extent (it does not matter how much) and that is matter of proof."

In that same case, Lord Watson, at p. 24, expresses his view thus:

"But in the case of a rule like this mere disobedience is not enough; it must be shewn that it constituted fault in this sense, that it was actively contributing to the collision. To express it otherwise, it must be shewn to have been one of the proximate causes of the collision."

Later on, he expresses the opinion that the vessel disregarding one of the rules must accept the onus of shewing that the neglect did not contribute to the collision; but that view does not appear to have been shared by the other noble Lords, and I do not burden the defendant with that onus here.

In the case before us the Princess Victoria was, in my opinion, guilty of a most unjustifiable breach of Article 25 of the Collision Regulations, and that breach was, I think, the larger inducing cause of the catastrophe. Article 25 reads as follows:

"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

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To suggest a possible practice to the contrary is but to suggest a practice of law-breaking. One can readily see that allowance might be plausibly claimed for small, low-powered craft going out through the Narrows against the tide and naturally desirous of taking every advantage of slack water and back eddies. Such craft might possibly find protection in the plea that the starboard-side of mid-channel was not to them "safe and practicable," but manifestly no such plea could be put forward by a vessel like the Princess Victoria.

The learned trial judge has held that the First Narrows, from Prospect Point to Brockton Point, must be deemed a "narrow channel" within the meaning of this Article and I entirely agree with this view. The learned judge then animadverts very

emphatically upon the action of Captain House in disregarding this regulation; but, in my opinion,—and I say it with all deference—the fault of Captain House in that regard was venial when compared with the recklessness of the captain of the Princess Victoria. The only reference I can find in the judgment under review to this Acticle 25 so far as it touches the Princess Victoria is at the foot of p. 104 (13 B.C.) and as to this the learned judge says (p. 105): "It is enough to refer to what has already been said on the point"—meaning, evidently, to refer to the passage on p. 102, which deals with the position only "after the Princess had rounded the point." She is exonerated from all blame thereafter, but no reference is made to her course up to that time. In the latest case upon this particular Article, *Der Kaiser Wilhelm der Grosse* (1907), 76 L.J., P. 97 at p. 138, Sir Gorell Barnes gives expression to a view, which, if I may say so, must commend itself by its inherent reasonableness, and that is, that the rule ought to be taken as applicable, not only to the actual channel, but also to "so much of the water adjoining as was necessary for the navigation of the channel." The same view appears clearly put forward in *The Harvest* (1886), 55 L.J., Adm. 35, in appeal 11 P. D. 90. In this last case, it is true there was, in addition to the ordinary narrow channel rule, an express rule that vessels should be brought into the port at the mouth of the Tyne to the north of mid-channel, *i.e.*, the starboard-side for entering ships, and should be taken out to the south, *i.e.*, the starboard-side also for ships bound out. Of this rule Butt, J., says:

"My understanding of that rule is, that a vessel about to enter the Tyne coming from the southward is not to cross from the south side to the north side close up to the pier-heads. She is to get on to a course that will take her up the river at some considerable distance outside the piers. The reason for such a regulation is obvious."

And in that case a cross course two or two-and-a-half cables, *i.e.*, one-fifth or one-quarter of a mile distant from the pier-head was held faulty. In the Court of Appeal this view was upheld and emphasized. See also *The John O'Scott* (1897), P. 64. If, as put by Butt, J., the reason is "obvious," good seamanship would dictate the course, apart from express regulation.

Applying the principle thus enunciated to the case before us it seems clear that, as a matter of obedience to the regulations,

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as well as of regard for what should be the first care of a good seaman, namely, the safeguarding of life and property, a vessel entering the First Narrows from the east should not only enter at a point north of mid-channel, but should get on to a course that will take her down the Narrows at some considerable distance outside, *i.e.*, to the eastward of the entrance. The fact here is that instead of taking the course she should have taken outside Burnaby Shoal, thus opening up her course down the Narrows, the Princess Victoria got at once, after leaving her dock, upon a course which took her into the First Narrows within a very short distance (70 to 75 yards the captain made it) from Brockton Point and away to the south of mid-channel, and found herself at once in trouble. She had deliberately entered the channel on the wrong side at full speed and she continued on that wrong side to the end unable to pull up in time to avoid collision. Under these circumstances, I am quite unable to differentiate this case from *Thorogood* v. *Bryan* (1849), 18 L.J., C.P. 336. I mean, of course, as that case should have been decided in the view of the House of Lords in *The Bernina, ubi supra.* Thorogood was riding in a cab. His driver negligently set him down in the middle of the road instead of at the kerb. The defendant's coachman, driving at excessive speed, ran over and killed him. According to the House of Lords (eliminating any question of Thorogood's own personal negligence in getting out where he did) his widow should have recovered. I can see no difference in principle between the act of Thorogood's driver in negligently setting his fare down where he did in the way of a negligently advancing cab and the act of Captain House in negligently placing his passengers and crew in the way of the negligently advancing Princess Victoria. I am not here placing any stress upon the question of the speed of the Princess Victoria, but upon the fact that, as the result of a gross disregard of a plain rule, she advanced upon the spot where the collision took place and, like the driver of Bryan's cab, could not pull up in time to avert disaster. In my opinion, it is impossible to say otherwise than that one effective cause of that disaster was the negligence of the captain of the Princess Victoria: see *Engelhart* v. *Farrant & Co.* (1897), 1 Q.B. 240 at p. 243. With all deference,

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I again point out that this aspect of the case is not really touched upon in the judgment under review.

Other breaches of the regulations were charged against the Princess Victoria: (a.) that her speed was, under the circumstances, excessive; (b.) that, if she gave a two-blast signal, she did not in fact do what that signal indicated, *viz.*, direct her course to port; (c.) that, instead, she reversed her engines and went full speed astern without giving the three-blast signal to indicate that manœuvre; (d.) that she, an overtaking ship, failed to keep out of the way; (e.) that, finally, she failed to slacken her speed as promptly as was necessary on approaching the Chehalis. In view of the opinion that I have expressed—that there was throughout a clear and continuous breach of Article 25—it becomes unnecessary to say anything as to these other alleged transgressions other than this, that I am not satisfied that any one of them was a cause of the collision. I should, perhaps, except charges (a.), (d.) and (e.) as, to some extent and in a sense, those charges are involved with the more comprehensive charge under Article 25. But, standing alone, that is to say, if the Princess Victoria had been properly where she was immediately after rounding Brockton Point, I could not say that the learned trial judge was not justified on the evidence in finding that those charges were not substantiated, *i.e.*, as effective causes of this disaster. I point out, however, in reference to charge (a.) that in *Der Kaiser Wilhelm der Grosse, ubi supra*, Lord Alverstone criticizes rather strongly an attempt to cross the mouth of Cherbourg harbour, a "narrow channel," at half speed—in that case 18 knots. But I must express my dissent from the learned trial judge's view of the meaning of the words "I am directing my course to port." The word "port" can manifestly have no reference to the port side of the other ship, as the signal would, if so construed, mean one manœuvre of the helm on the part of an overtaking ship and the very opposite in the case of a meeting ship. I think the signal must mean "I am under a starboard helm." See *Der Kaiser Wilhelm der Grosse, ubi supra*, in which Fletcher-Moulton, L.J., speaks of the one-blast signal as meaning that "she was acting under a port helm," and the two-blast signal is spoken of by both Lord Alverstone and Fletcher-

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Moulton, L.J., as indicating that the ship giving the signal was "starboarding." See also *The Aristocrat* (1907), 77 L.J., P. 57. Lord Alverstone's language in the earlier case "that he should twice signal he was starboarding when he was not doing so was highly improper" would be very pertinent here if the "false signal" (as Lord Alverstone calls it later on in his judgment) had contributed to the collision.

As to the appellant House, the learned trial judge has found upon very conflicting testimony that at a time when the Chehalis was under obligation to keep her course and speed Captain House altered her course by "at least three to four points from west to southward, thus bringing her across the bows of the Princess Victoria. Some of the evidence would, if believed, indicate that this movement was made "in the agony of collision," but other evidence points strongly in an opposite direction. The learned trial judge believed that Captain House was "startled" when he heard the Princess Victoria's whistle "and made a wrong movement of his wheel at a critical moment in the strong tide." But, as the learned judge viewed the evidence, Captain House should not have been "startled." Had the Chehalis had any sort of a look-out the approach of the Princess Victoria would have been reported or seen by Captain House himself and "this deplorable collision would have been averted." I cannot, therefore, having due regard to the principles which should guide an appellate tribunal in reviewing a judgment as to matters of fact, say that the learned judge was wrong in finding Captain House to blame, *i.e.*, guilty of contributory negligence. The assessors associated with the trial judge agreed with him that the Chehalis was negligently handled on her "diagonal course from the north to the south shore." That course meant a breach of Article 25. Lord Alverstone is disposed to think that this Article "lays down a rule which is to be obeyed, not merely by one vessel as regards another, but, so far as practicable, absolutely and in all circumstances": *Der Kaiser Wilhelm der Grosse, supra.* Whether this be the true view or whether the Article is to be obeyed, primarily, in the interest and for the protection of ships travelling in the opposite direction on their own proper side (and there was no evidence of any such

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on this occasion) the manœuvre, when permissible, is a risky one and should only be taken with great precaution; and the learned judge has found, and Captain House indeed admits, that no precaution whatever was taken. I might add that what I have just said applies *a fortiori* to condemn the Princess Victoria for her breach of this Article 25, for she, unlike the Chehalis, could have no knowledge, until close to Brockton Point, of what shipping, inward bound or otherwise, there might be in the Narrows.

Appeal allowed, Irving, J., dissenting.

The question of the assessment of damages in the case of House was subsequently spoken to, and the following opinion was given:

HUNTER, C. J.: On the question as to the application of the Admiralty rule in assessing the damages, it seems to me that the decision of the Court of Appeal in the case of *The Bernina.* (*2.*) (1887), 12 P.D. 58; affirmed (1888), 13 App. Cas. 1, is conclusive both as to House and the other plaintiffs. In that case one of the actions was brought by the administrator of one Owen, an officer, who was partly responsible for the collision, and the Court were unanimous in holding that he could not have recovered if he had survived. Therefore, as the majority of the Court have held that House was at least partly responsible, he cannot recover any damages.

HUNTER, C.J.

IRVING, J.

IRVING, J., concurred.

CLEMENT, J.

CLEMENT, J., concurred.

[Upon application to settle the minutes of judgment, it being brought to the attention of the Court that the plaintiff Bryce had died after argument, but before judgment, the Court ordered the judgment to be ante-dated to the 18th of April, which was the last day of the argument.]

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THE KING v. THE CARLOTTA G. COX

THE KING v. THE CARLOTTA G. COX.

Admiralty law—Seizure and condemnation—Behring Sea Award Act, 1894—Illegal sealing—Evidence of offence—Onus—Failure to make entries in official log—Seizure by United States revenue cutter—"Duly commissioned and instructed."

Defendant schooner was on the 29th of May boarded by an American revenue cutter in pursuance of the Behring Sea Award Act, 1894, within the prohibited area defined in the Act. She then had among the seal skins on board six skins of freshly killed seals, which the master contended had been killed before the close season commenced, (1st of May), and outside the prohibited zone, *viz.:* on the 27th of April:—

Held, on the evidence that, the skins were taken during the close season.

Status of an officer "duly commissioned and instructed" by the President of the United States of America to seize a British vessel pursuant to the Behring Sea Award Act, 1894, considered.

Remarks on the effect of said Act since the field of pelagic sealing in Behring Sea has been entered by subjects of a power not a party to the agreement between Great Britain and the United States of America under the statute.

Statement

ACTION tried before MARTIN, LO. J.A., at Victoria on the 4th of February, 1908, for the condemnation of the Carlotta G. Cox, under the provisions of the Behring Sea Award Act, 1894.

Peters, K.C., for the Crown.

Luxton, K.C., for the ship.

7th March, 1908.

Judgment

MARTIN, LO. J.A.: On the 29th of May, 1907, shortly after 7 a.m., the sealing schooner Carlotta G. Cox, John Christian, master, a British vessel registered at Victoria, was boarded, searched and detained by the United States revenue cutter Rush in the North Pacific ocean off Yakutat Bay, in latitude 59° 10″ N. and longitude 141° 19″ W., being suspected of contravening the Behring Sea Award Act, 1904, which, *inter alia*, forbids subjects of Great Britain and the United States of America from pursuing, killing or capturing fur seals during the close season (beginning on the 1st of May and extending to the 31st of July)

on the high sea north of the 35th degree of N. latitude and eastward of the 180th degree of longitude. Later, and on the 4th of June, the schooner was formally seized at Sitka, where she had been towed by the Rush, and she was thence towed to Port Simpson, B. C., where she was handed over to Captain Hackett, commander of the Canadian Government steamer Quadra, who arranged with Captain Christian that he should take the schooner to Victoria and deliver her to the collector of customs there, which was done.

At the time of the first searching on May 29th, there were 77 fur seal skins in the schooner's salt room, of which the six top ones were very green, with blood on them so fresh that it soiled the fingers; the 7th and following skins were quite distinct in appearance, not fresh nor moist, but cured. On the 4th of June when these skins were again examined they had changed in appearance so that they could not be distinguished from the others; when the said six were first seen they had a thin layer of salt on them. The schooner's log was not written up, but the master said he had a note book with pencil entries which he produced and said contained the particulars of seals killed, from which he claimed to be able to make the entries in the log required by Article 5 of the First Schedule of said Act, and later he did, before reaching Sitka on the 4th of June, make certain entries therein shewing his total catch to be 133, out of which 56 skins had been landed at Hesquiat, V. I., on April 22nd, for shipment to Victoria.

Judgment

The schooner was fully manned and equipped for sealing and was admittedly within the prohibited area when seized, but the contention of her captain is that all the seals had been taken before the close season and outside of the prohibited area. At the time she was first discovered, about 6 a.m., by the Rush she was lying-to, not sealing; the weather was clear, and Mount St. Elias could be distinctly seen, 68 miles away. That locality is well known to sealers as the Fairweather sealing grounds and fur seals had been seen by the Rush in the vicinity for several days before, and at the time of search a Japanese sealer was engaged in sealing within five or six miles of the Carlotta G. Cox with several boats out, and other Japanese vessels had

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previously been sighted sealing in the vicinity and using firearms, the use of which is forbidden British and United States subjects by Article 6 of the said First Schedule; as one of the officers of the Rush described it: "Japanese vessels were shooting all round there," and though the Rush boarded one of them on the same morning, shortly after she had searched and detained the Carlotta G. Cox, nothing could be done to stop it because Japan is not a party to the Treaty between Great Britain and the United States of America upon which the said Behring Sea Award Act, 1894, is founded.

With respect to the said six green skins I am satisfied, largely upon the convincing evidence of the pilot of the Rush, James W. Keen, who has had a long experience in salting, overseeing and examining seal skins in the waters in question, and in connection with seizures, that the seals from which they were taken had been killed within four days before the 29th of May at the outside, and possibly some not longer than 24 hours. But even taking the killing to have been within four days what explanation is offered by the master? Nothing that is satisfactory to this Court, and in the circumstances the entry in his log which states that the last killing of seals took place over a month before, *viz.*: on the 27th of April when 25 were captured, is entitled to no credit. The master was not brought forward as a witness to explain this suspicious circumstance and I have no hesitation on all the facts in rejecting the suggestion that he happened to be in the locality in question hunting for sea otters, or on his way to Kadiak Island, or the Shumagin Islands for that purpose. It was laid down by this Court in *The Minnie* (1894), 3 B.C. 161, 4 Ex. C.R. 151, 23 S.C.R. 478; and in *The Shelby* (1895), 4 B. C. 342; and followed by a long line of cases ending with *The Queen* v. *The Ship Otto* (1898), 6 Ex. C.R. 188; that the statutory onus upon the master to explain his conduct in circumstances similar to these is a strong one, but, like the master in the *Shelby* case, he did not come forward (though this was done, *e.g.*, in *Re Ainoka*, (1894), 3 B.C. 121) to discharge that onus, nor was any reason given for his failure to do so; therefore I am satisfied on all the facts that his schooner was employed in the unlawful killing of seals as charged.

Judgment

There is a further charge, in paragraph 9 of the statement of claim, that proper entries were not made in the official log giving the particulars of killing as aforesaid and the condemnation of the vessel is also asked on that ground, but it has been already decided by this Court in *The Beatrice* (1895), 4 B.C. 347, that such neglect is not one which attaches any penalty or forfeiture to the ship, though the master is personally liable to suffer the statutory consequences, therefore it is unnecessary to consider that point in relation to the schooner. With respect to the decision in *The Beatrice* case, it may be that, as Mr. *Luxton* contends, full consideration was not given to section 4 of the said Act, nevertheless Mr. *Peters* is justified in claiming it as an express decision on the point in his favour, by which I am bound.

But the objection is raised that the seizure here was unlawful in that the commander of the Rush is not shewn to have been "duly commissioned and instructed by the President" to seize a British vessel, as is required to be done by section 1 of the Imperial Order in Council of 30th April, 1894, or that the name of the United States vessel making the seizure was beforehand "communicated by the President of the United States to Her Majesty as being a vessel so appointed for that purpose," as is also required by said Order in Council. And it is also objected that the commander of the Rush neither brought the schooner "for adjudication before any such British Court of Admiralty" nor "delivered her to any such British Officer as is mentioned in the said section (103 of the Merchant Shipping Act, 1854) for the purpose of being dealt with pursuant to the recited Act" (*i.e.*, Behring Sea Award Act, 1894). Said section 103 is as follows:

Judgment

"103 . . . . . And in order that the above provisions as to forfeiture may be carried into effect, it shall be lawful for any commissioned officer on full pay in the military or naval service of Her Majesty, or any British officer of customs, or any British consular officer, to seize and detain any ship which has, either wholly or as to any share therein, become subject to forfeiture as aforesaid, and to bring her for adjudication before the High Court of Admiralty in England or Ireland, or any Court having admiralty jurisdiction in Her Majesty's Dominions; and such Court may thereupon make such order in the case as it may think fit, and may award to the officer bringing in the same for adjudication such portion of the proceeds of the sale of any forfeited ship or share as it may think right."

In my opinion, even assuming that the commander of the Rush

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was not "duly commissioned and instructed" to seize the schooner, and even though the commander of the Quadra to whom she was first delivered is not an officer who can take proceedings against her under said section 103, yet seeing the fact is that she has been brought for adjudication before, and is now before this Court (and in the custody of its marshal) by and at the instance of an officer, Commander Allgood, R. N., who admittedly is within said section 103, and who claims her condemnation for contravention of the Behring Sea Award Act, it is not open to her owners to answer that charge (whatever other remedies they may have) by setting up irregularities in the manner in which she was originally seized or in the means whereby she was ultimately brought within the jurisdiction of this Court, and, later, before it by Commander Allgood who instructed the writ to be issued on the 29th of November, as appears by the indorsement thereof. According to the principle decided in *The Annandale* (1877), 2 P.D. 179, the forfeiture here accrued at the time the illegal act was done, and I am unable to agree that any of said antecedent irregularities can affect the admittedly regular proceedings in this Court.

The result is, therefore, that I find there has been a contravention of the Behring Sea Award Act, 1894, in the manner aforesaid, by the schooner Carlotta G. Cox and I therefore declare her and her equipment and everything on board of her to be forfeited to His Majesty, but, following the precedent established in *Re Ainoka* (1896), 5 B.C. 168, and *The Beatrice*, *ib.*, 171, in case of payment of a fine of £400 and costs within 30 days she, her equipment, and everything on board of her may be released.

Judgment

Though I have come to this conclusion yet I think it proper to observe that I have not overlooked the strong appeal of the defendant's counsel that this Court should now cast a lenient eye upon these infractions of the Behring Sea Award Act, 1894, since, it is contended, the facts proved in the course of the hearing shew that it has failed of its object and not only places the citizens of Canada at a disadvantage in their commercial enterprises in adjacent waters, but offers special inducements to foreign sealing vessels from *e.g.*, the other side of the Pacific.

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But however strong a case such facts may found in diplomatic circles for a change in the Act, or other redress, they can have no weight in a court of justice; the sole duty of a judge is to administer the law as it is given to him by that Legislature which has the power to enact it, and therefore I have imposed a penalty as though there had been no change in the condition of affairs since 1894.

Judgment for plaintiff.

McINNES v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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McINNES v. B. C. ELECTRIC RY. CO.

Practice—Discovery, examination for—Nature of under Rules of 1906—Old Rules 703 and 712—New Rules 370c and 370i (3).

The omission to include in the Supreme Court Rules, 1906, the amendment of June, 1900, to the old rule 703, has not changed the examination for discovery from a proceeding having the nature of a cross-examination.

Statement

MOTION for an order compelling plaintiff to answer certain questions on examination for discovery, heard before MARTIN, J., at Vancouver on the 21st of May, 1908.

Bloomfield, for plaintiff.
Martin, K.C., for defendants.

Judgment

MARTIN, J.: This is a motion to compel the plaintiff to answer certain questions on an examination for discovery, and it is resisted on the ground that the new rules of 1906 have introduced a change into the practice of this Court by omitting the amendment of June, 1900, to old rule 703, and, therefore, it is contended that the examination is no longer in the nature of a cross-examining one. But, though it is true the omission has, in some unaccountable manner, been made, yet the practice is

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still what I held it to be in the *Bank of B. C.* v. *Trapp* (1900), 7 B.C. 354, *i.e.*, in effect, a cross-examining one—quite apart from the said amendment of June, 1900. This view, in principle, was adopted on appeal in the same case, and also confirmed later by the Full Court in *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23, wherein at p. 27 the Chief Justice, with the concurrence of Mr. Justice IRVING said:

"This amendment (of June, 1900) really effected nothing, as it merely emphasizes the fact that the examination is to be a cross-examination, which was already provided for by rule 712, and interprets the expression 'matters in question in the action' to mean 'issues raised by the pleadings.'"

Since the new rules 370c. and 370i. (3.) are, for the present purpose, practically identical with the old rules 703 and 712, it follows that the decision in *Bank of B. C.* v. *Trapp, supra,* is exactly in point, and, therefore, the present motion must be allowed and the costs of this motion and any costs occasioned by such refusal to answer, shall be costs to the defendant in any event of the cause.

Judgment

With respect to question 26, as to what the plaintiff's friend told him at the time of the accident, it is perhaps somewhat premature to express a final opinion on it, because the circumstances which would determine that point are not fully brought out, owing to the refusal to answer other questions which clearly should have been answered. From one point of view, what was said to the witness by his friend would be relevant and, from another point, it would not.

Motion allowed.

GREEN v. THE WORLD PRINTING AND PUBLISHING COMPANY, LIMITED.

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GREEN v. THE WORLD PRINTING AND PUBLISHING CO.

Libel, action for—Verdict of jury opposed to judge's charge—New trial, grounds for.

Two substantive allegations of wrong-doing on the part of plaintiff as a minister of the Crown having been alleged, and there being no proof of the truth, and no justification for one of such allegations, the jury, after a charge in favour of plaintiff returned a verdict in favour of the defendant:—

Held, on appeal (IRVING, J., dissenting), that there should be a new trial.

APPEAL from the judgment of CLEMENT, J., in an action for damages for libel, tried before him with a jury at Vancouver on the 30th and 31st of July, 1907. The facts on which the case was decided are sufficiently set out in the headnote.

Statement

The appeal was argued at Victoria on the 26th of February, 1908, before HUNTER, C.J., IRVING and MORRISON, JJ.

Wilson K.C., and Burns, for appellant (plaintiff).

Macdonell, and *Wintemute*, for respondent (defendant) Company.

29th April, 1908.

HUNTER, C.J.: Following the established practice by which a Court of Appeal should refrain from prejudging the merits of a case when it orders a new trial, see *e.g., S. Pearson & Son, Limited* v. *Dublin Corporation* (1907), A.C. 351, 77 L.J., P.C. 1, I shall say nothing as to the merits, the sole question before us being whether or not there should be a new trial.

HUNTER, C.J.

In respect of his right to hold his verdict, Mr. *Macdonell* staked his case on the proposition that the article was to be read as a whole, and while he admitted that there was no foundation for the allegations concerning the Pine River leases which never had any existence, he maintained that the substance of the matter was that the plaintiff had been guilty of making a corrupt bargain with the applicants contrary to his duty as a minister of the Crown.

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I am unable to see how the sting of the article can be minimized in this way. The fair reading of the article, and that which any stranger would place upon it, was that there had been two distinct transactions, one in respect of the Pine River lands and the other in respect of the Telqua lands, and that in respect of both of them the plaintiff had been corrupt. It cannot be said to be of no consequence that the Pine River charge was unfounded, as it is obvious that if a similar transaction had taken place as alleged in respect of those lands the one transaction might be more difficult to explain in the presence of the other, as the existence of the one might in the mind of the impartial reader go more or less, according to the kind of mind, to negative the presumption of innocence in the case of the other.

HUNTER, C.J.

It seems to me, therefore, that the plaintiff suffered a legal wrong in respect of at least one charge for which no justification was attempted, and for which he has not had the remedy given by law, and the verdict therefore cannot be sustained. It was, moreover, in the teeth of the charge of the learned trial judge.

There should, therefore, be a new trial.

The appeal should be allowed with costs and the costs of the first trial should abide the result of the new trial.

IRVING, J.: The charge of the learned trial judge to the jury in this case was on the whole in the plaintiff's favour, and I can see no misdirection in it.

As to the jury finding for the defendant, it was said that the plaintiff was entitled to at least nominal damages, and that therefore we should now order a new trial. It seems in England, at any rate, that there is no inexorable rule or practice which precludes a Court from granting a new trial on account of the smallness of damages. Odgers in his 1905 edition on Libel and Slander, at p. 657, says:

IRVING, J.

"There seems to be no case reported in which a new trial had been granted on this ground in an action of libel; but in an action of slander a new trial was granted where the smallness of the amount recovered *i.e.*, one farthing, shewed, in the special circumstances of that case, that the jury had made an improper compromise, and had not really tried the issue submitted to them. (*Falvey* v. *Stanford* (1874), L.R. 10 Q.B. 54)."

In *Levi* v. *Milne* (1827), 4 Bing. 195, the Court ordered a new

trial because the jury made it manifest that it was their desire to deprive the plaintiff of his costs. That case proceeded on the ground that the jury had misbehaved themselves. In *Forsdike* v. *Stone* (1868), L.R. 3 C.P. 607, where for a cruel slander, which was disproved, a verdict of one shilling only was given, the judges refused a new trial. In *Milligan* v. *Jamieson* (1902), 4 O.L.R. 650, an action of slander, the slander was proved, but the jury virtually said "We find no damages for the plaintiff and find a verdict for the defendant"; that is just like the case we are now dealing with. On a motion for a new trial upon the ground that the verdict was perverse and that the jury should have found for the plaintiff with nominal damages at least, the Divisional Court, consisting of Meredith, C.J., and MacMahon and Lount, JJ., held that a new trial should not be ordered. Meredith, C.J., at p. 651, says in the course of his judgment:

"It is, I think, made out that the use by the respondent of the defamatory words was proved and admitted by the defendant; but granting this, *Simonds* v. *Chelsey* (1891), 20 S.C.R. 174, and *Scammell* v. *Clarke* (1894), 23 S.C.R. 307, establish that ordinarily where a verdict has passed for the defendant when it should have been for the plaintiff for nominal damages, the Court will not send the case down for another trial. In other words, that a new trial will not be granted to enable the plaintiff to obtain nominal damages.

IRVING, J.

"The actions in these cases were, no doubt, on contract, and the most that the plaintiff could have recovered was nominal damages, but I think the principle of the decisions applies here. All that the jury ought to have done, having come to the conclusion at which they arrived, was, putting the case most strongly for the appellant, to have found a verdict for him for nominal damages.

"They did not find for the plaintiff, but they found for the defendant, and, I think, applying the principle of the cases referred to, we should not send the case down for a second trial in order that the damages which the jury ought to have assessed should be assessed to the appellant.

"We have no power to alter the verdict, and the result, therefore, is that upon this branch of the case the appellant fails."

I think the appeal should be dismissed.

MORRISON, J.

