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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

GORDON HUNTER, - BARRISTER-AT-LAW, EDITOR.
PETER SECORD LAMPMAN, BARRISTER-AT-LAW, REPORTER.

VOLUME VII.

VICTORIA, B. C.
PRINTED BY THE COLONIST PRINTING AND PUBLISHING COMPANY, Limited.
1901.

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

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. ANGUS JOHN McCOLL.

PUISNE JUDGES.

THE HON. GEORGE ANTHONY WALKEM.
THE HON. MONTAGUE WILLIAM TYRWHITT DRAKE.
THE HON. PAULUS ÆMILIUS IRVING.
THE HON. ARCHER MARTIN.

LOCAL JUDGES IN ADMIRALTY.

THE HON. ANGUS JOHN McCOLL.
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COUNTY COURT JUDGES.

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HIS HON. WILLIAM NORMAN BOLE,	New Westminster
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The following forms of Orders for the sale of debtors' interests in lands under the Judgment Act have been approved:

By IRVING, J., in *Hanson* v. *McLeod* (Supreme Court.)

Upon hearing, etc., it is ordered that unless cause to the contrary be shewn by the defendant, on the 5th day of April, A.D. 1900, at the hour of 10.30 o'clock, in the forenoon, to the presiding Judge in Chambers, at the Court House, in the City of Vancouver, the interest of the defendant, John G. McLeod, in the lands mentioned in the notice of motion herein, that is to say . . . . . or a competent part thereof, be sold by the District Registrar of this Court at Vancouver, according to the usual practice to realize the amount payable upon the plaintiff's judgment against the defendant, which was obtained on the 20th day of June, A.D. 1899, for the sum of $1,200.00 debt, and $200.58 costs, together with interest thereon at the rate of six per cent. per annum since said date.

And it is further ordered that notice of the intention of the debtor to shew cause against the said sale must be given by the debtor to the plaintiff's solicitor twenty-four (24) hours previous to 10.30 o'clock of the said 5th day of April, A.D. 1900, and in default of the service of such notice it is ordered that the sale do take place as above directed without further order.

And it is further ordered that a copy of this order be personally served on the said defendant John G. McLeod, on or before the 29th day of March, A.D. 1900, and that the costs of this application be added to the judgment.

By MARTIN, J., in *Robinson* v. *Needham* (County Court.)

Upon the application of the plaintiff . . . . . and upon it being shewn that the land of the above named defendant particularly mentioned, is liable to be sold for the purpose of satisfying the plaintiff's judgment obtained herein, it is ordered that the Registrar of the said County Court, holden at Revelstoke, do sell all the interest of the said defendant Samuel Needham in lot

5 . . . . . at the best price which can be obtained, and out of the moneys derived from such sale in the first place pay the costs and expenses of and occasioned by and consequent on such sale, and then to pay the plaintiff or his solicitor the amount of the plaintiff's judgment and costs to date of such sale, with interest, if any, and then to pay the balance (if any) over to the above named defendant; and it is further ordered that the said Registrar may sell the said land either by public auction, tender, or private sale, as he may think expedient, and it shall not be necessary to lay abstract of title before counsel or prepare the conditions of sale; and it is further ordered that the said Registrar may be at liberty to employ the services of an auctioneer for the purpose of effecting such sale; and it is further ordered that before any of the said lands or the interest of the defendant therein be offered for sale the said Registrar shall cause a notice to be advertised for two weeks in the Herald newspaper, published at Revelstoke aforesaid, specifying the property to be sold, the names of the plaintiff and defendant, the charges (if any) appearing on the Register against such land, the date of registration of incumbrances, the time and place of the intended sale, and the amount of the judgment; and it is further ordered that upon any sale made hereunder the said Registrar shall execute to the purchaser under his hand and seal a conveyance of the land sold, and shall in such conveyance fully, distinctly, and sufficiently describe the lands and interest therein which have been sold, and such conveyance when delivered to the purchaser shall vest in him, according to the nature of the property sold, all the legal and equitable estate and interest of the defendant therein at the time of the registration of the judgment herein, as well as at the time of such sale or at any intermediate time, discharged from said judgment and from all other judgments and charges against the defendant and his lands subsequent to said judgment; and it is further ordered that the plaintiff shall be at liberty to purchase at such sale and shall acquire the same right, estate and interest as any other purchaser; and it is further ordered that the costs of this order and of any proceedings taken hereunder shall be plaintiff's costs in the cause and may be taxed and added to the judgment.

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REPORTS OF CASES

DECIDED IN THE

SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY.

DUNLOP v. HANEY *ET AL.*

MARTIN, J.

1899.

Aug. 11.

DUNLOP v. HANEY ET AL

Mineral Acts—Adverse proceedings—Overlapping—Evidence of—Measurements—Abandonment and re-location—Evidence of—B.C. Stat. 1898, Cap. 33, Sec. 11—Practice.

In adverse proceedings if the plaintiff wishes to attack the defendant's title he must attack it while proving his own title and not wait till rebuttal.

The plaintiff must shew the measurements of the ground in dispute in order to prove overlapping of claims.

An affidavit by a re-locator that the ground is unoccupied may be regarded as a statutory abandonment of his former claim.

ACTION under the Mineral Acts to establish plaintiff's title to the Legal Tender mineral claim, which it was alleged was overlapped by the boundaries of the Pack Train and Legle Tender or its re-location the Legal Tender Fraction mineral claims.

Statement.

The action was tried at Vancouver on 28th and 29th July, 1899, before MARTIN, J.

Davis, Q.C., for plaintiff.

Wilson, Q.C., and *John Elliot*, for defendant Haney.

MARTIN, J.

1899.

Aug. 11.

DUNLOP v. HANEY ET AL

11th August, 1899.

MARTIN, J.: In the presentation of his case the plaintiff's counsel has followed the course laid down in *Schomberg* v. *Holden* (1899), 6 B.C. 419. The defendants' counsel contends that the result of that decision is that a plaintiff in an adverse action has an undue opportunity of answering and meeting an attack which on the pleadings might be made by a defendant upon his (the plaintiff's) title. But I cannot see that there is any injustice in such a course. The plaintiff is only called upon to make out a *prima facie* case, and if the defendant attacks that case surely it is not unreasonable that the plaintiff should be allowed to meet that attack and re-establish his title. I do not mean that the plaintiff may go further and attack the defendant's title in such reply; the plaintiff must, if he attacks the defendant's title on his pleadings, make such attack at the same time that he makes out his own *prima facie* title. Further, quite irrespective of pleadings, the defendant is now required by section 11 of the Mineral Act Amendment Act, 1890, to give "affirmative evidence of title," and I have already held in *Schomberg* v. *Holden*, that the said section "applies to all cases which come before the Court for trial."

Judgment.

It is strongly urged by defendants' counsel that the plaintiff has not proved, as he must prove, that the claims (the Pack Train and the Legle [*sic*] Tender, or its re-location the Legal Tender Fraction) in dispute overlap either wholly or partially. The only evidence is that of the Mining Recorder, Kirkup. He stated that they covered practically the same ground, but on cross-examination admitted that he had never seen the stakes of these conflicting claims; and in further explanation stated: "I mean to say it is supposed to be the same ground, that is all." On re-examination he said: "Though I have not seen the stakes of the two claims, I have seen the records of the Pack Train and the Legle Tender, and from them I am satisfied they would

be more or less over lapping." It is objected that such statements without exact knowledge are quite insufficient, and that there should be positive evidence that the claims are co-incident or over lap to some extent, otherwise the plaintiff cannot obtain the relief prayed, which is so prayed on the assumption that his claim is encroached upon by the defendants' claim. There is no evidence of any measurements being taken. I agree with defendants' counsel that this is a matter of importance, and I feel bound by the remarks I made in the somewhat similar case of *Ryan* v. *McQuillan* (1899), 6 B.C. 431 at 432 in regard to the necessity of measurements being taken. The learned Chief Justice had earlier expressed his opinion to the same effect in another mining case, *Waterhouse* v. *Liftchild* (1897), 6 B.C. 424 at 425, where he rejected the evidence of a witness as to distances because "it did not appear that he measured them." "It is," says Roscoe, N.P. Evidence, page 1, "a general rule that the best evidence, or rather the highest kind of evidence, must be given of which the nature of the case admits; and evidence of a nature which supposes better proof to be withheld, is only secondary evidence." How can I with safety depart from such a rule, which in this case, could so easily have been observed by taking a few simple measurements on the ground? With due respect for the wide experience of the Mining Recorder the most that I can derive from his evidence is a feeling that probably his view as to the claims over lapping would turn out to be correct. But when an allegation is specifically made and as specifically denied in pleadings it is not probability but proof that a Judge must require. The objection must be sustained, and it follows that the relief sought cannot be granted and the plaintiff's action must be dismissed, for, so far as the evidence goes, the owner of the other claim is not shewn to have encroached upon his ground or otherwise interfered with his rights. But further than this I do not go, and I am not to be understood as de-

Judgment.

MARTIN, J.
1899.
Aug. 11.
DUNLOP v. HANEY ET AL

claring that the plaintiff has no title to the Pack Train mineral claim; under the turn the case has taken it is neither necessary nor desirable that I should express any opinion on that matter.

Now as to the defendant Haney. I am of the opinion that he comes within the provisions of section 11 above mentioned and that in the broad sense of the term, these are "adverse proceedings" as contemplated by the Mineral Act.

I also think that the plaintiff's rights herein are preserved by the joint order of the 24th of June, 1898.

The said section 11, introduces it may be remarked, a new feature into mining litigation, for it is passed, apparently, for the purpose of protecting the rights of the Crown. It certainly is not aimed, primarily at least, to protect or assist the adverse litigant. The result is that an additional duty is cast upon the Court, and in reality, in the great majority of instances, two cases have to be tried. That the section will have a very beneficial effect in putting an end to fictitious titles and preventing mineral claims from being practically appropriated without colour of right, is evident from the briefest consideration of it. Take the present case of the defendant Haney as an example. What title has he "established" to the ground he claims? As I understand his counsel, it is practically admitted that the original Legle [*sic*] Tender was staked twenty-four hours too soon, even if Dunlop, the deceased locator of the claim, had not died; and further, no assessment work has been done on it since February 25th, 1896.

Judgment.

But supposing it was not staked too soon. On 22nd June, 1896, Haney re-located the claim as the "Legal Tender Fraction" filing an affidavit containing these words: "That to the best of my knowledge and belief the ground comprised within the boundaries of the said frational claim is unoccupied by any other person as a mineral claim." Despite the argument of his counsel, I can only regard such a statement

as evidence of his intention to abandon his old claim, the Legle [*sic*] Tender. It evidences to my mind a fixed intention of such abandonment, and being in writing conforms to the requirements of what is now section 30 of the Mineral Act, which section (then 27) was considered by Mr. Justice McCreight in *Nelson and Fort Sheppard Railway Company* v. *Jerry* (1897), 5 B.C. 421. This re-location is admitted by the defendant Haney in his statement of defence, but it is shewn by the Mining Recorder that a written permission to re-locate was not given by the Gold Commissioner, and without that permission the statute declares no interest can be held in any portion of such claim. The result is that I find that Haney has not established his title to the Legle [*sic*] Tender or Legal Tender Fraction mineral claims.

The action will be dismissed without costs to either party.

Action dismissed.

FULL COURT
At Victoria.
1899.
Jan. 9.
DAVIES
v.
LE ROI
MINING
AND
SMELTING
COMPANY

DAVIES v. LE ROI MINING AND SMELTING COMPANY.

Master and servant—Employers' Liability Act, R.S.B.C. 1897, Cap. 69—Findings of jury—Apparatus causing injury—Necessity to use—New trial.

To entitle plaintiff to judgment in an action under the Employers' Liability Act the jury's findings must shew that it was reasonably and practically necessary for him to use the apparatus causing the injury.

Where the facts proved shew absence of such necessity a new trial will not be granted.

APPEAL by defendant from a judgment pronounced by DRAKE, J., in an action under the Employers' Liability Act, tried at Nelson on the 29th day of June, 1898, before him and a jury.

The following are the questions put to and answers returned by the jury: (1) Was there another and safer passage way by which the plaintiff could come up from the mine without using the skip? A. Yes. (2) Was there a defect in the ways, works and machinery of the mine? If so, what? A. Yes, want of guard rail. (3) What was the cause of the accident? A. Defect in working of machinery. (4) Was it the duty of the plaintiff to go down into the mine without orders from Hall or Tregear? A. No. (5) Did the plaintiff go down into the mine for the gates in the ordinary course of his duties or under instructions from his superiors? A. Yes, in consequence of instructions of superiors. (6) Did the plaintiff voluntarily use the skip on the occasion, or was he ordered to do so? A. Yes, voluntarily. (7) Was the plaintiff justified in his belief that under the orders he received it was his duty to get the door

Statement.

up for repairs if they were not ready for him? A. Yes. (8) Amount of damages, if any? A. $300.00.

Judgment was thereupon given for the plaintiff.

The appeal was argued at Victoria on 7th November, 1898, before McColl, C.J., Irving and Martin, JJ. The facts appear fully in the verdict and the judgment of Irving, J., on appeal.

Davis, Q.C., for appellant: The plaintiff is not entitled to recover as he incurred the danger voluntarily—he knew of the two ways to come up and chose the dangerous one, knowing of the ladder way and that it was safe. He referred to *Scott* v. *British Columbia Milling Co.* (1894), 3 B.C. 221, and (1895), 24 S.C.R. 702; *Pritchard* v. *Lang* (1889), 5 T.L.R. 639; *Ivay* v. *Hedges* (1882), 9 Q.B.D. 80; *Indermaur* v. *Dames* (1866), L.R. 1 C.P. at p. 280; *Finlay* v. *Miscampbell* (1890), 20 Ont. 29.

Belyea, for respondent: Plaintiff had been in habit of using the skip for similar purposes and he was never told not to use it and there is no evidence that he knew it was dangerous. The onus of proving contributory negligence is on defendants. If the Court is of the opinion that the findings of the jury do not support the judgment he asked for a new trial.

Argument.

Davis, Q.C., in reply: If a counsel at a trial omits to have questions put to the jury it amounts to non-direction, and the practice is not to grant a new trial—it is otherwise if he asks to have questions put and is refused. This is not a case in which a new trial should be granted as already there have been three trials and in the face of the two findings of a safer way and that he incurred the danger voluntarily a new trial would be useless for the plaintiff. There is no suggestion of a duty cast on defendant to make the ore skip a safe means of carriage for workmen.

Cur. adv. vult.

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AND
SMELTING
COMPANY

9th January, 1899.

MCCOLL, C.J.: The findings of the jury do not establish "that the plaintiff had of necessity (reasonable and practical necessity) to" use the skip in question. Therefore they do not entitle him to judgment. *British Columbia Mills Co.* v. *Scott* (1894), 24 S.C.R. p. 702.

I am further of the opinion after careful and repeated consideration, that the plaintiff was under no such necessity, and in view of the smallness of the amount involved, I think it would be wrong to send the case down to yet another trial on the chance of a jury coming to a different conclusion.

IRVING, J.: This is an action under the Employers' Liability Act. The plaintiff was a blacksmith, employed on the surface. He was instructed to go up to the mine and mend certain gates which should have been at the mouth of the shaft at a certain hour. The gates not being there, the plaintiff and his helper decided to go down into the mine and get the gates. They did so, and the gates and the plaintiff's helper came up in the skip in safety. The skip was again lowered, and the plaintiff began to ascend by means of the skip. It ran off the track and he fell a distance of thirty feet, and sustained the injuries now complained of.

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The skip, originally intended for use in hoisting ore, had been for a short time—some two weeks—used for conveying men up. Then the men were forbidden to use it, though this prohibition is not shewn to have come to the knowledge of the plaintiff.

At the time of the accident there was in existence to the knowledge of the plaintiff a system of ladders for the ascent and descent of the men, a more laborious but a safer means of ascent than the skip.

The following questions and answers were submitted to and returned by the jury; [then follows the verdict]. Judgment was thereupon given for the plaintiff and the defendant on

appeal now asks that judgment be set aside, and judgment entered for the defendant on the ground that the findings are inconsistent and insufficient, and that on the findings the judgment should have been for the defendant.

The action is an action of negligence. The Employers' Liability Act is not intended to make the employer liable for every accident occurring owing to a defect in the machinery. It must be by reason of a defect owing its existence to negligence, *i.e.*, a breach of duty on the part of the employer, that breach must be a breach of duty to the person injured. According to the findings of the jury, the defendant had "another and safer passage way" (answer No. 1) by which the plaintiff could have come up without using the skip, but he "voluntarily used the skip" (answer No. 6) from which he himself had shortly before removed the safety appliances.

At the close of the argument we intimated that in our opinion these questions and answers would not support the judgment, and Mr. *Belyea* thereupon asked for a new trial.

The plaintiff had on several occasions in obedience to orders then given gone down on the skip to make certain repairs to the car itself, and to the chairs upon which the skip, when at the bottom of the shaft, rested. On one of these occasions he had objected to going down the mine at all. On other occasions he had gone down by the ladders. On this particular day he expected to find the gates at the top of the shaft. He waited about three-quarters of an hour, and then after a discussion with his helper as to whether or not they should go down, they finally decided to go down by the skip. The time selected was between shifts, and certain station tenders, whose duty it was to travel with the skip and to see that the wheels were on the track before it started on its upward journey, were off duty.

Having regard to the time—between shifts—of the accident, the fact that there was a full knowledge by the plaintiff that the safety appliances had been removed from the

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skip, and that he voluntarily selected the skip in preference to the ladders, I cannot help thinking that he voluntarily incurred the risk. The plaintiff, was not as to descending into the mine a *mere* licensee. There was introduced into the question of his being in the mine an element of business "with its exigencies and necessities," *Holmes* v. *The North-Eastern Railway Company* (1869), L.R. 4 Ex. 254 at p. 259, but as to the particular means he chose to adopt in ascending and descending, *i.e.*, in travelling by the skip instead of using the ladders, it was argued successfully, I think, that he was a *mere* licensee. In *Holmes* v. *North-Eastern Railway Company* at p. 259, it is pointed out that the defendants were under an obligation to keep the flagged path in a proper condition. There was on them the same obligation as regards that path, whether one mode of delivery was adopted or another. In that respect that case is different from the case before us. But placing him on the higher plane of a person there on invitation I do not think he is entitled to succeed.

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of
IRVING, J.

In *Indermaur* v. *Dames* (1866), L.R. 1 C.P. at p. 288, Wills, J., speaking of a person brought on to premises by invitation, says: "With respect to such a visitor (*i.e.*, an invited person) we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from *unusual* danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

The obligation of the Company was to use "usual reasonable care to prevent damage from unusual danger." That is to prevent people going on insecure skips, roadways, etc. The question of what would amount to a sufficient warning would in ordinary cases, be for the jury.

The Company was not under obligation to make every ore skip and roadway safe for the passage of human beings. If they had a man stationed at the place to inform the plaintiff what he already knew, that the safety appliances had been removed from the skip, and that a safe means of ascent was at hand, no one would doubt for a moment but that the plaintiff must fail in his action.

Then what is the difference between the case of a person coming there with a *knowledge* of the place and its dangers, and that of a person coming there and being told by the Company of the state of things? In *Manchester, Sheffield and Lincolnshire Railway Company* v. *Woodcock* (1871), 25 L.T.N.S. at p. 336, Blackburn, J., said that he could see no difference between the cases I have put, *where the plaintiff knew the premises*; and in *Headford* v. *McClary Manufacturing Company* (1894), 21 A.R. 165, where a man fell down an unguarded hoist, Burton, J.A., says: "Knowing the premises as he did, the case is substantially the same as if he had been warned by his employers not to go near the hoist, as it was being repaired." In the case of *Pritchard* v. *Lang* (1889), 5 T.L.R. 639, there was a choice of ways, and the man chose to go by a way which was not the proper way, the Court held that there was no liability, *because he ought to have known.* And see remark of Montagu Smith, J., at page 282 of L.R. 1 C.P. with reference to *Bolch* v. *Smith* (1862), 7 H. & N. 736.

I do not think we should order a new trial, as in the view I take of the admitted facts the plaintiff cannot support the allegations in his statement of claim. In *Indermaur* v. *Dames* (1866), L.R. 1 C.P. at p. 277, in dealing with motions for non-suit, and again in the summing up of the case Erle, C.J., points out the difference between the duty owing to strangers and to men ordinarily employed upon the premises.

MARTIN, J., concurred in the view that the appeal should be allowed and a new trial refused.

Appeal allowed.

IRVING, J.

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KIRK v. KIRKLAND ET AL

KIRK v. KIRKLAND *ET AL.*

Land Registry Act—Tax sale—Certificate of title based on—Whether ousts a prior certificate in hands of former owner or not.

A certificate of title based on a tax deed does not *ipso facto*, oust a prior certificate of title outstanding in the hands of the former owner, and the holder of such later certificate must affirmatively shew the regularity of all the tax sale proceedings in order to make good his title.

APPEAL by defendant Mary M. Johnson, from judgment of IRVING, J., pronounced 10th May, 1899.

The plaintiff, who was the owner of certain lots in Vancouver, entered into an agreement for the sale of one of them, and then discovered that a conveyance (dated 20th July, 1898) of the lot from the defendant Kirkland, the Assessor of Taxes, to the defendant Johnson had been registered. Plaintiff sued to have the deed set aside, and for a declaration that she was the owner of the property. The defendant Johnson pleaded that the said lots were on 15th July, 1896, duly offered for sale by public auction by the defendant Kirkland for arrears in taxes due thereon, and were purchased by one S. K. Twigge, whose certificate of purchase and interest thereunder were subsequently transferred to her, the defendant Johnson.

Statement.

Paragraph (2) of the statement of defence was as follows:

"The defendants admit having made application on the 31st day of August, 1898, at the Land Registry Office, City of Vancouver, to register a conveyance in fee in her favour of the said lots under and by virtue of the provisions of the Assessment Act, executed and delivered by E. L. Kirkland, Assessor of the District of New Westminster, dated the 20th day of July, A.D. 1898, and that said conveyance has been

duly registered and a certificate of title issued to her in respect thereof under the provisions of the Land Registry Act, and the defendant claims benefit accordingly."

The trial took place at Vancouver on 9th May, 1899.

Wilson, Q.C., for plaintiff.

Martin, Q.C., A.-G., and *J. A. Russell*, for defendant.

10th May, 1899.

IRVING, J.: The plaintiff brings this action to set aside a tax sale deed dated 20th July, 1898.

The lands are situate in Vancouver on Hastings Street and Dupont Street, and are worth $6,000.00.

The defendant Mary M. Johnson, in her statement of defence, set up that she is the assignee of the purchaser at a tax sale. The other defendant Kirkland, the Assessor for Westminster District, is a formal party.

At the trial the plaintiff put in her certificate of title. This by section 23 of the Land Registry Act is *prima facie* evidence that she is the owner of the land and would entitle her to judgment unless the defendant proves the title which she has undertaken to prove, which she can only do by shewing that the plaintiff was assessed according to the provisions of the law for the year in respect of which the taxes for which the land was sold were claimed; per Killam, J., in *Ryan* v. *Whelan* (1890), 6 Man. 565; per Gwynne, J., in *O'Brien* v. *Cogswell* (1890), 17 S.C.R. at p. 463. This the defendant failed to do, and I think the plaintiff is entitled to judgment.

Judgment of IRVING, J.

As to the necessity for the defendant to prove, in addition to his tax sale deed, that the requirements of the statutes in respect of the assessment and imposition of the rate have been complied with, see *Ryan* v. *Whelan* (1890), 6 Man. 565 and cases there cited (Supreme Court in appeal (1891), 20 S.C.R. 65); *Alloway* v. *Campbell* (1891), 7 Man. 506.

The defendant at the trial put in her certificate of title and also relied on section 23 of the Land Registry Act. I

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think having regard to the joinder of issue contained in the plaintiff's reply and to the remarks of Gwynne, J., at page 440 of the case of *O'Brien* v. *Cogswell*, that was insufficient. Mr. Justice Gwynne says as follows: "Now the defendants so made parties having pleaded their title, and the facts upon which they relied as supporting it, and having insisted that it was a title superior to that of the plaintiffs, the latter, by joining issue upon the facts upon the existence of which the title, so set up, rested, had, in a perfectly sufficient and in the customary mode of pleading, put in issue everything which was material to the final determination of the case, and (here is the point I wish to emphasize) cast upon the defendants the burden of proving the existence of every single thing necessary to exist in order to support the title as set up by the defendants."

As the defendants failed to adduce this evidence, I think the plaintiff is entitled to judgment.

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The terms of the judgment, in particular as to Kirkland and costs payable to or by him, as well as any other matters of detail can be settled hereafter. I am anxious to dispose of the main issue of the case, so that the defendant, if she desires it, can bring on her appeal at the sittings of the Full Court appointed to be held next week.

From this judgment the defendant Mary M. Johnson appealed to the Full Court and the appeal was argued 18th May, 1899, at Vancouver before WALKEM, DRAKE and MARTIN, JJ.

Argument.

Martin, Q.C., A.-G., for appellant: The defendant relies on the assumption that the tax sale deed is not of itself sufficient, but requires evidence of regularity to support it. By legislation in this Province on the production of a tax sale deed, the person producing it is deemed to be the owner unless evidence is produced to displace him from that position. See the Assessment Act, R.S.B.C. 1897, Cap. 179, Sec. 110 and the Land Registry Act, R.S.B.C. 1897,

Cap. 111, Sec. 23. When there is a reference in the Land Registry Act to the Assessment Act, both Acts must be read together. It has now been enacted in most of the States that the tax sale deed is *prima facie* evidence, *i.e.*, the onus of proof has been changed ; this has been done also in Manitoba and Ontario. As to the Registrar acting "in the usual manner" (Assessment Act, Sec. 110), this means that no change is made in the usual manner other than the change in the onus of proof. The object of section 110 is to do away with the usual examination.

Wilson, Q.C., for respondent: In a tax sale case the onus is on the defendant relying on his tax deed and he must shew that a tax was levied. *Stevenson* v. *Traynor* (1886), 12 Ont. 804 ; *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420 ; *Ryan* v. *Whelan* (1890), 6 Man. 565 ; (1891), 20 S.C.R 65 ; *Alloway* v. *Campbell* (1891), 7 Man. 506. Section 96 of Cap. 111 C.S.B C. 1888, and section 110 of Cap. 179 of R.S.B.C. 1897, are founded upon section 150 of Cap. 180, R.S.O. 1877, which is almost word for word with ours except the last clause in section 110, and on which the *Attorney-General* relies, but section 153, Cap. 180, R.S.O. 1877, contains a similar provision whereby the deed shall be registered by the Registrar.

Argument.

The Manitoba Act, 1892, Cap. 26, Sec. 7, goes further than our Act and the assessment is made conclusive, but notwithstanding that section the Courts there will set aside a sale made on the basis of absolutely void proceedings. See *Tetrault* v. *Vaughn* (1899), 35 C.L.J. 315, following *O'Brien* v. *Cogswell*, *supra*. That a rate was levied cannot be presumed, but all conditions precedent must be proved. See *Bird* v. *Adcock*, 47 L.J., M.C. 123 ; *Murne* v. *Morrison* (1882), 1 B.C. 120. At the time the tax was levied the plaintiff's name was not on the list—the name was "Kirks" instead of "Kirk."

Martin, Q.C., A.-G., in reply.

Cur. adv. vult.

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27th June, 1899.

WALKEM, J.: The plaintiff, who is a married woman, acquired the ownership in fee, in August, 1891, of two lots of land, in the City of Vancouver, the title to which is now in dispute. She has been in actual possession of the lots ever since and holds a certificate of title for them, dated the 28th of August, 1894.

According to the evidence given at the trial, the lots are worth "$6,000.00 or more." In July, 1896, they were sold, for delinquent taxes, by the defendant Kirkland, as Government Assessor, to S. K. Twigge for the sum of $20.10. He transferred them to the defendant Mrs. Johnson, who subsequently got the usual statutory deed for them from the Assessor, and registered it in the Land Registry Office under section 110 of the Assessment Act. She afterwards obtained a certificate of title for them, dated the 29th of November, 1898—the certificate being thus over four years later than the plaintiff's. Both certificates are for absolute fees, and are in the form prescribed by the Land Registry Act. The question is—which of them is to prevail—the earlier or the later one?

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Section 13 of the Land Registry Act provides that "Where a person claims the ownership in fee of any land, he may apply for registration thereof" in a form which is given; and "the Registrar," upon being satisfied after examination of "the title deeds that a *prima facie* title has been established," is to register the title in the "Register of Absolute Fees."

According to section 19, the Registrar shall issue a certificate of title to any person registering an absolute fee; and, after providing for cases where certificates have been lost or destroyed, the section concludes as follows: "Every certificate of title shall be received as *prima facie* evidence in all Courts of Justice in the Province of the particulars therein set forth."

By section 23, "The registered owner of an absolute fee

shall be deemed to be the *prima facie* owner of the land described or referred to in the register for such an estate of freehold as he" may possess, but subject to registered charges and the rights of the Crown.

As might be expected, counsel are agreed as to the proper meaning of the term "*prima facie*" as used in the above sections; but it may not be amiss to quote the following from *Starkie* (Ev. Vol. 1, 544): "*Prima facie* evidence is evidence, which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if it be accredited unless it be rebutted or the contrary proved."

At the trial, each certificate was put in on behalf of the holder of it as evidence, under sections 19 and 23, of *prima facie* ownership of the fee of the land in dispute. Counsel for the plaintiff, as a matter of precaution, also put in her title deeds. Counsel for the defendant rested his case upon his client's certificate, and for that reason, as he stated, declined to put the Assessor's deed in evidence. Secondary evidence was then given of it by the plaintiff's counsel. The further evidence in the case consisted of proof of the value of the land, of its sale for overdue taxes, and of the fact that the plaintiff's name was incorrectly spelt "Kirks" in the Assessment Roll. In substance, the arguments of counsel were first, on behalf of the plaintiff, that her certificate should prevail as it was a subsisting one and first in point of time, and, moreover, was statutory evidence, which had not been rebutted, of her title to the fee of the land; and, next, on behalf of the defendant, that while her certificate had a similar statutory effect in her favour, the very fact of its being the later one entitled it to priority and cast the onus of overthrowing it on the plaintiff; and as this had not been done, the action should be dismissed. The same arguments were used on the hearing of this appeal. If the defendant's certificate is a valid one, which I propose to shew is not the case, I fail to see why the mere fact of its

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being a second or later certificate should give it priority over the first one. It seems to me that nothing short of a special enactment could give it that effect—some such enactment, for example, as section 41 of the Registry Act which gives priority to "charges" according to the dates of their registration, and not according to their actual dates. The proposition is, moreover, opposed to the well established rule *qui prior est tempore, potior est jure* that is followed in cases of contested titles (*Scott* v. *Scott* (1854), 4 H.L. Cas. 1082); and it is, certainly, not warranted by anything to be found in the Registry Act. In the not infrequent case of an owner of land fraudulently selling it twice, and giving each purchaser a conveyance in fee, does not the first deed, in the absence of Registry laws to the contrary, always prevail?

As far as this case has been considered, the plaintiff has, in my view of it, the right to say, "My certificate not having been cancelled, its legal effect entitles me 'to be deemed,' in the words of section 23, 'to be the *prima facie* owner of the land;' and as the contrary has not been proved the certificate should prevail. Moreover, its legal effect having been given to it by statute can only be taken from it by statute, and, consequently, not by any subsequent certificate such as the defendant's."

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Whether the defendant's certificate is valid or not depends on the construction to be placed on sections 19 of the Registry Act and 110 of the Assessment Act. The latter section, after declaring what the legal effect of an Assessor's deed shall be, requires the Registrar to register it "in the usual manner" upon its production—the requirements of sections 13 and 62 of the Registry Act that title deeds should be produced and examined on such occasions being thus dispensed with. While section 110 thus authorizes the registration of the deed, it is clear that it gives the Registrar no authority to issue a certificate of title to the holder of it; and as the principles of construction applicable to

Acts relating to taxation require them to be strictly construed, no such authority can be implied. Registration of a deed and the issue of a certificate are distinct matters, and, as such, are separately dealt with in sections 13 and 19 of the Registry Act. In the present case, the Registrar, in issuing a certificate to the defendant, must have assumed that he was empowered to do so by the language used in the first paragraph of section 19, viz.: "The Registrar shall, upon registration of any absolute fee, issue a certificate of title to the person who shall have effected registration." These words are clear and explicit enough ; but in obeying them literally the scope and object of the Registry Act would seem to have been lost sight of. A literal construction of an enactment has only a *prima facie* preference ; and although the above words, as I have said, are plain, a survey of the other parts of the Act is not only proper but is indispensable for the purpose of ascertaining their true meaning—a meaning that should correctly interpret the purpose of the Act and serve to carry out its scheme of registration in accordance with what was intended by the Legislature. See Maxwell, Stat., 3rd Ed. 35 ; *Colquhoun* v. *Brooks* (1889), 14 App. Cas. at p. 506. The importance attached by that body to a certificate of title is visible throughout the Act. It is not to be issued unless the Registrar is satisfied from an examination of the title deeds that the applicant for it is entitled to it. (See sub-sections 13, 62). Should it be lost or destroyed, a new one is not to be issued unless, in the first place, the Registrar is convinced of the truth of such loss or destruction by evidence on affidavit ; and, in the next place, he has given not less than a month's notice in the press of his intention to issue it unless objected to. Moreover, the new one is to bear on its face the word "duplicate," and also a reference to the affidavit on which it was issued. (Section 19). Again, in the event of the holder of a certificate sub-dividing his land, and requiring new certificates for the sub-divisions, they

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are not to be issued to him unless the original certificate has been delivered to the Registrar and cancelled ; and care is to be taken "that no two new certificates cover the same parcel of land." (See section 20). According to section 63, where a person, having a *prima facie* title, applies to have it registered, but is unable to produce the certificate of title owing to its being held by some other person who refuses to part with it, the Registrar may register the title provided he has given the holder of the certificate not less than a week's notice in writing of his intention to do so, and is satisfied by affidavit that the notice has been served ; and after registration takes place "the certificate outstanding in the name of the grantor" shall "be deemed to be cancelled." This provision would have been of much service in cases like the present one had it been adapted to them as might have been done ; but the word "grantor" shews that it was not intended to apply to them. Like the somewhat similar provision in section 19, it is another instance of the intention of the Legislature that a certificate ought not to be cancelled without giving the holder of it an opportunity of being heard. This is in accordance with the first principles of justice. The Act also provides that a memorandum must be kept by the Registrar of all certificates that are issued ; hence, in the present case the Registrar must have known when he gave the defendant her certificate that the plaintiff held a prior one which was a subsisting one as it had not been cancelled.

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It is evident from the foregoing several sections of the Registry Act that it is part of its policy, and, indeed, one of its foremost principles, that no two original certificates which would, at any time, concurrently cover the same land should be issued ; or in other words, that no second original certificate should be issued while a first one was subsisting. It is a matter of common knowledge that the adoption of this principle has given our system of registration its main value. The construction to be placed on section 19 must

necessarily be that which will accord with the policy of the Act; and as the defendant's certificate purports to be an original certificate and was issued when the plaintiff held a subsisting one it was on that account illegally issued, and therefore invalid from the outset. It, consequently, never was *prima facie* evidence that the defendant had a title to the land in question; hence, the defence to the statement of claim should have been proved; and as it was not proved the plaintiff is entitled to judgment.

But, apart from this, even if there was authority for the issue of the defendant's certificate at the time she got it, the judgment appealed from is right on the same ground, namely, that the statement of defence was not proved. It contains some very important allegations. For instance, after stating that the land was sold for taxes it proceeds to say that the taxes were due and in arrear for such a period as to entitle the Assessor to sell; that all requisite assessments, levies, notices and advertisements were made, given and published; that "all other requirements of the Assessment Act necessary to the validity of the sale were fully complied with;" that the necessary time for redemption having expired without being taken advantage of by the plaintiff, the conveyance which is in question was made to her by the Assessor; and that the defendant "has done all things necessary" (under the Assessment Act), "and is entitled to the land in question." These allegations being in the nature of affirmative pleas, should, according to a well established rule of practice, have been proved, especially as they constituted the issue which was set down for trial, namely, as to whether the sale by the Assessor was legal or illegal.

In my opinion, the dismissal of the appeal is justifiable on any one of the three or four grounds that I have stated. The costs of the appeal should be paid to the plaintiff by the defendant, Mrs. Johnson—her co-defendant, Kirkland, not having been a party to it.

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The order for judgment has not, as I understand, been drawn up; but, whether or not, it should contain a declaration that the sale of the land by the Assessor to the defendant, the deed given by him to the defendant, dated the 20th of July, 1898, and the certificate of title issued to the defendant, and dated the 29th of November, 1898, are severally null and void. It should also contain a direction to the Registrar of the Vancouver Land Registry Office to cancel the registration of the defendant's deed, and a further direction to the defendant to deliver up her certificate of title to be cancelled.

The plaintiff is entitled to the costs of the action.

DRAKE, J.: The learned Judge who tried this case gave judgment for the plaintiff, relying on *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 463; *Ryan* v. *Whelan* (1890), 6 Man. 565; (1891) 20 S.C.R. 65; *Alloway* v. *Campbell*, 7 Man. 506.

The plaintiff produced her title with a certificate of title shewing that she had been duly registered as the owner in fee. The defendant, Mary M. Johnson, a married woman, was a purchaser of the lots in question from Mr. Twigge, who was a purchaser at a tax sale, and Mrs. Johnson obtained the usual deed from the Assessor, and applied for and obtained registration. The *Attorney-General* contends that under section 13 of the Land Registry Act the onus of shewing that the tax title was bad rested on the plaintiff. He cited no authority in support of his contention. The Tax Act, Cap. 179, Revised Statutes, Sec. 110, enacts that the Registrar-General upon production of a tax deed and application made in the usual form and upon payment of the fees shall register or record the same. It does not make the deed absolute against all the world. The deed, the section says, shall not be invalid for any error of calculation in the amount for which the land was sold, or any error in describing the land as granted, pre-empted, leased or otherwise. The tax deed is based on the levying of a

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lawful tax upon the lands of a person who is liable to pay the same, and all the necessary steps have to be taken as set out in the Act before the deed can be held to be a valid deed. The registration by section 13 of Cap. 111, Revised Statutes, only states that the Registrar upon being satisfied that a *prima facie* title has been established shall effect registration. He is bound to register or record a tax sale deed upon the conditions mentioned in section 110 ; but if there is a certificate of title outstanding in someone else's name, how can he issue a new certificate without taking steps to get in the prior certificate for the purpose of cancellation ? It is to be remarked that section 110 uses the term record as well as register. Deeds can be recorded under section 46 of Cap. 111, and records do not require the production of prior titles. Section 23 of Cap. 111 states the effect of registration. The person in whose favour the certificate is issued shall be deemed the *prima facie* owner of the land described for such estate of freehold as he legally possesses therein subject to registered charges. Under this section his possession of a legal title is open to question. The certificate of title is not a title deed, but it is evidence of a *prima facie* title existing, and the alleged owner may be called upon to establish his title in proceedings properly instituted The effect of a record on the other hand is notice only, and not evidence of title.

In this case we are met with this difficulty, the plaintiff and the defendant both have certificates of title. The Registrar of Titles has not taken any steps to cancel the first certificate even if he has power to do so under the Act, and there is nothing in the Act which gives a later certificate any priority over a prior one. The whole Act contemplates that there should be only one certificate of title of an absolute fee. Therefore, before a second certificate should be issued the Registrar should take the precautions mentioned in section 19, and give notice to the prior holder. The Legislature has apparently omitted to provide for the

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case of tax sale deeds, and if so the provisions in section 19 should be followed, unless the holder of such a title is satisfied with a record in the first instance.

The plaintiff here challenges the title of the defendant and has shewn a registered title in herself prior in date to that of the defendant. But there is further evidence adduced. The Gazette with the alleged taxes was put in. The land in question was assessed in the name of Kirks. Section 43 of Cap. 179 says, " Land occupied by the owner shall be assessed in his name." Section 46, " If the owner is not resident thereon the Assessor shall assess in the name of the reputed owner, and if occupied against the reputed owner and occupant." It can not be said that " Kirks " is the same name as " Kirk," and therefore the land was not assessed in the name of either the owner or reputed owner.

The plaintiff's contention is that the onus is on the defendant to shew first that a tax has been legally levied, and that the subsequent proceedings have been duly followed. *Stevenson* v. *Traynor* (1886), 12 Ont. 804, was decided on an Act very similar to ours. There the learned Judge decided that a *prima facie* title having been established in the plaintiff the burden was cast on the defendant to shew a better title; and in order to do that he had to shew that there was a tax due when the property was sold for taxes. And in *Whelan* v. *Ryan* (1891), 20 S.C.R. 67, the Court held that when the statute then under consideration purported to give by the tax sale deed an indefeasible title in the purchaser without regard to the validity of assessment, it referred to informalities and defects in or preceding the sale as distinguished from proceedings in assessing and levying the taxes which led to the sale; and *McKay* v. *Crysler* (1879), 3 S.C.R. 436 and *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420, have settled the principles of construction of language similar to section 110 of Cap. 179, that is, that the defects cured are strictly limited to the grounds mentioned in the section, *i.e.*, miscalculation in amount for which land was sold and

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error in describing the title under which the land was held. The defendant therefore has to shew that a tax has been validly levied, which she has not done. To throw the onus of proving the invalidity of the tax deed on the person who has a prior legal title to land would be a violation of common right and justice. The defendant is a claimant to the plaintiff's property, and claims that the production of a deed signed by one who executed as Assessor is sufficient to oust the legal owner without a tittle of proof as to the statutory right of the person to execute such a deed. In my opinion the appeal should be dismissed with costs.

Judgment of DRAKE, J.

The order will be that the costs both here and in the Court below will be borne and paid by the defendant, that the tax sale deed be given up to be cancelled, together with the certificate of title, and that the registration be cancelled.

MARTIN, J.: This is a conflict between certificates of title under the Land Registry Act.

As the learned trial Judge says in his judgment: "At the trial the plaintiff put in her certificate of title. This by section 23 of the Land Registry Act is *prima facie* evidence that she is the owner of the land," etc.

This certificate of title (absolute fee) is dated the 28th of August, 1894. The defendant Mary M. Johnson, on her part put in her certificate of title (absolute fee) to the same property, which is dated November 29th, 1898, and contended that the effect of the later certificate was to displace and supplant the earlier, which could no longer be deemed to have a valid existence; she asked for judgment in her favour on the strength of the *prima facie* case established by such certificate, which shews on its face that it is issued in pursuance of a tax sale deed, also in evidence.

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According to the opinion of the learned Judge below it was further incumbent on the defendants to prove the regularity of all the tax sale proceedings pursuant to the well

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known rule laid down in *Ryan* v. *Whelan* (1890), 6 Man. 565; (1891), 20 S.C.R. 65; *Alloway* v. *Campbell* (1891), 7 Man. 506; and *O'Brien* v. *Cogswell* (1890), 17 S.C.R. at p. 463: see also to the same effect *Nanton* v. *Villeneuve* (1894), 10 Man. 213; *Scott* v. *Imperial Loan Company* (1896), 11 Man. 190; and *Tetrault* v. *Vaughn* (1899), 35 C.L.J. 315, (1899), 19 C.L.T. 178. But the Manitoba cases relied on in support of this view are easily distinguishable, because they were decided on quite a different set of circumstances; the effect of such a provision as section 23 above quoted, and section 110 of the Assessment Act was not, and, because of the difference in our statutes, could not have come before the Courts which decided those cases, so we must here proceed to consider this important question from a different standpoint.

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In the first place said section 110 must be read with said section 23 and the last paragraph of section 19 of the Land Registry Act. The former section, after providing that the tax deed "shall have the effect of vesting the land in the purchaser, his heirs, etc., in fee simple, or otherwise, according to the nature of the estate or interest sold," declares in its last paragraph that " . . . . the Registrar-General of titles, upon production of the deed and application in the usual form, and upon payment of the usual fees shall register or record the same in the usual manner." The defendant Johnson obtained her certificate under this section, and I agree with the argument of the appellant that the Registrar acted rightly in issuing the certificate under it, because its effect is to do away with the necessity for the "examination of title deeds," which by section 13 of the Land Registry Act is otherwise required. I might here remark that the requirements of section 62 as to production of title deeds are inapplicable, for a tax sale purchaser would not be a "person by right entitled to the possession of documents of title": the effect of a tax sale is to destroy not to confirm a prior title.

The question of what rights are conferred upon the holder of a certificate of title has been considered in this Court in several reported cases, but there has never been any substantial difference in the views taken by the learned Judges. *In re The Vancouver Improvement Company* (1893), 3 B.C. 601, at p. 603, my brother DRAKE said: "The effect of this certificate is, that the person so registered shall be deemed to be *prima facie* the owner of the land described for such an estate of freehold as he legally possesses therein, subject only to registered charges and the rights of the Crown."

In the *Hudson's Bay Co.* v. *Kearns & Rowling* (1895), 4 B.C. 536, Mr. Justice MCCREIGHT at pp. 558-9, refers to "this important document to shew that the Legislature has treated it throughout as an important muniment of title and given every reasonable facility for its being acquired and safely kept by the person really entitled, as good evidence of his ownership, and to be used by him on every important dealing with his land." A similar view was taken by Mr. Justice WALKEM in the same case, page 546. I have already noticed the learned trial Judge's view of the effect of a certificate as evidencing a *prima facie* case, a view in which both counsel agreed.

Quite apart from section 110 it seems to me that to give effect to these rulings and said sections 19 and 23, it must be held that where a party produces in evidence a certificate of title in his favour, that certificate confers upon him the right to be regarded as the *prima facie* owner of the estate therein mentioned, in preference to any claim to the same land made by one holding a certificate of prior date. I am unable to see after mature consideration any analogy between such certificate and, *e.g.*, two conveyances of different dates from an owner of land in favour of two different persons. Section 110, above quoted, declares that the tax deed "shall have the effect of vesting the land in the purchaser," and when once the Registrar has pursuant

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to the latter part of that section issued the certificate of title to the purchaser the fact that there is or is not an earlier certificate becomes immaterial, nor would there be any object in calling in or cancelling such earlier certificate, because as already pointed out, the object of the tax sale is to destroy the earlier title and the old certificate could not form a cloud on the tax title. The object of cancelling certificates in the ordinary operation of the Land Registry Act is manifestly to preserve an uninterrupted chain of title from a given source, but the tax deed and the certificate under it must be regarded as an antagonistic and intrusive title (if the expression be allowable) by virtue of the Assessment Act (section 110) which cannot be controlled or measured by the ordinary rules of procedure under the Land Registry Act because its origin is of necessity foreign and destructive to the usual course of that procedure. Nor in my opinion does the case of *Harding* v. *Cooke* (1831), 7 Bing. 346, aid the respondent in the contention that the later certificate, *i.e.*, the later *prima facie* title is not of greater weight than the earlier. In that case the plaintiff proved a possession of over twenty years while the defendants only established a subsequent ten years' possession. The Chief Justice (Tindal) said "I cannot see why any period short of twenty years should be supposed to raise a counter presumption sufficient to outweigh the presumption arising from the first twenty years" and the defendant naturally failed ; that is a very different case from the present.

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Further, the fact that the Registrar has or has not made the "examination" required by the statute in ordinary cases seems to me, for the purpose of the *prima facie* case, to be immaterial. Taking the present case as an example, there is absolutely no evidence before us on the point of examination, and for all this Court knows from the evidence (and that is the only way it can know anything of matters of fact, other than by judicial notice) an examination may have been made by the Land Registrar into the

tax title. I mention this to shew that if it is intended to attack a certificate on the ground that there was no examination of the title, and assuming that it can be attacked on that ground, evidence must be given on the point, for it certainly should not be presumed.

It was argued that the effect of these provisions would be to reverse the ordinary rule, and cast upon the former owner the heavy burden of proving that the tax sale was bad, instead of the purchaser having to prove it good, and that a hardship is thereby created. It may be a hardship, though analagous legislation in Manitoba and the United States was cited to us on the argument, but with that this Court has nothing to do, provided the meaning of the Legislature is clearly expressed; the hardship, if such it be, must be removed by that body which imposed it. In my opinion the language of this validating and declaratory enactment is perfectly plain and capable of one construction only, which is that the ordinary rule has been reversed and the holder of a certificate of title under a tax sale deed has now a *prima facie* title which in default of being displaced entitles him to judgment in his favour as his interest under the certificate may appear.

The only evidence adduced by the plaintiff of irregularity in the tax sale proceedings is that in the notice of sale for taxes remaining unpaid, published in the Official Gazette and in the Vancouver "World," pursuant to section 93 of the Assessment Act, the name of the owner is given as "Kirks, Evelyn Georgiana," instead of "Kirk, Evelyn Georgiana," *i.e.*, the letter "s" has been inadvertently added to the plaintiff's name; the notice is otherwise correct. Is the insertion of this single letter good ground for setting aside the sale? In default of any authority quoted in support of such a view I am of the opinion it is not; there must be some limit even to technical objections to a tax sale. There is no evidence at all to shew that anyone was misled by this trifling clerical error; the cross-examination

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of the witness Morgan on this point at pages 14-17 of the Appeal Book shews the contrary. When he was examining the tax sale columns of the Gazette he could not have been misled by the "s" added to the name because he says he was looking for the name "R. A. L. Kirk," the husband, and further, that if he had been looking for the plaintiff's name the fact of an "s" being added to the name "would more likely have caught my eye."

Turning to the United States for authority on this point I find that in New Hampshire, where a similar statute exists, (*i.e.*, requiring the Assessor to list the lands in the names of owners) the fact that the name was entered as "Packard" instead of "Packer" has been held to be immaterial, *Pierce* v. *Richardson*, 37 N.H. 306. See also *The People* v. *Sierra Buttes Quartz Mining Co.*, 39 Cal. 511, where the omission of the word "Mining" in the name of the defendant company was held not to vitiate an assessment; and even where in New York the name was given as "Henry, D. V.," the real name being "William, H. V.," on proof that the person intended was known in the town as Henry, the assessment was held valid; *Van Voorhis* v. *Budd*, 39 Barb. (N.Y.) 479. In the tax case in Manitoba, *Nanton* v. *Villeneuve*, *supra*, at 219, it was pointed out that an inaccuracy must be something more than "merely a formal mistake or omission by which nobody could be deceived;" see also to the same effect *McRae* v. *Corbett* (1890), 6 Man. 426, where the mistake of a word in the name of the municipality executing the conveyance was held to be immaterial.

Judgment of MARTIN, J.

There should be judgment for the appellant with costs.

Appeal dismissed with costs.

BIRD *ET AL.* v. VIETH *ET AL.*

DRAKE, J.
1899.
July 8.
FULL COURT
At Victoria.
Sept. 6.
BIRD
v.
VIETH

Practice—Evidence—Exclusion of witnesses—Parties to action.

The mere fact that a party intends to give evidence does not entitle the other party to call for his exclusion as in the case of an ordinary witness.

If a party has been wrongfully excluded it is not necessary for him to shew that he was substantially prejudiced thereby in order to get a new trial.

Quaere, in case of harmless exclusion.

APPEAL by defendants from a judgment of DRAKE, J., pronounced 8th July, 1899, in favour of plaintiffs.

During the trial the defendants (appellants) were excluded, at the instance of the plaintiffs, with other witnesses, no special reason being given for the request, and the case is reported as to this point.

Statement.

The appeal came on for argument at Victoria, on 5th September, 1899, before McCOLL, C.J., IRVING and MARTIN, JJ.

Duff, for appellants, cited *Outram v. Outram* (1877), W. N. 75 ; *Charnock v. Dewings, et al* (1853) 3 C. & K. 378 ; *Selfe v. Isaacson* (1858), 1 F. & F. 194 ; *Russell v. Pilson*, cited in Phipson on evidence at page 468.

Cassidy (*A. D. Crease* with him), for respondents cited Taylor, 9th Ed., 1400 ; Usher v. Henwood, 26 Sol. J. 598 ; Roscoe, N. P. Ev. 16th Ed., 157 ; *Penniman v. Hill* (1876), 24 W. R. 245 and *Reg. v. Newman* (1852), 3 C. & K. at p. 260.

Argument.

6th September, 1899.

The judgment of the Court was delivered by

McCOLL, C. J. : We are of opinion that the learned trial Judge erred in dealing with the question of the defendants' exclusion from the Court room, as if they were in the same

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position as a witness, not a party to the action, whose exclusion, if requested, is commonly ordered as of course. In our judgment the parties to an action have the right to be present during the trial, unless some good reason is shewn why any of them should be excluded, and the mere circumstance that these defendants would, or might, be called as witnesses did not entitle the plaintiffs to require their exclusion. It is sufficient for the disposition of this appeal that no reason whatever was even suggested for the exclusion, other than the plaintiffs' supposed right to call for it. Mr. *Cassidy* contended that a new trial ought not to be granted because of the exclusion, even if wrongful, unless the defendants could shew that they had been substantially prejudiced in the result by their absence. We cannot accede to this. If the questions to be determined between the parties were such as to make it clear that the defendants could not have been prejudiced by the error complained of, a different question would have arisen ; but in this case, after some of the witnesses had been examined, it was found necessary to permit the return of one of the defendants to the Court room for the purpose of instructing their counsel, and in the present circumstances we ought not to speculate to what extent the defendants may have been prejudiced. There should be a new trial, with costs to the defendants in any event.

Judgment.

New trial allowed.

WILSON BROS. v. DONALD.

WALKEM, J.
1899.
July 31.

WILSON BROS. v. DONALD

Practice—Writ of summons—Service out of jurisdiction—Shares in ship—Receiver—Order XI.

Action by execution creditors against a mortgagee of a British ship to recover the surplus of sale proceeds under power of sale.

Held, (1) That the creditors not having got a receiver appointed of the shares they had passed to the purchaser.

(2) That an order for service out of the jurisdiction on the mortgagee could not be made.

Statement.

MOTION to set aside the service of a writ of summons out of the jurisdiction and to discharge the order allowing the service. The facts appear in the judgment.

Langley, for the motion.

G. A. S. Potts, contra.

31st July, 1899.

WALKEM, J.: This is a motion to set aside the service of a writ out of the jurisdiction, and to discharge the order allowing the service. The plaintiffs sue on behalf of themselves and all the other execution creditors of one James Morton, and on behalf of the sheriff of Victoria. Morton being the owner of the steamship Horsa (registered here) mortgaged her on the 27th of August, 1898, to the defendant John A. Donald, to secure payment to him of $15,000.00. After the mortgage was executed, and before it became due, the plaintiffs severally recovered judgments here against Morton for various sums due to them, principally for supplies to the ship, and placed writs of *fieri facias* in the sheriff's hands with instructions, as I understand, to seize Morton's equity of redemption in the shares of the ship. Morton having failed to pay off the mortgage, Donald under a power of sale in it, sold the ship on the 31st of December, 1898, to H. P. Saunders, of New York, for $20,000.00, that

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is to say for about $5,000.00 over what was due to him. The bill of sale to Saunders was registered at the Custom House here on the 16th of January last. The ship left this port some time ago.

Notwithstanding the sale to Saunders, it is contended on behalf of the plaintiffs that the equity of redemption in the shares had been seized, and is now held by the sheriff, and that the shares are thus, in effect, now within the jurisdiction of this Court. But the equity of redemption could not, as a matter of procedure, have been seized by any common law process; and, hence, not by means of a writ of *fieri facias*. The proper course for the plaintiffs to have pursued for the purpose of getting the shares while the ship was here was to have obtained equitable relief from the Court in aid of execution by means of an order for a receiver; (see *In re Shephard* (1889), 43 Ch. D. 131). It is stated in an affidavit on behalf of the plaintiffs that the sheriff seized the shares under the writs but subject to Donald's mortgage; but this statement of itself shews that no proper or effective seizure was made, for the mortgage was, to use the language of Lord Justice Cotton, in the above case, "A hindrance in the way of execution at law." Such being the case, the shares became the property of Saunders when he bought the ship and registered his purchase.

Judgment.

The action is brought to compel Donald to account for the surplus of $5,000.00 received by him on his sale of the ship, on the ground that he held that surplus as a trustee on behalf of the plaintiffs. He has never occupied that position in the present instance. He undoubtedly was a trustee for the mortgagor in respect of the surplus, but that trusteeship ended when they mutually settled their accounts. There never was any privity between the plaintiffs and Donald; nor is there any authority for holding that he was at any time even constructively a trustee for them.

The action is not one "for the execution . . . . .

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of the trusts of any written instrument (as to property situate within the jurisdiction) of which the person to be served is a trustee;" hence it is not within Rule 1 (*d*) of Order XI., which is the rule that governs the question.

The order for service out of the jurisdiction, and all subsequent proceedings must be set aside with costs.

SHORT v. THE FEDERATION BRAND SALMON CANNING CO.

FULL COURT
At Vancouver.
1899.
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SHORT v. FEDERATION

Practice—Time for appealing—Supreme Court Act, Sec. 76—Meaning of "refusal of a motion or application."

The time for bringing an appeal from a trial judgment runs from the date of signing, entry or perfection thereof, as the case may be, and not from the date of pronouncement.

The International Financial Society v. City of Moscow Gas Company (1877), 7 Ch. D. 241, discussed.

APPEAL to the Full Court from the judgment of DRAKE, J., dismissing the action. The judgment was pronounced on the 26th of April, 1899, and entered on the 5th of June, 1899. The notice of appeal was served on the 2nd of September, 1899, for the September sittings of the Full Court, Vancouver, when the appeal was not heard in consequence of the number of appeals on the list and was adjourned to the November sittings.

Statement.

On the 28th of November, 1899, the appeal being called before McCOLL, C.J., WALKEM, and IRVING, JJ., *Wilson, Q.C.*, for the respondents, took the preliminary objection that the appeal was out of time as the notice was given

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more than three months after the pronouncing of the judgment. The dismissal of an action is the refusal of an application and the time for appealing does not therefore run from the time of signing, entry or otherwise perfecting of the order, but from the time of refusal. *The International Financial Society* v. *City of Moscow Gas Company* (1877), 7 Ch. D. 241 is exactly in point and settles the question.

A. D. Taylor, for the appellants: The case comes under the second category in section 76 of the Act, that is "in all other cases from signing, entry or otherwise perfecting of the order." The dismissal of an action at the trial is not the refusal of an application. In *The International Financial Society* v. *City of Moscow Gas Company*, the application was for the dismissal of a Bill in Chancery and it was not the ordinary trial of an action, and even if it is held that under the English rule the words "refusal of an application" are general enough to cover the dismissal of an action at the trial, our statute is different for it uses the words "refusal of a motion or application" and this limits the meaning of the word "application" to proceedings *ejusdem generis* as a motion.

Argument.

McCOLL, C.J.: I cannot consider the words "refusal of a motion or application" as applying to the dismissal of an action at the trial.

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

IRVING, J.: I consider that *The International Financial Society* v. *City of Moscow Gas Company* decides the question. I would give effect to the preliminary objection.

The result was that the preliminary objection was overruled and the appeal proceeded on the merits.

On the 30th of November, the following judgment was handed down by the Chief Justice, who mentioned in doing so, that the point was of such importance that he had prepared a written judgment:

McCOLL, C.J.: The plaintiff having proceeded to trial in the usual way judgment went against him and he now appeals. Objection is taken that the appeal not having been brought within the time limited if calculated from the giving of the judgment, is beyond the time allowed by the Supreme Court Act Amendment Act, 1899, amending section 76 of the Supreme Court Act relying upon *The International Financial Society* v. *City of Moscow Gas Company* (1877), 7 Ch. D. 241.

The question depends upon the meaning of the word "application" in section 76, and it is necessary to consider the difference between the English Rule (Order LVIII., Rule 15), and the section in question.

As remarked by Lord Justice Thesiger in that case the words "refusal of an application" are certainly not very happily chosen to express the termination of an action by judgment at the trial. The distinction drawn by the English Rule was between interlocutory and other orders simply. The word "application" there stands alone and is used in a perfectly general way and in its natural sense would therefore include the asking for anything at any stage of the action. It admittedly did include the asking some orders for final judgment and other final orders. That being so, and there being nothing to limit the meaning of the word, the language of the rule afforded no ground for any distinction between orders and a judgment given at the trial.

The distinction made by our statute is between orders in Chambers and other orders. The words in the clause upon which the contention now arises are "refusal of a motion or application." Now, as Lord Justice Baggallay pointed out, the word "application" standing alone clearly includes a motion, therefore the respondent's contention leaves the words "motion or" without any meaning. It seems to me that having regard to the circumstance that the distinction is between orders made in Chambers and

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other orders, these words are not inaptly used to describe the different ways of proceeding for orders in Court or in Chambers apart from the trial of the action. Though the present English Rule is nearly in the same words as the section, the clause in question has been preserved.

This construction leaves the word "judgment" its ordinary meaning, which does not depend upon its having been given for the plaintiff. It may be added that our rules provide for an unsuccessful party entering up judgment.

Since writing the above I have had an opportunity to consult Mr. Justice DRAKE, who authorizes me to say that he agrees.

WALKEM, J.: I concur.

Judgment of IRVING, J.

IRVING, J.: I see the distinction the Chief Justice points out, but as the word "application" has been given by the Lord Justices a definite meaning in connection with appeals from the dismissal of a suit at the hearing, I think we should assume that the Legislature was aware of it and used the word in the sense ascribed to it in the *Moscow Case*.

Preliminary objection overruled, Irving, J., dissenting.

McDONALD v. THE CANADIAN PACIFIC EXPLORATION COMPANY, LTD.

MARTIN, J.
1899.
Dec. 19.
McDONALD v. C. P. EXPLORATION Co.

Inspection of Metalliferous Mines Act, R.S.B.C. 1897, Cap. 134, Sec. 25—Accident by falling rock—Statutory duty of mine owner—Negligence.

Section 25 of the Inspection of Metalliferous Mines Act was not intended to impose unreasonable burdens upon the mine owner and therefore he is only required to use reasonable precaution against accidents to miners.

Statement.

ACTION tried at Nelson on 2nd November, 1899, before MARTIN, J., without a jury. The facts sufficiently appear in the judgment.

Macdonald, Q.C., and *Johnson*, for plaintiff.

MacNeill, Q.C., for defendant.

19th December, 1899.

Judgment.

MARTIN, J.: In this case the plaintiff sues the defendant Company, his former employer, for damages for injuries received in its mine, on the ground that the air course in which he was set to work was not securely timbered, in consequence of which alleged negligence a mass of rock fell, from the hanging wall, upon his left foot and severely crushed it, causing injuries which resulted in the amputation of the greater part of the wounded member.

No one was present at the time of the accident except the plaintiff, and his account of it is not so precise as one would desire, though perhaps as full as can be expected from one who does not seem to have a good memory, *e. g.*, his inability at first to give, at the opening of his examination in chief, even a reasonably accurate date of his leaving the hospital.

I find that the plaintiff, who on the day of the trial attained the age of eighteen years, and fully looks his age,

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was engaged on January 28th, 1899, by the defendant's superintendent, McMullen, as one who had worked three years in a mine, and that after working two days he was set to work to clear out the air course in question. I am satisfied the superintendent did not know, and had no reason to suspect, that the place was dangerous, or in any way insecurely timbered, and I do not credit the evidence of the witness, Marquis, to the contrary—he impressed me very unfavourably. The evidence shews that the system of timbering in the mine is a good one, and that plenty of men and materials were available for the purpose ; the mine itself is, as a whole, a well timbered mine, above the average, and the walls are of solid rock as a general rule. The work the plaintiff was engaged at was of a simple kind, and not of a nature from which any accident could have been anticipated. All the evidence goes to shew that whether the plaintiff is to be regarded as a "mucker" or a "miner" in the proper sense of the latter word, his primary duty to himself was to sound the ground by tapping or otherwise, as he went along. This he did not do, and that he knew he should have done so is shewn by the fact that he stated to three different witnesses that the accident was his own fault. The plaintiff denies this statement, but in the face of the evidence of three credible witnesses I can only take this as another instance of his unreliable memory. Of course it is a painful thing to see a youth crippled for life, but I am unable after mature reflection to say that the defendant Company has been negligent in any particular. I think, on the contrary, that more than ordinary precaution has been taken in the Porto Rico mine to protect the workmen, and that the superintendent has conscientiously done his duty to the employees in this regard. I cannot help thinking that the accident was directly caused by the plaintiff's careless and unauthorized use of the hammer, though all the tools he needed to carry out his orders were the pick and shovel. But however that may be, and if the

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fall of rock were not so caused, then it must be regarded, in my opinion, as one of those accidents which happen despite all reasonable care and foresight.

The plaintiff's counsel further relies on the statutory duty to securely timber imposed upon the defendant by the Inspection of Metalliferous Mines Act, R.S.B.C. 1897, Cap. 134, Sec. 25, rule (20): "Each shaft, incline, stope, tunnel, level or drift, and any working place in the mine to which this Act applies, shall be, when necessary, kept securely timbered or protected to prevent injury to any person from falling material."

It is argued that the effect of this rule is that unless it is reasonably impossible to timber a mine, and a rock drops from any cause, and injury results, the mine owner is liable.

The operative words of section 25 are as follows: "The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies."

For the defence it is urged that the words "so far as may be reasonably practicable" restrict the operation of the rules, and that to extend rule (20) to cover such a case as the present would be, in effect, to make the defendant an insurer against accidents, a result not contemplated by the Act. If the rule stood alone, without the said words, it is plain that a stricter liability would be imposed upon the defendant; the exact value of the particular expressions is not easy to determine. It seems to me that they do not require the rule to be construed in a manner which would in practice place an unreasonable burden upon the mine owner, and that is the test I shall apply to this case; I do not feel justified in going further, in view of the element of uncertainty so introduced. Applying this test then, I am of the opinion that it would be unreasonable in practice for me to require of the defendant Company that the mine should have been better timbered than it was. This is

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equivalent to saying that the mine was "securely timbered" within the true intent of said rule and section read together. If a stricter construction be desired I shall look for plainer language in the statute.

In view of the above conclusion it is not necessary for me to consider what the consequences of breach of a statutory duty would be in view of the penalties prescribed by sections 27-37, or otherwise, or to express an opinion on the objections taken to the notice. The action should be dismissed with costs.

Judgment.

Action dismissed.

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HAND v. WARREN

HAND v. WARREN.

Mining law—Action to set aside certificate of improvements instead of adverse action.

An adverse claimant who neglects to take the remedy provided by section 37 of the Mineral Act cannot sue to set aside a certificate of improvements on the ground of fraud.

Semble, that under such circumstances the Crown alone is entitled to sue.

Statement.

ACTION by the recorded owner of two mineral claims to set aside the certificate of improvements issued to the defendants in respect of the same claims previously recorded by them under different names. On behalf of the plaintiff it was alleged that the certificate of improvements was obtained by fraud. The evidence shewed that the defendants had employed a man to do the assessment work, who

fraudulently represented to the Mining Recorder that the necessary work had been done and in this way obtained a certificate of work. The action was tried on 6th December, 1899, at Rossland before IRVING, J.

Martin, Q. C., and *W. S. Deacon*, for plaintiff.
J. A. Macdonald, for defendants.

16th December, 1899.

IRVING, J.: The plaintiff is the recorded owner of the Tin Dipper and Dominion mineral claims, located on the 9th and 26th of August, 1897, respectively. The defendants are the recorded owners of the Vanderbilt and Hand Fraction mineral claims, located on the 5th and 23rd of August, 1896, respectively. The plaintiff's claims are re-locations of the defendants' claims. The re-locations were made by the plaintiff and one Green (who afterwards assigned the Tin Dipper to the plaintiff) in consequence of the failure of the defendants to do the assessment work on their claims.

The evidence at the trial shewed that the defendants had employed a man to do this work, but instead of doing it he merely cleared out some old workings on an abandoned shaft, and then represented to the Mining Recorder that the necessary work had been done, and in this way obtained a certificate of work, which was issued to the defendants on the 28th of June, 1897. The defendants themselves were ignorant of this fraudulent representation, and remained so until after they had obtained a certificate of improvements by the payment of $1,000.00 in cash on the 10th of February, 1898.

Judgment.

The plaintiff failed to bring his adverse action in time, but on the 5th of March, 1898, brought this action to set aside the certificate of improvements issued on the 10th of February, 1898, on the ground that the same was obtained by fraud.

By section 37 it is provided (1.) that a certificate of improvements when issued shall not be impeached in any

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Court on any ground except that of fraud: (2.) In case any person shall claim an adverse right of any kind.....he shall within sixty days .....commence an action in the Supreme Court to.....enforce his claim..... A failure to so commence shall be deemed a waiver of the plaintiff's claim.

This action is an ingenious contrivance to get round the second sub-section. The plaintiff attacks the certificate of improvements, whereas the fraud complained of was committed in respect of the obtaining the certificate of work.

I do not think that the statute can be got round in this way. It may be put in more ways than one. It may be put on this ground, that the plaintiff has waived his claim, or that the statute, having prescribed a particular form of action for persons claiming an adverse right of any kind that form of action (with its time limitations) must be followed, and no other ; or it may be put on the two grounds combined.

Mr. *Martin's* contention was that any free miner could bring an action under the first sub-section of section 37. At the trial I thought not, and I am still of the same opinion. *Osborne v. Morgan* (1888), 13 App. Cas. 227, seems to me to support the view I took. I think that the proper method of attack by any one interested is by adverse action, and as the plaintiff by his waiver under sub-section 2 has lost the peculiar interest which would entitle him to bring an action, the only way in which the defendants' certificate of improvements can now be assailed is by *scire facias*, or some other similar action instituted by the Crown or its officers.

Judgment.

To shew that the plaintiff has a status—or rather to shew that the Attorney-General is not the only person who can bring an action under the circumstances existing in this case, Mr. *Martin*, for plaintiff, draws attention to the difference between the language used in section 28 and that in section 37, sub-section 1.

It is possible to explain this. Section 28 is only applicable to cases in which there are two or more claimants of the same property. Under section 37 the question does not of necessity arise in every case between two claimants. Sub-section 1 does not say by whom the action must be brought, possibly contemplating cases in which the Crown alone is interested.

Sub-section 2 says that where there is someone whose rights are being interfered with that person can bring an action in the form prescribed under sub-section 1, a proceeding like *scire facias*, or an action for penalties should be taken. In this class of cases the Attorney-General is the proper person to sue. Cf. *Bradlaugh v. Clarke* (1881), 7 Q.B.D. 38, and (1883), 8 App. Cas. 354 ; *In re Wier* (1898), 31 N. Sc. Rep. 97 ; *Boggs v. The Merced Mining Co.* (1859), 10 Morr. 334. Perhaps the nearest kind of action to our adverse action to be found in English law is that given by the Imperial Statute 46 and 47 Vict. Cap. 57, Sec. 26. The action must be dismissed with costs.

Judgment.

At the trial it was proved that the plaintiff's certificate of work was improperly obtained. I am able to decide the case without regard to that point, and therefore, in considering the question of costs, I do so without reference to the amendment I allowed at the close of the case. I mention this in order that the plaintiff may have the benefit of it in the event of the Full Court considering it necessary for me to invoke the aid of that fact in determining this case.

Action dismissed.

FULL COURT
At Vancouver.

1899.

Nov. 29.

JOHNSON
v.
MILLER

JOHNSON v. MILLER.

Bennett-Atlin Commission Act, 1899—Appeal by consent from Commissioner purporting to sit as County Court Judge—Whether competent.

The Special Commissioner appointed under the Bennett-Atlin Commission Act, 1899, cannot confer the right of appeal to the parties to a dispute tried before him by purporting to sit as a County Court Judge.

Statement.

APPEAL from a decision of IRVING, J., pronounced at Atlin City in a dispute originally brought by petition before him as "Special Commissioner" under the Bennett-Atlin Commission Act, 1899, but afterwards heard and determined by the learned Judge as County Court Judge by request of the parties.

The appeal came on for argument on the 29th of November, 1899, at Vancouver before the Full Court consisting of McCOLL, C. J., WALKEM and DRAKE, JJ.

Wilson, Q. C., for appellant.

No one for respondent.

After the hearing the following judgment of the Court was delivered orally by

Judgment.

WALKEM, J.: This case having been very fully presented by counsel for the appellant we think that an adjournment for the purpose of further considering it is unnecessary. The facts are simple. Under a Provincial Act, passed last session, the Government was authorized to appoint a Commissioner to settle all mining disputes that might arise in the new District of Atlin. His decision in any matter brought before him was to be final. Mr. Justice IRVING having been appointed Commissioner, the plaintiffs, John-

son and Haseltine, addressed a petition to him as "Special Commissioner," dated the 11th day of August, 1899, requesting him to assess the damages which they alleged they had suffered from the destruction, by the defendants, of a natural dike that protected their mining claims. Notice was given to the defendants that the petition would be presented to the "Special Commissioner at Atlin," on a day named. It would appear that when that day arrived, both parties expressed a wish to have a right of appeal. As the statute, as I have said, provided otherwise, Mr. Justice IRVING, who acted as the Commissioner, decided, with the concurrence of both litigants, that he would sit as a County Court Judge, and thus give them an opportunity of appealing.

In our opinion the object of the Act could not thus be defeated. On the face of the proceedings, which consist of the petition and notice referred to, the learned Judge was appealed to as a Commissioner, and must have acted as such. He certainly cannot have sat as a Judge of a County Court, which is a Court of Record; for, as none of the proceedings were taken in that Court, there was nothing of record which required his judicial intervention. If he did not sit as a Commissioner, he may have sat as an arbitrator; and the mere fact that both parties agreed that there should be an appeal to this Court gives us no jurisdiction; because as was said in *The Attorney General* v. *Sillem* (1864), 33 L. J., Ex. 92, an inferior tribunal cannot, by consent, or otherwise, confer a jurisdiction of an appellate character upon a Superior, or paramount, Court. Consent cannot give jurisdiction where none exists. Moreover, an appeal only lies when given by statute in express terms—*Rex.* v. *The Justices of the Hundred of Cashiobury* (1823), 1 D. & R. 485.

Judgment.

The case not being appealable, the defendants have no status in this Court, and we consequently make no order.

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TRAVES v. CITY OF NELSON

TRAVES v. CITY OF NELSON.

IN RE TRAVES—CERTIORARI.

Municipal law—Revising by-law—Printed roll not attested by Mayor and City Clerk at time of passage of by-law—Proceedings by Municipality under a by-law not quashed—Municipal Clauses Act, R.S.B.C., 1897, Cap. 144, Secs. 91 and 92.

Where a revising by-law purports to bring into effect a number of by-laws contained in a printed roll alleged to be attested by the Mayor and City Clerk, but such roll was not, in fact, so attested until after the final passage of the revising by-law, such by-law has failed to bring into force any by-law contained in such roll.

Sections 91 and 92 of the Municipal Clauses Act do not prevent suit to restrain a municipality from proceeding under a by-law which has not been quashed, but only prevent an action, for damages already suffered, till the by-law is quashed.

The validity of such a by-law may be determined in *certiorari* proceedings.

Statement.

ACTION for an injunction to prevent the defendant Corporation from pulling down and removing a building within the fire limits as defined by by-law No. 7, of the revised by-laws of the City of Nelson, and for damages. The trial took place before MARTIN, J., at Nelson on 25th October, 1899.

S. S. Taylor, Q.C., and *R. W. Hannington*, for plaintiff.
Sir C. H. Tupper, Q.C., and *Galliher*, for defendant.

21st December, 1899.

Judgment.

MARTIN, J.: Acting under the provisions of by-law No. 7 of its revised by-laws, the defendant Corporation on the 15th day of July last notified the plaintiff in writing to pull

down and remove within seven days "a building, or addition to a building, now erected or in course of erection," in the City of Nelson, within the fire limits as defined by that by-law, and, further, that if the plaintiff made default in so removing the building, it would be removed by the Corporation at the plaintiff's expense. Thereupon this action was commenced and an *interim* injunction obtained to prevent the threatened trespass, and the plaintiff now asks for a perpetual injunction and damages.

A number of objections are taken to the validity of the by-law, and I shall consider first that which I now deem most important.

This by-law derives its existence from and under by-law No. 25 "for revising and consolidating the by-laws of the City of Nelson." Objection was taken to the manner of the passing of it through the Council, and the details of procedure there adopted, such as not actually reading or considering the whole by-law or the printed roll "A," (the first two pages of the revising by-law, 25, containing the operative words, were read), but I regard the particular matters so complained of as being "domestic" in their nature, and, no objection having been taken at the time, it is now too late to do so.

But a peculiar question here arises by reason of section 1 of this revising by-law 25, which is: "The printed roll marked 'A' and attested as that of the draft revision and consolidation under the signature of the Mayor and the City Clerk of the City of Nelson, and deposited in the office of the City Clerk of the said City shall be held to be the original thereof."

It appears by the cross-examination of the City Clerk that at the time the Council finally passed the revising by-law the printed roll "A" had not been attested under the signature of the Mayor and City Clerk, and that this was not done till after the Council meeting had adjourned, and at the same time that the Mayor and City Clerk attested

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the revising by-law; Roll "A" was not at any time actually read or considered by the Council.

Counsel for the defendant argued that all regularity in favour of the by-law must be presumed, and that therefore the Court should not inquire into the attestation of roll "A." On the other hand plaintiff's counsel urges that, while admitting the doctrine of favourable presumption in general, yet in the presence of direct evidence the doctrine has no application. It is here established as a fact that at the time the Council was exercising its legislative functions there was nothing on which those functions could operate. There was no roll in existence which had been attested in the manner prescribed by section 1, or attested at all. The Council adjourns and disperses, and after that the Mayor and Clerk affix their signatures to a document. The case for the City must be that such subsequent attestation brought into existence a particularly attested roll which the Council had treated as being already actually before it, but which, as a matter of fact, was not. During the argument counsel were unable to refer me to any case decided upon such circumstances, and it is not surprising, for the occurrence is one hardly to have been looked for. The nearest case I have been able to discover is *The London and Canadian Loan and Agency Co.* v. *The Rural Municipality of Morris* (1890), 7 Man. 128. There an attempt was made to have the Court investigate certain alleged fraudulent irregularities in the passage of a bill through a Provincial Legislature, but it was held that the mode or means could not be so inquired into after the bill had become an Act by passing the House and receiving the Royal assent. That case, while an authority in support of the view I have taken as to a presumption in favour of regularity in the passing of the revising by-law, does not, of course, go to the point now taken. What is now complained of is something far removed from an irregularity. The section here in question is the same, *mutatis mutandis*,

Judgment.

as that of the same number in the "Act respecting the Revised Statutes of British Columbia," R.S.B.C. cxi. In that section the printed roll "A" is required to be attested by the Lieutenant-Governor and Clerk of the House. Now assuming that the Act had received the Royal assent, and it afterwards turned out that at the time of the passage of the Act no such roll was in existence, could it be successfully argued that the laws of this Province would depend upon an unidentified document, afterwards brought into life? It seems to me that it would be dangerous in the extreme to sanction such a state of affairs. And the danger is increased in the case of a Municipal Council where there would be more opportunity for the operations of unscrupulous persons, if so disposed.

I am driven to the conclusion, somewhat reluctantly, if I may say so, that the objection is too serious, in the public interest, to pass over, and that there is no way by which such a defect in legislation, parliamentary or municipal, can be cured. The revising by-law is good, so far as it is itself concerned, but it has operated on nothing, and has brought nothing into existence, therefore the plaintiff has not been guilty of any offence against it, and his rights of property have been unlawfully interfered with by the corporation relying on a "by-law," No. 7, which never had any foundation whatever for even being so termed.

Judgment.

Such being the view I take, it is not necessary to consider the other objections. But the point is submitted by the defendant that the present suit or action is barred by section 91 of the Municipal Clauses Act. The sections to be considered under this objection are 91 and 92. "91. In case a by-law, order, or resolution is illegal, in whole or in part, and in case anything has been done under it which, by reason of such illegality, gives any person a right of action, no such action shall be brought until one month has elapsed after the by-law, order, or resolution has been quashed, nor until one month's notice has been given to

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the municipality; and every such action shall be brought against the municipality alone, and not against any person acting under the by-law, order, or resolution.

"92. In case the municipality tenders amends to the plaintiff or his solicitor, if such tender is pleaded and (if traversed) proved, and if no more than the amount tendered is recovered, the plaintiff shall have no costs, but costs shall be taxed to the municipality, and set off against the verdict, and the balance due to either party shall be recovered as in ordinary cases."

A section in Ontario similar to 91 has received much judicial attention for many years past, notably in the case of *Connor* v. *Middagh* (1889), 16 A. R. 356, where the principal decisions are reviewed. So far back as 1859 in *Wilson* v. *The Corporation of the County of Middlesex*, 18 U.C.Q.B. 348, it was held that such a section was no bar to an action of replevin, the Court saying, per Robinson, C.J., "We do not think that the provision extends further than to prevent actions being brought for the recovery of damages." In *Connor* v. *Middagh* at p. 378, Chief Justice Hagarty expresses himself similarly; "It is simply a claim for damages against the Corporation and its officer for acts done under the by-law, and it is only to such claim for damages that the Legislature requires the preliminary proceeding" of quashing, &c.: see also the remarks of Osler, J. A., at p. 388. In 1890, *Wilson* v. *The Corporation of the County of Middlesex* was approved in *Rose* v. *Township of West Wawanosh et al*, 19 Ont. 294, where it was expressly held that an injunction would be granted to restrain a corporation from enforcing a right (there of entry upon lands) claimed under a by-law. Mr. Justice Street took this view of the matter, p. 297: "It is perhaps true that the plaintiff here might be unable until he had quashed the by-law to recover damages for anything done under even such a by-law as this; but the damages here claimed are trifling; the substantial relief sought is

Judgment.

an injunction to restrain the defendants from proceeding to enforce the rights they claim under this by-law. Section 338 does not tie the hands of a person threatened with damage under an illegal by-law; it only prevents his bringing an action to recover damages for a wrong already done him until he has quashed it. There is nothing therefore in that section to prevent the plaintiff from maintaining this action, so far as it is based upon a claim to restrain further damage."

Wilson v. *The Corporation of the County of Middlesex* was also approved in *Alexander* v. *The Township of Howard* (1887), 14 Ont. at p. 43, and this latter case was cited favourably by Mr. Justice Osler in *Connor* v. *Middagh* at p. 388.

I regard this action as being substantially one for an injunction, to which the plaintiff is entitled; the course he took was the only one then open to him to save his property from destruction; but as to damages I do not think I should, in view of the above authorities, entertain the question.

Judgment.

Perhaps I should state that in my opinion the case of *The Midland Railway Company* v. *The Whittington Local Board* (1883), 52 L.J., Q.B. 689, does not take the defendants' case further than the Ontario cases do. There will be an injunction as prayed, and the plaintiff should have his costs.

Injunction granted.

IN RE TRAVES

The plaintiff had been fined $100.00 by the Police Magistrate for the City of Nelson for an alleged infraction of the said by-law and he obtained a rule *nisi* for a writ of *certiorari* to remove the conviction. The rule *nisi* was argued 27th

MARTIN, J.
1899.
Dec. 21.
IN RE TRAVES

October, 1899, at Nelson before MARTIN, J., immediately after the conclusion of the preceding case.

S. S. Taylor, Q. C., and R. W. Hannington, for the applicant.

Sir C. H. Tupper, Q. C., and Galliher, contra.

21st December, 1899.

MARTIN, J.: It is objected that a *certiorari* should not issue from this Court, in the exercise of a sound judicial discretion, because the defendant might have appealed to the County Court under section 70 of the Summary Convictions Act, or moved to quash the by-law. In support of this contention several cases were quoted, among them *Ex parte Russell* (1886), 25 N.B. 437; *Wallace* v. *King* (1887), 20 N.Sc. Rep. 283; *Ex parte Ross* (1895), 1 C.C.C. 153; and *Queen* v. *Stevens* (1898), 31 N.Sc. Rep. 124. The first has no application, being under the special provision of the Canada Temperance Act taking away the right to a *certiorari* where the Magistrate has jurisdiction; in the second, the Court stated its inability to deal with the suit, as contemplated by a particular statute, after removal (pp. 287, 291); and in the fourth the right was restricted by statute (p. 126). The third case, *Ex parte Ross*, goes further and is to the effect that in cases somewhat resembling the present the writ should not go, unless in exceptional circumstances. The report is very meagre, and, as the editor states in his annotations to the brief memorandum of judgment, the decision is directly contrary to the rule usually followed. In the case before me the matter can be conveniently disposed of by the procedure resorted to, and the practice of this Court has not been the same as the Supreme Court of New Brunswick in this respect, if its judgment is exactly reported in *Ex parte Ross*. It is not necessary to mention the other cases cited as they are either plainly distinguishable, or confirm the view I have taken.

Judgment.

As I understand the course of the argument, I am to entertain in this application the objections taken, and arguments thereon *pro* and *con*, in the case of *Traves* v. *Nelson*, which was argued immediately before this motion, and also two additional objections herein taken by Mr. *Taylor*. In view of the fact that I have just delivered judgment in the prior case to the effect that no such by-law as the corporation relies upon ever had any existence, it would seem unnecessary to consider the other points raised, and I shall not do so unless counsel shall communicate with the District Registrar at Nelson and shew reasons for my so doing.

Conviction quashed.

DRAKE, J.
1899.
June 7.
DART v. ST. KEVERNE

DART v. ST. KEVERNE MINING CO., LIMITED.

Mining law—Location embracing unconnected strips of land—Whether good—Mineral Acts of 1891 and 1893.

Two strips of land unconnected with each other, although within the statutory limit of 1,500 feet, cannot be embraced in one location and record.

ACTION tried by way of special case before DRAKE, J., at Nelson on 7th June, 1899.

Wilson, Q. C., for plaintiff.
John Elliot, for defendant.

DRAKE, J.: This action is brought by way of special case to decide whether or not a miner can locate a claim on each side of a prior location under one record, in other words, whether two strips of land unconnected with each other but within the statutory limit of 1,500 feet can be covered by one location and record.

The O. B. H. claim was recorded on 16th August, 1894, and the only unoccupied land was a strip lying North-east of the Exeter claim and a strip lying South-west of the Exeter claim but divided further on the East by the Slocan Boy.

Judgment.

Thus the two pieces of land which the defendants claim, are divided the one from the other by lawfully occupied and recorded mining claims.

The defendants contend that they are entitled to both these strips under their record.

The object of the Mineral Act is to enable miners to enter on lands of the Crown and record a plot of ground which under section 14 of the Act of 1891, as amended by

Cap. 29 of 1893, is where possible not to exceed 1,500 feet by 1,500 feet and of a rectangular form.

The term "plot of ground" does not mean a variety of plots. A mining claim may be restricted in area by other existing claims but it must be of rectangular form except when a boundary line of a previously surveyed claim is adopted as common to both claims. The whole scope of the Act indicates that a mining claim means but one piece of ground.

The legal posts which were required by the Act are two in number and the notice upon the initial post is to contain the number of feet lying to the right and left of the line.

The location notice, Form A, in schedule to Act of 1893, Cap. 20, Sec. 14, defines the claim as so many feet in length by so many feet in breadth and is to shew how many feet lie to the right and left of location line. This location notice shews that the party claiming under it claims a clear tract of land on each side of the location line. If any land on either side of the location line and within the area indicated by the location notice is lawfully occupied mining ground the locator has no right to enter on it and therefore no right to extend his line across such ground. The locator of the O. B. H. claimed 1,500 feet to the left of the line but there was only a few feet of land to the left because the Exeter intervened, therefore he could only take up to that line and any further unoccupied land forming portion of the same plot without any intervening bar of a recorded claim.

Judgment.

I am of opinion that the defendant Company are not entitled to any portion of the land separated and cut off from this portion of land on which they had placed their stakes. No question is before me for decision as to whether the records of either parties are valid or the reverse. As the parties have agreed there shall be no costs, the plaintiff will have judgment without costs.

DRAKE, J.
COUNTY COURT
1900.
Jan. 4.
SHAWNIGAN v. FAIRFULL

SHAWNIGAN LAKE LUMBER CO. v. FAIRFULL.

COBURN, GARNISHEE.

Costs of garnishee proceedings—Not allowed when defendant pays money into Court before judgment.

Where a defendant in a County Court action pays the full amount of the claim and costs called for in a default summons within the five days' limit mentioned in the summons, the plaintiff will not be allowed the costs of a garnishee summons.

Statement.

ACTION commenced in the County Court of Victoria on 23rd December, 1899, for the recovery of $22.25. The defendant was served with the default summons the same day it was issued and on 28th December, he tendered the Registrar $27.75 in full payment of the claim and costs, but the garnishee had already paid into Court $29.75 in full of the claim and costs of the garnishee summons. The Registrar did not receive the money from the defendant, and under the circumstances would not enter judgment until the matter had been mentioned to the Judge, and on 4th January, 1900, the case was called before DRAKE, J.

Argument.

Jay, for the defendant, contended that as his client had tendered the money before judgment and within the eight days' limit mentioned in the default summons he could not be made to pay the costs of the garnishee summons.

Higgins, contra.

Judgment.

DRAKE, J.: The defendant should not be made to pay the costs of the garnishee summons. The order will be for the payment out of Court to the plaintiff of $27.75 and to the defendant of $2.00.

Order accordingly.

GIBSON v. McARTHUR AND LUEKMAN.

IRVING, J.

1899.

Dec. 21.

GIBSON v. McARTHUR

Mining law—Adverse action—Mineral claim—Bill of sale—Fraud.

W. sold certain mineral claims called the Big Four group to A., who sold in turn to the defendants after which W. as agent for the plaintiff, located a fraction between two of the claims in the plaintiff's name.

Held, That defendants had no right to the fraction in the absence of proof of fraud by W. and that the plaintiff was a party thereto; and held also, that the defendants could not invoke against the plaintiff a statement in a bill of sale from H. to W. that the end of the two claims between which the fraction in question was located, adjoined each other.

Statement.

ACTION of adverse claim tried at Rossland before IRVING, J., on the 6th day of December, 1899. The facts sufficiently appear in the judgment.

J. A. Macdonald, for plaintiff.
Hamilton, for defendants.

Judgment.

IRVING, J.: This is an action brought by the Maggie Fraction mineral claim, (located 2nd November, 1897, recorded 13th November, 1897), to adverse the defendants' application for a certificate of improvements in respect of the Big Four mineral claim, located 22nd April, 1895, recorded 29th April, 1895, and the St. Luke Fractional mineral claim, located 12th November, 1897, recorded 13th November, 1897.

The defendants' theory was that the No. 1 posts of the Big Four and Queen Lil mineral claims respectively were planted side by side, and that the end lines of the two claims marched together for their greater part. Where they separated they left a triangular space which the

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defendants took up as the St. Luke Fractional mineral claim.

The plaintiff established by the evidence of Wells that the No. 1 of the Big Four was 270 yards from the No. 1 of the Queen Lil, and in this space he staked the Maggie Fraction. Wells' evidence is the only evidence on this point, and as it is uncontradicted it must be accepted. As the Maggie location does not conflict with the triangle taken up as St. Luke, the plaintiff during the course of the trial gave up that part of the contest.

The case then resolved itself into the question whether the plaintiff was entitled to the Maggie or whether it was the property of the defendants.

Judgment.

The Big Four had been located for Hoover by Wells, the witness whose name has already been mentioned, at the same time that he (Wells) located the Queen Lil. Wells also became by purchase the owner of two other mines. The four claims known as the Big Four group, he put into Acorn's hands for sale on commission. Acorn was unable to effect a sale, and then Wells gave Acorn an option on the group. The option was given in this way: Wells placed bills of sale with the name of the purchaser in blank in the bank, to be delivered out on payment of the purchase price. The defendants bought, paid the money, and the bills of sale with their names inserted as purchasers were delivered to them. Wells swears positively that Acorn was not his agent, and that the sale by means of the deposit of the bills of sale was a sale by him to Acron, and that he was not concerned in the sale by Acorn to the defendants.

Evidence of intermediate sales, by verbal agreements was allowed in *Brown v. Harrower* (1886), 3 Man. 441, in order to shew that the grantee whose name appeared in the deed was not the original purchaser from the grantor.

After the purchase had been completed the defendants sent out a surveyor to have their claims surveyed. On the

surveyor's arrival there, he found that Wells had that very day as agent for the plaintiff located the Maggie Fraction in the interval between the Queen Lil and Big Four.

This the defendants claim was the consummation of Wells' fraudulent scheme, and they claim that this piece of ground is theirs, either as part of the original Big Four mineral claim, or that the plaintiff is estopped from claiming it on the principle of equity enunciated in *Hobbs v. Norton* (1682), 1 Vern. 135 ; and *Savage v. Foster* (1723), 9 Mod. 35.

That I am in a state of doubt about the *bona fides* of the plaintiff in the matter is not sufficient. The defendants' case is that there was fraud. I am not able to say that the plaintiff either by himself or through Wells assisted in or connived at the fraud which led up to the condition of affairs which brought about these proceedings.

The mere silence of Wells cannot work an estoppel against the plaintiff unless it is part of a line of conduct, equivalent to an express statement by the plaintiff of a fact. The defendants I think were remiss in not examining the ground before they purchased. Had they done so the chances are that on seeing that the No. 1 post (or supposed No. 1 post) of the Big Four had been badly charred they would have required some evidence from Wells of its location.

As to the representation contained in Hoover's bill of sale to Wells of the Big Four, that the Big Four claim adjoined the south end lines of the Queen Lil and Sailor Boy, I do not see how it is binding on Gibson.

There will be judgment for the plaintiff as to the Maggie, and for the defendants as to the St. Luke, and that portion of the Big Four not covered by the Maggie. Each party to pay their own costs.

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NOBLE v. BLANCHARD.

Mining Law—Adverse claim—Action of—Extension of time after lapse of time fixed by a previous order—B.C. Stat. 1898, Cap. 33, Sec. 9, and B.C. Stat. 1899, Cap. 45, Sec. 13.

The time for filing affidavit and plan in an adverse action under the Mineral Act may be further extended on an application made after the lapse of the time fixed by a previous order.

Statement.

APPEAL to the Full Court from an order of McCOLL, C.J., pronounced 31st August, 1899, ordering that the time within which the plaintiffs might file their affidavits setting forth the nature, boundaries and extent of the adverse claim (the subject matter of the suit) together with a map or plan made in pursuance of section 9 of the Mineral Act Amendment Act, 1898, be as against the defendants, further extended to the 1st of September. The writ was issued on 14th December, 1898, but the plaintiffs, owing to the snow on the claim were unable to obtain a plan and on the 10th of March, the Chief Justice extended the time to the 1st of August. On 1st August, the affidavit and plans were not filed, and on the 18th of August the plaintiffs took out a summons to extend the time, and on the return the order appealed against was made. The affidavit of Adolphus Williams, one of the plaintiffs, shewed that in the month of June, 1899, he engaged one William A. Bauer, to make the

required survey, and on the 16th of July, the said Bauer left Vancouver for the Kootenay Country for the purpose of making such survey, but that for some reason unknown to him (Williams), the survey was not commenced until the 5th of August, and that he (Williams) intended that the said survey and plan should have been made by the said Bauer in time to enable him to comply with the terms of the order. The grounds of the appeal were that there was no jurisdiction to extend the time and that the evidence shewed no reasonable ground for the extension.

The appeal was argued at Vancouver before WALKEM, DRAKE, and IRVING, JJ., on 29th September, 1899.

Argument.

Wilson, Q.C., and *J.H. Senkler*, for appellants: Chapter 33, section 9 of the Mineral Act of 1898, does not provide for an extension of time within which to file plans, and although Chapter 45, section 13 of the Amendment of 1899, gives the Court jurisdiction to extend the time, still section 20 of the same Act excepts any rights acquired under previous Acts. The order of the 10th of March is a nullity as there was no jurisdiction to extend the time; see *Attorney-General* v. *Lord Hotham* (1823), 24 R.R. 21 at p. 29. After the time had elapsed there was no jurisdiction to extend it, see *Doyle* v. *Kaufman* (1877), 3 Q.B.D. 7. The case of *Banner* v. *Johnston* (1871), 5 E. & I. Appeals 157, is distinguishable as there the Court had, under its special rules, the right to extend the time after the time had elapsed. The section reads "the Court" and a Judge in Chambers has no jurisdiction, *Barker* v. *Oakes* (1877), 2 Q.B.D. 171 and the Annual Practice, 1899, Vol. 2 at p. 323. The evidence was not sufficient: See *Kinney* v. *Harris* (1897), 5 B.C. 229 at p. 232 and *Kilbourne* v. *McGuigan* (1897), 5 B.C. 233 at p. 240.

Williams, for respondents: The extension of time is a matter of procedure and there is no vested right in procedure. There was power to further extend the time although the

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time limited by a former order had expired. He cited *Banner* v. *Johnston* (1871), 5 E. & I. Appeals 157; *In re Good Friday, &c., Mineral Claims* (1896), 4 B.C. 496; *In re Golden Butterfly Fraction and Countess Mineral Claims* (1896), 5 B.C. 445, and *Cusack* v. *London and North Western Railway Company* (1891), 1 Q.B. 347.

Cur. adv. vult.

30th November, 1899.

DRAKE, J.: The plaintiffs issued a writ adversing the claim on 14th December, 1898. By section 9 of Cap. 33, 1898, the adverser has within sixty days after publication in the Gazette of the notice referred to in section 36 to commence an action in the Supreme Court unless such time shall be extended by special order of the Court; and he has further to file an affidavit together with a plan setting forth the extent and boundaries of such adverse claim within twenty days from the commencement of the action. The plaintiffs owing to the condition of the snow on the claim were unable to obtain a plan; and on the 10th of March, the Chief Justice, on application of the plaintiffs, extended the time to the 1st of August. This order was not appealed against and therefore is a valid order.

Judgment.

The Mineral Act was amended by Cap. 45, 1899, by authorizing the Court to extend the time for filing this affidavit and plan, but that Act did not come into force until the 1st of May, 1899.

It is not necessary under these circumstances to discuss the effect of the section postponing the operation of the Act until the 1st of May, whether it is to be treated retrospectively or not, because there was an order of Court in existence which extended the time to the 1st of August.

On the 1st of August the affidavit and plans were not filed ; and on the 18th of August a summons was taken out to extend the time. This was not heard until the 31st day of August, on which day the time was further extended to the 1st of September. It is this latter order which is appealed against.

The defendants contend that the extended time having run out on the 1st of August, there was not power to further extend it after the time then given had expired.

A point of a similar character was raised in *Banner* v. *Johnston* (1871), 5 E. & I. Appeals at p. 170. In that case, under the Companies Act, 1862, Sec. 124, appeals may be had from any order of the Court, subject however, to the restriction that no appeal shall be heard unless notice shall be given within three weeks after the order complained of has been made in the manner in which notices of appeal are ordinarily given, according to the practice of the Court, unless the time is extended by the Court of Appeal. The Lord Chancellor considered that it would be too narrow a construction of the Act to hold that the word "extend" must be taken to mean that the application must be made before the original time had elapsed because the time having elapsed, there was nothing to extend ; and he held that the Court had power to extend the time although the time had elapsed. The manner of extending the time is a question of discretion in the Court, and although the time had elapsed before the order was made, I think the order is valid, as the statute of 1899 was in force when the order of the 31st of August was made ; and if there is nothing in the language used which could be held as limiting the discretion to a single period, then if sufficient cause is shewn for a further extension, it should be granted.

Judgment.

The case of the *Good Friday, &c., Mineral Claims* (1896), 4 B.C. 496, was cited as a direct authority in support of the plaintiffs' contention, and it is an authority for the order of the 10th of March. *In re Golden Butterfly Fraction and*

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Countess Mineral Claims (1896), 5 B.C. 445, was decided on another ground, the point raised here was not in question.

I think there was jurisdiction to make the order appealed from, and the appeal will be dismissed with costs to the plaintiffs in the cause.

WALKEM and IRVING, JJ., concurred.

Appeal dismissed.

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IRON MASK v. CENTRE STAR.

Practice—Trial—Costs on adjournment of.

Defendants got an order at the trial for the inspection of a vein in the plaintiffs' claim which they alleged was the continuation of a vein, the apex of which was within the limits of their own claim, and plaintiffs alleging that such order necessitated inspection by them of other similar places on their property, with a view to furnishing evidence to rebut that which might be adduced by reason of the plaintiffs' inspection, and therefore an adjournment for that purpose, were allowed the adjournment but only on the terms that all costs occasioned thereby should be borne by them in any event.

Held, on appeal that such costs should abide the result of the issues to which the inspection related.

Statement.

APPEAL by plaintiff to the Full Court from an order of WALKEM, J., pronounced 28th April, 1899, whereby the defendant Company was allowed to continue the sinking of its winze within the boundaries of the mineral claim of the plaintiff Company, and from a further order of WALKEM, J., pronounced 29th April, 1899, ordering the plaintiff to pay

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the costs of the adjournment of the trial and in addition thereto all outlay and expenditure of the defendant Company connected therewith, the words of the order being: "And it is further ordered that all disbursements, expenses and outlay of every kind (including costs) occasioned to the defendants by the said adjournment be costs to the defendants in any event of the cause; the intention being that the plaintiffs shall reimburse the defendants for and indemnify them against any and all loss that they may suffer by reason of the said adjournment." The defendant applied for leave to inspect the mining workings and premises in question and to do certain experimental work for the purpose of obtaining full information and evidence requisite for the trial, but the application was refused. The defendant appealed to the Full Court and the appeal was dismissed. For a full statement of the facts see *Centre Star* v. *Iron Mask: Iron Mask* v. *Centre Star* (1898), 6 B.C. 355. The trial having afterwards been begun before WALKEM, J., at Rossland, and it appearing to the learned Judge's satisfaction after some evidence had been taken, that the inspection previously asked for was then proper, he made an order accordingly upon the defendant's application. The plaintiff then asked for an adjournment of the trial on the ground that it would be necessary for the plaintiff to do certain work in order to preclude the evidence which the defendant expected to derive from the inspection, from being evidence, or at all events being conclusive evidence of the continuity of the vein. The application for the adjournment was resisted by counsel for the defendant on the grounds, first, of the great expense, stated to be over $40,000.00 that it would occasion, and, second, on the ground of the danger that the adjournment would prevent the defendant having the benefit of the attendance of certain witnesses, eminent mining engineers, whose presence it was unlikely could be procured at an adjourned trial. The learned trial Judge granted the ad-

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journment but ordered that the costs occassioned by it should be costs to the defendant in any event. The plaintiff appealed from both orders on the grounds (as to the order allowing the work to be done): (1.) That it was a variation of the order of the Full Court made herein on the 24th day of December, 1898, whereby the application of the defendant for the detention, preservation and inspection of the vein claimed by the defendant, was dismissed; (2.) That the learned Judge had not nor had the Supreme Court of British Columbia jurisdiction to pronounce the said order and that the adjournment of said trial having been necessitated by the order allowing work on the ground of surprise to the plaintiff, the plaintiff ought not to have been compelled to pay the costs of said adjournment; and in any event, the plaintiff ought not to have been ordered to pay more than taxable costs; (3.) That the said order of adjournment in so far as it directs the payment by the plaintiff of the disbursements, expenses and outlays of the defendant beyond the amount of taxable costs, ought to be reversed; and that the learned Judge had not nor had the Supreme Court of British Columbia jurisdiction to pronounce the said order; and further (as to the order granting the adjournment) that the adjournment of the said trial having been necessitated by the order allowing work on the ground of surprise to the plaintiff, the plaintiff ought not to have been compelled to pay the costs of the said adjournment; and in any event, the plaintiff ought not to have been ordered to pay more than taxable costs.

Statement.

At the time the order was made counsel for the respondent consented to a stipulation being entered on the record that he would take no objection, and that no counsel appearing for the Centre Star Company would take any objection to the Iron Mask Company having an appeal upon any order whichmight then be made as to costs.

The appeal came on for argument on 18th and 19th

September, 1899, at Vancouver before the Full Court, consisting of McColl, C.J., Drake and Martin, JJ.

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Bodwell, Q.C. (*MacNeill, Q.C.*, with him), for appellant: The order allowing the work to be done is a variation of the Full Court judgment, the effect of which was that no such order should be made until the Court had decided that it was impossible to conclude the action on other issues. [The Chief Justice: The Full Court left it to the trial Judge to direct inspection if he thought fit, so does it not come down to the question of whether or not the trial Judge exercised the discretion soundly? What remains for us to consider is the question if there were such special circumstances as would justify the direction that the costs should be borne by the plaintiffs. Is it not the point that the adjournment was made wholly consequent upon the order for inspection and therefore you should not have to bear the costs?] That is the point, and until the Court ordered the work to be done it was not necessary or proper for us to do the work which will now have to be done—it only became necessary on the Court exercising its discretion to make the order.

Argument

Davis, Q.C. (*Galt*, with him), for respondent: The consent which was given that there should be an appeal does not go to the length of saying that the Appeal Court should substitute its discretion for that of the trial Judge—only that there might be an appeal where otherwise there would not be. See *In re Gilbert* (1885), 28 Ch. D. 550; *Young* v. *Thomas* (1892), 2 Ch. 137.

As to the question of jurisdiction the Full Court would not have left such a matter to the trial Judge unless it was satisfied that the Court had jurisdiction to make an order allowing experimental work to be done. [The Chief Justice intimated that it was not necessary to pursue that point further. Drake, J.: In giving the judgment in the Full Court the view in my mind was that it was better to leave

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it to the trial Judge as the one best fitted to decide when (if at all) the order should be made. The CHIEF JUSTICE: That was my view also.] The other side had no right to assume that under the Full Court judgment there was no likelihood of the trial Judge making the order and that there was no necessity for it to prepare for it.

Bodwell, Q.C., in reply: We did not get the adjournment as an indulgence but as a matter of strict right and it would have been a denial of justice to force us on.

Cur. adv. vult.

On 22nd November, 1899, the judgment of the Court was delivered by

McCOLL, C.J.: Before trial application was made by the defendants to Mr. Justice WALKEM for inspection of the place where a flat fault is alleged by the plaintiffs to exist. The learned Judge was of the opinion that he ought to make the order if he had power to do so, but refused on the ground of want of jurisdiction to make such an order in any circumstances.

On appeal the Full Court decided in favour of the now respondents upon the question of jurisdiction, but held that they had not shewn good and sufficient reason for the inspection, and left them to apply for it at the trial if, and whenever, they should appear entitled to it.

Judgment.

The trial having afterwards been begun before the same learned Judge, and it appearing to his satisfaction, after some evidence had been taken, that the inspection previously asked for was proper, he made an order accordingly upon the defendants' application. The plaintiffs upon this application claimed that, although the inspection might disclose physical indications apparently supporting the defendants' contention that the vein continued through the place sought to be inspected, yet, that precisely similar indications would appear upon the property in other places apart from any vein, thus precluding the evidence which

the defendants expected to derive from the inspection, being evidence, or, at all events, being conclusive evidence of the continuity of the vein; and the plaintiffs, in these circumstances, urged that inasmuch as time was necessary to demonstrate this they ought to be allowed a postponement of the trial for the purpose of doing the necessary work.

The learned trial Judge granted the adjournment, but ordered, however, that the costs occasioned by it should be costs to the defendants in any event. It is from this portion of the order that the present appeal has been brought.

Notwithstanding that counsel for the respondents had undertaken upon the application for the order that in the event of an appeal from it no objection would be taken that the order is not appealable, it was objected for them that no appeal from an order for costs lies even by leave, except for some mistake of law or misapprehension of fact. In the view I have taken, the appellants are not estopped by this ordinary rule, even if applicable. But it seems to me impossible, after what occurred when the order was made to hold that this Court is fettered in any way. I think that the appellants are entitled to ask this Court to consider whether the learned Judge had good and sufficient reason for imposing upon them the burden now complained of, or whether he rightly exercised the discretion upon which the respondents rely.

Judgment.

The Judge's leave alone would have been sufficient for an appeal in the usual way—Supreme Court Act, Sec. 78.

The respondents' undertaking therefore necessarily implies something more. And it cannot, I think, be doubted that the learned Judge intended, and the appellants understood and were warranted in understanding that there should be a special appeal by consent, such as happened in the case of *Burgess* v. *Morton* (1896), A.C. 136.

See the remarks of the Lord Chancellor, page 138: "It has been held in this House that where with the acquiesence of both parties a Judge departs from the ordinary

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course of procedure . . . . . it is incompetent for the parties afterwards to . . . . . treat the matter as if it had been heard in due course." To use the language of Lord Watson, page 142, the respondents have "unreservedly submitted the determination of the (question) upon its merits, to (our) jurisdiction."

The next question which arises is upon what ground did the learned Judge proceed in disposing of the costs of the adjournment? And, from a careful consideration of all that took place, I can come to no other conclusion than that he did not fully appreciate the circumstance that the Full Court had decided that no sufficient case had been made by the respondents, up to the time of trial, for the inspection, but that the learned Judge having been disposed to make the order upon the first application, and the Full Court having decided that he had jurisdiction to make it and having left the matter to be dealt with by him as trial Judge, he was led into treating the subject as if the appellants had been in the wrong in resisting the first application and so ought to pay the costs of the postponement. In other words, the learned Judge dealt with the matter as if the Full Court had simply established the jurisdiction and had referred the application back to him to make such order as he would have made if he had not questioned his jurisdiction.

Judgment.

A party may by applying for inspection before trial succeed in escaping terms which may be imposed upon him if the application be delayed until the trial. But a party ought not to be put in a worse position as regards the costs occasioned by an inspection being ordered at the trial solely because he has successfully resisted a previous application, than if he had been unsuccessful.

As this is the first time an inspection order of the kind has been made by the Court, I think that an examination into the nature of the order and the grounds upon which it rests may not be out of place. Where the object is to ascer-

tain if something artificial exists, as for instance a water pipe, the result will necessarily be to end the dispute upon the point. But in such a case as the present the result may be very different. If evidence has already been given, the inspection may throw no additional light whatever upon the dispute; or while the inspection may seem to settle the dispute in favour of one of the parties, the other side may be able to shew by the inspection of other places that what appears conclusive is not so.

If there is no substantial difference between the parties as to what an inspection will be likely to disclose, there can, of course, ordinarily be no good reason why inspection should be had. There ought to be at least a probability that the inspection will establish the position of one of the parties regarding a material disputed fact. If this does appear, to refuse the inspection would be to decline to permit the procuring of evidence not otherwise obtainable which might be decisive of the controversy. But if a reasonable case having been made for an inspection, the fact appears at the same time that the result of other inspections may not improbably be to negative inferences which otherwise might be drawn from the physical conditions shewn by the inspection ordered, surely the very reason for requiring the one requires also that opportunity be given for the others, otherwise the Court would be refusing to be informed as to facts which might prevent the Court being misled in a way which the action of the Court in ordering an inspection alone made possible.

Judgment.

The real difficulty, if any, in circumstances such as those now under discussion is, of course, to decide whether sufficient is shewn to entitle the side asking the adjournment to the desired opportunity to make additional inspections; and the question may be, apparently, made more difficult by the circumstance that the adjournment will, or may be, beneficial to the party in other ways.

The question remains whether, because of the order for

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inspection made on the defendants' application the plaintiffs were reasonably entitled to test the result of that inspection by other inspections? The consideration of this question would require the discussion of matters not in appeal and of the evidence given, unnecessary comment upon which ought to be avoided at this stage of the action and I do not think it would be useful to attempt to determine the question now. The adjournment is being acted upon by both parties and its effect, apart from the costs occasioned by it, cannot be got rid of.

With the materials at present available it is impossible to decide with any confidence that the result of the trial may not shew that the decision will work inequitably, while the disposition of the costs may, and probably will after the inspections have been made and all the evidence has been given, present no difficulty.

Judgment.

The decision upon any application must necessarily depend upon the particular circumstances of the case. I cannot agree with the course taken by the learned Judge when he was able to see that an adjournment was proper. There was no question as to the solvency of the plaintiffs. The costs awarded were left to be paid at the end of the litigation. It is not as if payment at the time had been thought proper. If the costs had been made dependent upon the result of the issue upon which the inspection was ordered, the case of *Forster* v. *Farquhar* (1893), 1 Q.B. 564, shews that they could have been disposed of by the judgment distributively so as to do entire justice between the parties. The result of the disposition complained of is that, even if the appellants should succeed upon the issue and succeed only by reason of the inspections for which the adjournment was undoubtedly necessary, yet the appellants will inevitably lose their own costs which the respondents' application has caused to be thrown away, and must also pay the costs of the respondents. That such a result was necess-

ary cannot be pretended, and, if not necessary, it cannot, I think, be right.

If the adjournment was reasonable for the purpose of affording the test which the plaintiffs desired to make of the inspection asked by the defendants, the circumstance that either party would or might benefit by the adjournment for other reasons, cannot, it seems to me, affect the right of either party.

For the respondents it was urged that the adjournment was merely an indulgence. But it was not asked for as such. If so intended, I see no reason why it should have been allowed at all, and in such case, if granted, the terms imposed would have been a matter of course, and could neither have afforded room for the discussion before the learned Judge or this Court, nor have possibly created any of the embarrassment felt by him. It was also contended that the inspection order did not change the case which the appellants have to meet but only affected their evidence, and that they ought to have gone to trial prepared with any evidence necessary to their case. It may be remarked that if such a rule is to be applied, it is equally applicable to both sides and would have disentitled the respondents to an inspection order at the stage when it was made.

Judgment.

But why should the appellants have foreseen what the Full Court did not—that the respondents would make out at the trial a case for an inspection? Or, why should the appellants have anticipated being denied an opportunity to test the result of the inspection, if ordered, except upon the footing that this was not their right but a privilege to be paid for? How could the appellants have profitably made the inspections desired by them without first knowing the precise conditions which the inspection ordered would disclose? Or why should they have incurred the risk of the expense of their inspections being thrown away if the respondents did not ask for and obtain the inspection?

I am of opinion that the order should be varied by leav-

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ing the costs to be dealt with by the trial Judge upon the principles discussed in *Forster* v. *Farquhar*, and that the costs of the appeal should be costs in the cause.

Order varied.

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ROBERTSON *ET AL* v. BEERS.

Practice—Ca. re.—Affidavit—Sufficiency of—Irregularity—Waiver by giving bail.

Statements in affidavit as to debt and intention to leave considered.

A defendant arrested under a writ of *ca. re.*, admits by implication his intention to leave the Province by denying his intention to leave it permanently.

By the giving of bail, a defendant so arrested waives his right to object to irregularities in the writ.

SUMMONS to set aside an order made by McCOLL, C.J., and the writ of *capias* issued thereunder and for delivery up of the bail deposited with the sheriff on the grounds that: (1.) The affidavit does not disclose a good and sufficient cause of action and is bad. (2.) That the writ of *ca. re.* is not in the statutory form. (3.) That the affidavit is not sufficient as to the defendant's intention to leave British Columbia.

The following were the irregularities in the writ of *capias* complained of: (1.) That the style of cause was inserted whereas there should be no style of cause, the form not making provision for this. (2.) Vancouver was specified as the place for putting in special bail, whereas the form

Statement.

provides no place. (3.) The expression proceedings "may be taken" instead of "may be had and taken." (4.) In the warning "a defendant" instead of "the defendant" and "plaintiff" instead of "plaintiffs."

The affidavit of J. H. S., on which the order for arrest was made, was in part as follows: "(1.) That I am bookkeeper for the plaintiffs and as such have a personal knowledge of the state of the accounts between the plaintiffs and defendant. (3.) That the defendant, Norman Beers, is justly and truly indebted to the plaintiffs in the sum of $482.19 for lumber and material supplied to the said Norman Beers at his request for building various buildings in the City of Vancouver. (4.) That on or about the 29th day of November, A.D. 1899, I saw the defendant Norman Beers and pressed him for payment of the plaintiffs' account. He then promised to give me an order on Messrs. Bowser, Godfrey & Co., for at least $200.00 of the plaintiffs' claim. (7.) That I am informed by Ernest Evans of the City of Vancouver, merchant, that the said Norman Beers informed him that he intended leaving for Dawson, and the said defendant also informed me to the same effect himself."

Statement.

Paragraph two of the defendant's affidavit read on the return of the summons was as follows: "I did not intend leaving the Province of British Columbia permanently, but I have changed my residence from the City of Vancouver to the City of Victoria, and on my leaving Vancouver on the 3rd instant I intended to return to Vancouver and then procured and have now in my possession a return ticket from Victoria to Vancouver. The said ticket is now produced to me marked 'A.'"

Harris, for the summons.
Marshall, contra.

McColl, C.J. (after stating the facts), proceeded: The application not being under the Act (Sec. 7) for the dis-

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charge of the defendant might have been made simply upon verified copies of the proceedings. The defendant has chosen, however, to apply also on his own affidavit, in which he admits by implication his intention to leave the Province by denying his intention to leave it permanently —an immaterial circumstance—and does not deny the debt.

I do not think that he can now be heard therefore to minutely criticise the precise language of the affidavit on which the order was made.

I am clearly of opinion, however, that the affidavit sufficiently shews the existence of the debt, particularly in view of paragraphs one and four, and that the statements upon which the belief in the defendant's intended departure is founded, are also sufficient.

As to the alleged irregularities in the writ, they were in my opinion waived by the giving of bail. If not, I think the writ amendable in respect of them if necessary as this cannot prejudice the bail.

Judgment.

I refer to Archbold's Practice, 8th Ed.; *Damer* v. *Busby* (1871), 5 P.R. 356; *Robertson* v. *Coulton* (1881), 9 P.R. 16; and *Gilbert* v. *Stiles et al* (1889), 13 P.R. 121.

Summons dismissed with costs.

ROGERS v. REED.

MARTIN, J.

1900.

Jan. 16.

ROGERS v. REED

Practice—Security for costs of appeals—Amount of.

The amounts for which security for costs of appeals will be ordered, considered.

SUMMONS for security for costs of appeal from an order under Order XIV. The question was as to the amount.

Barnard, for plaintiff.
Lawson, for defendant.

MARTIN, J.: This is an application for security for costs of an interlocutory appeal, from an order of a Local Judge of this Court, under Order XIV. The respondent asks that the security ordered should be $100.00, while the appellant suggests that $75.00 would be sufficient. There is a difference between the practice of this Court at Victoria and at Vancouver in regard to the amount for which security on appeals generally is ordered to be given, and I think it desirable that hereafter the practice should be uniform. After inquiring into the practice of my brother Judges, and conferring with them, I have decided that for the future, so far as I am concerned, security will be ordered as follows :

Judgment.

(1.) Appeals, generally..... $150 00
(2.) Appeals, interlocutory, from both Supreme and County Courts..... 75 00
(3.) Appeals, County Court..... 100 00

The above items may be varied in exceptional cases.

IRVING, J.

1899.

Dec. 22.

PAVIER v. SNOW

PAVIER v. SNOW.

Mining law—Adverse claim—Staking—Admissibility of documents—Mineral Acts.

In adverse proceedings where it is not established with reasonable certainty (1.) that the ground was properly staked; (2.) that assuming the ground had been properly staked it was identical with the ground mentioned in the record, and the defendant shews title and produces certificates of work for several years, judgment will be given in favour of defendant.

Before a substituted certificate will be admitted in evidence there must be proof of loss of the original.

Conditions of the admissibility of a Mining Recorder's certificate as to issue of free miner's license and as to issue of certificates of work considered.

Copies of certain recorded instruments held admissible without proof of originals.

Statement.

ADVERSE claim under the Mineral Acts tried at Rossland before IRVING, J., on 5th December, 1899. The plaintiff on 11th May, 1899, located and recorded the Eva Fraction mineral claim covering (so the plaintiff alleged) the same ground as the Tulair mineral claim located on 25th April, 1895, but which subsequently lapsed. On 13th May, 1895, the Little Bess mineral claim was located on the same ground and the defendant now claimed to be its owner, the plaintiff contending that at the date of the location of the Little Bess, the Tulair was in existence and covering the same ground. The remaining facts sufficiently appear in the judgment.

Nelson, for plaintiff.

W. S. Deacon., for defendant.

22nd December, 1899.

Judgment.

IRVING, J.: The plaintiff's case admittedly depends on his establishing that there was in existence, on or before

the 13th of May, 1895 (the date of the location of the Little Bess), a mineral claim called the Tulair.

The evidence adduced on that point is that of Mr. Burnett, P.L.S., who in 1899, when he was sent out to survey the plaintiff's claim, found a post which he assumed at first to be the No. 1 of the Tulair, and on which was legible the following words:

". . . . . located . . . 750 . . . & 750 . . . . . Thomas Clark." He then proceeded northly, and found another post, on which he was able to make out ". . . Dul . . . mineral claim . . . . . located 25th April, 1895."

He was not quite certain whether it was Dul or Tul. His evidence was sought as to whether or not the "D" or "T" was a capital letter; but as the question was a leading one I disallowed it.

He found another post at or about the place where one would naturally expect to find the No. 2 post of the Tulair, but on the assumption that the first mentioned post belonged to that claim he made no note of what was on it. I arrive at the conclusion that he was not able to identify it from any of the other posts he found at that place.

Judgment.

I do not think any of the witnesses carry the matter further.

Mr. Burnett thought at one time that the first mentioned post was the No. 1; but later, when confronted with the record of the Tulair, which shewed that the No. 1 was at the south end of the location line, he called the first mentioned post the No. 2. This is not a very serious alteration, but it shews, I think, that Mr. Burnett was guided not so much by the posts, which he assumed belonged to the claim he was seeking to establish, and the inscriptions thereon, as he was by the record and the posts of the other claims placed on the ground long after the date of the Tulair location.

The conclusion I arrive at is that he is unable to-day to

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put his hand on a particular post and say "This I know is the No. 1 post of the Tulair."

In my opinion, Mr. Burnett's evidence, like the evidence of all experts, must be received with great caution, and as the whole case turns on it I do not feel justified in deciding the case in the plaintiff's favour. That there was a Thomas Clark in Kootenay in 1895, holding a license, a free miner's, dated 13th April, 1895, and numbered 57,147, I think was proved.

It was also proved that a Thomas Clark, No. 57,147, recorded a mineral claim called Tulair, situate in or about the place in question.

But it was not established with reasonable certainty that (1.) the ground was properly staked; (2.) that assuming the ground had been properly staked it was identical with the ground mentioned in the record.

The defendant on the other hand produces certified copies of recorded bills of sale shewing the title to the Little Bess from 1895 to this date; certificates of work issued to him or his predecessors in 1896, 1897, 1898, and the last on 20th April, 1899. This last certificate in itself is sufficient answer to the plaintiff who staked the Eva on the 11th of May, 1899. In my opinion the location of the Little Bess by the defendants during the life of the Tulair is, so far as the plaintiff is concerned, a mere irregularity.

Judgment.

Judgment for the defendant with costs.

At the trial I gave the following rulings as to evidence:

I refused to receive in evidence, without proof of loss of the original certificate, a "substitute certificate" issued in the name of Thomas Clark, obtained by the plaintiff.

That under section 119, the Mining Recorder can certify the fact that a free miner's license was issued to a particular man on a particular day, and that said license bore a certain number, and that if such certificate is from entries in one of the books named in the Mineral Act, such certi-

ficate can be received without ten days' notice under the Evidence Act.

That under section 119, the Mining Recorder can certify the fact required by section 21 that a certificate of work in respect of a certain claim was recorded on a certain day, and such certificate can be admitted without ten days' notice under Evidence Act.

That under section 119, copies of instruments recorded under section 115 are admissible in evidence without proof of loss of original and without ten days' notice under Evidence Act.

Judgment for defendant.

NOTE: Section 119 of the Act of 1896, is the same as section 98 of R.S.B.C. 1897, Cap. 135, and section 115 of the Act of 1896, is the same as section 94 of R.S.B.C. 1897, Cap. 135.

MARTIN, J.
1900.
Jan. 8.

B. C. FURNITURE COMPANY v. TUGWELL.

B. C. FURNITURE COMPANY v. TUGWELL.

Practice—Suing in firm name—Rule 104—Order XIV.

One person cannot sue in a firm name.

SUMMONS for judgment under Order XIV.

Belyea, Q.C., for summons.

J. K. Macrae, for defendant, took the objection that Jacob Sehl was really the plaintiff and he was suing in a firm name when he was the only member of it. He referred to Rule 104 and *Mason & Son* v. *Mogridge* (1892), 8 T.L.R. 805.

MARTIN, J., upheld the objection and refused the plaintiff an adjournment in order that he might apply to amend the style of cause in the proceedings.

Summons dismissed.

BURKE v. B. C. ELECTRIC RAILWAY CO., LTD.

McColl, C.J.
1900.
Feb. 5.

Burke v. B. C. Electric Railway Co.

Railways—Regular station—Personal injury to passenger alighting—Negligence—Omission or nonfeasance.

Special tickets at reduced rates were issued by the defendant Company to persons living along the line and one was held by W., limited to the use of himself and the members of his family between Vancouver and Central Park station. The plaintiff who lived in Vancouver went to visit the W's, travelling, as was her custom, on W's ticket, although not a member of the family.

W. lived beyond Central Park station and the Company gratuitously and for her own convenience carried the plaintiff some four hundred yards farther on where she was allowed to alight. At this place the ground was not level and a person living along the line had been permitted for his own convenience to lay down on the right of way a platform, one end of which rested on the ground and the other upon a plank. The plaintiff descended safely to the platform, but in passing from it she fell and was injured, owing, as alleged, to some defect in the condition of the plank supporting it.

Held, in an action for damages that the Company was not liable.

Statement.

ACTION by plaintiff against the British Columbia Electric Railway Company, Limited, to recover damages for an injury sustained in alighting from a car operated by defendant Company between the cities of Vancouver and New Westminster.

The trial took place at Vancouver on 3rd January, 1900, before McColl, C.J.

Hagel, Q.C., and *A. D. Taylor*, for plaintiff.
Martin, Q.C., for defendant.

5th February, 1900.

Judgment.

McColl, C.J.: The defendant Company operates a tramway between the cities of Vancouver and New Westminster. Until shortly before the accident in question cars were stopped

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anywhere between stations for the convenience of passengers. But before that time presumably because of the grades or for other reasons of convenience, certain places at short intervals between the stations were designated by notices that "Cars stop here," for the purpose of taking up any person waiting to get on a car.

These stopping places were provided for the convenience of persons living along the line elsewhere than near stations and I suppose of persons visiting them. Tickets were not sold to any of these stopping places, but only to a station, beyond which the passenger if carried travelled free. Special tickets at reduced rates were issued to persons living along the line, among others to a Mr. Wolfe, limited to the use of themselves and other members of their families.

The plaintiff though a resident of Vancouver had on several occasions when visiting Wolfe, whose family and her own were on friendly terms, travelled on a special ticket issued to him. The tickets were to a station called "Central Park," but she usually remained in the car till it arrived at a stopping place called Patterson's, distant beyond the station 400 yards—and nearer than it to Wolfe's —where she was allowed to alight.

Judgment.

At this place the ground was not level and Patterson had been permitted for his convenience to lay down on the right of way a platform, one end of which rested upon the ground and the other upon a plank.

This platform was used by the plaintiff without any accident until the day in question, when, although she descended safely to the platform, yet in passing from it she fell and was injured, owing as alleged to some defect in the condition of the plank supporting it. She had travelled upon one of Wolfe's special tickets obtained by her son for the purpose.

Counsel admitted that there is no fact in dispute and I let the case go to the jury by consent of counsel only to avoid the expense of a new trial if an Appellate Court

should differ with me. The case of *Bridges* v. *The North London Railway Company* (1874), 43 L.J., Q.B. 151, as explained in *Jackson* v. *The Metropolitan Railway Company* (1877), 46 L.J., Q.B. 376, and many other cases has established that when no material fact is in dispute, the Judge must determine that negligence can legitimately be inferred before the jury can properly be asked to say whether it ought to be inferred.

Whatever liability the Company may be under to a person while in or upon a car, there can I think be no doubt that if the Company is liable in the circumstances of this case to the plaintiff it must be by virtue of some contract. When the Company agrees in the usual way to carry a passenger to a station the contract requires that reasonably safe provision be made for the passenger to alight and to pass to the public highway, and when the car is stopped at such a place and there is an express or implied invitation to the passenger to alight and he does so and is injured because of the want of the necessary provision and without negligence on his part the Company is liable for breach of contract.

In the present case the plaintiff was carried beyond the station gratuitously for her own convenience and in my opinion her use of the Company's right of way to walk along it to the place where she desired to go was at her own risk as regards the accident which happened. There is of course no question of misfeasance or of the application of the principle discussed in *Bolch* v. *Smith* (1862), 7 H. & N. 736 and other cases relating to an injury occasioned by something in the nature of a "trap."

Judgment.

The question here is one merely of omission or nonfeasance.

There was no evidence that the conductor knew the plaintiff was not entitled to travel on Wolfe's ticket. Mr. Buntzen's evidence is that a conductor had no authority to dispense with its conditions and the case of *The Grand*

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Trunk Railway Company of Canada v. *Anderson* (1898), 28 S.C.R. 541 is authority that this evidence was not necessary.

I am of opinion that the effect of the custom of stopping at the places referred to in the manner and under the conditions stated is merely to give to a passenger lawfully travelling, the privilege of using the right of way in the ordinary condition in which it may be and subject to the Company's ordinary right to use it that he may pass along it to the public highway or other place where he may be going and not that there is any implied agreement on the part of the Company to alter the condition or vary its use of the line because of the privilege. But apart from this in the language of Mr. Justice Sedgewick in the case last cited, page 553: "How could the (plaintiff) take advantage of a privilege which had never been extended to (her) but was confined to a class to which (she) did not belong?"

Judgment.

As to the effect generally of the deception practised in the matter of the ticket, I refer to Abbott on Railway Law at page 332, and cases there cited.

Judgment for defendant with costs.

HALL v. THE QUEEN AND THE KASLO AND SLOCAN RAILWAY COMPANY.

DRAKE, J.
1900.
Feb. 14.
HALL
v.
THE QUEEN

Petition of right—Crown lands—Kaslo and Slocan Railway Subsidy Act and Amending Acts.

Suppliant applied to be allowed to purchase certain lands under section 31 of the Land Act, tendering the proper amount therefor. The application was refused on the ground that the lands had been granted to the Railway Company. The suppliant alleged that such grant was illegally issued and void and the Crown allowed a petition of right to be brought.

Held, dismissing the petition, that the suppliant had no *locus standi* to obtain any relief.

PETITION of right praying that the Crown grant of Lot 873, Group 1, Kootenay District, said to contain 428 acres, dated 21st March, 1898, to the Kaslo and Slocan Railway Company be declared null and void, and that a Crown grant of the said lot be issued to the petitioner upon his paying the purchase price to the Province of British Columbia.

Under the Kaslo and Slocan Railway Subsidy Act, 1892, it was declared lawful for the Crown under certain stated circumstances to issue to the Railway Company lands "not containing areas of less than one mile square." For the suppliant it was contended that it was incompetent for the Crown to grant any lands to the Company under its Subsidy Act in less quantities than a mile square and also that the grant to the Company was illegally and improperly issued as it did not contain the provision of section 32 of the Land Act, R.S.B.C. 1897, Cap. 113, viz.: a reservation of a quarter interest in townsites, and also that there was no reservation of the timber.

Statement.

The statement of defence of the Railway Company set out that the Company would object that the suppliant's

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petition shewed no right to make the Company parties to the proceedings because it did not appear that the petition was presented for the recovery of any real or personal property or any right in or to the same and it was not alleged that the suppliant ever owned or was in possession of the land referred to or had any right in or to the same.

The defence further set up that the Company would object that the petition was bad in substance inasmuch as it was not alleged therein that the lands of the suppliant had found their way into the possession of the Crown and that the relief sought was restitution or compensation, and it was not alleged that the conditions of the Land Act necessary to entitle the suppliant to purchase the lands were ever fulfilled.

The Crown also denied the right of the petitioner to a grant and also submitted that if the Court found that any of the conditions relating to the issue of grants to the Railway Company had not been complied with that the grant should be declared void.

Statement.

The case came up for trial before DRAKE, J., and evidence was given on behalf of the petitioner shewing the circumstances with which the grant was issued. At the close of the suppliant's case the Railway Company and the Crown both moved that the petition be dismissed on the ground that the suppliant had no *locus standi* to obtain any relief.

Hunter and *Walls*, for suppliant.
Maclean, D. A.-G., for the Crown.
Bodwell, Q.C., and *Duff*, for the Railway Company.

14th February, 1900.

DRAKE, J.: The suppliant alleges that on the 27th of April, 1898, he applied to the Chief Commissioner of Lands and Works to purchase Lot 873, Group 1, Kootenay District, amounting to 428 acres of surveyed lands, and tendered the purchase money. The Deputy Commissioner in reply in-

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formed the suppliant that the lands referred to were not Crown lands. *Prima facie* this fact put an end to any rights which the suppliant might have had, if the lands were at that date Crown lands.

But the suppliant says that these lands had been conveyed to the Kaslo and Slocan Railway by Crown grant dated 21st March, 1898, illegally and improperly inasmuch as the conditions of that Company's Act had not been complied with, and that the Lieutenant-Governor in Council had no right to issue a grant of this land to the Company.

This involves an examination of the grounds on which a suppliant is entitled to a decree on a petition of right. He has to shew a right to the interference of the Court on his behalf. The right must be legal or equitable, and according to the dictum of Cockburn, C.J., in *Feather v. The Queen* (1865), 6 B. & S. 257 at p. 292, "this right is only open to the subject where lands or goods or money of a subject have found their way into the possession of the Crown; and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown, or to the public service;" and the learned Judge goes on to say that "no case has been found in the books in which a petition of right has been brought in respect of a wrong properly so called." And he further says "that a petition of right is founded on the violation of some right in respect of which, but for the immunity from all process which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. The petition must shew on its face some ground of complaint which, but for the inability of the subject to sue the Sovereign, might be made the subject of a judicial proceeding."

Judgment.

It follows therefore that a petition of right which complains of a tortuous act done by the Crown, or by a public servant with the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress.

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In *Tobin v. The Queen* (1864), 16 C.B.N.S. 355, Erle, C.J., while affirming the doctrine that the Sovereign cannot be sued by petition of right for a wrong done by the executive, held that claims founded on contracts and grants made on behalf of the Crown are legally distinct from wrongs, and in *Windsor and Annapolis Railway Company v. The Queen* (1886), 11 A.C. at p. 615, Lord Watson affirmed Chief Justice Cockburn's definition of the grounds on which a petition of right could be properly heard.

The petition in this case is not founded on contract, neither in respect of land to which the suppliant has either a legal or equitable claim, and which has found its way into the hands of the Crown, but it is based on an alleged tort committed by the Crown in dealing with the Crown lands of the Province in favour of the Kaslo and Slocan Railway Company.

The suppliant's right, if any, arises subsequent in date to the issuing of the Crown grant to the Railway Company, therefore the element of contract is wanting.

To use the language of Ritchie, C.J., in *Farmer v. Livingstone* (1882), 8 S.C.R. at p. 145, "To declare this void (referring to a patent from the Crown), would be to interfere with the contract made by and between the Crown and the purchaser of Crown lands, it would, in effect be determining that the Crown had no right to dispose of unappropriated Crown lands by permitting parties having no interest in or right to the land to interfere with the Crown dealing with the Crown estate and its grantees..... If a party has no legal or equitable rights enforceable in a Court of law or equity, he cannot be injured by the issue of the letters patent. He is a mere volunteer." This accurately describes the position of the suppliant here. It appears to me that the object of the suppliant is to attack the land grants of the Railway Company, but he has shewn no rights of his that have been affected.

Judgment.

The Crown in this Province is the owner of all the lands

but they are to be dealt with under the provisions of the Crown Lands Act, and such other Acts as specifically authorize the dealing with lands for special purposes. If in dealing with the Crown lands the Crown should exceed this statutory authority, I fail to see how any one who considers the Crown wrong in the way it has exercised its powers, without some contract has been broken with the suppliant, can by petition apply to set the Crown right. There may be other modes by which such a state of circumstances can be rectified but not in this way.

Mr. *Hunter*, in his argument, contended that the suppliant by making an application for leave to purchase lands already Crown granted, obtained a *locus standi* to discuss and regulate the amount of lands to which the Railway Company were properly entitled to under their several Acts, and evidence was adduced directed to this view, but it was clear that the Crown had not granted the Railway Company nearly as much land as they were entitled to; and he further argued that it was incompetent for the Crown to grant any lands in less quantities than a mile square. This limitation in the Act is merely directory and clearly was inserted for the purpose of preventing the Company from picking out valuable pieces of land all over the district, and leaving the worthless, but it did not prevent the Crown from granting smaller pieces of land when, owing to circumstances, it became expedient so to do. I have alluded to the points thus raised because they were strongly pressed as acts in derogation of the statute, and therefore void. But in my opinion this argument, even if I was entitled to consider it on these pleadings, is not well founded. I think therefore that the suppliant has made out no case and his petition should be dismissed, with costs, these however, can be spoken to later.

Judgment.

Petition dismissed.

McCOLL, C.J.
[In Chambers].

1900.
Jan. 23.

IN RE LEY

IN RE LEY *ET AL.*

Creditor's Trust Deeds Act—Exemption of personal property under Homestead Act—Remuneration of Trustee—Costs.

Debtors assigned, under the Creditor's Trust Deeds Act, all their personal property, credits and effects that might be seized and sold under execution and afterwards claimed, as exempt, chattels to the amount of $500.00.

Held, on an originating summons for directions, that by the form of assignment the claimants were precluded from claiming exemption.

Trustees remuneration in this case fixed at five per centum.

ORIGINATING SUMMONS by trustee for benefit of creditors for directions. By an indenture dated 20th June, 1899, made in pursuance of the Creditor's Trust Deeds Act, between John Ley, Joseph Wildauer and Arthur J. Wilkinson, carrying on business as builders under the firm name of Ley, Wildauer & Wilkinson, of the first part and James W. Hackett, trustee of the second part, the said parties of the first part did grant and assign unto the said party of the second part "all their and each of their personal property, credits and effects which may be seized and sold under execution." The trustee took possession and sold all the stock in trade, office fixtures and furniture and effects of the said firm and of each of them for $458.00, and he received from the sale of debtors' interests in real estate $824.50. He paid a dividend of twenty-five per cent. on the claims of preferred creditors, being workmen in the employ of the debtors, and after disbursing certain sums for advertising, rent, etc., he had a balance on hand of $908.60. The assets were not sufficient to pay any part of the claims of ordinary creditors. Ley and Wilkinson claimed as exemption, chattels to the value of $500.00 each, selected out of the lumber and materials around the fac-

Statement.

McCoLL, C.J. [In Chambers].

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IN RE LEY

tory of the firm. Several of the preferred creditors objected to the allowance of any sum to the debtors in the way of exemption, and the trustee took out an originating summons for the opinion of the Judge as to (1.) whether the said Ley and Wilkinson were entitled to an exemption on the personal property of the partnership estate under the Homestead Act; (2.) what remuneration he was entitled to as trustee and (3.) in what manner the costs of the application should be paid or provided for.

Davis, Q.C., for the summons.
Williams, for debtors.
Bowser and *Bull*, for creditors.

23rd January, 1900.

McCoLL, C. J.: As regards the matters referred to me I am of opinion (1.) That under our Act the exemption is not an absolute right but a privilege and therefore may be waived as well as lost by laches, and that by the form of assignment the claimants in this case are precluded even if otherwise entitled as to which I express no opinion. (2.) I think five per centum sufficient in this instance. (3.) Let the costs including those of the parties directed to be served be paid out of the funds in hand.

Judgment.

IRVING, J.
1899.
Oct. 22.
OPPENHEIMER v. SPERLING

OPPENHEIMER *ET AL* v. SPERLING *ET AL.*

Practice—Service out of jurisdiction—Agreement to transfer shares in a British Columbia Company—Order XI.

An *ex juris* writ having been issued to enforce an agreement between residents of British Columbia and England for transfer of shares in a Provincial Company not in terms providing for its performance within the jurisdiction:

Held, that the writ should be set aside.

ACTION by plaintiffs, who sued as executors of the last will and testament of David Oppenheimer, for damages for breach of an agreement made between the defendants and David Oppenheimer whereby the defendants agreed to transfer to the said David Oppenheimer $68,000.00 fully paid up ordinary stock, in the Consolidated Railway and Light Company (whose head office is in Vancouver), and to hold in trust for the said David Oppenheimer $100,000.00 of fully paid up ordinary stock in the said Company. The plaintiffs resided in Vancouver, and the defendants in London, England.

Statement.

On the 4th of May, 1899, an order was made by MARTIN, J., allowing for the issue of a writ for service out of the jurisdiction and limiting the time for appearance to twenty-one days after the service.

The defendants moved to set aside the writ and the order allowing it to be issued on the grounds *inter alia* that the alleged contract sued upon was not produced to the learned Judge who made the order so that the terms could be examined, and that the plaintiffs had not shewn a cause of action entitling them to an order allowing the issue and service of a writ on the defendants out of the jurisdiction.

The motion came on first before MARTIN, J., when the

plaintiffs tendered in evidence an affidavit verifying the agreement sued on.

Counsel for defendants objected to its receipt, but his Lordship, on the authority of *Great Australian Gold Mining Company* v. *Martin* (1877), 5 Ch. D. 1 allowed it in.

The argument was not concluded before MARTIN, J., and it was subsequently argued *de novo* before IRVING, J., on 3rd October, 1899.

There was nothing in the contract to shew where it was to be performed.

Bodwell, Q.C., and *A. E. McPhillips*, for the motion.
Wilson, Q.C., and *Marshall, contra.*

IRVING, J.: By Order XI., Rule 1, "Service out of the jurisdiction of a writ of summons . . . . . may be allowed by the Court whenever (*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof ought to be performed within the jurisdiction."

In *Comber* v. *Leyland* (1898), A.C. 524, it is pointed out that the extension of jurisdiction of the Court into a foreign country should be carefully watched. Lord Shand even questions the right of Parliament, in the absence of any special treaty, to confer the jurisdiction now in question. But as also laid down in that case the principle upon which the jurisdiction of this Court proceeds is this—that where the parties have agreed that something is to be done in this country, that some part of the subject matter of the contract is to be executed within this country, it is a sort of consent of the parties wherever they may be living, or wherever the contract may have been made that question may be litigated here. This principle is, I think, the key to the construction of the rule. In each case to be decided the contract must be looked at, and the question in each case resolves itself into this: Is the contract sued upon, or

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OPPENHEIMER v. SPERLING

some part of the subject matter of the contract, to be executed in this country? If it is shewn that the plaintiff is entitled to require the performance of a contract, or some part of the subject matter of that contract—see Halsbury, L.C., at p. 527 and Lord Herschell at p. 529—in this Province and that consequently a breach takes place in this Province, then process may be served out of the Province.

To illustrate by some of the leading cases: In *Bell & Co.* v. *Antwerp, London and Brazil Line* (1891), 1 Q.B. 103 at p. 107, the inference was that the lighterage and other dues were payable at the foreign ports, certainly so, if demanded, and therefore plaintiffs were not entitled to the writ. In *The Eider* (1893), P. 119, the obligation to pay which was the breach relied on, was an obligation to pay abroad. Hence the writ could not issue, and in *Comber* v. *Leyland* (1898), A.C. 524, the breach was the failure to put the bank bills in the post of the foreign country. In *Thompson* v. *Palmer* (1893), 2 Q.B. 80, the writ was allowed to issue against the defendants in Spain at the suit of an Englishman, resident in England, because, although the contract did not provide in express terms where the payments were to be made, it was the opinion of the Court that having regard to the position of the parties and the circumstances under which it was entered into the payments were to be made in England.