MORRISON, J.: The pith of the alleged libel is that the plaintiff whilst acting as Chief Commissioner of Lands and Works for the Province of British Columbia accepted bribes from certain persons who were having dealings of a public

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nature with him as such Commissioner. There were no specific questions left to the jury which returned a general verdict for the defendant. The plaintiff was a responsible member of the Legislature, and when charged with such grave conduct, he is entitled to a vindication of his character unless the evidence upon which the jury based their verdict is clear and unmistakable.

It is not necessary to make any detailed observations on the evidence, for, as Lord Halsbury, L.C., said in the course of his judgment in *Jones* v. *Spencer* (1897), 77 L.T.N.S. 536 at p. 537:

"It is not desirable that the judges who take part in the discussion of the question whether or not there shall be a new trial, should make any observations about what the effect of the evidence was, or what might or might not have been the proper course to pursue, because such observations are likely to prejudice the trial which may come on afterwards; therefore, that matter ought to be left untouched by the tribunal which orders the new trial."

The learned trial judge charged for the plaintiff as strongly as a judge consistently could charge. The jury found a verdict directly in face of that charge. Not only that, but, in my opinion, found their verdict unreasonably against the facts left to them.

MORRISON, J.

"That doctrine of setting aside a verdict as being against evidence, or against the weight of evidence, has lasted in the Courts for an immense time . . . . . The criterion to apply is—Did the tribunal which has to decide the question come to the conclusion that the jury have, in the verdict at which they have arrived, acted unreasonably upon a contrast of the whole of the evidence on both sides": *Jones* v. *Spencer*, *supra*, *per* Lord Morris, at p. 538.

Lord Shand, at p. 538, says:

"The Court must be satisfied . . . . . that the verdict is such that it could not be reasonably sustained on the evidence; but I think that it has been put too strongly by Lord Esher, M.R., when he represents the state of the law to be this, that 'it is nearly impossible to obtain a new trial when a jury have returned their verdict.'"

I think there ought to be in this case a new trial. Costs of appeal to appellant, and costs of first trial to abide result of second.

Appeal allowed, Irving, J., dissenting.

FOLLIS v. SCHAAKE MACHINE WORKS.

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Feb. 1.

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FOLLIS v. SCHAAKE

Master and servant—Injury causing death of servant—Failure of action under common law and Employers' Liability Acts—Workmen's Compensation Act, 1902—"Dependants"—Costs occasioned by abortive common law action—Set-off—Power of arbitrator to direct taking evidence on commission.

Plaintiffs received money at times from deceased in his life-time, but there was no evidence of the money having been sent at regular intervals or in regular amounts:—

Held, on appeal, affirming the decision of MARTIN, J., that plaintiffs were, on the evidence, dependants within the meaning of the term in the Workmen's Compensation Act, 1902.

An action at common law for damages for the death of a workman having failed, the trial judge proceeded under section 2, sub-section 4 of the Workmen's Compensation Act, to assess compensation. On the question of apportionment of costs of the abortive action and the assessment under the Act, plaintiffs' counsel set up his inability under the Act to take evidence on commission:—

Held, per MARTIN, J., at the trial, that section 2 of the second schedule and Rules 2, 34 and 81 of the Workmen's Compensation Rules, 1904, give the arbitrator power to direct the taking of evidence on commission.

APPEAL from the judgment of MARTIN, J., in an action tried before him with a jury at New Westminster on the 8th and 9th of May, 1907, to recover damages for negligence on the part of defendant Company, resulting in the death of James Follis. The action was dismissed by the trial judge on the ground that no negligence was proved, but defendant Company having admitted liability under the Workmen's Compensation Act, 1902, the learned judge proceeded to assess compensation under that Act.

Statement

G. E. Martin, for plaintiffs.

Martin, K.C., for defendant Company.

1st February, 1908.

MARTIN, J.

MARTIN, J.: On the evidence I am satisfied that the deceased's parents, who live in Ireland, were, at the time of his death,

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wholly dependent upon his earnings and therefore, since those earnings exceeded $500 per annum "during the three years next preceding the injury" the amount of compensation is fixed by the Workmen's Compensation Act, 1902, First Schedule, Sec. 1, Sub-Sec. 1 (*a.*), at $1,500: *Varesick* v. *B. C. Copper Co.* (1906), 12 B.C. 286.

Then as to costs. The action failed at common law and under the Employers' Liability Act, and therefore was dismissed. But section 2, sub-section 4 of the Workmen's Compensation Act, *supra*, provides that:

"(4.) If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing this action, instead of proceeding under this Act. In any proceeding under this sub-section, when the Court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act."

Under that section I proceeded, at the plaintiff's request, to assess compensation as above, at $1,500, but from this sum I am at liberty to deduct all the costs which in my judgment have been caused by the plaintiff bringing this action instead of proceeding under said Act. That sum is the difference between the said two courses of procedure and can only be ascertained by the taxing officer in the usual way as hereinafter mentioned. To escape this result the plaintiff's solicitor submits that he was compelled to bring the action for the alleged reason that otherwise he would not have been able to obtain the evidence of the parents, because the rules of 1904, under the Act, make no provision for issuing a commission to take evidence abroad, and asks me in my discretion to grant him certain costs under section 6 of the Second Schedule which provides that "the costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator, ..." But first,

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in my opinion that section has no application to the special case of particular powers being conferred upon a judge of this Court sitting in the ordinary way in the trial of an action and who was and is not an arbitrator—*Cattermole* v. *Atlantic Transport Company* (1902), 1 K.B. 204, which decides that the assessment of the compensation is a proceeding in the action. And, second, I am unable to take the view that the arbitrator has not the power to direct evidence to be taken by commission. Section 3 of the Second Schedule and Rules 2, 34 and 8 point to the opposite conclusion.

The working out of the section has been considered in the *Cattermole* case, *supra*, and the practical way to ascertain the said difference in costs is that since the costs of the abortive action must follow the event, under Supreme Court Rule 976 unless for "good cause" to the contrary (and there is none such in this case) the successful dependant is entitled to have them taxed in the ordinary way, as pointed out in Beven on Employers' Liability and Workmen's Compensation, 2nd Ed., p. 241. Then the plaintiff is entitled to such costs as would have been occasioned by proceedings brought in the ordinary way under the Workmen's Compensation Act, which will be set off against or deducted from those of the defendant, and the balance, which presumably in this case will be in favour of the defendant, will be deducted from the plaintiff's compensation, and the necessary certificate given.

MARTIN, J.

I note that, apart from the "good cause" above mentioned, the words "shall be at liberty to deduct" give a discretion to the judge, in a proper case, to refuse to make the deduction. And it is pointed out by Beven that where the compensation is payable in instalments the deduction must be made correspondingly.

The appeal was argued at Vancouver on the 8th of April, 1908, before IRVING, MORRISON and CLEMENT, JJ.

Martin, K.C., for appellant (defendant) Company.
G. E. Martin, for respondents (plaintiffs), was not called upon.

Judgment

Per curiam: We are all of opinion that the evidence of

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dependency is sufficient to meet the case, and we express no view on any other point.

Appeal dismissed.

Solicitor for plaintiffs: *G. E. Martin.*
Solicitor for defendant Company: *W. G. E. McQuarrie.*

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ROBERTS
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ROBERTS v. TARTAR.

Admiralty law—Master discharged without notice—Custom of port as to termination of employment by employer or employee—Costs—Rule 132.

Plaintiff, a tug-boat master, was dismissed at the port of Vancouver, without notice. The ship owners pleaded a custom that such masters, as well as masters of small coasting vessels might be so discharged, and that they might also leave without notice, receiving pay up to the date of termination of service:—

Held, that no such custom existed and that plaintiff was entitled to recover, with costs.

Statement

ACTION tried before MARTIN, Lo. J.A., at Vancouver on the 1st of April, 1908, for recovery of wages and damages for wrongful dismissal. The facts on which the decision turns are shortly stated in the headnote.

Brydone-Jack, for plaintiff.
Reid, K.C., for defendant ship.

14th April, 1908.

Judgment

MARTIN, Lo. J.A.: This action raises a question of importance to mariners of the port of Vancouver, *viz.*: Is it the custom of that port that masters of tug-boats and small coasting vessels may on the one hand be discharged without notice, and, on the other, leave their employer's service in the same manner, in either case receiving their wages up to the date of the termination of the service?

The owners of the defendant tug-boat adduced evidence to support the custom and the plaintiff brought forward witnesses to the contrary, with the result that I am satisfied said alleged custom does not exist. It is of so unusual a nature that I should have expected evidence to satisfy me beyond reasonable doubt that it was the "settled and established practice of the port," as was said in *Postlethwaite* v. *Freeland* (1880), 5 App. Cas. 599 at p. 616, but even the defendant's evidence hardly went that length. But in any event I could not hold such a custom to be reasonable, the objections to it being so many and so obvious: to give one example only, it would be an extraordinary state of affairs, and one contrary not only to the interests of master and owner but of the travelling public, if a master on a trip from, say, Vancouver to Van Anda, thence to Nanaimo, and back to Vancouver, could, in effect, desert his ship at Van Anda without any notice, leave his passengers and his owners in the lurch, and yet get paid for such a manifest breach of all marine traditional obligations and standards. A Court of Admiralty can hardly be expected to sanction anything of that sort.

If the defendants were not justified in dismissing the plaintiff in pursuance of the said custom, which I find they were not, then after a careful consideration of all the evidence I have come to the conclusion that there was no other ground for his dismissal. The question very largely depends upon the state of the weather when the tug had the boom in tow, and though the master of the Sechelt was called by the defendant to disprove the plaintiff's statement on that head, he admitted he was unable to do so.

Judgment

Such being the case, the plaintiff is entitled to the sum of $116.35, being the amount of wages actually due up to his discharge on the 15th of January, and I award him the further sum of $100 damages, *i.e.*, one month's salary, for wrongful dismissal. Mr. *Jack* rightly contended that it has been the practice of this Court to make an allowance of a month's wages to mariners engaged on a monthly basis who have been wrongfully dismissed, provided they shewed due diligence, as the plaintiff did here, to obtain similar employment elsewhere after dismissal but where, as here, unsuccessful in the effort.

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Turning then to the set-off. The first item, for merchandize, has been abandoned, and the second one, for washing, the owners have not established. The third does not found any claim against the plaintiff. It is true that he, as master, increased the mate's wages on the pay-sheet sent to the owners, but they were not misled by it, and if they chose to pay the additional amount, which there was no legal obligation to do, they cannot recover the sum from the plaintiff.

The two last items in the set-off amount to $30.75 and are sought to be deducted from the plaintiff's wages because the owners objected to his taking a friend with him on the tug on one of her trips, and so they charged the fare up against him—$9—together with his friend's board for 28 days at 75 cents—$21.75. But I do not think it would be just to allow this deduction in view of the fact that one of the defendants' own witnesses admitted that owners in general did not object to captains of tug-boats taking their friends on such trips, even for longer periods than 28 days, and that it would not be customary to object to the captain extending in this way the courtesy of his vessel, so to speak, to a friend who no doubt would reciprocate. Such being the fact it would, I think, have been better, in case the owners herein objected to such a recognized practice, if they had definitely informed the master of that fact beforehand, otherwise it would not be fair to him to seek to make him liable.

Judgment

The result is that judgment will be entered in favour of the plaintiff for $116.35 wages and $100 damages, total $216.35.

As to costs. Mr. *Reid* asks that they should not be awarded to the plaintiff because the amount was relatively small, under £50 (Howell's Admiralty Practice, 63) and the action might have been brought in the County Court. It is true that the amount is not large, but as is frequently the case with actions regarding seamen's wages, questions of principle are herein involved, as a recent example of which in this Court see *Cable* v. *Ship Socotra ante*, p. 309 and the two questions of custom which have arisen are of general importance to mariners on this coast and merit the consideration of a Court of superior jurisdiction. But further, as was urged by plaintiff's counsel, this Court affords a special remedy for the recovery of wages, by the seizure of the

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vessel, which is not open to other Courts, and its practice affords the means for a very desirable, prompt determination of the claim. I see no good reason to depart from general Rule No. 132, that the costs should follow the event. No question of accounts, properly so called, arises here, as was the case in *The Fleur de Lis* (1866), L.R. 1 A. & E. 49; it is a simple claim for so much wages for so many days, as fully within the defendants' knowledge as the plaintiff's, and damages for wrongful dismissal.

Judgment for plaintiff.

IN RE NARAIN SINGH *ET AL.*

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IN RE NARAIN SINGH

Constitutional law—British North America Act, Sec. 95—Immigration Act, R.S.C. 1906, Cap. 93—British Columbia Immigration Act, 1908—Dominion and Provincial legislation, overlapping of.

Costs against the Crown.

Parliament, by the Immigration Act, R.S.C. 1906, Cap. 93, having provided a complete code dealing with immigration, the British Columbia Immigration Act, 1908, is inoperative.

Costs awarded against the Crown, following *Regina* v. *Little* (1898), 6 B.C. 321.

APPEAL from an order made by MORRISON, J., at Vancouver on the 13th of March, 1908, on an application for a writ of *habeas corpus,* directing the release of the applicants, a number of Hindus, convicted under the provisions of the British Columbia Immigration Act, 1908. The facts are set out in the reasons for judgment of the learned judge.

Statement

Davis, K.C., Brydone-Jack and *Woods,* for the applicants.

A. D. Taylor, K.C., for the Provincial Government.

MORRISON, J.: The prisoners on whose behalf the application is made for a writ of *habeas corpus,* arrived in the Port of Vancouver some days ago, and were examined by Dr. Monroe, the

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Dominion Immigration Agent, who was satisfied that they had complied with the requirements of the Dominion Immigration Act and granted them permission to land pursuant to section 17 thereof, which is as follows:

"The master of any vessel shall not permit any passengers to leave the vessel until written permission from the immigration agent to allow his passengers to land has been given to the master.

"2. The immigration agent at a port of entry, after satisfying himself that the requirements of this Act and of any Order in Council, proclamation or regulation made thereunder have been carried out, shall grant permission to the master of the vessel to allow the passengers to leave the vessel."

Immediately upon their landing, the Provincial authorities caused their detention and they were subjected to the test set out in the British Columbia Immigration Act, 1908, which test they failed to stand, and they were accordingly charged with an infraction of this Act, convicted and sentenced to the limit provided.

The ground relied upon in this application for their release is that the British Columbia Immigration Act, 1908, is *ultra vires* of the Legislature. I agree with this contention.

Section 95 of the British North America Act enacts that:

"In each Province the Legislature may make laws in relation to agriculture in the Province and to immigration into the Province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any of the Provinces, and to immigration into all or any of the Provinces; and any law of the Legislature of a Province in relation to agriculture or to immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

MORRISON, J.

The Parliament of Canada pursuant to the power contained in that section passed Chapter 93 of the Revised Statutes of Canada, 1906, and the amending Act, 1907, known as the Immigration Act, applicable to the whole of Canada. By sections 26 to 29 inclusive, certain classes of immigrants are excluded in terms. The Federal legislation thus occupied the field as to those.

Then by section 30, which enacts:

"The Governor in Council may, by proclamation or order, whenever he considers it necessary or expedient, prohibit the landing in Canada of any specified class of immigrants, of which due notice shall be given to the transportation companies.

"2. The Governor in Council may make such regulations as are necessary to prohibit the entry into Canada of any greater number of persons from any foreign country than the laws of such country permit to emigrate to Canada."

The remainder of the field is thus as it were pre-empted, shewing, in my opinion, that the Parliament of Canada intended to deal exclusively with the question of immigration into Canada. But whereas the sections above referred to point out the classes of immigrants who may not enter Canada, see 17, *supra*, and sections 35 and 53, to my mind clearly give a right in terms to land to immigrants such as the prisoners. If that be so, then the Dominion Act is met at once by the Provincial Act by section 7 of which

"Any person who, or corporation which, shall in any way assist any immigrant to contravene the provisions of this Act shall be deemed to have contravened this Act, and shall be liable to the penalties imposed by section 5 of this Act upon any such immigrant."

The Privy Council last year laid down two propositions in the case of the *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1907), A.C. 65 at p. 68, *viz.*:

"First, that there can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

These propositions were adopted by Lord Collins in delivering the judgment of the Privy Council this year in the case of *Toronto Corporation* v. *Canadian Pacific Railway* (1908), A.C. 54.

This last case goes very far indeed, for the power to legislate there was inferential only, whereas in the present instance, section 95, *supra*, gives the Dominion the power in terms, and in terms enacts that in a domain where the two legislations meet and the field is not clear the Dominion legislation must prevail. I do not think that those two Acts can stand together. They meet emphatically and therefore the Dominion Act must prevail.

The appeal was argued at Vancouver on the 29th of April, 1908, before HUNTER, C.J., IRVING and CLEMENT, JJ.

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A. D. Taylor, K.C., for the Crown: The Province has power to pass this legislation, and such legislation is in force so long as it is not repugnant to Dominion legislation. It is here not so much a question of jurisdiction as repugnancy.

[HUNTER, C.J.: The question is, whether it is operative.]

There is no Dominion legislation imposing an educational test. The Province has simply debarred illiterates.

[HUNTER, C.J.: By section 13 of the Dominion Immigration Act, the Governor in Council is clothed with power to impose further tests at any time. The Dominion having dealt with the question, how, therefore, can any Legislature deal with it?]

We submit that, so far, there is no Dominion legislation dealing with it. As to part of the statute being valid and part invalid, see *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1898), A.C. 700 at p. 709; *Union Colliery Co. of British Columbia* v. *Bryden* (1899), A.C. 580. Then the presumption is in favour of the Act.

Argument

[HUNTER, C.J.: The effect of that is, that the Government having power to say from time to time, in their discretion, that certain classes shall be excluded, does it not follow that until the Government specifically say so, those classes shall be admitted?]

Not necessarily; the Dominion Government must move in the matter, and until they do, there is no conflict.

Brydone-Jack, contra, not called upon.

HUNTER, C.J.

HUNTER, C.J.: By sections 26 to 30 of the Dominion Immigration Act, Parliament has occupied the field; in sections 26 to 29 it has specially provided that certain classes shall be excluded, and it has delegated to the Governor in Council power to deal with all other immigrants, and therefore we have a complete code as to what class or classes of immigrants shall be admitted or excluded. From sections 17 and 53 it must also be reasonably plain that the field has been occupied. The Provincial Act is inoperative so long as Parliament leaves the legislation in the position it is. The appeal should be dismissed with costs.

IRVING, J.
CLEMENT, J.

IRVING and CLEMENT, JJ., concurred.

Taylor—As to the question of costs against the Crown, see *Johnson* v. *Rex* (1904), A.C. 817.

[CLEMENT, J.: The gaoler is the party here; you are not in that class of case.]

The Attorney-General was the only person before the Court below, and he is the only person here.

[HUNTER, C.J.: Is the gaoler the *alter ego* of the Crown?]

Then if the Attorney-General is not a party, there is no right to inflict costs on him.

[HUNTER, C.J.: The applicants having been unlawfully deprived of their liberty, ought to be indemnified at least as to their costs.]

The Crown is not to be visited with costs merely because the Act is bad. This is a matter of a *quasi* criminal nature, where the Crown comes in to maintain the validity of the statute.

Per curiam: As to this we will consider and announce our decision later.

The following ruling was subsequently handed down:

24th June, 1908.

HUNTER, C.J.: In this case the Court has decided to adhere to the rule of practice laid down 10 years ago in the case of *Regina* v. *Little* (1898), 6 B.C. 321, in which it was established that the Court would and should on occasion give costs either for or against the Crown. That practice as then established has never been interfered with by the authorities, although they have had frequent occasion to change the rules; and therefore it must be understood so far as we are concerned, that we will not interfere with it, especially as in our opinion the practice is reasonable.

WILSON, LO. J.

1908

June 8.

IN RE RELIANCE GOLD MINING AND MILLING CO.

IN RE RELIANCE GOLD MINING AND MILLING COMPANY, LIMITED.

Land Registry Act, Secs. 24, 89—Surface rights of mineral claim—Registration of quit claim deed of surface.

The grant from the Crown to the surface rights of a mineral claim, being given in conjunction with the right to win the minerals thereunder, is not an interest which can be separately transferred by the grantee so as to secure registration under the Land Registry Act.

APPLICATION under section 89 of the Land Registry Act to compel the District Registrar of Land Titles at Nelson to register a quit claim deed given by the owners of the Giant fractional mineral claim, being lot 6,449, group one, Kootenay District, to the applicant. Heard before WILSON, Lo. J.S.C., at Nelson on the 8th of June, 1908.

Statement

The grantors in this quit claim deed were the owners of the mineral rights in the property under Crown grant issued in pursuance of the Mineral Act. The applicants were in occupation of a portion of the surface of such mineral claim and had erected a mill thereon. They had then applied for and obtained from the owners of the mineral claim the quit claim deed in question which covered that portion of the surface which they occupied. The district registrar refused to register this deed on the ground that the grantors had no transferable estate or interest in the surface.

Lennie, for the applicant.

The District Registrar, in person.

WILSON, Lo. J.: This is an application to compel the registration of a quit claim deed of certain surface rights in the Giant fractional mineral claim.

Judgment

Can the owner of a mineral claim transfer any rights to the surface of such claim, other than those he can transfer by virtue of a transfer of his mineral claim? It seems that a Crown grant conveys to an owner all minerals underneath certain land

and also gives him certain easements over the surface of that certain mineral claim. Does this applicant then come within section 24 of the Land Registry Act? In other words, following the section, has the grantor any estate or equitable interest whatever that he can transfer to this applicant?

All the grantor purports to convey is his right, etc., of in to or out of all the surface of that certain parcel, etc., being the Giant fractional mineral claim. All the grantor ever possessed under his Crown grant as to surface right is "the right to the use and possession of the surface of such mineral claim . . . . for the purpose of winning and getting from and out of such claim the minerals contained therein, including all operations connected therewith or with the business of mining."

Now it must be borne in mind that all the grantors could transfer was a right to the use of the surface, but it must also be borne in mind that that right under the Crown grant, as I view it, was to be used only in connection with the working of the mineral claim in question. Can such an easement therefore be the subject of transfer, apart from a transfer of the mineral rights? I do not think it can. It seems to me that this right to the use of the surface is a right running with the mineral rights and must and does follow their transfer and is not a transferable right apart from that. It may be claimed that this is an equitable interest that can be transferred, but I do not think that it is such an interest that can be segregated from the mineral interests so that it may be the subject of transfer alone. The Mineral Act has provided a mode for the acquisition of surface rights (see Sec. 26), and their transfer could then be dealt with. Taking that view surely there cannot be two interests outstanding that are transferable and that can be registered. Taking this view I do not think the applicant herein has secured any registerable interest, as its grantor had no interest that he could convey.

Judgment

Application refused.

CLEMENT, J.

1908

April 7.

TUYTENS v. NOBLE

TUYTENS v. NOBLE.

Vendor and purchaser—Contract for sale of land—Payment of instalment of purchase price to vendor's agent—Acknowledgment under seal by vendor—Estoppel—Fraud of agent—Repudiation of contract.

T. paid to D. a real estate agent, $700 as part payment of the purchase price of a certain lot. D. procured from N., the owner of the lot, an agreement under seal for the sale of the lot to T., containing a recital of payment of and a receipt for $700 on account of the purchase price, and delivered same to T. D. in reality only paid a $20 "deposit" to N., the owner, and afterwards absconded:—

Held, that N. was estopped from denying receipt of the $700, and that T. was entitled to a conveyance on payment of the balance mentioned in the agreement.

Gordon v. *James* (1885), 30 Ch. D. 249, followed.

Statement

ACTION by purchaser for specific performance of a contract for the sale and purchase of land, tried at Vancouver, before CLEMENT, J., on the 6th of April, 1908. The facts sufficiently appear in the headnote.

C. MacL. O'Brian, for plaintiff.

Martin, K.C., for defendant.

7th April, 1908.

Judgment

CLEMENT, J.: Action for specific performance. The execution of the agreement by the defendant is admitted; and the agreement when produced shews *prima facie* that the plaintiff is entitled to judgment; that he has paid $700 on account of the purchase price and that on payment of the balance, some $200 odd, he is entitled to a conveyance of the property free from all encumbrance. But the defendant claims that the receipt for the $700 which appears in the body of the agreement is not a true statement of the fact; that he was not paid that sum, or any sum, except $20 on account of the $700, the receipt of which he has acknowledged, as I have said, on the face of the agreement. The plaintiff chose to make the defendant's examination for discovery part of his case, and defendant's counsel was content to leave his client's story before the Court in that shape and did

not call any evidence. It appears that the plaintiff negotiated with one Dreyer for the purchase of the lot in question and finally agreed verbally to take it at $900. He did not then know the owner's name, but did know that Dreyer was not purporting to sell his own property. The plaintiff paid $700 to Dreyer on account of the purchase price and at the same time (practically) agreed with Dreyer that if the sale purchase transaction went through and the papers were all right, Dreyer and he should proceed to build on the lot as a joint venture. This arrangement does not, in my opinion, affect the case. The payment of $700 to Dreyer is the payment with which we are concerned, and the only one made by the plaintiff, and as the defendant has over his deliberately affixed signature under seal acknowledged receipt of that sum, it might be contended that this was an admission of Dreyer's authority to receive the payment as his agent, and that the defendant has not displaced this position by satisfactory evidence. I must say that the story told by the defendant is not at all satisfactory; but on further consideration I prefer to place my judgment upon another ground. To resume the narration of the facts: Dreyer, after receiving the $700, went to the defendant and negotiated about the lot. He returned to the plaintiff with the agreement sued on, duly signed by the defendant, and containing as already mentioned, an express acknowledgment of the receipt of $700 on account of the purchase price of $900. Thereupon the plaintiff signed the agreement assuming (for the first time so far as any binding contract is concerned) the obligations of a vendee, and naturally resting assured that his $700 had reached its intended and proper destination. Dreyer then absconded. In my opinion, this raises against the defendant a clear case of estoppel. *Gordon* v. *James* (1885), 30 Ch. D. 249, cited by Mr. *O'Brian*, is very much in point; and I think I may safely conclude my judgment by a paraphrase of the language of Lindley, L.J., at p. 259:

Judgment

I confess that when we look at the plaintiff's position it appears to me a safe one. He knew, although the defendant did not, that he had parted with his money to Dreyer. The defendant told him by this agreement that he (deft.) had got his money. He had no knowledge, and no reason to suppose for a moment, that that statement was not true; he had every reason to suppose that it was true. Acting upon that supposition he went

CLEMENT, J.
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on in perfect security, treating himself as owner of the property, and of course not looking after his $700, which he would have done if his suspicions had been aroused. The defendant, by his carelessness, you may say, but I should rather say by his act, enabled Dreyer to deceive the plaintiff and lull him into security, and prevent his having recourse to him who got his money from him by that trick.

There will be judgment for the plaintiff for specific performance with, if the plaintiff desires it, a reference as to title. If title is accepted, then the defendant should be directed, on payment by the plaintiff of $201.50, to execute a conveyance of the property, free from all encumbrance, to the plaintiff. As the defendant has repudiated the agreement, the plaintiff may, if he please, take judgment for $750, to cover the money paid, interest thereon and damages. The defendant must pay the costs of this action.

Judgment

Judgment for plaintiff.

MARTIN, J.
1908
June 17.
SHEPPARD v. SHEPPARD

SHEPPARD v. SHEPPARD.

Divorce—Jurisdiction of Supreme Court—Divorce and Matrimonial Causes Act, 1857 (Imperial)—Whether in force in British Columbia—Introduction of English law into Colonies of British Columbia and Vancouver's Island—Long and undisturbed practice of the Courts—Precedent.

The Divorce and Matrimonial Causes Act, 1857 (Imperial), is in force in British Columbia.

Watt v. Watt, reported *ante*, p. 281, not followed.

The introduction of English law into the Colonies of British Columbia and Vancouver's Island, and as it is in force in the Province of British Columbia, considered and reviewed.

Statement

ACTION tried before MARTIN, J., at Vancouver, on the 2nd of December, 1907, on a petition filed by the wife for a dissolution of marriage on statutory grounds.

Wintemute, for the petitioner.