Judgment.

In each case then we must look to the contract, to the parties to it and to the circumstances in which it was entered into. Lord Esher, M.R., in *Bell & Co.* v. *Antwerp, London and Brazil Line*, at p. 107, said that "terms of the contract itself" and not the "surrounding circumstances" should govern. Lord Herschell (1898), A.C. 529, seems to be of the same opinion, but Cotton, L.J., in *Reynolds* v. *Coleman* (1887), 36 Ch. D. 464; Kay, L.J., in *Bell & Co.* v. *Antwerp, London & Brazil Line* at p. 109; Jeune, J. (1893), P. at p. 127; Lindley, L.J., at p. 133; and Lopes, L.J., (1893), 2 Q.B. at p. 80, and the Lord Chancellor in *Comber v. Leyland* at

p. 528, say that the surrounding circumstances under which it was made must be considered. Without attempting to weigh these eminent authorities one against the other, I think it is safe to follow the rule laid down by Kay, L.J., that in order to bring the case within the rule, the Court must see from the express terms of the contract, or on the construction of its terms applied to the surrounding circumstances that it is to be performed within the jurisdiction.

The plaintiffs seek to enforce a contract to transfer shares in a British Columbia Company. The defendant would satisfy their demand by executing the deed in England, or anywhere else. There is nothing to be performed under the contract in British Columbia either in respect of the transfer of the shares or of the defendants' holding the other shares in trust.

The writ in my opinion should not have been allowed to issue.

Writ set aside.

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At Vancouver.
1900.
Jan. 27.
BELL & FLETT v. MITCHELL

BELL & FLETT v. MITCHELL.

B.C. MILLS, TIMBER AND TRADING CO. v. MITCHELL.

County Court Judge—Sitting in county other than his own—Jurisdiction of when requested so to sit by Supreme Court Judge.

A County Court Judge for one county was requested by a Supreme Court Judge, being the Acting County Court Judge for another county, to sit in lieu of himself whenever absent.

Held, that the County Court Judge had no jurisdiction to sit by virtue of such request and that section 8 of the County Courts Act empowers only a County Court Judge to make such request.

APPEAL from an order made in an action in the County Court of Vancouver by His Honour Judge Bole, directing an issue.

The appeal was taken as a test case to determine the question as to whether or not the presiding Judge of the County Court of New Westminster has jurisdiction to try cases in the County Court of Vancouver when requested so to act by one of the Judges of the Supreme Court; in this case the request being made by the Chief Justice.

Statement.

The appeal was argued at Vancouver on 26th January, 1900, before the Full Court, consisting of DRAKE, IRVING and MARTIN, JJ. The facts appear fully in the judgments.

Davis, Q.C. (with him *Marshall*), for appellants, the B.C. Mills, Timber and Trading Co.: He referred to R.S.B.C. 1897, Cap. 52, Secs. 8 and 9, and B.C. Stat. 1899, Cap. 18, Sec. 3.

Argument.

(*A. D. Taylor*, for Bell & Flett, and *Bowser*, for garnishee, also appeared but took no part in the argument).

27th January, 1900.

Judgment.

DRAKE, J.: The only question that is raised on this

appeal is as to the jurisdiction of His Honour Judge Bole, the County Court Judge of New Westminster District, to sit and hold Court in Vancouver District.

By section 8 of the County Courts Act any County Court Judge appointed under the Act may act as County Court Judge in any other county upon the death, illness, or unavoidable absence, or at the request of the Judge of that other county.

There has been no Judge appointed solely for Vancouver District. By section 9 the Legislature appointed the County Court Judge of New Westminster District to perform the duties of County Court Judge in Vancouver District until a Judge should be appointed.

This section the Legislature repealed by County Courts Act Amendment Act, 1899. The result is that Vancouver as a County Court District, is without a Judge, as the Dominion Government have not yet appointed one to that position—neither have the Provincial Government named any Judge of any other District to perform the duties of Judge in Vancouver District.

Section 8 before referred to does not apply to Vancouver District, as none of the contingencies mentioned in that section have arisen relating to a duly appointed Judge in whose place the Judge of the County Court of New Westminster is supposed to be acting. Neither is it suggested that he is a Deputy Judge under section 10.

Judgment of DRAKE, J.

Section 8 further enacts that nothing shall affect or abridge the jurisdiction now possessed by the Judges of the Supreme Court to preside in any County Court of the Province. That jurisdiction from reference to previous enactments, appears limited to the performance of judicial duties for which purposes the Supreme Court Judges have all the powers of a County Court Judge. This in my opinion does not confer on the Supreme Court Judges the power to appoint any County Court Judge to act in a District which is vacant from any cause whatever.

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The power to appoint a County Court Judge to act in more than one district was held by the Supreme Court, *In re County Courts of British Columbia* (1892), 21 S.C.R. 446, to be vested in the Provincial Legislature.

Under these circumstances we are of opinion that the Judge of New Westminster County Court has no jurisdiction to sit as a County Court Judge in Vancouver District.

The appeal will be allowed but without costs.

IRVING, J., I concur.

MARTIN, J.: This appeal is taken, so counsel informs us, as a test case, at the instance of the Vancouver Bar Association, to determine the question as to whether or not His Honour Judge Bole, the presiding Judge of the County Court of New Westminster, has jurisdiction to try cases in the County Court of Vancouver when requested so to act by one of the Justices of the Supreme Court; in this case the request being made by the Chief Justice.

The question does not come before us in the most satisfactory manner because no counsel appears in support of the jurisdiction of the County Court Judge.

Judgment of MARTIN, J.

Prior to the last session of the Legislature the jurisdiction of Judge Bole in the County Court of Vancouver was undoubted, as that power was expressly conferred upon him by section 9 of the County Courts Act, but that section was repealed by section 3 of the County Courts Act Amendment Act, 1899.

The section under which the learned Judge purported to exercise jurisdiction in this case is section 8 of the County Courts Act as follows: "Any County Court Judge appointed under this Act may act as County Court Judge in any other county upon the death, illness, or unavoidable absence, or at the request of the Judge of that county . . ."

It is contended that as there is no County Court Judge of Vancouver a request by one of the Justices of this

(Supreme) Court does not confer jurisdiction. On the argument I suggested to counsel that it might be urged that as any Justice of the Supreme Court may exercise throughout the Province all the functions of any County Court Judge, perhaps the action of Judge Bole could be supported on the ground that the said request made to him by the Chief Justice was so made in his (the Chief Justice's) capacity as a County Court Judge. To this suggestion counsel replied that the expression "County Court Judge" in said section 8 must be construed as *persona designata*, and the words could not apply to a member of another bench who, though he might at times act in the capacity and discharge the functions of a Judge of a County Court, yet in fact was not, and could not be described as a "County Court Judge" with any more propriety than he could be called a Police Magistrate because by virtue of some statute he might discharge the duties pertaining to such an office.

I am of the opinion that this contention should prevail, particularly in view of the recent cases of *Re King* (1899), 18 P.R. 365; *Re Simpson and Clafferty* (1899), 18 P.R. 402. The result is that the learned County Court Judge has, we think, no jurisdiction in the County Court of Vancouver.

While I at present hold this opinion, I wish it to be understood that in case the question should be raised again I do not think the point should be deemed to be finally settled, so far as this Court is concerned, by the decision we have to-day come to, because should counsel appear on another appeal in support of the jurisdiction now excepted to, the matter might be presented to us in a different light by some authority not now cited for our consideration.

The appeal will be allowed; the appellant does not ask for costs.

Appeal allowed.

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At Victoria.

1900.
Feb. 23.

BANK OF B. C. v. OPPENHEIMER

BANK OF BRITISH COLUMBIA v. OPPENHEIMER.

Practice—Discovery—Affidavit of documents—Sufficiency of description in affidavit—Privilege.

An affidavit of documents which described certain bank books as bill registers, current accounts and ledgers for stated periods was held sufficient, IRVING, J., dissenting.

Privilege was claimed for the first time in respect of such books in a supplementary affidavit filed subsequently to the issue of a summons for a further and better affidavit.

Held, reversing MARTIN, J., that this affidavit defeated the summons and that the claim of privilege must be allowed.

APPEAL by defendants from an order of MARTIN, J., dated 6th January, 1900, dismissing an application of the defendants for further and better particulars, and cross-appeal by plaintiffs from that part of the said order of MARTIN, J., which ordered that the paragraph claiming exemption in Mr. Murray's affidavit should be struck out. The following statement of facts is taken from the judgment of DRAKE, J.: "This action is to recover amounts due on promissory notes of which the defendants were endorsers. The defendants obtained the common order of discovery, and Mr. Murray, the plaintiff's manager, filed an affidavit setting out in a schedule all the documents in his possession; and at the end he gave this description: 'Various dates. Plaintiff's books of account shewing their dealings with the defendant Horne in relation to the promissory notes sued on herein.' On November 4th the defendants other than Edmunds, Douglas and Horne took out a summons for a further affidavit of documents, and particularly of the documents above mentioned. On 7th November, Murray filed a further affidavit stating that the documents consisted of voluminous entries from 30th March, 1892, to

Statement.

24th August, 1894, in the current ledgers and bill registers, which they objected to produce as they contained nothing to impeach the plaintiff's case, or support the defendants, as they related to defendant Horne's accounts."

On 15th November, 1899, the following judgment was delivered by

MARTIN, J.: This is an application on the part of certain defendants that the plaintiff Bank should "make and file a further, full and sufficient affidavit" of documents.

There are two points which require consideration. The first is an objection raised by plaintiff's counsel that the summons is improperly taken out by a firm of Victoria solicitors as agents for the defendants' solicitors in Vancouver, and that such a proceeding is contrary to Rule 5 of 1899, which requires that certain specified documents shall, under certain specified circumstances, be served "upon the agent, if any, named in the 'Solicitors' and Agents' Book,' unless the Court or a Judge, before whom any such proceeding is had, shall give any direction as to any solicitor upon whom any such (document) is to be served." In this case the agents who took out and served the summons are not the same as those named in the Agents' Book.

Judgment of MARTIN, J.

In my opinion the objection is not opportunely taken. The plaintiff has nothing to complain of and the rule has not been disregarded. There are no directions in the rule as to the person who may take out or serve the said documents; the provisions relate only to those upon whom service shall be effected. Here the service has been effected on the proper party, and I think that, on this occasion at least, the status of the party effecting the service is not open to question. So far as the plaintiff is concerned it need not be embarrassed by complying with Rule 5 by serving the agent named in the Agents' Book, or it might with equal propriety serve the agent named in any proceeding served on it; for, as I read the Rule, it does not seem to me to be

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aimed at depriving a solicitor from having a special agent in any suit or proceeding before the Court apart from the general one named in the Agents' Book.

The second point is that the further and supplemental affidavit of documents which the plaintiff Bank has filed in answer to this application is insufficient. The first affidavit, sworn on the 17th of October, set out a large number of documents in the schedule without any claim of privilege. The last item in the schedule is as follows:

"Date—Various dates. Plaintiff's books of account shewing their dealings with the defendant Horne in relation to the promissory notes sued on herein."

The supplemental affidavit sworn on the 7th of November, states that the documents in the item above referred to "consist of voluminous entries in the books of account set forth in the schedule hereto, kept by the plaintiff, from the 30th of March, 1892, to the 24th of August, 1894," and in the schedule these books are stated to be: (1.) Current Account Ledgers; and (2.) Bill Registers. In this supplemental affidavit it is for the first time claimed that these current account ledgers and bill registers are privileged. On behalf of the defendants it is objected (1.) that it is too late to raise the claim of privilege and, because the documents were admitted by the first affidavit to be relevant, a contrary contention should not now be entertained; and (2.) that the documents are not sufficiently identified.

Judgment of MARTIN, J.

The following cases were cited in the argument: *Taylor* v. *Batten* (1878), 4 Q.B.D. 85; *Hope* v. *Brash* (1897), 2 Q.B. 188; *Roberts* v. *Oppenheim* (1884), 26 Ch. D. at p. 733; *Budden* v. *Wilkinson* (1893), 2 Q.B. at p. 436; *Downing* v. *Falmouth United Sewerage Board* (1887), 37 Ch. D. 234; *In re Wills' Trade-marks* (1892), 3 Ch. at p. 207.

Taking the second ground first. The rule on this point is precisely laid down in *Budden* v. *Wilkinson, supra*, as follows: "All that is required is that the documents in question should be sufficiently identified to enable the Court

to make and enforce an order for their production." Applying this rule to the circumstances of the present case I have come to the conclusion that the affidavit is reasonably sufficient; and I do not think there would be any difficulty in the way of the Court making and enforcing an order for the production of the current account ledgers and bill registers of a bank between certain specified dates. I lay down no hard and fast rule as to the particularity of description required, that should be determined by the circumstances of each case.

Then as to the claim of privilege. In *Roberts* v. *Oppenheim*, at p. 733, Mr. Justice Kay, in a somewhat similar case, allowed a claim of privilege to be set up, because he thought "they intended to state a sufficient case for protection," which is not the case here. In *Budden* v. *Wilkinson*, at 452, Lord Justice Lindley said, "You are bound by the oath of the party as to relevancy." In *Hope* v. *Brash*, *supra*, Lord Justice Rigby says, at p. 193, "If the contents of a document are unknown to the Court, and the party against whom inspection is sought has admitted that the document is relevant, of course it must be treated as such."

It seems to me that it would be introducing a dangerous element into affidavits of documents if a party were to be allowed to set up in an affidavit sworn to-day a claim of privilege which he did not make in an affidavit sworn yesterday. To hold otherwise would be to say, in the language of Lord Justice Cotton, in *Roberts* v. *Oppenheim*, that "the Court cannot rely on the affidavit of a party." No authority has been quoted in support of such a contention, and in the absence of it I must hold that a claim of privilege cannot for the first time be set up in a further or supplemental affidavit in regard to documents mentioned in the original affidavit.

As each side is partially successful the costs of the application will be costs in the cause.

The appeals came on for argument at Victoria on the 6th

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of February, 1900, before the Full Court, consisting of WALKEM, DRAKE and IRVING, JJ.

Duff, for defendants: The identification here does not comply with the standard prescribed by the authorities, which should be such as to enable the Court to enforce an order for production and to see that nothing is kept back: see *Taylor* v. *Batten* (1878), 4 Q.B.D. 85, and *Budden* v. *Wilkinson* (1893), 2 Q.B. 432.

Hunter, for plaintiffs: What is required is certainty of indentification rather than particularity of identification, see *Bewicke* v. *Graham* (1881), 7 Q.B.D. at p. 412; *Smith* v. *Duke of Beaufort* (1842), 1 Hare at p. 525.

As to privilege: Where the substantial question is whether or not documents are privileged and the Court comes to the conclusion they are privileged, an order for a further and better affidavit will not be made; *Taylor* v. *Oliver* (1876), 34 L.T.N.S. 902; *Owen* v. *Wynn* (1878), 9 Ch. D. 29, and *Budden* v. *Wilkinson* (1893), 2 Q.B. at p. 436.

Argument.

Under the old Equity practice, which governs in these matters, nothing appearing in the rules (see *Anderson* v. *Bank of British Columbia* (1876), 2 Ch. D. at p. 654; *Eade* v. *Jacobs* (1877), 4 Exch. D. 335) the claim to privilege could be asserted at any time before an order for production was made, nor would the Court allow a blunder to take away the privilege: *Llewellyn* v. *Badeley* (1842), 1 Hare at p. 530; *Corporation of Hastings* v. *Ivall* (1873), 8 Chy. App. 1,017; *Morrice* v. *Swaby* (1840), 2 Beav. 500; *Parsons* v. *Robertson* (1837), 2 Keen 605; *Talbot* v. *Marshfield* (1865), L.R. 1 Eq. 6 at p. 8; *Richards* v. *Gellatly* (1872), L.R. 7 C.P. 127; *Donahue* v. *Johnston* (1892), 14 P.R. 476.

Duff, in reply: A party's statement that documents are privileged is conclusive unless it can be seen from those that are produced that those in respect of which privilege is claimed are not really privileged; *Roberts* v. *Oppenheim*

(1884), 26 Ch. D. at p. 734; *The Compagnie Financiere et Commerciale Du Pacifique* v. *The Peruvian Guano Company* (1882), 10 Q.B.D. at pp. 197, 198, 199; *Attorney-General* v. *Newcastle-Upon-Tyne Corporation* (1897), 2 Q.B. 384; *Inman* v. *Whitley* (1842), 4 Beav. 548. Protection must be claimed definitely; Bray at page 230. It would obviously lead to inconvenience and uncertainty if a party could be allowed to set up a claim of privilege for the first time after the issue of a summons for a further affidavit.

Cur. adv. vult.

23rd February, 1900.

DRAKE, J. (after setting out the facts) proceeded: On the summons the learned Judge dismissed the application for further and better particulars, but ordered that the paragraph claiming exemption in Mr. Murray's affidavit should be struck out.

Both parties appeal: the defendants alleging that the further affidavit of Mr. Murray giving the particulars of the books in which the entries mentioned are contained is insufficient, and the plaintiffs that the claim of privilege was well established.

The plaintiffs contend that there is a sufficient description of the books to enable the defendants to ask for the current account ledger, or bill registers, of any particular month. If the books were indicated by numbers as it was suggested they should be, what advantage would that be to the plaintiffs? We think that there is in this affidavit sufficient information and a sufficient description of the books. All that the Court requires is sufficient identification to enable the Court to make an order for production of a book or books of any particular date. In the case of letters or loose documents something further is required. They should be numbered or placed in bundles with distinguishing marks. A great many cases have been cited

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in argument, but the above is in our opinion a sufficient summary of the results of those cases. The last case is *Cooke* v. *Smith* (1891), 1 Ch. at p. 520. We are therefore of the opinion that the order of Mr. Justice MARTIN, in this respect is correct.

On the cross-appeal by the plaintiffs we think the appeal should be allowed. No doubt the usual course is for a party making an affidavit of documents to claim his privilege in his affidavit, but there is no stringent rule on the subject. In the present case the privilege was claimed in a further affidavit filed in answer to an order for better particulars of certain documents, but does the neglect to do so by mistake or oversight forever debar a party from alleging that the documents do not in any way tend to support the case on the other side, or relate wholly to his own?

Judgment of DRAKE, J.

In *Swanston* v. *Lishman* (1881), 45 L.T.N.S. 361, Jessel says: "Discovery must set out every document you have in your possession, whether you are bound to produce them or not." The practice is after discovery to apply for inspection, and if refused, to obtain an order for that purpose, and the refusing party can on that application still set up a refusal to produce, which, on sufficient grounds, will be upheld.

The affidavit of Miller shews that there was a slip made by the plaintiff's solicitor, owing to the absence of Mr. Hunter, in preparing the affidavit of documents, and in our opinion the Court can rectify a mistake made in this way.

We are therefore of opinion that Mr. Justice MARTIN's order should be varied by striking out the last paragraph thereof. Under the circumstances the costs of this appeal should be costs in the cause.

WALKEM, J.: I concur.

Judgment of IRVING, J.

IRVING, J.: As to the appeal, I think the appeal should succeed. The case of *Cooke* v. *Smith* (1891), 1 Ch. at p. 522, shews the duty of a person required to make an affidavit

on production and the rule of practice should not be relaxed.*

The plaintiffs having admitted that these documents do relate to the subject matter of the suit, see *Attorney-General* v. *Emerson* (1882), 10 Q.B.D. at p. 199, it is their duty to mark them so that they can be identified in the event of the Court being called upon to consider the question whether they are indeed privileged; and if the Court were to attempt to enforce the order to produce and some were produced there would be no means, without a further affidavit, of ascertaining whether all were so produced. The case of *Hector* v. *The Canadian Bank of Commerce* (1896), 11 Man. 320, contains all the authorities and supports the view I am now endeavouring to put forward. On the other point I agree that the cross-appeal should be allowed.

Judgment of IRVING, J.

Appeal dismissed and cross-appeal allowed.

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*NOTE.—See Milbank v. Milbank (1900), W.N. 35, since reported.

HARRISON, CO.J.
1900.
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REGINA v. WILSON

IN THE COUNTY COURT OF NANAIMO.

REGINA v. WILSON.

Transient trader—License—Occupant of premises—Conviction—R.S. B.C. 1897, Cap. 144, Sec. 171, Sub-Sec. 23, and B.C. Stat. 1898, Cap. 35, Sec. 19.

Where goods are consigned by the owner to be sold on commission and they are sold by the consignee by auction in premises rented by him, the owner is not an occupant of such premises nor a transient trader within the Municipal Clauses Act (R.S.B.C. 1897, Cap. 144, Sec. 171, Sub-Sec. 23), as amended in 1898 (Cap. 35, Sec. 19).

To support a conviction it is essential that the person charged occupy premises in the Municipality.

Statement.

APPEAL to County Court Judge from a summary conviction of William Wilson by two Justices of the Peace for the City of Nanaimo. The facts fully appear in the judgment.

Beevor-Potts, for appellant.
Young, *contra*.

27th February, 1900.

Judgment.

HARRISON, Co. J.: This is an appeal from a summary conviction whereby the defendant was convicted "for that the firm of which he is a partner being transient traders occupying premises in the Municipality of the City of Nanaimo for a temporary period did offer for sale and sell certain goods, etc., by auction, conducted by a licensed auctioneer, they (Wilson Bros.) not having first obtained a license for that purpose, and contrary to the provisions of the Municipal By-Laws of the said municipality in that behalf."

By the conviction the defendant William Wilson was fined

$25.00 and costs $9.00, and $100.00 (the amount of the license hereinafter mentioned) and expenses and in default of sufficient distress to be imprisoned for one month.

The facts are that Wilson Bros., of Victoria, were mortgagees by virtue of a chattel mortgage on the goods in the shop of one J. W. McKay, situate outside of, but near to Nanaimo, to secure moneys advanced by them to him, and purporting to act under the powers conferred by that chattel mortgage, they, by their agents took possession of the goods and chattels therein mentioned and sent them to Mr. Good, a Nanaimo Auctioneer and Commission Merchant, for sale on commission.

Mr. Good's usual place of business and warehouse in Nanaimo being too full of other goods to permit of his placing the goods covered by the chattel mortgage in those premises and selling them there, rented other premises, and placed these and other goods there for sale and sold them there by auction.

He had at different times previously rented these same premises for auction sales, and immediately after selling the goods under the chattel mortgage sold by auction the other goods he had on the same premises.

The by-law under which the conviction was made reads as follows: "From any transient trader or other person who occupies premises in the municipality for temporary periods, and who may offer goods or merchandise of any descripion for sale by auction, or in any other manner, conducted by himself or by a licensed auctioneer, or otherwise." This by-law is copied verbatim from sub-section (23a.) of section 171 of the Municipal Clauses Act, as Amended by Chapter 35, 1898.

Judgment.

In the marginal note to the section of the Municipal Clauses Act, this license is termed "a transient auctioneer's license," but this marginal note does not form part of the section.

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There is no definition of the word "occupy" in the Act or by-law.

In the Act the word "occupier," however, is defined to be one "who is qualified to bring an action of trespass;" if this definition were to be applied to the section on which this by-law is based the occupation requisite under the by-law would, I think, be interpreted to be such an occupation as entitled the occupier or person who occupied the premises to bring an action for trespass in respect of the premises, which would not help the prosecution in this case.

But it is not necessary here to decide whether the definition of occupier in other parts of the Act has any application as regards this section and by-law, it is quite clear that to obtain a conviction under this by-law it is essential that the person alleged to have broken its provisions should be proved to have occupied premises in the . . . . . municipality.

The words "occupies premises" apply both to the words "transient traders" and to the words "or other persons;" *Regina* v. *Cuthbert* (1880), 45 U.C.Q.B. 19, and *Regina* v. *Caton* (1888), 16 Ont. 11. It is impossible to say on the evidence in this case that Wilson in any sense occupied premises in the municipality, neither he nor any one connected with him had anything whatever to do with the premises where the goods were offered for sale.

Judgment.

In *Regina* v. *Cuthbert, supra*, a conviction on a by-law similarly worded was quashed on the same grounds, though the person who consigned the goods actually took part in the sale of them, while here the defendant did not in any way take part in the sale or offering for sale of the goods comprised in the chattel mortgage to Wilson Bros.

The conviction is quashed with costs.

Conviction quashed.

IN RE TODD: TODD v. TODD.

DRAKE, J.
1900.
Feb. 27.

FULL COURT
At Victoria.
March 14.

IN RE TODD

Succession duty—Principle of calculation of—B.C. Stat. 1899, Cap. 68.

Under section 4 of the Succession Duty Act where the aggregate value of the property exceeds $200,000.00 only the excess over that amount is subject to a duty of $5.00 for every $100.00 of the value.

APPEAL from the judgment of DRAKE, J., as to amount of succession duty payable by the estate of Jacob Hunter Todd, deceased. The estate was over $200,000.00 in value. The question came before DRAKE, J., in Chambers, on a summons for an order to determine and declare whether succession duty at the rate of five per centum was to be paid on the whole estate or on the excess only, over $200,000.00.

Sub-section 3 of section 4 of the Succession Duty Act, as enacted by section 2 of B.C. Stat. 1899, Cap. 68, is as follows:

"(3.) Where the aggregate value of the property of the deceased exceeds $25,000.00 and passes under a will, intestacy or otherwise, either in whole or in part, to or for the use of the father, mother, husband, wife, child, grand-child, daughter-in-law or son-in-law of the deceased, the same, or so much thereof as so passes (as the case may be) shall be subject to duty as follows:

Statement.

[a.] "For the first $75,000.00, or portion thereof in excess of $25,000.00, at the rate of $1.50 for every $100.00.

[b.] "For the first $100,000.00, or portion thereof in excess of $100,000.00, at the rate of $2.50 for every $100.00.

[c.] "For any sum in excess of $200,000.00, at the rate of $5.00 for every $100.00."

Luxton, for the trustees.

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

DRAKE, J.

1900.

Feb. 27.

FULL COURT At Victoria.

March 14.

IN RE TODD

27th February, 1900.

DRAKE, J.: The question raised here is as to the amount of succession duty which is payable on the estate of the late Jacob Hunter Todd. The estate is over the value of $200,000.00. Mr. *Maclean* on behalf of the Crown contends that the duty payable is five per cent. on the whole, while Mr. *Luxton* contends that the duty is payable on a sliding scale.

In construing tax Acts, nothing is left to intendment; the tax must be clearly imposed in unambiguous language. The section in question here is sub-section (3.) of section 4 of Cap. 68, 1899. It says, where the aggregate value of the property of the deceased exceeds $25,000.00, and passes to certain persons therein named, it shall be subject to duty as follows: For the first $75,000.00, in excess of $25,000.00, $1.50 for every $100.00. This clearly means that any sum above $25,000.00, up to $75,000.00, is taxable, but no tax is imposed on the first $25,000.00.

The next provision is that for the first $100,000.00, or portion thereof, in excess of $100,000.00, is taxable at $2.50 for every $100.00. This only imposes a tax upon the estate above $100,000.00. The last clause is for any sum in excess of $200,000.00, and it imposes a tax of five per cent. on the excess of $200,000.00.

Judgment of DRAKE, J.

If the contention of Mr. *Maclean* was correct, I should have to read the section by omitting the words, "any sum in excess of," and the section would read thus: "For $200,000.00 and upwards five per cent."

I think it is quite clear that Mr. *Luxton's* contention is correct, and the tax must be calculated on the basis of a sliding scale.

The Crown appealed and the appeal came on for argument at Victoria on the 7th of March, 1900, before the Full Court, consisting of WALKEM, IRVING and MARTIN, JJ.

Argument.

Maclean, D.A.-G., for the Crown, appellant. There is no

special canon of construction for tax Acts; *Attorney-General* v. *Carlton Bank* (1899), 2 Q.B. at p. 164. The whole estate should be taxed at five per cent.

Luxton, for the trustees. When there is an ambiguity the subject should have the benefit of any doubt. See *Partington* v. *The Attorney-General* (1869), L.R. 4 H.L. at p. 122; *The Commissioners of Inland Revenue* v. *G. Angus & Co.* (1889), 23 Q.B.D. 579 and *In re Thorley* (1891), 2 Ch. 613.

Cur. adv. vult.

14th March, 1900.

WALKEM, J.: This is an appeal from the construction put by Mr. Justice DRAKE upon sub-section 3 of section 2 of the Succession Duty Act, 1899, 62 Vict. Cap. 68, which is as follows. [The learned Judge here set out the section and proceeded]:

The value of the estate of Mr. Todd, the deceased, is admittedly over $200,000.00. The question submitted to the learned Judge was, "whether duty at the rate of five per cent. should be paid on the whole estate of the deceased, or on any sum in excess of $200,000.00." The rate of five per cent. is only payable under provision (c.), the language of which is so plain that I am surprised that a judicial interpretation of it has been considered necessary. It says, in almost so many words, that, "Where the value of the estate exceeds $200,000.00, the duty payable shall be five per cent. on any sum in excess of the $200,000.00." Mr. Justice DRAKE having so held, the appeal must be dismissed with costs.

Judgment of WALKEM, J.

I refrain from expressing any opinion as to the effect of provisions (a.) and (b.) as they are not part of the question that has been submitted.

IRVING, J.: On the question submitted there is no doubt in my mind that the learned Judge whose decision is under appeal, was right. We were not called upon to express any opinion on sub-sections (a.) and (b.).

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At Victoria.
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MARTIN, J.: According to the form of the question submitted for our determinition we are restricted to the exact point as to whether five per cent. is payable on the whole estate (which is over $200,000.00 in value) or on the excess thereof over $200,000.00. The question is primarily governed by the third item of sub-section (3.), but in order to arrive at the true meaning of the said third item, and give proper effect thereto, the other items must, it seems to me, be also considered.

The object of the said sub-section is, as appears by its opening words, to first establish a general exemption of $25,000.00, and then provide for duty on greater amounts. The first item exempts $25,000.00, and imposes a duty of one and a half per cent on $75,000.00 or portion thereof, thus disposing of estates of the value of $100,000.00, and determining the duty to be paid thereon.

The second item deals with estates over $100,000.00, and up to $200,000.00. It is unhappily worded, but its intention is to take up the duty and the sum effected thereby where the first item left them, or, in other words, to provide for duty where the property exceeds the value ($100,000.00) already dealt with by the first item. Item two treats property of the value of $100,000.00, as having been already dealt with by item one, and then imposes a duty of two and a half per cent. on sums in excess of the $100,000.00 before provided for. This duty of two and a half per cent. is thus imposed on "the first $100,000.00 or portion thereof in excess of" the $100,000.00 already dealt with by item one. The expression "first $100,000.00" does not relate to the original sum of that amount dealt with by item one, but to the "first $100,000.00" in excess of the original $100,000.00 so dealt with by that item.

Judgment of MARTIN, J.

Item three controls all amounts over $200,000.00: not only what would be the second "excess" (if I may so term it) $100,000.00 over the first "excess" $100,000.00 (already provided for by item two), but the third, fourth and all suc-

ceeding "excess" sums of $100,000.00; and since the preceding items have by regular steps of progression declared what the tax shall be up to that stage, item three only deals with the excess over such prior amounts. In other words, on property up to and including $200,000.00, duty must be paid according to the scales of the two preceding items, but any excess not before provided for comes within the scope of item three, and is subject to a duty of $5.00 for every $100.00. The items deal with the surplus of each preceding class, not with each class as distinct from the others.

The contention of counsel for the Crown (that under the third item five per cent. is payable on the whole estate) is certainly plausible, and at first I inclined towards it, as the items are not easy of construction, but to give effect to that argument one would have expected the third item to have been expressed in language similar to the corresponding Act in Ontario, R.S.O., Cap. 24, Sub-Secs. (3.), (4.), of which (4.) is as follows:

"Where the aggregate value of the property exceeds $200,000.00 the whole property which passes as aforesaid shall be subject to a duty of $5.00 for every $100.00 of the value."

By adopting the above construction a due and harmonious effect is given to all the items of the sub-section, without violence to any expression therein contained, which, as I understand it, is the result aimed at in seeking to interpret any statute whose provisions are not absolutely clear. I do not regard the point as being wholly free from doubt, but the cases cited by counsel for the respondents, *Partington* v. *The Attorney-General* (1869), L.R. 4 H.L. at p. 122, and others, are ample authorities for the proposition that legislation of this nature should be construed in favour of the subject where any ambiguity exists.

Judgment of MARTIN, J.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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HALL v. THE QUEEN AND THE KASLO AND SLOCAN RAILWAY COMPANY.

Costs—Of trial when point disposing of case could have been raised for decision before trial—Rule 233.

Under Rule 233 the plaintiff may have a point of law raised on the pleadings disposed of before trial, but there is no duty cast on a defendant to do so, and therefore where a defendant succeeds on a point of law at the trial which could have been so disposed of he is entitled to the usual costs of trial.

APPLICATION by suppliant that the respondents should be allowed only such costs as would have been allowed them had they demurred instead of permitting the petition to be brought on for trial. The petition had been dismissed and leave reserved to mention the subject of costs, see *ante* p. 89.

Hunter, for suppliant.
Duff, for the Railway Company.

14th March, 1900.

DRAKE, J.: The application here is with reference to the costs of a petition of right which has been dismissed.

Mr. *Hunter* urges that as the point on which this petition was dismissed could have been taken as a point of law, equivalent to demurrer, before trial, that the suppliant should pay no more costs than if the question had been so raised, and in support of his contention he cited *Wallis* v. *Skain et al* (1892), 21 Ont. at p. 534, *McPherson* v. *Irvine* (1895), 26 Ont. 438. Under the Ontario Rules demurrer is still retained. To *Hood* v. *North Eastern Railway Company* (1870) L.R. 11 Eq. at p. 131, the same remark applies. Before the Judicature Act when a demurrer was filed it had to be set down for argument forthwith.

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Judgment.

But the Judicature Act changed this practice, and by Rule 233 any party is entitled to raise by his pleading any point of law, and such point shall be decided at or after the trial or on application of either party before the trial. The suppliant might under this rule have the law point disposed of before trial, but no duty was cast on the defendants to do so. The rule indicates that the proper time to dispose of the law point is at or after the trial unless by consent or by order on application of either party. I do not therefore consider that the defendants should be mulcted in costs for carrying out the rules of Court when the proceeding now contended for was open to the suppliant who did not desire to take advantage of it. The defendants are therefore entitled to their costs.

Order accordingly.

IRVING, J.

1900.

Jan. 3.

TOWN v. TOWN

TOWN v. TOWN.

Judicial separation—Cruelty—Condonation—Cruelty revived by subsequent acts.

Where the husband had been guilty of cruelty, which had been condoned, but within the six months subsequent to the condonation had been guilty of violent and harsh treatment which would no originally of itself constitute a ground for separation, the Court granted a separation to the wife.

THIS was a petition by the wife for judicial separation. The parties were married in South Africa in 1872. Shortly after the marriage, the husband was guilty of cruelty which was condoned. Again in England, in 1886, the husband was guilty of cruelty, which was again condoned. In 1897, the husband came to Vancouver, where his wife joined him in December of the following year. In January, 1899, the husband was again guilty of cruelty and also in May. On the night of the 25th, and the morning of the 26th of July, the husband was guilty of violent and harsh treatment, but not of such a character as to constitute legal cruelty, and the wife left him and instituted proceedings for a separation.

Statement.

The case was heard before IRVING, J., on 20th December, 1899.

A. D. Taylor (*Spencer* with him), for the petitioner: The acts in South Africa in 1872, in England in 1886, and in Vancouver in January and May, 1899, constituted legal cruelty, and although they may have been condoned by the wife, the subsequent harsh treatment revived the cruelty and the wife is entitled to a decree. In *Russell* v. *Russell* (1897), A.C. 395 the whole question of legal cruelty is fully discussed. The tendency of recent decisions is to enlarge

Argument.

the scope of the definition and the acts proved were clearly within the definition. See *Curtis* v. *Curtis* (1858), 27 L.J., M. 73; *Cooke* v. *Cooke* (1863), 32 L.J., M. 81; *Knight* v. *Knight* (1865), 34 L.J., M. 112; *Milford* v. *Milford* (1868), 37 L.J., M. 77; *Kelly* v. *Kelly* (1870), 39 L.J., M. 28; *Armytage* v. *Armytage* (1898), P. 178.

As to the alleged condonation it is no bar. Condonation is not absolute forgiveness but forgiveness on the implied condition that the misconduct condoned will not be repeated. Acts of unkindness and harshness not in themselves constituting legal cruelty are a breach of this condition. See *Curtis* v. *Curtis, supra, Mytton* v. *Mytton* (1886), 11 P.D. 141; *Bostock* v. *Bostock* (1858), 27 L.J., M. 86; *Beauclerk* v. *Beauclerk* (1891), 60 L.J., D. 20; *Wilson* v. *Wilson* (1849), 6 Moore, P.C. 484.

Martin, Q.C., for the respondent: While the early acts complained of may constitute cruelty, they have all been condoned and there is no act subsequent to the last condonation which amounts in any sense to legal cruelty. At the most they were ordinary quarrels between husband and wife, and in no way justify the wife leaving her husband and taking proceedings. The evidence as to the events of the evening of the 25th, and the morning of the 26th of July, which led to the final rupture between the parties, shews ill-feeling, but not cruelty and certainly nothing to warrant a decree.

Argument.

3rd January, 1900.

IRVING, J.: This is an application by the wife for judicial separation on the ground of cruelty.

What behaviour or conduct is cruelty sufficient to constitute a ground for judicial separation has been considered very recently in the House of Lords in *Russell* v. *Russell* (1897), A.C. 395, where it was said to bring home to a spouse a charge of this kind it must be established that

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there has been bodily hurt, or injury to health, or a reasonable apprehension of one or other of these.

Beyond doubt there have been committed by the husband both here and in South Africa, many acts coming within this definition; but the decree is resisted on the ground that the wife has condoned the cruelty and that after each of these offences of legal cruelty, reconciliations have taken place with the result that these offences in respect of which she would, were it not for the condonation, have been entitled to a decree for judicial separation, have been blotted out.

The respondent's contention is that, even assuming that there were acts of cruelty, the particular act or acts which led to the final rupture were not of such a character as to fall within the definition of cruelty as defined in *Russell* v. *Russell, supra.* Condonation is not absolute forgiveness; it is forgiveness on an implied condition that the misconduct shall not be repeated. A breach of that condition, in the case of cruelty, may take place where the person whose offence of cruelty has been condoned, has been guilty of violent and harsh treatment although such violent and harsh treatment would not of itself constitute a ground for judicial separation. That was so decided in the case of *Curtis* v. *Curtis* (1858), 27 L.J., M. 73 and (1859), 28 L.J., M. 55, and in *Mytton* v. *Mytton* (1886), 11 P.D. 141.

Judgment.

I doubt whether the actions of the respondent on the night of the 25th, and the morning of the 26th of July, were of such a nature as of themselves to constitute a breach on his part of the implied condition upon which the wife condoned his former acts of cruelty. As isolated acts, I do not think they would; but having regard to his conduct in the six months immediately preceding that date, I feel that there is sufficient to justify me in granting the decree. I therefore do so, but, I must say, with some considerable doubt. It is unnecessary, I think, to go into the facts of this painful case beyond saying that there are in

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evidence three distinct cases of legal cruelty, viz., in January, in April and May, and in connection with the Fader order; after any one of these scenes she would in my opinion have been entitled to a decree.

The evidence, I think, will support this finding, that as a consequence of the husband's conduct during the period of their residence in Vancouver, the wife's health was injured for some two months after she left him.

There will be a decree for judicial separation with costs, and an enquiry as to alimony.

Separation granted.

ARCHIBALD v. McDONALD *ET AL.*

FULL COURT
At Vancouver.
1899.
Sept. 30.
ARCHIBALD v. McDONALD

Practice—Appeal—Supreme Court Act, Sec. 79—Filing of notice of appeal.

Under section 79 of the Supreme Court Act, the provision as to the fourteen clear days applies to the service and not to the filing of the notice of appeal.

APPEAL to the Full Court from judgment of IRVING, J., at the trial on 22nd June, 1899, dismissing the action. The notice of appeal dated 19th June, 1899, was served on the solicitor for the respondents on the same day, the notice being for the sittings of the Full Court in September.

Statement.

On 2nd September, security was given and a notice served on respondents' solicitor that security had been given, and

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At Vancouver.
1899.
Sept. 30.

ARCHIBALD
v.
McDONALD

that the appeal would be heard at the September sittings. On the same day the appeal books containing a copy of the notice, were lodged and the appeal entered.

The appeal came on for argument on 30th September, 1899, before WALKEM, DRAKE and MARTIN, JJ.

Martin, Q.C., for respondents, took the preliminary objection that proper notice had not been given, as no copy of the notice had been filed in the Registry fourteen days before the sittings of the Full Court. Section 79 of the Statute provides that the notice shall be filed in the proper Registry and served not less than fourteen clear days before the first day appointed for the sittings of the Full Court, at which the appeal is to be heard. The filing and the serving must both be fourteen clear days before the sittings. The defect is not covered by section 83, sub-section 1, for it relates to the bringing of the appeal. Under section 76, sub-section 5, the giving of notice of appeal shall be deemed to be the bringing. The filing of the notice is part of the giving of notice and therefore not covered by section 83.

Argument.

A. D. Taylor, for the appellant. The fourteen days apply to the service, not to the filing. The respondents cannot complain, as they had ample notice. The filing is only a matter of procedure to enable the appeal to be set down, which had been done in this case by the lodging of the appeal books containing a copy of the notice. He cited *Re Laws* (1881), 9 P.R. 72, in which the appellant served the notice on the respondent, but omitted to serve the Registrar (which was then necessary) and the irregularity was condoned.

Per curiam: The objection is overruled; let the appeal proceed.

Preliminary objection overruled.

BAKER v. KILPATRICK.

FULL COURT
At Vancouver.

1900.

Jan. 25.

BAKER
v.
KILPATRICK

Practice—Appeal—Failure to set down for two successive sittings of the Full Court—Preliminary objection.

Failure to set down an appeal is an irregularity only, within section 83 of the Supreme Court Act.

No preliminary objection will be heard unless proper notice has been given under the same section.

Statement.

THIS case was tried before McColl, C.J., and a jury on the 24th and 25th April, 1899. On the motion for judgment, the Chief Justice on the 26th April, dismissed the action. Notice of appeal was served on the 29th June, 1899, for the September sittings of the Full Court. The case was not, however, set down for the September sittings, nor for the November sittings. On the 22nd December, a notice was given that security had been given, and that the plaintiff would bring on the appeal to be heard before the Full Court at the Sittings commencing on the 22nd January, 1900. On the 11th January, the appeal books were lodged and the appeal set down.

On the 25th January, 1900, the case came before the Full Court, consisting of Drake, Irving and Martin, JJ.

Yarwood, for the defendant, respondent, took the objection that the appeal had been abandoned, and no fresh notice given, citing *Norton* v. *London and North Western Railway Company* (1879), 11 Ch. D. 118, and *Kinney* v. *Harris* (1897), 5 B.C. 229.

Argument.

Martin, Q.C., for the plaintiff: Not setting down the appeal is an irregularity only and is covered by section 83 of the Act. In *McLellan* v. *Harris*, this Court overruled a similar objection, and allowed the appeal to pro-

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At Vancouver.
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ceed. In any case, no proper notice of the objection has been given.

Per curiam: The objection can not be sustained as no notice has been given, and in any case, the failure to set down is a matter of procedure.

Preliminary objection overruled.

WALKEM, J.
1899.
March 22.
MARTIN v. DEANE

MARTIN v. DEANE—NORTH YALE ELECTION CASE.

Election petition—Trial of—Amendment of petition at trial—Practice.

At the trial of an election petition based on bribery, the petitioner asked for leave to amend by setting up that the election was void on the ground that the list of voters used at the election was compiled and signed by an unauthorized official, this fact having been discovered only after the commencement of the trial.

Held, that the amendment must be refused.

TRIAL of election petition at Kamloops on 21st March, 1899, before WALKEM, J.

Statement.

After the trial had commenced, *Hunter* (*Whittaker* with him), for petitioner, applied to be allowed to amend the petition by setting up that the election was void on the ground that the list of voters used at the election was compiled and signed by an unauthorized official, this fact having been discovered only after the commencement of the trial.

[WALKEM, J.: You are setting up a wholly new case and I do not think you can be allowed to change front at this late stage of the case.]

That may possibly be the rule in an ordinary suit between subject and subject, but this is a matter in which the electors of the constituency have a direct interest, for if the election is void it is manifest that the constituency is not represented according to law, and it is the duty of the Court in the public interest to take care that the constituency is legally represented.

Langley and *Swanson*, for respondent.

WALKEM, J., refused to allow the amendment and on the following day delivered the following oral judgment:

In the middle of this trial an objection, which at first appeared to be rather formidable has been raised by Mr. *Hunter*, counsel for the petitioner, to the effect that the Collector of Voters, Mr. Pearse, was not the proper officer, inasmuch as another officer, Mr. Tunstall, had been gazetted in a subsequent number of the Gazette as Collector, that is to say that Mr. Pearse was first appointed and in the following year, Mr. Tunstall, without the first appointment having been formally cancelled—the consequence being that the public might have been led to believe that both were Collectors.

Judgment.

I think that the amendment which Mr. *Hunter* has asked for is so radical that it means a new petition. Looking to the decisions in Rogers on Elections, to which I have been referred, I don't think, notwithstanding that the Act says that the rules of the Supreme Court shall apply to election petitions, that I have power to make such a change, and therefore I must refuse the application.

As far as I see neither party has been injured by what Mr. *Hunter* complains of; and if I granted his application, I would be virtually disfranchising all the voters of the

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1899.
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Riding, who of course, are blameless, which would be a much more serious matter than overlooking what appears to be an official mistake.

It is admitted that on the scrutiny Mr. Deane succeeds; and on the question of corrupt practices no evidence has been given to entitle the petitioner to succeed. The petition is therefore dismissed with costs.

Petition dismissed with costs.

IN RE KOOTENAY BREWING COMPANY.

IRVING, J.

1898.

Jan. 25.

RE KOOTENAY BREWING CO.

Practice—Local Judge of Supreme Court—No jurisdiction to make winding up order—Appeal or motion to rescind?—Rule 1,075—R.S. Canada, 1886, Cap. 129, Sec. 9.

A Local Judge of the Supreme Court has no jurisdiction to make a winding up order.

An order made *ultra vires* should be moved against, not appealed from.

Statement.

MOTION to set aside a winding up order, made by Forin, Lo. J.S.C., dated 20th December, 1897, and also to set aside another order dated 4th January, 1898, purporting to post-date the first order so as to make it bear date as of 20th December, 1897. In the alternative the motion asked for leave to appeal notwithstanding the expiration of the time limited.

Argument.

Duff, for the motion: The Local Judge had no jurisdiction. Section 9 of R.S.C. 1886, Cap. 129, gives power to "the Court" to make the winding up order and section 2 of the Interpretation Clauses defines "Court" in British Columbia as the Supreme Court. Rule 1,075 gives, subject to exceptions, the same power to Local Judges as Judges of the Supreme Court sitting in Chambers and it is expressly limited to actions. A winding up proceeding is not "an action;" see *In re National Funds Assurance Company* (1876), 4 Ch. D. 305.

Galt, for petitioner: The only way of taking exception to the orders is by appeal: *Postill* v. *Traves* (1897), 5 B.C. 374; *Ryan* v. *Canada Southern Railway Company* (1885), 10 P.R. 535; *Locomotive Engine Company* v. *Copeland et al* (1885), 10 P.R. 572; *Jamieson* v. *Prince Albert Colonization Company* (1885), 11 P.R. 115.

Archer Martin, for liquidator.

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RE KOOTENAY BREWING CO.

Argument.

Duff, in reply: As to orders of a Court of a limited statutory jurisdiction, which have been made outside of the jurisdiction of the tribunal, such orders should be moved against, not appealed from; but as to orders of a Court of general jurisdiction, if something has been done outside its jurisdiction, then there should be an appeal as a Court of general jurisdiction can decide on its own powers; see *Attorney-General* v. *Lord Hotham* (1827), 3 Russ. 415; *Grant* v. *Maclaren* (1894), 23 S.C.R. 310; *Cape Breton* v. *Fenn* (1881), 17 Ch. D. 198; *Macfarlane* v. *Leclaire* (1862), 15 Moore, P.C. at p. 185; *In re Sproule* (1886), 12 S.C.R. 140. As to what defects make an order a nullity, see *In re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137; *Re Dominion Provident Benevolent and Endowment Association* (1894), 24 Ont. 416.

25th January, 1898.

IRVING, J.: If the Local Judge had jurisdiction to make the order the proper remedy would be by appeal.

Judgment.

But as the jurisdiction given by the Provincial Parliament is only in respect of "actions" brought in his county, I think an order can be set aside on motion.

The winding up of Companies is governed by Dominion Statute and I do not think the Province can confer judicial powers on persons other than those designated in the Dominion Statutes.

Order set aside.

SULLIVAN v. JACKSON.

FULL COURT
At Victoria.

1900.

Jan. 9.

SULLIVAN
v.
JACKSON

Practice—Application to dismiss for want of prosecution after notice of trial—Rule 340.

A Judge sitting in Chambers has power to dismiss an action for want of prosecution notwithstanding that the action has been entered for trial.

APPEAL to the Full Court by defendant from an order of FORIN, Lo.J.S.C., dated 22nd December, 1899, dismissing defendant's summons to have the action dismissed for want of prosecution.

The affidavit of defendant's solicitor read on the application set out that notice of trial had been given by the plaintiff for the sittings of the Supreme Court at Rossland in February, 1899, but on the 22nd of February, the trial was postponed on the application of counsel for the plaintiff and no notice of trial had been given by the plaintiff for the sittings of the Supreme Court which had been held in Rossland since February for the trial of actions; that this was an action of ejectment and that it was deponent's belief that plaintiff was delaying the trial in order by some means or other to acquire a title superior to that of the defendant to the lands in question, and to which the plaintiff never had any title. On the return of the summons no affidavit was filed or used by plaintiff. The cause coming on to be heard on 22nd February, 1899, was postponed in open Court by MARTIN, J.

Statement.

The appeal came on at Victoria on the 9th of January, 1900, before McCOLL, C.J., IRVING and MARTIN, JJ.

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At Victoria.
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Galt, for appellant: The Local Judge did not attempt to exercise his discretion, but simply held that once notice of trial has been given, it is not open to the defendant to apply to have the action dismissed for want of prosecution, relying on *McDougald* v. *Thomson* (1889), 13 P.R. 256 and *Simpson* v. *Murray* (1890), 13 P.R. 418. The facts in those cases were different. No attempt was made to explain the delay. Because notice of trial has been given the defendant is not precluded from applying, see *Robarts* v. *French* (1895), 72 L.T.N.S. 147; *The Hibernian Bank* v. *Hughes* (1882), 10 L.R. Ir. 15; *Chapman et al* v. *Smith* (1882), 32 U.C.C.P. 555.

[The CHIEF JUSTICE: Will you file an affidavit Mr. *McPhillips* undertaking to expedite the trial?]

Argument.

A. E. McPhillips, for respondent: I am not in a position to file an affidavit, but I am prepared to state that the plaintiff intends to proceed to trial at the next sitting of the Court at Rossland. The appellant is not right in his practice and we are not called upon for an affidavit. There is no case shewing that after a cause has been entered for trial, it may be dismissed for want of prosecution. In Ontario it has been found necessary to amend the rule (433) to bring it within the English rule (436), see Holmsted and Langton, p. 600. Not only has notice of trial been given but the action has been entered for trial, see *Crick* v. *Hewlett* (1884), 27 Ch. D. 354 and *Harvey* v. *City of New Westminster* (1894), 3 B.C. 398.

As to the Irish case cited by counsel for appellant, we are in the dark as to the terms of the general rule or order under which that case was decided, and it is a singular fact that that case is not quoted in either the Annual Practice or the Yearly Practice. If decisions conflict we must follow the English practice, *McLenaghan* v. *Hetherington* (1892), 8 Man. 357.

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Per Curiam: The application to dismiss for want of prosecution after notice of trial and entry of record was properly made, and the learned Local Judge should have exercised his discretion thereon.

The appeal should be allowed with costs.

Appeal allowed with costs.

NOTE:—See Boscowitz v. Cooper & Warren (1894), 3 B.C. 88.

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THE NORTHERN COUNTIES INVESTMENT TRUST, LIMITED (FOREIGN) v. NATHAN.

Practice—Writ for service out of jurisdiction—Affidavit leading to order for—What it should shew.

An affidavit leading to an order for an *ex juris* writ should shew the grounds on which deponent believes that the plaintiff has a good cause of action.

Statement.

APPEAL from an order of DRAKE, J., dated 8th December, 1899, whereby it was ordered that the order of MARTIN, J., dated 9th October, 1899, and service of the writ of summons pursuant thereto be set aside. The affidavit of C. E. Pooley was used on the application before MARTIN, J., and it set out that deponent had a knowledge of the matters deposed to (being a member of the firm of plaintiffs' solicitors), that he was informed and believed that the defendant resided in England, out of the jurisdiction of the Court, and was a British subject, and that the plaintiffs had a good cause for action under and by virtue of their mortgage security dated 7th November, 1893. The mortgage was not made an exhibit to the affidavit and there was no evidence that it was produced. MARTIN, J., made an order allowing a writ to issue and the plaintiffs issued the writ and served it on defendant in England, who then applied to set aside the proceedings on the grounds (1.) That the affidavit in support of the application on which said order was made was not properly entitled and endorsed; (2.) That the summons on which the said order was made was not served on the said defendant; (3.) That said summons was taken out in this action before the said action was commenced; (4.) That the said affidavit of Charles Edward Pooley does not shew the grounds on which the said application was

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made; (5.) That the material facts were not disclosed to the learned Judge who made the order. On the return of the summons the plaintiffs read an affidavit made by their manager and setting out the particulars of the mortgage and the amount due thereon.

DRAKE, J., considered that on the fourth ground of defendant's summons, the order of MARTIN, J., and the service of the writ of summons should be set aside and he so ordered.

Statement.

The plaintiffs appealed and the appeal came on for argument at Victoria on 9th January, 1900, before McCOLL, C.J., IRVING and MARTIN, JJ.

Luxton, for appellants: The matter when it came before DRAKE, J., should have been gone into *de novo*, see *Fowler* v. *Barstow* (1881), 20 Ch.D. 240, Jessel, M.R., at p. 244; *Great Australian Gold Mining Company* v. *Martin* (1877), 5 Ch.D. at p. 7; *Collins* v. *North British and Mercantile Insurance Company* (1894), 3 Ch. 228. At the most there was only an irregularity, not a matter of substance. He cited *Perkins* v. *Mississippi and Dominion Steamship Company (Limited)* (1884), 10 P.R. at p. 200 and *Dickson* v. *Law and Davidson* (1895), 2 Ch. at p. 65.

Argument.

Moresby, for respondent: The affidavit of Pooley should have been entitled "in the matter of an intended action," and in any event it was altogether insufficient. He cited *Young* v. *Brassey* (1875), 1 Ch.D. 277; *Stigand* v. *Stigand* (1882), 19 Ch.D. 460; *Great Australian Gold Mining Company* v. *Martin*, *supra*, at p. 17; *White* v. *Macgregor* (1882), 64 J.P 775; *Kinahan* v. *Kinahan* (1890), 45 Ch.D. at p. 82. DRAKE, J., exercised his discretion and his order should not be interfered with; *Dickson* v. *Law and Davidson*, *supra*. and *Hoerler* v. *Hanover Caoutchouc, Gutta Percha and Telegraph Works* (1893), 10 T.L.R. 22 and 103.

Judgment.

Per Curiam: The learned Judge in setting aside the

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order exercised his discretion to hold strictly to the rule, and there are no grounds for interfering with that discretion.

The appeal should be dismissed with costs.

Per MARTIN, J.: It is unfortunate that if the mortgage were produced to me, as alleged at the time I made the original order (and I am inclined to think it was) that that fact was not recited in the order, or the mortgage made an exhibit to the affidavit; and it would have been advisable to have brought this omission to the attention of Mr. Justice DRAKE: if there were positive evidence to shew that the mortgage was before me I should have allowed the appeal.

Appeal dismissed with costs.

ROGERS *ET AL* v. REED.

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Practice—Special indorsement—Account stated—Mistake in appeal book—Preliminary objection—Order XIV.

An objection to the hearing of an appeal on the ground that the appeal books are defective and erroneous is not a preliminary objection within section 83 of the Supreme Court Act.

The particulars of the plaintiffs' claim indorsed on the writ were:

"1899.

"November 30. To balance of account rendered, which balance has been stated.....$ 51.70

" balance of account rendered and stated owing to Hunter Brothers and duly assigned for value by an assignment dated the 1st day of December, 1899, to the plaintiffs, and of which express notice in writing has been given to the defendant.. 167.15

" Total.....$218.85"

Held, not a special indorsement such as would support a judgment under Order XIV.

ACTION for $218.85. The statement of claim indorsed on the writ was as follows:

Statement.

"The plaintiff Company's claim is against the defendant for $218.85, partly for balance of account rendered and acknowledged for goods sold and delivered by the plaintiff Company to the defendant at his request, and partly on an assignment of debt, particulars of which are as follows: (See head note.)

The plaintiff applied for judgment under Order XIV., and the affidavit of the plaintiffs' manager used in support of the summons set out that "the defendant is justly and truly indebted to the plaintiffs in the sum of $218.85 partly for balance of account rendered, stated and admitted for goods supplied between May 31st, 1899, and October

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6th, 1899, and partly on an assignment of debt, and was so indebted at the commencement of this action. The particulars of the said claim appear by the indorsement of the writ of summons in this action, a copy of which is now shewn to me and marked exhibit 'A' to this my affidavit," and that the deponent believed there was no defence to the action but that the appearance was entered for delay only. In answer the defendant's affidavit was read and in which he swore "that this action was commenced on the 1st day of December, 1899, by a writ of summons specially indorsed, which writ was served on me on the fourth day of December, 1899, and a copy of which said writ is attached to this my affidavit, marked as exhibit 'A;'

"That it is untrue that the account for $51.70 in the statement of claim mentioned has ever been stated: on the contrary, the said account is in dispute, and I do not owe the full amount thereof;

"That I have not received express notice in writing of the assignment of Hunter Brothers' account to the plaintiffs as in the statement of claim referred to;

Statement.

"That I know nothing whatever of the said assignment;

"That the account alleged to be due Hunter Brothers in the statement of claim mentioned, amounting to $167.15, has never been settled or agreed upon in any manner whatsoever, and that the said account is still an open account;

"That the defence herein is not entered for the purpose of delay, but with the *bona fide* desire of ascertaining the amount which may be due and owing on the accounts in question, and to put the plaintiffs to the proof of the assignment in the statement of claim referred to and of its sufficiency in point of fact and as a matter of law."

On the return of the summons, FORIN, Lo.J.S.C., gave the plaintiffs liberty to sign judgment for $167.15 with costs on County Court scale, and gave the defendant liberty to defend as regards the $51.70 of the amount claimed.

The defendant appealed on the grounds (1.) That the

assignment of the said account from Hunter Brothers to the plaintiffs was not proved; (2.) Express notice in writing of the said assignment was not given to the defendant as required by section 16 of the Supreme Court Act; (3.) The affidavit of Peter Starkey read in support of the plaintiffs' application was not a sufficient affidavit as required by Order XIV., of the Rules of the Supreme Court; (4.) The defendant has good defence to this action upon the merits.

There was also a cross-appeal.

The appeal came on for argument on 11th January, 1900, before McColl, C.J., Drake and Martin, JJ.

Duff, for appellant.

A. E. McPhillips, for respondent, objected to the appeal going on as there was a mistake in the appeal book.

Duff, contended that this was a preliminary objection and one day's notice should have been given of it whereas it had only been brought to his attention a few minutes before the case was called.

Argument.

The Court intimated that the argument should proceed as it might be possible to dispose of the appeal without the point being disposed of, but after the argument had proceeded a short time, further defects were found in the appeal book and the case was adjourned until January 15th.

On the 15th of January the case was called before Walkem, Drake and Martin, JJ.

Duff, for appellant, said that new appeal books had been handed in and they were now correct. No objection to the appeal book can be taken as no notice of preliminary objection was served: See section 83 of the Supreme Court Act.

McPhillips, for respondent: We applied to the Registry but could not get a copy of the appeal book and hence had no opportunity of finding out whether the appeal book was correct or not.

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Duff: That was not our fault as we gave five copies to the Registrar.

McPhillips: Five copies are not enough as the appeal is from a Local Judge and as there are five Supreme Court Judges, all five copies were handed out.

The point was reserved and the appeal proceeded.

Duff: The writ is not specially indorsed.

[DRAKE, J.: That is a matter of irregularity and you have not given notice of such an objection.]

If the writ was not specially indorsed the Judge had no jurisdiction and the point may be taken here though not taken below. It is a question of costs then, see *Aldous* v. *Hall Mines* (1897), 6 B.C. 394. He cited rule 188.

McPhillips: The defendant himself swears that the writ is specially indorsed and he is estopped from setting up that it is not.

Argument.

[THE COURT: That is swearing to a point of law.]

He referred to Odgers on Pleading, 3rd Ed., at pp. 186, 187 and 357; *Bradley* v. *Chamberlyn* (1893), 1 Q.B. at p. 441, in which it was held that a special indorsement need not have the particulars required in a statement of claim, *Roberts* v. *Plant* (1895), 1 Q.B. 597; *Wallingford* v. *The Directors, &c., of the Mutual Society* (1880), 5 App. Cas. 704. Because the indorsement is not sufficient for a statement of claim, it does not follow that it is not sufficient under Order XIV.; see *May* v. *Chidley* (1894), 1 Q.B. 451, and Chitty's Forms, 112, 113.

[THE COURT: There is no statement in the indorsement as to who stated the account or that it was agreed to by the defendant: See Odgers, 3rd Ed., 357.]

Duff, in reply: The defendant swears the account was never settled but is still an open account and that is all he had to swear to. See the definition of "Account stated" in the Encyclopaedia of the Laws of England. Rule 572 was not complied with as the summons was taken out on 15th December, and the affidavit of the plaintiffs' manager

read in support of the summons was sworn and filed the next day: See *Leiser* v. *Cavalsky et al* (1894), 3 B.C. 196.

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Per Curiam: The writ was not specially indorsed and rule 572 has not been complied with. The objection to the appeal book on the ground that it was defective is not a "preliminary objection" within the meaning of the statute as the respondent was entitled to presume accuracy in the appeal book. The appeal is allowed with costs, but the cost of the first day's argument are allowed to the respondent on account of the defective appeal book. The cross-appeal of the plaintiffs being abandoned is dismissed with costs.

Appeal allowed.

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1900.

March 3.

TILLEY v. CONFEDERATION LIFE.

TILLEY v. CONFEDERATION LIFE.

Life insurance—Premium note—Non-payment—Forfeiture—Extended insurance.

A life policy was issued 27th June, 1894, for $5,000.00, an annual premium of $84.50 being payable on the 20th of March in each year. The second premium was paid 20th March, 1895, but the third was not paid, the insured giving a note dated 20th March, 1896, at ninety days instead, the note providing that if it was not paid at maturity the policy should become null and void but subject, on subsequent payment, to reinstatement under the rules for lapsed policies. Payments on account of the note were made, and in February, 1898, the insured died.

Held, in an action by the beneficiary that the giving of the note was not a payment of the premium such as would entitle the insured to the extended insurance allowed in case three full annual premiums had been paid.

Statement.

ACTION on an insurance policy tried at Vancouver before IRVING, J., on 1st March, 1900. The facts appear fully in the judgment.

Wilson, Q.C., and *Bloomfield*, for plaintiff.
McPhillips, Q.C., for the defendants.

3rd March, 1900.

IRVING, J.: The plaintiff is the mother of one Charles Tilley, whose life the defendants had insured in her favour for $5,000.00 by a policy dated 27th June, 1894, and she sues for the amount of the policy. The policy was issued in consideration of a premium of $84.50 (paid at the time) and of the annual payment of a like sum to be made on or before the 20th of March in each and every year. The second premium which fell due on 20th March, 1895, was duly made. The third payment was not met but the Company accepted a note of which the following is a copy:

"Note $84.50.

"Toronto, 20th March, 1896.

"90 days after date I promise to pay to the Confederation Life Association or order, at the Head Office of the Association in Toronto, the sum of eighty four 50-100 Dollars with interest at 7 per cent. per annum till paid, being the renewal premium for an assurance under Policy No. 32,493 in the Confederation Life Association, on the life of myself. And it is understood and agreed that if this note is not paid at maturity, the policy shall forthwith become null and void. It is further agreed that should payment of this note be made subsequent to the date at which it becomes due such payment shall not be held to have put the policy in force, but the policy may be reinstated under the Rules of the Association for Lapsed Policies.

"(sd.) C. Tilley."

On this note the following payments were made: 18th of June, 1896, $15.00; 24th of August, 1896, $10.00; 22nd of October, 1896, $10.00; 23rd of October, 1896, $5.00; 27th of November, 1896, $20.00; in all $60.00.

Judgment.

Charles Tilley died on the 15th of February, 1898. At the time of the acceptance of the note, the Company delivered to the insured the Association's receipt signed by the Managing Director and countersigned by the agent holding the same. The receipt is as follows:

"CONFEDERATION LIFE ASSOCIATION.

"Premium $84.50.

"POLICY NO. 32493.

"On the life of C. Tilley.

"Received the sum of $84.50 (less temporary reduction, if any, as indicated in the margin hereof) being the..... yearly Renewal Premium from the 20th day of March, 1896, on the above policy.

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"This receipt is valid only when countersigned by the agent to whom payment must be made.

"Countersigned this 17th day of April, 1896.

"(sd.) J. K. Macdonald,
"Managing Director."

"J. J. Banfield,
"Agent at Vancouver.
"p J.P.N."

On the margin was written "Paid by note in terms thereof." It will be noticed that at the time of the death of the insured the sum of $24.50 remained unpaid on the note.

The defence was that by reason of the non-payment of the premium, that the policy had become void under a condition to that effect contained therein, and that by reason of the non-payment of the note at maturity the policy had not been revived or preserved.

The plaintiff and defendants relied upon the conditions of the policy. Mr. *Wilson* contended that the giving of the note was a complete accord and satisfaction of the Company's demand and that the assured was in good standing, and Mr. *Bloomfield* (on the same side) that the insured at all events was entitled to have the "equity" on the policy applied in the purchase of an extended insurance sufficient to cover the period.

Judgment.

By the first clause endorsed on the policy it is provided that if default be made in the payment of any note the policy shall cease and determine, except as provided under the Association's non-forfeiture provisions. The non-forfeiture provisions provide, in a case like the present where two full annual premiums have been paid, that in the event of the non-payment of any subsequent premium when due, the insured will be entitled to extended insurance for the full amount of the policy for such further period of time as is stated in the following table, *i.e.*:

If two full annual premiums have been paid for eight months extended insurance.

If three full annual premiums have been paid for two years extended insurance.

If this note is held to be payment of the premium the insured will be entitled to extended insurance up to 20th March, 1899.

If this note is not payment the insured will only be entitled to extended insurance up to 20th November, 1896.

The first clause provides that the policy shall cease and determine in the following cases: (1.) for non-payment of premium on the 20th of March; (2.) for non-payment of the note (if, as here, a note be accepted) on the 20th of June. Under this clause it seems clear that on the 21st of June, the policy ceased and determined except as provided under the non-forfeiture clauses.

When we apply those clauses to the facts we find that the period of extended assurance is a period of eight months, the extension runs from the 20th of March, 1896, *i.e.*, up to 20th of November, 1896.

Judgment.

Mr. *Wilson* asked: What does he receive for his note? The answer, I think, is, that by the acceptance of it he gained ninety days time. On the 20th of March, when the premium fell due the Company were entitled to say that this policy is at an end, subject to the extended assurance of eight months which will terminate on the 20th of November, 1896, but instead, they in consideration of his giving his note, extended the period for the determination of the policy until 20th June. I can see nothing in the wording of the note or of the other conditions in the policy extending the time.

The "equity" clause must, I think, in the absence of evidence of the meaning of that word, be taken to refer to the case where the policy has been mortgaged or pledged. If money has been advanced on the policy by the Company and the insured neglects to pay his premium, the Company's first interest would be to secure their debt; to do this they

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would ascertain the marketable value of the policy and then after satisfying their debt, the difference, which I take to be the "equity," would be applied in the purchase of extended assurance. That seems to me to put a less strained meaning on the word "equity" than that claimed for it by Mr. *Bloomfield.*

In such a case the preceding clause (giving the lender the right to extended assurance for the full amount according to the table), would not apply, but the rights of the insured would be regulated according to the state of the accounts, the insured receiving extended insurance in proportion to the amount coming to him in respect of this "equity."

The clause touching policies which may become claims by death within three years from the date of the first unpaid premium can only relate to those policies on which at least five full annual payments have been paid. Policies on which less than five premiums have been paid cannot ripen into claims by death within three years.

Judgment.

Then as to the effect of the Company's agent receiving payments on account; after the note had become due, the policy would, under the terms of the policy, except as provided under the non-forfeiture clauses cease and determine on the 20th of June, 1896. By the non-forfeiture clauses the insurance would remain in force till 20th November, 1896. Under the stipulation in the agreement or note if it is construed literally, the policy would become null and void if the note was not paid on the 20th of June. It was argued that the insured by signing this note placed himself in a worse position than he was before; that by signing it he agreed to renounce his right to extended insurance, and that any such agreement was invalid by reason of section 27, R.S.C. Cap. 124. In *Frank* v. *Sun Life Assurance Company of Canada* (1893), 20 A.R. 564, where there were no conditions on the policy, and a note somewhat similar to this was taken, effect was given to the note,

Osler and Maclennan, JJ.A., explaining that as the plaintiff could not succeed without it, he must be bound by its terms. But even apart from that, I do not see that the section in question is necessarily contravened if the parties by a subsequent collateral agreement meet together and determine upon what terms they will put an end to the policy.

Judgment for defendants with costs.

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Malicious prosecution—Reasonable and probable cause—Belief of defendant—Malice—Questions to jury.

In an action for malicious prosecution the Judge intimated that he thought there was no evidence to go to the jury, but he decided to let the case go to the jury so that the Full Court might have the benefit of the findings in case an appeal was taken.

The jury found that defendant had not taken reasonable care to inform himself of the facts before he proceeded against the plaintiff, and that he did not honestly believe in the charge, being actuated by an indirect motive, viz.: to obtain recompense for the loss of his horse. Damages were assessed at $200.00.

On motion for judgment, McCOLL, C.J., dismissed the action, holding that there was not a want of reasonable and probable cause.

Held, by the Full Court, reversing McCOLL, C.J., that on the findings the plaintiff was entitled to judgment.

Shrosbery v. *Osmaston* (1877), 37 L.T.N.S. 792, followed.

APPEAL from judgment of McCOLL, C.J., pronounced 26th April, 1899, dismissing the plaintiff's action for damages for malicious prosecution.

Statement.

The trial took place at Vancouver on 24th April, 1899, before McCOLL, C.J., and a common jury.

His Lordship held, that there was not a want of reasonable and probable cause, but stated that he would leave any questions counsel might desire to the jury in case they should find for the plaintiff and the Full Court should differ.

The jury returned the following verdict:

1. Did the defendant take reasonable care to inform himself of the facts of the case before he proceeded against the plaintiff? A. No.

2. Did the defendant honestly believe in the charge he laid before the magistrate? A. No.

3. Was the defendant actuated by malice or bad motive

in the proceedings taken against the plaintiff? A. Cannot agree.

4. Had the defendant any indirect wrong motive in bringing the prosecution before the magistrate, and if so what was it? A. Yes; to obtain recompense for the loss of his horse. We find damages for the plaintiff for $200.00.

Subsequently on 26th April, 1899, the following judgment was delivered by

McCOLL, C.J.: The plaintiff, a commercial traveller, wishing one afternoon at one o'clock to go from Cumberland to Courtney, a distance of six or seven miles, and return within two hours, got a horse and carriage for that purpose from the defendant, a livery stable keeper, a stranger to the plaintiff. About three o'clock the plaintiff went to the defendant's stable and told him that the horse, while being driven homewards, became unmanageable and ran away and had dropped dead by the roadside about a mile from the stable.

Judgment of McCOLL C.J.

The defendant went to the place at once and found the body very warm and froth coming from the mouth. He then claimed compensation from the plaintiff who refused it. Afterwards the defendant was informed by a person whom he knew named MacAbee, that he had met the plaintiff driving about a mile and a half from the place where the horse had fallen, that it was then in an exhausted condition evidently from its appearance owing to having been overdriven, that the defendant was driving with loose reins and that MacAbee thought at the time that only its "high life" was keeping it upon its feet and that he did not think it could have gone so far as it afterwards did go. MacAbee further said to the defendant that it was a shame the way the plaintiff had driven the horse and that the defendant ought to prosecute him. Upon this the defendant laid an information against the plaintiff for cruelty to the horse, but the magistrate, after the plaintiff had sworn that the

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horse had become uncontrollable after the time spoken of by MacAbee, dismissed the case with costs.

The plaintiff thereupon brought this action for damages for malicious prosecution.

The case was opened to the jury as if the horse was a very vicious one. It is sufficient upon this point to say that all the witnesses on both sides, with the exception of the plaintiff himself, agreed that the horse, though high spirited, had no vice, and that driven as it was with a curb had always been easily controlled. At the trial I intimated that I thought there was no evidence to go to the jury and that in my opinion the plaintiff's case had failed, but that I would leave any questions counsel might desire to the jury in case they should find for the plaintiff and the Full Court should differ.

Accordingly the first three questions were suggested for the defendant and the last for the plaintiff. I suppose the jury understood the words "malice or bad motive" in the third question as meaning spite, but the failure to answer it is immateral in view of the finding upon the last question.

Judgment of McCOLL, C.J.

The plaintiff is entitled to judgment if there was any evidence upon which they could reasonably find as they did. In my opinion the facts upon which the question of want of reasonable and probable cause depends are undisputed and if so the decision is for me alone. *Brown* v. *Hawkes* (1891), 2 Q.B. 718. It may be that if the defendant had laid the information merely upon what he inferred from the state in which he found the horse's body after hearing from the plaintiff his account of what had occured and after he had refused to compensate the defendant there would have been some evidence to go to the jury, for the defendant seems at that time to have acted as if he then considered the plaintiff to have been guilty of nothing worse than heedlessly allowing a too willing horse to run till it dropped.

But the defendant if he believed MacAbee whom he took to the magistrate before laying the information—and there

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is nothing in the evidence to warrant even a reasonable suspicion that he did not believe—was not only justified in bringing the charge, but in doing so, was merely performing a duty, which he owed to himself and to the public, and it is much to his credit that he acted as he did without waiting to renew his claim for the value of the horse.

The *Attorney-General* strongly urged that the question of the plaintiff's belief was for the jury and relied upon *Shrosbery* v. *Osmaston* (1877), 37 L.T.N.S. 792, as being directly in point, but the report of that case says that it was "nicely balanced for the jury." To give effect to this contention would be to yield up to the jury the absolute right of decision not only in every case in which the defendant has acted upon statements made to him, but whenever the plaintiff's actual guilt cannot be established. Judgment for the defendant with costs.

Judgment of McCOLL, C.J.

From this judgment the plaintiff appealed to the Full Court on the grounds amongst others, that the jury having found that the defendant did not honestly believe in the charge laid before the magistrate, the question of reasonable and probable cause could not be ruled in favour of the defendant, and the learned trial Judge erred in ruling that the question of the plaintiff's belief is not a question for the jury; that the jury having found that the defendant had an indirect wrong motive in bringing the prosecution, which motive the jury found was to obtain recompense for the loss of the defendant's horse, and the jury having found for the plaintiff, in damages, judgment should have been entered accordingly.

Statement.

The appeal came on at Vancouver on 25th January, 1900, before DRAKE, IRVING and MARTIN, JJ.

Martin, Q.C., for appellant: The Chief Justice found that there was not a want of reasonable and probable cause —that is a matter for the Judge and we appeal from his finding on it. The questions submitted are similar to the

Argument.

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questions in *Abrath* v. *North Eastern Railway Company* (1883), 11 Q.B.D. 440 and (1886), 11 App. Cas. 247. Reasonable and probable cause must exist in the mind of the prosecutor. The jury in answering question two in the negative rendered it impossible for the Judge to find there was not a want of reasonable and probable cause: See *Shrosbery* v. *Osmaston* (1877), 37 L.T.N.S. 792; *Hamilton* v. *Cousineau* (1892), 19 A.R. 203 at p. 218; Addison on Torts, 7th Ed., 224; *Brown* v. *Hawkes* (1891), 2 Q.B. 718. The Chief Justice should have found that there was evidence of want of reasonable and probable cause; and the answer to question two absolutely concludes the matter.

Argument.

Yarwood, for respondent: As to the respective duties of Judge and jury see *Archibald* v. *McLaren* (1892), 21 S.C.R. 588, and cases there cited. No facts are in dispute within the meaning of *Brown* v. *Hawkes*, *supra*: See also *Malcolm* v. *Perth Mutual Fire Insurance Company* (1898), 29 Ont. 717; *St. Denis* v. *Shoultz* (1898), 25 A.R. 131 and *Allen* v. *Flood* (1898), A.C. 1.

Cur. adv. vult.

22nd February, 1900.

Judgment of DRAKE, J.

DRAKE, J.: The jury in this case found in answer to questions submitted to them that the defendant did not take reasonable care to inform himself of the facts of the case before he proceeded against the plaintiff; and that he did not honestly believe in the charge he laid before the magistrate; and that the defendant had an indirect wrong motive in bringing the prosecution before the magistrate, namely, to obtain recompense for the loss of his horse.

The facts in this case are not in dispute as far as relates to the action of the defendant in instituting these proceedings; but the learned Judge who tried the case, after he had submitted to the jury the questions which resulted in the above findings, on motion for judgment came to the conclusion that as no facts were in reality in dispute he ought to have withdrawn the case from the jury, and decided it

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on the ground that there was no absence of reasonable and probable cause, and in the result he so decided it in favour of the defendant. The burden of proof of the absence of reasonable and probable cause lay on the plaintiff. See *Abrath* v. *The North Eastern Railway Company* (1886), 11 App. Cas. 247.

By putting the first question to the jury it in fact transferred to the jury the decision of what was reasonable and probable cause, and such a question should not be put. See judgment of Cave, J., in *Brown* v. *Hawkes* (1891), 2 Q.B. at p. 721, which met the approval of Bowen, L.J., in the same case on appeal.

But when such a question has been put and answered, and at the same time the jury have found that the defendant did not honestly believe in the charge he laid before the magistrate, but was actuated by an indirect motive, it seems impossible to say that the plaintiff was acting with reasonable and probable cause. *Shrosbery* v. *Osmaston* (1877), 37 L.T.N.S. 792. The plaintiff may have formed a belief in the defendant's guilt on insufficient foundation, but if he honestly entertained such a belief it is for the Judge to say if that constituted reasonable and probable cause. An unfounded charge, and not believed in by the prosecutor, shews an absence of reasonable cause, and when that is the case the law would imply malice. I think on the jury findings that the judgment ought to have been entered for the plaintiff. The fact that the Judge may not agree with the verdict is insufficient to set it aside if the verdict is one which reasonable men acting upon the evidence as a whole could properly have found, and we cannot say on reading the evidence that such is not the case here.

Judgment of DRAKE, J.

I think this appeal should be allowed with costs.

IRVING, J.: I concur.

MARTIN, J.: I agree that the appeal should be allowed with costs.

Appeal allowed with costs.

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CALDWELL *ET AL* v. DAVYS.

Mining law—Practice—Adverse claim—Onus of proof—Duty of counsel to press objection at trial.

In adverse proceedings the onus of proof is on the adverse claimant, who has to give affirmative evidence of his own title.

Counsel for adverse claimant in deference to a remark of the trial Judge, did not complete the proof of his own title.

Held, that he should have pressed to be allowed to complete it, but under the circumstances there should be a new trial.

APPEAL from judgment of the Chief Justice. The action was tried at Nelson on 28th June, 1898, and on 26th May, 1899, judgment as follows was delivered :

Judgment of McCOLL, C.J.

McCOLL, C.J.: At the trial which was held at Nelson on the 28th of June last, I came to the conclusion that I must find for the defendant on the ground that he was in actual occupation of and working the Red Star claim at the time of the alleged location of the Fair Play, following a former decision of mine (*Waterhouse* v. *Liftchild* (1897), 6 B.C. 424), that in such circumstance the ground was not open to location. I gave the plaintiffs an opportunity, however, of having a survey made to settle a dispute upon which the question of actual occupation depended.

A survey was accordingly made but not completed until March, when a plan was sent to me from which I understood the result to be in the plaintiffs' favour, and instructed the Registrar at Nelson to enter judgment for them. But before it was entered counsel for the defendant claimed that the survey really was upon the evidence in his favour, and I was desired to reconsider the evidence.

My note book having been lost at the time of the destruction by fire of the Court House at New Westminster, I am

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unfortunately without my memorandum of the arguments, and after perusing the evidence I am not quite clear as to the effect of it taken with the plan upon the point mentioned. I would therefore require a re-argument upon this question if necessary. But since the trial the Full Court have decided in the case of *Peters* v. *Sampson* (1898), 6 B.C. 405, in favour of the validity of a certificate of work though issued after the expiration of the statutory period, and the neglect to obtain a certificate of work in respect of the Red Star was the main ground relied upon by the plaintiffs.

Judgment of McColl, C.J.

I think therefore, that for the reason that I am bound by that authority, I must give judgment for the defendant. In the circumstances there will be no costs.

It is proper to expedite an appeal if desired, and an order ought to be made, if wished, for hearing at a special sitting of the Full Court which has been arranged to be held at Vancouver about the middle of next month.

From this judgment the plaintiff Caldwell appealed to the Full Court and the appeal came on for argument at Vancouver on 24th January, 1900, before Drake, Irving and Martin, JJ.

Argument.

MacNeill, Q.C., for appellant (also counsel in trial below): At the trial I was proceeding to prove title, inscription on posts, etc., and to do that produced the record. I then proposed to prove location affidavit, when the Chief Justice remarked that I had proved sufficient for a *prima facie* case, and to leave it to the other side for cross-examination, and that if anything turned upon the matter I could return to it afterwards; on that I dropped that branch. I would not say that *Bowes*, who was counsel for the defendant actually expressed his consent, but he acquiesced in that course of procedure.

Davis, Q.C., for respondent.

Cur. adv. vult.

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DRAKE, J.: This is an adverse action. The defendant Davys was the original locator of the Red Star mineral claim, and a considerable sum of money had been expended in working the same for lime used in the Hall Smelter.

Davys recorded the claim on the 27th of January, 1897, but failed to obtain a certificate of improvements until the 5th of February, 1898. In the meantime, one M. M. Grothe, recorded the same ground on the 28th of January, 1897, under the name of the Fair Play. The plaintiffs are now the assignees of Grothe.

The defendant by his defence alleged that this location of the Fair Play was invalid; first, that it was not located on unoccupied ground; second, that no legal stakes were posted thereon; third, the inscriptions on the stakes were insufficient; fourth, no blazed line; fifth, no mineral in place discovered.

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The plaintiffs' claim being thus attacked, they have to establish their rights. Grothe says he put in posts, a No. 1, and No. 2, and put the usual inscription thereon, and put the discovery post by the wharf. This is all the evidence he gives of compliance with the Act as regards location.

By section 131 the onus of proof is on the adverser and by section 11 of 1898, the adverser had further to give affirmative evidence of his own title.

The plaintiffs allege that they were prepared to do this, but did not do so owing to a remark of the learned Chief Justice who presided at the trial, to leave further proof to cross-examination. It was the duty of the plaintiff in view of the before mentioned section 11 of 1898 to insist on giving this proof, and on his failure to do so the trial Judge had to declare that he had not proved his claim.

On reference to the learned Chief Justice, it appears that neither he nor the stenographer had any note with reference to the plaintiff's allegation, but the Chief Justice has no doubt but that some such remark was made which

might have affected the evidence adduced. Under these circumstances we think there should be a new trial, but in doing so we must not be taken as laying down a rule that where counsel neglect to enforce their rights by pressing on the trial Judge their objection to any ruling of his so that the objection is clearly raised, he can obtain a new trial. It is laid down in numerous cases that a new trial will not be granted for an objection to the direction of the Judge at the trial, or to admission and rejection of evidence if such objection was not distinctly raised at the trial. It was the duty of counsel here to point out to the Judge the section before referred to. Under the circumstances, we think there should be a new trial, the costs of the first trial to abide the result of the second trial, and the costs of this appeal to be costs in the cause.

IRVING, J.: I concur.

MARTIN, J.: I agree that there should be a new trial.

New trial ordered.

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THURSTON v. TATTERSALL

THURSTON v. TATTERSALL.

Practice—On transfer to Supreme Court of County Court action—Can original claim be extended?

After an action has been transferred from the County Court to the Supreme Court the plaintiff can extend his claim beyond the sum he originally claimed in the County Court.

ACTION tried at Nelson before MARTIN, J., on 14th February, 1900.

Wilson, Q.C., and *F. Elliot* for plaintiff.

Macdonald, Q.C., and *Johnson*, for defendant.

28th March, 1900.

MARTIN, J.: In this matter the point reserved for my further consideration is—have I power to enter judgment in the plaintiff's favour for the full amount of his claim, $3,000.00, or only for $950.00, being the amount of the two actions in the County Court which were consolidated and transferred to this Court by the learned County Court Judge on the 28th of December, 1899.

Judgment.

The question is governed by section 69 of the County Courts Act, which directs that after transfer to this Court "the said action, suit or matter shall proceed in the Supreme Court, and any judge of the Supreme Court shall have power to regulate the whole of the procedure in the said action, suit or matter when so transferred." I have come to the conclusion that the words which direct that the action shall proceed in the Supreme Court, and be regulated by that Court, mean that any action which is so transferred shall become subject to the procedure of such Court, so that all matters arising out of the cause of action transferred to this Court may be completely and finally dealt with: the reason for the transfer to this Court is that there is a lack

of jurisdiction in the County Court, and I think it would defeat the intent of the statute to hold that the plaintiff could not extend his claim in this Court beyond the sum he originally claimed in the County Court in relation to the same subject matter. On the action being transferred to this Court the plaintiff properly delivered his statement of claim ; and rule 184 provides that whenever a statement of claim is delivered the plaintiff may therein alter, modify or extend his claim without any amendment of the indorsement of the writ. There is no good reason why this rule should not apply to plaints in actions transferred from the County Court as well as to writs in this Court.

Judgment should be entered for the plaintiff for $3,000.00 and costs.

Judgment for plaintiff.

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PENDER v. WAR EAGLE CONSOLIDATED MINING AND DEVELOPMENT CO., LIMITED.

Employers' Liability Act—Negligence—Accident in a mine—Excessive damages.

In an action under the Employers' Liability Act the jury found that defendants were guilty of negligence in not having a platform so fixed as to prevent drills which were thrown down from bounding into the tunnel and that plaintiff was unaware that drills were being thrown down when he was about to pass through the tunnel; and the jury assessed the damages at $3,000.00.

Held, by the Full Court, IRVING, J., dissenting, reversing WALKEM, J., who dismissed the action, that the defendants were liable but that the damages should be reduced to $500.00.

ACTION under the Employers' Liability Act for personal injuries. The plaintiff was a miner, and on 18th December, 1897, was employed by defendant Company in the War Eagle mine near Rossland. It was necessary for the plaintiff while going off shift to travel along No. 2 tunnel. The course along the tunnel passed an upraise, leading into the tunnel, and the upraise was so constructed that steel drills falling down it would fall into the tunnel. The upraise which began at the top of the wall of the tunnel extended upwards a distance of about seventy feet. The day the plaintiff was injured workmen were working in the drift at the top of the upraise, and at the time plaintiff was passing the mouth of the upraise going off shift, a steel drill was thrown down the upraise by said workmen in the course of their employment and struck plaintiff on the head, and injured him permanently.

Statement.

The plaintiff alleged that the construction of the upraise so that drills were allowed to fall in the tunnel, was a defect in the defendants' plant or way in the works of the mine, and he further alleged that the system of throwing drills down that raise was a defective system and that the defects

in the plant, way, and system were known to defendant Company.

The first trial resulted in favour of the plaintiff, but a new trial was ordered by the Full Court on appeal; on the second trial the jury failed to agree; and the third trial took place at Rossland on the 7th, 8th and 10th days of October, 1898, before WALKEM, J., and a special jury.

F. M. McLeod, for plaintiff.

Davis, Q.C., and *Galt*, for defendant.

The jury found in answer to the questions submitted to them by the Court as follows:

Statement.

"(1.) Was the plaintiff's injury caused by any negligence on the part of the defendants or their employees? If so state what the negligence was and who was guilty of it? A. (*a*) Jury believe defendant guilty of negligence; (*b*) Jury believe platform is not constructed so as to prevent drill steel from shooting out into the tunnel.

"(2.) Would an ordinarily careful man have passed the raise under all circumstances, as the plaintiff did? A. Jury believe that no ordinarily careful man would pass the east raise in question with the knowledge that drill steel was being thrown down. Jury is also of the opinion that plaintiff was not aware that drill steel was coming down at the time he passed.

"(3.) What damage, if any? A. The jury award damages of ($3,000.00) three thousand dollars to Pender the plaintiff."

On the motion for judgment his Lordship delivered on 27th October, 1898, the following opinion dismissing the action:

Judgment of WALKEM, J.

WALKEM, J.: This is a case arising out of the Employers' Liability Act, which, as is well known, is almost a transcript of the English Act on the same subject.

I am unable to agree with the verdict of the jury, which I think was influenced by sympathy for the unfortunate

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man who was injured. With this aspect of the case I have nothing to do beyond observing that, in my opinion, the plaintiff took the risk of the defect, which he seemed to have known of, without having communicated it to his employers; for the evidence shews that in passing the chute when the drills were being thrown down, he used the words, "to hell with them." In taking this risk he was injured and now sues his employers.

Under section 7 of the Employers' Liability Act, "A workman shall not be entitled under this Act to any right of compensation or remedy against an employer where (see sub-section 3) the workman knew of the defect or negligence which caused his injury, and failed, without reasonable excuse, to give or cause to be given, within a reasonable time, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence."

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In commenting on this section Lord Watson says, in the well-known case of *Smith* v. *Baker & Sons* (1891), A.C. 356: "I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer; but as was forcibly pointed out by Lord Esher, M.R., in *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 688, in cases where the employer and his deputies were personally ignorant of the defect, it is made a condition precedent of the workman's right to recover that he shall have given them information of it before he was injured."

This disposes of Mr. *McLeod's* contention that the plaintiff is entitled to recover independently of the statute, for as pointed out in the above judgments which Mr. *McLeod*

has perhaps overlooked, the common law doctrines as to negligence between employer and employee, have been materially modified by the Legislature.

Now, in this case, there was not a shred of evidence to shew that the defendant Company, or their employees, had been informed of, or had known of, the alleged defect which caused the injury to the plaintiff. On the contrary, the effort of the plaintiff's counsel was to prove that the defect which caused the injury to his client consisted in the want of: (*a*) a bucket and a windlass ; (*b*) What is known to miners as a "go-devil ;" (*c*) A properly constructed bulkhead at the foot of the chute as a lodgment for the drills thrown down ; (*d*) A drill chute, which was described by a witness as similar to a timber chute ; (*e*) A man at the bottom of the chute to give warning. It will be thus apparent that the alleged defect which for the first time was brought out in the plaintiff's evidence, was sprung upon the defendant Company who were consequently unprepared to meet that evidence. Mr. *Galt*, for the defendant Company, objected to the evidence as the plaintiff's pleadings were silent as to it and therefore did not warrant its admission. I allowed it, however, to go in subject to its being ruled out when I knew something more of the case. The evidence was clearly inadmissible.

In view of the judgment of the House of Lords in *Smith* v. *Baker & Sons*, *supra*, as well as the case referred to in it of *Sword* v. *Cameron*, 1 Sc. Sess. Cas. 2nd Series, 493, I must direct judgment to be entered for the defendant Company, with costs.

Before closing, I might observe that the second finding of the jury is that they believe that the platform is not constructed so as to prevent drill steel from shooting out into the tunnel.

There is no question in the pleadings about a platform, nor any allegation of a defect in platform. This platform was constructed at the bottom of the chute in question, to

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receive the drills on their being thrown down. Out of fourteen drills that were thrown down when a view was had of the defendant's tunnel or car level, only one bounded from the platform to the car level a few feet below. I mention this merely because the jury have found what they were not asked to find, and what the pleadings did not require any findings upon.

The plaintiff appealed to the Full Court and the appeal came on for argument at Victoria on 7th September, 1899, before McColl, C.J., Drake, Irving and Martin, JJ.

Argument.

W. J. Taylor, Q.C., for appellant: The plaintiff is absolutely entitled to judgment. The amount awarded ($3,000.00) represents plaintiff's earning power for three years and is within the limit.

Cassidy, on the same side, objected to a new trial as there was nothing to indicate that defendant Company did not have a fair trial.

Galt, for respondent: The only negligence found by the jury was that the platform at the foot of the raise was not constructed so as to prevent drill steel from shooting out into the tunnel. No evidence with regard to this platform was adduced by the plaintiff at the last trial (although some evidence was adduced at a previous trial) and consequently the defendants abstained from calling evidence on the point. It would be manifestly unfair to allow a finding to stand unsupported by evidence; and the learned Judge was perfectly right in disregarding the finding.

The maxim *res ipsa loquitur* is inapplicable, for the falling of the drill was not the result of any unusual act of the defendants; that was an unusual event which happened while the defendants were pursuing their usual course; Smith on Negligence, 247.

Even if the state of the platform was defective, in the particular complained of, the defect was discovered for the first time when the plaintiff was hurt; and in such a case

the employer is not liable; *Smith* v. *Baker & Sons* (1891), A.C. 325 at pp. 355 and 356.

The case of *Weblin* v. *Ballard* (1886), 17 Q.B.D. 122, relied upon by the appellant, has been practically overruled: see *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. at p. 699.

In any case the damages are excessive.

Taylor, in reply, cited *Weblin* v. *Ballard* (1886), 17 Q.B.D. 124; *Thompson* v. *Wright* (1892), 22 Ont. at p. 131 and *Sewell* v. *The British Columbia Towing and Transportation Company, Limited* (1884), 9 S.C.R. 527.

Cur. adv. vult.

12th September, 1899.

Judgment of McCOLL C.J.

McCOLL, C.J.: As the rest of the Court have arrived at a conclusion which makes it unnecessary for this Court further to protract this unfortunate litigation, I do not dissent, but I say so reluctantly as regards the result to the parties.

Judgment of DRAKE, J.

DRAKE, J.: The jury in this case found the following facts in answer to questions submitted by the learned Judge: That the defendants were guilty of negligence in not having the platform so constructed as to prevent drill steel from shooting into the tunnel, and that the plaintiff was not aware that drill steel was coming down at the time he passed.

On the motion for judgment the learned Judge entered judgment for the defendants, from which judgment the plaintiff now appeals. The evidence was very voluminous, and of a contradictory character, but there was evidence in support of the jury findings; and, although the learned trial Judge disagreed with the verdict, that alone is not sufficient to entitle the defendants to have judgment entered in their favour, if the verdict is one which reasonable men acting reasonably might have given based on the evidence

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adduced. The reasons given by the learned Judge are that the plaintiff took upon himself the risk of the defect of the workings and did not communicate the same to his employers, and that the alleged defect of an improperly constructed platform was not raised in the pleadings. This involves a reference to the evidence. I think it is reasonably clear that it was one of the arrangements of the mine that when working in a winze or upraise, the drills as they require sharpening are thrown down for the purpose of being carried away for repair. A platform of wood was constructed for receiving the drills, and occasionally a drill either missed the platform or bounded off it and fell into the tunnel. The defendants were quite aware that there was some risk to those in passing along the tunnel, for before drills were thrown down the man above shouted to give notice to anyone in the tunnel. If there was no danger from a falling drill this precaution was needless. So it is clear that the defendants recognized that there was a risk in the operation which they endeavoured to guard against. This mode of dealing with the drills was a part of the general arrangements of the mine, and a practice which might at any time lead to an accident. It must be held to be one of those defects of which the defendants were aware. Section 7 of the Act, which takes away the workman's remedy in cases when the workman knew of the defect or negligence, and failed to give notice to his superior, does not apply when it is shewn that the superior was aware of the alleged defect or negligence.

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It appears to me that the question of negligence must be considered with reference to the character of the work required from the employee. If it is one of risk a duty lies in the employer to minimize that risk as much as possible ; and although the employee knows of the risk, and although he may have considered the precautions taken insufficient, yet this of itself is not sufficient to get rid of the *prima facie* liability of the employer. *Smith* v. *Baker & Sons* (1891), A.

C. at p. 362 establishes this proposition where Lord Herschell says: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk." And Smith, L.J., in *Williams* v. *Birmingham Battery and Metal Company* (1899), 2 Q.B. at p. 343, adopts this language and continues: "This being the master's duty, if he knowingly does not perform it, it follows that he is guilty of negligence." The appliances here alleged to be sufficient were the platform to receive the drills, and the warning given by the man sending them down. The findings of the jury point to a want of reasonable care, and it may be inferred from those findings that the warning, if given, was considered insufficient. It is true there is evidence that shouts of warning were given, and that the plaintiff refused to pay attention. But the jury have accepted the plaintiff's evidence in denial in preference to that of the defendants. There have been no less than three trials of this action. On the first, which was in favour of the plaintiff, a new trial was ordered for sufficient reasons. On the second the jury failed to agree, and on the third there was also a verdict in his favour. Unless, therefore, there has been a manifest miscarriage of justice I should hesitate to send the case down for trial again. But it does appear to me that the amount of damages given is excessive, and as we have the power to enter such a judgment as the Court should have given, when we have all the facts before us, which we have in this case, I think the judgment should be reversed, and entered for the plaintiff, but for an amount of $500.00, which sum counsel informs us the plaintiff is willing to accept, and under the authority of *Belt* v. *Lawes* (1884), 12 Q.B.D. 356 the Court has the power to deal with.

Judgment of DRAKE, J.

The plaintiff is entitled to costs in the Court below

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and of this appeal except as to the costs of the second or abortive trial on which there will be no costs.

MARTIN, J.: I agree that there should be judgment for the plaintiff for $500.00. In a case like the present where there have been three trials already, I do not think a fourth should be ordered unless there is no other course open to us by which justice may be done between the parties. On the question of negligence I may refer to the case of *Wilson* v. *Boulter* (1899), 26 A.R. 184, at pp. 193, 196 and 197. The plaintiff should have the costs of the former trials (other than the abortive second trial) and of this appeal.

Appeal allowed with costs.

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Practice—Privilege—Photographs.

Photographs sworn to be part of the materials of the defendants' evidence in the action are privileged from production.

Documents sworn to be called into existence in the *bona fide* belief that litigation might ensue are not for this reason only privileged from production.

SUMMONS by plaintiff for inspection. The action was for an injunction and for damages against defendants who had erected a building next to plaintiff's building and thereby shut out free access of light. In the affidavit of documents filed by defendants they objected to produce (1.) Photo shewing part of the premises occupied by defendants prior to the erection of the building complained of in the action; (2.) Photo shewing part of the premises occupied by the plaintiff and part of the premises occupied by the defendants prior to the erection of the building complained of in the action. The defendants claimed that the photographs were privileged upon the grounds (1.) That the same were called into existence by the defendants in the *bona fide* belief that litigation might ensue and in view of the present action; (2.) That the same form part of the materials of the defendants' evidence in the action.

Statement.

Barnard, for the summons: As to the first ground it is insufficient to protect the documents. The affidavit should go further and state that the documents were called into existence by or through the instrumentality of the solicitor or with a *bona fide* intention of being laid before him for his advice, otherwise they were not privileged; *Lyell* v. *Kennedy* (1884), 27 Ch. D. 1, Cotton, L. J.; *The Southwark and Vauxhall Water Company* v. *Quick* (1878), 3 Q. B. D.

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315; *Anderson* v. *Bank of British Columbia* (1876), 2 Ch. D. 644; *Westinghouse* v. *Midland Railway Company* (1883), 48 L. T. N. S. 462; *The London, Tilbury and Southend Railway Company* v. *Kirk and Randall* (1884), 51 L. T. N. S. 599; Annual Practice, 383. As to the second ground, the relevancy of the documents being admitted, the affidavit should shew that the documents relate solely to the case of the defendants and not to that of the plaintiff; Bray on Discovery 482, and cases there cited. Even if they are not evidence in themselves, but merely materials for evidence, it should have been stated in order to protect them that they were called into existence through the instrumentality of the solicitor, for the employment of the solicitor is the very ground of privilege. See judgment of Cotton, L. J., in *Lyell* v. *Kennedy* (1884), 27 Ch. D. at p. 25. There the documents were called into existence before the cause of action arose. In no case under such circumstances have documents been held to be privileged. *Bustros* v. *White* (1876), 1 Q. B. D. 423; *Felkin* v. *Lord Herbert* (1861), 30 L. J., Ch. 798, were also referred to.

Argument.

Bradburn, contra: The photographs having come into existence in view of a threatened or expected action, with a view of having same laid before solicitors are privileged. *Collins* v. *London General Omnibus Company* (1893), 68 L.T. N.S. 831; *The Southwark and Vauxhall Water Company* v. *Quick* (1878), 3 Q.B.D. 315; *Anderson* v. *Bank of British Columbia* (1876), 2 Ch.D. 644, relied on by plaintiff is distinguished in the judgment in *Collins* v. *London General Omnibus Company, supra.* The photographs are also privileged on the ground that an inspection thereof would disclose details of the defendants' evidence. *Benbow* v. *Low* (1880), 16 Ch.D. 93; *In re W. H. Strachan* (1895), 1 Ch. at pp. 445, 447 and 448.

Judgment.

MARTIN, J.: As to the first ground of privilege claimed, all that the affidavit sets out is that the documents were

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called into existence in the *bona fide* belief that litigation might ensue and in view of the present action; this is clearly insufficient according to the authorities cited.

As to the second ground, I think it should prevail, because to allow an inspection of photographs (which differ materially from what are ordinarily included in the term "documents") would be, at least in this case, to disclose materials for evidence, and no case has been cited which goes that far.

Application refused, costs to defendants in any event.

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Practice—Cross-examination of deponent on affidavit—Rules 385, 401 and 429.

Rules 385 and 429 taken together compel the production for cross-examination of a deponent on his affidavit if required by the opposite party before such affidavit can be used.

MOTION for injunction.

Argument.

Duff, for defendant, objected to plaintiff's affidavit being read as he had served notice asking that plaintiff be produced for cross-examination on his affidavit, but plaintiff had objected to being cross-examined. He cited rules 385 and 429; *Concha* v. *Concha* (1886), 11 A.C. 541; *Mansel* v. *Clanricarde* (1885), 54 L.J., Ch. 982 at pp. 984 and 985 where Kay, J., says: "It seems to me the meaning is unmistakable, as I have already pointed out—namely, that the

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practice as to the examination, cross-examination, and re-examination of witnesses is to be the same both at the trial and at any other stage of the action. The practice at the trial being laid down by Order XXXVIII., rule 28, in express language, Order XXXVII., rule 22, must be read in the same way as if that language were there repeated."

Argument.

Harold Robertson, for plaintiff. The defendant has not made an affidavit of merits and so cannot demand cross-examination: See *Leavock* v. *West et al* (1897), 6 B.C. 404.

Judgment.

MARTIN, J.: Under the authority of *Mansel* v. *Clanricarde*, *supra*, approved in *Emerson* v. *Irving* (1895), 4 B.C. 56, rule 429 applies to the cross-examination of a witness on affidavit before trial. The cross-examination of the deponent is not a matter of judicial discretion but a right derived from the rule which provides a penalty for failure to produce, and even that penalty does not relieve from the obligation to attend—*In re Baker* (1885), 29 Ch.D. 711, wherein the practice is considered. The case of *Leavock* v. *West et al*, *supra*, decided in Chambers, is a binding authority on the rule to which it relates, but the defendant here resorts to a quite distinct procedure. Unless the deponent is produced for cross-examination his affidavit must not be used.

WESTPHALEN v. EDMONDS.

IRVING, J.

1899.

March 21.

WEST-PHALEN v. EDMONDS

Practice—Cross-examination of deponent on affidavit—Rules 385, 401 and 429.

Rules 385 and 429 taken together compel the production for cross-examination of a deponent on his affidavit if required by the opposite party before such affidavit can be used.

SUMMONS for discharge from custody of defendant, who was held under a writ of *capias ad respondendum.* An affidavit made by defendant was filed on his behalf, and the solicitor for plaintiff served notice requiring production of defendant (who was on bail) for cross-examination on his affidavit. Defendant did not attend for examination, and on the return of the summons, *Higgins* objected to defendant's affidavit being read as he had not attended.

Statement.

G. E. Powell, for defendant.

IRVING, J., held that unless defendant was produced for examination the affidavit could not be read, and adjourned the summons so that defendant might attend as required.

Judgment.

COURT OF CRIMINAL APPEAL

1900.

Feb. 9.

REGINA v. PETRIE

REGINA v. PETRIE.

Criminal law—Common gaming house—Black jack—Criminal Code, Sec. 196.

Certain persons played the game called black jack in a room to which the public had access, there being no constant dealer.

Held, that the lessee of the room was legally convicted of keeping a common gaming house.

CASE reserved for the Court of Appeal by IRVING, J., pursuant to section 743 of the Criminal Code as follows: "The prisoner was convicted before me under the Speedy Trials Act for keeping a common gaming house. I convicted him; but at the request of the prisoner's counsel, reserved the following questions:

Statement.

"(1.) Was the building in the rear of the Savoy rented by Petrie from Innes, Richards & Ackroyd, as shewn in the evidence herein, a house, room or place kept or used for playing therein at any game of chance or any mixed game of chance and skill?

"(2.) Was the game which was being played, as shewn in the evidence, in said building at time of Petrie's arrest a game in which 'a bank is kept by one or more of the players exclusively of the others?'

"(3.) Was the game which was being played, as shewn in the evidence, in said building at time of Petrie's arrest 'a game the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet?'"

"I found against the prisoner on each of these points. Should the Court be of opinion, (*a*) That the first question

ought to be answered in the negative or (*b*) That both the second and third questions ought to have been answered in the negative, the conviction will be quashed unless the Court is of opinion that the conviction can be supported as an offence at common law.

"I reserved sentence."

Black jack was the game played and the following description of the game as played was agreed on by counsel at the trial :

"The game is played by two or more players and generally with one pack of cards. After determining among themselves (the players) either by lot or otherwise who shall be dealer, the bets are made before any cards are dealt. The dealer then deals two cards to each player and two to himself, one at a time, but two are dealt to each player and two to himself, and if on examining his own hand he finds he has a black jack, that is to say, any one of the court cards or a ten-spot with an ace, he takes in all the bets that are made, except some one or more of the players have also a black jack as just described, in which case no money passes between those two. Assuming that he has not a black jack, beginning with the player on his left he asks them whether or not they will take cards. They then, looking at their own hands, decide in their own minds after examining the number of pips, whether they will draw cards. The cards are turned face up, and if the player has more than twenty-one he is 'bust' and the bet is taken by the dealer without reference to the number in his own hand. This goes on through all the players, some deciding to stand on their own hands without drawing cards, others drawing one or more. The dealer then determines whether or not he will draw cards, and whether he pays or receives from the other players who have not 'busted' is determined by the nearness to the number twenty-one. If he 'busts,' that is, if he draws more than twenty-one, he pays all those that have a lesser number who have not already paid him. If

Statement.

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any player other than the dealer has a black jack, the dealer not having a black jack or twenty-one, composed of a court card, a ten-spot and an ace, the player so having a black jack takes the deal."

The question was argued at Vancouver before McCOLL, C.J., DRAKE, IRVING and MARTIN, JJ., on the 25th of January, 1900.

Argument.

Davis, Q.C., for the prisoner: The English Acts are different and are aimed at unlawful games, but section 196 of the Code aims only at the games therein mentioned. The game here played was alike favourable to all the players; it may be that after the deal is obtained the dealer has an advantage, but it must be remembered that the chances of obtaining the deal are equal. The fact that the deal begins and changes by chance instead of rotation does not alter the case. The dealer is not strictly speaking a "banker;" but assuming he is he cannot keep it exclusively of the others. Only a certain kind of bank is aimed at by the Code such as when under the rules of the game there are certain players who never could get the bank, *e.g.*, roulette.

Wilson, Q.C., for the Crown: In *Jenks* v. *Turpin* (1884), 13 Q.B.D. 505, baccarat was decided to be unlawful and baccarat and black jack are the same game except that the object in the former is to get nine whereas in the latter it is to get twenty-one. The intention of the Code is to strike at all banking games, and the mere fact of the bank passing from hand to hand does not take it out of the category of games in which a bank is kept by one or more of the players exclusively of the others. He cited *Fairtlough* v. *Whitmore* (1895), 64 L.J., Ch. 386.

Brydone-Jack, on the same side: It is an offence at common law. He cited *Reg.* v. *Shaw* (1887), 4 Man. 404; *The King* v. *Dixon* (1795), 10 Mod. 336; *The King* v. *Rogier and Humphrey* (1823), 25 R.R. 393; *Hamilton* v. *Massie et al*

(1889), 18 Ont. 598; *Arthur* v. *Bokenham* (1796), 11 Mod. 150; *The Queen* v. *Ashton* (1852), 1 E. & B. 289; *Patten* v. *Rhymer* (1860), 3 E. & E. 1 and *Regina* v. *Ah Pow* (1880), 1 B.C. 151 (Part 1.)

Argument.

Davis, in reply: Apart from the question as to whether common law applies when the subject is specially dealt with in the Code, we have here a statutory offence defined, and even were the charge laid under the common law the offence would have to be that defined in the Code; it could not be said, *e.g.*, that there could be two kinds of murder. He distinguished *Jenks* v. *Turpin*, *supra*; there, there was nothing in the rules to compel a player to take the bank in his turn—he could refuse it, but here he must play the bank in his turn.

Cur. adv. vult.

9th February, 1900.

Judgment of McColl, C.J.

McColl, C.J.: The last clause of section 196 of the Code contains, as a definition of a common gaming house, one "in which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet.

It is admitted that the person, who may be sufficiently described as the banker, in the game in question has at least a slight advantage over the other players, and it is certain that his and their chances are not equal. That the advantage may be slight; that each player has an equal chance of securing it; and that it can be obtained only in the course, and by means, of the game itself, cannot, in my opinion, make any difference. The point is that the banker, while banker, has some advantage, or is under some disadvantage, and this is, it seems to me, just what is forbidden.

It was urged that the persons aimed at are only those

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who are bankers by some arrangement outside of the game. But they are provided for by the clause immediately preceding the one now under discussion. That clause relates to a house, etc., "in which a bank is kept by one or more of the players exclusively of the others." And, apart from this, the rule applicable to the construction of the Code is thus stated by Lord Herschell in *The Governor and Company of the Bank of England* v. *Vagliano Brothers* (1891), A.C. at pp. 144 and 145: "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities."

Judgment of McCOLL, C.J.

The language of the particular clause in question has not any settled technical meaning nor is it of uncertain import, and therefore applying to it this rule I have no doubt that the conviction ought to be affirmed.

DRAKE, J.: The defendant was convicted of keeping a common gaming house. There is no evidence that the defendant kept the room for gain, and this part of the case was abandoned.

The Code, by section 196, sub-section (*b*), defines a common gaming house as a house, room or place kept or used for playing therein any game of chance, or mixed game of chance or skill in which a bank is kept by one or more players exclusively of the others—or in which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play or bet.

Judgment of DRAKE, J.

The game played in the defendant's room to which the

public were admitted indiscriminately was called black jack.

This section in the Code is almost a transcript of section 2, of 8 and 9 Vict. 109, but it omits all reference to unlawful games as defined by certain English Statutes, and sweeps into one general definition of a gaming house as a house or room kept for playing any game of chance or mixed game of chance or skill. The statute is not intended to affect games of skill, but where chance is the main element in the game then the Act applies.

From the above description black jack is in my opinion a game of chance. Possibly experience may benefit a player, but it is not less a game of chance, and it is a game in which the dealer or manager of the game is a banker for the time being, the bets of the players being limited to the amount he has placed on the table; and the defendant admitted that there was an advantage in having the deal. What the value of that advantage is, whether great or small is not stated, but if there is any advantage in being banker or dealer over the other players the Act applies.

The game of black jack is described as played by two or more persons. The persons playing, except the dealer, make their bets, and then two cards are dealt to each, the object being to obtain twenty-one, and after the cards are dealt any of the players can call for more cards; if the additional card or cards make more than twenty-one the player pays his stake to the dealer, and all the players may have to pay without the dealer being called upon to look at his cards. If any player has black jack as well as the dealer the bet is drawn; if the dealer has black jack he sweeps the board. If any of the players draw twenty-one or less, then the dealer looks at his cards, and if he thinks proper draws an additional card or cards, and on the cards being shewn he pays or receives according to whether his cards are higher or lower than the other players, and he keeps the deal until some one of the players obtains twenty-one, and then the

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Judgment of DRAKE, J.

deal passes. There is very little difference between this game and baccarat in principle. In the latter game the dealer is called the banker, and keeps the deal until the amount which he declared the bank to contain is exhausted. Baccarat is declared to be an unlawful game in *Jenks* v. *Turpin* (1884), 13 Q.B.D. 505, and the game of black jack is clearly a game of chance in which the dealer is the one against whom the other players stake, play or bet, and as against the players the chances are in favour of the dealer. It is true that the deal may pass very speedily, but in my opinion the dealer while in that position falls within the language of sub-section 2 of section 196 before referred to, for the dealer has an advantage over the other players. Therefore under the Code the room or building occupied by the defendant becomes a common gaming house, because it is a place used or kept for playing therein at a game of mixed chance and skill, in which the players stake, play or bet against the manager of the game, and in my opinion the conviction should be affirmed.

MARTIN, J., concurred in affirming the conviction.

Conviction affirmed.

NOTE.—Subsequently the prisoner was brought before IRVING, J., and fined $200.00.

ROGERS v. REED.

FULL COURT
At Victoria.
1900.
Jan. 9.
ROGERS
v.
REED

Practice—Security for costs of appeal—How application should be made.

Applications for security for costs of appeal to the Full Court should be made to a Judge in Chambers and not to the Full Court.

MOTION to the Full Court (all the members present) at Victoria on 8th January, 1900, for security for costs of appeal from an order under Order XIV.

A. E. McPhillips, for the motion.

Duff, contra.

The application was remitted to Chambers and the next day the following judgment of the Court was delivered by

McCOLL, C.J.: This is an appeal from Judge FORIN, Local Judge for the County of Kootenay.

Mr. *A. E. McPhillips* applies for security for costs of the appeal, stating as his grounds for not applying in Chambers that the application there would have to be in Kootenay, in the Registry of which County the proceedings have been taken, and that there was not sufficient time for this. But it was held in the Divisional Court, *In re Ellard* (1892), 2 B.C. 235, that a Judge in Chambers has jurisdiction to entertain an application made by summons issued out of a Registry other than that out of which the writ of summons issued; and it is expressly provided by the Supreme Court Act Amendment Act, 1899, Sec. 7, that applications to Court or in Chambers where the proceedings commenced in a Registry other than at Victoria, Vancouver or New Westminster, may be made either at Victoria or Vancouver.

Judgment.

It is extremely inconvenient that the time of the Full Court should be occupied with applications which can be as

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well disposed of in Chambers, and I think that unless there is some good cause for applying in the first instance to the Full Court this should not be done. What will be good cause must of course depend upon the particular circumstances of the case.

As Mr. *Duff* opposes the motion, and states that it will require some discussion, I think that the present application should be remitted to Chambers, and that there should be no costs of this application.

FULL COURT
At Victoria.
1900.
Jan. 9.

HALEY
v.
McLAREN

HALEY v. McLAREN.

Practice—Extending time for depositing appeal books—How application for should be made.

Appeal books were not deposited in time and on an application to extend the time, it was

Held, by the Full Court, that such applications should be made as soon as possible to a Judge in Chambers if the Full Court is not sitting at the time, but if so sitting that the better course is to apply at once to the Full Court.

Statement.

MOTION to the Full Court at Victoria (all the members present) on 8th January, 1900, for an extension of time for depositing copies of appeal books.

Galt, for motion.

Duff, contra.

The application was allowed and the case put at the foot of the list. The next day the following judgment of the Court was delivered by

FULL COURT
At Victoria.
1900.
Jan. 9.

HALEY
v.
McLAREN

McCOLL, C.J.: In this case Mr. *Galt* applies to extend the time for depositing copies of appeal books on the ground that they were left at the Post Office in Rossland in time to arrive at Victoria within the necessary period, but were delayed on the way.

We are asked to express our opinion whether applications of this kind ought to be made in Chambers or to the Full Court.

Judgment.

I think that the application ought to be made as soon as possible, and to a Judge in Chambers if the Full Court is not sitting at the time. In many cases, as in the present, the only question is upon what terms the order ought to be made, and in a doubtful case the Judge can refer the application to the Full Court. If the Full Court is sitting at the time I think the better course is to apply there in the first instance.

NOTE.—The same course was taken by the Court on the same day in the case of Sullivan v. Jackson.

MARTIN, J.

1900.

March 31.

GRUTCHFIELD v. HARBOTTLE

GRUTCHFIELD v. HARBOTTLE.

Mining law—Failure to record transfer of mineral claim—Right of locator subsequent to such transfer—Mineral Act, Secs. 9, 49 and 50.

In May, 1897, B. located and recorded the May Day claim and six days after location conveyed a half-interest to defendant by a bill of sale which was not recorded till April, 1898. B's free miner's certificate lapsed in July, 1897, and in October, 1897, the plaintiff, a free miner, relocated the May Day as the Equalizer claim.

Held, in adverse proceedings that the defendant's title could not prevail against the plaintiff.

ADVERSE claim tried at Nelson on 16th February, 1900, before MARTIN, J.

Galliher and *P. E. Wilson,* for plaintiff.

S. S. Taylor, Q.C., for defendant.

31st March, 1900.

Judgment.

MARTIN, J.: In May, 1897, one Beadles located and duly recorded the May Day mineral claim, and six days after location, by bill of sale conveyed a half-interest therein to the defendant. The bill of sale was not recorded till the 29th day of April, 1898, and in the meantime two things had happened, (1.) Beadle's free miner's certificate had lapsed (on July 23rd, 1897), and (2.) the plaintiff, a free miner, had on the 30th of October, 1897, relocated the May Day as the Equalizer claim.

Section 9 of the Mineral Act declares that " .....on the expiration of a free miner's certificate the owner thereof shall absolutely forfeit all his rights and interests in or to any mineral claim, etc., ... Provided, nevertheless, should any co-owner fail to keep up his free miner's certificate, such failure shall not cause a forfeiture or act as an abandonment of the claim, but the interest of the co-owner

who shall fail to keep up his free miner's certificate shall, *ipso facto*, be and become vested in his co-owners *pro rata*, according to their former interests....."

Applying this proviso to this case the result is that on the lapse of Beadles' certificate his half-interest in the May Day became vested in his former co-owner, the defendant. If the defendant had then recorded his bill of sale his position would have been unassailable, but he did not do so till some considerable time after the plaintiff had located the Equalizer on the May Day ground.

Section 49 of the Mineral Act provides: "Every conveyance, bill of sale, mortgage, or other document of title relating to any mineral claim, not held as real estate, or mining interest, shall be recorded within the time prescribed for recording mineral claims: Provided, always, that the failure to so record any such document shall not invalidate the same as between the parties thereto, but such documents as to third parties shall take effect from the date of record, and not from the date of such document."

Under this section as between the parties to the instrument there is no penalty, but as regards others, *i.e.*, "third parties," the penalty is that the document in question "shall take effect from the date of record, and not from the date of such document."

The argument of the defendant's counsel that section 49 must be read with section 50 is answered by the judgment of Mr. Justice McCreight in *Atkins* v. *Coy* (1896), 5 B.C., at pp. 14 to 16, wherein the effect of the corresponding sections, 50 and 51, of the Mineral Act of 1891, was considered. That judgment shews, it seems to me, that the defendant having failed to record his conveyance before the plaintiff located the claim must suffer the penalty prescribed by the statute, which is that he can only ask this Court to give effect to such conveyance from the date of its record, and since, owing to the plaintiff having intervened and acquired rights as a locator under the Mineral Act, there is nothing

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Judgment.

that the conveyance can operate on (at least so long as the plaintiff or his successors remain the owners of the claim) no effect can be at present given to the conveyance.

I might add that I am entirely in accord with the remarks of Mr. Justice McCREIGHT in *Atkins* v. *Coy*, *supra*, regarding the value of sections 50 and 51, now 49 and 50, for the purpose of preventing frauds. It may be that the section has operated hardly on the defendant in this case, but it is necessary for the protection of the public that it should be maintained in its entirety.

Taking the above view the question as to whether the plaintiff had notice of the defendant's interest before he located the Equalizer becomes unimportant, though possibly in view of what occurred at the trial it is proper for me to state that the evidence was not strong enough to satisfy me that he had such notice.

Section 28 was cited by the defendant's counsel in support of his case, but I cannot see that it applies to the circumstances to be dealt with here.

Judgment for plaintiff.

SUN LIFE v. ELLIOTT *ET AL.*

FULL COURT
At Vancouver.
1900.
Jan. 23.

SUN LIFE
v.
ELLIOTT

Fraudulent conveyance—Counsel electing to take judgment in lieu of issue being ordered—Effect of—Whether such judgment appealable.

Plaintiffs' counsel, on motion for judgment after trial, was given the option of having an issue ordered as to a point on which evidence was not sufficiently directed or of taking judgment against one defendant with costs and dismissing the action against the other defendant without costs, and elected to take the latter course.

Held, IRVING, J., dissenting, that such judgment was in effect a compromise and therefore unappealable.

APPEAL from a decision of McCOLL, C.J., who in an action brought to set aside as fraudulent under the statute of Elizabeth, conveyances made by Henry Elliott in his lifetime in favour of his wife and daughter, set aside the conveyance to the daughter but dismissed the action as against Mrs. Elliott. The following statement of facts is taken from the judgment of IRVING, J.:

Statement.

"On 12th September, 1892, the late Henry Elliott, then being in good circumstances, borrowed from the plaintiffs the sum of $12,000.00 repayable in instalments of $500.00 a year, and as security gave a mortgage on 905 acres of land situate on Annacis Island. He had, about a year or so before this, retired from business—a wood and coal and teaming business—and lived on profits of the sales of his real estate, and on the rents derived from his real estate. These would average say $60.00 to $100.00 a month. He was reputed to be well to do, and in 1890 and 1891, had no liabilities. In 1892, 1893 and 1894, with the exception of the moneys due the plaintiffs, he had no liabilities.

"During these years he kept four banking accounts and his wife kept a fifth; to the credit of this account he himself from time to time made deposits and she deposited

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there to her credit the rents received from his properties. An examination of her bank account shews that in 1893, she deposited $663.75; in 1894 (during which year his account was drawn on to the extent of $12,792.00), $6,510.00, and in 1895, $380.00. Her evidence shews that between her marriage some 28 years ago and her husband's death in November, 1895, she did not inherit or receive any money, except 'presents once in a while' and these 'not to any big amount.'

"I cannot reconcile her statements made on her oral examination for discovery as to the building up of this bank balance, with the account itself, nor can I find in her accounts, or in his, any corroboration of the statement that she had paid $4,000.00 for the property. I assume from this that she has made a mistake in alleging that the two conveyances were anything but purely voluntary conveyances.

Statement.

"In 1892, 1893 and 1894, real estate was very much depreciated, and in 1894 the deceased made the following disposition of his real property: 10th February, conveyance to wife; 29th October, conveyance to daughter; 10th December, conveyance to wife; and as to his bank account: He paid out of one account $1,100.00 on 7th December; out of another $2,436.28 on 3rd December, and closed the account out of third $2,591.20 on 9th March, and ceased to pay anything to this account thereafter. In fact at the end of 1894, the deceased had practically retired from the management of his affairs, and shortly after, *i.e.*, on 7th November, 1895, he died.

"In 1894 and 1895, the deceased neglected to pay his taxes due in respect of certain other property mortgaged by another mortgage to the plaintiffs; these taxes they were compelled to pay.

"The property made over to the defendant amounted in value to $27,500.00. The deceased's estate when adminis-

tered amounted to $7,100.00; his liabilities to $50,000.00 or $60,000.00.

"On 17th August, 1897, the plaintiffs recovered under this mortgage, judgment for $13,457.20 debt and $21.73 costs."

The plaintiffs' sued (on behalf of themselves and all other creditors of the estate of Henry Elliott, deceased), Ellen Elliott (the widow), Mary Logan (the daughter), wife of John Logan, and John Logan.

The trial took place at Vancouver on 27th July, 1898.

Wilson, Q.C., for plaintiffs.

Aulay Morrison and *Dockrill*, for defendant, Ellen Elliott.

A. Henderson and *Keith*, for defendant, Mary Logan.

On 20th May, 1899, the following judgment (dated 8th May, 1899), was entered:

Statement.

"This action coming on to be heard before the Honourable the Chief Justice at the Court House, Vancouver, B.C., on the 27th day of July, 1898, upon reading the pleadings, hearing the evidence adduced and what was alleged by counsel for all parties;

"It is ordered that as against the defendant Ellen Elliott this action be dismissed without costs;

"And this Court doth declare that the indenture dated the 29th day of October, 1894, in the pleadings mentioned, made by Henry Elliott in favour of his daughter Mary Logan, the wife of John Logan, is void as against the plaintiffs and the other creditors of the said Henry Elliott;

"And let the defendant Mary Logan, deliver up the said indenture to the plaintiffs to be cancelled, and if necessary let an account be taken of the rents and profits of the hereditaments comprised in the said indenture received by the defendant Mary Logan, or any other person or persons for her or on her account, and let upon taking such account the amount ascertained to have been so received by the defendant Mary Logan, be paid to the plaintiffs, and let the costs of this action as against the defendant Mary Logan be taxed and paid by the said defendant to the plaintiffs or their solicitor."

On 29th May, 1899, the plaintiffs gave notice of appeal, and on 6th June, 1899, the following reasons for judgment were given by

McCOLL, C.J.: I am now told by the Registrar that my

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reasons for judgment are desired on the part of the plaintiffs for the purpose of an appeal.

There is some misunderstanding as to the position. Mr. *Wilson*, of counsel for the plaintiffs asked me during his argument, upon authorities which he cited, to direct an issue as to the insolvency of the deceased at the time of the impeached transaction, if I should be of opinion that such insolvency was not sufficiently established.

I had a strong opinion during the trial that the evidence as to solvency was not directed to the time in question sufficiently as between the plaintiffs and Ellen Elliott, and I so intimated and upon further consideration I remained of this opinion.

Judgment of McCOLL, C.J.

But I informed counsel that I would direct an issue as requested in case the plaintiffs were not satisfied to have judgment against Mary Logan with costs and in favour of Ellen Elliott without costs.

These two defendants occupy different positions and I think the destruction by Mrs. Elliott of the books of the deceased warranted the bringing of the action although it did not appear that she was actuated by any improper motive in doing so.

Mr. *Wilson*, after taking time, stated in open Court during the sitting of 21st April last, that as I understood him, he elected to take judgment in the terms mentioned which were then taken down by the Registrar and initialed by me and judgment formally given accordingly.

The appeal was argued on 22nd November, 1899, at Vancouver, before DRAKE, IRVING, and MARTIN, JJ.

Wilson, Q.C., for appellants.

Aulay Morrison and *Dockrill* for respondent.

23rd January, 1900.

DRAKE, J.: This action was tried before the Chief Justice on the 27th of July, 1898, and according to the learned Judge's note, he was asked by the plaintiffs' counsel to

direct an issue as to the solvency of the deceased at the date of the impeached transaction, if the learned Judge should be of opinion that such insolvency was not sufficiently established.

The Chief Justice states he was of opinion that the evidence of insolvency was not directed to the time in question sufficiently as between the plaintiff and Ellen Elliott, and that he would direct an issue if the plaintiffs were not satisfied to have judgment against the defendant Mary Logan with costs, and in favour of Ellen Elliott without costs. After several months consideration the plaintiffs accepted judgment on these terms, and the order was accordingly entered on the 20th of May, 1899.

The plaintiffs now say there was no agreement that they should not appeal against such an order, and that therefore they are entitled to such an appeal. In my opinion this was a compromise judgment on terms from which the plaintiffs are not entitled to appeal. It has been decided that counsel has authority to bind his client to a compromise without express authority, *Matthews* v. *Munster* (1887), 20 Q.B.D. 141; and such a compromise will not be upset by the Court. And where a judgment by consent has been passed and entered it cannot be varied on the ground of mistake except for reasons sufficient to set aside an agreement. *Attorney-General* v. *Tomline* (1877), 7 Ch.D. 388.

The plaintiffs were in no way compelled to accept the terms offered by the Chief Justice, but having accepted them, they cannot now apply to set aside, as they do, that portion of the order which was in favour of the defendant Elliott, and hold to that which was in their favour. There has been no suggestion offered by the plaintiffs that the compromise was made against their instructions or without their knowledge. Under these circumstances the appeal must be dismissed with costs. If, however, the plaintiffs still desire to have an issue tried as suggested by the learned Chief Justice they can do so upon payment of the appeal

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costs as a condition precedent, such issue to be prepared and settled by a Judge in Chambers in case the parties differ, the plaintiffs undertaking to prosecute the same with expedition.

IRVING, J. [after setting out the facts] proceeded: On the facts as they appear to me, the settlement was a voluntary settlement of a very considerable part of his assets. The effect of it is that there is not sufficient to enable the creditors to pay themselves in full, without waiting for an improvement in the value of real estate. The onus as to shewing that at the date of the conveyances the deceased was in a condition to pay his creditor in full, or that he had a reasonable belief that he had retained a sufficient amount for that purpose, is, in my opinion, on the defendant.

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I think the case is covered as to that point by *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106 and *Osborne* v. *Carey* (1888), 5 Man. at p. 240, and cases there cited. I can see no difference between a case of a man entering in a hazardous business and one who having accumulated a large amount of real estate and borrowed money on it, and feeling the weight of its burthen, lays down his arms after taking care to screen and protect his widow against the risks of further depreciation.

It is not necessary to shew that a man has a fraudulent intent in making a settlement; nor is it necessary that a man should be actually indebted at the time he enters into the settlement; nor that the insolvency should follow immediately after the voluntary settlement was executed. These points were all settled in *Mackay* v. *Douglas*, *supra*, which has been approved in Ontario in *Fleming* v. *Edwards* (1896), 23 A.R. 718. I think it is just as applicable to a case where a man is passive, that is, where he is being slowly overwhelmed by interest and taxes, as it is where a man is active and is about to enter into a hazardous business.

The statute of Elizabeth is to prevent a debtor from putting his property out of the reach of his creditors, and should be liberally expounded.

On the evidence before us, I think the plaintiffs are entitled to the relief they seek, and that the decree should declare that the lands conveyed are liable to satisfy the plaintiffs and other creditors (if any) of the deceased.

As cases of this character are becoming fashionable I annex a list of authorities to which I have referred in preparing my judgment.

Chamley v. *Dunsany* (1807), 2 Sch. & Lef. 690; *Richardson* v. *Smallwood* (1822), Jacob 552; *Jackson* v. *Bowley* (1841), Car. & M. 97 and 103; *Dening* v. *Ware* (1856), 22 Beav. 184; *French* v. *French* (1855), 6 DeG. M. & G. 95; *Buckland* v. *Rose* (1859), 7 Gr. 446; *Spirett* v. *Willows* (1864), 3 DeG. J. & S. 293; *Adames* v. *Hallett* (1868), L.R. 6 Eq. 468; *Freeman* v. *Pope* (1869), L.R. 9 Eq. 206; *Crossley* v. *Elworthy* (1871), L.R. 12 Eq. 158; *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106; *Taylor* v. *Coenen* (1876), 1 Ch. D. 636; *Ex parte Huxtable* (1876), 2 Ch. D. 54; *Ex parte Stephens* (1876), 3 Ch. D. 807; *Morton* v. *Nihan et al* (1880), 5 A.R. 20; *In re Ridler* (1882), 22 Ch. D. 75; *In re Maddever* (1884), 27 Ch. D. 523; *Brimstone* v. *Smith* (1884), 1 Man. 302; *Leacock* v. *Chambers* (1886), 3 Man. 645; *The Building and Loan Association* v. *Palmer et al* (1886), 12 Ont. 1; *Osborne* v. *Carey* (1888), 5 Man. 237; *Gowans* v. *Chevrier* (1890), 7 Man. 62; *Ferguson* v. *Kenny* (1889), 16 A.R. 276; *Ripstein* v. *The British Canadian Loan & Investment Company* (1890), 7 Man. 119; *Boyd* v. *Robinson* (1891), 20 Ont. 409; *Halifax Joint Stock Banking Company* v. *Gledhill* (1891), 1 Ch. 1; *McDonald* v. *McQueen* (1893), 9 Man. 315; *Oliver* v. *McLaughlin et ux* (1893), 24 Ont. 41; *Crombie* v. *Young* (1894), 26 Ont. 194; *Fleming* v. *Edwards* (1896), 23 A.R. 726; *Brown* v. *Peace* (1897), 11 Man. 409; *Rice* v. *Rice et al* (1899), 31 Ont. 59.

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MARTIN, J.: During the argument the attention of the plaintiffs' counsel was called by my brother DRAKE to the fact that, from a perusal of the judgment of the learned Chief Justice, it would appear this was not properly a case for appeal. In answer counsel stated, in effect, that the judgment that was given was the judgment of the Court, and that therefore it had to be accepted, but that there was no waiver of the right to appeal. Since the argument I have further considered this point, and having had the benefit of perusing the judgment of my brother DRAKE, I have reached the same conclusion that he has, *i.e.*, that this is not a case for appeal, as it was, in effect, a compromise. Nevertheless, I also agree that the plaintiff should still have the opportunity of taking the issue suggested by the learned Chief Justice, on the terms mentioned by my brother DRAKE, otherwise the appeal must be dismissed with costs.

Appeal dismissed with costs, if appellants do not choose to take issue on payment of costs of appeal.

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Patent for combination producing new result—Infringement.

A patent for a mechanical combination which produces a new result is infringed if the combination is taken in essence and in substance.

ACTION by plaintiff to restrain defendant Company from infringing a patent for a machine for automatically soldering flat oval cans. The defence consisted in a denial of the alleged infringement, a denial of the alleged novelty and an allegation that the machine complained of was an invention patented by one Walter Morris and since used by the Company as his licensee.

Statement.

The action was tried at Victoria on 27th March, 1899, before DRAKE, J.

Martin, Q.C., A.-G., and *Alexis Martin*, for plaintiff.

Wilson, Q.C., and *H. G. Hall*, for defendants.

26th April, 1899.

DRAKE, J.: The plaintiff in this action sues for an infringement of his patent for soldering oval cans.

The defendants do not admit that the plaintiff was the first inventor, they deny the novelty and usefulness of the invention, and they deny the infringement, and claim that the machine they use is one patented by Walter Morris. The case was tried on these pleadings, and after the evidence was all in and the case closed the defendants applied to amend by adding a defence that the plaintiff's patent was void owing to the specifications and claim being too general, and covering more than the actual invention. I refused to allow the amendment as involving practically

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different issues, and possibly requiring additional evidence.

A denial of infringement does not put in issue the validity of the patent: *Croppen* v. *Smith* (1884), 27 Ch.D. 700 and (1885), 10 A.C. 249. All grounds of objection to the validity of the patent must be pleaded.

The plaintiff's patent is not attacked on these pleadings, only the want of novelty and the infringement; and in my opinion an amendment such as asked for here should not be made after the close of the case on both sides. If asked for at the commencement of the case it might be allowed on terms, which would involve a postponement of the trial, and a reformation of all the pleadings, but to do so at this stage would encourage a greater laxity of pleadings than exists at present.

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From the facts proved the plaintiff invented a machine for soldering oval cans automatically. He claims that his machine successfully performed the work for which it was designed, but it has not been put on the market, and has not been used except in trial tests made by himself.

The defendant Company have, during the last season, used a machine invented by Walter Morris, which has been patented for the same purpose but subsequent to the plaintiff's patent.

The two machines are similar in appearance, and a combination of known mechanical devices is used in both machines in a similar way, but the mode in which the object is sought to be attained is different.

The plaintiff uses an endless chain and sprocket-wheel with a pinion and rack, to give the required motion; he uses a novel link in the endless chain which gives to the machine the required angle for the cans to dip into the solder-bath. The can-case which contains the cans for soldering is made with a slot, and the required movement of the cans in order to make them revolve is attained by a pinion working in the slot in the can-case; and the cans after being soldered drop out of the can-case automatically.

Walter Morris has for a long time been experimenting in the same direction. He constructed a somewhat similar machine with an endless chain and sprocket-wheel and pinion and rack, but the circular movement required was given by a series of rollers of iron. That machine was constructed in 1895, but it was not satisfactory, it did not give level work, and was abandoned. Morris still continued his experiments, and eventually hit upon a machine like the plaintiff's but when he discovered that the plaintiff had patented a similar machine he abandoned it, and continued his experiments until he made the machine which he patented, and under which he has worked.

His machine is made with the endless chain and sprocket-wheel the same as the plaintiff's; he uses an ordinary link in place of the novel link designed by the plaintiff, and the whole machine is set at an angle proper for the cans to meet the solder-trough. He also uses a pinion and rack to give the motion the same as the plaintiff's; but the can-case is entirely different, and the required circular motion of the cans is attained by a cog-wheel working in the can-case, and a pinion working on the outside of a rack giving the direction to the cans. It is also not dissimilar to the mode in which the same result was sought to be attained by his original solder machine, for in that machine he used the endless chain and sprocket-wheel and a pinion and rack. The defendants' machine requires the can when soldered to be pushed out by hand instead of falling out automatically. This alone would not constitute a new machine but only a slight change. Therefore the actual difference between the two machines consists in the can-case and the mode in which the can is made to revolve through the soldering trough, and setting the machine at an angle.

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In my opinion the can-case and the mode in which the circular motion is imparted are different in the two patents.

The question then comes down to this, have the defendants infringed the plaintiff's patent by using well-known

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mechanical appliances common to both machines, and which have been applied by both patentees for the purposes of attaining a similar result? On this head the evidence is very conflicting. The plaintiff says that the object of his patent is to rotate the can in the solder, and so solder the top and bottom of the can, and to give an even rotary motion to the can itself. For that purpose he claims a shackle-link and spindle passing through, and in order to produce the motion required he has a gear-wheel fixed near the opposite end of the spindle which has the same circumference as the can-socket to make it turn in its own circumference; and a fixed rack at the bottom of which the pinion works and turns the can-socket; and the belt round the pulleys gives the travelling motion to the can-cases. The plaintiff claims the whole design is novel except the standards, and that the defendants have appropriated the can-holder and spindle passing through the link, the gear-wheel and the rack.

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The difference of the two machines as stated by the plaintiff is a rim to the can-holder, a hollow spindle with a pin through it to eject the cans, a common link instead of the particular one invented by the plaintiff, and a different mode of revolving the cans in the holder.

On cross-examination the plaintiff admits that the chain and sprocket-wheel are not novel, or the rack and pinion or spindle, but that the can-holder is; and the novelty consists in the way the various things are put together.

Mr. Burton says the principle of the two machines is the same, but the construction is different as regards the defendants' wheel in the can-holder—the link—the angle at which the machine is fixed.

Mr. Burpee says the defendants' machine works differently, pointing out the angle at which the machine is set, the method of keeping the can at an even radius through the solder, and the elliptical internal gear attached to the can-holder, and arrangement of the spindle. He says he

does not think the differences essential, only changes in particular portions of the plaintiff's machine; that the principle of the machines is very much the same.

On the part of the defendants it is alleged that there are features common to both machines which are not patentable, such as rack and pinion and endless chains and sprocket-wheel, but the rotation of the cans is different and arrived at by a different process and by different mechanism; and the view that the defendants' machine was novel in the mode in which the rotation of the can-case was obtained and necessary angle given to the cans in the solder-bed; and this view was supported by scientific and practical machinists.

The cases to which my attention has been directed lay down certain principles which could be more easily applied if the plaintiff's patent had been attacked on other grounds than want of novelty. In *Dudgeon* v. *Thomson and Donaldson* (1877), 3 A.C. 34, it is laid down that when a combination of instruments is the invention patented an infringement must be an infringement of the combination. Here there is a combination of well-known mechanical contrivances; but in addition there is an invention of a particular can-case worked in a particular manner. The gist of the plaintiff's invention is the mode of operating the can-case so as to enable the can to rotate evenly through the solder. The defendants have arrived at the same result by a different method. Again, in *Clark* v. *Adie* (1875), L.R. 10 Ch. 667, a patent for a combination of several improvements is not infringed by using a combination of some only of those improvements. This case went to the House of Lords (1877), 2 App. Cas. 423, and the judgment was affirmed.

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The case of *Curtis* v. *Platt* (1866), L.R. 1 H.L. is found in (1866), 35 L.J., Ch. 852, where it is laid down that a patent for an entire combination is not infringed by a different combination for the same object of the same elements though important, or of equivalents for them, if not a mere

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colourable evasion or imitation. And in considering the question of colourable evasion the Court will look at the novelty of the object of the combination and of the parts combined. Lord Westbury, whose judgment was confirmed, says there were certain common elements out of which any inventor was at liberty to construct a machine when the plaintiff's patent was granted and equally so when the defendant's patent was granted; that the defendant when availing himself of these elements put them into a combination different from the plaintiff's and as he combined them the effect was different. That is much the case here. There are certain elements common to both, but the mode in which the can is operated so as to obtain a steady circular motion is different. The defendants here question the novelty of the plaintiff's combination of the elements common to both, and as to that I think they succeed, because when we look at the pinion and rack in the plaintiff's machine he claims as an essential element that his pinion is of the same circumference as the can-case, so as to give the can a turn for every revolution of the pinion; the defendants' device is entirely different. In *Murray* v. *Clayton* (1872), L.R. 7 Ch. 570, which is cited at p. 675, of L.R. 10 Ch., the defendant obtained a patent for a new brick making machine by which he cut the clay into bricks upon a table, much as in the plaintiff's machine; he then moved the brick on to an end table instead of a side table, and by hand instead of by machinery, as in the plaintiff's table; and in giving judgment the Court held that the plaintiff had produced a new result by a combination of known methods of proceeding, but the combination on which he had succeeded was a whole combination of all three parts of the machine. The defendant used the combination of two of the parts with another part differing from the plaintiff's. Held not an infringement. And in *Harrison et al* v. *The Anderston Foundry Company* (1876), 1 A.C. at p. 578, the Lord Chancellor says: "If there is a patent for combin-

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ation, the combination itself is, *ex necessitate*, the novelty, and there is no infringement unless the whole combination is used; and it is in that way immaterial whether any or which of the parts are new.