The respondent was not represented.

17th June, 1908.

MARTIN, J.

1908

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MARTIN, J.: This is a wife's petition for dissolution of marriage on the grounds of adultery and cruelty. At the original hearing at Vancouver I refused to grant a decree because the latter charge was not sufficiently established, upon which occasion I deemed it advisable to make the following observations:

"In view of the increasing number of cases of this nature coming before the Court (three, for example, at this sittings) and the lax way in which the evidence in some of them has been presented, it is opportune to say that it must be understood that, for obvious reasons, the Court has a special responsibility in the exercise of this peculiar jurisdiction to society at large, quite apart from the interests of the parties immediately concerned, and those invoking its assistance must be prepared to establish their case in detail. In the great majority of petitions the respondent does not appear and hence it is, in my opinion, the duty of the Court to scrutinize the proceedings narrowly."

Leave was, however, in the special circumstances of this case, given the petitioner to adduce further evidence, and it later appearing that she had been deprived of the testimony of an important witness residing at a distance because she had no money with which to pay his expenses to bring him before me, additional leave was given in May last to prove certain facts by affidavit and supplement them by oral testimony, and the hearing was further adjourned to enable that to be done. This further hearing was delayed for divers good reasons but ultimately was fixed for the 2nd of December last, on which day the said evidence was taken and counsel, Mr. *Wintemute*, pressed for a decree in his client's favour.

Judgment

I do not propose to discuss the facts here, but simply say that they now fully establish the petitioner's case, and had not something intervened I should not then have hesitated to make a decree *nisi*, as I have often done during the nine years and a half that I have exercised this particular jurisdiction.

That which has intervened is a judgment delivered by my learned brother CLEMENT on the 10th of November last in *Watt* v. *Watt* (1907), 13 B.C. 281, wherein he holds, first, that this Court does not possess the necessary jurisdiction, and second, that he is not bound by its decision to the contrary in *M., falsely called S.* v. *S.* (1877), 1 B.C. (Pt. 1) 25; and *Scott* v. *Scott* (1891), 4 B.C. 316, nor by its practice for over 30 years.

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With respect to the second point, it would follow, if my learned brother is correct in holding that the said decisions are not binding on him, that his decision is, nevertheless, binding on me because it is a considered opinion given by a judge of this Court which I am bound to follow in accordance with numerous decisions in this Court, cited for the most part in *Watt* v. *Watt, supra,* to which I only add the striking example of *Clabon* v. *Lawry,* decided 20th January, 1898, and reported in the note to *Noble Five Mining Co.* v. *Last Chance Mining Co.* 2 M.M.C., at p. 38. My learned brother has indeed himself recently declared his own duty in the premises in his judgment delivered on the 14th of January last, in the *Victoria Municipal Voters List* matter (unreported) wherein he said:

"It is admitted that the learned Chief Justice of this Court, about this time last year, decided in favour of the right to vote in cases such as this, and I do not think that I should do otherwise than follow."

Such being the duty with respect to a decision given by one judge of this Court a year before, why is there a different duty with respect to a judgment given by the majority of all the judges of British Columbia 30 years ago?

This intervening decision in *Watt* v. *Watt* was referred to and discussed at the further hearing herein by the learned counsel for the petitioner herein, who contended that it was a departure from prior binding decisions, and therefore that I should disregard it and hear the present petition in accordance with said prior decisions and long established practice. But in such unusual circumstances, especially in a case of this gravity, it is only proper, I think, out of respect to my learned brother's considered judgment, not to ignore it, but to examine the reasons which induced him to take so serious a step. The first one he gives (p. 285) is that:

Judgment

"Owing, as I am given to understand, to his (*i.e.*, Chief Justice BEGBIE'S) refusal to join in the exercise of the alleged jurisdiction, the view put forward by Mr. Justice GRAY that one judge sitting alone could exercise the full powers of the Court was adopted in practice and has since been uniformly followed."

In view of the importance which will be attached later to the unbroken line of decisions of this Court, this is an unfortunate as well as important misconception of the Chief Justice's

attitude, which I have been at some pains, by a careful, not to say laborious, examination of the old Court records at Victoria, and of his and the other judges' original note books, to clear up, in which successful search I owe much to the assistance of the deputy registrar, Mr. Combe. The important facts in *Sharpe* v. *Sharpe, supra,* which it is essential to fully understand, and which are unfortunately largely omitted from the published report, are, that the petition, which was addressed "To the Supreme Court of British Columbia," was originally filed on the 13th of December, 1876, and the matter was first brought before Mr. Justice CREASE on the 31st of December, when the question of his jurisdiction came up, and he made an order for (*inter alia*) the trial of the petition without a jury, and this trial was fixed for the 16th of January next, to come on before the "Full Court," as it is termed by the 66th section of the Divorce and Matrimonial Causes Act, 1857, when constituted under section 10 thereof (see *Scott* v. *Scott, supra,* at p. 319) which was composed of all the judges of the Supreme Court of British Columbia, then three in number. When the hearing came on, and after the service of the citation had been proved, and the Registrar's certificate of the respondent's non-appearance had been filed, the Chief Justice raised the question of jurisdiction thus (I quote from his note book, No. 8, p. 12):

"The first point is as to jurisdiction. While alone, I have repeatedly declined jurisdiction in matrimonial causes. Since the year 1870 there has been one case but it never came to any decision, nor indeed did the proceedings reach a point when the question of jurisdiction could be considered."

Judgment

Mr. *Drake* for the petitioner then submitted his argument at length in support of the jurisdiction he invoked, and judgment was reserved, and later delivered on the 28th of February following (not on the 14th as stated in said law report) upholding the jurisdiction; and then, on Mr. *Drake's* application, the 7th of March was fixed for the further hearing. On that day, before the same Bench, the matter came on to be heard when the following extract from the Court Record (minute book, No. 5, p. 61) shews what took place:

"Mr. *Drake* appeared in support of petition for nullity of marriage.

"The Chief Justice took exception to the manner of filing the petition

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and asked under what rules and regulations counsel was proceeding.

"*Counsel:* Under the Rules and Regulations appended to the English statutes.

"The Chief Justice: The Rules and Regulations of an English Court are not part of the law of England and are therefore not in force here.

"*Per curiam:* Let the further hearing stand adjourned until proper Rules and Regulations have been promulgated."

Shortly afterwards, on the 21st of the same month, the Rules and Orders regulating the practice and procedure of the Supreme Court of British Columbia sitting in Divorce and Matrimonial Causes were promulgated as an Order of Court and signed by the three judges, as were also the accompanying forms, and further the Chief Justice (by virtue of his then sole authority under the old Supreme Court Fees Act, 1870, which authority was very shortly thereafter taken away and bestowed upon the whole Bench—Cap. 21 of 1877), signed and issued on the same day a special table of fees (see p. 12 of the published Order of Court) to be used "in all proceedings, matters and things relating to divorce and matrimonial causes and coming or depending before the said Supreme Court."

After these rules were signed by the judges they were, as a matter of precaution, sent to the Government to be laid before the Legislature then in session in conformity to the spirit of the 67th section of the Imperial Act, which required the Rules to be laid before Parliament, and later they were laid before the Legislature by the Premier and Attorney-General, Mr. A. C. Elliott, on the 12th of April. Then, on the last day of the following term, 25th of April, before the same Bench, the matter came up again when Mr. *Drake* applied for the direction of the Court as to what should be done regarding the proceedings which had been so far taken under the English rules, and as to whether or no said proceedings should be deemed regular, whereupon the Court gave the following direction, by the Chief Justice (*vide* his note book, *ante*, at p. 98):

Judgment

"Looking to the vast importance to the social status of parties now alive and possibly to the status and rights of inheritance, etc., of parties still unborn, it is better, without definitely deciding the question, that all proceedings should be taken *de novo* in accordance with the rules and regulations which now at least do certainly govern the forms of pleadings, etc. We incline to think indeed that all proceedings before these rules and

regulations came into force were irregular—*e.g.*, that there has been hitherto no petition filed, nor consequently any service thereof on the respondent; nor any affidavit, since there was in this view no cause in which an affidavit could be made or sworn."

Leave was then given to take the petition off the files and re-swear, re-serve, and re-file it, and the Court adjourned for that purpose. Next day the petition was re-sworn and re-filed, and afterwards and on the same day the Chief Justice himself made an order in these words : "I do order that this cause be tried and heard before the Full Court with a jury," and he also, *inter alia*, ordered that there should be a physical examination of the parties by medical practitioners. The petition and citation were then re-served on the respondent (on the 30th of April), and were also served on the Attorney-General on the 11th of May, so as to give the Crown formal notice of the proceedings, and finally the hearing, pursuant to the Chief Justice's order, came on before the Full Court on the 21st of June following when a decree was granted on the evidence adduced, following the decision in *D. falsely called F.* v. *F.* (1865), 34 L.J., P. & M. 66: the Registrar records it thus in the minute book:

"(The) Chief Justice gave the judgment of the Court. Decree, marriage a nullity."

It will be seen from all the foregoing facts that though Chief Justice BEGBIE naturally acted very deliberately and cautiously, as did the other judges, throughout these weighty proceedings, yet he ultimately not only did not "refuse to join in the exercise of the alleged jurisdiction," but actively did exercise it, and at once accepted as binding on him the decision of the Full Court in favour of it, thereafter promptly performing every duty necessary to enable the jurisdiction to be fully exercised. Moreover, the new rules and forms (*cf.* Form No. 3 still in use under Rule 1 of Divorce Rules of 1906), signed by him, recognized the opinion expressed not only by Mr. Justice GRAY but also by Mr. Justice CREASE (p. 61) that the jurisdiction could be fully exercised by one judge only. This rendered it unnecessary for him to sit, as a rule, in divorce cases, and since he was a bachelor it is not at all unreasonable to infer that he recognized that matters relating to the matrimonial state might well be left to those judges who had already entered it, their experience as

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husbands and fathers would necessarily be of much advantage in determining domestic matters. But when it became necessary for him to sit to constitute the Full Court, he did sit, as in *Scott* v. *Scott, supra,* which was an appeal sought to be taken to the Full Court specially sitting as "the Court for Divorce and Matrimonial Causes," under section 55 of the Act in question. In that case Mr. Justice DRAKE'S jurisdiction to grant a decree *nisi* for divorce *a vinculo* was questioned, but that learned judge held that "*Sharpe* v. *Sharpe, supra,* had settled the question of jurisdiction and was binding on him," and therefore he granted the decree. When the appeal came on before the Full Court (composed of BEGBIE, C.J., CREASE and WALKEM, JJ.), the Court unanimously upheld Mr. Justice DRAKE'S view (though it held it could not entertain an appeal from him) and the Chief Justice, who delivered its judgment, spoke with no uncertain sound about *S.* v. *S.*, saying, at p. 318:

> "We have neither the power nor the inclination to discuss the decision in *Sharpe* v. *Sharpe*, or to impugn it in any way."

How could there be a clearer expression by the Chief Justice of his recognition of the principle decided in that case, or a more loyal acceptance of its results by the whole Bench?

It will also be seen that my brother CLEMENT is under a misapprehension in saying that "until after 1872, when the Court at length consisted of three judges, no attempt was made to invoke the provisions of the Act," because the extract I have given above contains Chief Justice BEGBIE'S own statement to the contrary, which explains why he never made any rules on the subject, and having entertained and acted on that view for years "while alone" (and therefore being then practically "a law unto himself" in things judicial) it is not altogether to be wondered at that prospective petitioners were discouraged, or that he was the dissenting judge in *Sharpe* v. *Sharpe* when the vexed question at last came up for authoritative and more satisfactory adjudication than could flow from the opinion of one judge, however able.

Judgment

But my learned brother further says that two other judges "have as is well known, declined to exercise this jurisdiction." This statement requires explanation, without which it would

mislead. The judges referred to can only be Mr. Justice McCREIGHT and Chief Justice DAVIE, because every other judge has exercised said jurisdiction, including Mr. Justice ROBERTSON, though he, unhappily, was only on the Bench for a little over a year. The real reason why Chief Justice DAVIE and Mr. Justice McCREIGHT wished to avoid exercising this jurisdiction is that assigned by counsel in *Watt* v. *Watt, supra,* at p. 282, *i.e.*, because of religious scruples. These two judges were converts to the Roman Catholic religion (a fact which is apparently unknown to my learned brother CLEMENT owing, doubtless, to his having only recently, relatively, come to live among us) and in such circumstances the laudable and strict views of their new church in regard to divorce would naturally be particularly present to their minds, and their very proper conscientious scruples would lead them to wish to leave to the other judges of the Court the exercise of such a jurisdiction; and no doubt their colleagues of another faith would respect such scruples and relieve them of the painful necessity of facing a conflict between their consciences, their public office, and the rights of suitors. As will be seen by reference to the Chart of the Judges of the Supreme Court the changes in the personnel of the Bench enabled this to be easily done. Furthermore, Chief Justice DAVIE had been Attorney-General in the Robson Government from August 3rd, 1889, and from the 2nd of July, 1892, had been Premier of this Province, and held the two portfolios of Attorney-General and Provincial Secretary till he went on the Bench as Chief Justice on the 23rd of February, 1895, and therefore he had long and exceptional Legislative opportunity to settle any doubts that he thought might exist concerning this jurisdiction. But instead of so doing he caused to be proclaimed and brought into force, by Order in Council of October 22nd, 1892 (passed by virtue of section 7 of the Supreme Court Act, Con. Stat. B. C. 1888, cap. 31) the Supreme Court Rules of 1890, having the force of a statute, which embodied for the first time (under a separate heading, Order LXVIII.—Divorce and Matrimonial Causes)—in substance, and, indeed, nearly word for word, the Divorce and Matrimonial Rules passed by the judges in 1877. By the Judicature Act of 1879, the power of the

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Supreme Court judges to make Rules of Court had been taken away and conferred upon the Lieutenant-Governor in Council (see Hodgins' Dominion and Provincial Legislation, pp. 1,075-6) and it was apparently intended to re-enact all the Rules of Court so as to avoid doubts. It may be here noted that the former similar statutory Supreme Court Rules of 1880 recognized the special divorce jurisdiction and rules of 1877 thus:

"Rule 419.—Nothing in these rules shall affect the practice or procedure in Divorce or other Matrimonial Causes."

Both the Rules of 1880 and 1890 were printed and submitted to the Legislature before being brought into operation.

Such was the recognition by Premier and Attorney-General Davie of the jurisdiction now called in question. However, after he ascended the Bench he was, on the 9th of March, 1895 (under the Revised Statutes Act, 1895), appointed sole commissioner to "revise and consolidate a new edition of the laws of the Province of British Columbia, and, should the Lieutenant-Governor in Council see fit, of the statute law of England in force in and applicable to this Province." In his report to the Lieutenant-Governor in Council (1896) in the first volume of the revision presented for submission to the Legislature, he, for the general reasons given on pp. 4 and 5, included without change the Imperial Divorce Act of 1857, and its Amendment of 1858, but added notes on pp. 6 and D39-40, drawing particular attention to these Acts, and expressing his doubt respecting the jurisdiction thereunder, recognizing, however, that in view of the decision in *Sharpe* v. *Sharpe*, "it is necessary to include them in this consolidation," and he went on to say, "It is submitted that the whole matter should, before these statutes are finally incorporated into the Revised Statutes, be referred under the Supreme Court Reference Act, to the Full Court for decision." The Legislature, however, not only rejected his suggestion (largely, doubtless, for the personal reasons hereinbefore mentioned), but, some dissatisfaction having been expressed regarding the commission, passed on the 8th of May, 1897, a new "Act respecting the Revised Statutes of British Columbia," the enlarged and specific provisions of which it is instructive to contrast with those of the former Act of 1895. Chief Justice DAVIE having

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resigned his original commission (see his report in draft, vol. 2), a new one was issued to him and two other judges, *viz.:* Mr. Justice WALKEM and Mr. Justice DRAKE. They made their final report on the 31st of December, 1897, and they revised and consolidated the said Acts of 1857 and 1858, and, as Chapter 62, included them in the Revised Statutes; and on March 4th, 1898, the Legislature passed The Statutes Revision Act, 1898, Cap. 40, Sec. 5 of which "declared" said Cap. 62, with others, "to be the laws of the Province of British Columbia," and the preamble recites that it (62) was one of those "reported by the Commissioners as not departing or varying from the spirit of existing law, but as complying with the provisions of section 3 of the Act now in recital," *i.e.*, the Statutes Revision Act, 1897, of which more hereafter.

Now, in the light of these facts it is not too much, I think, to say that no importance should be attached to the failure of these two judges to exercise this jurisdiction. And since they left the Bench, over 10 years ago, all the other judges have continued to discharge that duty (till *Watt* v. *Watt*) and in addition, as recently as the 1st of May, 1906, the whole Bench of judges of this Court (Mr. Justice DUFF then being a member of it, before Mr. Justice CLEMENT'S appointment) joined in signing "for the avoidance of doubts," the same Divorce Rules that were proclaimed on the 28th of March, 1906, by his Honour the Lieutenant-Governor in Council (*vide* pp. 361-371, and v.-vi. of the Supreme Court Rules, 1906), and ratified by the Legislature on the 18th day of March, 1906, by the Supreme Court Rules, 1906, Act, Cap. 14, as to which I shall speak later. But, finally, there remains to be noticed the third reason given (p. 291), by CLEMENT, J., for not following our own decisions, and it is that:

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"No attempt has ever been made, so far as I know, to invoke the aid of the Courts in Manitoba, or the North-West Territories along this line, notwithstanding the fact that the law of England as it stood in 1870 was introduced there in terms almost identical with those of Sir James Douglas's proclamation."

Now, even assuming the case to be as stated, and the circumstances to be similar, I cannot see what inference could reasonably be drawn from them against our jurisdiction. But the fact is that not only is the language of the Manitoba statute very

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different, (*cf.* Manitoba Consolidated Statutes, 1880, Cap. 31, Sec. 4, which says "so far as the same can be made applicable"; and *cf.* Con. Statutes, 1888, Cap. 33, Sec. 1), recognizing a serious difficulty pointed out below, but there is no similarity between the distinct and peculiar and constitutional history of the Hudson's Bay Company's great plantation of Rupert's Land (which included the present Provinces of Manitoba, Alberta and Saskatchewan, and much more) granted to them by their charter of the 2nd of May, 1670, and that of the two separate colonies, now united, which form this Province. In his well-known judgment in *Sinclair* v. *Mulligan* (1886), 3 Man. L.R. 481 at p. 491 (in appeal, (1888), 5 Man. L.R. 17) Mr. Justice Killam points out the said difficulty, which alone completely destroys any fancied analogy, *i.e.*, the peculiar constitution of the old General Court of the Hudson's Bay Company, which derived its authority solely from that Company, and was presided over by its own appointed servant, recorder of Rupert's Land. Speaking of that Court, the learned judge says:

> "Even after the General Court was established, it can only be considered as the medium through which under its charter the Hudson's Bay Company administered justice in the colony, (Red River Settlement) and not as corresponding with, or representing otherwise, the Courts at Westminster."

Yet that was the highest Court which there was in existence when the Province of Manitoba was created and (with the North-West Territories) on the 15th of July, 1870, became part of Canada, and so continued to be for more than two years afterwards, till the new Court of Queen's Bench was constituted (*ib.* 489); and see 1 West. Law Ti., (*infra*) at p. 99. In the face of such unprecedented local conditions, considered in the light of the objection herein raised, it would be clearly fruitless to investigate this point further, quite apart from the fact that various other obvious difficulties arise out of the same decision, and that in *Templeton* v. *Stewart* (1892), 3 West. Law Ti. 189-94, (1893), 9 Man. L.R. 437; and see the Hudson's Bay Company's Land Tenures (1898), 87, 88, 183, 210-2 (note); and my articles entitled the Rise of Law in Rupert's Land in 1 West. Law Ti. (1890), pp. 49, 73, 93.

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I confess I cannot, with all due deference, quite comprehend

how, in the face of the foregoing facts and of such a venerable and ever increasing body of authority, in the course of which no less than five judges have in reported judgments formally upheld this jurisdiction, any judge can refuse to exercise it; the case of *Dodd* v. *Dodd* (1906), P. 189, 75 L.J. P. 49, which is cited as some slight authority to the contrary, is based upon quite different circumstances which are explained by the President of the Court at p. 53 of the Law Journal report. It comes to this, that if the decisions of this Court are in practice not to be binding on its own members, the inevitable result will be, as we said in *Jordan* v. *McMillan* (1901), 8 B. C. 27 at p. 29, "to introduce the wildest uncertainty in the administration of justice." The following extract taken from the judgment of the Chief Justice of Newfoundland in *Chancey* v. *Brooking* (1823), Newf. L.R. 314, at pp. 315-6, in a case relating to the application of English law in that colony, is singularly appropriate to the present occasion:

"Of all the evils which can afflict a country, uncertainty with regard to those rules which regulate our lives and properties is, undoubtedly, one of the greatest; for the slightest reflection will convince us that the condition of society must ever be extremely miserable, '*ubi lex est vaga aut incognita*' . . . . . It is obviously, therefore, of greater importance to the peace and happiness of any country that its laws should be clearly defined than that they should possess superior excellence, since men may enjoy tranquility and security under a code of laws by no means perfect, whereas they never can be quiet and secure where the laws are obscure and liable to arbitrary changes. In other words, it is of much less consequence what the rule is upon any given subject than that there should be some fixed and settled rule in regard to it. But it is evident that this certainty, so desirable and so necessary, can never be attained if judges allow themselves to think that they are not strictly bound by the solemn determinations of those judges who have preceded them; for if the decisions of a judge may be over-ruled and over-turned by his successor a new rule may be introduced by every new judge, and thus variety would usurp the place of certainty in our system of jurisprudence."

Judgment

In all the exceptional circumstances, and seeing that every other member of the Bench was exercising this jurisdiction now attacked, I think I may venture to express the opinion that it would have been better if my learned brother had invited some, if not all of us, to sit with him in *Watt* v. *Watt* if he wished to re-open this long settled question, or had taken some other

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means of giving us an opportunity to express our opinion on such an unusually grave matter, as Mr. Justice CREASE did to his colleagues over 30 years ago, because otherwise (according to *Scott* v. *Scott*), the case would have to go, as it since has gone, to their Lordships the Judicial Committee of the Privy Council without any present member of this Court being able to say a word in support of the jurisdiction which it has been his duty to exercise, a duty which I may say I, for one, have found a far from attractive, and always anxious one. I note also, as confirming my view, that when a question of the jurisdiction of the Court in England first arose, the Judge Ordinary consulted the other members of the Court saying:

> "I think it is a question of great nicety, which I ought not to take upon myself to decide. I will consult some of the members of the Full Court": *Vicars* v. *Vicars* (1859), 29 L.J., P. & M. 20.

Leaving, then, this branch of the subject I pass to the next, *viz.:* Did the Act in question apply to British Columbia in 1858? Holding the view that I am bound by the said decisions on that point, I would not in ordinary circumstances be called upon to discuss them, but seeing that leave has been granted on the 4th of February last to appeal to the Judicial Committee of the Privy Council, I think it is proper on this special occasion to make some observations thereon, and the more so because matters have arisen and cases have been decided since *Sharpe* v. *Sharpe* was determined.

Judgment

First, it may be noted that the despatch from the Secretary of State for the Colonies of the 14th of February, 1859, referred to by GRAY and CREASE, JJ. (pp. 37 and 61), which was not before the Court in 1877, being brought to light five years after, gives some support to their contention, and it is not unreasonable to suppose that Chief Justice BEGBIE might have been influenced by it had it been before him, though for the reasons I have mentioned he evidently had formed a strong contrary opinion early in his judicial career. At the same time he made the important admission (pp. 66 and 74), that the Act was in force to a certain substantial extent, nor would he go so far as to deny that it was in force in other important and far reaching respects specifically mentioned by the other judges, admitting that it was at least

doubtful as regards them. I refer particularly to the very large powers conferred upon the judge of the Court of Probate, styled in the Divorce Court "the Judge Ordinary," who, as his title implied, exercised alone all the wide and far reaching ordinary jurisdiction of the Court, saving only those matters reserved by section 10, and even as regards them he did everything, as a perusal of the law reports for the period shews, except when the actual hearing came on. To my mind it is absolutely clear that it cannot, at least, be said that all the powers so exercised by that single judge were not applicable to British Columbia. To contend that would be to admit (as pointed out by GRAY and CREASE, JJ., at pp. 33 and 60), that the Probate and Letters of Administration in England Act, 20 & 21 Vict., Cap. 77, passed at the same session as, and three days before the Divorce Act, did not apply. No one, however, has ventured to go that far, least of all Chief Justice BEGBIE, who had acted under it for years (74-5), and admitted that the jurisdiction of the judge of the Court of Probate (who was *ex officio* the Judge Ordinary of the Divorce Court; sections 8 and 9 of Divorce Act) was vested in himself as well as in the other judges of the Court *qua* Court, though not in any particular one of them, even though it was a new and special Court with a new and special judge at the head of it styled "The Judge of the Court of Probate." And I draw attention to the fact that though the jurisdiction of this judge of the Court of Probate has been accepted without question, though the Act was expressly limited to England only and on the same day a similar Act (Cap. 79, entitled The Probate and Letters of Administration Act (Ireland) 1857), was passed for Ireland, yet that involves in principle the very point that formed a stumbling block to Chief Justice BEGBIE, *i.e.*, a single judge in a new colony having, so to speak, to represent three judges in England. This is shewn by the distinctive and remarkable section 30 of the Probate Act (section 35 of the Irish Act), which provides that:

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"And to the Intent and End that the Procedure and Practice of the Court may be of the most simple and expeditious Character, it shall be lawful for the Lord Chancellor, at any Time after the passing of this Act, with the Advice and Assistance of the Lord Chief Justice of the Court of Queen's Bench, or any One of the Judges of the Superior Courts of Law to

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be by such Chief Justice named in that behalf, and of the Judge of the said Prerogative Court, to make Rules and Orders, to take effect when this Act shall come into operation, for regulating the Procedure and Practice of the Court, and the Duties of the Registrars, District Registrars, and other Officers thereof, and for determining what shall be deemed contentious and what shall be deemed non-contentious Business, and, subject to the express Provisions of this Act, for fixing and regulating the Time and Manner of appealing from the Decisions of the said Court, and generally, for carrying the Provisions of this Act into effect; and after the time when this Act shall come into operation it shall be lawful for the Judge of the Court of Probate from Time to Time, with the Concurrence of the Lord Chancellor and the said Lord Chief Justice, or any One of the Judges of the Superior Courts of Law to be by such Chief Justice named in this Behalf, to repeal, amend, add to, or alter any such Rules and Orders as to him, with such Concurrence as aforesaid, may seem fit.

Now it will be seen from these exceptional provisions, that in order to carry out the specially recited object of the statute, the new Court could not even enter upon the discharge of any of its functions until the Lord Chancellor and the Lord Chief Justice (or his substitute selected by himself) and the Judge of the Prerogative Court had first combined to make rules and orders not only to regulate and define the practice, procedure and duties of officers of the Court but also and most essential to regulate the time and manner of appeal from the Court, not to speak of determining the important question as to what should be deemed to be contentious or non-contentious business. This is in principle a much more drastic and "personal" provision than that objected to in section 8 of the Divorce Act, because under that section and section 11 a substitute is provided for every one of the three judges necessary to make up the quorum to constitute the Full Court under sections 8 and 55-6, but under said section 30 of the Probate Act there are two *personæ designatæ* for whom no substitutes at all could be appointed, *i.e.*, the Lord Chancellor and the judge of the Prerogative Court—and even the substitute for the Lord Chief Justice could only be appointed by himself; and it will be observed that this principle is not altered even after the time when the Act came into operation, because the judge of the Court of Probate could not alter the rules without the consent of the Lord Chancellor and the Lord Chief Justice (or his said named substitute). There is nothing like this special

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section in the Divorce Act which only contains this simple and customary provision regarding rules:

"Sec. 53. The Court shall make such Rules and Regulations concerning the Practice and Procedure under this Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same."