Now what does Short claim by his patent? He makes six claims which appear as far as they are intelligible to cover the whole machine, sprocket-belt, shackle-links, spindles arranged to journal in apertures fixed at an angle in the links, and self-adjusting can receptacles arranged on depending ends of the spindles, and pinions rigidly fixed near the opposite ends of the spindles made to engage a fixed rack; standards having adjustable frames carrying wheels having a sprocket-belt passing them round togle-links; pinions or shafts passing through apertures therein, which apertures at an angle of twenty degrees to the plane of sprocket-belt; wheels arranged on either side of the sprocket-belt; spindles arranged along the chain with self-adjusting can receptacles on their depending ends; a rack engaging the pinions, a guide-rod, and so on; in fact it appears that the plaintiff nowhere distinguishes the new from the old. He claims the whole series of combinations and the mechanical devices forming the combination as his own. The defendants have utilized the machinery which consists of ordinary mechanical devices and from thence they diverge and attain the same result that the plaintiff contends for by a different method. The result is that in my opinion there has been no infringement of the plaintiff's patent, and judgment will be for the defendants with costs.

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From this judgment the plaintiff appealed to the Full Court on the grounds, (1.) That the learned Judge erred in holding that the defendants had not infringed the plaintiff's patent; (2.) That the Morris patent used by defendants is in substance though not in terms for an improvement in plaintiff's patent and produces no new result but a supposed improvement in the means of effecting an old object; (3.)

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That whether the Morris patent was or was not an improvement on that of the plaintiff's it involves the substance of plaintiff's patent and constituted an infringement; (4.) That the combination of devices and mode of operation made use of by the defendants are a colourable evasion and imitation of the plaintiff's patent.

The appeal came on for argument at Vancouver on 28th November, 1899, before McCOLL, C.J., WALKEM and IRVING, JJ.

A. D. Taylor, for appellant.

Wilson, Q.C., for respondent.

17th April, 1900.

McCOLL, C.J.: I think the appeal should be allowed.

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WALKEM, J.: This action was brought by Mr. Short for the purpose of restraining the defendant Company from infringing a patent obtained by him, in July, 1897, for a machine for automatically soldering flat oval cans similar to those used in the canning industry for such articles as fish, meat, vegetables and fruit. The defence pleaded consists, in substance, of a denial of the alleged infringement; of a denial of the alleged novelty; and of an allegation that the machine complained of is an invention patented by Mr. Walter Morris in November, 1898, and since used by the Company as his licensee.

According to the evidence, the plaintiff's machine is a combination of well-known mechanical devices, with some new ones, which produces a new result, namely, the automatic soldering of oval, as distinguished from circular, cans. Having described his machine in his specifications, he makes the following claim,—

"What I claim is,—

"(1.) In combination with a machine for soldering cans of uneven radii,—having a solder-trough arranged longitudinally above a furnace and beneath a runway for cans, and sprocket-belt wheels adjustably arranged above and at either end of said runway; shackle-links arranged at intervals upon a sprocket-belt taking round the said wheels;

spindles, 20, arranged to loosely journal in apertures, fixed at an angle in said link, 19; (of) self-adjusting can receptacles, 21, arranged on the depending ends of the spindles, 20; and pinions, 22, rigidly fixed near the opposite ends of the spindles and made to engage a fixed rack arranged in their track, substantially as set forth:

"(2.) In an apparatus for soldering can of uneven radii by means of rolling movement over a receptacle of heated solder,—the combination of standards, 15, having adjustable frames arranged thereon, said frames carrying wheels, 10, having a sprocket-belt passing thereround; togle-links, 19, inserted at regular intervals in said belt, the projecting portion of said links being turned laterally; spindles or shafts, 20, passing through apertures therein, which apertures are at angles of approximately twenty degrees to the plane of the sprocket-belt; (of) can receiving sockets, 21, adjustably arranged upon the ends of the shafts or spindles, 20, means for controlling said spindles from lateral movement; and means for imparting a rotary motion to the same while passing over a solder-trough, whereby the can receptacle will be rolled along a common runway, as set forth:

"(3.) In an apparatus for can soldering,—having wheels arranged at either side and a sprocket-belt, or chain, passing over a common runway, spindles arranged along said chain, the same being provided with can receptacles on their depending ends which receptacles are self-adjusting as to radius; pinions, 20, rigidly fixed near the opposite ends of the said spindles; a rack, 23, engaging the pinions in their lower path; a guide-rod, 24, made to engage the upper portions of the projecting ends of the spindles, 20, in proximity to the pinions while engaging the rack, 23, substantially as set forth:

"(4.) In a machine for soldering cans,—having sprocket-belt wheels and a belt taking round the same, and can conveyers arranged at intervals along said belt; the combinations of spindles passing through apertures therein; (of) can receptacles adjustably arranged on the ends thereof, the same being arranged to adjust their bearing radii; and means for revolving the same at a uniform speed, as set forth:

"(5.) In a machine for soldering cans,—can receptacles, 21, spider castings, 21a, suitably secured thereto, the same having slots therein; spindles, 20, having flat shanks passing through the said slots, and collars arranged on either side of the said castings; and means for passing the said can receptacles over a common runway by a rolling movement, substantially as and for the purposes set forth:

"(6.) In a can soldering machine,—having belt-wheels arranged at either side of a fixed trough; a frame adjustably arranged and made to support one of the belt-wheels; a sprocket-belt having can conveyers thereon, and fixed angling to the line of the said wheel; a hood, or guide, 25, secured to the branches of the frame, 12, the same being made to engage and prevent cans from being detached from the con-

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veyers while taking round the arc of the wheels, 10; as and for the purposes hereinbefore set forth."

The above paragraphs have been differently punctuated from the originals in order to make them more intelligible. I have bracketed the word "of" in paragraphs 1 and 4 as being a word that should evidently be omitted. As a clerical error it could be corrected by leave of the Patent Office. (Patent Act, Sec. 48.) Independently of this, the plaintiff is entitled to have the paragraphs construed fairly, and "by a mind willing to understand, not by a mind desirous of misunderstanding. Inventors, and those who assist them, are seldom skilled adepts in the use of language; faults of expression may be got over where there is no substantial doubt as to the meaning;" *per* Chitty, J., in *Lister* v. *Norton* (1886), 3 P.O.R. 203, cited in Edmunds on Patents, at p. 125. These observations apply to all the paragraphs, for they are not as grammatically expressed as might have been the case. This is the only fault I have to find with them, for, allowing for this defect, they, as well as the specification, by the light of which they must be read, are perfectly intelligible. I make these observations because it was held by the learned trial Judge, and is now contended by counsel for the Company, that the six paragraphs are six claims covering the machine and all of its individual parts. It is clear to me from the specification as well as from the paragraphs themselves, that they represent but one claim—that claim being for a combination.

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Again, it is not necessary to distinguish the old from the new parts of a combination, or, in other words, to explain what is novel in it, for "the novelty is to be found in the description of the arrangement of its parts in the body of the specification;" *Harrison* v. *The Anderston Foundry Company* (1876), 1 App. Cas. at pp. 580, 581.

Coming now to the specification, the plaintiff, after explaining his drawings in a general way, says, "My invention relates to improvements in machines for fluxing

and soldering cans, and its object is to provide such an apparatus that will conveniently solder flat oval cans of almost any form, so long as the peripheries of the same are of a roundish form, and to do the work with rapidity and despatch." The specification then proceeds to give a minute description of the different parts of the apparatus; of their relative places in it; of the manner in which they are arranged and put together so as to secure unity of action; of the means by which they are collectively set in motion, and a uniform speed obtained; and of the final result produced by their combined action. The claim is quite consistent with the specification. *Ex facie*, it is for a combination, for in every one of the six paragraphs the arrangement of the different parts of the machine is more or less frequently mentioned, and is, manifestly, what is claimed, and the plaintiff says in his evidence, which I am entitled to refer to (*Plimpton* v. *Spiller* (1877), 6 Ch.D. at p. 423), that he only claims a combination. I have dealt with this matter at some length in consequence of the learned trial Judge having taken a contrary view of the claim, and also because a proper conception of it is obviously necessary before one can say whether the invention has been infringed.

According to the specification, as illustrated by the drawings and model, the invention may be correctly described as an invention for automatically soldering the tops and bottoms of oval flat cans, which are necessarily uneven in their radii, by means of an apparatus consisting of two sprocket-wheels of approximate size mounted on standards, placed as far apart as may, from time to time, be considered necessary. An endless flat chain, or belt, passes round these wheels, and at intervals on its face an oval can-holder, having a lateral tilt of twenty degrees to the face, is connected with the belt by a spindle which passes through an inverted shackle-link that serves to give both holder and spindle the tilt mentioned. At the other end of this spindle

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is a pinion which is immovably fastened to it. Each can-holder has a slot in it in which the shank of the spindle is so secured as to permit of its working loosely and in an oscillating manner in the slot. The object of this contrivance is to give the can-holder, when in motion, a self-adjusting power that will enable it to roll evenly on a horizontal path alongside of a trough containing molten solder. When the machine is in use, and the cans have been placed in their respective holders, the moving belt carries them *seriatim* over one of the sprocket-wheels which has a hood over its arc that prevents them from falling from the holders in their downward course to the bed of the machine, where the solder-trough lies. Here each pinion comes into play by engaging and running in a straight horizontal rack that is below the belt, and parallel to the solder-bath. This part of the process gives the can-holder its rotary motion. As the spindle which connects it with the pinion is, as above stated, at a slant, or angle, the holder, which is at its depending end, leans at that angle towards the trough, and thereby dips the projecting rim of its can in the solder. The onward movement imparted to the can-holder by the belt, in conjunction with the self-adjusting rotary motion given to it by the rack and pinion, causes the oval rim to revolve evenly in the bath until it is completely soldered. When this takes place the can drops, face downwards, by gravitation out of its holder upon a flat revolving belt that conveys it away from the machine; and the empty holder is carried by the moving sprocket-belt under and round the second sprocket-wheel to the level above, there to be refilled and the process, if necessary, repeated. There is a standard at each end of the bed of the machine, which has an adjustable yoke in which the axles of the sprocket-wheels turn, and by which the distance between the wheels can be increased or decreased, or the tension of the sprocket-belt, or its elevation, regulated. The standards are set vertically, or at right angles to the bed of the machine, and serve to sup-

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port what may be called the subordinate running-gear, namely, the sprocket-wheels and belt, and consequently the can-holders attached to the belt, as well as the spindles and pinions which co-operate with the holders. The pinions are kept in their path on the straight rack by a flange that extends along its lower side, and by a guide-bar placed over the projecting ends of their spindles. The flange prevents them from sliding downwards off the rack, and the guide-bar keeps them from tilting upwards off their bearings on the rack. Provision is made for chemically cleansing the rims of the cans preparatory to their entering the solder-bath, and also for operating the machine by steam. With some slight alterations, corresponding to alterations that appear in the machine complained of, this description would be a good description of both machines. The alterations referred to will severally be dealt with later on when the question of the difference between the two machines is being considered.

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With respect to infringement, the test of whether it has taken place has thus been stated by Cotton, L.J., in *Proctor* v. *Bennis* (1887), 57 L.J., Ch. at p. 17 which governs this case: "Has the combination been taken in substance? Has the defendant, though not exactly taking the whole combination which has been patented, taken, by slight variations, or by mechanical equivalents, the substance of it, to produce the same result by practically the same means? Has he taken the essence of it?"

Had these questions been put to the witnesses at the trial, it is my opinion, after carefully considering the notes of their evidence and minutely examining the models of both machines, that they would have been answered in the affirmative. The models, to my mind, are very important parts of the evidence; for they exhibit, in a practical shape, the points of difference and resemblance between the two machines so plainly that any person of ordinary intelligence can thoroughly understand them. Hence, neither mechan-

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ical skill nor scientific knowledge is necessary to explain those points, for both machines are combinations that are largely composed of old and well-known elements—the new ones being very few.

An examination of the facts in *Proctor* v. *Bennis* shews that the changes, consisting of variations, omissions and additions, made by Bennis in the plaintiff's machine were much more radical than those made by Mr. Morris in the present plaintiff's machine. Notwithstanding this fact, Bennis' machine was held to be an infringement of Proctor's as the substance and essence of the latter had been taken. After stating the nature of Proctor's claim, Lord Justice Cotton deals with Bennis' alleged infringement in language so appropriate to the present case that I shall quote it (see page 18 of L.J. Report): "Now what has the defendant, (or, as in this case, Mr. Morris) done? Looking at his machine you say at the first blush, 'well that is something different'—and it does look a different machine." This is precisely the impression I had of Mr. Morris' machine when first comparing it with the plaintiff's. "But," continues the Lord Justice, "we must consider this, whether, in substance, although the defendant has not taken the exact combination, he has merely substituted for the particular part, or various parts, of the plaintiff's specifications ordinary mechanical equivalents for producing the same objects; and if he has done so, in my opinion, although he has not taken the exact combination he has, in substance, taken the combination—he has taken the essence of it—and, therefore, his machine sometimes would be called a 'colourable variation,' or, in plain terms, an infringement of that which is protected by the plaintiff's patent. A colourable variation, as I understand it, is where a man makes slight differences in the parts of his machine, although really he takes in substance those of the patentee, and gives a colour so as to suggest that he is not infringing the patented machine when he is really using mere sub-

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stitutes for the portions of the machine so as to get the same result for the same purpose." Hence, what we have to consider is whether Mr. Morris has taken the substance and essence of the plaintiff's invention by ordinary mechanical equivalents, or by colourable variations, so as to obtain the same result as that patented by the plaintiff.

Both machines are, in my opinion, substantially alike. The points where they differ are best seen, as I have said, in the models; for Mr. Morris' specification is too indefinite to enable one to compare it with the plaintiff's and thus get the information that it should have supplied. The most conspicuous difference—and the one that at first sight caused me to think that the machines were different—is in the arrangement of their subordinate running gear. In Mr. Morris' machine, the standards, instead of being set vertically and, thus, similarly to the plaintiff's, are set obliquely, or, in other words, tilted laterally, at an angle of twenty degrees towards the solder-trough. This has the effect of similarly tilting his sprocket-wheels and belt and the can-holders attached to the belt, and also the co-operating spindles and pinions. A straight rack, similar to the plaintiff's, is also correspondingly deflected to enable the pinions, which severally give the rotary motion to the can-holders, to travel in it. To make this tilting process effective a "knock-out" as Mr. Morris calls it, is added, as part of the mechanism of the can-holder, to expel a can from it when soldered. The lateral tilt of twenty degrees thus given to the standards and can-holders is exactly the same in degree as the tilt given to the plaintiff's holders by means of his angular links and serves, with the aid of the knock-out, to produce the same result. This variation is, therefore, a substitute for the plaintiff's shackle-link, and, according to the evidence, it is a slight and immaterial one. To understand Mr. Morris' evidence on this matter, it is necessary to state that for several months prior to April, 1898, he had, as manager of the defendant

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Company, been using a machine similar to the plaintiff's and had abandoned it, because it turned out unsatisfactory work, or, as appears by the correspondence, because of threatened proceedings for infringement. Thereupon, Mr. Morris, assisted by Murray, the Company's machinist, constructed a new machine which is the machine complained of. He admits that it is similar to Short's, except as to the rotating process of its can-holder, and as to the knock-out. "Q. In making your claim apart from those two things, don't you claim the same device as Mr. Short claims? A. (Mr. Morris) Similar, similar, I admit. Q. All the rest of the machine, whatever it is, you got from this previous (abandoned) machine that you had, which you had made—you and Murray together—which you say is the same as Short's. A. The rest is the same—the same, or similar—I will use the word similar. Q. Yes, similar, or the same? A. Yes." The evidence of Burpee and Tretheway for the plaintiff, and Murray and Ramsay for the Company is to the same effect—Ramsay's statement being that the two machines now in question "are practically the same up to the point of the pinion which actuates the can-holder," that is to say, that up to that point they are similar notwithstanding their different tilting contrivances. The variation in question is, therefore, a slight and immaterial one.

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The next difference to be considered is the difference in the respective can-holders and attachments. The plaintiff's holder is a metal socket of oval form, and so designed, in that and other respects, as to be a fitting receptacle for an oval flat can. It has, with its attachments which make it self-adjustable in its rotary motion, been the chief factor in his combination in affecting the object of his invention—which is a "new object," namely, the automatic soldering of oval flat cans. This is the essence of the invention. For some years prior to the plaintiff's patent, Mr. Morris had been experimenting for the purpose of finding some

such contrivance, and photographs of a machine that he had invented were produced at the trial as evidence of the fact, and also of anticipation; but the photographs shew that the machine had no can-holders; and beyond the fact that it had tilted sprocket-wheels and a solder-trough, it bore no resemblance whatever to either of the present machines. Moreover, Mr. Morris states that it worked unsatisfactorily and was abandoned. The can-holder was invented by the plaintiff, and is a novelty; and, to my mind, is a very ingenious contrivance in view of the obvious difficulty of automatically rolling an oval can, or other elliptical body, on an even plane as evenly as if it were circular; and that is what it has served to accomplish. There can be no better proof of its merit in that respect than the fact that Mr. Morris found it necessary to adopt it, as he has done, and make it, with some variations, the essential feature of his machine. Those variations are few. His holder is a few inches deeper than the plaintiff's, the extra depth being cogged inside, like the wheel of a lawn mower, so as to form an internal rack for a small pinion to work in. This alteration, therefore, has no novelty in it. In the straight rack, that is similar to the plaintiff's, a smaller pinion than the plaintiff's travels forward, like the plaintiff's, when the machine is in use, and acting through its spindle on the pinion in the holder causes it to work in the internal rack and thereby give the holder a rotary and self-adjusting motion similar to the rotary and self-adjusting motion given to the plaintiff's holder by his spindle, pinion and slot. This lawn mower process, if I may so term it, is, therefore, an ordinary mechanical equivalent for the plaintiff's slot, spindle, and pinion, as described. In Mr. Morris' tilting process, his can-holders face downwards; hence the cans have to be fitted tightly in them to prevent them from falling out either into the solder, or on their way to it; and the knock-out is necessary to eject them when soldered. This device is, therefore, a substitute or mechanical equiv-

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alent for the plaintiff's better arrangement, as I think it is, whereby the can drops by gravitation at the proper time out of its holder, and, therefore, without force or risk of injury to the plant. As a mere can-socket, his holder is almost a duplicate of the plaintiff's—both being metal sockets, oval in shape, and similar in dimensions. Both are tilted laterally, at precisely the same angle towards the solder, so that the rims of their cans may be dipped evenly and at an even depth in it when revolving through it, this being the pith and substance of the plaintiff's invention, and the new result obtained by him. For this purpose both have a similar power of adjusting their respective rotary motions to their uneven radii, when travelling on the level path alongside of the solder. Furthermore, the machines are put in motion by substantially the same means.

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The evidence of the seven witnesses examined on behalf of the plaintiff as to whether the difference in the can-holders and the addition of the ejector are material variations or not, is, in substance, as follows: "the machines are very much the same;" the difference is "slight" and "not essential;" it is merely a difference, and a "slight" one "in the mode of finding an even radius for the can when being turned;" "the principle upon which the cans turn round is the same;" and "the difference in the turning is a slight modification;" the "can ejector" is but a "slight difference, the plaintiff's holder does not require it as it has plenty of pitch which allows the can to drop out of its own accord without using anything to knock it out;" the "object" of the machines "is the same," and "the machines are very similar with that object;" "the principle is the same as in the Short machine, only they (the Company) adopt the same appliance as they use in a common lawn mower to drive a knife, for to drive that can." According to this evidence, the changes mentioned are slight and unimportant. It was also proved that the combination is "a new design;" and it

having been proved that the automatic turning of an oval can evenly on its rim in a body of molten solder is a "novelty producing a new result or new effect" it follows that the plaintiff's machine is a "pioneer" machine. On behalf of the Company, five witnesses were examined. Most of them regarded the changes as improvements, and also as being material because, as was said by one of them, "if you get away from a combination" you get a new one; and this is the idea that, evidently, influenced some of the other witnesses in stating, as they did, that the combinations are "quite different." It is, of course, quite true, in a literal as well as technical sense, that any change, however trifling, in a combination makes a new one, but that is not the question. In my opinion, the statements of the plaintiff's witnesses to the effect that the changes are slight and immaterial are well founded. Even if the changes are improvements, that circumstance, as *Proctor* v. *Bennis* shews, does not entitle Mr. Morris to take the substance of the plaintiff's patent. (*Per* Bowen, L.J. at p. 24.) In the same case, Lord Justice Cotton observes that "the opinions expressed by the Judges" in *Curtis* v. *Platt* (1866), 35 L.J., Ch. 852, "with reference to mere improvements in an old machine for an old purpose cannot apply to a case like this where there is not only novelty in the machine, but novelty in the result," and this exactly applies to the present case as there is novelty both in the machine and the result. Lord Justice Bowen also observes that where a machine is a pioneer machine, as the present plaintiff's is, that circumstance "goes to the root of the case," and should be the test as to whether any variations in it "are such as to prevent the machine complained of being an infringement of the plaintiff's;" and he considers that the question is not whether a variation is "material, but whether what has been taken is the substance and essence of the invention," that being, as he adds, "the true test, as propounded by the House of Lords," in *Clark* v. *Adie* (1877), 2 App. Cas. 315. In any

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event, the evidence that has been dealt with seems to me to conclusively shew that the tilting of the running gear and the difference of the mechanism of the can-holder in the machine complained of are merely slight variations, and substitutes or ordinary mechanical equivalents for parts of the plaintiff's machine. Adapting the language of Lord Justice Cotton in *Proctor v. Bennis* to the present case: "Although the defendant Company has not got the exact combination, yet it has got the combination in substance and result by the substitution of mere mechanical equivalents for things which are in the plaintiff's machine, and are protected by his patent." The machine is, therefore, an infringement of the plaintiff's. I might observe that this case strongly resembles *Proctor* v. *Bennis*, in some important respects. The object of the invention in that case was to feed furnaces with coal at regular intervals by means of the intermittent radial action of flaps or doors which pushed the coal on to the fire. There had been previous imperfect machines for the same purpose which had no radial action. Proctor's combination consisted of four elements, viz.: shafts, tappets, springs and two doors, which collectively produced the intermittent radial action which was a new result; and the machine was, on that account, considered by Bowen, L.J., to be a pioneer machine. Bennis' combination was different, as described in the judgments of the Court and in the argument of Bennis' counsel, although it produced the same result. It had only one door and, apparently, only one shaft. The shaft, tappets, spring and door severally differed from Proctor's in size, action and position, yet his machine was held to be an infringement of the plaintiff's, as the essence and substance of the latter had been taken and used in it by means of variations, omissions and additions and mechanical equivalents. (57 L.J., Ch. at pp. 14, 18, etc.) The changes mentioned were more radical and numerous than the changes that we have been discussing.

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A price list of canning implements was shewn to us at the hearing. It contains a diagram of a machine for soldering round cans. The machine so represented is quite different from the plaintiff's machine, and has no sprocket-wheels, sprocket-belt or can-holders, but has merely a revolving "logging" chain which, resting on the cans, rolls them, by reason of its weight, alongside of a trough for soldering them. This confirms the evidence of Burpee, and other witnesses—Burpee's statement being that "they do not revolve ordinary round cans by means of a sprocket-wheel and chain," but "with an ordinary logging chain." Another witness, Gilmour, says that the principle of soldering round cans and oval cans is not the same ; as in soldering round cans they use a different machine, and have only to work a weight on top of them when travelling.

My attention has been called to the case of *The Ticket Punch and Register Company, Limited* v. *Colley's Patents, Limited* (1895), 11 T.L R. 262. It does not apply here, as it is a case of a new combination of old elements having for its object the improvement of an old result. It was therefore decided, as the judgment of Lindley, L.J., shews, in accordance with the principle laid down in *Curtis* v. *Platt* (*supra*). This case is, however, useful as shewing that *Proctor* v. *Bennis* and *Curtis* v. *Platt* were regarded by this Court as the leading authorities in cases of the infringement of combinations respectively producing old and new results.

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According to the practice, Mr. Morris should, as patentee and licensor of the machine complained of, have been made a party to this action. In view of what has been said, the plaintiff is entitled to have the judgment appealed from reversed, with costs here and in the Court below, and also to the injunction prayed for, the terms of which, if not agreed upon, can be settled by a Judge of this Court.

The only question that remains to be dealt with is that

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of damages. Every sale or use, without license, of a patented article must be a damage to a patentee. *Davenport* v. *Rylands* (1865), L.R. 1 Eq. at p. 308. In the present case, however, there is no evidence upon which an estimate of the loss which the plaintiff has actually sustained can be made; but as he is entitled to nominal damages, I am in favour of awarding him $50.00. (See *Collette* v. *Lasnier* (1886), 13 S.C.R. at p. 576.)

IRVING, J.: I agree with the conclusion reached by the learned trial Judge who has found against the plaintiff on a question of fact.

The difficulties in this case are caused by the generality of the expressions used by the plaintiff in his specification and claim, but all parties have come to the conclusion that the patent claimed is a combination, the combination of certain old well-known contrivances, with the following new devices, viz., a shackle-link and can-holder (the latter of which is claimed to be novel in that it is oval), arranged with a spindle sliding through a slot for the purpose of correcting the uneven radii of oval cans, the former (which is also claimed to be a novelty), to give the cans the necessary tilt. The patent, it seems to me, does not include these two novelties, but the combination alone was patented. This is one of the difficulties of the case as the patent for the combination does not necessarily protect the subordinate parts. The plaintiff should, for his own protection, have secured patents for them (if patentable.)

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Upon the authority of *Proctor* v. *Bennis* (1887), 36 Ch. D. 740, I think it may be safely laid down that there are two different classes of combinations; (*a*) Combination of well-known machinery for an old object and (*b*) Combination of well-known machinery for a new object. In the (*a*) class where there is no novelty in the machine or in the result the patentee is held strictly to the description which he gives of the particular means by which his invention is to

be carried into effect and to constitute an infringement of such a patent the combination described must be copied. But in (*b*) class it is different, there being in this case not only novelty in the machine, but also novelty in the result, the exact combination need not be taken. It is an infringement if the defendant substitutes for the particular parts of the plaintiff's machine ordinary mechanical equivalents for producing the same effects.

Both parties to this action were seeking means to solder oval cans by passing the oval on its edge through a solder-bath ; the means of soldering round cans by passing them through a solder-bath were well known. The plaintiff designed his machine so that it would stand upright and that the can after passing through the bath would fall out by gravity. The defendant tilted his machine and provided for getting rid of the soldered can by a "knock-out" device. Both machines had a common system for giving the cans a forward motion, *i.e.*, into and through the bath, but they had different devices for giving the cans the rotary motion as they passed through the bath. The object of each of the combinations is to secure the rolling of the oval can on an even keel (I trust the application of that term is permissible) through the bath of solder. If that were the whole case I think the judgment should be for the plaintiff. But there is another very important point and that is this—that before the question of equivalents can arise, the conclusion must be reached that the inventions are identical ; for if two solve a problem in substantially different ways neither method is an infringement of the other though there may be well-known contrivances common to both. (See *The Ticket Punch and Register Company, Limited* (1895), 11 T.L.R. 262.)

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Now in considering this point we must, I think, compare the novel parts of the two machines. The use of a solder-bath and a machine to give the cans—I am speaking now of round cans—the forward and also the rotating movement

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is not new. (See the price list put in as an exhibit.) The problem to be solved was to make the apparatus applicable to oval cans. Can-holders oval in form had already been used by hand. The plaintiff hit on the combination already described, that is to say, he made an attachment which without altering the angle of the machine could be affixed to the machine shewn in the price list. His invention, that is, the new parts of it, constitute what might be called an attachment. The defendant's invention is also an attachment designed for the same purpose and is a different machine. The plaintiff in fixing his oval can-holder uses a shackle-link to get the proper angle; the defendant uses an oval can-holder with an ingenious contrivance and tilts the standard. I think that the two attachments when compared in this way without reference to the well-known elements common to both cannot be said to be identical.

That is, I think, the view of the question of fact which the learned Judge took at the trial, that they used the same ordinary well-known mechanical device for carrying the cans and that from that point on the two inventors diverged and obtained by different attachments the same result.

The plaintiff's claim for a combination cannot give him the exclusive right to the use of oval can-holders, nor can it prevent other persons inventing and patenting (as the plaintiff has done) other attachments differing from the plaintiffs to be used with what are admittedly well-known elements such as are common to both machines.

Appeal allowed, Irving, J., dissenting.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND THE NEW VANCOUVER COAL MINING AND LAND COMPANY, LIMITED v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

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Crown, prerogative of—Right of Attorney-General to injunction to restrain action—Public harbour.

It is a prerogative right of the Crown to stop a suit between subjects in the subject matter of which it is alleged that the Crown is or may be interested and in respect of which suit has been brought in behalf of the Crown to have its interest declared.

If the Crown right alleged is a right in behalf of the Province then the Attorney-General of the Province is the proper officer to exercise the prerogative.

Observations by MARTIN, J., on the history of the Supreme Court of British Columbia.

Statement.

APPEAL from injunction order. On 27th January, 1898, the defendants brought an action against the New Vancouver Coal Mining and Land Company, Limited, for a declaration that they were entitled to the coal under the sea opposite the lands known as the Newcastle Townsite reserve, claiming them under Letters Patent from the Dominion dated the 21st of April, 1897. The action was ready for trial and on 5th September, 1899, the Attorney-General for British Columbia and the Coal Company commenced this present action against the Esquimalt and Nanaimo Railway for a declaration that the right of coal under the foreshore and opposite to Newcastle Townsite Reserve was vested in the Crown in right of the Province, and for an injunction to restrain the defendants from further prosecuting their action against the Coal Company. On the application of the Attorney-General the Chief Justice made an order restraining the further prosecution of the action against the Coal Company until the determination of this action.

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On 12th September, 1899, the following written judgment was delivered by

McCOLL, C.J.: Ordinarily the Crown has the prerogative right to intervene in an action between subjects if the Crown claims to be interested in the matters in dispute. It is not necessary that the nature of the interest should be apparent. It need not even be suggested.

The Crown, if it so intervenes, should take the matter up at the stage in which it is at the time.

But the Crown has also the larger right of instituting a suit and requiring the proceedings in the other action to be stayed. *Attorney-General* v. *Barker* (1872), L.R. 7 Ex. 177; *The Attorney-General* v. *Constable* (1879), 27 W.R. 661; *Dixon* v. *Farrer, Secretary of the Board of Trade*, (1886), 17 Q.B.D. at p. 664.

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The difficulty in the present case arises from the dual position of the Crown in Canada under the British North America Act with reference to federal and provincial matters.

Mr. *Bodwell* contended that where such a conflict exists the right can be invoked for the Crown only by the authority having jurisdiction over the subject matter of the litigation.

But thus to limit the right is to take away its very nature as a prerogative of the Crown; the mere assertion of which must prevail. Moreover, the question to which authority the jurisdiction belongs is of importance only when it is itself a question disputed in the action, and to make this the test in whom the right to control the litigation is, would be to require the determination of the rights of the parties for the decision of the preliminary question.

The right is one between the Crown and the subject, not between the Crown in one capacity and itself in another.

It follows, therefore, I think, that the right, if it exists at all, over the matters now under discussion can be claimed

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at the instance of either authority, and that, having been once asserted, no further question of the kind can arise respecting the same litigation. The right of the other authority in the Court which has already recognized the right must then necessarily be confined to an application to be also added as a party to the action, or for the consolidation with it of any action which such other authority may have brought.

If the right should happen to be claimed by both authorities at the same time, the Court must decide which is to have the conduct of the proceedings.

Before the commencement of this action the Attorney-General of Canada had applied in the action now sought to be stayed for leave to intervene as plaintiff, and an order was made accordingly, subject to his written consent to be added as a plaintiff being filed.

It appeared on the argument that this order has been abandoned. If the order had been acted upon I do not see what right the Attorney-General of British Columbia could now have other than to be added as a party to that action, or perhaps to have the actions consolidated.

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For this Court, having given leave to the Crown at the instance of the Dominion authority to control that action by means of that authority, now virtually to restrain the Crown from doing the very thing so authorized would, it seems to me, be absurd.

In other circumstances I would have asked counsel to argue the question whether this prerogative right exists regarding matters with reference to which the Crown occupies the dual position, because of the impossibility of giving effect to the right when claimed by either authority, unless with the consent of the other, without prejudicing such other by depriving it of the opportunity to claim the right, and because of the conflict which may arise in the exercise of the right to the prejudice, possibly, of the Crown itself in one of its capacities.

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But the existence of the right was assumed by both sides in the very able arguments addressed to me: and as all parties are anxious for an immediate decision, I merely call attention to the point.

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There will be an order as asked. Leave should be formally reserved to the Attorney-General of Canada to come in.

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The defendants appealed and the appeal was argued at Victoria before WALKEM, DRAKE and MARTIN, JJ., on 13th September, and 8th and 9th November, 1899.

Argument.

Bodwell, Q.C., for appellants: In England in a suit between subject and subject the Crown had a right to intervene and remove the suit into the Exchequer Court and restrain the parties from proceeding in another suit, or if the suit were already in the Exchequer Court then the Crown could assume conduct of that suit; but there is no prerogative right in British Columbia to have an action stopped already proceeding in the Court and commence another in same Court. See *Attorney-General* v. *Barker* (1872), L.R. 7 Ex. 177; *The Attorney-General* v. *Baillie* (1842), 1 Kerr at p. 453; *The Attorney-General* v. *Halling* (1846), 15 M. & W. at p. 692 and *Wall* v. *The Attorney-General* (1823), 11 Price at p. 698.

The only prerogative right was to transfer the litigation into the Court of Exchequer, as being the Court which had a peculiar jurisdiction in respect of Crown rights and the suit must have been pending in another Court between subjects, and some specific question relating to proprietary rights of the Crown affected. *Cawthorne* v. *Campbell* (1790), 1 Anst. 205 (note); *Hammond's Case* (1659), Hardres 176; *Attorney-General* v. *Barker*, *supra*, at pp. 183, 184 and 186; *The Attorney-General* v. *Hallett* (1846), 15 M. & W. 97.

As to removal to the Exchequer Division see *Attorney-General* v. *Constable* (1879), 4 Ex. D. 172. He also cited *Attorney-General* v. *Baillie*, *supra*, at pp. 453 to 455; Order

in Council of 4th April, 1856, in which the particular jurisdictions are carefully set out but the Exchequer Court is omitted.

As to the contention that it was not necessary for the Attorney-General to shew title but only to suggest or surmise it, the Court is not bound to accept the statement of the Attorney-General that the Crown is interested; it may look into the evidence to see if he is misinformed and it need not be shewn by affidavit that he has no interest, but it may be gathered from the pleadings: *Dixon* v. *Farrer, Secretary of the Board of Trade* (1886), 17 Q.B.D. at p. 662, and (1886), 18 Q.B.D. at pp. 51 and 53.

Assuming the Crown has the prerogative right to stop the suit it is the Crown as represented by the Attorney-General for the Dominion, not the Province. As to what is prerogative see Dicey on the Constitution, 5th Ed.; Anson on the Constitution.

Argument.

He referred to the distribution of powers under the British North America Act; *St. Catherines Milling and Lumber Company* v. *The Queen* (1888), 14 A.C. 46; *The Attorney-General of Ontario* v. *Mercer* (1883), 8 A.C. 767; *The Attorney-General for Canada* v. *The Attorney-General of the Province of Ontario* (1894), 23 S.C.R. 458; *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Province of Ontario* (1898), A.C. 247.

In this case the coal is under Nanaimo Harbour, and being a public harbour we contend that the bed of the harbour is the absolute property of the Dominion, so any prerogative affecting the title is to be exercised by the Federal Attorney-General. See *Holman* v. *Green* (1881), 6 S.C.R. 707, 713, 716; *In re Provincial Fisheries* (1896), 26 S.C.R. 444 at pp. 514, 515, 535; (1898), A.C. at p. 711, in which it was said that public harbours including the bed of the sea are vested in the Dominion. Section 108 of the British North America Act gives the Dominion proprietary rights.

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Duff, on the same side: As to the practice: Assuming the right to intervene and to stay proceedings to exist and to be exercisable by the Attorney-General for British Columbia, there was no jurisdiction in the Court to make the injunction order. The only course open to the Attorney-General was to apply in the former case to stay proceedings; he has no right in this action to get an injunction restraining another action. The Supreme Court Act provides that no proceedings shall be stayed by injunction.

Davis, Q.C., for respondents: Whenever the title of the Crown to any property is in question the Crown has a prerogative right to prevent the matter being litigated between subject and subject and to have it settled in a suit to which the Crown is a party.

Argument.

So far as the Crown is concerned all we have to shew is that the Crown has a substantial interest and is *bona fide* asserting a right. The grant of public harbours to Canada by section 108 of the British North America Act should be regarded as something carved out of 109, and the burden of proof should lie on the defendant Company to shew the exceptions in 109 extend to the present case; further, that the words "public harbour" should be construed in the same manner as "Military roads" (item 7), and that there would be no object in conferring upon the Dominion, mines and minerals, but only everything necessary to control, operate and maintain a public harbour; that if the words related to a certain specific piece of property the case would be different, *e.g.*, Sable Island (item 3) which would include the whole Island, everything above and below the surface; that a public health Act which vests a street in an urban anthority does not vest the sub-soil; *The Mayor, &c., of Tunbridge Wells* v. *Baird* (1896), A.C. 434; and, as to *Holman* v. *Green* (1881), 6 S.C.R. 707, that it does not decide the point in question here, but relates only to the foreshore, nor does the *Fisheries Case* carry the defendant's argument any further.

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In answer to the objection that the Crown of British Columbia recognizes the title of the Coal Company and therefore has no interest, our position is that if the title to the Coal Company is bad then we intend to ratify it. If the Railway Company succeeds the reversionary interest outside the exclusive rights of mining goes to the Dominion ; if the Coal Company succeeds then it goes to the Province, and *Attorney-General* v. *Hallet*, *supra*, shews that a reversionary interest is sufficient. As to prerogative and practice, he cited *The Liquidators of the Maritime Bank of Canada* (1892), A.C. at p. 441 ; *The City of Quebec* v. *Her Majesty the Queen* (1894), 24 S.C.R. 420. We have only one Court in this Province and the prerogative right must be worked out in that Court; it is immaterial whether the Court has the power of the Court of Exchequer for wherever the Crown has the prerogative it must have a remedy.

Argument.

Under the old practice the Court of Chancery could restrain an action in the same Court by injunction : see *Askew* v. *Millington* (1851), 9 Hare at p. 69 and *Scully* v. *Lord Dundonald* (1878), 8 Ch. D. 669.

Bodwell, in reply : Until the Attorney-General for the Province establishes his right to property he cannot establish his right to exercise the prerogative incidental to the Provincial Crown. The primary point at this stage is, which Government is entitled to exercise the prerogative ?

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DRAKE, J. [After setting out the facts] proceeded : Mr. *Bodwell* contended that the Supreme Court of British Columbia had not the powers of the Exchequer Court, or the jurisdiction, and therefore had no authority to restrain an action *inter partes* on an allegation that the Crown was interested. This is confounding prerogative with procedure. The Court may not have the special practice of the Exchequer Court, but the prerogative rights of the Crown are not therefore limited or affected. We must ascertain in

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what the prerogative consists. It consists in this, that the Crown can intervene in any action between subject and subject which either directly or indirectly affects Crown rights; or it may commence an action on its own account to have those rights ascertained and defined; and the only question which we have to deal with here is whether or not in the latter case it can compel a stay of the action *inter partes* until the rights of the Crown, as claimed by the Province, are ascertained. This is the sole question. We are not concerned with the argument that it is the Crown in right of the Dominion which is entitled to the coal in question, that would be deciding the subject matter of the action on a side issue; and Mr. *Bodwell's* contention that the Attorney-General of this Province had to shew a clear right to the subject matter in contention before he was entitled to intervene, or bring an action to define that right, is hardly an argument that requires serious consideration.

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The Supreme Court of British Columbia has and always had jurisdiction in all pleas civil and criminal, and under these general words that Court has jurisdiction to try causes affecting the property or interests of the Crown.

That Court consisting of one Court only could never be in a position such as that occupied by the Exchequer Court prior to the Judicature Act; but the prerogative right of the Crown is to have actions in which the Crown is interested tried in whatever Court the Attorney-General may select.

The prerogatives of the Crown exist in the Provinces to the same extent as in the United Kingdom, and can only be taken away by express statutory enactment. *Her Majesty the Queen* v. *The Bank of Nova Scotia et al* (1885), 11 S.C.R. 1; *The Liquidators of the Maritime Bank* v. *Her Majesty the Queen* (1889), 17 S.C.R. 657 and in *The Liquidators of the Maritime Bank of the Dominion of Canada* v. *The Receiver-General of the Province of New Brunswick* (1889), 20 S.C.R. 695.

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The Government of each Province of Canada represents the Queen in the exercise of her prerogative as to all matters affecting the rights of the Province.

Such being the rights of the Crown it becomes a minor question how those rights should be enforced. There is no doubt that the Crown can sue in respect of any infringement of those rights. The only question we have to consider is whether in the attempted enforcement of those rights, the Crown can stay proceedings in an action pending between private persons in which incidentally the Crown rights will be affected.

It is admitted that the Crown can intervene in such an action either as plaintiff or defendant, and that course it is contended ought to be taken here ; but that is not so, as the Crown is not bound to adopt such a course.

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The case of *The Attorney-General* v. *Barker* (1872), 20 W. R. 509 laid down this principle as the result of a line of decided cases, and the Chief Baron stated in his judgment, that not merely from the prerogative of the Crown, but upon the general principles and doctrines of a Court of Equity, the Crown being plaintiff in the suit, was entitled to apply for an injunction to restrain proceedings in the action at law ; and Baron Cleasby says, " In this suit, however, the decisive question is that of prerogative, for it is a rule, established by many authorities, that where the title of the Crown to property is disputed, the Crown can prevent that title from being contested between subjects, and can cause it to be decided in a proceeding to which the Crown is a party." This case was decided prior to the Judicature Act, 1873. By that Act the Exchequer Court proceedings were not affected, but in 1880, the Exchequer Court was abolished and transferred to the Queen's Bench.

The case of *The Attorney-General* v. *Constable*, 27 W.R. 661 and 4 Ex. 172, was decided in 1879, and it was there held that the Judicature Act did not alter the prerogative rights of the Crown ; and the Chief Baron says: " By the

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principles of the common law of the realm the prerogatives of the Crown cannot be in any way extinguished or even impaired except by the express words of an Act of Parliament." And in *Yates* v. *Dryden*, Car. 598, the Crown can intervene even after judgment.

There is nothing in our Judicature Act which limits or impairs the prerogatives of the Crown, and the Crown is not bound by statute unless expressly mentioned.

Sub-section 5 of section 13 of the Supreme Court Act, R.S. B.C. 1897, Cap. 56, enacts that, no cause pending in the Court shall be restrained by injunction, provided that any person who would have been entitled, if the Act had not passed, to apply to restrain the prosecution thereof, shall be at liberty to apply for a stay of proceedings. This section cannot be invoked by the appellant, as the Crown is not bound by it; and even if it was, it leaves a discretion in the Judge to grant a stay for the purposes of justice.

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The result of the cases is this, that the Judicature Act made no change in the prerogative right of the Crown to stay proceedings in an action between subjects, in which Crown rights were involved. The same prerogative exists in the Provinces as in England, and can be enforced in the same way; and on this ground I am of opinion the appeal should be dismissed. But Mr. *Bodwell* pressed upon the Court the argument that if the Crown were entitled to take proceedings it was the Crown as represented by the Dominion Government and not by the Province. As this would in fact be asking us to decide the action I decline to express any opinion. It is not necessary for the Attorney-General to establish beyond dispute that the rights of the Crown as represented by the Province are in danger. The Attorney-General can allege or surmise that the Crown is interested in the subject matter of the suit, and he cannot even be called upon to state the grounds, though as a matter of courtesy he sometimes does.

Since this case was heard the case of the *Attorney-Gen-*

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eral v. *Lord Stanley of Alderley* was heard in the Divisional Court and that Court stayed all proceedings in the County Court on the intervention of the Attorney-General, alleging that the rights of the Crown were affected, and an appeal against that decision heard on 16th December, 1899, was dismissed. See (1899), 16 T.L.R. 99. The appeal should be dismissed with costs.

WALKEM, J.: I concur.

MARTIN, J.: First among the important points submitted for our consideration in this appeal from the order of the learned Chief Justice, is the objection that there is no Court in this Province corresponding to the English Court of Exchequer, and that this Court has no authority to exercise the jurisdiction of the said Court of Exchequer either as regards its common law jurisdiction, or its equity jurisdiction. In support of this contention reliance is chiefly placed on the New Brunswick case of *The Attorney-General* v. *Baillie* (1842), 1 Kerr, 443. In that case jurisdiction in Exchequer causes was sought to be upheld under the commission granted by His Majesty King George III., to the first Chief Justice of the Supreme Court of Judicature of new Brunswick, George Duncan Ludlow, Esq., conferring upon him "full power and authority in our said Supreme Court, to hear, try and determine all pleas whatsoever, civil, criminal and mixed, according to the laws, statutes and customs of that part of our kingdom of Great Britain called England, and the laws of our said Province of New Brunswick, not being repugnant thereto, and executions of all judgments of our said Court, to award, and to act, and do all things which any of our Justices of either Bench or Barons of the Exchequer in England may or ought to do; and to make such rules and orders in our said Court as shall be judged useful and convenient, and as near as may be, agreeable to the rules and orders of our Courts of King's Bench, Common pleas, and Exchequer, in England."

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In considering the scope of this commission the learned Judges of New Brunswick devoted special attention to the words "to hear, try and determine," and pointed out (p. 454) that "These are words pertinent and appropriate to convey common law powers, especially the term 'to try,' of which the prominent signification is, without doubt, trial by jury." Also on p. 455, "The terms try and trial, I conceive to be peculiarly apt to denote proceedings at common law, and not at all applicable to proceedings in equity. The judgment then proceeds: "'Pleas, civil, criminal and mixed,' 'laws, statutes and customs,' 'executions of all judgments,' are all expressions which clearly import proceedings according to the course of the common law, and have no reference to the course of proceeding in Courts of equity. Reliance is placed on the following clause of the commission, 'to act, and do all things which any of our Justices of either Bench or Barons of the Exchequer in England may or ought to do.' But the acts and doings here authorized, must be in relation to the pleas which the Court is empowered to hear, try and determine. And the power of the Barons of the Exchequer, which this clause of the commission conveys, must be confined to the judicial powers exercised by them in the Common Law Court of Exchequer where they are the sole Judges, and cannot be stretched to include powers which they exercise in another Court, in conjunction with other Judges, especially powers of a Court of Equity, which are altogether distinct from and foreign to the powers known to the common law." And finally on p. 457: "The Crown has contented itself with establishing a Court, with general common law powers, of which powers the Crown may avail itself as well as the subject, as need may require, and which powers the Crown has evidently deemed sufficient for the Supreme Court of a colony to exercise."

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From these extracts it must be plain beyond question that the powers of this Court were at all times much larger

than those of the New Brunswick Court constituted under the said commission. Before discussing what powers have been conferred upon this Court, I take this opportunity of correcting an impression which has apparently widely prevailed, viz.: that this Court had no existence before the Order in Council of the 4th of April, 1856, under the Imperial Act 12 and 13, Vict. Cap. 38, relating to "The Supreme Court of Civil Justice of the Colony of Vancouver's Island." The fact is that "the Supreme Court of Civil Justice of Vancouver's Island" has existed since the 2nd day of December, 1853. In his despatch of the 7th of January, 1854, the then Governor of Vancouver Island (James Douglas) notified the Duke of Newcastle, Secretary of State for the Colonies, of the establishment, on 2nd December, 1853, by an Act of the Council of Vancouver Island, of a "Supreme Court of Civil Justice with jurisdiction over the whole Colony of Vancouver Island and its dependencies, in all matters of law or equity, where the amount in dispute is of the value of 50 pounds sterling and upwards;" that "David Cameron, Esq., was appointed Judge for the time being," and also that rules and forms of pleadings had been adopted. Vancouver Island Parliamentary Papers, July 25th, 1863, p. 37. These dates are confirmed by Chief Justice Cameron (as he then was) in his letter of February 2nd, 1863, to the Colonial Secretary in Vancouver Island. *Ib.* p. 33.

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From what will appear later it is immaterial to discuss the question as to what powers were conferred by this Act of Council, or by the Order in Council of the 4th of April, 1856, because a much wider jurisdiction was conferred by section 5 of the proclamation issued on June, 8th, 1859, by the Governor of the then separate Colony of British Columbia, pursuant to the powers conferred upon him by the Imperial Act 21 and 22, Vict. Cap. 99 (1858). Section 5 of the proclamation is as follows:

"The said Supreme Court of Civil Justice of British Columbia shall have complete cognizance of all pleas what-

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soever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the said Colony of British Columbia."

By various subsequent statutes and ordinances of Vancouver Island and British Columbia, which it is unnecessary to particularize here as they are set out in the judgment of this Court in the noted case of *S.*——v. *S.*—— (1877), 1 B.C. Pt. 1, 25, and also in my "Chart of the Judges of the Supreme Courts of Vancouver Island and British Columbia," this present Supreme Court "became as it were," (to use the language of Mr. Justice Gray in *S.*——v. *S.*——, p. 29), "the inheritor, not only of the detailed jurisdiction first given in the formation of the Vancouver Island Court, but also of the more enlarged jurisdiction given by the constitution of the Court of the Mainland when it was created in 1859, as well as of any increased power the Supreme Court of Vancouver Island acquired, after the introduction of the English Law in 1867, from the terms in the second division in the order creating it, giving jurisdiction to adjudge and determine upon, and according to, the laws thereafter to be in force in the Colony." A comparison of section 5 of the proclamation with the commission of the Chief Justice of New Brunswick will shew at once that the powers conferred by the proclamation are far in excess of those conferred by the commission. There are no words in the commission corresponding to the phrase in the proclamation—"and shall have jurisdiction in all cases civil and criminal arising within the said Colony of British Columbia." I might point out other differences, but it is unnecessary to do so, for I regard the decision of this Court in the case of *S.*——v. *S.*—— (which was not cited in the argument) as, in effect, settling the point here raised, because in *S.*——v. *S.*—— it was held that this Court has jurisdiction in "all divorce and matrimonial causes as well as all others, except admiralty," page 45, and the judgments therein delivered by the learned Judges twenty years ago, and thirty-five years

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after *The Attorney-General* v. *Baillie*, *supra*, are, of course, binding on us to-day.

It follows, then, as to the first point, that I am of the opinion that this Court has all the powers of the Exchequer Court in England, and all the machinery necessary for the exercise thereof.

The second point, raised by the defendant, is that unless the Crown in right of the Province of British Columbia has a proprietary interest in the subject matter of litigation between subject and subject the prerogative here claimed cannot be exercised; in other words, that before a cause will be removed into the Exchequer, the Court considers, as a preliminary question, whether or no the title of the Crown is in question.

In the case of *Attorney-General* v. *Lord Stanley of Alderley* (1899), 16 T.L.R. 99, decided since the argument herein, the leading cases on the subject were considered by the Court of Appeal, and the learned Judges used the following language in giving their decisions: Lord Justice A. L. Smith: "The authorities shewed that it was part of the prerogative of the Crown to have the action removed and stayed and that the Crown should become the actor in the litigation involving its rights, and that this could be done after judgment. As to the discretion of the Court apart from the prerogative of the Crown he desired to say nothing."

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Lord Justice Vaughan Williams agreed: "When there was an action between two subjects of the Crown which raised a question of the title of the Crown or some other question in which the Crown was interested, the Crown has two rights, which were not necessarily connected; first, to have the action removed to the Revenue side of the Queen's Bench Division . . . . Secondly . . . . the right to apply to have the action stayed until the information which raised the same question of right was determined."

The result of this case, as I understand it, is that before

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the Crown can become the actor the Court must be satisfied there is something in the existing litigation "involving its rights," or "some question of the title of the Crown, or some other question in which the Crown is interested." This seems to me to be but another way of saying that the prerogative sought to be asserted here exists only in relation to proprietary rights, and if there be no property, whatever its nature, there can be no prerogative. The question then arises, has the Crown in right of the Province of British Columbia any interest, *i.e.*, of a proprietary nature, in the subject matter of the action which has been stayed by the order appealed from? It will be seen immediately that such a question could not arise in England, where the Crown has an undivided jurisdiction, but owing to the peculiar constitution of the Dominion of Canada, which is a federal state (Dicey on the Constitution, 2nd Ed., 130, *et. seq.*), the matter may here be on a very different footing. The subject requires careful attention as being but another illustration of the problems which arise out of the constitutions of the various Colonies, Provinces and States which compose our British Empire, and this Court is bound, in my view, to investigate the question however novel, startling, or difficult of elucidation.

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Speaking recently of sub-sections 91 and 92 of the British North America Act, that great jurist, Lord Watson, said, in an appeal from this Court: "The clauses distribute all subjects of legislation between the Parliament of the Dominion and the several Legislatures of the Provinces." *Union Colliery Company of British Columbia, Limited* v. *Bryden* (1899), A.C. 580, at p. 585. Similarly, it seems to me, sub-sections 12 and 65 of the same Act distribute the executive functions of government between the Dominion and the Provinces. As the Lord Chancellor (Earl of Selborne) said in *The Attorney-General of Ontario* v. *Mercer* (1883), 8 A.C. 767, at pp. 773, 774, the Act "established a Dominion Government and Legislature, and Provincial

Governments and Legislatures, making such a division and apportionment between them of powers, responsibilities, and rights as was thought expedient." That the prerogatives of the Crown are exercised by that power which exercises the executive functions of government is established beyond question—"The Executive Sovereign may then be described as the 'Crown in Council,'" and "The executive power of the Crown comprises what is called the Royal Prerogative . . . . " Anson on the Constitution (2nd Ed.), Pt. II., p. 2; "The Crown in Council is the Executive" *Ib.* Pt. I., pp. 22, 39. In the *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Province of Ontario* (1898), A.C. 247, Lord Watson, referring to the appointment of Queen's Counsel in Ontario, uses the following words, "The Crown, or in other words the Executive Government of the Province . . . . . " The subject has been elaborately considered by Mr. Dicey, and the result of his investigations may be summed up in the significant sentence: "The prerogatives of the Crown have become the privileges of the people." Constitution (5th Ed.), p. 396, see also *The Attorney-General for Canada* v. *The Attorney-General of The Province of Ontario* (1894), 23 S.C.R. 458.

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Probably the most important function of a government is the preservation of the property of the state, and any rights in relation to such property can only be lawfully exercised by the government of that state or province to which the property, whatever its nature, appertains. A prerogative such as is here claimed is sought to be exercised in relation to real property, so it follows that when the Executive of any government in the Dominion of Canada, (that is to say the Crown, as represented by such Executive) professes to exercise a prerogative in relation to any property in litigation between subject and subject, it surely is open to either of the litigants to have it ascertained what government (Crown) it is that is entitled to such an exercise. Were it otherwise it might easily occur that in a suit

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in this Province the prerogative of the Crown might be exercised in three capacities, viz., the Crown as representing Imperial interests, *i.e.*, the Crown Imperial (in relation to property owned by the Home Government within our boundaries); the Crown in right of the Dominion of Canada, *i.e.*, the Crown Federal; and the Crown in right of this Province of British Columbia, *i.e.*, the Crown Provincial. If it were to be held that on the mere assertion of a right, the Crown could stay an existing suit between subject and subject and become itself the actor in a new cause, then it might happen that counsel instructed by the Attorney-General of England, or of Canada, or of British Columbia might ask this Court in an action herein pending to support such a prerogative. And if the Crown in any one of these capacities were to exercise such a prerogative, would that put an end to its own existence in its other capacities? Surely not. The contention as to the bare assertion of the Crown would thus seem to lead to absurd results; and, as was recently said by the Lord Chancellor it is not permissible to repudiate the logical conclusion of a contention, or to throw over consequences which may reduce an argument to an absurdity—*Wolverton* v. *The Attorney-General* (1898), A.C. 535 at p. 543. The learned Chief Justice adopted the view, advanced by the plaintiffs below, that the mere assertion of the prerogative must prevail, but the attention of the Court below was not, apparently, drawn to the fact that *Dixon* v. *Farrer, Secretary of the Board of Trade* (1886), 17 Q.B.D. 664, went to appeal, 18 Q.B.D. 43, and it was then held that the "Attorney-General is entitled to a rule in the first instance upon his statement that the Crown is interested, but that it is open to the party who objects to that order to shew that, in point of fact, the Court is misinformed on this point, and unless he can shew this the rule would stand. That leaves open the question in what cases the Crown is interested." The ground now taken by the plaintiffs' counsel is: "All we

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have to shew is that the Province is interested in the property and that that property is being litigated." This case is peculiar in this that the defendant does not deny the interest of the Crown, but admits it in its Federal capacity, though it does deny that the Crown Provincial has any status. This feature of the case puts it at once on a different plane from any case in England, where, as already noticed, such a point could not possibly have arisen, so the English authorities are of practically little assistance to us. Even admitting that the mere assertion is sufficient, the question here is, who is entitled to assert? If a litigant in England had ever been placed in the invidious position that his action was liable to be stayed at the instigation of the Crown in any one of three distinct capacities, I am, I think, entitled to assume, from the history of our legal procedure, that a practice would speedily have sprung up to put an end to that anomalous position; the duty of the Court to protect suitors from being harassed or embarrassed in the trial of actions pending before it would have provided a prompt and adequate remedy. If it were necessary for this Court to lay down a new practice to meet new conditions it would be done, but in my view the practice as it now exists amply justifies an inquiry into the interest of the Crown Provincial as here set up. The foregoing leads me irresistibly to the conclusion that it is not only a reasonable request on the part of the defendant Company, but a convenient practice, tending to lucidity and a speedy determination of the questions involved that this Court should answer as a preliminary point the question—Is it the Crown Federal or the Crown Provincial that has the right to exercise the prerogative relied on here? It is objected that in this case the circumstances are such that to answer that question is in effect to decide the whole action. That seems to me an exceptionally good argument for determining the point now, because it will bring the matter to a speedy conclusion, and save great expense. It is better to face the exact

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situation cheaply and expeditiously at the beginning of the action than to obtain an expensive judgment, one way or another, at the end of it, not to speak of the delay and uncertainty in the meantime.

In the view I have taken that the said prerogative is incident to proprietary rights this second question is herein equivalent to saying, were the minerals underneath the waters and bed of Nanaimo Harbour, at the time of the Crown grant hereinafter mentioned the property of the Dominion or of this Province? I shall proceed, as briefly as the importance of the subject will permit, to answer this third question.

By Crown grant dated the 21st of April, 1887, issued under and by virtue of section 3 of the "Dominion Act respecting the Vancouver Island Railway, &c.," 47 Vict. Chap. 6 (assented to 19th April, 1884), Her Majesty in right of the Dominion purported to convey to the defendant certain lands bordering on the sea at Nanaimo Harbour, and the foreshore rights in respect to such lands together with the privilege of mining under the foreshore and sea opposite any such land, etc., etc. It is common ground that Nanaimo Harbour is a public harbour and the property of the Dominion Government under the British North America Act, Sec. 108, 3rd Schedule, item 2, which declares public harbours to be the property of Canada, but the plaintiffs contend that while the Crown in right of the Dominion is entitled to the harbour that expression as used in the British North America Act does not include the minerals beneath the water of the harbour. On behalf of the defendant it is asserted that Canada acquired public harbours in the fullest extent of that term, meaning everything necessary to create or constitute a harbour, *i.e.*, the bed, the water above the bed, and the soil and everything else below which supports the bed, without which there could be no harbour; reliance is placed on *Holman* v. *Green* (1881), 6 S.C.R. 707, and *In re Provincial Fisheries* (1896), 26 S.C.R. 444; (1898), A.C. 701. But

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the plaintiffs urge in reply that because by the next succeeding section 109, "All lands, mines, minerals and royalties belonging to the several provinces . . . . . shall belong to them subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same," therefore the grant of public harbours to Canada by the preceding section 108 should be regarded as something carved out of 109, and the burden of proof should lie on the defendant Company to shew the exceptions in 109 extend to the present case; further, that the words "public harbour" should be construed in the same manner as "Military roads" (item 7), and that there would be no object in conferring upon the Dominion, mines and minerals, but only everything necessary to control, operate and maintain a public harbour; that if the words related to a certain specific piece of property the case would be different, *e.g.*, Sable Island (item 3) which would include the whole island, everything above and below the surface; that a public health Act which vests a street in an urban authority does not vest the subsoil; *The Mayor, &c. of Tunbridge Wells* v. *Baird* (1896), A.C. 434; and, as to *Holman* v. *Green, supra,* that it does not decide the point in question here, but relates only to the foreshore, nor does the *Fisheries Case* carry the defendant's argument any further.

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Though, with much respect, I differ from my learned brothers on some points of this case, yet I think we are all agreed that the judgment in the *Tunbridge Wells* street case affords us no assistance in determining the main question here. In endeavouring to arrive at the meaning of a great statute which confers a constitution upon a federal state the subject must be approached in a very different frame of mind from that in which one would consider the rights of a parochial authority.

Then as to section 109, the construction put upon its scope in *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. at p. 57, is this: "The en-

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actments of section 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under section 108, or might assume for the purposes specified in section 117.

It is admitted that "public harbours" are an exception, but what is included in that expression?

I agree that in *Holman* v. *Green*, *supra*, the point there raised was not exactly the same as that before us; if it were, this branch of the plaintiff's case would be unarguable. Nevertheless the broad point was therein taken (p. 710) that the whole soil of the harbour passed to the Dominion, and the Court felt it necessary to decide that important question before it could come to a satisfactory conclusion. The Chief Justice lays it down that the words "public harbours" must be "construed in their full plain and grammatical sense." Mr. Justice (now Chief Justice) Strong says, (p. 717):

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"Next arise the questions—Does the description 'public harbours' include the bed or soil of the harbour? And if so, is the foreshore also comprised in it? I am of opinion that there is even less doubt on this head than on the first point. By the attribution of the harbours to the Dominion it never could have been meant to transfer a mere franchise to the Dominion Government—that is, to the Crown in right of the Dominion, leaving the property in the soil vested in the Crown in the right of the Province. Such a construction would be so arbitrary, unnatural and improbable as to be totally inadmissible .....The fair inference is therefore that it was intended to transfer the harbours in the widest sense of the word, including all proprietary as well as prerogative rights, to the Crown as representing the Dominion."

In my opinion the fact, relied on by Mr. *Davis*, that Mr. Justice Strong (as well as the Chief Justice) referred to the object of vesting the harbours in the Dominion as being doubtless that of enabling that Government to carry out with more facility measures relating to navigation and shipping, does not detract from the weight of the conclusion arrived at. Mr. Justice Fournier is quite as positive (721) "Du moment que la propriete du havre est devenue celle du gouvernement federal, le gouvernement de (P.E.I.) a cesse d'y avoir aucun droit." With these views Mr. Justice Henry concurs, and Mr. Justice Gwynne states, "Her Majesty remained seized of those harbours and of the land covered with the waters thereof, *jure regio*, for the public purposes of the Dominion, and subject to the exclusive control of the parliament of Canada."

In the *Fisheries Case, supra*, the same Court affirmed *Holman* v. *Green*, and declared it to be a binding decision; pp. 514, 515 and 535. At p. 515 the Chief Justice declared that the "beds of such streams and waters (lakes, rivers and public harbours) were therefore lands belonging to the several provinces in which the same were situated.....excepting the beds of public harbours, which, by the operation of section 108, were vested in the Dominion." I can see nothing in the judgment of the same case when it came before the Privy Council that would detract from the effect of *Holman* v. *Green*, so far at least as the point now under consideration is concerned; in fact I find the language used is, if anything, an appreciable confirmation thereof. No assistance as to what the words "public harbours" include specifically can be derived from the judgment of the Judicial Committee, because after stating (p. 711) "With regard to public harbours their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada," it proceeds to say, "their Lordships think it extremely inconvenient that a determination should be sought of the abstract question

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of what falls within the description 'public harbours.' They must decline to attempt an exhaustive definition of the term applicable in all cases."

Since the argument a report of a suit in Ontario has come to hand wherein the term in question has been considered —I refer to the important case of *McDonald* v. *Lake Simcoe Ice and Cold Storage Company* (1899), 26 A.R. 411. There the defendant contended that the plaintiff was not entitled to a water lot on Lake Simcoe because the *locus in quo* was a public harbour and therefore the Crown grant from the Province of Ontario to the plaintiff was invalid. The further point was raised that if the grant were valid, was the plaintiff entitled to an injunction to restrain the defendant from cutting channels in the ice formed on the water lot? It was held on the facts that the harbour in question was not a public one, that the plaintiff's grant was valid, and that he had a title to the ice forming on his lot. The reason why the Court decided in his favour was because it was considered that the grant was not, in the words of the Chief Justice, "a mere barren right to the land," but a grant of everything upon the land *usque ad coelum.*" Mr. Justice Maclennan states (p. 423) "I think the solid ice which forms in winter upon the plaintiff's freehold is the plaintiff's property, just as the soil beneath and the air above, or rather the space occupied by the air, are his and cannot be invaded or interfered with by others, except in the exercise of the right of navigation." To the same effect is Mr. Justice Moss, to whose most lucid judgment (if I may be permitted to say so) I particularly refer. "The shore, the bed, and the water, are vested as private property in the plaintiff, subject to the servitude of a common public right of way for the purposes of navigation;" (425), and (at p. 427) "The ownership of the subjacent soil *prima facie* carries with it the right to everything above and below it;" and again (p. 427) approving the old case of *Goodtitle* v. *Alker & Elmes* (1757), 1 Burr. 133, "the owner of the soil

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has a right to all above and under ground, except only the right of passage for the King and his people." Mr. Justice Lister concurred with these expressions; the fifth member of the Court, Mr. Justice Osler, expressed no opinion on this point, agreeing with the trial Judge that what the defendant had been doing was an use of the water lot for the purposes of navigation.

The bearing of the propositions above quoted, (propositions which Mr. Justice Moss says were "scarcely disputed") is very considerable on the case at bar, because, in spite of the fact that the plaintiff was declared to be possessed of the ample rights specified, *i.e.*, everything above and below the ground, nevertheless they were all liable to be defeated if the *locus in quo* were a public harbour. In such case as the Chief Justice puts it, "it follows, as of course, that the patent under which the plaintiff's claim is wholly void and inoperative," and Mr. Justice Maclennan says (421) "if it was a public harbour..... the grant must be held to be *ultra vires* and void."

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Does the fact that there are minerals in the soil below the land (bed) on which the waters of the harbour rest alter the rule? Surely not. In *Acton* v. *Blundell* (1843), 12 M. & W. at 354, Chief Justice Tindal alludes to the well-known "principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure.... " See also Broom (Maxims) on *Cujus est solum* (6th Ed.), 374.

Applying the above authorities to the present case and giving the words "public harbours" their "plain grammatical sense," and bearing in mind that they are to be construed as is also said in *Holman* v. *Green*, "in the widest sense," I can come to no other conclusion than that the

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Crown in right of the Dominion possesses in, over, and under this land covered with water all the rights of any other owner of land, including the minerals, subject only to the public right of navigation and the defendant's interests, and that the harbour and minerals thereunder are included in the exception mentioned in section 109 of the British North America Act.

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It may possibly be that, as the respondent's counsel suggests, the Supreme Court did not intend *Holman* v. *Green* to go so far as is contended here. All I can say to such a view of the judgments therein is that to me they lead only to the conclusion I have drawn: if there is another meaning it would be more becoming in me to let that tribunal itself declare it. One thing seems to me clear: that case did beyond question decide that the foreshore belonged to the Dominion, and it flows from that that the minerals to the centre of the earth follow the ownership of the foreshore: can it be that the minerals under the foreshore of the harbour were owned by the Crown in one capacity, and that the minerals under the general bed of the harbour were owned by the Crown in another capacity?

It follows, then, that in my opinion the Crown in right of the Province of British Columbia has no interest in the property in litigation in this action, and is not entitled to exercise any prerogative in relation thereto.

The appeal should be allowed with costs, to the appellants in any event.

Appeal dismissed, Martin, J., dissenting.

REGINA v. UNION COLLIERY COMPANY.

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May 8.

REGINA v. UNION COLLIERY CO.

Criminal law—Manslaughter—Grievous bodily injury—Indictment of corporation—Punishment—Criminal Code, Secs. 191, 192, 213, 252, 639 and 713.

The defendants, a corporation, were indicted for that they unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining a bridge forming part of their railway which was used for hauling coal and carrying passengers, and that on the 17th of August, 1898, a locomotive engine and several cars then being run along said railway and across said bridge, owing to the rotten state of the timbers of the bridge, were precipitated into the valley underneath, thereby causing the death of certain persons.

The defendants were found guilty and a fine of $5,000.00 was inflicted by WALKEM, J., at the trial.

Held, per McCOLL, C.J., and MARTIN, J., on appeal affirming the conviction, that such an indictment will lie against a corporation under section 252 of the Code.

Per DRAKE and IRVING, JJ.: Such an indictment will not lie against a corporation.

Statement.

Sections 191, 192, 213, 252, 639 and 713 of the Code considered.

A corporation cannot be indicted for manslaughter.

Per McCOLL, C.J.: The words "grievous bodily injury" in section 252 have no technical meaning and in their natural sense include injuries resulting in death.

Per DRAKE, J.: The indictment charges the Company with the death of certain persons owing to the Company's neglect of duty and is a charge of manslaughter, the punishment of which is a term of imprisonment for life and because a corporation cannot suffer imprisonment therefore the punishment laid down in the Code is not applicable to such a body. When death ensues the offence is no longer "grievous bodily injury," but culpable homicide.

CASE reserved for the Court of Appeal by WALKEM, J., pursuant to section 743 of the Criminal Code as follows:

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The defendants were tried and convicted at the Fall Assizes, 1899, at Victoria, before the Honourable Mr. Justice WALKEM and a jury, under the following indictment:

CANADA,
PROVINCE OF BRITISH COLUMBIA,
COUNTY OF NANAIMO,
CITY OF NANAIMO.

The jurors for our Lady the Queen present that the Union Colliery Company of British Columbia, Limited Liability, is a Company duly incorporated under the Companies Act, 1878, for the purpose amongst other things of acquiring coal lands in the Province of British Columbia, of extracting the coal therefrom, and of erecting and using tramways and roadways necessary for transporting said coal from the mines to the place of shipment:

The jurors aforesaid do further present that the said Company pursuant to the said powers have for a long time past been mining coal near Union in the County of Nanaimo in the Province of British Columbia, and have been transporting said coal from said mines to Union Wharf in said County, the place of shipment thereof along a tramway or railway in cars drawn by locomotives:

The jurors aforesaid do further present that the said tramway or railway is about ten miles in length, and that for some time past the Company have been carrying passengers as well as hauling coal on said tramway or railway between said points:

Statement.

The jurors aforesaid do further present that the said tramway or railway on the day and year hereinafter mentioned was carried across the valley of the Trent River by trestle work and a Howe Truss bridge erected several years prior to said date, which truss bridge was about one hundred and thirty-three feet in length, and about ninety-five feet above the bed of the said river, and that the said trestle work and truss bridge were maintained by the said Company:

The jurors aforesaid do further present that in the absence of reasonable precaution and care, the said Howe Truss bridge might endanger human life, and that the said Company were under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger:

The jurors aforesaid do further present that the said Company unlawfully neglected without lawful excuse to take reasonable precautions and to use reasonable care in maintaining the said Howe Truss bridge, and that on the seventeenth day of August, in the year of our Lord one thousand eight hundred and ninety-eight, a locomotive engine and several cars, then being run along said tramway or railway, and across said Howe Truss bridge by said Company, broke down said Howe Truss bridge owing to the rotten state of the timbers thereof, and were precipitated into the valley of the Trent River, thereby causing the death of Alfred Walker, Richard Nightingale, Walter Work,

Alexander Mellodo, K. Nanko (Japanese), and Osano (Japanese), who were then on said cars and locomotive against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, Her Crown and dignity.

The question reserved for the opinion of the Court is: Will the indictment lie against a corporation? If this question be answered in the negative, the conviction is to be quashed, otherwise the conviction is to stand.

The Company was fined $5,000.00.

The question was argued at Victoria on 7th March, 1900, before McColl, C.J., Drake, Irving and Martin, JJ.

Duff, for the accused: Sections 191 and 192 of the Code cannot be invoked as the indictment does not refer to them; they were not invoked in the Court below. This charge is one of culpable homicide (manslaughter) or nothing, and as the only punishment for that offence is imprisonment (section 236) it cannot relate to corporations. Taschereau at page 206 says that sections 213 and 214 are nothing but additions to the definition of culpable homicide.

Maclean, D. A.-G., for the Crown: I rely on sections 191, 192, 213 and 639. The defendants were common carriers and are responsible to the public in the same way as persons. By section 3 (*t*) "person" includes a corporation. The charge here is failure to take reasonable precautions quite irrespectively of the fact that such negligence resulted in death. He referred to judgment of Lord Blackburn in *The Pharmaceutical Society* v. *The London and Provincial Supply Association, Limited* (1880), 5 App. Cas. at p. 869. The Company was not indicted under any particular section: the words of the indictment apply to 192 and 193 as well as to 213. The Company cannot escape liability on the ground that the offence committed was a graver one than the one charged. He cited *The Queen* v. *The Great North of England Railway Company* (1846), 2 Cox, C.C. 70; *In re The Queen* v. *The Toronto Railway Company* (1898), 30 Ont. 224; 2 C.C.C. 471; Archbold's Criminal Evidence,

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Argument.

21st Ed., 7 and *The Queen* v. *Weir* (1899), 3 C.C.C. 102 as to indictment.

Duff, in reply: As to the attempt to bring the case within sections 191 and 192 and make it an indictment for a nuisance, it is not alleged in the indictment that the lives, safety, etc., of the public were endangered. See Russell on Crimes, 6th Ed., 731.

Section 213 does not create an indictable offence, but simply imposes a responsibility; there must be some consequences before there can be any liability and if the consequences are manslaughter then the punishment must be that for manslaughter.

Section 639 is merely a procedure section. He cited also *The Metropolitan Saloon Omnibus Company, Limited* v. *Hawkins* (1859), 4 H. & N. 87 and Pollock on Contracts, 6th Ed., 110 and 111.

8th May, 1900.

Judgment of McCOLL, C.J.

McCOLL, C.J.: The question to be determined is whether the Company is liable to punishment under any section of the Code. Section 933.

Section 252 provides that "everyone is guilty of an indictable offence and liable to *two years'* imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person."

The term "one" is used throughout the Code as of the same meaning as "person," and therefore by sub-section (*t*) section 3, corporations aggregate are within section 252, "in relation to such acts and things as they are capable of doing and owning respectively." The Company being admittedly liable in damages for injury caused by its default in not maintaining the structure in question in a safe condition an indictment would lie against it at common law for breach of duty.

The position at common law was stated by Lord Denman, C.J., in 1846, in *Regina* v. *The Great North of England*

Railway Company, 10 Jurist p. 755, to be undisputed, and section 933 leaves the common law in force. Tash. p. 959.

That being so, to apply section 252 to the Company adds nothing to its criminal responsibility for what it is here charged with. Is the section applicable to it?

The Judicial Committee in *Robinson* v. *Canadian Pacific Railway Company* (1892), A.C. at p. 487, laid down the rule applicable to a statutory Code as being that if any enactment is in itself "intelligible and free from ambiguity" "the law should be ascertained by interpreting the language used," and that resort ought not to be had to the pre-existing law except upon some such special ground as that the language is of "doubtful import," or "had previously acquired a technical meaning."

Lord Justice Thesiger in *The Pharmaceutical Society of Great Britain* v. *The London and Provincial Supply Association, Limited* (1880), 5 Q.B.D., at p. 319, formulates three rules by which to determine whether the term "person"—the equivalent to "one" as used in the Code—includes corporations, holding them not to be included except where "first, the term is expressly interpreted as including them; or, secondly, the context of the Act clearly shews that they are included, or, thirdly, the object and scope of the Act peremptorily require them to be so included, and the context does not clearly negative a construction to that effect."

Judgment of McCOLL, C.J.

In my opinion all three conditions exist in the present case.

The breach of duty may have been the omission of the Company alone, and even if some person connected with it is also liable, Lord Denman in the judgment referred to shews the great importance to the public of maintaining the liability of the Company as well.

The cases of *The Queen* v. *Tyler and the International Commercial Company, Limited* (1891), 2 Q.B. (C.A.) 588; and *The Queen* v. *The Toronto Railway Company* (1898), 2 C.C.C. 471, may be usefully considered.

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As section 230 defines manslaughter to be culpable homicide not amounting to murder, and section 218 defines homicide to be the killing of a human being by another, a corporation cannot be convicted of such an offence.

But the words "grievous bodily injury" in section 252 have no technical meaning, and in their natural sense include injuries resulting in death, and there being no conflict between this section and any other enactment relating to corporations, it would be most extraordinary if the Company could escape liability merely because the consequences of its breach of duty were more serious than would have sufficed to make it punishable.

It was argued that the heading of the group of sections in which section 252 is found "bodily injuries and acts and omissions causing danger to the person" indicates that this section was not intended to apply in case of death. But many of these sections deal with acts and omissions likely to cause death, and one at least (section 255) expressly provides for the case of death caused by an omission, so that any light which may be thought to be afforded in this way is not to the advantage of the Company.

Judgment of McCOLL, C.J.

The distinction between headings so drawn as to be applicable grammatically to the sections following them and headings "inserted for the purpose of convenience of reference, and not intended to control the interpretation of the clauses which follow" is pointed out in *Union Steamship Company of New Zealand, Limited* v. *Melbourne Harbour Trust Commissioners* (1884), 9 A.C. at p. 369, where it is in effect laid down that it lies upon the Company to shew that to hold section 252 includes a corporation is inconsistent with the context or subject matter merely because death has resulted.

What is the effect of death in such a case ?

If a man is charged with manslaughter for a death caused by breach of duty and the evidence fails as to the death, but shews grievous bodily injury, he may by section 713 be convicted under section 252, and if charged under

section 252 and the evidence discloses that death has resulted and the accused is not convicted of the offence charged, the reason is that death creates a new crime.

But if the offender is a corporation the death is merely a supervening aggravation which, as it creates no new crime, cannot, it seems to me, affect the crime which already existed.

If that be so then, that the death may have ensued at once does not, I think, make any difference, for the injury necessarily precedes the death and is not the less but the more grievous because of such result.

As to the nature of the punishment, section 639 expressly provides that it is to be such as is applicable to corporations and this was well understood to be a fine. Section 934 leaves the amount of the fine to the discretion of the Court.

As to the question of punishment, Lord Blackburn says in *The Pharmaceutical Society* v. *The London and Provincial Supply Association, Limited* (1880), 5 A.C. pp. 869—870, "I quite agree that a corporation cannot, in one sense, commit a crime—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death if that be the punishment for the crime; and, so, in those senses a corporation cannot commit a crime. But a corporation may be fined, and a corporation may pay damages; and therefore I must totally dissent, notwithstanding what Lord Justice Bramwell said, or is reported to have said. I must really say that I do not feel the slightest doubt upon that part of the case."

Judgment of McColl, C.J.

It was argued that section 639 only enables a fine to be imposed if the corporation does not appear, that is, in effect that it is left to the accused in any case to evade punishment by the easy expedient of simply appearing. Such a construction is of course out of the question unless the words used are incapable of a sensible meaning.

I have not been forced to the conclusion that when Par-

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liament imposed upon the Courts the duty of convicting corporations guilty of offences under section 252 and others applicable to corporations, Parliament at the same time purposely left the Courts impotent to punish except at the will of the accused themselves. I say purposely, for it is incredible that an error so serious should have remained uncorrected during all the time which has elapsed since the Code was passed, though many amendments have since been made. The form of the indictment is perhaps not artificial, but it is, I think, sufficient at this stage in the way the case is stated. *The Queen* v. *Weir* (1899), 3 C.C.C. p. 102.

Judgment of DRAKE, J.

DRAKE, J.: The defendants, a corporation, are indicted for that the said Company unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining the Howe Truss bridge (a bridge erected by the Company across the Trent River and forming part of the defendants' railway), and that on the 17th of August, 1898, a locomotive engine and several cars then being run along the said tramway or railway and across the said Howe Truss bridge, owing to the rotten state of the timbers thereof were precipitated into the valley of the Trent River, thereby causing the death of certain named persons. The defendants were found guilty, and a fine was inflicted. The question reserved for us is whether this indictment will lie against a corporation.

Sub-section 1 of section 3 of the Criminal Code includes in the expressions person, owner and other expressions of the same kind, bodies corporate.

The expression here is everyone, and *prima facie* that includes a corporation.

Section 213 enacts that everyone who erects, makes or maintains anything which in the absence of precaution or care may endanger human life is under a legal duty to avoid such danger and is criminally responsible for the

consequences of omitting, without lawful excuse, to perform such duty.

Sections 191 and 192 were referred to, and it was argued that the indictment could be supported under any section in the Code which had reference to the offence charged. Section 191 defines a common nuisance as an act or omission which endangers the lives or safety of the public or by which the public are obstructed in the enjoyment of any common right. The public in its ordinary meaning refers to the community at large, and when applied to property or rights, means rights or property common to the enjoyment of all persons. The indictment does not allege the infringement of any duty to the public at large, and I do not think this section applies to the present indictment. Then we have section 192 which says: "Everyone is guilty of an indictable offence and liable to one year's imprisonment or fine who commits any common nuisance which endangers the lives, safety or health of the public" This is still limited to endangering the lives, health or safety of the public, but it proceeds, "or which occasions injury to the person of any individual." Both the offences here indicated, the one of potential and the other of actual injury, must arise out of the committal of a common nuisance. Unless this is shewn these sections do not apply.

Section 213 makes the neglect of reasonable precautions when there is a legal duty to take such precautions not a criminal offence, but makes the person responsible, criminally liable for the consequences; therefore whatever neglect of duty may have existed, that does not constitute an offence under this section, but if that neglect is followed by consequences injurious to the individual, then criminal responsibility arises.

The criminal liability of a corporation aggregate for breaches of duty is no new law. This liability has been frequently affirmed in the English Courts. In *The Queen* v. *The Great North of England Railway Company* (1846), 9

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Q.B. 314 at p. 326 Lord Denman says: "Some dicta occur in old cases. 'A corporation cannot be guilty of treason or felony,' and it might be added 'of perjury, or offences against the person;' but it is liable for assault committed by its servants if authorized by them; it is also liable for libel, trespass and for misfeasance."

The indictment charges the Company with the death of certain persons owing to their neglect of duty. This is a charge of manslaughter, the punishment of which is a term of imprisonment for life. A corporation cannot suffer imprisonment, and therefore the punishment laid down in the Code is not applicable to such a body.

The Code by section 252 makes any person who by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do causes grievous bodily injury to any other person, liable to two years' imprisonment. This section, if the indictment had alleged grievous bodily injury alone to some individual, might have been invoked in order to make section 958, under which the fine was inflicted, applicable, but the indictment as I read it is an indictment for manslaughter.

Judgment of DRAKE, J.

Does the term grievous bodily injury apply when death results from the neglect of duty? I do not think that the use of the term bodily injury is of any greater import than bodily harm. In either case when death ensues bodily harm or injury has been done. But the penalties are distinct, and in the case of *Reg.* v. *Friel* (1891), 17 Cox, C. C. 325, Williams, J., held that when there had been a summary conviction for assault, and the person assaulted dies of the injuries, a plea of *autre fois convict* is no answer to an indictment for manslaughter, because the death is a new fact, not a mere matter of aggravation, or a mere consequence, because in cases of manslaughter based on death resulting from culpable negligence there is no criminal offence unless death ensues and gives rise to a charge of manslaughter. On this last remark of the learned Judge

the section 252, which I am now considering, is not in the English Act, but when death ensues the offence is no longer grievous bodily injury but culpable homicide.

The object of an indictment is to enable the defendant to know what case he has to meet. The necessary facts must be set out with certainty, but there is no necessary form of words to make a perfect indictment if all essential allegations are contained in it, and if the offence created by the statute is in substance charged. The question whether this indictment is good or bad is not before us, but it certainly does not indicate to the defendants that they are called upon to plead to a case of grievous bodily injury. They are called upon to plead to an indictment for unlawfully causing the death of certain individuals, which would be culpable homicide, and a corporation cannot be tried on such an indictment. In my opinion the question submitted to us must be answered in the negative.

Judgment of DRAKE, J.

IRVING, J., concurred with DRAKE, J.

MARTIN, J.: In this matter the question reserved for this Court is—Will the indictment lie against a corporation?

In regard to the point raised as to the offence being a nuisance (sections 191 and 192), I need only add to the remarks of my brother DRAKE that the lucid notes on said sections to be found in Crankshaw fully support the view taken as to the nuisance thereby dealt with being in each case a common one.

Judgment of MARTIN, J.

Section 213 I regard as merely laying down a principle of criminal responsibility, and liability to be indicted arises only in the event of consequences resulting which are offences against the criminal law. A careful consideration of Part XVI., of the Code, which embraces sections 209-217 under the heading "Duties tending to the preservation of life," seems to make this clear. Further, it is significant that in the schedule of forms of indictment under said Part forms are given to be used in connection with all the sec-

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tions in the Part except the three sections of a declaratory nature, *i.e.*, 212, 213 and 214.

The consequences for which a corporation may be made responsible by said section 213 cannot be manslaughter, because, as pointed out by the learned Chief Justice, the definitions of homicide and manslaughter contained in sections 218 and 230 restrict that crime to a "human being." The defendant Company, then, was not, and could not have been indicted for manslaughter since it is a physical impossibility that it could have committed that offence, or any other which infers a physical existence, *e.g.*, rape: as Lord Denman said in *The Queen* v. *The Great North of England Railway Company* (1846), 9 Q.B. 326, "nobody has sought to fix them (corporations) with acts of immorality." The defendant Company not being a human being had no reason to suppose that it was being indicted for an offence that could only have been committed by a human being, so the question here is—What offence was it indicted for? The only offence mentioned in the Criminal Code which it was called upon to answer is that set out in section 252. If a "human being," to quote section 218, had been arraigned under this indictment I have no doubt that he would have, under the criminal practice of to-day, by reason of the beneficial results of recent enactments and decisions, been entitled to suppose that he was charged with manslaughter, because even though the indictment does not use the historic words "kill and slay," or "manslaughter," which are mentioned in the forms of indictment under Title V., of the Code, yet section 611, wherein the present requirements of an indictment are specified, provides that the statement of the offence "may be made in popular language without any technical averments or any allegations of matter not essential to be proved," and that such statement may be "in any words sufficient to give the accused notice of the offence with which he is charged." The effect of this section has been considered in the case of *The Queen* v. *Lapierre* (1897),

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1 C.C.C. 413, and again quite recently in *The Queen* v. *Weir* (1899), 3 C C.C. 102. In the latter case at p. 107, Mr. Justice Wurtele says, referring to an indictment then in question :

"The language used is certainly ungrammatical, and the drafting or wording of the indictment is faulty in construction, but, as it contains a statement of all the facts and circumstances which are essential to constitute the offence created by section 99 of 'The Bank Act,' it is not bad on that account."

But though, under the above authorities, the indictment is so framed that now, but not formerly, a "human being" might have been justified in thinking the charge he had to meet was manslaughter, what does it contain that, so far as the Code is concerned, would give a corporation any ground or reason for believing that it had to meet any other charge than one of causing grievous bodily injury under section 252 ? After mature reflection I am constrained to answer, nothing. It is not as though there was any other statute, or section in the Code, relating to the offence, or that any new offence had been created unknown to the common law, or that, so far as the defendant Company is concerned, any other charge might be brought against it upon the indictment. So this is not a case where a defendant Company might not be able to gather from the indictment what statute it was charged under, because, as has been seen, there is only one section of the Code which is applicable. Nor could any question arise as to whether the offence charged was against the common law or the statute, because the language used and the evidence would be the same in either case. That this indictment may be supported at common law I do not understand to be disputed.—*The Queen* v. *The Great North of England Railway Company supra*, followed in *The Eastern Counties Railway Company and Richardson* v. *Broom* (1851), 6 Ex. 314 ; and *Whitfield* v. *The South Eastern Railway Company* (1858), E. B. & E.

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114, in which last mentioned case Lord Campbell, C.J., said "an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, although not by imprisonment."

I have considered the case of *Reg.* v. *Friel* (1891), 17 Cox, C.C. 325, but the circumstances therein differ so materially from the case at bar that I am unable to derive assistance from it.

In view of the fact that the judgment of the learned Chief Justice, which I have had the benefit of perusing, exactly expresses my views of the case, it it unnecessary to give at greater length my reasons for answering the question in the affirmative.

Conviction affirmed.

BEAMISH v. WHITEWATER MINES, LIMITED.

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1900.
June 6.

BEAMISH v. WHITE-WATER MINES, LIMITED

Practice—Prohibition—Mineral Act, Sec. 117, Sub-Sec. 2.

An action for damages for personal injuries received by an employee in a metalliferous mine may be brought for any amount in the County Court.

Statement.

MOTION for prohibition. The plaintiff was a miner in the employ of defendants and brought an action in the County Court (mining jurisdiction) for $2,190.00, damages for personal injuries. Defendants moved for prohibition on the grounds that the amount sued for was beyond the jurisdiction of the County Court and that no jurisdiction is given the County Court in the action by reason of sub-section 2 of section 117, Cap. 135, R.S.B.C., 1897.

Bodwell, Q.C., for the motion.

Cassidy, contra.

Judgment.

DRAKE, J., held that the action was properly brought in the County Court under section 117 of the Mineral Act and dismissed the motion with costs, but on defendants' application made an order transferring the action to the Supreme Court, costs of such transfer to be costs in the cause.

MARTIN, J.

1900.

March 14.

TATE v. HENNESSEY

TATE *ET AL* v. HENNESSEY *ET AL.*

Practice—Ex juris writ—Affidavit leading to order for—Jurisdiction of Local Judge—Order XI.—Rule 1,075.

A Local Judge of the Supreme Court has jurisdiction to make an order for an *ex juris* writ.

The affidavit leading to the writ should be reasonably precise as to the essential facts alleged to constitute the cause of action, and if there are omissions of substance the order should not be made.

A Supreme Court Judge has power on motion to set aside an *ultra vires* order made by a Judge of limited jurisdiction.

MOTION to set aside an order made on 26th September, 1899, by SPINKS, Lo.J.S.C., allowing plaintiffs to issue a writ for service out of the jurisdiction. The action was for a declaration that defendants held a five-eighths interest in mineral claims in trust for plaintiffs, for an account, and for an injunction restraining defendants from alienating or otherwise disposing of said interest. Paragraphs two and three of the affidavit (of the plaintiff Tate) in support of the order were as follows:

Statement.

"(2.) In the month of August, 1896, I acquired a five-eighths interest in the Wisconsin and Lucky Strike mineral claims situate in the Ainsworth Mining Division of West Kootenay District in the Province of British Columbia from the above named defendants W. W. Hennessey and J. J. Hennessey; the said five-eighths interest though standing in my name was held by me in trust for the above named R. N. McLean and A. B. Railton and myself.

"(3.) Subsequently on or before the 18th day of December, 1897, I made a bill of sale of my said interest in the said mineral claims to the defendant C. A. Fleming. The said bill of sale was procured from me and the assent of the said

R. N. McLean and A. B. Railton was given to the same being so made by the fraud and false representations of the said C. A. Fleming, J. J. Hennessey and W. W. Hennessey. I have only lately discovered the true facts and circumstances under which the said bill of sale was obtained."

Statement.

Defendants moved to set aside the order on the grounds that the Judge had no jurisdiction to make it, and that the affidavit was defective in that it shewed no cause of action and did not state belief of deponent that he had a good cause of action. The motion was argued before MARTIN, J., on 9th March, 1900.

A preliminary objection was taken that it was not open to the defendants to move against the order before a single Judge on the ground that the order was made without jurisdiction but that the only way in which that point could be raised by the defendants was by appeal. MARTIN, J., held that he had jurisdiction to entertain the application, following the ruling in *In re Kootenay Brewing Company* (1898), 7 B.C. 131.

Argument.

Duff, for the motion: Under rule 1,075 all the County Court Judge can do is to act in all actions brought in his county, but here the order is for leave to issue a writ. No cause of action is disclosed. See *Pope* v. *Cole* (1898), 29 S.C.R. 291; *Collins* v. *North British and Mercantile Insurance Company* (1894), 3 Ch. at p. 234; *Cargill* v. *Bower* (1878), 10 Ch.D. 516; *Webster* v. *Power* (1868), L.R. 2 P.C. 81, and *Davy* v. *Garrett* (1878), 7 Ch.D. 489.

J. K. Macrae, for plaintiff: As to affidavit see *Fowler* v. *Barstow* (1881), 51 L.J., Ch. 104 and *Dickson* v. *Law and Davidson* (1895), 2 Ch. 62. The cause of action may be gathered from the affidavit as a whole.

14th March, 1900.

Judgment.

MARTIN, J.: In my opinion the first objection to the order, viz., that the learned County Court Judge, acting as

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a Local Judge of this Court, had no jurisdiction, cannot prevail.

It is true that rule 1,075 limits the jurisdiction generally to "all actions brought in his county," and that section 22 of the Supreme Court Act makes any jurisdiction derived therefrom "subject to rules of Court," yet rule 1,075 applies the interpretation clause of the Supreme Court Act to the rules. Turning then to the word "action" in the interpretation section 3, we find it means "a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court." This provision seems a complete answer to the objection, even if a close consideration of rule 1,075 did not furnish other arguments in support of the jurisdiction in question.

Judgment.

The second objection is that the affidavit on which the order was obtained discloses no cause of action. Rule 47 says that "no such leave shall be granted unless it shall sufficiently appear to the Court or Judge that the case is a proper one for service out of the jurisdiction under this order." In *Collins* v. *North British and Mercantile Insurance Company* (1894), 3 Ch. 228, at p. 235, Mr. Justice Kekewich says, "I propose to consider, as if it were now for the first time before me, the question whether this defendant ought to be served out of the jurisdiction or not;" and in case there are "omissions of substance" the order cannot be supported.

The cause of action set up here is fraudulent misrepresentation. As was said in *Wallingford* v. *The Directors, &c., of The Mutual Society* (1880), 5 App. Cas. at p. 697, "General allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice." See also Odgers on Pleading, 3rd Ed., p. 415, where the essentials of such an action are set out, following the remark, "The plaintiff cannot succeed; unless he prove .....etc." The allegation in the affidavit here is in lan-

guage of the vaguest character, and does not really enable a Judge to say "if the case is a proper one, etc.," as contemplated by the rule. I do not say that an affidavit should contain all the averments of a plea, but it should be reasonably precise as regards essentials, and here there are "omissions of substance." If the matter had come before me in the first instance I should not have made the order, and consequently I ought not to uphold it now, because I find myself unable to say that it discloses a cause of action, or, what is practically the same thing, makes out a *prima facie* case.

Judgment.

I might add also that the delay is not satisfactorily explained: It may be owing to inadvertence that the clause which purports to explain it is somewhat ambiguous, but it is unfortunate if the deponent had "the true facts" within his knowledge as he states, that he did not set them out so as to be of some assistance to the Court, particularly in a case of fraud. However much I might feel inclined to give effect to the argument of plaintiffs' counsel, that the cause of action may be gathered from the affidavit as a whole, yet I could only do so here by inferring matters not stated, and to do that would be to create an undesirable precedent.

Order set aside.

DRAKE, J.

1900.

May 23.

CRANSTON *v.* ENGLISH CANADIAN CO.

CRANSTON *ET AL* v. THE ENGLISH CANADIAN CO.

Mining law — Unoccupied ground — Overlapping — Abandonment— Proof of.

In adverse proceedings the party locating over a claim alleged to have been abandoned must produce clear evidence of abandonment and it is not enough for this purpose to rely upon the non-production of certificates of work.

Semble, a locator cannot after abandonment by a prior locator rest on a location made before such abandonment, but must re-locate.

Statement.

ADVERSE claim tried before DRAKE, J., at Rossland on 23rd May, 1900. The facts fully appear in the judgment.

W. J. Whiteside, for plaintiffs.

J. A. Macdonald, for defendants.

23rd May, 1900.

DRAKE, J.: This is an adverse action. The plaintiffs claim to be entitled to the Union Maid, a claim in Trail Creek Mining Division which was a re-location of the Chelsea claim. The parties admit the free miners' certificates of all the persons interested. They also admit the record of the Chelsea claim on 19th March, 1896, and a certificate of work issued 13th March, 1897.

Judgment.

The Union Maid was recorded 23rd March, 1899, and the lines of this claim coincide with the abandoned Chelsea claim. A claim is held to be abandoned if a certificate of work shall not be obtained within the year. The Chelsea claim having recorded a certificate on the 13th of March, 1897, was a good claim until 13th March, 1898, at which date it was an abandoned claim.

The Sea Gull claim was recorded 4th June, 1896, this record was made during the period that the Chelsea was a valid claim, the effect of which would be that so much of the Sea Gull claim as overlaps the Chelsea—about 3.87 acres—would be invalid.

The defendants contend that the plaintiff has not shewn that the Chelsea was not a valid claim when he located the Sea Gull, and that he has not shewn discovery of mineral in place either as regards the Chelsea or Union Maid. There is no direct evidence going to the fact that the Chelsea had been abandoned beyond the presumptive evidence that no certificate of work was produced subsequent to 13th March, 1897, but that is sufficient. On the other hand I do not see how this fact helps the defendants as the time they located and recorded the Sea Gull, the Chelsea was a valid claim. The certificate of work under section 28 of the Act of 1896, assumes the title up to that date to be perfect and therefore the defendants' rights to the ground in question never matured.

Then, with regard to the other objection that the plaintiff has not shewn that mineral in place was discovered by the locators of the Chelsea, this is also evidenced by the certificate of work ; it lay upon the defendants to shew that there was no mineral discovered in place after the production of the certificate of work. In these cases the onus of proof is constantly shifting, the plaintiffs are entitled to rely on the certificate of work until it is shewn that some statutory essential has been neglected.

It appears to me what the defendants rely on is that having located part of their claim on the Chelsea ground, when that claim was abandoned the piece of ground in dispute became their property without any re-location. This, I think, is a fallacy ; the right of recording mineral ground is restricted to the waste lands of the Crown at the time the record is made and a record void in part at that time cannot be made valid at a subsequent period by the lands

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reverting to the Crown. The land in question is therefore not part of the Sea Gull claim, but was unoccupied land at the time the Union Maid was located.

The defendants not having any rights to this piece of ground, I do not see by what right they can contest the Union Maid claim—whether that claim is valid or invalid is of no interest to them as they are not legally recorded owners of any portion of this claim.

There will be judgment for the plaintiffs with costs.

Judgment for plaintiffs with costs.

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IN RE THE AMERICAN BOY MINERAL CLAIM.

Mining law—Adverse claim—Certificate of improvements—Crown grant—Rectification of.

An application was made to the Chief Commissioner of Lands and Works for the rectification of a Crown grant of certain mineral claims and was opposed by parties who had obtained a certificate of improvements covering a portion of the ground included in the grant.

Held, affirming the Chief Commissioner, that the applicant was entitled to have the grant rectified notwithstanding the said certificate.

Held also, by the Chief Commissioner, that the holder of a certificate of improvements is not bound to adverse any subsequent applicant for a certificate.

Statement.

APPEAL by William Braden from a decision of the Honourable C. A. Semlin, Chief Commissioner of Lands and Works, dated 24th December, 1898, disallowing the adverse claim of the said Braden against the rectification of the Crown grant of the American Boy Mineral claim. The facts fully appear in the following decision of the Chief Commissioner:

Eva Boss, J. W. Troup and Thomas McGuigan are the owners of a mineral claim called the American Boy. I shall afterwards refer to these owners under the name of Troup.

Frank H. Kilbourne and William Braden are the owners of two mineral claims called the Ajax and Treasure Vault. I shall afterwards refer to these owners under the name of Kilbourne.

The Treasure Vault claim was located on the 8th of October, 1891, and recorded on the 15th of October, 1891. The Ajax was located on the 10th of October, 1891, and recorded on the 15th of October, 1891. The American Boy mineral claim was located on the 20th of June, 1892, and recorded on the 22nd of June, 1892, and the field notes of the survey were received at the Department of Lands and Works on the 24th of January, 1896. On the 27th of November, 1895, Troup gave notice in the British Columbia Gazette of his intention to apply for a certificate of improvements with respect to the American Boy.

Kilbourne took proceedings to contest the claim of the American Boy to the land set out in the field notes filed on the application for a certificate of improvements. On behalf of the Ajax and Treasure Vault, he filed in the office of the Gold Commissioner at Nelson, previous to the 27th of February, 1896, an adverse claim, and he instructed Mr. J. B. McArthur to take the necessary proceedings to enforce the adverse. The matter came before the Court in a suit styled *Kilbourne* v. *McGuigan*, which is reported in (1897), 5 B.C. 233. That was a motion on behalf of Kilbourne to extend the time for commencing his action. It had become necessary for him to take such proceedings as Mr. McArthur had failed to prosecute the adverse claim within the time specified by the Act. Mr. Justice DRAKE, before whom the application was made, dismissed the motion on two grounds, the first being that proceedings had not been commenced within the time prescribed by the Act; the second that

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Kilbourne had never properly filed the adverse claim. The adverse had been filed in the office of the Gold Commissioner, but not in that of the Mining Recorder, and Mr. Justice DRAKE held that, by virtue of sections 21 and 126, the adverse should have been filed in the office of the Mining Recorder. From this decision an appeal was taken to the Full Court; that appeal was dismissed; an application for leave to appeal to the Privy Council was also dismissed.

On the 6th of May, 1897, a certificate of improvements was granted to Troup in respect of the American Boy, and on the 13th of July, 1897, a Crown grant was issued to him, but for a portion only of the land set out in the field notes filed upon his application for a certificate of improvements. And under section 86 of the Land Act, Troup now applies for a cancellation of the said Crown grant and for the issue to him of a corrected Crown grant.

Section 86, in part, reads as follows:

"Wherever a Crown grant contains any wrong description of the land thereby intended to be granted, the Lieutenant-Governor in Council may direct the defective Crown grant to be cancelled, and a corrected one to be issued in its stead, which corrected Crown grant shall relate back to the date of the one so cancelled, and have the same effect as if issued at the date of such cancelled Crown grant."

Kilbourne also applied for certificate of improvements in respect of the Ajax and Treasure Vault claims, and on the 25th of February, 1896, Troup filed adverse claims to Kilbourne's application. Troup issued a writ to enforce his adverse against the Treasure Vault and Ajax, but the writ was never served, and on the 19th of August, 1897, a motion was made to set aside the writ of summons and all proceedings thereunder, and to vacate the adverse claim filed by Troup. The matter came before DRAKE, J., and is reported in *Troup* v. *Kilbourne* (1897), 5 B.C. 547. Mr. Justice DRAKE refused the motion on the ground that as the writ in the action had never been served, by virtue of

rule 31 it was at that time no longer in force, and there was therefore no action pending in Court. He also intimated that in his opinion Troup had waived his adverse claim against the Treasure Vault and Ajax by failing to duly prosecute his action.

On the 13th of October, 1897, certificates of improvements were granted to Kilbourne in respect of the Ajax and the Treasure Vault.

It seems to me that the controversy in this case is absolutely concluded by the provisions of section 37 of the Mineral Act, as enacted by section 14 of Chapter 32 of the Statutes of 1892, and by section 46 of the Mineral Act.

Section 37 provides that no adverse claim shall be filed by the Mining Recorder after the expiration of the period of publication in the next preceding section mentioned and that in default of such filing, no objection to the issue of a certificate of improvements shall be permitted to be heard in any Court, nor shall the issue of any such certificate, when issued, be impeached upon any ground except of fraud. The latter part of the said section provides the procedure for contesting the validity of an adverse claim by a judgment of a competent Court, and then proceeds: After the filing of such judgment with the Mining Recorder, and upon compliance with all the requirements of the next preceding section, such person or persons—that is the applicant for certificate of improvements—shall be entitled to the issue to him or to them of a certificate of improvements in respect of the claim, or the portion thereof which he or they shall appear from the decision of the Court to rightfully possess. And the last clause of section 46 provides that after the granting of such certificate of improvements no action shall be brought with respect to the title of such claim except on the ground of fraud.

In this case, Kilbourne failed to comply with the requirements of the Act as to taking legal proceedings and as to duly filing his adverse claim. He is therefore now in the

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same position as if he had never filed an adverse claim, and the applicant for a certificate of improvements has a legal right to such certificate and to the following Crown grant. It seems to me clear that there must be some time at which all disputes as to boundaries to claims must be determined, and that the statute appears to provide that time very clearly. After Troup obtained his certificate of improvements, in my opinion, he was entitled to have issued to him a Crown grant for all the land embraced in the survey and field notes which he had filed with his application for certificate of improvements.

It is true that afterwards certificates of improvements were issued to Kilbourne in respect of certain of the land embraced in the certificate of improvements before issued to Troup, and Troup failed to prosecute his adverse against the issue of such certificates. Mr. *McPhillips* contends that as Troup failed to prosecute his adverse claims against the Ajax and Treasure Vault, Kilbourne is in as good a position with regard to these two claims as Troup is in regard to the American Boy. In my opinion, however, it was not necessary for Troup to take any proceedings whatever to contest the granting of a certificate of improvements to the Ajax and Treasure Vault claims. His position was already assured and there would be no end of controversies if a man were compelled to adverse the claims of all persons who might ask for certificates of improvements that would embrace some of his property.

On the argument of the application, Mr. *Davis* cited several American authorities which seem to me conclusively to establish the correctness of the above conclusion. I find that the mining laws with regard to filing and failing to file adverse claims in this Province are in substance very similar to those of the United States, and the American authorities appear to me to be quite in point.

The following are some of the authorities which I would cite:

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"If a senior locator permit another to locate upon the same ground and make application for patent, and file no adverse or protest, and the patent be issued to such junior locator, his title will hold, the failure of the first locator to file an adverse being a waiver of his priority." (Kopp's Land Owner, Vol. 3, p. 113.)

Sections 2,325 and 2,326 of the Revised Statutes of the United States are very similar in their provisions to our law with regard to filing adverse claims, and in the following case, decided under those sections, Judge Sawyer expressed himself as follows: "Under an application for a patent for mining ground, under sections 2,325 and 2,326 Revised Statutes, unless adverse claims are filed with the Registrar and Receiver of the proper land office within sixty days after the first publication of the notice, such adverse claims are waived, and the applicant is entitled to a patent upon payment to the proper officer of the statutory fees and costs, and it shall thereafter be assumed that no adverse claim exists; and thereafter no objection from third parties to the issue of the patent shall be heard, except that it is shewn that the applicant has failed to comply with the terms of the statute. The statute makes such a proceeding, regularly prosecuted, when the period of notice is completed without the presentation of an adverse claim, absolutely conclusive against adverse claims." *Hamilton* v. *Southern Nevada Gold and Silver Mining Company* (1887), 15 Morr. 315.

And in *Lee et al* v. *Stahl* (1889), 16 Morr. 152 at p. 155 the language is as follows: "They cannot maintain the right to the mineral within the space of lode intersection, nor other rights which they may have had by virtue of a prior location, because they did not assert and secure the same by adversary proceedings as provided by the Act of Congress; a failure so to assert such rights being deemed a waiver of them."

The following opinion has been delivered by Mr. Justice

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Field, of the Supreme Court of the United States, sitting as a circuit Justice, in *Eureka Consolidated Mining Co.* v. *Richmond Mining Co. of Nevada* (1877), 9 Morr. 578 at p. 592: "As was said by the Supreme Court in the case of *Shepley et al* v. *Cowan et al* (1875), 1 Otto 338, where two parties are contending for the same property, the first in time, in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right. But this principle has been qualified in its application to patents of mining ground, by provisions in the Act of 1872, for the settlement of adverse claims before the issue of the patent. Under that Act, when one is seeking a patent for his mining location and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will afterward be precluded from objecting to the issue of the patent..... The silence of the first locator is, under the statute, a waiver of his priority."

The last mentioned decision has been affirmed by the decision of the Supreme Court of the United States in *Richmond Mining Company* v. *Eureka Mining Company* (1880), 103 U.S. 839.

The following authority, it seems to me, disposes of Mr. *McPhillips'* contention that it was incumbent upon Troup to adverse the claims of the Ajax and Treasure Vault for certificates of improvement: "But appellants contend that the Jacob Little Company had waived its right to the premises in controversy in the action brought by the Gold Lead Company for a patent. This position cannot be maintained. The Jacob Little Company, having regularly applied for a patent was not, in our opinion compelled, in order to preserve its rights, to protest against any subsequent application for the same ground while its own appli-

cation was still pending in the land department." *Steel et al* v. *Gold Lead Gold and Silver Mining Company* (1883), 15 Morr. 292 at p. 296.

The only ground, therefore, on which the right of Troup to obtain a Crown grant of all the land set out in his survey can be attacked, is that of fraud. Before me it was contended that Troup was guilty of fraud because he had located land which previously had been located by the Ajax and Treasure Vault. Mr. Matthews was examined as a witness on behalf of Kilbourne, and it was clear to me from his evidence that at the present time it is very doubtful where the original boundaries of the Treasure Vault and Ajax were located. Mr. Matthews' evidence also disclosed that for a long time before Troup's application for a certificate of improvements there had been a dispute between the owners of the American Boy property on the one hand and the owners of the Ajax and Treasure Vault on the other as to the boundaries of their respective claims. The American Boy people contended that their claim in no way conflicted with the original location of the Treasure Vault and Ajax, and there is nothing to shew that their contention is not right. On that point, there is absolutely no evidence before me, and the fact that the American Boy owners applied for a certificate of improvements for what they claim to be their property, does not, in my opinion, in itself constitute fraud. The owners of the Treasure Vault and Ajax knew about the dispute; they knew about the application for the certificate of improvements, and they took no proceedings to adverse the claim. It may be that through their failure to properly file their adverse claim and duly proceed with the same, they may be deprived of land that they were really entitled to, but it seems to me that they have only themselves to blame if such is the case.

My conclusion, therefore, on the whole case, is that the Crown grant issued to Troup was issued in error; that it should be now cancelled and a new one issued to him for

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all the land set out in the survey and field notes of the American Boy claim filed by him on his application for a certificate of improvements.

Braden appealed pursuant to section 95 of the Land Act and the appeal was argued before MARTIN, J., on 17th March, 1899.

Bodwell, Q.C., and *A. E. McPhillips*, for the petitioner Braden.

Davis, Q.C., for the respondents, the owners of the American Boy claim.

29th March, 1900.

MARTIN, J.: After full consideration of the cases which I have been referred to by counsel for the petitioner, beginning with *Silver* v. *Ladd* (1868), 7 Wall. 219, and ending with *Sanford* v. *Sanford* (1891), 139 U.S. 642 at p. 646, I have come to the conclusion that I am unable to apply the principles laid down in those authorities to this case, for the reason that while they sustain the contention that in certain cases a Crown grant may be subject to attack, yet they are no guide as to what course should be pursued where there is a statutory provision of the nature of section 37 of the Mineral Act (1891) Amendment Act 1892, relied on by the respondent here. Mr. *Bodwell's* suggestion that, because the petitioner's adverse proceedings (*Kilbourne* v. *McGuigan* (1897), 5 B.C. 233) have been terminated by a regrettable error which prevented the merits being gone into, they should not now be regarded as a final termination of the matters in controversy between the parties, or between the respondent and the Crown, cannot, in my opinion, be given effect to in view of the said section.

Judgment.

It may possibly be that in this case there has been a hardship, but I take the view that speedy finality of litiga-

tion and quieting of titles with all due celerity are the dominant policy of the Mineral Act.

Taken as a whole, section 37 may be regarded as a provision of the same nature as the Statutes of Limitation, providing that in case anyone has a claim to the ground applied for he must substantiate such claim within a prescribed time, or be forever barred, except in case of fraud on the part of the adverse applicant.

In my opinion the fact that the respondent also commenced adverse proceedings, but abandoned them, does not, under the circumstances of this case, in any way lessen its rights under the said section.

Judgment.

It seems unnecessary to supplement the reasons given by the Honourable the Chief Commissioner of Lands and Works which are set out at length in the appeal book, though the case of *The St. Louis Mining and Milling Company* v. *Montana Mining Company* (1898), 171 U.S. 651 might be added to the list of authorities.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

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June 11.

REGINA v. NICOL

REGINA v. NICOL.

Venue—Change of—Grounds for—Criminal libel—Political bias.

In criminal libel, in order to obtain a change of venue, it is not sufficient to allege that the prosecution is interested in politics in the place where the libel is alleged to have been committed and that therefore the defendant cannot obtain a fair trial.

The fact that two abortive trials have taken place is not *per se* a reason for change of venue.

MOTION for change of venue from the County of Victoria. The defendant was charged with criminal libel in respect of an article in the Province newspaper published in Victoria on 11th December, 1897, and reflecting on the conduct of Messrs. Turner and Pooley, then members of the Provincial Executive. The motion was made under section 651 of the Criminal Code, 1892, which section is in part as follows:

"Whenever it appears to the satisfaction of the Court or Judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some district, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the Court before which such person is or is liable to be indicted may, at any term or sitting thereof, and any Judge who might hold or sit in such Court may, at any other time, either before or after the presentation of a bill of indictment, order that the trial shall be proceeded with in some other district, county or place within the same province, named by the Court or Judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereby caused to the accused, as the Court or Judge thinks proper to prescribe."

Statement.

The cause had been tried at Victoria in February, 1899, and in April, 1900, and in each of the trials the jury failed to agree.

The affidavit of *W. H. Langley*, solicitor for the defendant used in support of the motion set out that the prosecutors were, at the time of the alleged libel, and still are interested in politics, and that in his belief it would be impossible to obtain a fair and impartial trial in the City or County of Victoria.

Langley, for the motion, cited *Brown* v. *Vervon* (1860), 2 L.T.N.S. 251.

Argument.

Cassidy, contra, cited *Regina* v. *Ponton et al* (1898), 18 P.R. 210 and (1899), 429.

11th June, 1900.

DRAKE, J.: Mr. *Langley*, for the defendant, applies to change the venue to some other County.

The defendant is charged with libel and there have been two abortive trials in Victoria.

The affidavit alleged that the prosecution are interested in politics in the City and County of Victoria, and have been for a number of years, and that owing to the nature of the libel the deponent believes it will be impossible to obtain a fair and impartial trial in Victoria.

The grounds here alleged for a removal of the indictment are of the very slightest character. The prosecution being interested in politics is a fact applicable to most people in the Province. In order to obtain a change of venue there must be some facts alleged which will satisfy the Court that a fair trial in the district cannot be had.

Judgment.

In *Regina* v. *Ponton et al* (1898), 10 P.R. 210, very full affidavits of the state of public opinion hostile to the prosecution and of threats and demonstrations against the jury were forthcoming and the learned Judge who heard the application prefaced his remarks with the enunciation of the well-established rule that all cases should be tried where the offence is supposed to have been committed and that

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the rule should not lightly be ignored. Here there is no fact sworn to which induces Nicol to believe that a fair trial cannot be had in Victoria. If being interested in politics is a ground for change of the place of trial, I should consider it impossible to name a place in the Province where the same objection might not be raised.

The fact that two trials have already been had and the jury have failed to arrive at a verdict is a matter to be regretted, but it does not impress me with the fact that a fair trial cannot be had.

Judgment.

There is no allegation of any political excitement existing or of any prejudice against the defendant or, in fact, of any interference whatever having been taken in the trial. Under these circumstances I must refuse the application with costs.

Motion dismissed.

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REGINA v. HOLLAND.

Insurance Act of Canada—Constitutionality of—Right of Insurance Company to carry on business in British Columbia without compliance with provisions of Insurance Act.

H. was the authorized agent at Vancouver of the Equity Fire Insurance Company, a Company incorporated in Ontario, but which was not registered or licensed under the provisions of any British Columbia statute or of the Insurance Act of Canada.

H. was convicted under the provisions of the Insurance Act for carrying on an insurance business without a license.

Held, by DRAKE, J., on appeal confirming the conviction, that the Act is *intra vires* of the Parliament of Canada.

APPEAL by way of case stated from a conviction of W. S. Holland by Joseph A. Russell, Police Magistrate of the City of Vancouver.

The case stated was as follows:

"On the 29th of December, 1899, the defendant W. S. Holland was convicted before me the undersigned Police Magistrate in and for the City of Vancouver for that he the said W. S. Holland did on or about the 28th day of October, 1899, at the said City of Vancouver carry on the business of insurance on behalf of the Equity Fire Insurance Company, a Company not incorporated by an Act of the Legislature of the late Province of Canada, nor licensed, nor registered under an Act of the Legislature of the Province of British Columbia, without having first obtained a license from the Minister of Finance and Receiver-General of Canada to carry on such business in Canada, contrary to the form of the statute in such case made and provided.

Statement.

"The defendant was at the time of the alleged offence and is one of the firm of Fred J. Holland & Co., the duly authorized agents of the said Insurance Company to carry on its business in Vancouver.

"The said Company was not at the said time nor yet is either registered or licensed under any British Columbia statute, nor otherwise registered or licensed under the provisions of the Insurance Act of Canada.

"The defendant was convicted by me as aforesaid under the provisions of Chapter 124 of the Revised Statutes of Canada (1886), being the

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Insurance Act of Canada, and now desires to take the opinion of this Honourable Court on the constitutionality thereof.

"If the provisions thereof are *ultra vires* of the said Parliament so far as aforesaid the conviction is to be quashed; otherwise affirmed.

"Dated the 20th day of January, 1900.

"(Sgd) Joseph A. Russell,
"Police Magistrate."

Hunter, for appellant: We are entitled to carry on business in this Province under the comity doctrine subject only to any laws the Province may make: *Duff v. Canadian Mutual Fire Insurance Co.* (1880), 27 Gr. 410, affirmed (1881), 6 A.R. 238; *Canadian Pacific Railway Company* v. *The Western Union Telegraph Company* (1889), 17 S.C.R. 155, at p. 167; Lindley on Companies, 5th Ed., 910; *Clarke* v. *Union Fire Insurance Company* (1883), 10 P.R. 313.

If the Dominion is held to have power to interfere with us it must follow that it can make a law to regulate the carrying on of all other business in the Province, *e.g.*, to compel a dry goods merchant with headquarters at Montreal to take out a license to do business in British Columbia. But in *The Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96, there is an explicit statement that the Dominion can not make regulations regarding a particular kind of business under the trade and commerce clause, but only general regulations.

Argument.

To carry on a particular trade or business in the Province is clearly a civil right within the Province and the onus is on the other side to shew that the Dominion has the power to interfere, and the particular subhead must be pointed out: *Per* Lord Selborne in *L'Union St. Jacques de Montreal* v. *Dame Julie Belisle* (1874), L.R. 6 P.C. at p. 36.

Peters, Q.C., and *A. E. McPhillips*, for the private prosecutors, contended that the fact that from 1868 down to the present time statutes had been passed by the Dominion Legislature dealing with the regulating of insurance companies, and granting licenses, without any question being raised, shewed a general consensus of opinion that such legis-

lation was within the authority of the Dominion Legislature.

The following Dominion Statutes dealing with insurance were referred to:

(1868), Cap. 48; (1871), Cap. 9; (1874), Cap. 48; (1875), Caps. 20 and 21; (1877), Cap. 42; (1878), Cap. 21; (1885), Cap. 49; (1886), Cap. 45; (1894), Cap. 20; (1895), Caps. 19 and 20.

They further contended that insurance was now an absolute necessity in the carrying on of almost all trade and commerce, and therefore came fairly within the authority given to the Dominion Legislature to regulate trade and commerce; that while the local Legislature had certain power with regard to insurance companies (such as the right to tax them for local purposes, and the right to regulate the form of contract they should enter into) it was not inconsistent with the right of the Dominion Legislature to deal with insurance companies from a national point of view.

The principle that the subject matter may from one point of view come within the jurisdiction of the local Legislature, and from another point of view may come within the jurisdiction of the Dominion Legislature, applies to this case.

Argument.

They also referred to the following cases:

Valin v. *Langlois* (1879), 1 Cartw. 161; *Lenoir et al* v. *Ritchie* (1879), 1 Cartw. 511; *Hodge* v. *The Queen* (1883), 3 Cartw. 177; *Regina* v. *Watson* (1890), 4 Cartw. 593; *Attorney-General for Ontario* v. *Attorney-General for the Dominion and The Distillers and Brewers' Association of Ontario* (1896), A.C. 348 (prohibition case); *Edgar* v. *The Central Bank of Canada* (1888), 4 Cartw. 541; *Charles Russell* v. *The Queen* (1882), 2 Cartw. 22; *The Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 and (1881), 1 Cartw. 306; *Cushing* v. *Dupuy* (1880), 5 App. Cas. 408, 415; *Tennant* v. *The Union Bank of Canada* (1894), A.C. 31 at p. 46, and Doutre's Constitution of Canada p. 265.

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Hunter, in reply : The power to deal with prohibition is expressly referred to the good government clause and not to the trade and commerce clause.

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DRAKE, J.: This is a special case, and the only point argued was that the provisions of Cap. 124, Revised Statutes of Canada, and amending Acts, as far as relate to the necessity of taking out a license to carry on a fire insurance business outside of the Province of Ontario, where the Equity Fire Insurance Company was incorporated, are *ultra vires* the Dominion Parliament.

The Attorney-General for the Dominion has been notified in pursuance of section 100 of Cap. 56 of the Revised Statutes of British Columbia, but does not appear.

The Insurance Act does not apply to any company carrying on business exclusively within the Province by the Legislature of which it was incorporated, but it assumes to apply to all companies doing business elsewhere in Canada except as in section 3 mentioned.

Judgment.

The Company in question attempted to do business in the Province of British Columbia without complying with the conditions of the Insurance Act as to deposit of security and license.

The question here raised has never been directly adjudicated upon, although the Act has been in force in principle since confederation.

Mr. *Hunter* for the appellant contends that the right to carry on an insurance business falls within the powers reserved to the Provincial Legislature by the British North America Act, and comes under the heading of property and civil rights. Sections 91 and 92 of the Act must be read together in order to ascertain the respective powers of the different Legislatures. In sub-section 29 of section 91 the Dominion Legislature has no control over the classes of

subjects assigned exclusively to the Provinces. By sub-section 11 of section 92 the incorporation of companies with provincial objects is one of the subjects exclusively assigned to the Provincial Legislatures. This would indicate that the incorporation of companies with powers greater than merely provincial objects does not belong to the Provincial Legislatures, but in order to avoid any question on this head, section 91 says the Dominion Parliament may make laws in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the Legislature of the Province ; and as the formation of companies with extra-provincial powers is not given to the Provincial Legislatures this power must be held as falling within the above general words. But the appellant contends that a fire insurance company is a trading company, and falls within the term property and civil rights. This term in its largest sense would undoubtedly include the incorporation of insurance and other companies within the Province, in fact there is hardly any legislation that would not in a sense affect property and civil rights. The regulation of trade and commerce, navigation and shipping, weights and measures, and a variety of other subjects expressly reserved to the Dominion Parliament, all affect property and civil rights. The term, therefore, must be restricted to such property and civil rights as are not subject to Dominion legislation, and which are purely local.

The contention is that admitting the Dominion has power to incorporate companies to do business all over the Dominion, the power to do that business is vested in the Provinces. I think it clear that the Provinces have the power to impose conditions on companies doing business within their territorial limits, but this power does not restrict the paramount authority of the Dominion to impose their own conditions on companies who wish to carry on business over other parts of the Dominion than the particular Province which granted them their charter.

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In the exhaustive judgment of the Privy Council in *The Citizens Insurance Company of Canada* v. *Parsons* (1881), 1 Cartw. 265 these sections 91 and 92 are discussed; and it is there pointed out that no rule can be laid down to define the actual limits of the various powers given to the Dominion and Provinces respectively. The powers overlap, and in some instances the Provinces can legislate until the subject matter is dealt with as a whole by the Dominion. When this takes place Provincial legislation has to give way to the Dominion. One instance cited is "bankruptcy and insolvency" which is expressly reserved to the Dominion, but until this subject is dealt with by that Legislature, the Provinces can and have legislated on matters nearly connected with insolvency, such as assignments for benefit of creditors and fraudulent preferences. The judgment further deals with the regulations of trade and commerce, but carefully refrains from any definition of the powers of the Dominion Parliament in this direction, and points out that this power does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as fire insurance in a single Province, and therefore does not conflict or compete with the provincial power over property and civil rights assigned by sub-section 13 of section 92 to the Provinces.

Judgment.

The judgment then discusses the Insurance Act, and it nowhere suggests that this Act was beyond the competence of the Dominion Parliament. It points out that assuming the Act to be within the competence of the Dominion as a general law applicable to foreign and domestic corporations, it in no way interferes with the provincial powers to regulate the contracts which corporations may enter into in the Provinces. Although the Privy Council do not absolutely lay down the proposition that the Insurance Act is a valid exercise of the powers of the Dominion Parliament, because that point was not before them for decision, yet I think there is a strong indication

that when a general Act affecting the whole Dominion is passed which affects trade and commerce, and insurance is undoubtedly of such a character, that such an Act would not be held invalid, because it in some slight degree affects corporations which have been incorporated by Provincial Legislatures, but only when such companies attempt to exercise their powers beyond the limits of the Province incorporating them. And this brings me to the further argument raised by Mr. *Hunter* that by the comity of nations foreign companies are not precluded from carrying on their business wherever they please ; but a foreign company is bound by the *lex loci*, and although entitled to carry on business outside of the country of its incorporation if not prohibited by its charter, it is always subject to the restrictions and laws enforced in the country where it establishes itself. But although the Company in question may be entitled to do business in this Province, that right is subject to compliance with the conditions imposed by the Dominion in such a case. In the case of the *Attorney-General for Ontario* v. *Attorney-General for the Dominion, and The Distillers and Brewers' Association of Ontario* (1896), A.C. 348, the subject of the conflict of powers which might arise under sections 91 and 92 was greatly discussed, and it was laid down that the Dominion had no authority to encroach upon any class of subjects exclusively assigned to the Provinces ; it was also pointed out that if it were once conceded that the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each Province were substantially of local and private interest, upon the assumption that these matters also concerned the peace, order and good government of the Dominion, there was hardly a subject in section 92 on which they might not legislate to the exclusion of the Provincial Legislatures. I do not think that the Act now in question can be said to infringe on matters exclusively assigned to the Provinces, or that it infringes on the Pro-

Judgment.

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vincial powers to incorporate companies with provincial objects. In my opinion the Act objected to is within the power of the Dominion Parliament, and the conviction was right.

Conviction affirmed.

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RE ST. EUGENE MINING CO., AND THE LAND REGISTRY ACT.

Conveyance of land by grantor to whom precious metals have passed—Whether precious metals pass without being mentioned.

Where the precious metals have been passed out of the Crown to a grantee, a conveyance of the land by the latter to a third person in the ordinary form will pass the precious metals although not specially mentioned.

Statement.

REFERENCE to a Judge in Chambers under section 82B of the Land Registry Act, by S. Y. Wootton, Registrar-General, as to the effect of certain conveyances. The facts sufficiently appear in the judgment.

Argument.

Barnard, for the Company, cited *Townley* v. *Gibson* (1788), 2 Term Rep. 701; *Moore* v. *Shaw* (1861), 79 Am. Dec. 123 and *The Attorney-General of British Columbia* v. *The Attorney-General of Canada* (1889), 14 A.C. 295 at p. 302.

The *Registrar-General* in person.

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DRAKE, J.: This is a question submitted to the Court under section 82B of the Land Registry Act as to the effect of certain deeds of conveyance. There are no persons interested in the lands in question except the above named Company.

The Company are owners in fee of the Lake Shore mineral claim by a chain of title commencing with a grant from the Crown of the minerals, precious and base, except coal, dated 2nd March, 1898, subject to the exceptions in the said grant mentioned. This grant was of the minerals underlying the whole Lake Shore mineral claim, including the minerals under Lake Moyie.

On the 7th of November, 1898, a further grant was made of the said claim, limited to the land not underlying Lake Moyie, and was a conveyance of the surface rights. This grant was also subject to certain exceptions in the said grant contained.

The effect of these two grants is that the minerals, precious and base, except coal, passed to the grantees together with the surface rights, subject, however, as aforesaid.

Judgment.

In the subsequent deeds of conveyance from the grantees to the present applicants the land was conveyed without any general words, and without any mention of mines and minerals, precious or base, and the Registrar is doubtful as to the effect of these deeds.

The use of the term "land" in a conveyance of freehold is sufficient to pass mines or minerals. See *Townley* v. *Gibson* (1788), 2 Term Rep. 701. The precious metals are not considered as *partes soli* in an ordinary freehold grant, and would not pass thereby because they are not vested in the subject, but in the Crown. Here the Crown has expressly parted with them to the grantee. The question now comes whether (the conveyances not expressly mentioning the precious metals) they will pass as well as mines and minerals. In

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my opinion mines and minerals pass with the term "land." The precious metals are part of the Royal prerogative, and the Crown having parted with this prerogative to the subject, the ordinary deed of fee simple conveying the land will also convey all that the grantor then had vested in him, including the precious metals.

IN RE SOY KING, AN INFANT.

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IN RE SOY KING

Infant—Right of person standing in loco parentis to custody of, as against stranger—How lost—Habeas corpus—Practice.

A girl aged fourteen was taken by a Refuge Home from the custody of a person standing in *loco parentis* who was proved to be leading a bigamous life.

Held, in *habeas corpus* proceedings that such person had lost his right to the custody of the infant.

An application in vacation for a rule *nisi* for a writ of *habeas corpus* should be made in Chambers.

Statement.

RULE *nisi* for a writ of *habeas corpus* directed to the authorities of the Refuge Home in the City of Victoria to have the body of Soy King before the Court to be delivered to Sam Kee. The facts fully appear in the judgment.

Fell, shewed cause.

Helmcken, Q.C., contra.

26th July, 1900.

Judgment.

MARTIN, J.: A question arises on this application which is quite distinct from that which arose in the cases of *In re Ah Gway* (1893), 2 B.C. 343, and *In re Quai Shing* (1898), 6 B.C. 86. Here, Sam Kee claims to stand in *loco parentis* to the girl Soy King, aged fourteen years, who, he alleges, was confided to his charge by her father, a resident of China, to be cared for, supported, and educated as his (Sam Kee's) own daughter. Since April, 1897, the girl has been an inmate of Sam Kee's house, until, on the 30th of June last, she went, or was taken to the Chinese Women's Refuge Home, maintained by the Methodist Church in this city.

I am satisfied from the affidavits filed that the girl is in the custody of the Refuge Home, and is being there, in effect, detained by the authorities of that institution against the wishes of the applicant, Sam Kee, who, if he be the repre-

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sentative of the father's authority stands, as against all the world, the father himself excepted, in *loco parentis* to the child committed to his charge and custody—*In re Emily Suttor* (1860), 2 F. & F. 267; Eversley on Domestic Relations (1896), 493.

In shewing cause against the rule counsel for the Refuge Home takes two grounds: first, that it is shewn by the material filed that the child never was entrusted to Sam Kee by her father, but was sold as a slave; and second, that assuming Sam Kee does stand in *loco parentis* he has lost whatever rights he had by an abuse of them on account of (a) cruelty; (b) failure to properly maintain and educate; and (c) grossly immoral conduct.

Judgment.

Taking the second ground first, and passing over for a moment the allegations of cruelty and failure to maintain and educate, the charge of grossly immoral conduct set up is that Sam Kee is maintaining bigamous relations with two women, in other words, that he has two wives, *i.e.*, a chief wife, and a second, or inferior wife. This fact appears from the affidavit of the girl Soy King, and though during the argument I drew the attention of the applicant's counsel to the serious nature of the allegation, it has not been denied. I must say that, like the learned Judges *In re Goldsworthy* (1876), 2 Q.B.D. 83-4, it would have been more satisfactory to my mind if I had been furnished with fuller information with regard to the domestic relations existing in the applicant's household, but I must, also like the said Judges, "remember how difficult it is to obtain the testimony of friends or neighbours as to matters of this kind." I have to accept an uncontradicted statement as being true if there is no ground for suspicion of falsity.

In answer to the charge of gross immorality the applicant's counsel took the position that he who unlawfully deprives a father, or one in *loco parentis*, of the custody of his child cannot set up the immorality of the father as an answer to a rule *nisi* for a *habeas corpus*.

After consulting a large number of authorities I do not think that the case of the father can be put stronger than was done by Lord Ellenborough, C.J., in 1804, in *The King* v. *De Manneville*, 5 East, 221 at p. 223 as follows: "We draw no inferences to the disadvantage of the father. But he is the person entitled by law to the custody of his child. If he abuse that right to the detriment of the child, the Court will protect the child." And the learned Chief Justice went on to say that "there is no pretence that the child has been injured for want of nurture, or in any other respect. Then he having a legal right to the custody of his child, and not having abused that right, is entitled to have it restored to him." Again, in *The King* v. *Henrietta Lavinia Greenhill* (1836), 4 A. & E. 624, Lord Denman, C.J., lays down the rule as follows (p. 640):

"When an infant is brought before the Court by *habeas corpus*, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody. The only question then is, what is to be considered the proper custody; and that undoubtedly is the custody of the father. The Court has, it is true, intimated that the right of the father would not be acted upon where the enforcement of it would be attended with danger to the child; as where there was an apprehension of cruelty, or of contamination by some exhibition of gross profligacy."

Judgment.

And Mr. Justice Coleridge to a similar effect, thus—643: "But, although the first presumption is that the right custody according to law is also the free custody, yet, if it be shewn, that cruelty or corruption is to be apprehended from the father, a counter-presumption arises."

So also Lord Campbell, C.J., in *The Queen* v. *Maria Clarke* (1857), 7 E. & B. 186, at p. 196: "There is an admitted qualification on the right of the father or guardian, if he

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be grossly immoral, or if he wishes to have the child for any unlawful purpose." Further on the learned Chief Justice quotes with approval the general rule of law laid down in similar language by Mr. Justice Patterson on a question submitted to him by the Chief Justice of Bombay.

The foregoing attitude of the Courts before the Judicature Act and the exercise of their common law jurisdiction have been recognized and considered in several recent cases, particularly in *The Queen* v. *Gyngall* (1893), 2 Q.B. 232, wherein the Master of the Rolls, Lord Esher, lays it down as follows (p. 238):

"That jurisdiction might be exercised in cases where there was no question of the relation of parent and child, or it might be exercised as between parents and other persons. In such latter cases, where the dispute was with regard to the custody of a child, the question arose whether the party detaining the child had a right to detain it as against the parent. I take it that at common law the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct. Certain statutes have been passed which did limit to some extent the rights of the parent, though not guilty of misconduct that would have disentitled him or her to the custody of the child at common law. Where the common law jurisdiction was being exercised, unless the right of the parent was affected by some misconduct or some Act of Parliament, the right of the parent as against other persons was absolute."

Judgment.

The learned Judge proceeds to notice the wholly distinguishable parental jurisdiction, by virtue of which the Chancery Court was put to act on behalf of the Crown as being the guardian of all infants in the place of a parent, and as if it were a parent of the child, thus superseding the natural guardian of the child, which jurisdiction had been exercised by the Court of Chancery from time im-

memorial, and then points out that in England under the Judicature Act the Judges of the Queen's Bench Division are bound to exercise this Chancery jurisdiction themselves. The statement of Lord Chancellor Cotton in *In re Spence* (1847), 2 Ph. 246 at p. 251 is approved: "This Court interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*, and the exercise of which is delegated to the Great Seal."

The manner in which the Court will exercise the above jurisdiction is considered at length. The result may be summarized as being that the dominant matter for the consideration of the Court is the welfare of the child, and that its moral and religious welfare must be considered as well as its physical well-being. See also Lord Justice Kay in *The Queen* v. *Gyngall, supra*, at pp. 247-9. The matter is also later considered in *In re Newton* (1896), 1 Ch. 740, where it is clearly laid down that parental rights may be forfeited by moral misconduct. All the foregoing is, of course, quite apart from the effect of the English Guardianship of Infants Act, 1886, not in force here, which, as the Master of the Rolls states in *In re X.* v. *Y.* (1899), 1 Ch. 526, has "revolutionized" the old law as regards the rights of mothers—*vide* also *In re A. and B.* (1897), 1 Ch. 785.

Judgment.

My attention has been particularly drawn to the expressions of the Master of the Rolls *In re Agar-Ellis* (1883), 24 Ch. D. at p. 328, as supporting the proposition that the Court will only interfere with the rights of a father when the child is a ward of Court, but a reference to the preceding page will shew that the learned Judge was not referring to an application by way of *habeas corpus*, but to the application of former principles to the case before him, which was a petition by a ward of Court.

The course of procedure followed in *habeas corpus* matters in a Court of common law is distinctly laid down in *In re Andrews* (1873), L.R. 8 Q.B. 153, at p. 158:

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"Indeed, it appears to have been the invariable practice of the common law courts on an application for a *habeas corpus*, to bring up the body of a child detained from the father (and the case would be the same as to a testamentary guardian) to enforce the father's right to the custody, even against the mother, unless the child be of an age to judge for itself, or there be an apprehension of cruelty from the father, or of contamination, in consequence of his immorality or gross profligacy."

As was said in *The Queen* v. *Clarke*, following *The King* v. *Greenhill*, the immorality to extinguish the right of the parent or guardian to the custody of the child, must be of a gross nature, so that the child would be in serious danger of contamination by living with him.

It follows from the foregoing authorities, even in the sole exercise of a common law jurisdiction, that if I have reason to apprehend the contamination of the infant in consequence of the gross immorality of her custodian I cannot make the rule absolute. Does the evidence shew gross immorality? Mere illicit sexual relations is not sufficient. Lord Chief Justice Coleridge says *In re Goldsworthy, supra*:

Judgment.

"I do not place my decision on the ground of imputed immorality of the husband, using the word immorality in the sense attached to it by convention, which limits it to the relations between the sexes. It is manifest that, according to the principles by which this jurisdiction has always been exercised, there may be immorality of that sort which would not be held sufficient ground for depriving a father of the custody of his children."

So it must appear not only that the parent is immoral but that there is danger of the child being brought into contact with that immorality. In *Ball* v. *Ball* (1827), 2 Sim. 35, it was held: "This Court has nothing to do with the fact of the father's adultery, unless the father brings the child into contact with the woman. All the cases on this subject go upon that distinction, when adultery is the

ground of a petition for depriving the father of his common law right over the custody of his children." So in *The King* v. *Greenhill, supra,* it is said : "Although there is an illicit connection between Mr. Greenhill and Mrs. Graham it is not pretended that she is keeping the house to which the children are to be brought.....&c."

A case of *Ex parte Skinner* (1824), 9 Moo. 278 has been cited in support of the rule. There, the father was in gaol and cohabiting with another woman who took the child to him daily, and the mother applied for a writ of *habeas corpus* and was refused, because, to quote Lord Chief Justice Best: "It now appears that the father has removed the child, and has the custody of it himself; and no authority has been cited to shew that this Court has jurisdiction to take it out of such custody for the purpose of delivering it over to the mother." Under such circumstances—the converse of those at bar—that case is no authority for the applicant even at common law. But in that very case, the Chief Justice was careful to point out "the Court of Chancery has a jurisdiction as representing the King as *parens patriae*, and that Court may accordingly, under circumstances, control the right of a father to the possession of his child, and appoint a proper person to watch over its morals, and see that it receive proper instruction and education, &c."

Judgment.

In the present case though the evidence of Soy King may not be sufficient to prove that Sam Kee, who says he is a naturalized British subject, is living in a state of bigamy, yet it satisfies me that the atmosphere of his house is, as viewed from the standard of social life in this country, so grossly immoral that there is serious danger to apprehend that Soy King will be morally contaminated by a further residence under his roof. Whatever rights he may have had must now "be treated as lost...." *In re Fynn* (1848), 2 De Gex & S. at p. 475.

Taking the above view it is unnecessary to consider the

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two other grounds relied on by the authorities of the Refuge Home as shewing Sam Kee's unfitness to be the custodian of the infant.

I say nothing as to the rights of the father, or what might be done should he see fit to assert them. In the meantime it is best for the child that she should remain in the custody of the authorities of the Refuge Home.

The rule *nisi* will be discharged.

Judgment.

By request I add a note on a point of practice. Mr. *Fell* objected, when the matter first came before me, that the proceedings were fatally defective on the ground that the application had been made to my brother Drake in Chambers, and such an application could only be made to the Court. In taking this objection counsel overlooked the fact that the application was made during vacation, in which case the practice is to apply in Chambers—Short & Mellor, pp. 349, 352, and 662, at which last page a form is given which was substantially followed. The above authority fully supports the contention of Mr. *Helmcken* on this point founded on former proceedings in this Court to which he drew my attention : see also *In re Suttor* (*supra.*)

Rule nisi discharged.

McCLARY *ET AL* v. HOWLAND.

IRVING, J.
[In Chambers.]

Sept. 11.

McCLARY
v.
HOWLAND

Practice—Security for costs—Joint plaintiffs, one an extra-provincial Company—R.S.B.C. 1897, Cap. 44, Sec. 144.

An extra-provincial Company must give security for costs under R.S. B.C. 1897, Cap. 44, Sec. 144, notwithstanding it is suing along with a resident of the Province and has assets within the Province.

APPLICATION by defendants for security for costs from the plaintiff Company. The McClary Manufacturing Company are an extra-provincial Company carrying on business in British Columbia and having valuable real and personal property within the Province. The plaintiff Drake is resident within the jurisdiction.

Statement.

Kappele, in support of the application, cited R.S.B.C. 1897, Cap. 44, Sec. 144.

Bloomfield, contra: The statute carries the former rule no further. Before the Act all residents without the jurisdiction were bound to give security for costs. The statute therefore is only declaratory. The plaintiffs have ample means, unencumbered real property within the jurisdiction. In any event the other plaintiff resides within the jurisdiction, and security will not be ordered. *D'Hormusgee & Co., and Isaacs & Co.* v. *Grey* (1882), 10 Q.B.D. 13, followed in *Smith et al* v. *Silverthorne* (1893), 15 P.R. 197.

Argument.

11th September, 1900.

IRVING, J.: At first I was disposed to take time to consider, but on reading the section of the Act I am of opinion that I am governed by the statute, and that is imperative. Order that the Company do give security in the sum of $200.00.

Judgment.

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1899.

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DUNLOP v. HANEY.

Practice—Trial—Undertaking not to proceed further till trial—Proceeding before formal order drawn up but after judgment delivered—Whether breach of undertaking.

An undertaking not to proceed further until the trial of the action is observed although proceedings are taken before the formal order or decree is drawn up but after judgment delivered.

MOTION to dissolve an injunction argued before MARTIN, J.

Bodwell, Q.C., for plaintiff.
Wilson, Q.C., and *A. E. McPhillips*, for defendant.

15th September, 1899.

MARTIN, J.: The plaintiff moves to dissolve an injunction (interim order) granted by me herein on the 29th of August, on the application of the defendant Haney, "restraining the plaintiff from applying for or obtaining a certificate of improvements or Crown grant of the Pack Train mineral claim in the pleadings mentioned." This interim order was obtained by the defendant Haney on two grounds, which may be stated briefly as follows: (1.) An alleged agreement arrived at immediately after the trial of the action before me, the terms of which are set out in the fifth paragraph of John Elliot's affidavit as follows:

Judgment.

"At the conclusion of the argument, which lasted some hours, the Attorney-General announced as a result that no steps should be taken or allowed by the Government Officers permitting a certificate of improvements or Crown grant to issue to either party pending the result of the litigation, in which all counsel engaged concurred, and then not without notice to the other party."