Now if an Act which is stated to be passed "to amend the law relating to Probates and Letters of Administration in England" and which contains the aforesaid absolute preliminary bar to the exercise of any jurisdiction whatever by the new Court it created, or to any appeal from the exercise of that jurisdiction, is nevertheless admittedly "not inapplicable" to the local circumstances of British Columbia, I confess I cannot understand why the Divorce Act is on principle to be differently regarded. If we can dispense with and have dispensed with what were in England the indispensable antecedent Act and sanction of three judges in the one case, properly regarding them as part of the "machinery" to carry out the legislative principle, why cannot we dispense with the presence of two of them in the other? Strangely enough it is sought in construing the Divorce Act to deny the applicability of the powers of the Judge Ordinary, which are not subject to the said antecedent bar, while in construing the Probate Act the powers of that identical judge are conceded to be applicable, though they are subject to the said bar; to my mind these inconsistent positions cannot, with all respect, be based upon a sound foundation.

Undue stress has, I think, been laid upon what is styled the "exceptionally strong (Divorce) Court constituted in an exceptionally strong way of three judges, of whom the judge of the newly created Court of Probate was to be one." While great judical officers are naturally named in section 8, yet "automatic" substitutes, named by statute and not subject to personal selection (as already noted are required in the case of the Probate Act), are provided for, and to obtain a clear idea of the working of the Court I have gone through all its decisions, page by page, as reported in the Law Journal reports from the time it was opened by the Judge Ordinary alone, Sir Cresswell Cresswell, on the 12th of January, 1858 (see 27 L.J., P. & M. 2), till the sole jurisdiction was conferred upon him on the 28th

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of August, 1860, by Cap. 144 of 23 and 24 Vict., and find that no more than three judges ever sat in the Full Court, and that in the majority of cases it was constituted by the Judge Ordinary and two of the senior puisne judges. At first the cases for dissolution were few in number, but Mr. Justice Wightman was called upon to act within the first six months and sat, *e.g.*, on June 2nd-14th in *Ling* v. *Ling* (1858), 27 L. J., P. & M. 58; on June 14th in *Kaye* v. *Kaye, ib.* 54; on June 15th in *Teagle* v. *Teagle, ib.* 55; on June 14th-16th, 21st and July 3rd in *Robinson* v. *Robinson, ib.* 91 and thereafter he sat more than any other judge except the Judge Ordinary. And indeed even where the Full Court sat in appeals from the Judge Ordinary, he sat himself to form the quorum under the statute with two other judges only; *e.g.*, with Martin, B., and Willes, J., in *Matthews* v. *Matthews* (1860), 29 L.J., P. & M. 118. The way the power to substitute automatically and statutorily was thus taken advantage of shews that in practice no importance could have been intended to be attached to the naming of the heads of other Courts to positions in the Divorce Court, for it must have been contemplated that their other high and existing duties would prevent them from sitting except on occasions; this is further illustrated by the fact that in 1859 (13th August) by the amendment of that year, Cap. 61 of 22 & 23 Vict., all the other judges of the Queen's Bench, Common Pleas and Exchequer were added to the Court, and after that (according to the Law Journal Reports) none of the heads of the Courts sat, and, finally, in 1860 (28th August), as above noted, all the powers of the Full Court were vested in the Judge Ordinary.

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The fact is, as pointed out by CREASE and GRAY, JJ. (pp. 31, 56-7), that in a new country judges are called upon to exercise powers which are necessarily greater than those that are customarily exercised by corresponding judges in England, particularly before the fusion of the Courts under the Judicature Act, and as an example it was pointed out that the great and special powers of the Lord Chancellor, *e.g.*, in lunacy, had been exercised by local judges in both the old colonies of Vancouver Island and British Columbia, as well as the lesser powers of the Vice-Chancellor; though at the same time, as Chief Justice BEGBIE

pointed out (p. 72), there was no appeal here from one judge to another, and therefore neither of them occupied the real position of Lord Chancellor or Vice-Chancellor. That a judge should at different times and places by analogy adequately and completely represent two such different English judges, and yet at another time be absolutely incapable of representing either of them, because, *e.g.*, he could not appeal from himself to himself, is of course a judicial anomaly, and if the same contention were pressed, as has been pressed here, then it could logically be demonstrated that no chancery jurisdiction existed in the new and united colony of British Columbia on March 6th, 1867, when the Legislative Council passed Ordinance No. 7, introducing "to all parts of the colony" the "civil and criminal laws of England as they existed on the 19th of November, 1858, so far as the same are not from local circumstances inapplicable." Nevertheless, no one has the shadow of a doubt that the judge of Vancouver Island and the judge of British Columbia had each full jurisdiction in that respect, though neither of them corresponded to the Lord Chancellor nor yet to the Vice-Chancellor. The explanation is of course that these jurisdictions pertain to the Court as such and not to the judges. If I may say so, with all respect, I think that is what Chief Justice BEGBIE hardly gave full effect to, because he says, p. 66, "I cannot understand how a Court can possess powers which it cannot exercise, though called upon to do so," answering the suggestion of Mr. Justice GRAY (p. 32), that the jurisdiction in 1858 might at least, even if there were not complete machinery in the way of judges in 1858 to exercise it, be viewed as a partially dormant or abeyant principle of jurisdiction, to become effective later on as the machinery arrived, and see CREASE, J., to the same effect at pp. 43 and 54. But though Chief Justice BEGBIE in 1877 could not "understand" how a Court could have powers and not exercise them when called upon to do so, yet that is precisely the case to-day in this Province with respect to our present Appellate Court, the Full Court, the fact being that though such a Court exists under section 80 of the Supreme Court Act, 1903-4, which empowered all the judges to sit therein, yet that Court, however loudly or persistently it may be called upon, admittedly cannot (since the

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change effected by the passing of the new statutory rule 1,043 of 1906, assuming it to be constitutional) in any way exercise any of its former appellate functions, and is confessedly in a dormant state, and none of the judges of this Court can lawfully sit on that Bench to hear an appeal or make any order therein till the present Chief Justice by apt assignments under said rule, "in a moment inspires vitality into the hitherto lifeless body," to use the appropriate language prophetically, though unsuspectingly, employed by Chief Justice BEGBIE (p. 67). The Full Court itself in *Huntting* v. *MacAdam* (reported *ante*, p. 426), declared this to be the effect of said rule and, in fact, removed one of the members of this Court from the Bench on that ground. This strikingly confirms the view advanced by Mr. Justice GRAY on that aspect of the matter.

Further, I find it impossible to reconcile Chief Justice BEGBIE'S judgment in *Sharpe* v. *Sharpe* with his subsequent one in *Regina* v. *Ah Pow* (1880), 1 B.C. (Pt. 1) 147, wherein he held that "when British Columbia was founded" Jervis' Summary Jurisdiction Act of 1848 (11 & 12 Vict., Cap. 43, assented to on the 17th of August, 1857), "came into force here and have ever since continued so." This decision turned on the latter Act so I shall consider that only. It was declared by section 15 that it did not extend to Scotland, and after a preamble reciting that "it is expedient that provision should be made for obtaining the opinion of a superior Court on questions of law which arise in the exercise of summary jurisdiction by justices of the peace," the Act went on to specify the "Superior Courts of law" in England and Ireland that might be appealed to in the premises, as follows:

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"1. In the Interpretation and for the Purposes of this Act, the following words shall have the meaning hereinafter assigned to them; that is to say:

"'Superior Courts of Law' shall for England mean the Supreme Courts of Law at Westminster, and for Ireland the Supreme Courts of Law at Dublin;

"'Court of Queen's Bench' shall mean for England the Court of Queen's Bench at Westminster, and for Ireland the Court of Queen's Bench at Dublin."

It then provided that justices of the peace shall on application of a party aggrieved state a case for the opinion of said Court.

Now if the view of Chief Justice BEGBIE in *Sharpe* v. *Sharpe* is correct, that the Divorce Act could not apply because there were not enough judges, or judges of a particular kind here, on the 19th of November, 1858, then *a fortiori* this very important remedial criminal statute providing for a much needed appeal, could not apply because, even assuming (which I decidedly do not), that on that day there were any lawfully appointed justices of the peace at all in that wild and undefined region, then loosely and locally called, in default of a better name, Fraser's River (which formed part of the vast unorganized Indian Territories, a portion of which was called New Caledonia, and was included in the newly born colony of British Columbia), yet in another vital respect, if the Act is to be construed according to its plain intent, it cannot be held to have been applicable to the new colony. I refer to the provision in section 2 that "the appellant shall within three days after receiving such case transmit the same to the Court named in his application," which has been held to mean actually lodged in Court within that period, otherwise the appeal was lost, and these and other similar provisions are conditions precedent to the right of appeal and cannot be waived by parties or justices. (See Paley on Convictions, 7th Ed., pp. 326-7, and, after change in practice, 8th Ed., pp. 420-1-3). But in British Columbia in 1858 the performance of such an absolute condition precedent was generally speaking a sheer and manifest impossibility because of the immense distances and lack of communication, and, save when the solitary judge was on circuit, could not be carried out in any part of the colony, except at the capital, New Westminster and vicinity; nor even to-day could it be carried out in many parts of this vast Province.

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Furthermore the English appellant was given the valuable privilege of selecting any one of the three Courts of law at Westminster to hear his appeal, a power, as Paley points out (*supra*, 473, note) which he has since been deprived of by statute, yet there was then only one Court in British Columbia, and even admitting that for the purposes of that appeal it could be held to correspond to any one of the three specified and distinct English Courts (and to which of them may I ask ?) that left two other Courts unrepresented, and so deprived the appellant of his

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statutory right of selection. And still further, no effect could be given to section 4 of the Act providing that "the justice or justices shall not refuse to state a case where application for that purpose is made to them by or under the direction of Her Majesty's Attorney-General for England or Ireland, as the case may be," because not only was there no Attorney-General in British Columbia on that date (19th Nov.), but none was appointed till long after, nor was there any lawyer, either barrister or solicitor, in that colony (nor even in the neighbouring and much older one of Vancouver Island, the first barrister arriving there in the latter part of December) as appears by the judge's special Order of Court dated December 27th, 1858, reciting the facts, and the consequent necessity of temporarily permitting foreigners, citizens of the United States, to practise in his Court. (See Chief Justice BEGBIE'S letter to Governor Douglas dated December 15th and 29th, 1858, B.C. Papers, 1859, Pt. ii, pp. 54-5).

So much for that Act, but when the attempt is made to apply other ordinary English criminal statutes on that same day that the Divorce Act is objected to, increased difficulties are to be encountered because there was no adequate "machinery," *i.e.*, lawfully appointed officers of the law, (as to which I speak later) then in existence to carry out their provisions, except the Governor and the judge (who were the only officials who took or were in a position to take the oaths of office when the colony was "born" on November 19th, 1858), and the inspector of police (Chartres Brew) who had been appointed by the Home Government. In addition to the absence of an Attorney-General, even the Chief Commissioner of Lands and Works, Col. Moody, and the colonial treasurer, Captain Gossett, did not arrive till Christmas day, which shews the primitive state of affairs. But far more serious is the fact that there was such a deficiency of properly qualified jurors, grand and petit, that the judge complains to the Governor on April 25th, 1859, that "At Cayoosh (then the centre of a mining region) I tried to cause a grand jury to be summoned to present all the matters formally to me, but there were not 12 British subjects there." (B.C. Further Papers, part iii., 1860, p. 21). And as "one of the chief

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points that struck me," he remarks on "the great preponderance of the California or Californicized element of the population and the paucity of British subjects." (*Ib.* p. 24). To overcome these obstacles the Government had to come to the rescue of the criminal law by passing the Jurors Act, 1860, (March 8th) which made special provisions to meet the novel circumstances after the following recitals which speak for themselves:

"Whereas in many parts of British Columbia there is found to be great difficulty in procuring on proper occasions a sufficient number of British subjects to sit upon grand and petit juries:

"And, whereas many of the provisions of the statutes relating to the summoning and qualifications of jurymen cannot be complied with in British Columbia and it is expedient to make other provisions in respect thereof," etc.

Other difficulties with respect to the important office of sheriff had to be likewise specially met and are recited in the "Sheriff's Act, 1860" (March 8th), as follows:

"Whereas divers acts, matters, and things, which, according to law ought to be done by the sheriff, or some person appointed by him may arise to to be done in parts of British Columbia in which there is no sheriff or deputy sheriff lawfully authorized to act," etc.

These officially acknowledged and grave defects in the "machinery" of the law it is essential to bear in mind, for the contention against the applicability of the Divorce Act is that because on the 19th of November, 1858, there was not enough "machinery" to give full effect to its provisions, therefore it must be wholly rejected, and, consequently, that even though there might be adequate "machinery" one year, or one month, or one day after the 19th of November, that would not be sufficient to save the introduction of the said statute which must be applicable on that specific day or not at all. This, in my opinion, is a contention which, pushed to its unavoidable conclusion, destroys itself. But if it is sound and the test is to be pinned down to a certain and single day, the same test must inevitably be applied to all other statutes civil and criminal; there cannot be one strict test against the Divorce Act and another lax test in favour of all other statutes; and if that strict test is to be generally applied, then the criminal laws of England must, for the most part, go by the board, including trial by jury.

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The simple answer, of course, to such an absurdity is, that there is no such test.

The exceptional circumstances of the creation of the new colony and the difficulties to be overcome were fully realized by the Home Government as appears by the despatch of the Secretary of State for the Colonies of September 2nd, 1858, to Governor Douglas, in which he says (B.C. Papers, 1859, Pt. i, 61–62):

"Almost the first point to which your attention will be directed will be the establishment of a Court or Courts of Justice, with the necessary machinery for the maintenance of law and order . . . . . It will also be essential that you should constitute juries," etc.

And in his despatch of December 16th, 1858 (B.C. Papers, 1859, Pt. ii., 73), the Minister says:

"We should lose no time in securing law and government to a district hitherto unknown to civilization."

Again on December 30th, 1858 (*ib.* p. 74), he refers to the Governor's position "amid circumstances so extraordinary as those in which you find yourself placed." If was because of, and to meet such circumstances that the Governor was clothed with extraordinary powers which are thus referred to in the despatch of September 2nd, 1858, forwarding his commission:

"These powers are indeed of very serious and unusual extent, but Her Majesty's Government fully rely on your moderation and discretion in the use of them. You are aware that they have only been granted in so unusual a form on account of the very unusual circumstances which have called into being the colony committed to your charge and which may for some time continue to characterize it."

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He was thus, as the prior despatch of August 14th, 1858, (*ib.* 47), stated he would be, "empowered both to govern and to legislate of your own authority . . . ." Prior to the receipt of his commission and formally entering into office he had of course no jurisdiction outside of Vancouver Island, so it became necessary to make the proclamation of indemnity (November 19th, 1858), for unlawful acts, the recitals of which explain the reasons therefor. (B. C. Papers, Pt. ii., 34). It is to be noted that while the proclamation ratifies his acts in the Fraser River territory, yet it does not continue in office in the new colony those who had been appointed *ex necessitate* in the unorganized regions.

Such being the extraordinary powers of the Governor, it is the

fact that, so far as the administration of justice was concerned, the judge of the new colony was likewise commissioned by Her Majesty (on the same day as the Governor) in as comprehensive and untrammelled a manner as was the Governor, *viz.:* "with full power and authority to hold Courts of judicature and to administer justice," as appears by . . . . his commission.

Clothed with such ample powers these two high officers contained in themselves on the birth of the colony all the machinery necessary for governing, and legislating and administering justice. With respect to the last, the principle, in the exceptional circumstances, must necessarily be regarded as relatively everything and the machinery as relatively nothing, because, as has been seen, the latter, save in the person of the judge, did not lawfully exist. The situation called for immediate action on the part of the judge; the Governor refers graphically in his dispatch of September 9th, (B. C. Papers, 1859, Pt. ii., 34), to "the mixed multitude that have literally forced an entrance into the British possessions." The disorder consequent upon the sudden inrush of turbulent men seeking for gold had to be met by prompt measures. The occasion was not one for delay or for forms and technicalities and the judge necessarily began immediately to exercise his powers under his commission and under the proclamation in question of November 19th, introducing English laws, civil and criminal, as defined, and directing that "such laws shall be administered and enforced by all proper authorities," without waiting for any formal proclamation or establishment by the Governor of Courts of Justice in form or in name. There was then only one legal Court, his own, with the fullest powers, and he called it very appropriately in the first Order of Court of December 27th, 1858, *supra*, the Court of British Columbia, and in that Order he provided for rules of procedure and regular sittings. It would be an easy thing were it profitable, to shew, if technical considerations are to prevail on the founding of a colony in such circumstances, that each and every one of those early criminal trials, by which men lost their lives and their liberty, was illegal because of the inapplicability of the English criminal statutes under which they were held, for, *e.g.*, as before noted, not even the jury which convicted them

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was or could be summoned according to formalities which were essential in trials in English Courts.

Indeed, after some of the sentences were imposed according to law they could not be carried out, for the Governor complains to the Duke of Newcastle (then Secretary of State for the Colonies) on November 30th, 1858 (B. C. Papers Pt. ii., p. 39), that "several murders had been committed by white men" and the perpetrators brought to justice, but that it had been found

"impossible to carry out the sentence of the law in cases where criminals are sentenced to transportation for life, for the reason that there is no penal settlement within reach, and that I have no means of forming a settlement for that purpose on this coast."

The absence of this machinery did not deter his Grace, however, from dealing with the matter in a practical way and he replied on August 5th, 1859 (B. C. Papers, Pt. iii., 1860, p. 98):

"I have to inform you that no British colony remains for the reception of offenders sentenced to penal servitude or transportation, and that the only recourse available for their punishment is imprisonment with hard labour in the country where their offences were committed."

It would not be difficult, though tedious, to consider indefinitely and shew how many of the civil statutes of England were technically inapplicable for lack of machinery or otherwise to the new colony. In *Watt* v. *Watt*, p. 284, counsel gave an apt illustration of one of them, *viz.*: 15 & 16 Vict., Cap. 68 (1852), to Amend the Practice and Course of Proceeding in the High Court of Chancery. Among other impossibilities it is, at the very outset, amusing to read the 2nd section thereof, which abolishes the practice of engrossing bills on parchment, but requires them to be printed instead, saying "the Clerks of Records and Writs of the said Court shall receive and file a printed Bill of Complaint," a condition which was even more impossible in British Columbia in 1858, because there was not then a printing press in the colony, nor for some time after. Nor could the decrees of the Court be carried out in an all important respect under section 66, which declares that:

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"Before any estate or interest shall be put up for sale under a decree or order of the Court of Chancery, an abstract of the title thereto shall, with the approbation of the Court, be laid before some conveyancing counsel to be approved by the Court, for the opinion of such counsel thereon, to the

intent that the said Court may be the better enabled to give such directions as may be necessary respecting the conditions of sale of such estate or interest, and other matters connected with the sale thereof;"

because there was no conveyancing counsel, or any other counsel in existence at the time. But in view of what I have already said it would be as profitless as it would be endless to continue the comparison, and I shall content myself with the illustration last given in addition to that already given of the two statutes, one on each branch of the law, (*i.e.*, Jervis' Act, and the Probate Act), which were passed in the same session of Parliament as the Divorce Act and therefore are the more striking. If two of these Acts applied despite impossible conditions, why not the third? The truth is, as the Upper Canada Court of Common Pleas (Draper, C.J., Richards and Hagarty, JJ.), said in a leading case on this subject, *Mercer* v. *Hewston* (1859), 9 U.C.C.P. 349 at p. 355, that where a provision in a statute applicable in principle is wholly impossible of application to the conditions of a new country, that does not mean the statute must be rejected, but that the provision should be dispensed with. What was dispensed with there was the Court of Chancery itself, because the necessary enrolment of a deed under the Mortmain Act which had otherwise been held to be in force in Upper Canada (without which enrolment the deed was declared to be wholly inoperative and void), could not be made without it. The Court, however, after saying that "a literal compliance with the English statute was impossible for we had no Court of Chancery," went on to declare that "the provision for enrolment in Chancery being then wholly impossible, it must be considered virtually dispensed with." This decision is a strong one in support of my views, as are the two cases it rests upon (*Doe Anderson* v. *Todd* (1845), 2 U.C.Q.B. 82 and *Hallock* v. *Wilson* (1856), 7 U.C.C.P. 28) and I fail to see why, if the whole Court of Chancery could be dispensed with in that case, two judges of the Divorce Court cannot be dispensed with in this. The opinion of the three eminent judges who sat on the case carries great weight; in addition to the Chief Justice, Draper, the senior puisne judge became Chief Justice of Canada and the other the Chief Justice of Ontario. This decision was approved by the

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Court of Appeal in Ontario in *Corporation of Whitby* v. *Liscombe* (1875), 23 Gr. 1, which case is justifiably much relied on in *Sharpe* v. *Sharpe*.

This necessity of dispensing with impossible machinery has been recognized by their Lordships of the Privy Council in *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L. R. 6 P. C. 381 at p. 393, in considering the question of the application of English law to the Straits Settlements "as far as circumstances will admit" wherein it was laid down that the law must be taken to be "modified in its application by these circumstances." This would be the case in a country newly settled by subjects of the British Crown."

In view of these decisions it should not be necessary to cite more authorities on this point of "machinery," and I shall leave it after saying, that, as regards the Mortmain Act, relied on in *Watt* v. *Watt*, at p. 289, with all respect, I am unable to see, any more than did Mr. Justice GRAY, the similarity there depicted between that Act and the Divorce Act. While the learned judge quoted, Sir William Grant, held in *Attorney-General* v. *Stewart* (1817), 2 Mer. 143, at 163-4, that the former Act was not only "quite inapplicable to Grenada," yet he also added "or any other colony," because of the reason he gives on p. 161:

> "I conceive that the object of the statute of Mortmain was wholly political—that it grew out of local circumstances, and was meant to have merely a local operation."

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Though this view has not been adopted in Ontario, nor in Manitoba (*Law* v. *Acton* (1902), 14 Man. L.R. 246), yet it was long ago (in 1889) held in this Province that the Act was not in force here, and it is a coincidence that the judge who first so held was Mr. Justice GRAY, and so there is no doubt that he had no difficulty in distinguishing between the nature of that Act and the Divorce Act which he held did apply in *Sharpe* v. *Sharpe*, His judgment is to be found in a note to *In re Pearse Estate* (1903), 10 B.C. 280, wherein DRAKE, J., followed him, as WALKEM, J., had done in 1897. It flows from this that the inference sought to be drawn from decisions on the Mortmain Act should have been in favour of *Sharpe* v. *Sharpe* and not opposed to it.

Another argument was founded in *Watt* v. *Watt* at pp. 286

and 289 on the fact that "there is no appeal from his decision (*i.e.*, of a judge sitting in a divorce case) to any tribunal in this Province," and the difficulty that would be experienced in bringing an appeal under section 66 to the House of Lords. I am unable to see what sound contention can be founded on those facts. With regard to the first, it is not regarded even to-day as a practical objection, because, *e.g.*, there is no appeal from the Admiralty Court in this British Columbia District, over which I have the honour to preside, "to any tribunal in this Province." The difficulty regarding appeals is one which has to be faced not only in every new colony, but also in every new Province or Territory of Canada as it is opened up, before a local Court of Appeal can be established, the nearest illustration of which is the state of affairs which till lately existed in our northern neighbour, the Yukon Territory. In British Columbia in 1858 when there was only one judge there was no tribunal before which any appeal could be brought, but surely it will not be contended that the whole body of English law was inapplicable because the statutory rights of, and opportunities for appeal which existed in England could not be exercised or resorted to in British Columbia? The litigants of that day, whatever jurisdiction they invoked, necessarily had under new conditions only the Privy Council open to them for purposes of appeal, interlocutory or final, and had to make their way there as best they might; that is one of the many disadvantages pioneers in new regions have to endure. The only other case in this Court that should be noted is *Hinton Electric Co.* v. *Bank of Montreal* (1903), 9 B.C. 545, wherein Chief Justice HUNTER after deciding that the Imperial Stamp Act of 1853, Cap. 59 (16 & 17 Vict.), is not in force here because it was a revenue law, goes on to say—pp. 547-8:

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"Nor is it any more admissible to contend that while the whole Act may not have been brought into force, yet section 19 alone was brought in force, any more than it would be to contend that section 2 of 9 Geo. II., Cap. 36, commonly called the Mortmain Act, was introduced into British Honduras in the face of the fact that the Act itself was decided in *Rex* v. *McKinney* not to have been so introduced, although taken *per se* there appears to have been no reason for saying that section 2 was inapplicable to British Honduras."

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This is an answer similar to that advanced by CREASE and GRAY, JJ., to the contention of Chief Justice BEGBIE that the Divorce Act was in force in part, *e.g.*, to the extent of abolishing the action of criminal conversation by section 69, though that section only purported to prevent its being brought to England:

"69. After that Act shall have come into operation no Action shall be maintainable in England for Criminal conversation."

Passing, then, to the question of principle, it must be conceded that the Divorce Act of 1857 was applicable to the local circumstances for the reasons set out by CREASE and GRAY, JJ., at pp. 29-31. With the inrush of settlers in 1858 came, as Sir E. B. Lytton, the Secretary of State for the Colonies, puts it in his despatch of August 14th, 1858 (B. C. Papers, Pt. i., 1859, p. 47), "a sudden rise of social institutions in a country hitherto so wild." Of these social institutions the first in importance was marriage, because as the President of the Divorce Court recently said in *Dodd* v. *Dodd, supra,* it is the "basis on which society rests, the principle of marriage being the fundamental basis upon which this and other civilized nations have built up their social systems." No one, I think, at this late stage will be found to contend that the Divorce Act was not intended to bring about a great reform in that "fundamental basis" of society, and why should the inhabitants of the latest colony be deprived of the benefits of the latest social reform?

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The parliamentary authority of this great reform was Sir Richard Bethell, then Attorney-General, afterwards Lord Chancellor Westbury, and his celebrated speech on the 30th of July, 1857, supports the view above expressed, if support now be needed. I think the importance of the subject justifies my making two extracts from T. A. Nash's "Life of Lord Westbury," 1888, Vol. 1, pp. 214-216:

"The matter remained in that state until Parliament, coming to the relief of the law, and of what might be called the necessities of the country, established the system of parliamentary divorces. To speak of legislative interference as nothing more than the passing of peculiar laws to meet peculiar emergencies, and to denominate these judicial sentences of Parliament as mere *privilegia* was, he urged, to use language inaccurate and inapt. The administration of justice upon settled principles, and according to rules previously fixed, was essentially a judicial act, and it mattered not whether the duty was discharged by a body calling itself a

Legislature, or by two or three individuals sitting in an ordinary Court of Justice. That interference on the part of Parliament was, in truth, the only mode by which justice could be administered in the absence of any regular tribunal which should be the habitation and seat of the principle of the law."

"The system had been established for a century and a half, and it was plain by historical deduction that in the House of Lords there was a tribunal for that purpose proceeding upon permanent rules, imposing the conditions upon which alone divorce could be obtained. The party seeking it must have thrice proved his injury before he was entitled to a divorce *a vinculo matrimonii*—first in the Ecclesiastical Court, then in an action for damages for what was commonly called *crim. con.*, and lastly in the House of Lords. In one particular only did the bill go beyond the existing law—in cases of malicious desertion; in other respects it adhered to the rules universally understood for the administration of justice with regard to divorce. But while it embodied the settled law it altered most materially the form of its procedure, and got rid of 'that most abominable proceeding,' to action of *crim. con.*, which he held to be a great reproach to the country."

This removes some misconceptions regarding the true nature of the proceedings in parliament, and it would be difficult to regard the manner in which divorces have been and are granted by the Parliament of Canada to-day in any other way than that contended for by Sir Richard Bethell, which answers the suggestion put forward in *Watt* v. *Watt* at p. 288.

Further at pp. 210–211, in the "Life" above cited it is said:

"Next came the great question of divorce. More than one Commission had reported in favour of establishing a separate Court, so that the dissolution of marriage might be effected by judicial decision instead of by a special Act of Parliament. By this change the expense incident to the existing procedure would be materially reduced, and the remedy which lay within the reach of the wealthy would be extended to the poor. As the law, or rather practice stood, the privilege of obtaining a release from the marriage tie depended on a mere property qualification. If a man had £1000 to spend, he might rid himself of an unfaithful wife; if not, he must remain her husband. Very rarely indeed did the House of Lords entertain a wife's application for divorce.