It is further alleged in the seventh paragraph of the said affidavit that the plaintiff, and those interested with him, have since the "understanding before the Attorney-General

above referred to, prepared affidavits and in violation of the conclusion arrived at before the Attorney-General, applied for and obtained a certificate of improvements for the Pack Train mineral claim, and they are now endeavouring to procure the issuance of a Crown grant for the said mineral claim....."

(2.) The preservation of the property in dispute pending an appeal by defendant from my judgment, which appeal, it is deponed, will be brought on as early as possible, and notice whereof has been given.

As to the first of these grounds it is objected by the plaintiff that it is based upon a matter which has arisen subsequent to judgment, and that what I am asked to do is practically to declare a new right founded on the defendant's breach of faith ; and the case of *Davis* v. *Riley* (1898), 1 Q.B. 3, is relied on in support of this contention. It does, I think, fully support it, and the view that I have no such power. But irrespective of this objection I would point out, though it does not become essential in view of my subsequent remarks, that a close examination of said paragraph five shews the result of the agreement therein was that "the Attorney-General announced as a result no steps should be taken or allowed by the Government Officers, &c....in which all counsel engaged concurred...." All this amounts to is, in strictness, that all counsel adopted the view taken by the Attorney-General as to the course that should be pursued by the Government Officers, and there is no allegation that either party agreed to refrain from active steps on his own account.

Judgment.

But it is further urged that the plaintiff's counsel has not observed the undertaking embodied in the order of June 13th, 1899, as follows : "And the plaintiff by his counsel undertaking not to proceed further, until the trial of this action, with his application for a certificate of improvements or Crown grant in respect of the said Pack Train mineral claim...."

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It is not alleged that any such steps were taken on the plaintiff's behalf till after the trial before me at Vancouver, and my judgment thereon subsequently delivered, but the contention is that the "trial" is not at an end till the formal order or decree is drawn up, and that the undertaking binds until that is done. In my opinion the undertaking was substantially observed by taking no steps till after such trial and subsequent judgment. Whatever technical meaning the word "trial" may have I do not regard it here as being wider than the ordinary definition in Wharton as "the examination of a cause, civil or criminal, before a Judge who has jurisdiction over it, according to the laws of the land."—1 Inst. 124. Also, the word is defined in *Gath* v. *Howarth* (1884), W.N. 99, by Mr. Justice Field as follows: "A trial is where the Judge (with the assistance of a jury) has to decide which of two parties is entitled to succeed." I might add that the defendant's solicitor in the third paragraph of his affidavit himself speaks of "the trial of this action" as being over; his words are: "Immediately after the trial of this action...."

Judgment.

Then as to the second ground. From a perusal of the cases cited it would appear that until 1879 it was doubtful whether an injunction would be continued after the plaintiff's bill had been dismissed so as to preserve property pending appeal. But before that, in 1865, in the case of *Galloway* v. *The Mayor, &c., of London* (1865), 12 L.T.N.S. 623, it was stated by Lord Justice Turner that "the plaintiff if he had anticipated appealing to the House of Lords, ought at the hearing of the cause to have asked that the decree should be so framed as to keep alive the jurisdiction pending the appeal. That unfortunately not having been done, I cannot but think that, according to the case of *Oddie* v. *Woodford* (1821), 3 Myl. and Cr. 625, the power of the Court over it is gone." Lord Justice Knight Bruce took a similar view, but pointed out that, in the case then before them, "after all it was only a question of money."

Subsequently in *Polini* v. *Gray* (1879), 12 Ch. D. 438, it was laid down by Jessel, M.R., and Lords Justices James, Brett, and Cotton (p. 443), that the Court had jurisdiction to preserve a fund "because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success;" and again at p. 445: "The Court having arrived at the conclusion that the appeal is *bona fide*, that she (the plaintiff) intends to prosecute it with a view to determine her rights and to get a final decision on those rights; and the Court .... being satisfied that there would be danger, if it were not to interfere for the interim protection of the fund, of its not being forthcoming if she succeeded in the House of Lords, the question is, is it not the duty of this Court to say that the fund ought to be preserved for the successful party?" And it is pointed out on the preceding page that in another case where a claim to a fund failed twice the Lord Chancellor ordered the fund to be retained. The same principle is really recognized in the case of *Wilson* v. *Church* (1879), at p. 454 of the same volume, wherein Lord Justice Cotton, at p. 458, states: "Acting on the same principle I am of opinion, that we ought to take care that if the House of Lords should reverse our decision (and we must recognize that it may be reversed) the appeal ought not to be rendered nugatory. I am of opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be a very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bond-holders." It is likewise obvious that under the mining laws of this Province it would be quite as difficult to "get back" a mineral claim, the title to which had been acquired by the wrong party.

Judgment.

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It is laid down in *Polini* v. *Gray*, *supra*, at p. 446, that "this jurisdiction ought, no doubt, to be very carefully exercised, and so as not to encourage any one to present an appeal for the mere purposes of delay," and also that "it is a thing to be done only under very special and exceptional circumstances." In view of the important change in the investigation of mining titles under litigation introduced by section 11 of the "Mineral Act Amendment Act, 1898," alluded to in my former judgment herein (*ante* at p. 1), the circumstances of this case certainly are "very special and exceptional," as well as difficult to deal with, in fact they never could have occurred before that Act, and in view of them I cannot see that the case of *Carter* v. *Fey* (1894), 2 Ch. 541, is applicable.

Judgment.

The result is that I should be disposed to continue this injunction till after the appeal, with leave to apply to dismiss in case of delay in prosecution, were it not for a point which arises out of the operation of the section above referred to, and which now confronts me.

It will be remembered that the plaintiff is the owner of the Pack Train claim, and the defendant Haney of the Legle (*sic*) Tender. In my judgment I gave effect to the objection taken by the defendant's counsel that the plaintiff had not proved that this Pack Train overlapped the Legle Tender, and therefore the plaintiff was not entitled to succeed, because it follows that if these claims were not shewn to overlap, the rights of their respective owners were not antagonistic; *i.e.*, to put it plainly and briefly, the owner of the Pack Train was not concerned in, nor entitled to object to, any lawful acts of the owners of the Legle Tender regarding that claim. It was on this ground that I dismissed the plaintiff's action, and at the hearing of this application it was not alleged that either party was appealing against my judgment in this respect; the defendant manifestly could not. Now Haney, the owner of the Legle Tender, wishes to prevent the owner of the Pack Train from dealing with that claim. On what ground? Haney took, and

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successfully maintained, the position at the trial that the Pack Train and Legle Tender did not occupy the same space, wholly or partially, and therefore the rights of the owners on the question of title could not conflict. That was his position then; that must be his position now; he cannot recede from it; nor does he even now allege in the material before me that the Pack Train encroaches upon the Legle Tender. It follows that he cannot be concerned in any lawful steps the owner of the Pack Train may take to perfect his title by Crown grant or otherwise. How can I grant an injunction in the defendant's favour in regard to a claim which he has strenuously and successfully contended does not encroach upon his own? I find myself quite unable to do so, and no other course is open to me than to dissolve the injunction with costs.

Judgment.

Injunction dissolved.

DUNLOP v. HANEY *ET AL.*

FULL COURT
At Vancouver.
1899.
Nov. 24.
DUNLOP v. HANEY

Mining law—Adverse proceedings—Overlapping—Evidence of—Measurements—Abandonment and re-location—Evidence of—B.C. Stat. 1898, Cap. 33, Sec. 11—Practice.

Judgment of MARTIN, J., reported *ante* at p. 1 varied by Full Court.

APPEAL from decision of MARTIN, J., reported *ante* at p. 1.

The appeal was argued at Vancouver on 24th November, 1899, before the Full Court consisting of WALKEM, DRAKE and IRVING, JJ.

Wilson, Q.C. (*Lennie*, with him), for defendant (appellant.)

W. J. Taylor, Q.C., for plaintiff (respondent.)

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Judgment.

In the result the action was dismissed without a declaration of title being made in favour of either party. The following is the order made :

"Upon motion made unto this Court at the Court House, Vancouver, on the 23rd day of November, 1899, and this day by counsel on behalf of the defendant Edmond Haney by way of appeal from the judgment of the Honourable Mr. Justice MARTIN pronounced herein on the 11th day of August, 1899, and upon hearing counsel for the above named plaintiff and by consent of respondent (plaintiff), and it appearing that formal judgment hath not been entered but parties consenting to proceed with appeal notwithstanding, this Court doth order and adjudge that the plaintiff's said action be as against the defendant Edmond Haney, dismissed out of this Court without costs to either party and without any declaration affecting the title of either party to their respective mineral claims in the pleadings in this action mentioned, namely, the plaintiff to the Pack Train mineral claim and the defendant to the Legle Tender or Legal Tender Fraction mineral claim ; and this Court does further order that the plaintiff do pay to the defendant Edmond Haney, his costs of this appeal to be taxed.

"Let the cross-appeal be dismissed with costs."

DUNLOP v. HANEY.

DRAKE, J.
1900.
April 28.
DUNLOP v. HANEY

Mining law—Res judicata.

Held, by DRAKE, J., that the order of the Full Court reported *ante* at p. 305 operated to prevent the plea of *res judicata* being set up by the defendant in this action.

ACTION for declaration of title tried before DRAKE, J., at Victoria, on 10th April, 1900.

W. J. Taylor, Q.C., for plaintiff.
Hunter, for defendant.

28th April, 1900.

DRAKE, J.: The legal point raised by the defendant that this action cannot now be heard because the subject matter is *res judicata* involves the necessity of tracing the litigation which has taken place with reference to the Pack Train mineral claim, and the Legle Tender and Legal Tender Fraction (all of which claims practically cover more or less the same ground) down to the present time.

Without discussing the merits of the different claimants to these claims, I shall only deal with the legal aspect resulting from the various judgments which have been rendered, and shortly refer to the alleged facts.

Judgment.

The Pack Train was recorded on the 25th day of August, 1890, in the name of Thomas Dunlop, a free miner. He died on the 17th day of December, 1890, and on the 31st day of March, 1891, his estate, except this claim, was taken possession of by Mr. Fulton as Official Administrator. The claim itself was taken charge of by the Gold Commissioner. By section 131, Consolidated Statutes, Cap. 82, such claim was not open to occupation during the claim owner's last illness, or after his decease, and the Gold Commissioner might cause the property to be duly represented, or dis-

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pense therewith at his option until letters of administration issued.

The present plaintiff was appointed administrator on the 2nd day of July, 1895. What took place with reference to occupation and assessment work from 21st March, 1891, down to 2nd July, 1895, I need not now stop to discuss. The plaintiff from that time was paid $100.00 a year in lieu of doing assessment work down to 1899. The defendant on the 25th day of February, 1891, registered the Legle Tender claim over the same ground as the Pack Train with a trifling exception. The present plaintiff gave the usual notice of an intention to apply for a certificate of improvements, whereupon the defendant, on the 5th of August, 1897, commenced an adverse action as claimant to the Legle Tender, but the writ was not served until the 19th of January, 1899, and the Court set aside the service of the writ and all proceedings thereunder, and the appeal against this order was dismissed on the 2nd of May, 1899. (See 6 B.C. 520). This left the plaintiff at liberty to go on with his application for a certificate of improvements, as by section 37 of the Mineral Act any failure to commence and prosecute an adverse action shall be deemed to be a waiver of the plaintiff's claim, and in fact precludes him from litigating it.

Judgment.

On the 6th of August, 1895, the defendant advertised his intention of applying for a Crown grant to the Legle Tender —this was the day after he had issued his writ—adversing the plaintiff's right to the Pack Train, whereupon an action was brought by the present plaintiff against the present defendant and one, Enslow, who had located the Olivett claim over part of the same ground as the Pack Train. This action was commenced on the 22nd of October, 1895, asking for the possession of the Pack Train, and a direction that the defendant was not entitled to the Legle Tender claim. In this action an order was made on the 24th of June, 1898, discontinuing the same without prejudice to the plaintiff's claim in the action. This order, the defendant

now contends, acted as a waiver of the plaintiff's claim under section 37 of the Revised Statutes, because it was an adverse action by Dunlop against Haney. It has to be borne in mind that Haney was at this time adversing the Pack Train, and his action was pending, yet he apparently was not satisfied with this, but made an application on behalf of the Legle Tender so as to compel the present plaintiff to commence an adverse action. This procedure I do not think was contemplated by the framers of the Act. The order made discontinuing that action before referred to preserved the plaintiff's rights. Then the defendant Haney, feeling doubtful about the Legle Tender claim, staked, in 1897, the Legal Tender Fraction on the same ground as the Legle Tender.

On the 19th of June, 1897, an action numbered D. No. 7, was commenced by the plaintiff against the defendant Haney, W. Y. Clark, Jerry Spelman, and Napoleon Fitzstubbs, as Gold Commissioner. This action was to adverse the claim of W. Y. Clark, who was the assignee of Enslow, with reference to the Olivett mineral claim, so far as it encroached on the Pack Train, and for a declaration of title as against all the defendants to the ground covered by the Pack Train, and for an injunction. No order was drawn up in this case, but the learned Judge who tried the case dismissed the action on the ground that the evidence of over-lapping of the Pack Train with the Legle Tender or Legal Tender Fraction was not sufficiently proven. At the same time he found that the defendant Haney had not established his claim to the Legle Tender or Legal Tender Fraction; but no reference appears to have been made to the Olivett claim, which was the main ground of action, and no reference was made to the Copper Chief which had been recorded by the defendant Spelman, also on the same ground. I think if the order had been drawn up instead of rushing to an appeal against the Judge's reasons these other alleged claims would not have been forgotten. From this

Judgment.

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judgment Haney appealed, and it was ordered that Dunlop's action be dismissed without costs, and without any direction affecting either party to the respective claims, Pack Train and Legle Tender, or Legal Tender Fraction. (See *ante* p. 305.)

The effect of this order is that the question of ownership is at large both as regards the plaintiff and the defendant Haney, and also possibly as regards the Olivett and Copper Chief.

Before this last mentioned action was brought to trial the defendant Haney, on the 23rd of June, 1896, registered the Legal Tender Fraction, and obtained certificates of work in May, 1897, and June, 1898 and 1899. This fraction is on the same ground as the Pack Train and Legle Tender, and as this claim was also in dispute in the action before Mr. Justice MARTIN it would be left in the same position as the other claims.

Judgment.

To establish *res judicata* there must be a decision on the subject matter of the litigation and between the same parties. In *Phillips v. Ward* (1863), 2 H. & C. 717, the defendants pleaded that they had been jointly liable with B., and that in a former action judgment had been given in favour of B. *Held*, bad plea, because it was not shewn that the former action had been resisted on some ground common to all the joint debtors. The subject matter of the litigation is the ownership of the claims Pack Train, Legle Tender, Legal Tender Fraction, Olivett and Copper Chief. On this point there had been no adjudication. If there had been it would be a case of transit in *rem judicatam*, and as such would act as an estoppel against all parties, and prevent them impugning the accuracy of the decision in any subsequent proceedings. It is true the question of title was before Mr. Justice MARTIN, and he decided that the plaintiff had not shewn his boundaries, and that the defendant had not shewn any title. This portion of the judgment was varied by the Full Court as above.

Mr. *Hunter* relies on *In re May* (1885), 28 Ch. D. 516.

That case decided this, that when a petition had been heard and decided on its merits a fresh petition could not be presented for the same object without leave of the Court. The distinction is obvious. Here there has been no decision on the merits. If Mr. Justice MARTIN's judgment stood without the variation made by the Full Court the argument would be effective, but that decision has eliminated the question of ownership, and the decision is equivalent to the leave referred to in the *May* case. But in addition to this I have to consider the effect of section 11 of Cap. 33, 1898. That section deals with adverse proceedings, and says that each party to such proceedings shall give affirmative evidence of title to the ground in controversy, and if such title shall not be established by either party the Judge shall so find, and judgment shall be so entered without costs. If the effect of this clause is to debar the parties who have litigated the question of ownership of conflicting claims from ever litigating the same again it would be an estoppel against both, and also against their privies, and it would in effect cancel both claims. I, however, decline to express an opinion as to the results which would happen when a judgment has been rendered in accordance with this section, as I think the point now in issue can be dealt with without ruling on its legal effect. I consider that when the Full Court expressly excepted from Mr. Justice MARTIN's judgment any declaration of title as to the ownership of the claims in question they, by implication, left the parties in the same position as they stood before the action was brought. The result may be unfortunate in view of increasing the litigation which this claim has already given rise to. I, therefore, overrule Mr. *Hunter's* plea of *res judicata.*

Judgment.

MARTIN, J.

1900.

Aug. 15.

ATTORNEY-GENERAL v. DUNLOP

ATTORNEY-GENERAL v. DUNLOP.

Practice—Judgment—When pronounced or delivered.

Mining law—Crown suit to set aside certificate of improvements—Fraud—What constitutes—Whether application under section 10 of the Mineral Act Amendment Act, 1899, must be in writing.

Held, by MARTIN, J., that a judgment signed by him and left by him for deposit in the mail at Victoria on August 11th, 1899, was pronounced on that date although the judgment did not apparently reach the Vancouver Registry to which it was addressed until the 15th.

In an action by the Attorney-General to set aside a certificate of improvements on the ground that it was obtained by fraud, the fraud alleged was a statement in an affidavit of defendant's agent sworn on 10th August, 1899, that the defendant was in undisputed possession of the Pack Train mineral claim. On 10th August, 1899, an action was then pending as to the title of the Pack Train claim and judgment was not delivered till 11th August, 1899, in favour of the defendant. As it was after the 11th of August, when the affidavit reached the Gold Commissioner

Held, not fraud within section 37 of the Mineral Act.

The application to the Minister of Mines under section 10 of the Mineral Act Amendment Act, 1899, need not to be in writing.

Statement.

ACTION by the Attorney-General to have a certificate of improvements set aside on the ground that it was obtained by fraud. The facts appear fully in the judgment.

The action was tried at Victoria before MARTIN, J., on 29th and 30th June, 1900.

Cassidy, for plaintiff.

Duff, for defendant.

15th August, 1900.

MARTIN, J.: To clear the ground for subsequent observations, I shall first deal with two points raised.

Judgment.

As to the undertaking that was given in the case of *Dunlop v. Haney*, embodied in the order of June 13th, 1899; I have nothing to add to the remarks made on that point

in my judgment of September 15th, 1899 (*ante* at p. 300), on the motion to dissolve the injunction, except that the language in the case of *Carroll et al v. Provincial Natural Gas and Fuel Company of Ontario* (1894), 16 P.R. 518, now cited to me differs widely from that used in the undertaking in question.

Then as to the question as to when my judgment (on the issues raised at the trial in *Dunlop v. Haney*, *ante* at p. 1), was pronounced or delivered. After the case was heard at Vancouver, I reserved judgment, and after further consideration arrived at my decision, which was finally reduced to writing, dated, and signed on the afternoon of August 11th, 1899 (Friday). That same evening I enclosed the said judgment in an envelope with a covering letter directed to the District Registrar at Vancouver, and placed the said envelope on a table in my room at the Law Courts, Victoria, whence my letters are in due course taken to the post every evening. The letter should have reached the District Registrar early the next morning, according to the proper course of the then mails, but strange to say the office receipt stamp of the Vancouver Registry, stamped on the judgment' bears date August 15th (Tuesday), and no trace of the accompanying letter can be found. Under such circumstances it is impossible to say where the delay arose, but I am inclined to believe, from the absence of the letter, that it occurred in the Vancouver Registry. On the one hand it is contended that judgment was not pronounced or delivered till the 15th, and on the other it is urged that the 11th is the date. There is no rule of Court defining what constitutes pronouncing or delivering a judgment which is reserved after trial. In the case of a judgment of the Full Court the matter is regulated by statute—section 92 of the Supreme Court Act. The writ in *Dunlop* v. *Haney* issued out of the Victoria Registry, but the case was tried at Vancouver. Our present system of registries is peculiar and awkward. At one time there was a principal registry at Victoria with various sub-registries—now there are several

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independent registries in charge of independent "District Registrars." The office of "Registrar," under that specific term, exists now only in relation to the Full Court—Supreme Court Act Amendment Act, 1899, Sec. 14. If a case be tried by a Judge on circuit in, say, Kamloops, and judgment is reserved, it would be practically impossible, and also absurd, to require counsel to come down to, say, Victoria, to hear judgment delivered in open Court, and it would be equally impossible (in view of the proper carrying out of the judicial system) and absurd for a Judge to make a long and expensive journey to Kamloops for the sole purpose of delivering judgment in like manner. In such cases my practice has been, after completing my judgment, to send it to the District Registrar at the place of trial, with a direction that it shall be communicated to the parties. That, in my opinion, according to the exigencies of practice in this Province constitutes a pronouncement of the judgment just as much as the reading of the judgment in open Court, and it has for many years been so considered. I do not say that it may not also be pronounced in other ways, not necessary now to consider. In the present case when I finally settled, signed, dated, and posted (or its equivalent) my judgment on the 11th of August, I had finally determined the matter so far as I was concerned—in other words I had pronounced judgment on that day, and a party to the action should not be prejudiced by any delay in the registry, the post-office or otherwise. Supposing that after putting that letter in the mailing place in my room I had suddenly dropped dead, could it be said that I had not delivered judgment, and that it could not be acted upon? There can only be one answer to such a question—the judgment had already taken effect. As was said in *Holtby* v. *Hodgson* (1889), 24 Q.B.D. at 107: "Pronouncing judgment is not entering judgment; something has to be done which will be a record, and so the judgment that the Judge has pronounced is the judgment which is to be

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entered. No subsequent ceremony, no signing of judgment, is now necessary."

In the Encyclopædia of the Laws of England, Vol. VII., p. 114, article, Judgment, it is said: "The term is in strictness applicable to the formal adjudication of a Court as entered and recorded in writing. It is also frequently applied to the oral or written opinions of the Judges pronounced when directing judgment to be entered in a particular way."

See, also, in Ontario, *Kelly* v. *Wade et al* (1890), 14 P.R. 66; and *Davidson* v. *Taylor*, *Ib.* 78. But there is an additional circumstance in this case which supports the above contention. In the said case of *Dunlop* v. *Haney* an affidavit was made on the 16th day of September, A.D. 1899, by Mr. *Senkler*, a member of the firm of *Wilson & Senkler*, the agents for the defendant's solicitor, Mr. *John Elliot*, in that action, and that affidavit contains the following paragraph:

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"(3.) That judgment was pronounced herein on the 11th day of August, 1899."

In this present action it is sought to impeach a certificate of improvements, and it is founded upon sections 37 (as amended) and 28 of the Mineral Act. That portion of section 37 which is primarily relied on is—"(1.) A certificate of improvements when issued as aforesaid shall not be impeached in any Court on any ground except that of fraud."

Section 28 is: "Upon any dispute as to the title to any mineral claim no irregularity happening previous to the date of the record of the last certificate of work shall affect the title thereto, and it shall be assumed that up to that date the title to such claim was perfect, except upon suit by the Attorney-General based upon fraud."

It is contended by the Crown that in case any fraud is shewn under section 37 the curative properties of section 28 vanish, as against the Crown, and the question of antecedent irregularities is then at large. Perhaps that may be

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so, but before that stage is arrived at fraud must be proved. It will not, I think, be disputed that parties strenuously yet *bona fide* pursuing what they deem, however erroneously, to be their rights do not come within the meaning of the word "fraud" in either section. Has the defendant herein done anything more? If he has, it is contained in the affidavit of his agent Farwell, sworn on the 10th of August, 1899. It is alleged that that affidavit is untrue in fact in that it states that the defendant (1.) "is the recorded owner," and (2.) "in undisputed possession" of the Pack Train mineral claim. As to the first ground, counsel for the Crown practically admitted what is evident, that Farwell was really swearing to a question of law, and that, in effect, the statement was, in the result, accurate, for the defendant is the recorded owner in his capacity as administrator of his brother's estate. The point raised as to Garrison's recorded, but overlooked, one quarter interest is satisfactorily explained by the evidence of the Gold Commissioner and the witness Taylor.

Judgment.

Then as to the second ground. When the affidavit was made in Victoria on the 10th it was not the fact that Dunlop was then in undisputed possession; my judgment in the then pending case of *Dunlop* v. *Haney* was not delivered till the following day, but so far as said judgment was concerned the statement was accurate when the affidavit reached the Gold Commissioner some days later: the test is not was it true at the time it was sworn to, but was it true when it was communicated to the official to be acted on? But it is quite clear that in any event the Gold Commissioner was not misled in the present instance; his whole evidence goes to shew that he acted on his own thorough and exceptional knowledge of the case, and that Farwell made that affidavit at his suggestion as a formal compliance with the Act: I am quite unable to say there was any deception. The legal dispute so far as the Mineral Act was concerned (which is what the Gold Commissioner

alone took cognizance of, and then only when the proceedings were on file in his office) had been adjudicated upon, for the time at least, and Dunlop was in a position to demand his certificate, and it was issued and forwarded to the Minister of Mines under the circumstances detailed by the said official. I am unable to find that there has been any fraud here, and assuming that either the Gold Commissioner or Farwell was mistaken in his view of the state or result of the litigation, that is not surprising when it is borne in mind how very complicated that litigation has become.

So far I have not alluded to the letter and telegram of the Minister of Mines, dated the 11th and 14th of August, respectively. I need only say that in view of the statement of the Gold Commissioner that he had before got written instructions from the then Attorney-General not to issue the certificate, but that after getting the said later communications he did so, I am of the opinion, that, with the knowledge the Crown had of the circumstances, this action cannot be maintained.

I have not overlooked the objection that the requirements of section 10 of the Mineral Act Amendment Act, 1899, in regard to the application to the Minister of Mines, have not been complied with. It is only necessary to say that there is nothing that requires such application to be in writing, and I find that verbal application was repeatedly made, and that otherwise the objection is not supported by evidence.

The action should be dismissed with costs.

Action dismissed.

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KING v. BOULTBEE.

Practice—Garnishee proceedings—Order that money remain in Court until new action commenced—Whether nullity or not.

An order made by a County Judge that garnished moneys remain in Court to abide the event of a new action to be commenced forthwith (a former suit in respect of the same cause of action being dismissed by the same order) is not a nullity and if not appealed against is valid.

So *held* by McCOLL, C.J., and WALKEM, J.: IRVING and MARTIN, JJ., dissenting.

APPEAL to the Full Court from an order of Forin, Co.J., dated 3rd March, 1900. The action was commenced in the County Court of Rossland on 28th October, 1899, to recover $171.00, and on the same day a garnishee summons was also issued and served on the garnishee. On 30th October, the garnishee paid into Court $173.70. On 17th November, an order was made by Forin, Co.J., as follows:

"Upon hearing Mr. *Deacon*, of counsel for the plaintiff, and Mr. *Nelson*, of counsel for the defendant, and upon reading the affidavits and papers filed:

Statement.

"(1.) I do order that the plaint and summons issued herein, and the garnishee summons issued herein, and all proceedings thereunder, be and the same are hereby set aside with costs.

"(2.) And I do further order that the moneys in Court be not paid out, but remain in Court to abide the result of an action to be commenced forthwith in respect to the same cause of action.

"(3.) And I do further order that the summons so to be issued by the plaintiff for the same cause of action as in said plaint mentioned be returnable for the next County Court.

"(4.) And I do further order that the question as to whether or not such moneys were attachable shall be determined as of the date of the issue of the garnishee summons so set aside."

The action mentioned in paragraph two of the above order was commenced on 18th November, 1899, and the same was tried on 25th January, 1900, and judgment entered for plaintiff.

On 21st November, 1899, the defendant assigned to Mr. W. J. Nelson the sum of $173.70, then in Court.

Statement.

On 14th February, 1900, a summons was taken out in the first action on behalf of the defendant and Mr. W. J. Nelson for the payment out of Court of the said sum of $173.70, to the said Nelson, under and by virtue of the said assignment on the ground that the garnishee summons having been set aside the said Nelson was entitled to the money as assignee thereof.

This summons was dismissed with costs on 3rd March, 1900, and the defendant and the assignee appealed, and the appeal was argued at Victoria on 8th May, 1900, before McColl, C.J., Walkem, Irving and Martin, JJ.

Duff, for appellants, opened and stated the facts when the Court called on

MacNeill, Q.C., for respondent: The order of 17th November, was not appealed against, and on March 3rd the appellants' summons was dismissed as there had been no appeal. On 18th November, 1899, the new action was commenced; on 28th November, the defendant confessed judgment as to part, and on 25th January, 1900, plaintiff got judgment at trial.

Argument.

Duff: The order of 17th November, 1899, except in so far as it set aside the proceedings is a nullity and was made without jurisdiction, and hence we were not bound to appeal. See *In re Kootenay Brewing Company* (1898), 7 B.C. 131, 132 and cases there cited. [McColl, C.J.: It is not

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a question of jurisdiction—it is a question of whether or not there was consent to this departure from the regular procedure.] There is nothing to shew that there was any consent, and as a matter of fact there was none. The point that the order was made by consent has not been taken by counsel for respondent. The fourth section of the order of 17th November, is altogether beyond the Judge's jurisdiction.

Argument.

MacNeill: There is a good deal in the appeal book which bears out the fact that the defendant acquiesced in the order. [MARTIN, J.: Did the parties consent to order of 17th November?] By acquiescing in the procedure they did. The active opposition was about the garnishee summons being issued after hours.

Duff: It is not alleged that the defendant did any act to shew acquiescence. All we did was to go to trial because we had to defend the action on the merits. [MCCOLL, C.J.: The Judge should have given his reasons; there are too many appeals from the County Court.]

Cur. adv. vult.

10th September, 1900.

Judgment of McCOLL, C.J.

MCCOLL, C.J.: I cannot agree that the part of the order of 17th November, 1899, providing that the money garnished should remain in Court subject to the trial of an action was a nullity.

I do not doubt that such an order could have been made by consent, and it may, in the circumstances, have been a better course than to have left the plaintiff to take fresh proceedings, resulting in an issue in the usual course.

At all events, the order was not appealed against but on the contrary, was acted upon; and I am clearly of opinion that no assignment could have any validity as against the order until it was got rid of.

I would dismiss the appeal with costs.

WALKEM, J.: The money paid into Court in the first case between the above parties was subject to the order of the learned County Court Judge; and the mere fact which is relied upon, namely, that the order he made was not warranted by the practice of the Court would not justify me in holding that it was, on that account, a nullity. It could have been appealed from, and as no appeal was taken, it must be held to be valid.

The present appeal must therefore be dismissed with costs.

IRVING, J. [After setting out the facts] proceeded: The proceedings in the action in which the attaching order was made having been set aside, the attachment was dissolved and the moneys were liable to be assigned by Boultbee, or again garnished by the plaintiff, or by any of Boultbee's other creditors.

The statute authorizing the plaintiff in an action to attach moneys before judgment obtained, requires an affidavit to be filed. This summons is for the securing of the debt and costs "which may be recovered by the plaintiff against the defendant in the action in connection wherewith the garnishee summons is issued." Section 102.

When the learned County Court Judge set aside the County Court summons in action No. 1, the garnishee proceedings had nothing to support them, and they fell to the ground.

If the plaintiff desired to attach the moneys he should have proceeded to take out a second attaching order. If parties desire to obtain the benefit of an enactment like this there is nothing unreasonable in requiring the strict observance of the procedure that is laid down as a condition precedent to the exercise of the powers conferred. The rules of procedure are imperative; compare *French* v. *Martin* (1892), 8 Man. 364; *Hughes* v. *Hume* (1897), 5 B.C. 278; *Barker & Company* v. *Lawrence* (1897), 5 B.C. 460.

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It has been argued that the order of the 17th of November, might have been so worded, as to preserve the rights of the plaintiff. Possibly that is so. I express no opinion on that point; but if there had been a different order the defendants might have appealed. We should, I think, deal with the matter as it is.

I cannot see how the plaintiff was in any way misled by the defendant. The plaintiff, not the defendant, had charge of the proceedings. Everything the defendant did was consistent with his standing on his rights.

The appeal should be allowed.

Judgment of MARTIN, J.

MARTIN, J.: There is nothing before us to shew that the defendant (appellant) consented in any way to that portion of the order of His Honour Judge Forin—paragraph four which is now objected to; on the contrary we are informed by counsel that it was opposed. Nor can I see anything in the proceedings from which any acquiesence in the course suggested by the learned Judge can be implied, as was done in some cases cited: *e.g.*, *Moore* v. *Gamgee* (1890), 25 Q.B.D. 244; *Burgess* v. *Morton* (1896), A.C. 136. It cannot be denied that there was no power to make such an order, and in the absence of consent or subsequent acquiesence, I am of the opinion that the defendant was, in the case of a Court of limited statutory jurisdiction, entitled to disregard that portion of the order which was a nullity, and there was no necessity to appeal from it—*Attorney-General* v. *Lord Hotham* (1823), 24 R.R. 21; *Cape Breton Company* v. *Fenn* (1881), 17 Ch. D. 198 at p. 202; *Grant* v. *Maclaren* (1894), 23 S.C.R. 313; *Re Kootenay Brewing Company* (1898), 7 B.C. 131; *cf* also *West* v. *Downman* (1879), 27 W.R. 697.

The appeal should be allowed with costs.

Appeal dismissed.

YATES *ET AL* v. B. C. ELECTRIC RAILWAY COMPANY, LIMITED.

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YATES v. B. C. ELECTRIC RAILWAY

Agreement between Street Railway Company and Municipality—Whether Company compelled to operate to City limits extended after agreement made—B. C. Statutes 1890, Cap. 52 and 1894, Cap. 63.

The promoters of a Street Railway Company entered into an agreement with the City in 1888, and agreed to run cars along Douglas Street to the northern boundary of the City limits. They became incorporated as a joint stock company, and in 1890, obtained a charter authorizing the construction of tramways connecting the country districts with the City system, and in pursuance of the new powers continued the Douglas Street tramway northerly along the Saanich Road. Traffic on this extension was discontinued in 1898, because it did not pay.

In 1892, the City limits were extended so as to include a portion of the Saanich Road on which the tramway had been built.

In 1894, the Company obtained a private Act for the consolidation and confirmation of its rights, powers and privileges and ratifying the agreement of 1888, between the City and the original promoters.

Held, in an action for a declaration that the Company was bound to operate its tram system along Douglas Street to the extended City limits, that the Company was not bound to do so.

Quaere, whether a ratepayer could sue.

Statement.

ACTION by Yates, a ratepayer of the Corporation of the City of Victoria, and the said Corporation against the Rail-

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NOTE.—Section 4 of the Street Railway By-law, 1888, is as follows:

"The Corporation of the City of Victoria reserves the right to grant permission to any person or persons, or bodies corporate, to cross and re-cross the lines of railway to be constructed on the streets mentioned in the said schedule, or any other streets that may be hereafter used by the said J. Douglas Warren, Andrew Gray, Thomas Shotbolt, Joseph Hunter and David William Higgins or their assigns....."

Section 22 of the agreement of 20th November, 1888, is as follows:

"The cars shall run over the whole of the streets mentioned in the schedule hereto on which the said tracks are laid, at least 15 hours in summer and 15 hours in winter, on each day, and at intervals of not more than 30 minutes."

The Schedule reads "Douglas Street to northern boundary of City limits."

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way Company for a declaration that the Company was bound to operate that portion of its tram line between the northern limits of the City and Hillside Avenue and for damages to Yates for not carrying him over such portion of the road. All the facts were agreed upon with the exception of the fact that the operation of this part of the road entailed a loss to the Company and therefore it was closed to tram traffic. On this point Mr. Goward, Manager of the Company gave evidence of loss which was uncontradicted.

Statement.

The action was tried before DRAKE, J., at Victoria on 28th February, 1900.

W. J. Taylor, Q.C., and *Bradburn*, for plaintiffs.
A. E. McPhillips and *Barnard*, for defendant.

14th March, 1900.

DRAKE, J. [After stating the facts as above] proceeded: The present defendants are successors to the original promoters, who made an agreement with the Corporation on 20th November, 1888.

These gentlemen were incorporated as a joint stock company with limited liability, under the style of the National Electric Tramway & Lighting Company.

Judgment.

In 1890, the Company obtained a charter from the Provincial Legislature authorizing them to construct tramways connecting certain of the country districts with the tram system of Victoria, and in pursuance of these powers they constructed a tramway from the then existing termination of their line on Douglas Street, on the northern boundary of the City, along Saanich Road towards North Saanich. This line was only continued a short distance to a point at the junction of the Saanich Road and Tolmie Avenue, and traffic on a portion of this line was discontinued on the 25th of April, 1898.

At the time the agreement before referred to was made between the promoters and the Corporation, the northern limits of the City extended to a point on Douglas Street

which is parallel with the southerly boundary of lot 8 on the easterly side of said street.

On 23rd April, 1892, the territorial limits of the City were extended and included portion of the Saanich Road, on which the Company had laid their track in pursuance of their above mentioned charter.

On 26th December, 1893, the Corporation passed a by-law renaming the portion of Saanich Road so included as Douglas Street extension.

On the 6th of April, 1894, the Company obtained a private Act, Cap. 63, for the consolidation and confirmation of their rights, powers and privileges, and to change the name of the Company to that of The Victoria Electric Railway and Lighting Company, Limited.

The first section of that Act ratifies the agreement of 20th November, 1888, and the Corporation and Company are thereby empowered to do whatever is necessary to give effect to the substance and intention of the provisions of the agreement; and they are respectively declared to have had power to do all acts necessary to give effect to the same, and the obligations created thereby; and that clause 4 of the Street By-law, 1888, shall be binding on the Company so long as they shall operate the said tramway, or so long as they shall exercise any of the powers or privileges of the Company referred to in the agreement and by-law. Stopping here it is abvious that doubts existed as to the validity of the agreement, either on the ground that the Corporation, or promoters, had no power to make it, or that some of the provisions were possibly *ultra vires*. If this view is correct all that this clause does is to confirm the agreement, not extend or make a new one, or impose any other conditions or stipulations than such as are found in the Act.

Judgment.

The latter part of the section merely makes the agreement operative so long as the Company are exercising their powers. The point taken by the Corporation is that the Company by this Act and agreement are not permitted to

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abandon any portion of their line within the City limits when once laid down and operated, but are bound to run cars at intervals of not more than thirty minutes under section 22 of the agreement ; and that the schedule mentioned in the agreement " Douglas Street to northern boundary of City limits," must be held to cover this additional portion of the line. In other words, that the agreement must be read so as to include the extended limits of the City within its operation.

An Act of Parliament must be construed like any other document. The question at once arises: What was the contract the promoters and the Company entered into? That contract was limited to the northern boundary of the City, as it existed in November, 1888 ; and the stipulations of the agreement only refer to tram lines laid down within the limits and over the streets mentioned in the schedule. The Act of 1894, nowhere extends those limits, or makes any alteration in the terms and conditions of the agreement. On this point therefore my judgment must be against the view put forward by the Corporation.

Judgment.

Mr. *Taylor's* contention that because at the time the agreement was confirmed, the City limits had been extended, the confirmation must by implication alter and vary the agreement, is not tenable. The agreement when made was within the powers of the contracting parties, and there is nothing in the Act which either limits or extends the agreement as to the Company's rights to construct tram lines over the streets mentioned as they then existed.

And the further contention that when once a tram line has been constructed it must be operated for all time, and section 22 of the agreement is relied on. The agreement to construct and operate the tram line is merely permissive. No exclusive privilege is granted, the Corporation have inserted clauses in the interest of the public to govern the line and its operation. The promoters may construct lines over any or all the streets mentioned in the schedule, but

they are not compelled to; but the Corporation now say once you have constructed any portion of your line, even though it was made under a charter of the Provincial Government, and not under your contract with us, we will not allow you to close it again. There is no such condition in the agreement or in the charter. The true meaning of section 22, if it could be extended to the line in question, is that while the Company are operating their line they must operate it according to that section. The construction contended for would be most unreasonable. It was held by A. L. Smith, L.J., in *The Darlaston Local Board* v. *The London and North Western Railway Company* (1894), 2 Q.B. at p. 709, "If an Act is enabling, so as to impose no obligation to make (a railway) it imposes no obligation to maintain;" and at p. 712, "If the Legislature was imposing the onerous and novel obligation upon a railway company to maintain its works for some period, some apt words certainly would be found in the Act imposing this obligation, and yet the Act is altogether silent upon the subject, though other words are now said to bear that meaning, and are pressed into the service to do duty for those which cannot be found." This language is very applicable to the present case. There is nothing to prevent the Company, after it has laid a track down, to remove it for reasons satisfactory to themselves if they find it is inexpedient to continue to operate any particular portion of the line, and the language used in clause 22 does not impose on the Company any bar in this direction.

Judgment.

I have not referred to the point raised by the defendants that under no circumstances can Yates maintain this action, his position of a ratepayer not giving him any *locus standi* to enforce a contractual obligation entered into between the Company and the Corporation, because in my view the plaintiffs have failed in their action, which must be dismissed with costs.

Action dismissed.

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IN THE COUNTY COURT OF ATLIN.

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Small Debts Court—Jurisdiction of—Debt—Mechanic's lien—R.S.B.C. 1897, Cap. 132, Secs. 26 and 27.

An action to enforce a mechanic's lien is not one of debt within the meaning of section 2 of the Small Debts Act.

Statement.

APPEAL to the County Court of Atlin from a decision of a Magistrate of the Small Debts Court in favour of the plaintiff in an action to enforce a Mechanic's lien under sections 26 and 27 of the Mechanic's Lien Act.

The appeal was argued before MARTIN, J., at Atlin on 7th September, 1900.

Sawers, for appellant.
Jenns and *W. P. Grant*, for respondent.

13th October, 1900.

Judgment.

MARTIN, J.: It is objected that the Small Debts Court has no jurisdiction in this matter, because this action, which is brought under sub-sections 26 and 27 of the Mechanics' Lien Act, is not an "action of any kind of debt," as required by section 2 of the Small Debts Act. It is true that certain claims for penalties imposed by statute are in the nature of a debt, as was decided in *Cuming* v. *Silby* (1769), 4 Burr. 2,489, which was an action of debt under the Bribery Act of 2 George 2, Cap. 24, Sec. 7. But that statute provided that the penalties should be recovered "together with full costs of suit, by action of debt, bill, plaint or information, in any of His Majesty's Courts of Record at Westminster.....," and there is no corresponding provision in the Act here relied upon.

In that legal classic, Stephen on Pleading (1866), p. 11, it is stated, "an action of debt lies where a person claims the recovery of a debt, *i.e.*, a liquidated or certain sum of money alleged to be due to him ; and it is generally founded on some contract alleged to have taken place between the parties, or on some matter of fact from which the law will imply a contract between them." What is there in this case from which a contract between the parties can be implied ? It is urged that, taking the most favourable view of the matter for the plaintiff, the most that can be said is that a statutory obligation is cast upon the defendant, which obligation is, nevertheless, in the nature of a penalty.

The subjects of penal actions and the distinction between public and private penalties were considered by the Privy Council in the case of *Huntington* v. *Attrill* (1893), A.C. 150. At p. 160, the following reference is made to an American decision which is quoted with approval, and cannot be distinguished from the present case :

Judgment.

"The respondent, in his argument, placed great reliance upon *Merchants' Bank* v. *Bliss*, 35 N.Y. (8 Tiffany), 412, which was decided in 1866. The statute of 1848, already referred to, required the trustees of the Corporation to make a report at a stated period, and, in the event of their failure to do so, rendered them jointly and severally liable for all its debts then existing, or which might be contracted before the report was actually made. The suit was by a creditor against a defaulting trustee, and the only question raised was this—whether the action was for a 'liability created by statute, other than penalty or forfeiture, within the meaning of the Statute of Limitations, or for a penalty or forfeiture, when action is given to the party aggrieved ?' The Supreme Court of New York decided that the liability belonged to the second category, and that suit was consequently barred by the lapse of three years."

The result of the foregoing is that I must regard the pres-

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ent action as one for a penalty or forfeiture, given to the party aggrieved; and in the absence of any direct authority it cannot, in my opinion, be regarded as one "of any kind of debt," and so is not within the jurisdiction of the Small Debts Court.

It follows that the appeal is allowed with costs, and, pursuant to the Small Debts Amendment Act, 1899, Sec. 2, the case is remitted back to the Magistrate of the Small Debts Court, with instructions to enter the judgment that properly flows from this decision.

Appeal allowed.

HOLTEN *ET AL* v. VANDALL *ET AL.*

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1900.

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HOLTEN *v.* VANDALL

Fraudulent conveyance—Collusion—Immoral consideration—Statute of 13 Eliz., Cap. 5.

Practice—Pleading—Amendment of to conform to evidence.

V., a miner and prospector, engaged in 1896, B., as a servant in an hotel kept by him in Revelstoke, on the understanding that the rate of wages would be fixed when he found out what she was worth, and some weeks afterwards he fixed the rate at $50.00 per month. A few months after V. built a house and he and B. lived there as man and wife.

In November, 1898, V. made an assignment for the benefit of his creditors having seven days previously conveyed to B. the house property for an alleged consideration of $1,200.00 as representing her wages for two years. She had never asked for wages before October, 1898, and then V. was hopelessly in debt.

Held, by WALKEM, J., in an action to set aside the conveyance on the ground of its being fraudulent under the statute of 13 Eliz., Cap. 5, that there was collusion between V. and B. to defeat V's creditors.

Held, also, that the conveyance was void on the ground that it was based on an immoral consideration; also, that if necessary the statement of claim could be amended to conform to the evidence.

ACTION on behalf of the creditors of the defendant Vandall to have a conveyance set aside as fraudulent under the statute of 13 Eliz., Cap. 5. The facts appear in the head-note and very fully in the judgment. Statement.

The action was tried at Victoria on 30th and 31st October, and 1st and 2nd November, 1899.

Lindley Crease, for plaintiffs.

Duff, for defendants.

11th October, 1900.

WALKEM, J.: This action is brought on behalf of the creditors of the defendant, Vandall, to have a conveyance made by him on the 9th of November, 1898, in favour of the defendant, Millie Black, of his residence and the land Judgment.

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on which it stands, in Revelstoke, set aside on the grounds of its being fraudulent under the statute of 13 Eliz., Cap. 5.

At the trial, Vandall described himself as a miner and prospector and, lately, proprietor of the Gold Hill Hotel in Revelstoke. He became acquainted with Miss Black, who was a woman of the town, in October, 1896, and engaged her on the first of November following, as a servant in the hotel on the understanding that he would settle the rate of wages to be paid her later on when he found what she would be worth ; and, some weeks afterwards he fixed the rate at $50.00 a month, payable monthly. I might add that evidence as to Miss Black's character was objected to ; but I admitted it as the issue in the pleadings is one of fraud, and therefore one of character.

A few months subsequently, Vandall built the residence referred to on town lots 9 and 10, and, after furnishing it and providing a piano, occupied it—he says occasionally—with Miss Black and gave her charge of it. No other persons lived in the house, and, to outward appearances, they lived together as man and wife. They took their meals together at the hotel ; and Miss Black went by the name of Mrs. Vandall, and was so addressed in Vandall's presence without objection on the part of either of them. Miss Black's duties were to buy supplies for the dining room, to wait upon table, and with the assistance of a Chinaman, keep the dining room, bed rooms and linens, etc., clean. This, she says she did, but Mr. Sutherland, one of the plaintiffs, who boarded at the hotel in 1898, states that she only waited upon table twice a day and then had but little to do; and Vandall states that a washerman was paid to do the washing, although, she says she did all of it; and, moreover, a claim for laundry work has been made by Chinamen against Vandall's estate.

Judgment.

Miss Black also states that she never drew any wages during her two years of service as she had money of her own and required none for personal purposes. On the

other hand, she has admitted that she had to buy about $20.00 worth of clothing, and that she bought it on Vandall's credit. She also states that she never drove out with Vandall but once, and then, only for a "sleigh-ride;" but Vandall states, on cross-examination, that he took her out on fishing and shooting excursions—once as far as Shuswap Lake, about 100 miles from Revelstoke, and drove about the country daily with her, and paid all her travelling expenses; and that during part of the time they camped out—sometimes alone.

There are seven bedrooms in the hotel, two were occupied by the bar-keepers, a third, occasionally by Vandall, and a fourth, before the residence was built, by Miss Black; thus leaving very little accommodation for lodgers, of whom, Mr. Sutherland says, there were very few at any time.

It was proved that the rate of wages current in Revelstoke, Kamloops, and other places as far east as Calgary for women acting as general servants in hotels or private houses was about $25.00 a month during the time Miss Black was in Vandall's service. Including board and lodging, this would be equivalent to about $35.00 or $40.00 a month as against $60.00 or $65.00 per month allowed to Miss Black.

In conversation with Mr. Sutherland in the summer of 1898, and also the early part of October, Miss Black said, as he states, that she was going to rent the house, and, on the second occasion, she asked him to get a tenant for her as she intended leaving the Province as the winters in Revelstoke were too severe for her. In other words, she spoke to him as if the house belonged to her, before, it will be observed, her alleged claim of $1,200.00 had accrued; and I might observe that she subsequently left, say, in November, or December, for the State of Washington and took up her residence there. She says, in her examination, that she intended leaving owing to illness; but Mr. Sutherland states that he saw her almost daily and that she always appeared to be in excellent health and that the only reason

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she gave for leaving was that which he has stated. Again, she used the house, as she says, for "entertaining" her "lady friends," and probably, at Vandall's expense, for according to her own account, she saved what money she had. She also states that she knew nothing of Vandall's business affairs; but she purchased all the supplies for the hotel, except those for the bar, and engaged and discharged the servants, and must, therefore, have known something about his liabilities. It is true that she says she sometimes got money from Vandall, and sometimes from the barkeepers to pay for what she bought; but the evidence shews that such payments were exceptional.

On the 16th of November, 1898, Vandall made an assignment for the benefit of his creditors; but a few days prior to his doing so, namely, on the 9th, he had conveyed the residence in question to Miss Black for an alleged consideration of $1,200.00 (as representing, so she and Vandall say, her wages for two years), and subject to payment of a mortgage of $1,000.00, on lot 10 and some unpaid purchase money on lot 9, which liabilities she covenanted to pay. The $20.00 charged to Vandall for her clothing were, obviously, not deducted; nor were any deductions made for the time she was absent from her duties, for instance, on the fishing excursions. The plaintiffs knew nothing of the conveyance until several days after its execution.

Judgment.

Miss Black's evidence was given on an examination for discovery and she did not appear personally at the trial; Vandall's evidence was given on her behalf, and the same solicitor acted for both of them in this action up to the time of trial. Vandall states that he executed the impeached deed as Miss Black threatened to sue him if she was not paid. Her evidence on this point is that she never asked for wages before October, 1898, and that it was then that she threatened to sue; and it is a significant fact that at the time this threat was made Vandall was irretrievably in debt, on the face of it, and in view of the intimate relations

which existed between the two of them during the two previous years, and of the continuance of those relations after the impeached deed was given and until Miss Black left the Province, it is more than doubtful that the threat was made except upon legal advice and in view of Vandall's then insolvency, for, according to the statement he gave to his creditors shortly afterwards, he was hopelessly insolvent in October. Miss Black would lead one to believe that she acted without advice; perhaps, she did, but is it at all probable that, under the circumstances I have mentioned, she would, as she did, suddenly pounce, as it were, upon Vandall and insist upon instant payment of wages that she had allowed to run for two years and never previously asked for, if she had not known of his difficulties? Vandall, so far from being annoyed at what she did, acceded to her wishes as far as he could; went afterwards to Seattle, where he saw her, and, as I have said, appeared as a witness, solely on her behalf at the trial of this action.

Again, Miss Black states that when the impeached deed was returned from the Registry office in Victoria it was addressed to her; whereas, Vandall states that it was sent to Crosby who handed it to him and that he, in turn, gave it to Miss Black.

I have referred to Miss Black's evidence somewhat minutely because it is very plausible; and if I could believe it, I would have to decide that there was no collusion between her and Vandall for the purpose of defeating Vandall's creditors. I do not overlook the fact that she had the right to fairly press for payment of her claim. At all events, the question before me is not one of fraudulent preference, but is one of collusion between the two defendants to defeat Vandall's creditors; and, in my opinion, there was collusion—collusion, for instance, to bolster up, as it were, a claim based upon an immoral consideration by a conveyance under seal.

Vandall was a prospector, and, as I saw him in the wit-

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ness-box, of a very ordinary type. He had all the living accommodation that he could possibly want at his own hotel at small expense. My view of all the evidence is that when he first engaged Miss Black, he, purposely, deferred fixing the rate of her wages until he found whether she would consent to cohabit with him and prove to be an agreeable mistress. On finding that she would, he fixed her wages at an excessive rate, built a private residence for their joint accommodation, furnished it well, and amongst other things with a piano, and gave her charge of it. What does a prospector, as such, personally want, especially, under such exceptional circumstances, as the above, with a costly private residence and a piano ? The question seems ludicrous. But, in the case before me, the explanation I have given seems to me to be the true one, that both Vandall and Miss Black required the house for the purpose of cohabitation, as cohabitation at the hotel would, manifestly, have been most imprudent, as well as a public scandal.

Judgment.

In view of many of Miss Black's statements being contradicted by Mr. Sutherland and Vandall, and, in the case of her clothing, by herself, I place no reliance on her evidence as a whole. And with regard to Vandall's evidence, I must say that it was very unsatisfactory to me. The residence, together with the lots on which it stands, is the only asset available to the creditors. The hotel is valueless, and the title to it is questionable ; and Vandall turned over such liquors as were in the bar to his bar-keeper in part payment of his wages before he made the assignment to his creditors.

If I am wrong in concluding that there was collusion between the two defendants for the purpose of defeating Vandall's creditors, the impeached deed is void on the ground of the consideration for it being an immoral one. The bargain between Vandall and Miss Black in October or November, 1896, was, I think, incontestably, one for future cohabitation and, therefore, an illegal one (*Ayerst* v. *Jenkins*

(1873), L.R. 16 Eq. at p. 280). Hence, the consideration for the impeached deed was illegal. Its immorality is not pleaded; but the Court, after a trial, may always order such amendments to be made as will conform to the evidence that may happen to have been given ; and I, consequently, hold that the plaintiffs' pleadings may be amended so as to charge immorality of consideration for the impeached deed in conformity with the evidence, as I view it. See *Foley* v. *Webster et al* (1892), 2 B.C. 137.

The result of what I have said is that the impeached conveyance is void on one, or other, or both of two grounds.

There will be a reference to the Registrar—I would suggest, to save expense, to some person at Revelstoke upon whom the parties can agree—to take an account of what Miss Black may have received, or, legitimately, paid in respect of the premises in question. Further directions are reserved.

Conveyance set aside.

DRAKE, J.

1900.

Sept. 15.

ALASKA STEAMSHIP CO. v. MACAULAY.

Practice—Security for costs—Foreign company carrying on business in British Columbia—R.S.B.C. 1897, Cap. 44, Sec. 144.

ALASKA STEAMSHIP CO. v. MACAULAY

An American Steamship Company having its head office in Seattle was the lessee of certain premises in Victoria where applications for freight and passage could be made to an agent.

Held, by DRAKE, J., that the Company was a foreign company within the meaning of section 144 of the Companies Act, and was bound to give security for costs.

SUMMONS for security for costs from plaintiff Company on the ground that the Company resided out of the jurisdiction.

An affidavit filed in support of the summons stated that in deponent's belief the plaintiff Company had no assets that could be realized on within the jurisdiction.

Statement.

The Company was incorporated in the State of Washington and had its head office in Seattle; it owned steamers trading between Victoria and ports in the State of Washington and between other ports and particularly a steamboat line running between Seattle and Victoria: it had an office in Victoria managed by a freight and passenger agent who devoted his whole time to the business of the Company in Victoria and who was paid a salary by the Company. Rent and all office expenses in Victoria were paid by the Company which was not licensed or registered in British Columbia.

O'Brian (*R. Cassidy*), for defendant, referred to section 144 of the Companies Act.

Argument.

J. H. Lawson, Jr., for plaintiff, cited *La Bourgogne* (1899), P. 1 and (1899), A.C. 431. Section 144 of the Companies Act does not apply to the plaintiff Company as it is not a Company such as could be registered under the Act.

15th September, 1900.

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DRAKE, J.: The plaintiff Company is alleged to be an extra-provincial Company registered and carrying on business at Seattle, U.S.A., with an office in Victoria for the transaction of freight and passenger business. Such being the case section 144 applies and the plaintiff must furnish security for costs in the sum of $150.00.

Order accordingly.

GORDON v. THE CORPORATION OF THE CITY OF VICTORIA.

FULL COURT
At Vancouver.
1900.
June 30.
GORDON v. VICTORIA

Interest on judgment entered by Full Court in accordance with verdict, reversing trial Judge—When computed from—57 & 58 Vict., Cap. 22, Sec. 3.

Plaintiff obtained a verdict at the trial, but the trial Judge dismissed the action. The Full Court allowed the plaintiff's appeal and ordered that judgment be entered in plaintiff's favour for the amount of the verdict.

Held, that plaintiff was entitled to interest from the date of the verdict.

APPEAL from an order of WALKEM, J., dated 28th April, 1900. The action was one under Lord Campbell's Act for damages, and at the trial the jury returned a verdict of $10,000.00 in favour of the plaintiff on 19th May, 1897, but the Judge dismissed the action with costs (see 5 B.C. 553.)

Statement.

The plaintiff appealed to the Full Court, the appeal being argued in March, 1898, and judgment was reserved until the appeals in the two similar cases of *Lang* v. *Victoria* and *Patterson* v. *Victoria* (5 B.C. 628), were decided by the Privy Council. On 9th June, 1899, a joint judgment in the two appeal cases was delivered in favour of the plaintiffs. See (1899), A.C. 615.

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Subsequently on 29th November, 1899, the Full Court gave judgment in favour of the appellant (see *post* p. 342), the operative part of the Full Court judgment was as follows :

" It is this day ordered that the appeal be allowed without costs, and that judgment be entered for the plaintiff against the defendants the Corporation of the City of Victoria for the sum of $10,000.00 with the costs of the action to be taxed by the proper officer and paid by the said defendants the Corporation of the City of Victoria to the plaintiff."

Statement.

The defendants on 12th April, 1900, paid the plaintiff $10,000.00 and agreed to pay interest at six per cent. on the $10,000.00 from the date of the Full Court order, 29th November, 1899, to 12th April, 1900.

The plaintiff claimed interest on the $10,000.00 from 19th May, 1897, the date of the verdict, to the time of payment and took out a summons for liberty to issue execution for the amount.

The summons was heard by WALKEM, J., who granted the plaintiff's application whereupon the defendants appealed to the Full Court.

The appeal was argued at Vancouver on 2nd June, 1900, before the CHIEF JUSTICE, and IRVING and MARTIN, JJ.

Argument.

A. D. Taylor, for the appellants : If the plaintiff had recovered at the trial she should be entitled to interest, but she lost and only got a judgment by order of the Full Court so rule 687 does not apply. There is no question of suspension of entry as a judgment was entered : see *Quinlan* v. *The Union Fire Insurance Company* (1883), 8 A.R. 376 at p. 396. The order of the Full Court is a peculiar one not reversing the trial Judge, but entering judgment for $10,000.00.

Wilson, Q.C., for respondent : It is a question of statutory right. The Full Court order does reverse the trial Judge because it allows the appeal. This Court cannot now deprive us of interest as it is *functus officio* : It cannot now interfere with its own order.

30th June, 1900.

FULL COURT
At Vancouver.
1900.
June 30.

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McCOLL, C.J.: The Full Court could only properly have ordered judgment to be entered upon the verdict of the jury if of opinion that the plaintiff was entitled to judgment upon the findings of the jury and the facts not in dispute. That being so, the learned trial Judge ought to have given effect to the verdict at once instead of leaving the parties to move for judgment, and giving it for the defendants.

Judgment of McCOLL, C J.

That the law applicable may have been in doubt until the decision of the Judicial Committee in *Patterson* v. the same defendants does not in my opinion affect the question. Any delay, if such there was, in the Appellate Court, because of the then pending appeal in the case referred to, even if a reason for making some special provision as to interest, was for the Full Court to consider at the time. The result is, that in my judgment, the Registrar should have computed interest from the date of the verdict and the appeal ought to be dismissed with costs.

IRVING, J.: Interest under the statute runs from the verdict or judgment; in this case as there was a verdict interest should be calculated from verdict. That the Court of Appeal might have otherwise ordered is now no argument. The statute is that interest shall run notwithstanding certain contingencies. Mr. *Taylor* argues as if interest would only run in the event of one of those contingencies happening. *Quinlan* v. *The Union Fire Insurance Company* (1883), 8 A.R. 376 was on a different statute. There interest was to be allowed for such time as execution is stayed.

Judgment of IRVING, J.

The appeal should be dismissed with costs.

MARTIN, J.: I concur in the view that the appeal should be dismissed; the case is governed by 57 & 58 Vict., Cap. 22, Sec. 3.

Judgment of MARTIN, J.

Appeal dismissed.

FULL COURT
1899
Nov. 29.
GORDON
v.
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GORDON v. THE CORPORATION OF THE CITY OF VICTORIA.

Municipal Corporation—Negligence by allowing bridge to get rotten—New trial—Whether or not expedient in view of result of other decisions by Privy Council arising out of same accident.

In an action for negligence against a Municipality (reported 5 B.C. 553), the Judge gave judgment for the defendants, holding that the findings of the jury amounted to a verdict of non-feasance only. Other actions by other plaintiffs arising out of the same occurrence had been decided against the defendants by the Privy Council.

Held, by the Full Court, that it was useless to send the case to another jury and that the plaintiff was entitled to judgment for the amount of the verdict.

Statement.

APPEAL by plaintiff from the decision of DAVIE, C.J., reported in 5 B.C. 553.

The appeal was argued at Victoria in March, 1898, before the Full Court, consisting of WALKEM, DRAKE, McCOLL and IRVING, JJ.

Wilson, Q.C., and *Lindley Crease*, for appellant.
W. J. Taylor and *Cassidy*, for respondents.

Cur. adv. vult.

On 29th November, 1899, the judgment of the Court was delivered as follows by

Judgment.

DRAKE, J.: This appeal was heard in March, 1898, and judgment was reserved until the appeals in *Patterson* v. *The Corporation of the City of Victoria* and *Lang* v. *The Corporation of the City of Victoria* were decided by the Privy Council. On the 9th of June last, a joint judgment in the two appeal cases was delivered. See (1899), A. C. 615.

The facts on which the plaintiffs relied in those cases as disclosing negligence in the Corporation were somewhat different from the facts relied on here. The main ground there relied on as disclosing negligence was the boring of a stringer of the bridge which the jury found to be one of the chief causes which destroyed the stability of the stringer and caused the accident.

Here the jury found that the accident was caused by the breaking of a hanger and the Corporation were aware of the bad condition of the bridge and had attempted repairs, but the repairs were insufficient and not done well.

If the case was sent back for a new trial with the evidence that can now be obtained and on which the other cases were tried the result must inevitably be a judgment against the Corporation with greatly enhanced costs.

Judgment.

The main question which was decided by the Privy Council was that the Corporation was responsible for the state of the bridge and for the condition to which the bridge was reduced by the negligence of the Corporation.

We think that under the circumstances judgment should be entered for the plaintiff for the amount found by the jury. We are more impressed with the uselessness of sending back the case for a new trial which would inevitably result in a verdict for the plaintiff than by any doubt that the Chief Justice was wrong in his ruling.

Judgment will therefore be entered for the plaintiff with costs in the Court below. With regard to the costs of appeal, we think there should be no costs.

Appeal allowed.

FULL COURT
At Vancouver.

1900.
May 31.

GRUTCHFIELD
v.
HARBOTTLE

GRUTCHFIELD v. HARBOTTLE.

Mining law—Failure to record transfer of mineral claim—Right of locator subsequent to such transfer—Mineral Act, Secs. 9, 49 and 50.

In May, 1897, B. located and recorded the May Day claim, and six days after location conveyed a half-interest to defendant by a bill of sale, which was not recorded till April, 1898. B's free miner's certificate lapsed in July, 1897, and in October, 1897, the plaintiff, a free miner, relocated the May Day as the Equalizer claim.

Held (by the Full Court reversing MARTIN, J.), that the defendant's title should prevail against the plaintiff's.

Statement.

APPEAL by defendant to the Full Court from the decision of MARTIN, J., reported *ante* at p. 186.

The appeal was argued at Vancouver on 30th May, 1900, before McCOLL, C.J., WALKEM and IRVING, JJ.

Argument.

S. S. Taylor, Q.C., for the appellant, stated in opening, that his appeal was based on two grounds, (1.) that the third parties mentioned in section 49 of the Act, referred to parties claiming title to the same mineral claim under a conveyance and (2.) in any event, the lands were not waste lands of the Crown because they were in occupation by Harbottle.

The Court did not require argument on these points and called on

Duff, for respondent: Section 49 provides that documents shall take effect as against third parties from date of recording. "Parties" here clearly means "persons." There is no principle of construction upon which any limitation can be imposed by which any class of persons claiming title to the mineral claims can be deprived of the benefit of this section. On the other hand, whether you look at the section itself or at the Act as a whole, the rules of construction require that their full natural meaning should

be given to the words employed. Looking at the Act as a whole, it is clear that it is intended that the Recorder's office shall contain a real and complete record of all acts affecting the title to a mineral claim. The intention is that any person desiring to obtain a title to lands to be used for mineral purposes, shall be able to ascertain by an examination of the ground and inspection of the proper records whether any, and if so, what interests in those lands are held by persons other than the Crown. The rule is the same in the case of persons acquiring title by location and persons acquiring title by conveyance. In the first case the location must be recorded within the time specified by the Act. In the second case the conveyance must be recorded within the time specified by section 49. Similar provisions exist in the case of certificates of work, and certificates of improvements; and in the case of the abandonment of claims, it is necessary that the document expressing the intention of the miner shall be filed with the Recorder.

Argument.

The unsoundness of the appellant's contention appears if one applies it to the case of a mineral claim which has been abandoned. Suppose in the present case that Beadles after having executed the conveyance, had filed an abandonment of the claim and the plaintiff relying upon the abandonment had located the ground, could it be suggested that the plaintiff would not in such a case have been entitled to rely on the record; and suppose that having located the ground he had conveyed to a purchaser who also relies upon the records, could it be suggested that the Act intended that the purchaser should not be entitled in such a case to go on the information disclosed by the records? But clearly the result of the appellant's contention would be that the record would not avail him. If the contention be sound then in either case the plaintiff, or in the second case, the purchaser would be subject to the same attack which is made here. The general result would be that the record instead of being a real record is simply a sham and

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a trap for those who rely upon it. Again, the Act should not be construed (because it should not be assumed that the Legislature intended that it should operate) in such a way as to lend itself to fraudulent devices to the prejudice of honest locators and purchasers. The construction brought forward by the appellant would subject (in cases such as above mentioned) a purchaser after the lapse of months to an attack under a bill of sale fraudulently executed and ante-dated for the purpose of making a fictitious title.

Argument.

The contention of the appellant that the land in question was not waste land of the Crown at the time of the plaintiff's location must stand or fall with his argument on the construction of section 49. If the plaintiff is entitled to invoke the protection of section 49 then it follows that the defendant had not after the lapse of Beadle's certificate any interest in the May Day claim. The defendant having no interest in the claim and therefore none in the ground, it must be clear that the absolute allodial title of the Crown to the land in question was neither subject to nor burdened by any other title, interest or servitude of any kind whatever. The lands were, therefore, waste lands of the Crown. The occupation of the defendant amounted to nothing. The rule of law is clear that, the Crown being universal occupant of Crown lands, the mere physical possession of such lands without license or title does not attract to itself any such legal status as would arise if the lands were those of a subject. It is almost needless to point out that the suggested view involves the proposition that Crown lands in the possession of any person working them for minerals (notwithstanding non-compliance with the provisions of the Mineral Act and absence of title either under the Mineral Act or from any other source) are by reason of such physical occupation not open to location by free miners under the Mineral Act. It seems superfluous to argue that such a proposition is the very negation of the underlying

object of our Mineral Act, *viz.*, to secure the benefits of the mineral lands to persons holding and developing such lands in accordance with the provisions of the Act. He referred to *Belk* v. *Meagher* (1881), 104 U.S. 279 at p. 284.

31st May, 1900.

McCOLL, C.J.: The facts are fully stated in the judgment of Mr. Justice MARTIN.

There is apparently a conflict between sections 49 and 50 of the Act. The former provides that an assignment though not recorded within the time limited shall be valid as between the parties, and the latter that it shall be "enforceable" between them only after having been recorded.

Judgment.

In my opinion the failure to record did not result in the claim becoming waste lands of the Crown open to location.

An assignment is ordinarily enforceable against an unwilling party only by some legal process, and I think that section 50 can and ought to be construed as meaning merely that a Court should not afford relief before record of the assignment, thus giving effect to both sections.

WALKEM and IRVING, JJ., concurred.

Appeal allowed.

McCOLL C.J.
1900.
June 11.
YORKSHIRE v. EDMONDS

YORKSHIRE GUARANTEE AND SECURITIES CORPORATION v. EDMONDS *ET AL.*

Land Registry Act—Registered judgment—Whether mortgage given by debtor affected by or not—C.S.B.C. 1888, Cap. 67, Secs. 26, 27, 33 and 34, and Cap. 42, Sec. 32.

A registered judgment binds only the interest of the debtor existing at the time of registration and therefore cannot affect a mortgage already given by the debtor although such mortgage is not registered before the judgment.

Statement.

THIS was an action for foreclosure. None of the defendants contested the action save the Bank of British Columbia. The question to be decided was as to the priority of the two claimants on part of the lands mortgaged. The plaintiffs claimed by virtue of a mortgage executed by the defendant, H. L. Edmonds, on 6th March, 1893. Application for registration of same was filed on March 7th, 1893, at 11.40 a.m., and the mortgage was registered on 6th July, 1894. The defendants the Bank of British Columbia, claimed by virtue of a judgment obtained by them against the said defendant, H. L. Edmonds. Application for registration of same was filed in the Land Registry Office on 7th March, 1893, at 11.10 a.m., and the judgment was registered on 27th March, 1893. Execution issued on this judgment and on 14th December, 1894, the Sheriff sold, at public auction, the land in question to E. A. Wyld, an officer of the bank of British Columbia, and executed a conveyance to him, and the said Wyld thereupon conveyed the land to the Bank of British Columbia, and the Registrar issued a certificate of title to the Bank free from all encumbrances.

The question came up for argument before McCOLL, C.J., on the 11th day of May, 1900.

McPhillips, Q.C., for plaintiffs. The question as to priority here depends on the construction of Cap. 67 of the Consolidated Statutes of 1888. The prior date of the mortgage gives us priority over the judgment, because section 26, provides that a judgment which has been duly registered against the lands of a judgment debtor shall only bind the land to which he was at the time of the registering of such judgment, seized, possessed or entitled, for any estate or interest whatever, and the same section provides "that every judgment creditor shall have such and the same remedies in a Court of Equity against the land so charged as aforesaid, as he would be entitled to in case the judgment debtor had power to charge and had charged the same with the amount of such judgment, debt and interest" (yet a man can only charge the estate and interest he has in the land and that is what the Act says the judgment is, a charge upon), and that is all the statute allows the Sheriff to convey to the purchaser (see section 41, Cap. 42, C.S.B.C. 1888, and form E in the Schedule to the said chapter), and is all the Registrar can register (see section 48 *ib.*)

Argument.

The statute cannot be construed to mean that the defendant Edmonds might lawfully make a sale or conveyance of his property a second time, in other words, the Court will not construe the statute to mean a permission to Edmonds to commit a fraud. At the time of the registration of the judgment herein, the estate and interest of the debtor was subject to the lien he had created in favour of the plaintiffs, and therefore, any charge he could have created in favour of the Bank, must have been subject to this lien. Under the Act they can have no greater claim than if he had executed a charge under his own hand and seal. *Eyre* v. *McDowell* (1861), 9 H.L. Cas. 619; *Beavan* v. *The Earl of Oxford* (1856), 6 De G. M. & G. 507; *Wickham* v. *The New Brunswick and Canada Railway Company* (1865), L.R. 1 P. C. 64; *Whitworth* v. *Gaugain* (1846), 1 Ph. 727; *McMaster* v. *Phipps* (1855), 5 Gr. 253; *Waters* v. *Shade* (1851), 2 Gr.