Judgment

"The well known anecdote of Mr. Justice Maule gives a forcible illustration of the process under the old law, and is such an excellent specimen of judicial irony that it must not be omitted here. A hawker who had been convicted of bigamy urged in extenuation that his lawful wife had left her home and children to live with another man, that he had never seen her since, and that he married the second wife in consequence of the desertion of the first. The judge, in passing sentence, addressed the prisoner somewhat as follows:

NOTE.—One. In Ireland at the present day this threefold proceeding is necessary to obtain a divorce. (Nash.)

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"'I will tell you what you ought to have done under the circumstances, and if you say you did not know, I must tell you that the law conclusively presumes that you did. You should have instructed your attorney to bring an action against the seducer of your wife for damages; that would have cost you about £100. Having proceeded thus far, you should have employed a proctor and instituted a suit in the Ecclesiastical Courts for a divorce *a mensa et thoro;* that would have cost you £200 or £300 more. When you had obtained a divorce *a mensa et thoro*, you had only to obtain a private Act for a divorce *a vinculo matrimonii*. The bill might possibly have been opposed in all its stages in both Houses of Parliament, and altogether these proceedings would cost you £1000. You will probably tell me that you never had a tenth of that sum, but that makes no difference. Sitting here as an English judge it is my duty to tell you that this is not a country in which there is one law for the rich and another for the poor. You will be imprisoned for one day.'

"These observations exposing the absurdity of the existing law, attracted much public attention, and probably did more than anything else to prove the need of its reform."

All the reasons above advanced in favour of the hardship occasioned by the necessity of petitioning Parliament apply with redoubled force to the condition of a settler in British Columbia in 1858, because he had not only the expense to bear, but the immense distance and loss of time to overcome, assuming he could get his witnesses to take such a formidable journey; even in 1877, with much improved means of communication, the Court in *Sharpe* v. *Sharpe* was of the opinion that it then, generally speaking, would amount "to almost a total denial of justice" to ask a petitioner to apply, not to London, but to Ottawa—(pp. 40-1, 53-4). Nor could he, in 1858, invoke, in British Columbia, the large legislative powers conferred upon the Governor, because his first instructions of September 2nd, 1858, forbade him to legislate upon that subject, the 9th article of them being "(You are not to make) . . . . any law for the divorce of persons joined together in holy matrimony." (B. C. Papers, 1859, Pt. i., 6).

Judgment

Later instructions, however, contained in the despatch of the 14th of February, 1859 (cited in *Sharpe* v. *Sharpe*), led up to the enactment (in the circumstances detailed by Mr. Justice CREASE, p. 47, and *cf.* Mr. Justice GRAY at p. 34), immediately after the union of the two colonies in 1867, of the statute which is now

relied upon, but the fact remains that when the new colony was founded there was practically no way by which a resident of it would obtain a divorce unless the Divorce Act was applicable.

So far, I have been dealing with the question of applicability from the point of view of judicial decisions only, but far more important is the attitude of the Legislature of the Province on the matter. This was pointed out by the Court of Queen's Bench for Upper Canada, *in banc* (Robinson, C.J., Jones and McLean, JJ.), in *Doe d. Anderson* v. *Todd, supra,* at p. 88, wherein, after pointing out that on the English statutes and English decisions alone the Court could not hold the Mortmain Act to be applicable to that Province, nevertheless because of the recognition of its application by certain local statutes the Court took the view that

"We cannot properly hold that opinion now, after the legislative exposition which has been afforded, and especially in recent times, of the assumed effect of that statute. The Legislature, it is admitted, are the best interpreters of their own laws . . . ."

And again at p. 89:

"We can hardly suppose a point more especially within the province of the Legislature to decide, than whether a particular part of the statute law of England is or is not so far in its nature applicable to the state of things in this Province, that it may in reason be considered to be included within the operation of the statute which they had themselves passed, introducing the law of England relative to property and civil rights."

Judgment

This language was cited with approval, and the decision affirmed by the Ontario Court of Appeal (Draper, C.J., Burton, Patterson and Moss, JJ.), in *Corporation of Whitby* v. *Liscombe, supra,* at pp. 15, 18, 21, 31, 36, 38. Mr. Justice Burton at p. 21, says:

"Where solemn determinations, which establish a rule of property, have been acquiesced in for so long a period, a Court, even of last resort, should require very strong grounds for interfering with them; still less should it do so when it finds that such decisions have been acquiesced in and acted upon by the Legislature in subsequent enactments."

And Mr. Justice Moss at p. 38, after expressing his doubts as to the soundness of an early decision, at the time it was given, nevertheless goes on to say:

"The question seems to me to present a very different aspect now. Then the only legislative exposition was that offered by the proviso already

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quoted, and I believe a similar provision in another Act. But since that decision the Legislature has, as my brother Patterson has pointed out, very frequently passed enactments which involve the assumption that the statute was in force. Now the Legislature must be assumed to have been aware of the decision in *Doe d. Anderson* v. *Todd*. They knew that there had been a solemn adjudication that the statute 9 of Geo. II., ch. 36 was a part of our laws. Instead of enacting anything to the contrary, they impliedly recognized that adjudication by enactments which would otherwise have been unnecessary, if not unmeaning. It is upon the ground of this subsequent legislative recognition that I wish to place my judgment that the statute must now be held to be in force in this Province."

These views were approved by the Supreme Court of Canada in *Macdonell* v. *Purcell* (1894), 23 S.C.R. 101 at p. 114.

In *Webb* v. *Outrim* (1907), A.C. 81, their Lordships of the Privy Council, at p. 89, approved the following observations of Griffith, C.J., in *D'Emden* v. *Pedder*, 1 Commonwealth L. R. 91, at p. 110:

"When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them."

All the foregoing observations apply with much greater force to the case at bar because as has been seen, the attention of the Legislature of this Province was specially directed to the matter and the decisions of the Courts thereon by the Commissioner in his report submitted to that Legislature, with the result that the Divorce Act was expressly re-enacted as part of the statute law of this Province. And there is in addition the same intention displayed in the statutory rules of 1880 and 1890 and in those of 1906 which were also given special legislative sanction by the Supreme Court Rules Act, 1906, Cap. 14, as already mentioned, pp. 8-10.

Judgment

I do not think it possible to find elsewhere so strong an expression of legislative intention in favour of the applicability of a statute to a country, and in my opinion it is unanswerable and of itself ends the whole matter. The fact that it may be said that the Parliament of Canada can, since the Union, alone, in one sense, legislate on matters relating to Divorce, and might if it saw fit take away such a jurisdiction from the Courts of a Province, does not in the least detract from the significance of

the declaration of the Legislature of a Province as to the applicability of English laws to its own residents and circumstances. Moreover, while on the one hand it is true that the Legislature of a Province has no power to legislate in divorce matters so far as expending or contracting the jurisdiction in that respect possessed by its Courts before the Union, yet on the other hand it is equally true that the Court itself has inherent power to make rules regulating its procedure, and that power the Provincial Legislature can take from it in divorce matters as it has in all other matters in this Court (*ante* p. 9), and therefore may, in this sense, legislate by rules of court or otherwise, respecting the regulation of the procedure by which the unalterable Ante-Union jurisdiction may be exercised. Under section 92 (14) of the British North America Act the Provincial Legislatures have the exclusive power to constitute, maintain, and organize Courts for the purpose of exercising all jurisdictions whether acquired before or after the Union—*Regina* v. *Bush* (1888), 15 Ont. 398; *In re Small Debts Act* (1896), 5 B. C. 246. This view is indeed in effect that which is expressed by CLEMENT, J., in his Canadian Constitution (1904), p. 235, note:

> "It is submitted that, given a law permitting divorce, the administration of that law would *prima facie* fall to Provincial Courts, constituted under Provincial legislation—subject always, of course, to the power of the Dominion Parliament to constitute additional Courts, under s. 101, and to regulate procedure in divorce cases, if so disposed."

Judgment

In British Columbia, the Federal Parliament has so far been "disposed" to leave the exercise of that regulating jurisdiction to the Provincial Legislature, in doing which the latter is just as free to recognize the applicability of an Imperial statute as it would be if it had the power to alter the jurisdiction conferred thereby. This power to regulate as distinguished from other powers has been so clearly recognized by the Privy Council in the *Fisheries* case; *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1898), A.C. 700, that it is only necessary to refer to that decision.

I conclude what I have to say on this branch of the subject by the following extract from the judgment of Chief Justice

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Draper, in *Corporation of Whitby* v. *Liscombe, supra,* at pp. 17-18:

"My conclusion is, that the statute 9 Geo. II., ch. 36, is in force in this Province; if a change is desirable, it must be sought from the Legislature. There have been no conflicting decisions in this Province, and if there had, so that there must be error on one side or the other, I should adopt the opinion and language of Blackburn, J., in *Jones* v. *The Mersey Docks and Harbour Board,* as reported in 11 Jur. N.S. 746: 'Still the inconvenience caused by the unsettling the law, and disturbing what was quiet, is so great that we agree that even a Court of Error should be slow to reverse decisions, which, though originally wrong, have long been uniform. When such is the case, it may often be proper to persevere in the error, and leave the remedy to the Legislature.'"

Apart, however, from all other questions, there is another special feature of this matter which so far has not received consideration, and yet to my mind it is the most important one of all, *viz.*: that at this late date and after so long a period of the public exercise of the jurisdiction it would be against public policy to allow it to be questioned, because to do so would be as the Court of King's Bench unanimously held in *Regina* v. *Ballivas, &c., de Bewdley* (1712), 1 P. Wms. 223 "to overturn the justice of the nation for several years past," though in that case the judges were considering decisions given on a statute only seven years old, as against 31 years in the case at bar. The Court said, *per* Parker, C.J.:

Judgment

"We are all of opinion, though this clause might have extended to causes of the Crown, had the objection come earlier, yet the constant practice, ever since the making of the Act, having been otherwise, and all the precedents both in the Crown office, and in the Exchequer (in cases not expressly excepted), being *de vicineto;* to make a contrary resolution in this case, would be, in some measure, to overturn the justice of the nation for several years past."

In *The Earl of Waterford's Claim* (1831), 6 Cl. & F. 133, at pp. 172–3, Lord Chancellor Cottenham said:

"It is impossible to deny that their opinion thus expressed throws a great difficulty in the way of that construction which we should otherwise at once put upon this Act. It cannot be denied that in some cases the plain meaning of an Act of Parliament has been changed by a course of judicial decisions, each going a little and a little further, so that at length the Courts have adopted a construction widely different from that which would, but for such interpretations, have been put upon the plain intent of the words. In all such cases you are to take into consideration, not merely the words of the Act of Parliament, but the decisions on them,

which may be said to have been all but imported into the words of the Act, so that the Act is to be construed with reference to such decisions. . . . . There has been a course of decisions, and where the decision first made has been adhered to and confirmed by other decisions, and that is what is called a current of authorities too strong to be resisted."

In *Janvrin* v. *De la Mare* (1861), 14 Moore, P.C. 334 at p. 345, their Lordships decided that even though there had been an error in the rejection of evidence yet

"if this practice of the Court, though erroneous in its origin, has prevailed for a long series of years the Judicial Committee would not lightly alter it."

And on its appearing that such was the case the appeal was refused on that ground as well as another. The same tribunal in *Evanturel* v. *Evanturel* (1869), L.R. 2 P.C. 462, on a question as to the due execution of a will in Quebec, laid it down as follows, p. 488:

"There is no doubt that jurists, both in Canada and in France, have differed upon the construction of this Article of the Coutume. Their discordant opinions are more or less reflected by the conflicting decisions above referred to, and also by the difference in the practice of notaries in Canada. The interpretation put by the usage of these officers, who perform a public duty in the preparation of wills, is by no means unimportant, and the result of the evidence upon this head is, that the practice of the leading notaries in the principal Canadian towns of Montreal and Quebec, greatly preponderates in favour of the mode of executing a testament adopted in the case before us.

"It appears, therefore, to their Lordships that, even if the French authority were admitted to be in favour of the stricter construction of the Article in question, the latter interpretation has, both by decision and by long usage, acquired the force of law in Lower Canada."

Judgment

Again, their Lordships in *Migneault* v. *Male* (1872), L.R. 4 P.C. 123, at p. 136, spoke thus of the introduction of English law regarding probates into Quebec:

"At first sight it certainly appeared to their Lordships that this language availed to introduce the law of England with respect to the conclusiveness of a probate duly granted into the law of Canada; and that where, as in the present case, a suit as to the validity of the will had been contested in open Court, both parties appearing, pleading, and one examining, the other cross-examining, witnesses, and probate had then been granted, the same question could not be raised again, at all events between the same parties, before another tribunal; but that the production of the probate would operate as an estoppel to any such action. This, moreover, appears to their Lordships to be the true construction of the words, 'such proof

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shall have the same force and effect as if made and taken before a Court of Probate.'

"Their Lordships, however, think that they cannot consider this matter now as *res integra*. They cannot disregard the practice of the Canadian Courts with respect to it for the last seventy years, and they have, therefore, made as careful an investigation into this practice as the circumstances permit."

And at page 139:

"Upon the whole, it appears to their Lordships that, by the uninterrupted practice and usage of the Canadian Courts of justice since 1801, the law has received an interpretation which does not affix to the grant of probate, even in the circumstances of this case, that binding and conclusive character which it has in England."

And in *Harding* v. *Howell* (1889), 14 App. Cas. 307, their Lordships on an appeal from the Supreme Court of Victoria, say, p. 315:

"Upon the argument in support of this appeal much learning was expended on the overreaching effect of the statute of 27th Elizabeth in favour of a *bona fide* purchaser for value.

"Their Lordships do not intend in the least to question the principle which governs the construction and effect of that statute as now long established by decided cases. It has been over and again said that 'so many titles stand on it that it must not be shaken,' and in that their Lordships concur."

The House of Lords in *Nicol* v. *Paul* (1867), L.R. 1 H.L. (Sc.) 127, in considering certain old decrees of valuation said, *per* Lord Westbury, p. 131:

Judgment

"My Lords, the suit and the determination of it, are matters of very great concern generally to the heritors in Scotland. No doubt, the payments made by them and the value of their estates have for a long period of years been calculated upon the belief that these decrees of valuation would not be lightly disturbed. And I think it very desirable that the principle should be established that a very liberal interpretation should be given to the language of these decrees, so as to support long usage, and the conclusions that fairly may be derived from the acquiescence of persons who had an interest in disturbing them if not well founded."

Lord Chancellor Cairns, also sitting in the House of Lords in the *Commissioners of Inland Revenue* v. *Harrison* (1874), L.R. 7 H.L. 1, at p. 8, says with regard to disturbing established decisions on fiscal statutes:

"I think that a course of proceeding of that kind is one which your Lordships never have adopted. It appears to me that it would be a most dangerous course for this House to adopt; and if it could be more dangerous in one case than in another, it would be so in a case in which your

Lordships are dealing with one of the fiscal Acts of the country, as to which the object must be, above that of all other Acts, to maintain them and to expound them in a manner which will be consistent, and which will enable the subjects of this country to know what exactly is the amount of charge and burden which they are to sustain. I think that with regard to statutes of that kind, above all others, it is desirable, not so much that the principle of the decision should be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty."

With the greatest deference I venture to think that the Lord Chancellor would be the first to admit that it would be even more undesirable to disturb a decree under the Divorce Act than a judgment under a fiscal statute.

Lord Chancellor Herschell in his judgment in the House of Lords in *London County Council* v. *Church-wardens, &c. of Erith and Assessment Committee of Dartford Union* (1893), A.C. 562, after stating (p. 598) that he could not regard as satisfactory the grounds upon which the Court of Queen's Bench had rested the non-rateability of certain sewers "and that the law on the subject could not be said to be upon a sound and consistent basis," went on to say, p. 599:

"My Lords, I entirely concur with the learned judge in deeming it inexpedient to interfere in such a matter as this with a long course of practice supported by decisions which are not of very recent date. Therefore, even if it be not possible to rest upon grounds altogether satisfactory the exemption of these sewers, yet the case being, as I have said, a very particular one, I could not advise your Lordships to depart from a practice which has prevailed for a very long period, and which has been santioned by judicial authority."

Judgment

The Court of Appeal in *Ex parte Willey* (1883), 23 Ch. D. 118, laid it down, *per* the Master of the Rolls (Sir George Jessel) at pp. 127-8:

"Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs."

Even in the criminal Courts where questions of jurisdiction are at stake the same course has been followed. *Per* example, in *The Queen* v. *Cutbush* (1867), L.R. 2 Q.B. 379, exception was

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taken to the jurisdiction of justices of the peace to award consecutive sentences under 11 & 12 Vict., Cap. 43, Sec. 10, and as grave doubt existed, the Court of Queen's Bench (Cockburn, C. J., Blackburn and Lush, JJ.), thought it desirable to consult the rest of the judges respecting the practice of 40 years under a similar statute (7 & 8 Geo. IV., Cap. 28) with the result that it was found to support the action of the justices, and at p. 382, the Court said:

> "Now, inasmuch as that appears to have been for so long a series of years the practice of the judges at the Central Criminal Court and upon the circuits, we must take it as affording a contemporaneous exposition of the effect of the 10th section of 7 & 8 Geo. IV., Cap. 28."

And this was held despite the fact that the Court admitted it became necessary "it is true by some degree of technical straining" to make "the words capable of that interpretation." No one, in my opinion, can read that decision without perceiving that what saved the jurisdiction of the justices was "the long practice that has prevailed under the similar and corresponding enactment of the former statute," and the necessity from the point of view of public policy that such practice should not be overturned.

A still more striking case to the same effect decided by the same Court two years later is *Leverson* v. *The Queen* (1869), L.R. 4 Q.B. 394. Therein the validity of a certain conviction in the Central Criminal Court, in the Old Bailey, was attacked by writ of error on the ground, *inter alia*, that the trial had been held by Mr. Commissioner Kerr without jurisdiction because he had sat alone purporting to act as a "justice or judge" of the said Court under 4 & 5 Wm. IV., Cap. 36, Sec. 2 (25th July, 1834), entitled "An Act for establishing a new Court for the trial of offences committed in the Metropolis and parts adjoining," which after naming a large number of persons as qualified to act as "justices or judges" thereof went on to declare that "it shall be lawful for the justices and judges of the Central Criminal Court aforesaid or any two or more of them, to inquire of, hear, determine and adjudge all such treasons, murders, felonies and misdemeanours," etc.

Judgment

This, as the Court (composed of Cockburn, C.J., Mellor, Lush and Hayes, JJ.) said, raised "a very serious question," and if

the statute were to be construed in accordance with the plain tenor of its language the jurisdiction could not be upheld unless it was exercised by two judges. But the Court had recourse to the long established practice at the Old Bailey and read the apparently imperative statute "by the light of the procedure of the other superior courts of criminal judicature of the realm held under such commission" (oyer and terminer). It had been the practice of the Central Criminal Court for nearly 35 years (34 years and 10 months to be exact) to try such offences before a single judge and the Queen's Bench consequently held that, p. 404:

"Applying, therefore, the inveterate practice of the criminal courts of this country to the proceedings of the Central Criminal Court it appears to us that, while there were other judges under the same commission, sitting at the then sessions, the presence of a second member of the commission in the Court presided over by Mr. Commissioner Kerr on the trial of this indictment was unnecessary."

Here again, it was only the long and public exercise of the jurisdiction that saved the conviction and judgment from being set aside, public policy requiring that course to be adopted. There can be no question, I think, that if the same objection had been taken in 1834, when the new Court began its existence, instead of in 1869, it must have prevailed. And if one judge can in such circumstances be held to have sufficiently exercised the powers conferred upon two judges in matters of life and death, no difficulty should be found in holding that one judge could discharge the duties of two, three, or more judges in analogous circumstances in matters of divorce.

Judgment

But it is not only by the English Courts that this principle has been recognized, but also by the Courts of Canada as hereinbefore cited, and moreover, the Supreme Court of the United States was forced, in the public interest, at a comparatively early date in its history to adopt a like attitude towards appeals coming from the local courts of the various States. A remarkable illustration of this is to be found in the case of *McKeen* v. *Delancey* (1809), 6 Cranch, 22. A question there arose respecting the power or jurisdiction of the judges of the Supreme Court of Pennsylvania to take acknowledgments of deeds, the governing statute of 1715 specifically requiring that to be done

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"before one of the justices of the peace of the proper county or city where the lands lie." The acknowledgment in question was taken, not before a justice of the peace, but before one of the judges of the Supreme Court, who did not acquire the power to take acknowledgments till it was expressly conferred by statute in 1775. But the Court was unanimously of opinion, in a judgment (p. 32) delivered by Chief Justice Marshall, that

> "Were this act of 1715 now, for the first time, to be construed, the opinion of this Court would certainly be, that the deed was not regularly proved. A justice of the Supreme Court would not be deemed a justice of the county, and the decision would be, that the deed was *not properly* proved, and therefore not legally recorded.
>
> But, in construing the statutes of a state on which land titles depend, infinite mischief would ensue, should this Court observe a different rule from that which has been long established in the State; and in this case, the Court cannot doubt that the Courts of Pennsylvania consider a justice of the Supreme Court as within the description of the Act."

And again, p. 33:

> "On this evidence the Court yields the construction which would be put on the words of the Act, to that which the Courts of the State have put on it, and on which many titles may probably depend."

This language is peculiarly applicable to the case at bar, which indeed presents far stronger claims for the upholding of the decisions in its favour than any case I have cited or been able to find, strong as they are. How much stronger, for example, would *Leverson* v. *The Queen, supra,* be if the decision in favour of the jurisdiction of the single judge had been given at the time when that jurisdiction began to be exercised and followed by other decisions, and by the continuous exercise of that declared jurisdiction, not to speak of the making and signing by all the judges of the Court of rules for the express purpose of "the avoidance of doubts," as was done in 1906 by all of the judges of this Court as already noted? And not only this, but there must be considered from the point of view of public policy, the repeated enactments of the Legislature of this Province on this subject, as already noted, none of which has been disallowed by His Excellency the Governor-General in Council, nor has the Parliament of Canada exercised its jurisdiction to legislate in the premises, but with the said Provincial enactments before it asserting this jurisdiction, has been content to leave this Court

Judgment

in the undisturbed exercise of the same for all these years.

This legislative and judicial invitation, if I may so term it, to the people of British Columbia to resort to this Court for the exercise of its divorce jurisdiction presents to my mind the strongest possible case for non-interference with its continued exercise. It has been seen that a practice (not founded on a judicial decision) of 35 years saved the jurisdiction of the Central Criminal Court, and here we have a jurisdiction of 31 years founded on a decision most carefully considered and after unusual precaution taken as to rules, procedure and otherwise, with a full realization of the gravity of the matter and for the express object of removing any hesitation in the public mind about resorting to the Court in the future to obtain relief by way of divorce. Thirty-one years is a period of time in the short life of a colony and Province so young as this which relatively corresponds to a period of centuries in so ancient a country as England.

During the said period many decrees for nullity and dissolution of marriage have been granted, and though no complete returns are available from the various registries, yet by way of illustration I may mention that last year 10 decrees were granted in the Vancouver registry alone of which six were absolute and four *nisi*, which doubtless have been made absolute by this time; and since 1877 many other decrees of various kinds have been made, *e.g.*, for judicial separations, custody of children, alimony and charges on property to secure the same, and damages. Further, and of prime importance, many of those whose marriages have been dissolved have re-married in this Province and in other lands, and have children of the second marriage, and I confess that I shrink from bringing pain and shame into the households of those fathers and mothers who had every reason to believe they were contracting an honourable alliance and not one of such a nature as would result in the bastardizing of their innocent off-spring. The circumstances in my opinion present the strongest possible ground in the public interest for refusing, unless absolutely compelled to do so, to disturb this jurisdiction and bring about a social and domestic calamity in our midst.

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I am of the opinion that it is my duty to continue to exercise this special jurisdiction of this Court not only to the extent admitted by Chief Justice BEGBIE but to the fullest extent, and consequently pursuant to the foregoing views there only remains the duty of pronouncing formal judgment on this petition, which I do in favour of the petitioner and dissolving the marriage; in so doing I am glad to note that at least two other judges of this Court are also continuing to exercise this jurisdiction which has only so lately been challenged.

With respect to the granting of a decree *nisi* in the first instance, I need only say that this was done by Mr. Justice GRAY in *Tilley* v. *Tilley*, on 25th October, 1877, which is the next case after *Sharpe* v. *Sharpe* in the old Divorce Order Book, and was one for the dissolution of marriage on the ground of adultery and desertion, and since it has been the established practice of this Court for over 30 years to make such decrees, I see no reason to depart from it now. No harm can be done by continuing that procedure, and it is, apart from all other things, not too much to hope that the six months' time it allows for the parties to become reconciled may have been, and will yet be happily taken advantage of. The decree in *Sharpe* v. *Sharpe* was absolute, that being in the opinion of the Court the proper decree to make where the marriage was declared to be a nullity.

Judgment

Petition granted.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council.

MARKS v. MARKS (p. 161).—Affirmed by Supreme Court of Canada, 5th May, 1908. See 40 S.C.R. 210.

MCMEEKIN v. FURRY *et al.* (p. 20).—Affirmed by Supreme Court of Canada, 20th November, 1907. See 39 S.C.R. 378.

WATT v. WATT (p. 281).—Reversed by the Judicial Committee of the Privy Council, 30th July, 1908.

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ESQUIMALT WATERWORKS COMPANY, LIMITED v. THE CORPORATION OF THE CITY OF VICTORIA (p. 302).—Reversed by the Judicial Committee of the Privy Council, 31st July, 1907. See (1907), A.C. 499.

NEWSWANDER v. GIEGERICH (p. 272).—Affirmed by Supreme Court of Canada, 5th November, 1907. See 39 S.C.R. 354.

NORTON v. FULTON (p. 476).—Reversed by the Judicial Committee of the Privy Council, 9th July, 1908.

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ADMIRALTY LAW—*Master discharged without notice—Custom of port as to termination of employment by employer or employee—Costs—Rule 132.*] Plaintiff, a tug-boat master, was dismissed at the port of Vancouver, without notice. The ship owners pleaded a custom that such masters, as well as masters of small coasting vessels might be so discharged, and that they might also leave without notice, receiving pay up to the date of termination of service:—*Held*, that no such custom existed and that plaintiff was entitled to recover, with costs. ROBERTS v. TARTAR. - - - - - - - **474**

2.——*Seizure and condemnation—Behring Sea Award Act, 1894—Illegal sealing—Evidence of offence—Onus—Failure to make entries in official log—Seizure by United States revenue cutter—"Duly commissioned and instructed."*] Defendant schooner was on the 29th of May boarded by an American revenue cutter in pursuance of the Behring Sea Award Act, 1894, within the prohibited area defined in the Act. She then had among the seal skins on board six skins of freshly killed seals, which the master contended had been killed before the close season commenced (1st of May), and outside the prohibited zone, *viz.*: on the 27th of April:—*Held*, on the evidence, that the skins were taken during the close season. Status of an officer "duly commissioned and instructed" by the President of the United States of America to seize a British vessel pursuant to the Behring Sea Award Act, 1894, considered. Remarks on the effect of said Act since the field of pelagic sealing in Behring Sea has been entered by subjects of a power not a party to the agreement between Great Britain and the United States of America under the statute. THE KING v. THE CARLOTTA G. COX. - **460**

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3.——*Wages of seamen left in port en route—Lawful discharge, what constitutes—"Left behind"—Merchant Shipping Act, 1894, Sec. 166 (1.), 1906; Secs. 30, 31, 32, 36, 37, 38, 39.*] Plaintiff, who shipped for a voyage from Shields, England, to Victoria, B.C., and return, was left at Los Angeles for medical treatment and remained in hospital there for 50 days. The master left with the British Vice-Consul at Los Angeles on the 18th of July, a certificate of discharge under section 31, but this was not filled out until the 22nd of August, when plaintiff called at the Consulate. The master also made an error in computing the amount of wages due. In an action for recovery of wages:—*Held*, that, in the circumstances, the leaving of the certificate with the "proper authority" was a sufficient "giving" thereof to satisfy section 31, but as there had been an error, though unintentional, in computing the wages, thus necessitating plaintiff bringing action therefor, he was entitled to his costs. CABLE v. SHIP "SOCOTRA." - - **309**

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AGREEMENT—*Construction of—Freedom from liability for damage a consideration—"Property," meaning of—General words—Ejusdem generis.*] In consideration of the construction of a siding to their mill premises, plaintiff Company entered into an agreement with the Railway Company freeing them from liability for damage to the "siding or to buildings, fences or other property whatsoever" of the plaintiff Company "or of any other person." Two horses of the plaintiff Company, engaged in hauling a car from one part of the siding to another, were killed by being run down with a car sent on

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2.——*Construction of—Partnership—Arrangement between creditors of partnership and executors of deceased partner as to division of a particular asset.*] An agreement was entered into between two creditors of a partnership concern and the executors of a deceased partner that on the recovery of a certain sum of money due the partner, it should be divided: two-thirds to the said creditors and one-third to the daughter of the partner. In an action by another partner:—*Held*, on appeal (affirming the decision of MARTIN, J.), that the plaintiff was entitled to the one-third retained by the executors for the benefit of the daughter. OPPENHEIMER v. SWEENY *et al.* - 117

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2.——*Award—Section 209, Railway Act, R.S.B.C. 1897, Cap. 163—Amount in dispute.*] Where the three arbitrators agreed on the amount of compensation for land taken, and the third returned a separate finding dissenting, on the construction of a statute, from giving compensation for deprivation of a water supply, and an appeal was taken:—*Held*, on objection raised to the appeal as being based on an insufficient amount in dispute, under section 209 of the Railway Act (Provincial) that there was only one award given, and the appeal was properly brought. *In re* MILSTED. - - 364

ASSESSMENT—*Appeal from Assessor to Court of Revision—Powers of Court of Revision—Assessment Act, 1903, Cap. 53; Amendment Act, 1905, Cap. 50.*] The jurisdiction of the Court of Revision is confined to the question whether the assessment was too high or too low. *Re* CROW'S NEST PASS COAL COMPANY, LIMITED ASSESSMENT. - - - 55

2.——*Flat rate—Authority of Dyking Commissioners to fix—Compliance with statute—*

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Drainage, Dyking and Irrigation Act, R.S. B.C. 1897, Cap. 64.] In assessing certain lands under the provisions of the Drainage, Dyking and Irrigation Act, the commissioners fixed upon a flat rate, reaching their conclusion from their personal knowledge of the lands, extending over many years, and without making a personal inspection:—*Held*, on appeal (HUNTER, C.J., dissenting), that the assessment so made was good. Decision of MORRISON, J., affirmed. B. C. LAND AND INVESTMENT AGENCY, LIMITED v. FEATHERSTONE *et al.* - - - 190

ATTACHMENT OF DEBTS—*Creditors' Relief Act, 1902, Sec. 35, application of—Priority of attaching creditors—Practice.*] In a dispute between a number of attaching creditors for the moneys paid into Court by garnishees:—*Held*, that such moneys should be paid to the sheriff for distribution under the provisions of the Creditors' Relief Act. ROBERT WARD AND COMPANY, LIMITED LIABILITY *et al.* v. GEORGE WILSON. W. H. MALKIN COMPANY, LIMITED, Garnishee. 273

2.——*Moneys due to judgment debtor under mining contract—Attachment by judgment creditors—Mechanics' liens—Order directing issue—Liability of garnishees to lien-holders.*] On service of garnishee orders under the Attachment of Debts Act, 1904 (Cap. 7), the garnishees admitted a debt owing to the judgment debtor, but asked the protection of the Court as against mechanics' lien-holders claiming the fund. Thereupon an order was made directing the garnishee to pay the fund into Court to abide the determination of an issue between the attaching creditors and the lien-holders. In this issue the lien-holders failed, and proceeded upon their liens against the property:—*Held*, by the Full Court, that the garnishees were not estopped from requiring an issue between themselves and the attaching creditors to ascertain what, if anything, was owing by the garnishees to the judgment debtor at the time of the service of the garnishee orders. POWER *et al.* v. THE JACKSON MINES, LIMITED. - - - - - - - 202

BANKS AND BANKING—*Presentment of customer's cheque to the wrong clerk—Direction by such clerk to present the cheque to another clerk taken as refusal to pay—Action for damages for such refusal.*] A clerk from one bank presented at another bank a cheque of a customer of such last mentioned bank, but at the wrong ledger-keeper's wicket, and was directed to present it at another wicket. There was no evidence

BANKS AND BANKING—*Continued.*

that this was done, and a telegram was sent out by the first mentioned bank that the drawer of the cheque had no account:—*Held*, on appeal (IRVING, J., dissenting), that the trial judge was right in taking the case from the jury and dismissing the action for want of sufficient evidence. REAR v. THE IMPERIAL BANK OF CANADA. - **345**

2.——*Promissory note—Bills of Exchange Act—Dom. Stat. 1890, Cap. 33, Sec. 48—Demand note—Notice of dishonour to indorser, whether necessary.*] It is necessary before action to give notice of dishonour to an indorser of a demand note. ROYAL BANK OF CANADA v. KIRK AND RUMBALL. - **4**

3.——*Rate of interest—Agreement to pay more than statutory rate—Bank Act, Sec. 80, Dom. Stat. 1890, Cap. 31.*] Section 80 of the Bank Act does not prevent a bank from entering into a contract to be paid a higher rate of interest than 7 per cent.; and if, under such contract, interest is paid in excess of said rate, it cannot be recovered back. WILLIAMS v. CANADIAN BANK OF COMMERCE. - - - - - - **70**

BILL OF SALE—*Bills of Sale Act, 1905, Sec. 11—Time for registration, extension of—Protection of intervening rights—Delay caused by inadvertence.*] A company, domiciled in Toronto, Ontario, took a bill of sale on goods in Grand Forks, British Columbia. It was not possible to send the instrument to Toronto and have it returned for filing with the registrar with the affidavit of *bona fides* within the five days required by section 7, sub-section 2, of the Bills of Sale Act, 1905:—*Held*, that, in the order granting an extension of time for filing the instrument, there should be a provision protecting intervening rights. *Re* W. P. ELLIS & CO. - **271**

COMPANY LAW—*Non-trading corporation created under the Benevolent Societies Act, R.S.B.C. 1897, Cap. 13—Libel of, whether actionable.*] A non-trading corporation, having the right to acquire property which may be the source of income or revenue, the transaction of the business incidental thereto creates a reputation, rights and interests similar to those of an individual or a trading corporation, and must have the same protection and immunities, and be given the same remedies, in case of injury, as a trading corporation. CHINESE EMPIRE REFORM ASSOCIATION v. CHINESE DAILY NEWSPAPER PUBLISHING COMPANY, LIMITED *et al.* - - - - - - - - **141**

COMPANY LAW—*Continued.*

2.——*Registration of Company—Penalty for carrying on business—Companies' Act, 1897, Sec. 123.*] Section 123 of the Companies Act, 1897, although it penalizes the carrying on of business within the Province by non-registered companies, does not avoid contracts entered into within the jurisdiction. *Semble*, the forwarding of goods to an agent to be sold by him in his own name, is not a transaction within the prohibition of section 123. *Quære*, whether the creating within the jurisdiction of an obligation which is to be performed without the jurisdiction is carrying on business within the jurisdiction within the meaning of the section. DE LAVAL SEPARATOR COMPANY v. WALWORTH. - - - - - - - - **74**

3.—*Sale of shares—Resolution of company empowering president to sell—Note given for purchase price—Note and shares placed in bank in escrow pending payment of the note—Allotment.*] Defendant purchased 50 shares in plaintiff Company, giving his note for $5,000 therefor, payable 10 days after date, signing at the same time an application for the shares. There was some evidence of an arrangement between defendant and the president of the Company that defendant was to be employed as a foreman by the Company, and that if he proved unable to perform the work, the president would take back the shares and refund the money. Apparently there was no formal allotment of the shares by the Company, beyond a resolution empowering the president to dispose of the shares, but the president placed the shares and the note in escrow in the bank, the shares to be delivered up on payment of the note:—*Held*, that upon the signing of the application and the delivery of the note, the defendant became the owner of the 50 shares, with power to forthwith validly assign them to anyone else, or to have bound himself to do so on the issue of the certificates if the Company's articles of association required indorsement of the certificates; and that there was no notice of allotment necessary. ANGLO-AMERICAN LUMBER COMPANY v. MCLELLAN. - **318**

4.——*Statute—Construction of—Companies Act, 1897, R.S.B.C. 1897, Cap. 44, Sec. 123—Registration of company—Penalty.*] An unlicensed extra-provincial company, carrying on business within the Province, sued for a balance due on a contract to deliver building stone, entered into within the Province. The defence advanced was that, by reason of section 123 of the Companies Act, the contract was illegal and void:—*Held*, on

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appeal, reversing the decision of CANE, Co. J., that as the act to be done in pursuance of the contract was prohibited by statute, the contract was therefore unenforceable. *De Laval Separator Company* v. *Walworth* (1907), 13 B.C. 74, overruled. NORTHWESTERN CONSTRUCTION COMPANY v. YOUNG. **297**

5.——*Transfer of shares—Necessity to procure registration of transfer—Duty of vendor—Consideration, failure of.*] Plaintiff instructed a broker to purchase certain shares for him. The broker did so, and drew on plaintiff for the purchase money, the draft being indorsed by a member of the defendant firm, and the share certificate being attached to the draft. Plaintiff honoured the draft and received the shares, but on being informed that the indorsement on the share certificate was not in the handwriting of the transferor, James Boecher, forwarded the certificate to the Company's office. The Company's manager, after some negotiation with the witness to the indorsement, John Boecher, handed him the certificate. He disappeared. The Company refused to register the transfer of the shares to the plaintiff, who sued to recover the amount paid for the shares, and for damages:—*Held*, affirming the decision of MORRISON, J. (IRVING, J., dissenting), that the broker's duty was satisfied when he handed over the certificates, *ex facie*, properly indorsed, and that there was no obligation on him to procure the registration of the transfer. CASTLEMAN v. WAGHORN, GWYNNE & CO. - - - - - - - - **351**

CONSTITUTIONAL LAW—*British North America Act, Sec. 91—Adulteration Act, R.S.C. 1906, Cap. 133, Sec. 26—Provincial Health Regulations, Sec. 20—Ultra vires.*] Section 20 of the Provincial Government Regulations governing the sale of milk and the management of dairies, cow sheds and milk shops, is *ultra vires*, as being repugnant to the Dominion legislation on the same subject. REX v. GARVIN. - - **331**

2.——*British North America Act, Sec. 95—Immigration Act, R.S.C. 1906, Cap. 93—British Columbia Immigration Act, 1908—Dominion and Provincial legislation, overlapping of—Costs against the Crown.*] Parliament, by the Immigration Act, R.S.C. 1906, Cap. 93, having provided a complete code dealing with immigration, the British Columbia Immigration Act, 1908, is inoperative. Costs awarded against the Crown, following *Regina* v. *Little* (1898), 6 B.C. 321. *In re* NARAIN SINGH *et al.* - - - - - - **477**

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3.——*Dominion and Provincial legislation, conflict between—British Columbia Immigration Act, 1908—An Act respecting a certain Treaty between Canada and Japan, Dom. Stat. Cap. 50, 1907.*] The provisions of the Immigration Act, 1908, are inoperative insofar as the subjects of the Japanese Empire are concerned. *In re* NAKANE AND OKAZAKE. - - - - - - - - - **370**

4.——*Legislation by Dominion Parliament—"Property and civil rights"—Animal Contagious Diseases Act, 1903, Dom. Stat. Cap. 11.*] The Animal Contagious Diseases Act, 1903, is *intra vires* of the Dominion Parliament. BROOKS v. MOORE. - - **91**

5.——*Statute, interpretation of—Immigration Act, R.S.C. 1906, Cap. 93, Secs. 10, 26-30—Delegation of power under the Act.*] The power conferred upon the Governor-General in Council by section 30 of the Immigration Act, to prohibit the landing of immigrants of a specified class, cannot be delegated to the Minister of the Interior. *In re* BEHARI LAL *et al.* - - - - - - - - **415**

CONTRACT—*Sale of mineral claims—Interest in and division of proceeds—Mineral Act, R.S.B.C. 1897, Cap. 135, Secs. 50 and 130.*] Oliver Furry located certain mineral claims under an arrangement made in 1898 with one L. J. Boscowitz on a basis of Furry having a non-assessable half interest. Certain claims known as the "Queen," "Empress" and "Victoria" were located by Furry pursuant to this understanding. When the memorandum of the arrangement of 1898, and a further memorandum conveying a half interest in the claims, was being drawn up, Boscowitz, at the request of Furry, signed the firm name of "J. Boscowitz & Sons." The latter memorandum, made in May, 1899, was recorded with the mining recorder in April, 1901. Section 50 of the Mineral Act provides that transfers of mineral claims, or interests therein shall be in writing, signed by the transferor, or his agent authorized in writing, and recorded with the mining recorder, and if signed by an agent, the authority of such agent shall be recorded before the record of such transfer. In June, 1900, Boscowitz and Furry, after a consultation relative to handling and controlling the property generally, went together to a solicitor who drew up a document allotting to Furry a one-fifth interest in the claims already mentioned along with certain other claims, in lieu of the half interest previously arranged upon. This document was signed by L. J. Boscowitz but not by Furry:—*Held*,

CONTRACT—*Continued.*

on appeal, *per* IRVING, J., that the document of May, 1899, was a conveyance of a one-half interest in the claims mentioned therein to Furry. *Per* MARTIN, J.: That in signing the name "J. Boscowitz & Sons," there was no element of mistake on the part of L. J. Boscowitz, who thereby gave a deliberately incorrect signature which had no legal effect as regards those it purported to bind, and consequently no interest in the mineral claims was conveyed to Furry. *Per* CLEMENT, J.: The Statute of Frauds and section 50 of the Mineral Act were a fatal bar to the enforcement of the document of June, 1900, reducing Furry's interest to a one-fifth; while, on the other hand neither of them stood in the way of the enforcement of the document of May, 1899, conveying to Furry a one-half interest in the three claims therein mentioned. Judgment of HUNTER, C.J., varied, and Furry declared to have a half interest. MCMEEKIN v. FURRY *et al.* **20**

COUNTY COURT—*Appeal from—Time for taking—Delivery of judgment and taking out formal order for—Order xxiii., rr. 1, 4—Practice.*] The time for taking an appeal from an ordinary judgment of the County Court to the Full Court commences from the date of the delivery of judgment, and not from the date of taking out the formal order. A judgment in replevin is not a special judgment under Order xxiii., rule 1. KIRKLAND v. BROWN. - - - - - **350**

2.——*Jurisdiction—Exception to must be taken at the trial.*] Unless exception is taken at the trial to the jurisdiction of the County Court, it will not be entertained on appeal. *Gelinas* v. *Clark* (1901), 8 B.C. 42, followed. STEPHENSON v. STEPHENSON AND STEPHENSON. - - - - - - - - **115**

3.——*Jurisdiction of County Court judge in an action by a seaman for wages.*] A County Court judge has jurisdiction in an ordinary action for wages of a seaman to try a claim for more than $200 where the plaintiff has a good demand at common law; that is, where his cause of action is complete without the aid of the statute. Section 52 of the Seamen's Act merely creates a concurrent tribunal for securing a speedy settlement of claims for wages. CAIRNS v. BRITISH COLUMBIA SALVAGE COMPANY, LIMITED. - - - - - - - - **83**

4.——*Pleading—Amendment.* - **49**
See RAILWAYS.

5.——*Practice—Costs—Review of taxation—Scales "over $10 to $25" and "over $250 to $500"—Amount recovered by means of the action.*] Plaintiff claimed $333.19 for certain cattle sold to defendant, who pleaded tender of $300 and payment into Court, and not indebted as to the remainder of the claim. Judgment for plaintiff was given for $320. The taxing officer allowed costs on the scale "over $250 to $500":—*Held*, on review of the taxing officer's ruling, that the amount recovered by means of the action being only $20, the costs should have been taxed on the scale "over $10 to $25." MCLEAN v. DOVE. - - - - - - - - **292**

6.——*Statute, construction of—Liquor Licence Act, 1900, B.C. Stat. 1906, Sec. 2—Hotel licence granted by Commissioners—Appeal to County Court judge—Trial de novo—Number of householders—Onus of proof—Interpretation of "population actually resident"—Floating population.*] The onus of proving that the petition called for by section 22 of the Liquor Licence Act, 1900, does not comply with the provisions of the Act is on the petitioner. Where a man enters into the employment of another person for an indefinite period he thereby becomes, within the meaning of the Liquor Licence Act, actually resident. LABELLE v. BELL. - - - - - **328**

7.——*Statute, construction of—Naturalization Act, R.S.C. 1906, Cap. 77—Naturalization of Japanese, objections and opposition to—Procedure upon—Jurisdiction—Cross-examination of applicants.*] By the amendments of 1903 to the Naturalization Act, the scope of the judge's duty, as limited by the decision in *In re Webster* (1870), 7 C.L.J. 39, is changed, and the judge, upon an opposition being filed, or an objection taken in open Court to the granting of the certificate, has power to take any necessary measures to satisfy himself as to the truth of the facts stated by the applicant, and of his fitness to become a British subject. *In re* SADDJIRO MALSUFURO *et al.* - - - - - - **417**

8.——*Statute, construction of—Woodman's Lien for Wages Act, R.S.B.C. 1897, Cap. 194, Sec. 3—"Woodman," meaning of.*] Defendant hired a team of horses from plaintiff for certain logging operations, and, on default of payment for the use of the horses, which were driven by a man employed by defendant, plaintiff filed a lien against the logs for the amount due:—*Held*, that plaintiff was not a woodman within the meaning of the statute. MULLER v. SHIBLEY. - **343**

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See CONSTITUTIONAL LAW. 2.

CRIMINAL LAW—*Direction to jury—Assault committed by prisoner to recover money out of which he had been cheated—Whether he is guilty of robbery or assault.*] Where the prisoner acted in the *bona fide* belief that he had been swindled, and, in the belief that he was entitled to retake the money, committed an assault for that purpose alone, and did retake the money, or a portion of it, in that sole and *bona fide* belief, the jury, on consideration of the facts, would be justified in acquitting him on a charge of robbery, although it was open to them, on the same facts, to convict for assault. REX v. FORD AND ARMSTRONG. - - 109

2.——*"Disorderly house" defined—What constitutes—Criminal Code, Sec. 228.*] The term "disorderly house" in section 774 of the Code, includes any house to which persons resort for criminal or immoral purposes, and therefore includes a common gaming house. REX v. FOUR CHINAMEN. - - - - - - - - 216

3.——*Evidence—Proof of blood relationship on charge of incest.*] On a trial for incest, the only evidence against the accused was that of the child, a girl of 11 years, and of a woman who had known accused and the girl living together as father and daughter for some seven or eight months. This evidence was not rebutted:—*Held*, on appeal, affirming the decision of WILSON, Co. J., that this was not sufficient proof of relationship to justify a conviction. REX v. SMITH. - - - - - - - - 384

4.——*Indictment for concealing with intent to escape from prison—Attempt, and doing something with intent, to commit an offence—Difference between.*] Where the accused was indicted for "concealing himself with intent to escape from the penitentiary":—*Held*, that as the criminal act consists in an attempt to commit an offence, doing something with intent to commit the offence is not necessarily sufficient to constitute an attempt. REX v. LABOURDETTE. - 443

5.——*Jurisdiction of Indian agent, also acting as Justice of the Peace—Committal for offences under the Indian Act.*] An Indian agent, acting in a magisterial capacity, in committing an accused person for an offence under the Indian Act, must shew on the warrant of commitment, the district in which such Indian agent is acting. REX v. MCHUGH. - - - - - - - - 224

6.——*Jury, charge to—Duty of judge to explain their legal powers—Right of jury to find for lesser instead of graver offence—Mis-*

CRIMINAL LAW—*Continued.*

direction—New trial.] If the judge allows the indictment to go generally to the jury, it is not competent for him to withdraw from their consideration a verdict for any lesser offence which may be included in the indictment. REX v. SCHERF. - - 407

7.——*Statements made to constable at time of and after arrest—Admissibility—Inducement—Appeal.*] The constable when arresting the accused, said: "I arrest you for assaulting old man McGarvey," and proceeded to handcuff him. Accused asked to be permitted to go to the office to get some money, and inquired: "How much will the fine be?" to which the constable replied that he did not know anything about that. Subsequently the accused asked to have the handcuffs removed as he had no intention of escaping, to which the constable answered that he was taking no chances, and that he "had not much sympathy with a man who would kick an old man and bite him":—*Held*, that these remarks of the constable were not an inducement to the accused to speak. REX v. BRUCE. - - - 1

8.——*Summary conviction—Habeas Corpus—Canada Shipping Act, R.S.C. 1906, Cap. 113, conviction under section 287—Disclosure of offence in warrant of commitment.*] It is essential in a conviction under section 287 of the Canada Shipping Act, to state that the act charged was wilfully committed, and the omission to do so is fatal to the validity of the conviction. *The King* v. *Tupper* (1906), 11 C.C.C. 199, and *Ex parte O'Shaughnessy* (1904), 8 C.C.C. 136, followed. REX v. BRIDGES *et al.* - - - - - - 67

CROWN LANDS—*Sale of—Crown grant issued of lands covered by timber lease—Renewal of timber lease subsequent to issue of Crown grant.*] Plaintiff obtained a Crown grant to certain lands, to the timber on which a lease for 21 years had been previously given. The grant from the Crown was silent as to the timber lease. At a date subsequent to the said grant, the timber lease had to be surrendered for renewal under the provisions of the Land Act:—*Held*, that the rights given the grantee under his Crown grant were subject to the existing timber lease, and that the lessees did not lose their priority by taking a renewal under the Act. BROHM v. BRITISH COLUMBIA MILLS, TIMBER ADD TRADING COMPANY. - 123

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See PRACTICE. 10.

DIVORCE—*Alimony, whether grantable to wife obtaining a divorce on account of impotence.*] It is no objection to granting permanent alimony that the wife has obtained a decree for divorce on the ground of impotence. BROWN v. BROWN. - - **73**

2.—*Jurisdiction of Supreme Court—Divorce and Matrimonial Causes Act, 1857 (Imperial)—Whether in force in British Columbia—Introduction of English law into Colonies of British Columbia and Vancouver's Island—Long and undisturbed practice of the Courts—Precedent.*] The Divorce and Matrimonial Causes Act, 1857 (Imperial), is in force in British Columbia. *Watt* v. *Watt* (1908), 13 B.C. 281, not followed. The introduction of English law into the Colonies of British Columbia and Vancouver's Island, and as it is in force in the Province of British Columbia, considered and reviewed. SHEPPARD v. SHEPPARD. - - - - - - **486**

3.—*Jurisdiction—Supreme Court—Divorce and Matrimonial Causes Act, 1857 (Imperial)—How far in force in British Columbia—Stare decisis.*] (1.) The Divorce and Matrimonial Causes Act, 1857 (Imperial), is not in force in British Columbia, and the Supreme Court of British Columbia has no jurisdiction to grant a divorce *a vinculo.* (2.) The decision in *S*—— v. *S*—— (1877), 1 B.C. (Pt. 1) 25, not being the decision of an appellate tribunal, nor of the Supreme Court sitting *in banc*, is not technically binding on the Court, even when constituted of a single judge. (3.) The view taken by BEGBIE, C.J., in *S*—— v. *S*——, *supra*, adopted in preference to that of the other members of the Court (CREASE and GRAY, JJ.) (4.) The rule *stare decisis* does not apply, more particularly as the question is one of jurisdiction. *Semble*, if the Court has jurisdiction it may be exercised by a single judge sitting as the Court. WATT v. WATT. - - - - - - - **281**

EVIDENCE—Admissibility of statements made to constable. - - **1**
See CRIMINAL LAW. 7.

2.—*Extradition—Forgery—Production of forged document—Insufficiency of evidence without such production.*] The basis of a charge being false pretence, and that false pretence being contained in a written document, unless a foundation be laid by secondary evidence to make out a *prima facie* case, the document itself must be produced. *Re* JOHNSTON. - - - - - - **209**

3.—*Taken on commission—Discretion of trial judge to dispense with reading in full, or to accept a statement of its effect.*] Whether all the evidence taken upon commission in an action shall be read at length, or read in part, and stated in part, or stated by counsel at the trial, is a matter in the discretion of the trial judge. MARKS v. MARKS. - **161**

4.—*Whether expert witnesses can be heard when the Court is assisted by assessors.*] When the Court is assisted by nautical assessors, whose duty it is to advise on matters of nautical skill and knowledge, the evidence of witnesses, tendered for expert testimony purely, will not be received. *The Kestrel* (1881), 6 P.D. 182 at p. 189, followed. BRYCE *et al.* v. THE CANADIAN PACIFIC RAILWAY COMPANY. - - - - - - - **96**

EXTRADITION—*Forgery—Production of forged document—Insufficiency of evidence without such production.*] The basis of a charge being false pretence, and that false pretence being contained in a written document, unless a foundation be laid by secondary evidence to make out a *prima facie* case, the document itself must be produced. *Re* JOHNSTON. - - - - - - **209**

FOREIGN COURT—*Jurisdiction of—Judgment obtained in an undefended action for statute-barred claim.*] Judgment was given against defendant in Ontario in January, 1906, on a claim arising out of a promissory note signed in 1898. The action was undefended, although defendant was duly served in British Columbia. He left Ontario in 1899 for Winnipeg and afterwards came to British Columbia, where he has since resided. Plaintiff sued in British Columbia on this judgment, and at the trial evidence was given of a payment made after the British Columbia action had been commenced:—*Held*, by the Full Court, following *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1894), A.C. 670, that defendant had acquired a British Columbia domicile, and was not subject to the Ontario Courts. *Held*, also, following *Bateman* v. *Pinder* (1842), 11 L.J., Q.B. 281, that the payment made could not operate to defeat a plea of the statute of limitations; and that it was a mere conditional offer of compromise which was declined. WALSH v. HERMAN. - **314**

FORGERY. - - - - - - **209**
See EXTRADITION.

FULL COURT—Reference back to. **385**
See WORKMEN'S COMPENSATION.

GUILTY—*Plea of—When it may be struck out.*] Where the accused pleads guilty to a

GUILTY—*Continued.*

charge, and it is disclosed that the indictment alleges only a fact which might or might not, according to the circumstances, be sufficient to prove an offence, the plea of guilty will be struck out. REX v. LABOURDETTE. - - - - - - - 443

HUSBAND AND WIFE—*Moneys advanced by husband to enable wife to purchase land—Resulting trust, evidence to establish—Sale of land by wife—Notice by husband to purchaser—Payment by purchaser to wife after notice—Recovery by husband of amount paid—Lien of wife for moneys of her own used in purchasing property—Reference.*] In an action by a husband against his wife for a declaration of trust, the evidence shewed that the wife had received from the husband the money for the purchase of a homestead, the conveyance of which was taken in the wife's name. A purchaser from her received notice that she was not a widow, and notwithstanding that, before completing the agreement for sale, he received notice warning him, he did complete it:—*Held*, that there was a resulting trust in favour of the husband. A purchaser in the foregoing circumstances, proceeding to anticipate the agreement for sale by accepting an immediate conveyance:—*Held*, that plaintiff should recover from the purchaser the amount of purchase money which he had paid to secure such immediate conveyance. DUDGEON v. DUDGEON AND PARSONS. - - - 179

INDIAN ACT—Jurisdiction of Indian agent acting as Justice of the Peace. - - - - - - - 224

See CRIMINAL LAW. 5.

JUDGMENT—Ante-dating of. - 446

See SHIPPING. 2.

JURY—Direction to. - - - 109

See CRIMINAL LAW.

2.——*Direction to—Verdict, general, special—Right of jury to return general verdict if they choose.*] If either party asks that the jury return a general verdict, then the jury must do so unless they are unable to agree. MACLEOD v. MCLAUGHLIN. - - 16

3.—*Evidence sufficient to go to—Withdrawal of case from—Prima facie case.*] A clerk from one bank presented at another bank a cheque of a customer of such last mentioned bank, but at the wrong ledger-keeper's wicket, and was directed to present it at another wicket. There was no evidence that this was done, and a telegram was sent

JURY—*Continued.*

out by the first mentioned bank that the drawer of the cheque had no account:—*Held*, on appeal (IRVING, J., dissenting), that the trial judge was right in taking the case from the jury and dismissing the action for want of sufficient evidence. REAR v. THE IMPERIAL BANK OF CANADA. - 345

4.——*Questions to—Failure of judge to submit—New trial.*] The only object in submitting questions to a jury is to ascertain if they apprehend the case; but if the judge does not submit questions, it is no ground for a new trial, if he has properly instructed the jury on the law. SNOW v. CROW'S NEST PASS COAL COMPANY, LIMITED. - - - - - - - - 145

5.——*Withdrawal of case from—Slander—Actionable words—Meaning of language uttered—Proof of special damage—Defamation—New trial.*] In an action of slander for words used imputing an offence, which though non-criminal, and not being an indictable offence under the code, yet affects a person's status as a public officer, the plaintiff is entitled to have the case go to the jury without making out a *prima facie* case of special damage suffered. W. v. A. - 333

LANDLORD AND TENANT—*Forfeiture of lease—Relief against non-payment of rent excused by oral assurance—Authority of landlady's husband—Grounds against relief—Supreme Court Act, B. C. Stat. 1903-4, Cap. 15, Sec. 20, Sub-Sec. 7—Evidence—Costs.*] Plaintiff, as lessee, and defendant, as lessor, on the 1st of January, 1906, entered into a lease for a term of five years, at a rental of $70 per month, in advance, with a proviso for forfeiture and re-entry after 15 days' default in payment of rent, together with an exclusive option of purchase on terms named. Plaintiff being absent in December, 1906, and up to the 23rd of January, 1907, inadvertently allowed the rent for January to fall into arrear, but on the latter date, tendered defendant, through her solicitor, she herself being inaccessible, the rent for January and February, and also offered to defray any costs incurred. Defendant had in the meantime, through her bailiff, taken and retained possession. There was evidence of an oral arrangement that in the event of the plaintiff's absence at any time the forfeiture clause for non-payment in advance would not be enforced:—*Held*, following *Newbolt* v. *Bingham* (1895), 72 L.T.N.S. 852, that, no third party interests having intervened, plaintiff was entitled to relief against forfeiture, both as to the term and the option,

LANDLORD AND TENANT—*Contin'd.*

and that, the case coming within Rule 976 of the Supreme Court Rules, 1906, plaintiff should also get the costs of the action. Observations on the effect of section 20, sub-section 7, Supreme Court Act. Decision of HUNTER, C.J., affirmed. HUNTTING v. MACADAM. - - - - - - - - **426**

LAND REGISTRY ACT—*B.C. Stat. 1906, Cap. 23, Sec. 74, effect of.*] A candidate for alderman in the City of Victoria had, prior to his nomination, conveyed away the lands on the alleged ownership whereof he claimed qualification under section 13, sub-section (*b.*) of the Municipal Clauses Act, but the conveyance remained unregistered. In an action to establish disqualification, and for penalties under section 20 of the Act:—*Held*, that the effect of section 74 of the Land Registry Act, Cap. 23, 1906, is to make registration of conveyances taking effect after the 30th of June, 1905, a *sine qua non* of the vesting of any interest, legal or equitable, in the grantee. *Falconer* v. *Langley* (1899), 6 B.C. 444, considered. LEVY v. GLEASON. - - - - - - - - **357**

2.——*Sections 24, 89—Surface rights of mineral claim—Registration of quit claim deed of surface.*] The grant from the Crown to the surface rights of a mineral claim, being given in conjunction with the right to win the minerals thereunder, is not an interest which can be separately transferred by the grantee so as to secure registration under the Land Registry Act. *In re* RELIANCE GOLD MINING AND MILLING COMPANY, LIMITED. - - - - - - - - **482**

3.——*Unregistered deed—Validity of as against assignment for benefit of creditors.*] Notwithstanding section 74 of the Land Registry Act, Cap. 23 of 1906, an unregistered deed confers a good title upon the grantee as against a registered assignment for the benefit of creditors of the grantor, if the grantee, or any one claiming under him, can subsequently effect registration. WESTFALL v. STEWART AND GRIFFITH. - - **111**

MASTER AND SERVANT—*Employers' Liability Act—Injury to servant—Knowledge of workman—Negligence—Contributory negligence—Proximate cause of injury.*] Plaintiff, while engaged in replacing on their track some cars which had run off, was struck through a car becoming released on a down grade, and was thrown on a set of exposed cog-wheels some nine or ten feet to one side of where he was working. He lost the use of his arm in the cogs. His duties did not usually bring him in contact with the

MASTER AND SERVANT—*Continued.*

machinery which caused his injury, nor had he any control over or concern in its working:—*Held*, that the leaving of the cogs unguarded was the decisive cause of the accident, and whether that was negligence in the particular circumstances was properly left to the jury. SNOW v. CROW'S NEST PASS COAL COMPANY, LIMITED. - - **145**

2.——*Injury arising out of and in the course of employment—Serious or wilful neglect.*] While engaged in chipping the burs from a steel plate with a cold-chisel, the plaintiff was injured by a piece of the steel so chipped off, striking him in the eye and destroying its sight:—*Held*, on appeal, affirming the decision of MORRISON, J., that the injury was an accident within the meaning of the Workmen's Compensation Act, 1902. NEVILLE v. KELLY BROTHERS AND MITCHELL, LIMITED. - - - - - - - - **125**

3.——*Injury causing death of servant—Failure of action under common law and Employers' Liability Acts—Workmen's Compensation Act, 1902—"Dependants"—Costs occasioned by abortive common law action—Set-off—Power of arbitrator to direct taking evidence on commission.*] Plaintiffs received money at times from deceased in his lifetime, but there was no evidence of the money having been sent at regular intervals or in regular amounts:—*Held*, on appeal, affirming the decision of MARTIN, J., that plaintiffs were, on the evidence, dependants within the meaning of the term in the Workmen's Compensation Act, 1902. An action at common law for damages for the death of a workman having failed, the trial judge proceeded under section 2, sub-section 4 of the Workmen's Compensation Act, to assess compensation. On the question of apportionment of costs of the abortive action and the assessment under the Act, plaintiffs' counsel set up his inability under the Act to take evidence on commission:—*Held*, *per* MARTIN, J., at the trial, that section 2 of the second schedule and Rules 2, 34 and 81 of the Workmen's Compensation Rules, 1904, give the arbitrator power to direct the taking of evidence on commission. FOLLIS v. SCHAAKE MACHINE WORKS. - - **471**

MECHANICS' LIENS. - - **202**
See ATTACHMENT OF DEBTS. 2.

MINING LAW—*Extra-lateral rights—Trespass workings—Continuous or faulted veins—Conflicting theories—Evidence—Inspection—Onus.*] In a contest to determine the question as to whether a particular vein,

MINING LAW—*Continued.*

called the Star vein, was continuous, or whether it was faulted by another vein styled the Black or Barren Fissure, the trial judge, after inspection of the mine, in the presence of an engineer chosen by each party, ordered certain work to be done with a view to ascertaining which theory was correct. On inspection of this work the trial judge found that the facts that in three different places identically the same material was found in the Star vein and in the Fissure; that ore was found in the first 280 feet of the Fissure of the same character as that in the Star vein, and distributed over its entire width; that experiments destroyed the theory of junction or cut-off in all slopes and levels in the mine where it was alleged that such existed; that in all pits dug on the apex the same vein matter was visible; that assay ore was found in a pit on the apex corresponding to the middle of the barren vein; that the defendants had followed up their vein into and along the Black Fissure for over 1,000 feet without cross-cutting, were sufficient to warrant the conclusion that the two veins were continuous in fact, and that one vein did not fault the other; and outweighed the circumstance that the Fissure was barren for about 1,000 feet, and that it presented a shattered and contorted appearance in making a sharp curve around a dyke of porphyry. Plaintiffs applied for an order directing further work to be done on the ground that enough had not been done to establish their theory. This was refused, and plaintiffs appealed. The appeal was allowed, and further work directed to be done:—*Held*, on appeal (MORRISON, J., dissenting), on the evidence furnished by the further work done under direction of the Full Court, that the defendant Company had failed to discharge the onus cast upon it to establish the identity and continuity of the vein in question. STAR MINING AND MILLING COMPANY, LIMITED LIABILITY v. BYRON N. WHITE COMPANY (Foreign). - - - - - - 234

2.——*Hydraulic lease—Pleading—Dispute note—Special defence—Free miner's certificate—Recorded interest—New defence on appeal—Jurisdiction.*] Defence setting up failure to comply with the provisions of the Placer Mining Act must be specially pleaded, *e.g.*, lack of a free miner's certificate and failure to record interest. Unless exception is taken at the trial to the jurisdiction of the County Court, it will not be entertained on appeal. *Gelinas* v. *Clark* (1901), 8 B.C. 42, followed. Decision of CALDER, Co. J., affirmed on the facts. STEPHENSON v. STEPHENSON AND STEPHENSON. - 115

3.——*Mineral claim, contract for sale of interest in.* - - - - - - - 20

See CONTRACT.

4.——*Surface rights of mineral claim—Registration of quit claim deed of surface.*] The grant from the Crown to the surface rights of a mineral claim, being given in conjunction with the right to win the minerals thereunder, is not an interest which can be separately transferred by the grantee so as to secure registration under the Land Registry Act. *In re* RELIANCE GOLD MINING AND MILLING COMPANY, LIMITED. - 482

MUNICIPAL LAW—*By-law, validity of—Jurisdiction of Council over liquor traffic—Sunday closing—Saloons—Hotel bar-rooms—Distinction between—Liquor Traffic Regulation Act, R.S.B.C. 1897, Cap. 124, Sec. 7—Municipal Clauses Act, B.C. Stat. 1906, Cap. 32, Sec. 50, Sub-Sec. 100, and Sec. 205, Sub-Sec. (d).*] A liquor licence by-law provided that upon information of an infraction of its provisions by a holder of a licence, he might be summoned to attend the next meeting of the Licensing Commissioners to make application for a renewal of his licence. It was contended that the holder could not be compelled to make application for a renewal until the expiry of his licence:—*Held*, that the Council had authority to pass such an enactment under sub-section (*d.*) of section 205, Municipal Clauses Act, Cap. 32, 1906. *Held*, also, that a provision to enforce, *inter alia*, the closing of hotel bar-rooms during such hours of the night as may be thought expedient, was bad as exceeding the powers conferred by section 50, sub-section 122 of said chapter 32. *Hayes* v. *Thompson* (1902), 9 B.C. 249, followed on this point. *In re* MOLONEY AND THE CORPORATION OF THE CITY OF VICTORIA. - - - - 194

2.——*Health Act, R.S.B.C. 1897, Cap. 91—Isolation of infected premises by Medical Health officer—Liability of Municipal Council for expenses of maintaining quarantined premises and inmates.*] Where a Medical Health officer (appointed by a City Council), acting in pursuance of a Provincial statute, places a quarantine on a building and its inmates within the limits of a City Municipality, the latter cannot be held liable for the costs of provisioning and heating the building during the period of isolation. TAYLOR AND TAYLOR v. THE CORPORATION OF THE CITY OF REVELSTOKE. - - - - - 211

MUNICIPAL LAW—*Continued.*

3.——*Municipal Clauses Act, B.C. Stat. 1906, Cap. 32, Secs. 13, 19, 20—Alderman—Property qualification of—Land Registry Act, B.C. Stat. 1906, Cap. 23, Sec. 74, effect of.*] A candidate for alderman in the City of Victoria had, prior to his nomination, conveyed away the lands on the alleged ownership whereof he claimed qualification under section 13, sub-section (*b.*) of the Municipal Clauses Act, but the conveyance remained unregistered. In an action to establish disqualification, and for penalties under section 20 of the Act:—*Held*, that the effect of section 74 of the Land Registry Act, Cap. 23, 1906, is to make registration of conveyances taking effect after the 30th of June, 1905, a *sine qua non* of the vesting of any interest, legal or equitable, in the grantee. *Falconer* v. *Langley* (1899), 6 B.C. 444, considered. LEVY v. GLEASON. - 357

4.——*Tax-imposing powers of Council—By-law, interpretation of—Description of class of persons taxed.*] The effect of reprinting a municipal by-law was to alter the position of the last word in the first line of a section. The same word occurred five times in the section. An amendment was subsequently passed, intending the insertion of another word before the word so changed in position:—*Held*, that the amendment should be placed and read in the position only to which it could sensibly relate. A by-law provided for the taking out of a licence by every person using or following "any of the professions particularly described and mentioned in Schedule A." The profession of barrister or solicitor was not mentioned, but clause 27 of the by-law contained an omnibus provision that "every person following within the municipality any profession . . . . . not hereinbefore enumerated" should take out a licence:—*Held* (CLEMENT, J., dissenting), that this provision took in the professions of barrister and solicitor without any more definite description. THE CORPORATION OF THE CITY OF VICTORIA v. BELYEA. - - - - - - - 5

5.——*Trades licences—By-law, registration of under section 86, Municipal Clauses Act, B.C. Stat. 1906, Cap. 32—Certiorari.*] A municipal by-law, providing for the imposition of a licence "for every six months" was passed and registered on the 18th of September, and the time limited for the expiration of the first licence thereunder was fixed for the 15th of the ensuing January. There was no provision made for the period of time between the passage of the by-law and the 15th of January:—*Held*, that a conviction of defendant Company for carrying on business on or about the 4th of December intervening, without having taken out a licence under the by-law, was bad, in that section 1 of the by-law could apply only to a six months' licence for which a six months' fee had been paid:—*Held*, further, that the copy of the by-law deposited for registration having impressed upon it the seal of the Municipality was sufficient, and that it was not necessary to affix the seal to the certificate of the municipal clerk, authenticating the by-law. CITY OF FERNIE v. CROW'S NEST PASS ELECTRIC LIGHT AND POWER COMPANY, LIMITED. - - - - - - - 12

NEW TRIAL—*Grounds for—Libel, action for—Verdict of jury opposed to judge's charge.*] Two substantive allegations of wrong-doing on the part of plaintiff as a minister of the Crown having been alleged, and there being no proof of the truth, and no justification for one of such allegations, the jury, after a charge in favour of plaintiff returned a verdict in favour of the defendant:—*Held*, on appeal (IRVING, J., dissenting), that there should be a new trial. GREEN v. THE WORLD PRINTING AND PUBLISHING COMPANY, LIMITED. - - - - - - - 467

2.——*Sale of land—Conveyance—Rectification—Mistake in description—Excessive acreage—Insufficiency of evidence upon which to order rectification.*] Plaintiff purchased from one Peterson one-half of a piece of land, said to contain 82 acres, being a portion of lot 119, group 2, New Westminster District. The description and the conveyance of the land, which were drawn by a real estate broker who was neither a solicitor nor a surveyor, purported to state the metes and bounds, but declared the parcel to contain 41 acres more or less. There was also a mortgage of the parcel given by plaintiff, containing the same description as the deed, and drawn by the same person. The deed was registered without any description. Plaintiff sold to defendant on the basis of there being 41 acres, and the same description was used. Defendant inspected the property both before and after the sale, had no idea that the acreage was any more than stated, and so admitted at the trial. There was up to this time no proper survey of the sub-division, beyond a middle line drawn by a surveyor with a view to dividing the land into halves. Defendant on seeing the location of this line perceived that it excluded him from a piece of cleared land which he alleged was on his half. The surveyor, on this, ran another line, the plan from which

MUNICIPAL LAW—*Continued.*

shewed that defendant had within his line some 48 instead of 41 acres. Neither the surveyor, the draftsman of the conveyance, nor the parties could say that the original parcel contained 82 acres. The learned trial judge came to the conclusion that there was a mutual mistake, and directed the rectification of the conveyance:—*Held*, on appeal, that there was a lack of conclusive evidence as to the true area of the original parcel on which to direct the rectification of the deed, and that there should be a new trial. FALK v. SWENSON. - - - - - - **359**

3.——*Failure of judge to submit questions to jury not necessarily a ground for new trial.*] If the trial judge does not submit questions to the jury, it is no ground for a new trial, if he has properly instructed the jury on the law. SNOW v. CROW'S NEST PASS COAL COMPANY, LIMITED. - - - - **145**

PARTNERSHIP. - - - - - **117**
See AGREEMENT. 2.

PLEADING. - - - - - - **115**
See MINING LAW. 2.

PRACTICE—*Adding parties defendant—Rules 1 and 1,026 Supreme Court Rules, 1906—Proceedings in replevin.*] By the Supreme Court Rules, 1906, proceedings in an action for replevin are made uniform with those in other classes of actions. Decision of MORRISON, J., affirmed. EMERSON v. SKINNER. - - - - - - - - **121**

2.——*Costs of application for warrant for possession—Railway Act, 1903 (Dominion), Secs. 193, 217 and 219, Sub-Sec. 1.*] Where a railway company, under its powers to expropriate land, obtains a warrant for possession, and the amount awarded the owner in subsequent arbitration proceedings is less than the amount at first offered by the Company, the costs of obtaining the warrant for possession shall be borne by the owner. *In re* VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY AND MILSTED. - - - - **187**

3.——*Costs—Successful party—Power to deprive him of costs—"Good cause"—Marginal rule 976—Distinction between the English and the British Columbia Rules.*] In an action for libel between two newspapers, arising out of statements as to their respective circulation, the trial judge found on the facts that the statement made by the defendant newspaper was not established; but he came to the conclusion that there had been no special damage suffered by the plaintiff newspaper in consequence of the statement, and gave judgment dismissing the action without costs:—*Held*, that under the rule governing costs in British Columbia, as distinguished from that in force in England, the trial judge must find good cause for depriving a successful party of his costs; and here there was not such good cause. THE WORLD PRINTING AND PUBLISHING COMPANY, LIMITED v. THE VANCOUVER PRINTING AND PUBLISHING COMPANY, LIMITED. - - - - - - - - **220**

4.——*County Court action transferred to Supreme Court—Claim $140; counter-claim, $3,000—Time from which transferring order takes effect.*] The order transferring an action from the County Court to the Supreme Court takes effect as soon as pronounced. PARROT *et al.* v. CHEALES. - - - - **445**

5.——*County Court–Pleading–Amendment.* - - - - - - - - - - - **49**
See RAILWAYS. 4.

6.——*Directions—Particulars—Discovery—Distinction between.*] The true function of particulars is, not to give discovery, but to enable the opposite party to properly frame his pleading. STEVES v. MURCHISON. **188**

7.——*Discovery, examination for—Nature of under Rules of 1906—Old Rules 703 and 712—New Rules 370c and 370i (3).*] The omission to include in the Supreme Court Rules, 1906, the amendment of June, 1900, to the old rule 703, has not changed the examination for discovery from a proceeding having the nature of a cross-examination. MCINNES v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - **465**

8.——*Dismissal of action as frivolous and vexatious—Application to make party plaintiff a company already party defendant—Fraud, allegation of.*] On an application to dismiss an action as frivolous or vexatious, if the plaintiff does not answer the affidavits filed in support, they must be taken as true. W. D. HOFIUS AND COMPANY v. THE LENORA, MOUNT SICKER COPPER MINING COMPANY, LIMITED *et al.* - - - - - - **226**

9.——*Fixing of venue–Application for order made in regular way—Case necessary to be made out.*] Where the usual order for directions names the place of trial, a subsequent application to change the venue will not be entertained; at all events where there has been no intervening alteration of conditions. HUGGARD v. NORTH AMERICAN LAND AND LUMBER COMPANY *et al.* - **280**

PRACTICE—*Continued.*

10.—*Indorsement on writ—Statement of claim setting up different cause of action—Directions—Discretion.*] The indorsement on the writ asked for the delivery up and cancellation of a certain document, dated the 24th of April, 1906. The statement of claim, when delivered, shewed in effect that the document sought to be declared void was dated the 20th of September, 1906, and was of a different purport:—*Held*, that the indorsement was defective and erroneous, but that it might be amended and redelivered on payment of costs. CHANG SHEE HO CHONG v. CULLEY *et al.* - - - - - **18**

11.——*Joinder of defendants—Action for rectification of agreement for sale of land.*] In an action for the rectification of an agreement for sale of a certain lot, it developed that plaintiff had dealt with one L. assuming to act as agent for the defendant Corporation, who, on discovery, denied his authority to act as their agent:—*Held*, that plaintiff had a right to add L. as a party defendant, as, should it transpire that L. was not a duly authorized agent of the owners, plaintiff might have a right of action against him personally. BRADLEY v. YORKSHIRE GUARANTEE AND SECURITIES CORPORATION, LIMITED. - - - - - - - - - **68**

12.——*Questions put to judgment debtor—Whether marginal rule 610, Supreme Court Rules, 1906, displaced by Arrest and Imprisonment for Debt Act, R.S.B.C. 1897, Cap. 10, Sec. 9—Supreme Court Act, B.C. Stat. 1903-4, Cap. 15, Secs. 108 and 109.*] Under rule 610, of the Supreme Court Rules, 1906, the debtor must answer all questions affecting his property anterior to the recovery of the judgment. Section 19 of the Arrest and Imprisonment for Debt Act has not been displaced by rule 610. JACKSON v. DRAKE, JACKSON & HELMCKEN. - - - - **62**

13.——*Special indorsement on writ—Order III., r. 6—Order XIV.*] Where a party is placed in the position of having judgment signed against him summarily, he is entitled to have sufficient particulars to enable him to satisfy his mind whether he should pay or resist. BANK OF MONTREAL v. THOMSON. - - - - - - - - - - **218**

14.——*Stay of execution pending appeal to Full Court—Order 58, r. 16—Security for costs—Discretion.*] Under Order 58, r. 16 of the Supreme Court Rules, 1906, the granting of a stay of execution pending an appeal to be taken, is a matter of discretion to be exercised upon the facts of each particular case. REYNOLDS v. MCPHAIL. - **159**

PRACTICE—*Continued.*

15.——*Summons for directions—Order for directions also fixing place of trial—Subsequent application for change of venue—Order XXX., rr. 1, 2—Finality of order under.*] On a summons for directions the usual order was made, *inter alia* fixing the place of trial at New Westminster. There was nothing said as to venue, and no objection raised, on this application. Subsequently defendant applied to have the venue changed to Fernie, on the grounds of convenience of witnesses and the necessity for a view of the *locus in quo*. This application was refused:—*Held*, on appeal (CLEMENT, J., dissenting), that the omission of the solicitor's agent to keep open the question of venue until he was properly instructed should not in the circumstances be permitted to work an undue hardship on the defendant. Directions given under Order XXX., have not the finality of ordinary orders. FOSS *et al.* v. HILL. - - - - - - - - **403**

PRINCIPAL AND AGENT—*Authority of agent—Delegation of authority—Receipt given in name of agent's firm, signed by a clerk—Statute of Frauds.*] An agent "thereunto lawfully authorized" within the Statute of Frauds, cannot delegate his authority. An agent who, at the time of making a contract, has failed to bind his principal by a written note or memorandum within the statute, cannot sign an effectual note or memorandum after his authority as agent to sell has been withdrawn. STEVENSON v. SMITH. - - - - - - - - **213**

2.——*Contract for sale of land—Want of authority of vendor's agent—Incomplete contract—Specific performance—Correspondence.*] In viewing the relations or dealings between principal and agent, an unconditional authority to sell land should not be lightly inferred, but it should be clear beyond any reasonable doubt that such authority was conferred. JULL v. RASBACH. - **398**

3.——*Contractor and employee—Sale of land—Remuneration—Finding a purchaser, able, ready and willing to purchase—Added terms by vendor.*] In an action by an agent to recover the amount of his commission, he must shew that he has produced to the principal a purchaser ready, willing and able to enter into a binding agreement to purchase; and the agent is entitled to his commission if, the parties having been shewn to be agreed upon the terms, the sale is subsequently prevented by the fault or default of the vendor. *Grogan* v. *Smith* (1890), 7 T.L.R. 132, *per* Lord Esher, M.R., followed. BAGSHAWE v. ROWLAND. - **262**

PRINCIPAL AND AGENT—*Continued.*

4.——*Introduction of purchaser—Commission—Engagement to procure purchaser at a given figure—Sale subsequently at a lower figure to the same person.*] H. being pressed by his mortgagees, applied to B. to procure a loan of $58,000. Negotiations to that end by B., and also further efforts to procure a sale of certain of the property for $56,000, failed. Subsequently the person with whom B. was negotiating was introduced by his (the prospective purchaser's) banker to the agent of the mortgagees, and a sale was brought about for $50,000, H. paying the agent a commission. In an action by B. against H. for a commission for having first introduced the purchaser:—*Held*, on appeal, affirming the judgment of IRVING, J., at the trial (MORRISON, J., dissenting) that B. was engaged to find a purchaser at a certain figure, and having failed to do so, he was not entitled to a commission on a sale, although made to the person originally introduced by him. *Per* HUNTER, C.J.: When, *prima facie*, the agreement is to pay a commission on a named figure it is for the agent to shew in the clearest way that the intention of the parties was to pay a commission on any figure at which the sale goes through. BRIDGMAM v. HEPBURN. - **389**

5.——*Right of principal to recover—Contract of agency—Illegality—Contract prohibited by statute—enforceableness of.*] The general rule that persons who enter into dealings forbidden by law must not expect any assistance from the law, is not applicable so as to exonerate an agent from accounting to his principal by reason of past unlawful acts or intentions of the principal collateral to the agency. If the money is paid to him in respect of an illegal transaction, he is bound to pay it over, provided that the contract of agency is not itself illegal. The making of the contract of agency in this case was not a "carrying on business" by an unlicensed extra-provincial company within the meaning of section 123 of the Companies Act. Decision of HUNTER, C. J., upheld on different grounds. DE LAVAL SEPARATOR COMPANY v. WALWORTH (No. 2.) - - - - - - - - - **295**

RAILWAYS—*Costs of application for warrant for possession—Railway Act, 1903 (Dominion), Secs. 193, 217 and 219, Sub-Sec. 1—Practice.*] Where a railway company, under its powers to expropriate land, obtains a warrant for possession, and the amount awarded the owner in subsequent arbitration proceedings is less than the amount at first offered by the company, the costs of obtaining the warrant for possession shall be borne by the owner. *In re* VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY, AND MILSTED. - **187**

2.——*Expropriation of land—Obstruction of water supply following expropriation—Compensation for loss of water.*] In an arbitration to determine the amount to be paid to the owner of land expropriated by a railway company, the arbitrators found for the owner as compensation for the land, $2,950, and for loss of water supply from a spring, obstructed in consequence of such expropriation, two of the arbitrators awarded the sum of $1,200. The third arbitrator returned a finding against any compensation for deprivation of the water in the absence of a water record:—*Held*, that the owner was entitled. *In re* MILSTED. - **364**

3.——*General and special legislation affecting—Dominion and Provincial—Negligence—Damages caused by sparks from engine—Limitation of action for damages—"By reason of the construction and operation of the railway"—Consolidated Railway Act, 1879 (Dominion)—Railway Act, 1903 (Dominion)—Canadian Pacific Railway Company's charter—Interpretation Act, R.S.C. 1906, Cap. 1.*] In an action for damages caused by sparks from a railway engine, the Railway Company claimed the benefit of section 27 of the Consolidated Railway Act, 1879, which was incorporated into their charter by Parliament. Said section 27 provides, in part, that all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained:—*Held*, on appeal, *per* HUNTER, C.J., and CLEMENT, J., that by virtue of section 20 of the Interpretation Act (Dominion), the Railway Act, 1903, applies to the Canadian Pacific Railway. *Per* IRVING, J.: The general Railway Act of 1879, notwithstanding its repeal by subsequent general legislation, governs the Canadian Pacific Railway. THE NORTHERN COUNTIES INVESTMENT TRUST, LIMITED v. THE CANADIAN PACIFIC RAILWAY COMPANY. - - - - - - - - - **130**

4.——*Railway Act, 1903 (Dominion), Sec. 237, Sub-Sec. 4—"Animals at large upon the highway or otherwise," meaning of—Section 199.*] Plaintiff's animals were set at large to pasture in the open country, and were killed at a place where the Company were not bound to fence:—*Held*, that he could not invoke the aid of section 237, sub-section 4 of the Railway

RAILWAYS—*Continued.*

Act, 1903. Decision of FORIN, Co. J., affirmed, MARTIN, J., dissenting. MCDANIEL v. THE CANADIAN PACIFIC RAILWAY COMPANY. - - - - - - - - - 49

5.——*Railway Act, R.S.C. 1906, Cap. 37, Sec. 254, Sub-Sec. 4—"Locality," meaning of—Obligation of railway to fence—Animals killed by tratn.*] Plaintiff's animals were killed on defendants' track, the right of way of which passed in front of his land. There was no fence erected on this portion of land, either by the railway company or plaintiff. The north end of the plaintiff's ranch was within 800 yards of the municipal limits of Fernie. There were about two acres of the ranch with a frontage of 450 feet on the right of way, and about 200 feet off was an enclosure used as a goat pen, about 20 by 30 feet. There was also a potato patch of about three-quarters of an acre, and a moveable fence separating this patch from a grassy portion. This, together with a piece of fencing along a waggon road, but not reaching the right of way by some 225 feet, was the only fencing on the ranch. There was evidence of scattered places in the vicinity, some being fenced and others not, but with unfenced and unoccupied land intervening:—*Held*, by the Full Court, reversing the holding of WILSON, Co. J. (CLEMENT, J., dissenting), that as the land in question *per se* could not be classed as a settled or inclosed locality, there was no obligation on the Company to fence its right of way in the absence of an order from the Board of Railway Commissioners to do so; and that their contiguity to the limits of an incorporated town did not constitute the lands a portion of the settled locality of such town. Having regard to the powers given the Board of Railway Commissioners by section 254 of the Railway Act, and particularly the language of sub-section 4, the word "locality" must be construed without reference to the proximity of town limits. CORTESE v. THE CANADIAN PACIFIC RAILWAY COMPANY. - - - - - 322

RIPARIAN OWNERS. - - 77
See WATERS AND WATER RIGHTS. 2.

SALE OF LAND. - - - 389
See PRINCIPAL AND AGENT. 4.

2.——*Agreement for—Time of the essence—Rescission—Laches.*] In an agreement for the purchase of land, with possession, purchaser covenanted, *inter alia*, giving vendor power to enter and determine tenancy on default, and that notice of default addressed to purchaser at Vancouver, B.C., should be

SALE OF LAND—*Continued.*

sufficient. Purchaser having become in default, and his address changeable, vendor wrote to a firm of brokers who were in communication with him, after two demands for payment of moneys in arrear, desiring them to instruct purchaser of the cancellation of the agreement:—*Held*, affirming the judgment of CLEMENT, J., at the trial, that the time allowed purchaser was not a waiver of the right of rescission under the agreement. SCOTT v. MILNE. - - - - - 378

3.——*Construction of contract for—Agreement to indemnify indorser.*] A deed conveyed land to a party as security to indemnify him from loss in respect of his indorsement of a promissory note:—*Held*, that it secured him and his estate in respect of every subsequent indorsement of any other note, whether by way of renewal or as collateral security in respect of the same debt. WESTFALL v. STEWART AND GRIFFITH. 111

4.——*Contract for.* - - - 268
See VENDOR AND PURCHASER.

5.——*Conveyance—Rectification—Mistake—Excessive average—Insufficiency of evidence upon which to order rectification—New trial.*] Plaintiff purchased from one Peterson one-half of a piece of land, said to contain 82 acres, being a portion of lot 119, group 2, New Westminster District. The description and the conveyance of the land, which were drawn by a real estate broker who was neither a solicitor nor a surveyor, purported to state the metes and bounds, but declared the parcel to contain 41 acres more or less. There was also a mortgage of the parcel given by plaintiff, containing the same description as the deed, and drawn by the same person. The deed was registered without any description. Plaintiff sold to defendant on the basis of there being 41 acres, and the same description was used. Defendant inspected the property both before and after the sale, had no idea that the acreage was any more than stated, and so admitted at the trial. There was up to this time no proper survey of the subdivision, beyond a middle line drawn by a surveyor with a view to dividing the land into halves. Defendant on seeing the location of this line perceived that it excluded him from a piece of cleared land which he alleged was on his half. The surveyor, on this, ran another line, the plan of which shewed that defendant had within his line some 48 instead of 41 acres. Neither the surveyor, the draftsman of the conveyance, nor the parties could say that the original parcel contained 82 acres. The learned

SALE OF LAND—*Continued.*

trial judge came to the conclusion that there was a mutual mistake, and directed the rectification of the conveyance:—*Held*, on appeal, that there was a lack of conclusive evidence as to the true area of the original parcel on which to direct the rectification of the deed, and that there should be a new trial. FALK v. SWENSON. - - **359**

SHIPPING—Canada Shipping Act, R.S.C. 1906, Cap. 113—Conviction under section 287. - - - **67**

See CRIMINAL LAW. 8.

2.——*Collision—Overtaking vessel, duty of—Onus on overtaken vessel to keep proper look-out astern—Inevitable accident—Stopping and reversing—"Narrow channel," what constitutes—Articles 22, 23, 24 and 25 Collision Regulations—Finding by trial judge with assessors, reversal of—Narrow channel—Wrong side—Onus of proof of contributing negligence of overtaken vessel—Damages, assessment of—Ante-dating of judgment.*] On July 21st, 1906, between 11½ and 13 minutes after two p.m., the steamer Princess Victoria (length 300 feet, speed 19 to 20 knots) belonging to the defendant Company, collided with and sank the steamer Chehalis (length 59.3 feet, speed about 9 knots) both vessels being on their way westward out of Vancouver harbour. The Princess Victoria's point of departure was her usual berth on the south side of the harbour; the Chehalis left from the north side, or North Vancouver, and both vessels proceeded through the Narrows, the Chehalis going first and crossing the channel diagonally towards the south shore so as to take advantage of the slack water and avoid the incoming tide. The day was fine and clear with a light westerly breeze, and there were three vessels in the Narrows at the time, *viz.*: the two steamers and a small gasoline launch. The Chehalis was in view of the Princess as soon as the latter was steadied on her course after leaving the wharf, and was three points to starboard about three-quarters of a mile off. There was a strong tide, about eight to nine knots, coming through the Narrows, and against the vessels. The launch came into view of the Princess as the latter swung into the tide at Burrard Shoal, and the launch was then about 100 yards west of Brockton Point and steering for the south shore, and on the port bow of the Princess. The latter, after rounding the point and swinging slowly to port, was steadied within half a point so as to avoid the launch, and then headed straight down and through the Narrows, the intention being to pass between the Chehalis and the launch, which at that time were some 250 yards apart. After being so steadied, two whistles were blown by the Princess to indicate to the Chehalis that the Princess would pass her on the port side. At the moment this signal was given, the Chehalis changed her course at least three to four points from west to southward, bringing her across the bows of the Princess. The engines of the latter were at once stopped and reversed at full speed, but the speed she was making through the water and the effect of the tide on the Chehalis brought both vessels together, and the Chehalis was swept under the Princess's starboard bow and sunk. The speed of the Princess at the moment of impact was four or possibly five knots through the water, though making no headway over the ground. *Held, per* MARTIN, J., at the trial, that the master of the Princess Victoria gave the signal indicating his course at the earliest time consistent with the position of the vessels, and that he did not neglect to take any proper precaution which a prudent and skilful navigator should have taken in the circumstances. By the Full Court: In a collision action, there is, in order to establish contributory negligence, an onus on the overtaking vessel to shew that the overtaken one also violated the regulations and thereby contributed to the disaster:—*Held*, on the facts in this case that such onus had not been discharged. *Per* HUNTER, C. J.: Article 24 of the regulations is meant to assure those on the overtaken vessel that they need not concern themselves with the movements of the overtaking ship provided the former keeps its course and speed. The sole question being whether either or both vessels committed a breach of the regulations, the Court alone must decide, regardless of the opinion of the assessors. Decision of MARTIN, J. (reported *ante* p. 96), reversed, IRVING, J., dissenting. BRYCE *et al.* v. THE CANADIAN PACIFIC RAILWAY COMPANY. - - - - - - - **96, 446**

3.——*Seamen's Act, R.S.C. 1886, Cap. 74, Sec. 52—Jurisdiction of County Court—Wages of sailor—Term of hiring—Accrual of wages de die in diem—Desertion—Forfeiture of wages.*] A County Court judge has jurisdiction in an ordinary action for wages of a seaman to try a claim for more than $200 where the plaintiff has a good demand at common law; that is, where his cause of action is complete without the aid of the statute. Section 52 of the Seamen's Act merely creates a concurrent tribunal for

SHIPPING—*Continued.*

securing a speedy settlement of claims for wages. Plaintiff shipped for a voyage of three months. The period expired before the voyage was completed, and while the ship was calling at a port, he went ashore, without leave, to seek legal advice. While thus absent the ship sailed:—*Held*, that he could not be classed as a deserter. CAIRNS v. BRITISH COLUMBIA SALVAGE COMPANY, LIMITED. - - - - - - - - **83**

SLANDER—*Actionable words—Meaning of language uttered—Proof of special damage—Defamation—New trial—Jury, withdrawal of case from.*] In an action of slander for words used imputing an offence, which though non-criminal, and not being an indictable offence under the Code, yet affects a person's status as a public officer, the plaintiff is entitled to have the case go to the jury without making out a *prima facie* case of special damage suffered. W. v. A. - - - - - - - - - **333**

STATUTE—6 Edw. 7, Cap. 48, Secs. 30, 31, 32, 36, 37, 38, 39. - - **309**
See ADMIRALTY LAW. 3.

20 & 21 Vict., Cap. 85. - - **281, 486**
See DIVORCE. 2, 3.

30 & 31 Vict., Cap. 3, Sec. 91. - **331**
See CONSTITUTIONAL LAW.

30 & 31 Vict., Cap. 3, Sec. 95. - **477**
See CONSTITUTIONAL LAW. 2.

57 Vict., Cap. 2. - - - - - **460**
See ADMIRALTY LAW. 2.

57 & 58 Vict., Cap. 60, Sec. 166 (1.) **309**
See ADMIRALTY LAW. 3.

B.C. Stat. 1900, Cap. 18; 1906, Cap. 26. **278**
See STATUTE, CONSTRUCTION OF. 4.

B.C. Stat. 1902, Cap. 17, Sec. 35. - **273**
See ATTACHMENT OF DEBTS.

B.C. Stat. 1902, Cap. 74. - **385, 471**
See WORKMEN'S COMPENSATION.
MASTER AND SERVANT. 3.

B.C. Stat. 1903, Cap. 53; 1905, Cap. 50. **55**
See ASSESSMENT.

B.C. Stat. 1903-4, Cap. 15, Sec. 20, Sub-Sec. 7 - - - - - - - - **426**
See LANDLORD AND TENANT.

B.C. Stat. 1903-4, Cap. 15, Secs. 108 and 109. - - - - - - - - - - **62**
See PRACTICE. 12.

STATUTE—*Continued.*

B.C. Stat. 1905, Cap. 8, Sec. 11. - **271**
See BILL OF SALE.

B.C. Stat. 1906, Cap. 23, Sec. 74. - **357**
See LAND REGISTRY ACT.
MUNICIPAL LAW. 3.

B.C. Stat. 1906, Cap. 23, Secs. 74 and 89. **482**
See LAND REGISTRY ACT. 2.

B.C. Stat. 1906, Cap. 26, Sec. 2. - **328**
See COUNTY COURT. 6.

B.C. Stat. 1906, Cap. 32, Secs. 13, 19, 20. **357**
See MUNICIPAL LAW. 3.

B.C. Stat. 1906, Cap. 32, Sec. 86. - **12**
See MUNICIPAL LAW. 5.

B.C. Stat. 1906, Cap. 32, Sec. 50, Sub-Sec. 100; Sec. 205, Sub-Sec. (*d.*) - **194**
See MUNICIPAL LAW.

B.C. Stat. 1908, Cap. 23. - **370, 477**
See CONSTITUTIONAL LAW. 2, 3.

Canadian Stat. 1879, Cap. 9. - - **130**
See RAILWAYS. 3.

Canadian Stat. 1890, Cap. 31, Sec. 80. **70**
See BANKS AND BANKING. 3.

Canadian Stat. 1890, Cap. 33, Sec. 48. - **4**
See BANKS AND BANKING. 2.

Canadian Stat. 1903, Cap. 11. - - **91**
See CONSTITUTIONAL LAW. 4.

Canadian Stat. 1903, Cap. 58. - **130**
See RAILWAYS. 3.

Canadian Stat. 1903, Cap. 58, Secs. 193, 217 and 219, Sub-Sec. 1. - - **187**
See PRACTICE. 2.
RAILWAYS.

Canadian Stat. 1903, Cap. 58, Sec. 199 and Sec. 237, Sub-Sec. 4. - - - **49**
See RAILWAYS. 4.
STATUTE, CONSTRUCTION OF. 5.

Canadian Stat. 1907, Cap. 50. - **370**
See CONSTITUTIONAL LAW. 3.

Criminal Code, Sec. 228. - - - **216**
See CRIMINAL LAW. 2.

R.S.B.C. 1897, Cap. 10. - - - **62**
See STATUTE, CONSTRUCTION OF. 3

STATUTE——*Continued.*

R.S.B.C. 1897, Cap. 10, Sec. 9. - **62**
See PRACTICE. 12.

R.S.B.C. 1897, Cap. 13. - - - **141**
See COMPANY LAW.

R.S.B.C. 1897, Cap. 44, Sec. 123. **74, 297**
See COMPANY LAW. 2, 4.

R.S.B.C. 1897, Cap. 64. - - - **190**
See ASSESSMENT. 2.

R.S.B.C. 1897, Cap. 91. - - - **211**
See MUNICIPAL LAW. 2.

R.S.B.C. 1897, Cap. 124, Sec. 7. - **194**
See MUNICIPAL LAW.

R.S.B.C. 1897, Cap. 135, Secs. 50 and 130. **20**
See CONTRACT.

R.S.B.C. 1897, Cap. 163, Sec. 209. - **364**
See ARBITRATION. 2.
WATER RECORD.

R.S.B.C. 1897, Cap. 190. - - **364**
See WATER RECORD.

R.S.B.C. 1897, Cap. 190, Secs. 9, 27, 84. **275**
See WATERS AND WATER RIGHTS.

R.S.B.C. 1897, Cap. 190, Secs. 36 and 39. **215**
See STATUTE, CONSTRUCTION OF. 6.

R.S.B.C. 1897, Cap. 194, Sec. 3. - **343**
See COUNTY COURT. 8.

R.S.C. 1906, Cap. 1. - - - **130**
See RAILWAYS. 3.

R.S.C. 1906, Cap. 37, Sec. 254, Sub-Sec. 4. - - - - - - - - **322**
See RAILWAYS. 5.

R.S.C. 1886, Cap. 74, Sec. 52. - - **83**
See SHIPPING. 3.

R.S.C. 1906, Cap. 77. - - - **417**
See COUNTY COURT. 7.

R.S.C. 1906, Cap. 93. - - - **477**
See CONSTITUTIONAL LAW. 2.

R.S.C. 1906, Cap. 93, Secs. 10, 26-30. **415**
See CONSTITUTIONAL LAW. 5.

R.S.C. 1906, Cap. 113, Sec. 287. - **67**
See CRIMINAL LAW. 8.

R.S.C. 1906, Cap. 133, Sec. 26. - **331**
See CONSTITUTIONAL LAW.

STATUTE, CONSTRUCTION OF. 74
See COMPANY LAW. 2.

2.——*See* COUNTY COURT. 8. - **343**

3.——*Statute, construction of—Arrest and Imprisonment for Debt Act, R.S.B.C. 1897, Cap. 10, displaced by Marginal Rule 610, Supreme Court Rules 1906.*] Section 19 of the Arrest and Imprisonment for Debt Act has not been displaced by Marginal Rule 610 of the Supreme Court Rules 1906. JACKSON v. DRAKE, JACKSON & HELMCKEN. - **62**

4.——*Liquor Licence Act, 1900, Cap. 18, and 1906, Cap. 26—Appeal from Commissioners to County Court judge—Notice of—Signature of notice by party affected—Necessity for—Proof of decision appealed from—Number of licences—Proof of—Trial de novo—Population.*] (1.) In an appeal from the decision of commissioners under the Liquor Licence Act, 1900, proof of such decision is not necessary. (2.) It is not necessary that the notice of appeal be signed by the party or parties affected by the decision. (3.) The appellant is not called upon to prove that the commissioners have exhausted their authority by having granted the full number of licences. (4.) Section 11A. of the Act, as enacted by Cap. 26, 1906, contemplates an actual population of 1,500 before a fourth licence may be granted. HAREL *et al.* v. HANDLEY. - - - - - - **278**

5.——*Railway Act, 1903 (Dominion), Sec. 237, Sub-Sec. 4—"Animals at large upon the highway or otherwise," meaning of—Section 199.*] Plaintiff's animals were set at large to pasture in the open country, and were killed at a place where the Company were not bound to fence:—*Held*, that he could not invoke the aid of section 237, sub-section 4 of the Railway Act, 1903. Decision of FORIN, Co. J., affirmed, MARTIN, J., dissenting. MCDANIEL v. THE CANADIAN PACIFIC RAILWAY COMPANY. - - - - - **49**

6.——*Water Clauses Consolidation Act, 1897, Secs. 36 and 39—"Decision," meaning of, as used in section 39—Time for taking appeal.*] In a proceeding under the Water Clauses Consolidation Act, 1897, before the County Court judge, on appeal from the Water Commissioner, the respondents objected, *inter alia*, to the jurisdiction of the learned County Court judge, who overruled the objection and proceeded with the hearing, reserving his decision on the petition generally. Respondents appealed within the 21 days given in section 39 as the time within which an appeal must be taken from the decision of any Supreme or County

STATUTE—CONSTRUCTION OF —*Continued.*

Court judge on any proceeding under the Act:—*Held*, by the Full Court, that the term "decision" as used in section 39 means final disposition of the whole case before the judge on appeal from the Water Commissioner. BOLE v. ROE AND ABERNETHY. **215**

STATUTE OF FRAUDS—*Receipt given in name of agent's firm, signed by a clerk.*] An agent "thereunto lawfully authorized" cannot delegate his authority. STEVENSON v. SMITH. - - - - - - - **213**

2.——*Signature, sufficiency of—What constitutes—Party to be charged, description of.*] - - - - - - - - - - **20**

See CONTRACT.

STATUTE OF LIMITATIONS. - **314**

See FOREIGN COURT.

VENDOR AND PURCHASER—*Contract for sale of land—Offer—Acceptance—Correspondence.* Defendant, being in Montreal, and owning property in Vancouver, instructed his agents to obtain a purchaser at $1,400, offers to be first submitted to him. They received an offer and gave a receipt for a deposit of $25, "price $1,400; $900 or $950 cash, balance C.P.R., subject to owner's confirmation," and telegraphed defendant: "Deposit on Lot Kitsilano, $1,400. Wire approval and instructions." Defendant wired in reply: "$1,400 O.K. Letter instructions," at the same time writing that his papers were in the bank and could not be obtained until his return to Vancouver; that he wanted $1,400 net to him, and if this was satisfactory he would complete the transaction on his return to Vancouver:—*Held*, that there was no concluded bargain between the parties. *Held*, also, that the defendants F. & F. had not represented that they were, nor assumed to act as, the owner's agents. WILLIAMS v. HAMILTON AND FORBES & FRANKLIN. - - **268**

2.——*Contract for sale of land—Option—Sufficient description—Parol evidence—Specific performance—Statute of Frauds.*] A written agreement to sell "lots 16, 17, block 196, district lots . . ." must be taken to refer to land belonging to the vendor, and is a sufficient description within the Statute of Frauds to make extrinsic evidence admissible for the purpose of identifying the land and shewing the subject-matter of the negotiations between the parties. *Plant* v. *Bourne* (1897), 2 Ch. 281, followed. LEWIS AND SILLS v. HUGHES. - - - **228**

VENDOR AND PURCHASER—*Cont'd.*

3.——*Contract for sale of land—Payment of instalment of purchase price to vendor's agent—Acknowledgment under seal by vendor—Estoppel—Fraud of agent—Repudiation of contract.*] T. paid to D. a real estate agent, $700 as part payment of the purchase price of a certain lot. D. procured from N., the owner of the lot, an agreement under seal for the sale of the lot to T., containing a recital of payment of and a receipt for $700 on account of the purchase price, and delivered same to T. D. in reality only paid a $20 "deposit" to N., the owner, and afterwards absconded:—*Held*, that N. was estopped from denying receipt of the $700, and that T. was entitled to a conveyance on payment of the balance mentioned in the agreement. *Gordon* v. *James* (1885), 30 Ch. D. 249, followed. TUYTENS v. NOBLE. **484**

VENUE. - - - - - - **280**

See PRACTICE. 9.

WATER RECORD—*Absence of water record—Spring rising on land and creating water course—Riparian rights—Water Clauses Consolidation Act, 1897, R.S.B.C. 1897, Cap. 190.*] The owner of land on which there is a spring or stream has rights therein to the exclusion of all other persons not holding records under the Water Clauses Consolidation Act, 1897. *In re* MILSTED. - **364**

WATERS AND WATER RIGHTS—*Jurisdiction of Gold Commissioner—Change of point of diversion, application for—Water Clauses Consolidation Act, 1897, Secs. 9, 27, 84.*] The defendant Company, which held a record for 25,000 inches of water out of the St. Mary's river, granted on the 8th of May, 1906, applied, under section 27 of the Water Clauses Consolidation Act, 1897, to the Assistant Commissioner at Cranbrook, to change the point of diversion. This was opposed by the plaintiff Company, who held a record, granted on the 20th of October, 1906, for 5,000 inches of water out of the St. Mary's river at the new point of diversion applied for by the defendant Company. The Commissioner decided that he had jurisdiction under section 27, but upon it appearing that the defendant Company had taken certain proceedings under section 84, *et seq.*, to have their undertaking approved by the Lieutenant-Governor in Council, the Commissioner ruled that his jurisdiction was voided by these proceedings. They appealed under section 36 and afterwards withdrew, and they also withdrew their application to the Lieutenant-Governor in Council, and secured an appointment from

WATERS AND WATER RIGHTS —*Continued.*

the Gold Commissioner to proceed again with the application for a change of point of diversion. On motion by the plaintiff Company for prohibition:—*Held*, that the Commissioner had jurisdiction to entertain the application. CRANBROOK POWER COMPANY v. EAST KOOTENAY POWER COMPANY. - - - - **275**

2.——*Riparian owners—Effect on water record of abandonment of pre-emption.*] V. and M. held separate pre-emption records, and, as partners, a joint water record, dated January, 1888. In October, 1889, they formally abandoned their separate pre-emptions and relocated the same area as partners, obtaining in due course a pre-emption record to it in their joint names. The water record was left unchanged, standing in the names of V. and M.:—*Held*, on appeal (reversing the decision of MORRISON, J.), that when V. and M. abandoned their pre-emptions the water record obtained in connection therewith lapsed. THE EASTERN TOWNSHIPS BANK *et al.* v. VAUGHAN *et al.* - - - - - - - - **77**

WILL——*Construction of——Description of legatee—"To my wife"—Bigamous marriage, presumption of.*] In December, 1873, the plaintiff, Annie J. Marks, then aged 21, was returning from a visit to Detroit. Whilst waiting at the Windsor depot she made the acquaintance of the deceased, A. J. Marks, then a widower. After an acquaintance of an hour or so, she decided to go with him by train to Stratford, during which time the couple became engaged. She did not return to her home in Kincardine, but waited for a few weeks, when she received and accepted a request from him to meet her at Brantford. They went thence to Buffalo, where she contended they were married. After a short absence they returned to Kincardine, where they kept house as man and wife until the spring of 1876, when he sold the furniture, kept the proceeds and left her, but returned in the fall of 1877. During his absence he did not provide for her support. He lived with her until the spring of 1878, when he left for Winnipeg. They apparently parted on friendly terms; she did not request to be taken with him; they did not correspond with each other; she made no demand for support from him and he gave her none. In 1895 he returned to Kincardine, but did not visit her, although he visited her mother and sister and made enquiries concerning her. He died in October, 1904, but commencing in January of that year, he opened

WILL—*Continued.*

a correspondence with her. These letters were produced at the trial by her. In all of these communications he addressed her as "Dear friend" and she replied in the same way. In 1888 she lived with a man named Frankboner in Michigan, assumed his name and went as his wife. For the purposes of this action she had visited Buffalo, but was unable to discover any record of her marriage. She gave evidence to the effect that no public records of marriages in Buffalo were kept before 1878. She could not trace the witnesses, the hotel where she was married having been destroyed, and the minister being dead. She also gave evidence that deceased had taken possession of her marriage certificate in 1878, but his son swore that he had searched through all his father's papers in vain for the certificate, or any evidence that the plaintiff had ever been the wife of A. J. Marks. In November, 1903, nearly two years after his marriage to the defendant, Susan Elizabeth Marks, deceased wrote to plaintiff Annie, stating that he had obtained her address from her sister. He then addressed her as "Dear friend," and this correspondence continued until August, 1904, she sending in one of the letters her photograph, with "A. Frankboner" written on the back. In a letter from the deceased to her he spoke of the time "you and I were one" at Tift House in Buffalo. This was the only reference to their former relations. At the trial plaintiff's sister and cousin swore to having seen the paper supposed to be the marriage certificate, but neither witness remembered the contents of the document. Deceased married Susan in March, 1902, at Nelson, B.C., prior to his opening up correspondence with Annie, and during this period he also, when absent, wrote to Susan, but always addressed her as "my dear wife" and signed himself "your loving husband." He made his will at Nelson on the 6th of May, 1904, leaving to "my wife" $50 per month during her lifetime payable out of his estate. It is on this clause in the will that action was brought, it being contended that the marriage to Susan was a bigamous union and that the legacy ought therefore to go to Annie, who set up her alleged marriage in 1873:—*Held*, on appeal, affirming the decision of HUNTER, C. J. (MARTIN, J., dissenting), that there was nothing in the evidence to displace the presumption that the deceased had not committed bigamy in marrying Susan in 1902, and that she was the person designated in the will as "my wife" and "my said wife." MARKS v. MARKS. - - - - - - - **161**

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WORDS AND PHRASES—"Animals at large upon the highway or otherwise," meaning of. - - 49
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2.——"By reason of the construction and operation of the railway." - 130
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3.——"Decision," meaning of as used in section 39, Water Clauses Consolidation Act, 1897. - - - 215
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6.——"Duly commissioned and instructed"—Effect of under the Behring Sea Award Act, 1894. - 460
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7.——*Ejusdem generis.* - - 422
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8.——"Good Cause." - - - 220
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12.——"Population actually resident," interpretation of. - - 328
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13.——"Property," meaning of. - 422
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14.——"To my wife." - - 161
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16.——"Woodman," meaning of. 343
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WORKMEN'S COMPENSATION—*Arbitration—Case stated by arbitrator—Referred back by Full Court—Further case stated to single judge—Jurisdiction of judge to entertain and refer back to arbitrator—Opinion stated by judge in referring back—Workmen's Compensation Act, 1902, Cap. 74.*] On a case stated in an arbitration under the Workmen's Compensation Act, 1902, the Full Court referred the question back to the arbitrator to make definite findings of fact and have the questions of law clearly formulated. Upon the reference back, the case was re-stated to a single judge, and the learned judge to whom the questions were submitted found that they were questions of fact, and referred the matter back to the arbitrator to "proceed with the arbitration":—*Held*, on appeal, that there was jurisdiction for such an order; that the arbitrator had not finished his work, and that he is not *functus officio* until the award is made. ARMSTRONG v. ST. EUGENE MINING COMPANY. - - - - - - 385