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457; *Russell* v. *Russell* (1881), 28 Gr. 419; *Re Massey & Gibson* (1890), 7 Man. 172; *Case* v. *Bartlett* (1898), 12 Man. 280; *Wilkie* v. *Jellett* (1895), 6 West. L. T. 115 (1896, 26 S.C.R. 282).

There is nothing in our Land Registry Act which will give the defendants any greater right than under the Acts referred to in the above cases and it would need a section as strong as that which the Nova Scotia Act contains to effect what the defendants contend for; *Miller* v. *Duggan* (1892), 21 S.C.R. 33.

Sections 33 and 34 in our Act do not apply to judgments. A judgment only takes effect from the time of its registration. *Byrnes* v. *McMillan* (1892), 2 B.C. 163, 165 and 166; *Spiers* v. *The Queen* (1896), 4 B. C. at p. 394.

And the defendants have themselves admitted that their judgment was not registered until some twenty days after the date of our mortgage. Section 35 of our Land Registry Act states that "no purchaser for valuable consideration of any registered real estate, shall be affected by any notice expressed, implied, or constructive of any unregistered title, interest or disposition affecting such real estate." But a judgment creditor is not a purchaser for value. *Miller* v. *Duggan*, *supra*; *Eyre* v. *McDowell*, *supra*; *Beavan* v. *The Earl of Oxford*, *supra*, at p. 651; *McMaster* v. *Phipps*, *supra*, at p. 263.

Argument.

As all the Sheriff can sell and all the Registrar may register, is the estate and interest the execution debtor has in the lands (see sections 41 and 48, Cap. 42, C.S.B.C. 1888, and Form E in Schedule thereto), the purchaser from the Sheriff would stand in no better position than the purchaser referred to by Sir Henry Strong in *Miller* v. *Duggan*, *supra*, at p. 47. He says: "Purchasers who have contracted, not for the land itself, but only for such right, title and interest as their grantor might have, are not, under the Registry laws, entitled to priority over purchasers claiming under antecedent unregistered deeds." And according to same

authority an unregistered special deed takes priority over a quit claim deed duly registered.

Davis, Q.C., for the defendants, the Bank of British Columbia: Section 33 of the Land Registry Act distinctly states that when two or more charges are registered against the same land, they shall have priority according to date of application for registration and not according to date of creation of estate or interest. And section 34 says, "That the time at which such application shall be deemed to have been made shall be the time when the application is filled up and signed by the applicant." Section 33 must be read in conjunction with section 26.

A judgment is a charge so as to come within above section because, according to the interpretation of said Act, a charge includes any incumbrance, debt, judgment or mortgage or claim to or upon any real estate.

Argument.

It is immaterial to us whether the sale the Sheriff made is binding or not, the sole question is, whether the Registrar's certificate of title or the mortgage is prior. *Miller* v. *Duggan* (1892), 21 S.C.R. 33 is really an authority in our favour, as the section of the Nova Scotia Act on the strength of which judgment was given is section 21, Cap. 84, R.S.N.S. which states "That a registered judgment binds the lands of the judgment debtor whether acquired before or after such registry, as effectual as a mortgage, and deeds or mortgages of such lands duly executed but not registered shall be void against the judgment creditor who shall first register his judgment."

The expression "land" in that section is equal to the words contained in the corresponding section of our Act.

11th June, 1900.

McColl, C.J.: I have given repeated consideration to the arguments strongly pressed by the Bank founded upon the words of the sections of the Land Registry Act applicable, but in my judgment the Company must succeed on

Judgment.

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the short ground that as the registration of the Bank's judgment admittedly did not affect the Company's mortgage before its registration no question of priority in the proper sense of the term could arise as between them. Judgment for Company as against Bank with costs. Time for redemption shortened to one month.

DRAKE, J.
1900.
Sept. 20.
MERCHANTS BANK v. HOUSTON

MERCHANTS BANK v. HOUSTON *ET AL.*

Practice—Costs of separate defences—Who liable for.

Where defendants separate in their defence, a plaintiff who obtains judgment against them is entitled to costs against them jointly, and each defendant is liable for the costs of his separate defence, but not liable for any costs occasioned solely by the other.

REFERENCE to a Judge under rule 801 by the District Registrar at Nelson on taxation of bill of costs.

20th September, 1900.

DRAKE, J.: The defendants separated in their defence. The judgment was for the plaintiff against all the defendants. The question now comes up on taxation of costs whether each defendant is liable for the whole of the costs incurred, or whether they have to be segregated in respect of the special costs occasioned by the act of each. I think the plaintiff is entitled to his costs of action against the defendants jointly, and that each defendant is liable separately for the costs occasioned by his separate defence, and that one defendant is not liable for costs solely occasioned by the other. The case of *Stumm* v. *Dixon* (1888), 22 Q.B. D. 99 is entirely applicable.

Judgment.

IN RE COWAN.

MARTIN, J.
1900.
Jan. 24.
FULL COURT
At Vancouver.
March 19.
IN RE COWAN

Practice—Costs—Taxation of—Solicitor and client.

A charge in a bill of costs although not justified by the item under which it is framed may nevertheless be allowed if it can be sustained under any other item of the tariff.

SUMMONS for a review of the taxation by the District Registrar at Vancouver of a bill of costs rendered to John MacQuillan by Mr. G. H. Cowan, a barrister and solicitor.

Statement.

Item 45 in the bill of costs "Counsel fee perusing same (*i.e.*, statement of defence).....$5.00," was objected to as being excessive Other items were objected to, but for the purpose of this report this is the only one necessary to mention.

Duncan, for the client.
Kappele, for the solicitor.

24th January, 1900.

MARTIN, J.: In this matter I find myself unable to say that the Registrar has erred in regard to any of the items complained of. I shall only add that so far as the charge, "Counsel fee, perusing same (*i.e.*, statement of defence) .....$5.00," is concerned, while it would not be justified by item 147 of the tariff if that item stood alone, yet I find that it has been the practice of my brother IRVING to uphold a charge for work actually performed if it may be justified under any item of the tariff, even though framed under an item which would not of itself support it, so long as any injustice would not be done, nor the client hampered in the taxation. I agree with my brother IRVING'S former ruling that the charge in question might have been, and may now be sustained under item 229 of the tariff, and as

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Jan. 24.
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it was on this view the Registrar acted he should be upheld, with costs.

An appeal was argued by the same counsel on 19th March, 1900, before the Full Court, consisting of McCOLL, C.J., DRAKE and IRVING, JJ. The Court was unanimous in dismissing the appeal with costs.

MARTIN, J.
1900.
May 30.
FULL COURT
At Vancouver.
Sept. 17.
BANK OF
B. C.
v.
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BANK OF BRITISH COLUMBIA v. TRAPP *ET AL.*

Practice—Examination for discovery—Nature of—Whether or not cross-examination allowed—Rule 703.

The examination for discovery under rule 703 is in the nature of a cross-examination but limited to the issues raised in the pleadings. *Carroll* v. *The Golden Cache Mines Company* (1899), 6 B.C. 354 overruled.

The amendment of 15th June, 1900, to rule 703 is retroactive

APPEAL from a decision of MARTIN, J.

Upon the examination of the defendants Nellie K. Trapp and T. J. Trapp, pursuant to the order of WALKEM, J., dated the 27th day of April, 1900, certain questions were objected to on behalf of those defendants on the grounds that the questions were in the nature of a cross-examination. The plaintiffs demanded an adjournment of the examination for the purpose of bringing the matter before a Judge in Chambers. This was done, and on the 16th day of May, 1900, IRVING, J., dismissed the plaintiffs' application that

Statement.

NOTE.—Rule 703 was amended on 15th June, 1900, by adding the following at the end thereof :—

> "And such examination shall be in the nature of a cross-examination, limited, however, to the issues raised by the pleadings."—B.C. Gazette, Vol. 40, p. 1,063.

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the defendants attend at their own expense and answer the questions. The examination of the defendants was then proceeded with and plaintiffs' counsel put the questions which had been objected to at the previous examination. The examination was again adjourned and brought up before the Judge in Chambers, and on Wednesday, the 30th day of May, 1900, MARTIN, J., made an order requiring the defendants to answer the questions objected to.

The following written opinion was delivered by his Lordship:

Assuming for the present that I am bound by *Carroll* v. *The Golden Cache Mines Company* (1899), 6 B.C. 354, two things are clear, (1.) that the witness is hostile; and (2.) that the Registrar did not, with the best of intentions, carry out the course of procedure directed by that case. His reason for thinking the questions, *e.g.*, No. 2, were not "proper," appears later at questions 19, 20 and 22 where he says, "I don't see that I can give you leave to cross-examine, I don't think I have the power." As I understand the Registrar's view, it was that he considered the witness was hostile, but had not power to assist the plaintiff in obtaining that "full discovery as to the matters in question in the action" which is the very thing *Carroll* v. *The Golden Cache Mines Company*, provides for under such circumstances as are found herein. In a case like the present, full of suspicious occurrences the result is to reduce "discovery," so called, to a cloak for concealment.

Judgment of MARTIN, J.

But if I am wrong in the foregoing, the question arises, is the case just mentioned a decision which is binding on me in view of contrary decisions in this Court?

The rule as to conflicting decisions is laid down in *North* v. *Walthamstow Urban Council* (1898), 67 L.J., Q.B. at p. 974. "But, if on the other hand, as sometimes happens, the second case is a decision given in ignorance of the first, then the first is the greater authority, and the second must

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be treated as having been given inadvertently." See also *Knowles and Sons, Limited* v. *Bolten Corporation* (1900), 69 L.J., Q.B. at 484. In *Carroll* v. *The Golden Cache Mines Company*, the attention of the learned Judge was not drawn to several cases in this Court which have been decided on the nature of an examination held under Order LXI., particularly rule 703. The operation of this rule was considered by my brother DRAKE in *Jones* v. *Pemberton* (1897), 6 B.C. 69, and the examination was there in effect held to be a cross-examination, one of "a searching character," and *Smith* v. *Greey et al* (1884), 10 P.R. 482, was approved and followed. I may say, as one of the counsel in *Jones* v. *Pemberton*, that though the case is not fully reported, yet the scope and effect of rules 703, 712, 715, 716, among others, were fully discussed by counsel in an elaborate argument, and in my opinion the result of that case is that the discovery stops only at the names of the witnesses. *Mack* v. *Dobie* (1892), 14 P.R. 465 does not really conflict with *Smith* v. *Greey* (which I note was not cited) but only decides that the examination must not "go outside of the pleadings altogether." In *Beaven* v. *Fell* (1895), 4 B.C. 334 at p. 336, cited in *Jones* v. *Pemberton*, the Divisional Court, after pointing out the difference between our rules and the English, decided that "the very object of our rules is to enable the parties to an action, before the expense of a trial has been incurred, to ascertain whether or not the action is well founded, and whether or not the defence would displace the plaintiff's claim." How can this be accomplished if the examination is not in the nature of a cross-examination? In *Beadel* v. *Davidge* on November 5th, 1897, wherein I also acted as counsel, the same question came up and it was likewise decided by my brother DRAKE that the "examination is in effect a cross-examination." This case is not reported; I quote from my own notes. Finally on March 4th, 1899, in the case of *Sola* v. *McFarlane*, a case of a nature similar to *Jones* v. *Pemberton*,

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the question came before me and I myself followed the decisions above set out. If these cases had been brought to the attention of my brother IRVING I feel sure that he would have felt bound by them as I did when I acted on them in *Sola* v. *McFarlane*, and having done so it is now impossible for me to give a contrary ruling, however much I should like to avoid any seeming conflict of decisions.

The application will be granted.

The defendants appealed to the Full Court and the appeal was argued at Vancouver on 17th September, 1900, before MCCOLL, C.J., WALKEM, DRAKE and IRVING, JJ.

Argument.

Howay (*Dockrill*, with him), for appellants: The questions are not allowable as not being connected with the issues raised in the pleadings. He cited *Price* v. *Manning* (1889), 42 Ch.D. 372 and *Beaven* v. *Fell* (1895), 4 B.C. 334.

Davis, Q.C., for respondents, was not called on.

The appeal was dismissed and on 1st October, 1900, the following judgment was delivered by

Judgment of DRAKE, J.

DRAKE, J.: This is an appeal from an order for the defendant, Mr. Trapp, to answer certain questions on an examination taken before trial, the objection taken being that the questions asked were in the nature of cross-examination. The rules relating to examination for discovery are contained in Order LXI., rule 703. By that rule a plaintiff or defendant may be examined touching the matters in question in the action by any party adverse in point of interest, and may be compelled to testify in the same manner, and subject to the same rules as a witness. This rule imports an examination of a searching character, limited to the issues raised. It does not give the right to the person examining to go into questions of character and credit unless such evidence is directly in issue. This order is a transcript of the Ontario rules, and the decisions of Ontario Courts are a useful guide to us in interpreting them, as well

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as the object for which the rules were adopted. The object was to enable the litigant parties to ascertain whether the plaintiff had a good cause of action, or the defendant such a defence as would render further litigation useless. In *Dunsford* v. *Carlisle* (1884), 10 P.R. 449, the Chancellor held that a defendant was bound to answer, although his answers might subject him to the penal provisions of 13 Eliz., Cap. 5, the action being one to set aside a fraudulent conveyance. In *Mack* v. *Dobie* (1892), 14 P.R. 465, it was held that questions must be confined to matters raised by the pleadings, but a fair amount of latitude was to be allowed; and in *Colter* v. *McPherson* (1888), 12 P.R. 630, in an action for fraud, the defendant was permitted to examine fully into the plaintiff's transactions, and all entries in his books relating to the same. The action here is in respect of an alleged fraud upon creditors, and it becomes material to ascertain the facts on which the defendant relies. Owing, however, to some doubt as to the construction to be placed on these rules, rule 703 was amended on the 15th of June, expressly sanctioning cross-examination. As a matter of procedure the rule is retroactive, and governs the case under appeal. The appeal is dismissed with costs.

Appeal dismissed.

SEHL v. TUGWELL.

MARTIN, J.

1900.

Oct. 29.

SEHL v. TUGWELL

Practice—Costs—Security for—Two appeals included in one notice of appeal.

An order was made in Chambers allowing plaintiff to amend his writ and another order was also made dismissing defendant's application to set aside the writ. Defendant by one notice appealed from both orders.

Held, two separate appeals and that security for costs as of one appeal was insufficient.

SUMMONS for additional security for costs of appeal.

On 12th October, 1900, the defendant by one notice of appeal appealed from two orders made by DRAKE, J., the one granting leave to the plaintiff to amend the writ of summons and the other dismissing the defendant's application to set aside the said writ. After the plaintiff's summons, to amend the writ, was issued, the defendant took out a summons to set aside the writ, returnable by special leave at the same time as plaintiff's summons.

Statement.

Plaintiff demanded security for costs in the sum of $75.00 for each appeal, but the defendant contended there was only one appeal and filed a bond in the sum of $75.00.

The summons was argued before MARTIN, J., on 29th October, 1900.

Belyea, Q.C., for the summons.

Fell, contra: If it be held that the appeals are distinct, and that security should be ordered in each, it is submitted that it would be oppressive to require security to be given for the full amount, this being "an exceptional case" as contemplated by *Rogers* v. *Reed*, *ante* p. 79, because, in addition to other circumstances, the work of counsel in getting up

Argument.

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his brief for one appeal would extend to the other appeal, as the same argument would almost wholly apply to both cases.

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29th October, 1900.

MARTIN, J.: The appeals must be deemed to be separate and security must be given for each. As to the amount of security, the case might be considered exceptional as contemplated by *Rogers* v. *Reed*. I think the circumstances of the case will be met by ordering security in the sum of $50.00 in each instead of the usual amount of $75.00, but I am prepared to accede to the request of counsel that security already given stand for one appeal and that defendant give additional security in the sum of $25.00. The demand for security not having been complied with, the costs will be the plaintiff's in any event.

Judgment.

B. C. FURNITURE COMPANY v. TUGWELL.

DRAKE, J.
1900.
Oct. 5.
FULL COURT
At Victoria.
Nov. 20.
B. C. FURNITURE COMPANY v. TUGWELL

Practice—Amendment of style of cause—Irregularity or nullity.

J. S. trading under the name of the B. C. Furniture Company commenced an action on 10th March, 1899, in such name in respect of a promissory note dated 20th January, 1893, payable sixty days after its date.

A summons under Order XIV., having been dismissed on the ground that one person cannot sue in a firm name, plaintiff obtained an order amending the style of cause.

Held, by the Full Court, affirming DRAKE, J., that the writ was not a nullity and that the irregularity was properly amended.

APPEAL to the Full Court from the order of DRAKE, J., dated 5th October, 1900.

On 20th January, 1893, the defendant made a promissory note for $400.00 payable sixty days after its date to the Sehl Hastie Erskine Furniture Company, Limited Liability, and the note was afterwards endorsed over to the plaintiff Company. Since December, 1895, Jacob Sehl has been carrying on business under the name and style of the B. C. Furniture Company.

Statement.

On 10th March, 1899, this action was commenced by the B. C. Furniture Company and afterwards a summons for judgment under Order XIV., was dismissed by MARTIN, J., on the ground that one person cannot sue in a firm name. See (1900), 7 B.C. 84.

On 3rd October, 1900, the plaintiff took out a summons (returnable 5th October) for leave to amend the writ by prefixing to the title of the plaintiff the following words: "Jacob Sehl doing business under the name of." The defendant on 4th October, by special leave, took out a summons (also returnable on 5th October) for an order setting aside the writ on the grounds that the plaintiff Company is

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not incorporated and cannot sue in this Province and that if the Company name is only used by some other party, then that such party cannot sue in a firm or company name.

Both summonses were argued before DRAKE, J., who gave the plaintiff leave to amend and dismissed the defendant's summons.

The following written opinion was delivered by his Lordship:

The plaintiffs sued the defendant as maker of a promissory note, dated January 20th, 1893, for $400.00 payable sixty days after date to the Sehl Hastie Furniture Company, Limited, or order, and by that Company indorsed to the plaintiffs.

The plaintiffs applied for judgment under Order XIV., in January, 1900, which was refused. On that application Jacob Sehl made an affidavit in which he stated himself to be the Manager of the plaintiff Company, and by a further affidavit stated himself to be Manager and sole proprietor.

Judgment of DRAKE, J.

It now appears that the plaintiff Company is not an incorporated Company, but is merely a trading name and that Jacob Sehl is the sole person trading under that name.

The defendant applies to have the action dismissed on the ground that it was improperly instituted, and the plaintiffs apply to amend the writ and proceedings by adding Jacob Sehl trading as the B. C. Furniture Company.

Under rule 104 any two or more persons claiming as copartners may sue in the firm name, and by rule 92 when an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Judge may, if satisfied that it was a *bona fide* mistake, order another person to be added or substituted as plaintiff upon terms. That there is such a mistake here is clear. It is a mistake of law, and that is recognized as a ground for

amendment just as much as a mistake of fact. *Duckett* v. *Gover* (1867), 6 Ch.D. 82.

The powers of amendment are always exercised when the mistake can be compensated by payment of costs, but in cases where the legal rights of the opposing party are prejudiced, that is, rights which may have been intervened, then the Courts deal with the question of amendment in a more cautious manner. The defendant here alleged that if the amendment is allowed he will be prejudiced by not being able to plead the Statute of Limitations. I do not accede to this view. He can still plead the statute, whether it will be a defence is another matter.

If an action was dismissed on the technical ground raised, and a fresh action had to be instituted, it is then probable that the Statute of Limitations would be a bar. In my opinion the mistake can be compensated by costs. I also refer to *The Duke of Buccleugh* (1892), 67 L.T.N.S. 739, where after judgment in favour of the plaintiff the Court allowed an amendment substituting another as plaintiff, it being apparent that the actual plaintiff was in fact only an agent for the real plaintiff. I give the plaintiff leave to amend on payment of the costs of and consequent upon such amendment, and I dismiss the summons of the defendant with costs in the cause.

Judgment of DRAKE, J.

The defendant appealed and the appeal was argued at Victoria, on 5th November, 1900, before McColl, C.J., Irving and Martin, JJ.

Fell, for appellant: It has already been decided in this case that one person cannot sue in a firm name (1900), 7 B.C. 84, therefore the writ is a nullity because there is no real plaintiff, and it is impossible to add a plaintiff to or substitute one for, a plaintiff who has no real existence. He referred to rule 104; *Hudson* v. *Fernyhough* (1889), 61 L.T.N.S. 722, affirmed on appeal, 34 Sol. Jo. 228; *Huthnance et al* v. *Township of Raleigh* (1897), 17 P.R. 458;

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Smurthwaite v. *Hannay* (1894), A.C. 894 at p. 506; *Manby* v. *Manby* (1876), 3 Ch.D. 103; *Steward* v. *The North Metropolitan Tramways Company* (1885), 16 Q.B.D. 178 at p. 189 and on appeal at p. 556; *Lancaster* v. *Moss* (1899), 15 T.L.R. 476; *Hewett* v. *Barr* (1891), 1 Q.B. 98; *Mair* v. *Cameron* (1899), 18 P.R. 484; *Howland et al* v. *Dominion Bank et al* (1892), 15 P.R. at p. 61; *Doyle* v. *Kaufman* (1877), 3 Q.B.D. 7 and 340; *Lenz & Leiser* v. *Kirschberg* (1899), 6 B.C. 533; *Dumble* v. *Larush* (1879), 27 Gr. 190; *Magee* v. *Hastings* (1891), 28 L.R. Ir. 288. The action must be treated as if it was instituted the day the writ was amended, see *In re Bowden* (1890), 45 Ch.D. 444.

Argument.

Belyea, Q.C., for respondent: We don't ask to add anything to the writ or the cause of action, but merely to amend a misnomer, an irregularity only and not a nullity. There is a real cause of action existing in a real plaintiff who has by inadvertence wrongly described himself. He referred to *Henry Walker & Co.* v. *Parkins* (1845), 14 L.J., Q.B. 214 and 9 Jurist, 665; *Carne & Vivian* v. *Malins* (1851), 5 Ex. 803; *Blake* v. *Robert Done* (1861), 7 H. & N. 464; the Annual Practice 349 and *The Duke of Buccleugh* (1892), 67 L.T.N.S. 739.

Weldon v. *Neal* (1887), 19 Q.B.D. 394; *Duckett* v. *Gover* (1877), 6 Ch.D. 82 and *Matthews* v. *The City of Victoria* (1897), 5 B.C. 284, were also referred to during the argument.

20th November, 1900.

Judgment of McCOLL, C.J.

McCOLL, C.J.: I am of opinion that the amendment was, to use the language of Mr. Justice Grove in *Challiner* v. *Roder* (1885), 1 T.L.R. 527 p. 528, "that a mere clerical error or informality on the writ might be rectified," and so was properly made although the statute had run.

I would dismiss the appeal with costs.

IRVING, J.: I concur.

MARTIN, J.: In this case it appears from the evidence that one Jacob Sehl, has been carrying on business in Victoria for almost five years under the name and style of the "B. C. Furniture Company," and in the course of such business became the holder for value of a certain promissory note of the defendant: Sehl is and has always been the sole owner of the business so carried on.

It is contended for the appellant that since it has been already decided in this action that one person cannot sue in a firm name (1900), 7 B.C. 84, therefore the writ is a nullity because there is no real plaintiff, and it is impossible to add a plaintiff to, or substitute one for, a plaintiff who has no real existence: *i.e.*, there can be no addition to, or substitution for nothing. In reply, it is urged that this is not an application to add to or expand the cause of action, but merely to amend a misnomer, an irregularity only, and not a nullity; and that there is a real cause of action existing in a real plaintiff, who has by inadvertence wrongly described himself.

It seems to me that all we are concerned with in this appeal is to decide the above precise point of nullity or misnomer. If a nullity, the action totally fails—if a misnomer, an amendment should be allowed. I might here remark that this point was not considered by me when this case first came before me as reported above. All I there decided in regard to an amendment was, that, according to the existing practice under Order XIV., it could not on such an application be allowed.

Our attention has been drawn to *Henry Walker & Co.* v. *Parkins* (1845), 2 D. & L. 982; 9 Jurist, 665; 14 L.J., Q.B. 214, which is a case closely akin to the one at bar. Mr. Justice Coleridge states "The objection to the writ is, that the plaintiff is named in the writ 'Walker & Co.,' whom the indorsements on the writ speak of in the singular number as one person." (Thus—"The plaintiff claims £20. 1s., and interest.")

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B. C. FURNITURE COMPANY v. TUGWELL

In this case the circumstances are somewhat different. I have examined the papers in the Registry, and I find that in the writ the B. C. Furniture Company is referred to in the singular number, both in the style of cause and in the body of the writ, and again beneath the signature of the solicitor who issued the writ. In the indorsement on the writ, and in the claim for costs, the plaintiff is referred to twice in the plural number. It is somewhat strange that in none of the reports of *Walker* v. *Parkins* is the most material fact stated, whether the singular or plural in the writ itself was used, and, seeing that the singular number is herein used three times on the face of the writ itself, I regard this case as a stronger one for the respondent in that respect than *Walker* v. *Parkins*. Mr. Justice Coleridge therein further said :

Judgment of MARTIN, J.

"The principle appears to be this : if the fault be merely that the plaintiff is mis-named in the writ, that is no objection in this stage..... but if the name on the face of the writ is naught, or uncertain, then the writ is bad ; as if in the present case, it had appeared by the indorsement that there were more plaintiffs than one, it might have been reasonably contended that 'Walker & Co.' was uncertain ; one partner might have been named 'Walker,' but whether 'Co.' meant the other, or others, no one could tell. But in itself I cannot judicially say that 'Walker & Co.' may not be the name which the plaintiff bears."

Further, so far back as 1833, in *Smith* v. *Crump*, 1 Dowl. 519, it was held that the omission in the writ of summons of the name of the plaintiff as the person who would enter an appearance for the defendant if he failed to enter one was an irregularity ; and, commenting on this case, it is stated in Archbold's Q.B. Prac. (1866), 187, "An Amendment would generally be allowed." Mr. Justice Parke in giving judgment stated, "The omission is an irregularity." Now if the argument which was advanced on behalf of the appellant is sound, one would almost have thought that the

Court, under the strict practice which existed in the early part of this century, would then have taken a more unfavourable view of such a serious defect in a vital part of the writ.

On the question of misnomer generally I find the following remarks in Lush's Practice (1865), p. 359 :

"In one case where the christian name was omitted the process was set aside as irregular, but this was subsequently corrected, and the rule established that in all cases, including as well the entire omission of a christian name as the giving the initials, or a wrong name, or the omission or mis-statement of the name of dignity, misnomer either of the plaintiff or defendant, and either of the christian or surname, or describing the party by an alias name, was an objection which could only be taken by plea in abatement."

It is further stated in Archbold, p. 210, that it can "rarely be the case" that a writ of summons is absolutely void. In *Boughton* v. *Frere* (1811), 3 Camp. 29, it was held :

"If the plaintiff declares by a wrong christian name, this is no ground of non-suit at the trial, if it can be shewn that the defendant knew that the action was brought by the person who actually sues."

In addition to many others, I have considered carefully the case of *In re Bowden* (1890), 45 Ch.D. 444, on which appellant's counsel particularly relied; but the circumstances there were very different from those now under consideration ; the plaintiff herein does not ask to amend the pleadings, as was also done in *Weldon* v. *Neal* (1887), 19 Q.B.D. 394, in which case the following very appropriate remarks of Lord Justice Lopes are to be found :

"I think the Court ought to give all reasonable indulgence with regard to amending, and I quite agree with the rule that has been laid down, *viz.*, that, however negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side..... "

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As shewing how far this Court has gone in amending irregularities, the case of *Matthews* v. *The City of Victoria* (1897), 5 B.C. 284, referred to by the learned Chief Justice on the argument, may be consulted to advantage.

The defect herein being, in my opinion, an irregularity, a misnomer, I think that in the exercise of a discretion as to amendment, the order of the learned Judge below should be upheld, and this appeal dismissed with costs.

Appeal dismissed with costs.

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Nov. 30.
RE PROVINCIAL ELECTIONS ACT AND RE HOMMA

IN RE THE PROVINCIAL ELECTIONS ACT AND *IN RE* TOMEY HOMMA, A JAPANESE.

Provincial Elections Act, R.S.B.C. 1897, Cap. 67, Sec. 8—Validity of—Right of naturalized Japanese to be registered as voters.

Section 8 of the Provincial Elections Act which purports to prohibit the registration of Japanese as Provincial voters is *ultra vires.*

Union Colliery Company of British Columbia, Limited v. *Bryden* (1899), A.C. 580, considered and followed.

Statement.

APPEAL to the County Court of Vancouver from a decision (of 19th October, 1900), of the Collector of Votes of the Riding of Vancouver City Electoral District whereby he refused the appellant's name to be placed on the Register of Voters. Homma, a Japanese, was naturalized in Canada more than six months prior to October 19th, 1900, and has ever since resided in the City of Vancouver. On October 19th, he applied to the Collector of Votes to be put on the Register of Voters in pursuance of section 7 of Cap. 67, R. S.B.C. 1897, but the Collector refused on account of section 8 of the said Act. Under section 25 of the above Act,

Homma appealed to the County Court, and the appeal was argued at Vancouver before McColl, C.J., on 28th November, 1900.

Harris, for appellant: Section 8 is *ultra vires* of the Legislature of British Columbia. If the subject matter of section 8 falls within any of the classes of the subjects enumerated in section 92, and also falls within section 91 of the British North America Act, the power of the Provincial Legislature is thereby overborne. *Dobie* v. *The Temporalities Board* (1882), 7 App. Cas. 136; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348.

The subject of naturalization is one of the matters over which the Parliament of Canada has exclusive control under section 91 of the B.N.A. Act, and includes the power of enacting what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. *Union Colliery Company of British Columbia, Limited* v. *Bryden* (1899), A.C. 580. Section 15 of the Naturalization Act gives to every alien to whom a certificate of naturalization is granted, all political and other rights, powers and privileges to which a natural-born British subject is entitled within Canada. Section 8 of the Provincial Act, which assumes to deprive a naturalized Japanese of rights to which natural-born British subjects generally are entitled, comes into collision with and is overborne by the Dominion Act.

Argument.

The whole pith and substance of the enactment consists in establishing a statutory prohibition which is aimed directly at Japanese as such (including those who are naturalized), and which does not apply to native-born British subjects, and therefore it trenches upon the exclusive authority of the Parliament of Canada. *Union Colliery Company of British Columbia, Limited* v. *Bryden, supra.*

Wilson, Q.C., for respondent: Section 92 sub-section 1, gives the Province exclusive jurisdiction to amend from time to time "notwithstanding anything in this Act," the

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constitution of the Province, except as regards the office of Lieutenant-Governor. No other sub-section of section 92 contains words which so absolutely confer upon the Province the power of dealing with the specific subject, as sub-section 1. The power is conferred "notwithstanding anything in this Act." The effect of these words is to exclude from sub-section 1 the operation of the last paragraph of section 92. The powers to be exercised by the Dominion Parliament enumerated in section 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon Provincial legislation. To attach any other construction would practically destroy the autonomy of the Province. *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at p. 361. *Bryden's* case is distinguishable. There the question was whether the Province had the power to regulate aliens within the Province or to impose disabilities upon them, and their Lordships are careful to point out that if it had been merely a question of regulating the working of coal mines, it would have been exclusively within the powers of the Provincial Legislature, but the pith and substance of the Act being to establish a statutory prohibition against aliens, it encroached upon the exclusive authority of the Dominion Parliament in relation to that subject. It would seem as if the Imperial Parliament in inserting in sub-section 1 of section 92 the words "notwithstanding anything in this Act," and thus carefully excluding section 91 from having any operation, had had in their minds the absolute power of the Province to exclude aliens from the exercise of the electoral franchise.

Argument.

In any event the highest that it can be put is that the naturalized alien has the same rights as the British subject, and it seems clear that the Province would have the power to exclude any particular class of British subjects from voting. It can say no Englishman shall vote, or Australian or any other class of British subjects. With the wisdom of

such a course we have nothing to do. The Judicial Committee point that out, also in *Bryden's* case. It is a simple question of what is the power. Have they Legislative jurisdiction? It is not unworthy of observation that the powers of the Province, with respect to its constitution, are far greater than the Dominion. The Dominion has no power or authority to alter the constitution. The Provinces have power to amend their constitutions save with respect to the office of Lieutenant-Governor, and there is no limit to the power provided that it be exercised by a real amendment to the constitution, and not an attempt to encroach upon the powers of the Dominion in an otherwise constitutional enactment. See also *The Attorney-General of Canada* v. *The Attorney-General of Ontario* (1890), 20 Ont. 222; (1892), 19 A.R. 31; (1894), 23 S.C.R. 458.

Argument.

30th November, 1900.

McColl, C.J.: The sole question presented for determination is whether it was within the power of the Legislature to provide (section 8) that no Japanese is entitled to have his name placed on the Register of Voters or to vote at any election.

By section 3 the expression "Japanese" is defined to mean any native of the Japanese Empire or its dependencies not born of British parents, and to include any person of the Japanese race, naturalized or not.

Judgment.

Mr. *Harris*, for the appellant, relied on the *Union Colliery Company of British Columbia, Limited* v. *Bryden* (1899), A. C. 580.

Mr. *Wilson*, for the respondent, contended that the enactment is within sub-section 1 of section 92 of the B.N.A. Act, giving to the Legislature exclusive jurisdiction as regards "the amendment from time to time, notwithstanding anything in the Act, of the constitution of the Province, except in respect of the office of Lieutenant-Governor." He argued that the matter was peculiarly one of purely

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local concern and clearly could not, from any point of view, be regarded as falling within the Dominion authority. But whatever may be thought of the existing Naturalization Act in so far as it relates to British Columbia, the residence within the Province of large numbers of persons, British subjects in name, but doomed to perpetual exclusion from any part in the passage of legislation affecting their property and civil rights would surely not be to the advantage of Canada, and might even become a source of national danger.

Judgment.

Apart from decisions binding upon me, I would have considered that the authority of the Dominion Parliament becomes exhausted with the naturalization and that the person naturalized passes under the jurisdiction of the Provincial Legislature to the same extent as if born a British subject, and that the only restraint upon the Legislature in matters of this kind is the liability of any Act to be disallowed. But this view did not prevail with the Judicial Committee in the case mentioned, the effect of which, as I understand it, is that the Provincial Legislature has no power to pass any legislation whatever which does not, in terms at least, apply alike to born and naturalized subjects of Her Majesty, however its results may varyingly affect different classes or persons. The appeal is allowed with costs.

Appeal allowed with costs.

CANADIAN AND YUKON PROSPECTING AND MINING COMPANY, LIMITED v. CASEY *ET AL.*

FULL COURT
At Victoria.
1900.
March 6.

CANADIAN AND YUKON P. & M. CO. *v.* CASEY

Practice—Appeal—Right to in Yukon cases—62 & 63 Vict., Cap. 11, Sec. 7—Application to pending case tried before and decided after passing of.

The Act, 62 & 63 Vict., Cap. 11, giving the right of appeal to the Judges of the Supreme Court of British Columbia sitting together as a Full Court in cases from the Yukon as therein specified, does not apply to a case tried before the Act came into force and decided after.

MOTION to quash an appeal to the Full Court from a judgment of Dugas, J., pronounced 11th October, 1899, in the Territorial Court of the Yukon Territory. The action was tried at Dawson in May, 1899, and judgment was not delivered until October, 1899. The Yukon Territory Act, 61 Vict., Cap. 6, separated the Yukon Territory from the North-West Territories and constituted for it a Territorial Court.

Statement.

By the North-West Territories Act, R.S. Canada, 1886, Cap. 50, Sec. 50, the Supreme Court of the North-West Territories was constituted a Court in Banc to hear appeals from all Courts of the North-West Territories. The Yukon Territory Act does not expressly refer to the subject of appeals.

NOTE—Sections 7, 9 and 11, of 62 & 63 Vict., Cap. 11 are as follows:

7. The Supreme Court of British Columbia is hereby constituted a Court of Appeal for the Territory.

(2.) An appeal shall lie from any final judgment of the Territorial Court to the Judges of the said Supreme Court sitting together as a Full Court where the matter in controversy amounts to the sum or value of $500.00 or upwards or . . . . .

(3.) The said Supreme Court and the Judges thereof shall have the same powers, jurisdiction and authority with reference to any such appeal and the proceedings thereon as if it were an appeal duly authorized from a like judgment, order or decree made by the said Supreme Court or a Judge thereof in the exercise of its ordinary jurisdiction.

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By an Act to amend the Yukon Territory Act (62 & 63 Vict., Cap. 11), assented to on 11th August, 1899, it was enacted that appeals should lie from final judgments of the Territorial Court to the Judges of the Supreme Court of British Columbia sitting together as a Full Court. The amendment also gives an alternative appeal to the Supreme Court of Canada.

The motion was argued 5th March, 1900, before WALKEM, DRAKE, IRVING and MARTIN, JJ.

Argument.

Peters, Q.C., for respondent (plaintiff), for the motion: The Act, 62 & 63 Vict., does not apply to pending cases. See *The Queen* v. *Taylor* (1877), 1 S.C.R. 65; *Williams et al* v. *Irvine* (1893), 22 S.C.R. 108; *Mitchell* v. *Trenholme, Ib.* 333; *Hyde* v. *Lindsay* (1898), 29 S.C.R. 99; *Hurtubise* v. *Desmarteau* (1891), 19 S.C.R. 562 and *Williamson* v. *Bank of Montreal* (1899), 6 B.C. 480. Assuming there is a right of appeal, the Dominion Statute giving the right is of no avail until the Provincial Legislature has adopted the Court and stated by statute that the Court shall exist. He referred to section 101 of the British North America Act.

Davis, Q.C., for appellants (defendants): The Dominion has full jurisdiction over Yukon Territory and can establish a Court of Appeal, and when a Court is so established it is a Dominion Court. He referred to *Valin* v. *Langlois* (1879), 5 App. Cas. 115. In the cases cited in the Supreme Court of Canada there is a difference of opinion amongst the Judges, and the language of the Act here under consider-

9. Execution of the judgment appealed from shall not be stayed except upon application to the Territorial Court or a Judge thereof, or to the said Supreme Court or a Judge thereof, and upon such terms as may be just.

11. The procedure upon such appeals shall be regulated by the ordinary practice and procedure upon similar appeals coming before the said Supreme Court, so far as such practice and procedure are applicable and are not inconsistent with anything contained in this Act, and except in so far as is otherwise provided by general rules made in pursuance of this Act.

ation is different from the language of the Acts under consideration in those cases. He cited *The Koksilah Quarry Company, Limited Liability* v. *The Queen* (1897), 5 B.C. 611.

On 6th March, 1900, judgment was delivered quashing the appeal on the grounds that the Act 62 & 63 Vict., Cap. 11, under which the notice of appeal was given, was not passed until after the trial of the action and the Act is not retrospective. The Court also held that the said Act does confer jurisdiction on the Court in cases coming within its scope.

Subsequently, on 9th March, 1900, the following opinion was handed down by

DRAKE, J.: This is an appeal from a judgment of the learned Judge of the Territorial Court of Yukon in favour of the plaintiffs. The defendant appealed under section 7 of the Yukon Territory Act, Cap. 11 of 1899, which was assented to 11th August, 1899.

Mr. *Peters*, on behalf of the plaintiffs, objected that the appeal was not sustainable. The case was tried at Dawson on 23rd May, and judgment was rendered 11th October, 1899. This then was a pending action at the time the right of appeal was given on 11th August, 1899.

Mr. *Peters* relied on the judgment of the Supreme Court in *Williams et al* v. *Irvine* (1893), 22 S.C.R. 108, where it was held that section 3 of Cap. 25 of 54 & 55 Vict., giving an appeal to the Supreme Court of Canada from a judgment of the Superior Court in review did not apply to cases standing for judgment prior to the passing of the Act, and that case followed the case of *Couture* v. *Bouchard* (1892), 21 S.C.R. 281. It is impossible to distinguish the present case from the case cited; there are no words in the Yukon Act which make the right of appeal retrospective so as to apply to pending litigation, and we are bound to follow this decision. The right of appeal is not a matter of procedure, it is a matter of jurisdiction. Matters of procedure may be

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and often are retrospective, but matters of jurisdiction are not, without apt words are found in the statute for the purpose.

Mr. *Peters* further contended that the Dominion Parliament had no right to impose upon Provincial Courts jurisdiction of this nature without the assent of the Provincial Legislature, and he based his contention on section 101 of the B. N. A. Act, which he says limited the powers of the Dominion Parliament to the establishment of a general Court of Appeal for the whole of Canada. His argument would have considerable weight if the Dominion had imposed on the Court of one Province the power of hearing appeals from another Province. But here the Yukon Territory is under the direct domination of the Dominion, and this Territory is not subject to the B. N. A. Act. In what respect does the imposition of the appellate jurisdiction interfere with Provincial rights? Sub-section 14 of section 92 gives to the Province the administration of justice in the Province including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction. The appellate jurisdiction given by the Yukon Act certainly does not affect the administration of justice in the Province; it is a subject-matter entirely without the scope of that sub-section, and is not affected by the provisions of the B. N. A. Act at all. The case of *Valin* v. *Langlois* (1879), 5 App. Cas. at p. 120, is decisive on the point. Lord Selborne says, "there is therefore nothing here to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers, as to matters which do not come within the classes of subjects assigned exclusively to the Legislatures of the Provinces."

Judgment.

The appeal must therefore be dismissed with costs.

Motion allowed and appeal dismissed.

COURTNAY *ET AL* v. THE CANADIAN DEVELOPMENT CO.

FULL COURT
At Victoria.
1900.
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COURTNAY
v.
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Practice—Appeal—Right to in Yukon cases—62 & 63 Vict., Cap. 11, Sec. 7—Application to pending case tried and decided after passing of.

The Act, 62 & 63 Vict., Cap. 11, Sec. 7, which gives a right of appeal to the Supreme Court of British Columbia in cases from the Yukon Territory as therein specified, applies to an action pending when the Act came into force, but tried and decided afterwards.

MOTION to quash an appeal to the Full Court from a judgment of Dugas, J., pronounced 17th April, 1900, in the Territorial Court of the Yukon Territory. The amount of the judgment was $10,052.00.

The writ was issued out of the Dawson Registry of the Supreme Court of the North-West Territories on 28th September, 1898, and a concurrent writ was issued on 10th November, 1898. The statement of claim was filed on 28th September, 1898, and the statement of defence on 30th September, 1899. The trial began on 1st February, 1900, and judgment was given on 17th April, 1900. Notice of appeal to the Full Court of the Supreme Court of British Columbia was given on 1st May, 1900. For a statement of the statutes affecting this appeal, see *ante* p. 373.

Statement.

The motion was argued on 7th and 8th September, 1900, before McColl, C.J., Walkem, Drake, and Irving, JJ.

Peters, Q.C., for respondent, for the motion: This action was pending at the time of the passing of Cap. 11, 62 & 63 Vict., amending the Yukon Territory Act, and therefore this Court has no jurisdiction to entertain the appeal. If the case is pending the old right of appeal is not affected in any way. The right of appeal is a statutory right and must be expressly given. The decisions of the Supreme Court of

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Canada shew that a statute giving a new right of appeal does not apply to actions commenced after the passing of the statute. That was the ground on which this Court quashed the appeal in *The Canadian & Yukon Prospecting and Mining Company, Limited* v. *Casey et al, ante* p. 373. He cited *Hyde* v. *Lindsay* (1898), 29 S.C.R. 99; *Williamson* v. *Bank of Montreal* (1899), 6 B.C. 480; *The Koksilah Quarry Company, Limited Liability* v. *The Queen* (1897), 5 B.C. 600; *The Queen* v. *Taylor* (1877), 1 S.C.R. 65; *Hurtubise* v. *Desmarteau* (1891), 19 S.C.R. 562; *Couture* v. *Bouchard* (1892), 21 S.C.R. 281; *Williams et al* v. *Irvine* (1893), 22 S.C.R. 108; *Cowen* v. *Evans, Ib.* 331; *Mitchell* v. *Trenholme, Ib.* 333, and *Mills* v. *Limoges, Ib.* 334.

Duff, contra: The cases referred to do not apply for these reasons: (1.) In none of the cases cited in the Supreme Court of Canada has the trial of the action taken place after the passing of the Act; (2.) Here there is the establishment of an appeal of a wholly different character from the appeal from a Provincial Court to the Supreme Court of Canada. An appeal to the Full Court is not an appeal strictly; it is a further proceeding in the same Court, but an appeal to the Supreme Court of Canada is an appeal in the strictest sense—it is equivalent to proceedings in error; (3.) The Full Court is substituted for the Court in Banc of the North-West Territories to which, before this statute, the appeal would have been. The judgment of the Full Court on a Yukon appeal will be a judgment of the Yukon Court, and the appeal is only a step in the cause. He cited *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 675; *Hawkins Hill Consolidated Gold Mining Company, Limited* v. *Want, Johnson & Co.* (1893), 69 L.T.N.S. 297-8; *Hately* v. *The Merchants' Despatch Company et al* (1886), 12 A.R. 640; *Marsh et al* v. *Webb et al* (1892), 15 P.R. 64; *Hamill* v. *Lilley* (1887), 56 L.T.N.S. 620. This appeal is a matter of procedure and no suitor has a vested right in procedure. See judgments of Lords Cranworth and Wensleydale in *The Attorney-General* v. *Sillem*

(1864), 10 H.L. Cas. 704; *Lopez* v. *Burslem* (1843), 4 Moo. P.C. 300; *Boston* v. *Lelievre* (1870), 39 L.J., P.C. 17; Maxwell, pp. 314, 315; *Elliott* v. *Bishop* (1855), 10 Ex. 527.

The authorities cited by my learned friend are founded on *The Queen* v. *Taylor* (1877), 1 S.C.R. 65, but the decision in that case was grounded on cases in which judgments had been delivered, passed and entered before the Act was passed, and it was there held that the vested right of appeal could not be taken away—see pp. 85, 93, 98 and 99. The Court is not bound by decisions on other statutes. *Ex parte Blaiberg* (1883), 23 Ch.D. 257; *Grey* v. *Pearson* (1857), 6 H. L. Cas. 61. See *Kelly & Co.* v. *Killond* (1888), 20 Q.B.D. 572, for proposition that this Court can overrule previous decisions of Court consisting of smaller number of Judges.

Argument.

Peters, in reply: The test is, was the action pending at the time the Act was passed? It was because the actions were pending that the cases I have quoted were so decided. By the Act nothing is taken away, only a new Court is established.

5th November, 1900.

McCOLL, C. J.: This is a motion to quash an appeal from the Yukon Territory on the ground that the action was pending at the time of the passage of Cap. 11, 62 & 63 Vict., amending the Yukon Territory Act.

Before the passing of the principal Act there was a right of appeal from a judgment of the District Court to the Full Court of the North-West Territories. Counsel for the appellant claimed that the right remained notwithstanding the passing of the Act, and I did not understand that counsel for the respondent disputed this, although in answer to a question from me he said that he did not think it necessary to express any decided opinion.

Judgment of McCOLL, C.J.

It may be that the appeal to that Court was lost, but there was no contention that the appeal to the Supreme Court of Canada had also gone, and I think the result at most was

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merely that the appeal to an intermediate Court was suspended.

The respondent relies upon the line of cases in the Supreme Court of Canada from *The Queen* v. *Taylor* (1877), 1 S.C.R. 65 to *Hyde* v. *Lindsay* (1898), 29 S.C.R. 99, as establishing that if an appeal rests upon a statute which does not, in express terms, include actions pending when it takes effect they are not included.

Even if the circumstances of the present case were in most respects similar to those of any of the cases referred to, conflicting views expressed in many of the reported opinions in that Court would, I think, require us to be cautious in applying the rule to any particular case, especially having regard to the remarks of Jessel, M.R., in *Ex parte Blaiberg* (1883), 23 Ch.D. at p. 258:

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"I think the proper course is to read the section of the Act and to ascertain its meaning, and not to trouble ourselves about decisions upon the former Act. Any other course would be apt to lead us astray. If the later Act can clearly have only one meaning we ought to give effect to it accordingly. If, instead of doing that, we compare it with the former Act, and say that it differs from it only to such and such an extent, and then consider the decisions upon the former Act, we might in that way go back to half-a-dozen older Acts, and after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later Act."

The language of Lord Wensleydale in *Grey* v. *Pearson* (1857), 6 H.L. Cas. at p. 108, appears to me to be very applicable to the present case:

"We are bound by decided cases, for the sake of securing as much certainty in the administration of the law as the subject is capable of. But when the decision is not upon some rule or principle of law, but upon the meaning of words in instruments which differ so much from each other, and when the proper construction is so varied by the

peculiar circumstances of each case, it seldom happens that the words of one will are a sure guide for the construction of words resembling them in another."

But there seems to me to be no similarity between the circumstances of this case and those of any of the cases relied on by the respondent.

To grant an appeal where there is none is to give a privilege, and that express words are necessary to confer it, if beyond the usual course of litigation as it was when embarked upon by litigants, may be capable of being supported by reason as well as by authority. But having been given, an appeal becomes a right, subject to any conditions which may be attached to its exercise, and then totally different principles govern the construction of an Act claimed to affect it. Here Parliament was not dealing with the question of bestowing any new privilege of appeal. No such question was before it. What was being dealt with was the necessity or expediency of providing a Court to which appeals might be carried in the first instance in the altered circumstances created by the legislation now under consideration. And I have no doubt, in the absence of any clear expression of an intention on the part of the Legislature to the contrary, that "An Act to provide for the Government of the Yukon District" ought not to be construed as incidentally, and for no apparent reason, withholding from any litigant the benefit of any of the provisions of the Amending Act.

Judgment of McColl, C.J.

Drake, J.: [After stating the facts] proceeded: The Act giving this Court jurisdiction to hear appeals from the Yukon Territory was passed on the 11th of August, 1899, being Cap. 11.

By section 7 it was enacted that an appeal should lie from any final judgment of the Territorial Court to the Judges of the said Supreme Court sitting as a Full Court, when the matter in controversy amounted to $500.00, and upon other grounds.

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The statute then, after dealing with the procedure to be followed by any such appeal, gives an alternative appeal direct to the Supreme Court of Canada from the Territorial Court.

The Yukon Territory Act, Cap. 6, 1898, to which the Act under consideration is an amendment, constituted the Territorial Court, and defined the jurisdiction thereof, and by section 9 the existing laws of the North-West Territories as they existed at the time of the passage of the said Act were to remain in force until amended or repealed.

By the North-West Territories Act, R.S. Canada, Cap. 50, Sec. 50, the Supreme Court of the North-West Territories was constituted a Court in Banc to hear appeals from all Courts of the North-West Territories. The effect of the Yukon Territory Act was to take away that Territory from the control of the North-West Territories Act, but left the laws, both civil and criminal, binding on the new Territory, and the right of appeal to the North-West Territorial Court in Banc is not preserved. The result is that the intermediate appeal to the Court of British Columbia is the establishment of a new Appeal Court; the right of appeal to the Supreme Court of Canada still existing.

Judgment
of
DRAKE, J.

The question here raised is that as the Act constituting the Court of British Columbia an Appeal Court from the Court of the Yukon Territory was passed after the action was commenced it gives no right of appeal in respect of such actions; and the case of *Hyde* v. *Lindsay* (1898), 29 S.C.R. 99, was relied on as an authority for this proposition. This case I will consider later.

It must be conceded that the right of appeal is a statutory right only, and as such the Act of the Legislature giving it cannot be treated as retroactive, unless there are words to shew that such was the intention of the Legislature. Here we have simply a bald enactment that the Supreme Court of British Columbia shall be a Court of Appeal for the Yukon Territory. I think it may be treated as settled

law, that where the judgment of the Yukon Court was rendered prior to the coming into operation of the Act constituting this a Court of Appeal, there is no appeal to this Court.

In this case the right of appeal was given long prior to the trial of the action, so no right of either party to the litigation was affected.

The cases relied on in support of the contention that no appeal lies to this Court are clearly distinguishable. In *Hurtubise* v. *Desmarteau* (1891), 19 S.C.R. 562, the judgment appealed from was delivered the day the Supreme and Exchequer Courts Amendment Act, 1891, was passed. Ritchie, C.J., says it was for the appellant to shew that the Act allowing an appeal was in force at the time the judgment was delivered. Strong, J., says that it was on the party asserting that the case was subject to the new law to shew that the judgment was rendered after the passing of the Act, and was subject to its provisions. Taschereau and Patterson, JJ., reserve their opinion on the point whether or not there would be a right of appeal if the judgment had been rendered after the Act giving an appeal had passed.

The cases of *Williams et al* v. *Irvine* (1893), 22 S.C.R. 108; *Cowen* v. *Evans*, *Ib.* 331, and *Mitchell* v. *Trenholme*, *Ib.* 333, only decide the same point, that an appeal does not lie if the Court below has rendered judgment before the Act giving the appeal had come into operation, or if the cases were argued and standing for judgment at that time.

In *Hyde* v. *Lindsay*, *supra*, at p. 102, Taschereau, J., in giving the judgment of the Court, says, referring to *Hurtubise* v. *Desmarteau*, *supra*, and *Couture* v. *Bouchard* (1892), 21 S.C.R. 281, "that it might be said that it was assumed in both those cases that if the judgments appealed from had been rendered " after the passing of the statute, they would have been appealable. Strong, J., (now Chief Justice) gave his opinion that even in that case the judgments would not have been appealable. However, the subsequent

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decisions of the Court on the matter leave no room for doubt."

The learned Judge then goes on to consider the cases of *Williams* v. *Irvine, supra, Mitchell* v. *Trenholme, supra, and The Montreal Street Railway Co.* v. *Carriere* (1893), 22 S.C. R. 335, and in all those cases judgment had been rendered before the Act giving an appeal had passed, or had been held over for consideration, or the appeal had been brought from a judgment of the Provincial Appeal Court which had been delivered in respect of an action tried prior to the Supreme Court Act, and although he uses language which might be considered as applicable to all actions pending prior to the passing of the Act giving an appeal, a careful consideration of these cases shews that the term pending thus used by him is apparently applied to actions in which judgment had been rendered or held *en delibere*, and not to actions in which the trial had taken place subsequent to the passing of the Act giving an appeal. There is no case found in the books in which an appeal has been quashed when the action has been commenced before, but not tried until after the appealing Act came into force. No right in such a case has been interfered with. Both parties were aware that an appeal could be taken from any judgment that might be rendered. I am, therefore, of opinion that the motion to quash this appeal should be dismissed with costs.

Judgment of DRAKE, J.

IRVING, J.: I take this view, that as no question as to the right of appeal arose in this action until long after the 11th of August, 1899, the parties are entitled to appeal to this Court unless some substantive vested right would thereby be lost to one of them.

Judgment of IRVING, J.

In *The Queen* v. *Taylor* (1877), 1 S.C.R. 65 (the principle of which case runs through all the decisions in the Supreme Court of Canada), a substantive right was taken away. Compare the summary of that case by Killam, J., in *Foulds*

v. *Foulds* (1898), 12 Man. at p. 393, with the judgment of Ritchie, C.J., in particular at p. 86.

There is nothing novel in holding that the retrospective effect may be partial in its operation (*The Guardian of the Bath Union* v. *The Guardians of the Berwick-upon-Tweed Union* (1892), 1 Q.B. 731), and I agree that except as regards judgments delivered prior to the passage of the Act of 1899, this Act may consistently, with the Supreme Court of Canada decisions, be read as retrospective.

Motion dismissed with costs.

BANKS v. WOODWORTH.

Practice—Appeal in Yukon cases—Extension of time for—Costs—Security for—Appeal books.

The Court may extend on terms the time for appealing to the Full Court from the Territorial Court of the Yukon.

The respondent is entitled to a copy of the appeal book.

MOTION to the Full Court (McCOLL, C.J., DRAKE, IRVING and MARTIN, JJ.), at Vancouver for an extension of time for appealing from a judgment of the Territorial Court of the Yukon on the ground that it was impossible as yet to get the notes of the evidence.

Statement.

Davis, Q.C., for the motion.

Peters, Q.C., for respondent, asked as a condition precedent that security for costs be put up, and also that the respondent be furnished with a copy of the appeal book.

Argument.

Per curiam: Let the time be extended and security in the sum of $150.00 be put up before the first day of the first sitting in Vancouver, otherwise the appeal is dismissed without further order. It is the practice of this Court that a copy of the appeal book should be given to the other side.

Judgment.

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MALKIN v. TOBIN: MARTIN, GARNISHEE.

Practice—On appeal from Small Debts Court—New witness.

An appeal from the Small Debts Court is by way of a re-hearing and witnesses may be called although not called at the trial.

Statement.

APPEAL to the County Court from a decision of R. A. Anderson, Magistrate of the Small Debts Court at Vancouver. For the purposes of the report the facts appear fully in the judgment.

The appeal was argued before McCOLL, C.J., on 25th October, 1900.

Harris, for plaintiff.
Gilmour, for garnishee.

12th November, 1900.

McCOLL, C.J.: In this matter I found for the appellant at the close of the arguments, subject to the question whether he was entitled to call a witness not called at the trial in the Court below, and whose evidence was necessary to prove the deposit of the assignment for record at the Land Registry Office as required by section 4 of the Creditors Trust Deeds Act.

Judgment.

I was inclined to think the question at least doubtful for reasons now unnecessary to be given, but that the practice might be uniform, I delayed judgment for the purpose of consulting my brother Judges.

Mr. Justice DRAKE has given me the following memorandum of his views:

"Section 30 of the Small Debts Act enacts that the Court to which appeal is brought shall try and determine the question in dispute. A Court of Appeal pure and simple

does not try the case—it decides whether the Court below was right or wrong in its conclusions. The Court cannot try an issue of fact without evidence, and in my view the language used makes the appeal Judge the trial Judge and the whole matter is open. On another view of the Act, section 4 incorporates the County Courts Act rules, practice and procedure. Section 164 of the County Courts Act gives the Full Court all the powers to deal with County Court appeals as are given to appeals from judgments of the Superior Court. Supreme Court rule 674 gives the Appeal Court power to receive evidence on questions of fact. In either point of view the Court appealed to under the Small Debts Act has power to receive evidence on questions of fact."

Judgment.

I have since discussed the subject with him and Mr. Justice Irving and Mr. Justice Martin. On account of the absence of Mr. Justice Walkem on circuit I have been unable to consult him. We are all agreed that further evidence is admissible in such a case.

The result is that the judgment of the learned Magistrate must be reversed, but there will be no costs to either party except such (if any) as the judgment creditor may have by the statute in priority to the assignment.

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IN RE THE ORO FINO MINES, LIMITED.

Winding up—Voluntary—When interfered with by Court.
Practice—Liquidator—Whether he should be served with notice of appeal—Costs—Application to increase security for—Waiver.

The Court will not interfere with a voluntary winding up of a Company by its shareholders and order a compulsory liquidation unless it is shewn that the rights of the petitioner will be prejudiced by the voluntary winding up.

Service on the liquidator of a notice of appeal on behalf of the Company from a compulsory winding up order is not necessary.

A respondent by applying to increase the amount of security for costs waives his right to object that the security was not originally furnished in time.

APPEAL to the Full Court by the Oro Fino Mines, Limited, from the order of WALKEM, J. (who granted leave to appeal), dated 4th May, 1900, ordering that the Company be wound up. The Company was incorporated in March, 1897, under Part 1 of the Companies Act (C.S.B.C. 1888, Cap. 21), introducing The Companies Act, 1862 (Imperial).

Statement.

On 12th April, 1900, John M. Mackinnon presented a winding up petition shewing that he was a shareholder and Director of the Company, that the Company was insolvent, and that the Directors had passed a resolution authorizing the calling of an extraordinary general meeting of the Company for 25th April, for the purpose of considering, and, if deemed expedient, passing a special resolution to wind up the Company. On 25th April, the shareholders unanimously passed a resolution authorizing a voluntary winding up, and appointed J. W. McFarland liquidator.

On 4th May, WALKEM, J., made an order that the Company be wound up by the Court, and appointed Alexander Grant, provisional official liquidator. This is the order appealed from.

The respondent demanded security for costs of appeal, and the appellant deposited $75.00 within fourteen days from the date of the order appealed from; respondent then applied in Chambers for further security and IRVING, J., made an order fixing the amount at $150.00, and on 26th May, the balance of $75.00, to make up the $150.00, was paid into Court.

The appeal came on for argument at Vancouver on 5th June, 1900, before McCOLL, C.J., IRVING and MARTIN, JJ., when

Statement.

Wintemute, for the respondent, took the preliminary objections that (1.) the liquidator had not been served with the notice of appeal (notice had been served on the petitioner only); (2.) the Company being in course of liquidation could not prosecute an appeal; (3.) that security for costs had not been furnished as required by the Act and Rules and (4.) the appeal had not been properly entered. He referred to *In re Webber* (1889), 24 Q.B.D. 313; *Ex parte Ward* (1890), 15 Ch.D. 292; R.S. Canada, 1896, Cap. 129, Secs. 15, 34, 74, Sub-Sec. 4; *Re Sarnia Oil Company* (1893), 15 P.R. 82.

A. D. Taylor, for appellant.

On the 6th of June, all the objections were overruled and the argument proceeded. As to the objection that the appellant had not put up security in fourteen days, the Court held the respondent, by moving to increase the security, had waived his right to object.

Argument.

A. D. Taylor (*Kappele*, with him), for the appellant: The grounds of appeal are that petition does not shew any interest in the petitioner in the winding up, and at the time of the presentation of the petition a voluntary winding up was already in progress. I do not dispute that there is a discretion in the Court as regards a compulsory winding up, but there were no facts shewn on which a discretion could properly be exercised.

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As to the meaning of the words "just and equitable" he referred to Palmer (1897), Part 2, pp. 36-37; *In re Langham Skating Rink Company* (1877), 5 Ch.D. 669; *In re Russell, Cordner & Co.* (1891), 3 Ch. 171; *In re Dore Gallery, Limited* (1891), W.N. 98; *Shoolbred* v. *Clarke* (1890), 17 S.C.R. 265; *Re Ontario Forge and Bolt Company, Limited* (1894), 25 Ont. 407.

Argument.

J. A. Russell (*Wintemute*, with him), for respondent: A majority of the creditors supported the petition by appearing on the return by counsel and consenting to the order. Mackinnon had the statutory right to a compulsory winding up under both the Provincial and Dominion Acts. He cited *In re Gold Company* (1879), 11 Ch.D. 701 at p. 707; *In re The Varieties, Limited* (1893), 2 Ch. 235; *In re Anglo-Austrian Company* (1891), 35 Sol. Jo. 469; *In re Angelsea Colliery Company* (1866), L.R. 2 Eq. 379; *In re B.C. Iron Works Company, Limited Liability* (1899), 6 B.C. 536; *In re The Bank of Gibraltar and Malta, Limited* (1865), 35 L.J., Ch. 49; *In re Diamond Fuel Company* (1879), 13 Ch.D. 400; *In re National Savings Bank Association* (1866), 1 Chy. App. 547; *In re Tumacacori Mining Company* (1874), L.R. 17 Eq. 534; *In re West Surrey Tanning Company* (1866), L.R. 2 Eq. 737; *In re Union Fire Insurance Company* (1890), 17 S.C.R. 265; *In re Thomas Edward Brinsmead & Sons* (1897), 1 Ch. 406; *In re Suburban Hotel Company* (1867), 2 Chy. App. 750; *In re Home Assurance Association* (1871), L.R. 12 Eq. 113-4.

Garrett, for certain creditors.

Cur. adv. vult.

On 1st September, 1900, the following judgment of MARTIN, J., was delivered by IRVING, J., as the judgment of the Court:

Judgment.

This Company was incorporated in March, 1897, under Part 1 of the Companies Act (C.S.B.C. 1888,

Cap. 21), introducing the Companies Act, 1862 (Imperial), and so comes within the operation of section 44 of the Companies Act, 1890, which in turn brought into force the provisions of the Winding Up Act Amendment Act, 1889 (Dominion), and the machinery of the Dominion Acts was preserved by section 14 of the Companies Act Amendment Act, 1898—*In re B.C. Iron Works Company, Limited Liability* (1899), 6 B.C. 536.

Notice of presentation of a petition for winding up was given on April 12th, 1900, for the 20th instant, and according to section 7 of the Winding Up Act the winding up commenced on the date such notice was given. Subsequently, on the 25th of April, a resolution was passed by the shareholders of the Company authorizing a voluntary winding up; under section 6 of the British Columbia Companies Winding Up Act, 1898, such a winding up commences from the time of the passing of the resolution. At the said meeting 304,626 shares out of a total of 400,000 were represented, and the resolution was unanimously passed. On the 7th of May, the order of the learned Judge appealed from was made directing that the Company should "be wound up by the Court under the provisions of the Winding Up Act and Amending Acts."

Judgment.

In this country a shareholder has the same right to present a petition as a creditor has—Winding Up Act, Sec. 3, Sub-Sec. 6, and Sec. 8 as amended by Sec. 4 of the Winding Up Act Amendment Act, 1899.

It is admitted that if in the due exercise of his discretion the learned Judge had deemed it "just and equitable" that the Company should be compulsorily wound up, the order could not be successfully attacked, but it is contended that there was no evidence before him on which such a discretion could be exercised in view of the fact that the said resolution had been passed before the order was made.

It is not argued that a shareholder in Canada would have any greater right to a compulsory winding up than a

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creditor would in England. The question, then, really comes to this—would a creditor be entitled to this order in England? No importance attaches to the fact that the resolution for voluntary winding up was passed after the presentation of the petition—*In re The Varieties, Limited* (1893), 2 Ch. 235; *In re Medical Battery Company* (1894), 1 Ch. 444.

We have been referred to a large number of cases on the meaning of the words "just and equitable," most of which will be found noted in Palmer (1897), Part 2, pp. 36-7, and our attention has been specially drawn by respondent's counsel to *In re Gold Company* (1879), 11 Ch.D. 701 at p. 710; *In re The Varieties, Limited, supra*; *In re Thomas Edward Brinsmead & Sons* (1897), 1 Ch. 406; *In re Anglo-Austrian Company* (1891), 35 Sol. Jo. 469.

Judgment.

Though in a note of the decision of Mr. Justice Vaughan Williams *In re Sailing Ship Kentmere Company* (1897), W. N. 58 (cited in Palmer 36), it is stated that "the doctrine to be gathered from early cases—that the Court will not order a Company to be wound up on the grounds that it is 'just and equitable,' etc., unless the facts relied on shew a case *ejusdem generis* with those referred to in the four preceding heads of the section—may now be disregarded," nevertheless in such a case as the present there must be good cause shewn for displacing the voluntary winding up. It must appear that unless a compulsory order is made the petitioner will be prejudiced. *In re Russell, Cordner & Co.* (1891), 3 Ch. 171, Mr. Justice North remarks:

"It is said that by the Companies (Winding Up) Act, 1890, much larger powers of investigation have been given to the Court. But I think the law remains the same as it was under the previous Acts, that to enable a creditor to obtain an order for the compulsory winding up of a Company, when there is a voluntary winding up, he must satisfy the Court that his rights 'will be prejudiced' by the voluntary winding up—that is, that he will suffer by it": see

also *In re National Debenture and Assets Corporation* (1891), 2 Ch. at 518, and *In re Medical Battery Company, supra*, where it is laid down that where there is something "curious" about the Company, "a great deal to be found out," or investigated, or the Company, or the liquidator, is practically in the overwhelming control of one man, and improper influence is feared, then a compulsory order should be made—*In re West Surrey Tanning Company* (1866), L.R. 2 Eq. 737.

What evidence is there to satisfy us that the petitioner in the case at bar will suffer in consequence of the voluntary winding up? Suggestions have been made during the course of the argument, but exception was taken to such suggestions as not being supported by evidence, and the evidence is not forthcoming. I find myself unable to point to a single circumstance which would justify my brushing aside the voluntary winding up. I have examined all the cases cited by respondent's counsel, but they are clearly distinguishable, *e.g.*, in the case of the *Anglo-Austrian Company, supra*, Mr. Justice Stirling said: "Every one of these transactions called for the most rigid scrutiny and the most rigid investigation." Assuming that a majority, in value, of the creditors came before the learned Judge below and consented to the compulsory order, that should not override the wishes of the shareholders in the regulation of the affairs of the Company, and all the cases go to shew that the Court is not desirous of interfering with such control.

Judgment.

In the absence of any reasons given by the learned Judge I can find nothing in the proceedings of the Company that would warrant interference, and we are not justified in assuming that the liquidator under the voluntary winding up will not do his duty, either as regards the agreement of the 27th of October, 1898, between the Company and certain shareholders, or in any other respect.

So far as can be foreseen sections 19 (sub-section 7) and

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24 of the British Columbia Companies Winding Up Act, 1898, will be ample protection for the petitioner. The appeal should be allowed with costs.

Appeal allowed.

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ROSS v. BRITISH COLUMBIA ELECTRIC RY. CO. LTD.

Practice—Jury—Summoning of—Procedure on—Whether directory or imperative.

If on the trial of an action in the Supreme Court twenty persons do not appear from which a jury may be selected, the panel may be quashed.

The provisions of the Jurors Act relating to the procedure to be followed by the Sheriff in summoning a jury are not imperative but directory, and an irregularity in respect thereto is not *ipso facto* a ground for setting aside the panel.

Statement.

TRIAL of action before IRVING, J., and a common jury. On 14th June, 1900, when the case was called

Argument.

L. G. McPhillips, Q.C. (with him *Williams*), for defendants, challenged the array on the grounds (1.) that the Sheriff did not summon the jurors drafted to serve four days at least before 14th June; (2.) that in proceeding to draft the panel he did not, in the first place, prepare a proper title or heading for the panel of jurors to be returned; (3.) that he did not, at the drafting, prepare any title or heading, nor did he take any list or mark on any paper the names or numbers of the jurors selected, nor the numbers of the said jurors on the jury list; (4.) that he did not, immediately after the drafting nor at any time, transcribe alphabetically on the paper with such prepared heading, nor on any paper, the names of the jurors so selected; (5.) that he did not transmit to the District

Registrar of the Vancouver Registry a copy of the jury panel, and (6.) that at the time of the selection of the said jury he rejected Nos. 70, 42, 30 and 69, which were duly drawn by him from the box, on the alleged ground that the persons represented on the jury list by such numbers were absent from the City, whereas the Sheriff had no power under the Jury Act to reject such names for such cause, and he drew four other numbers from the said box and added them to the panel in place of the said numbers rejected.

Macdonell, for plaintiff, *contra*.

Irving, J., doubted whether the provisions of the Jury Act requiring the above procedure to be taken by the Sheriff were imperative, but he quashed the jury on the ground that twenty persons did not appear from which to select the jury.

The trial was then adjourned until the 26th of June, 1900.

On 26th June, the case was again called when the same counsel for defendants challenged the array on grounds similar to 1 and 5 *supra*, and on the additional ground that the jury panel was not drawn in the presence of both parties or the solicitors for both parties, and no one was present on behalf of the defendants.

Irving, J., without deciding whether the provisions of the Jury Act with reference to the procedure to be followed in summoning a jury are not merely directory, quashed the panel on the ground that it was not drawn in the presence of both parties or the solicitors for both parties, no one being present on behalf of the defendants, and that the Sheriff had not given reasonable notice to the defendants of the striking of the jury.

The trial was adjourned until the 30th of June, when the same counsel for defendants challenged the array on grounds similar to 1 and 5 raised on the first day, and on the additional ground that the Sheriff of the County of Vancou-

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ver gave notice in writing to the defendant's solicitors on Tuesday the 26th day of June, 1900, of the drawing of the petit jury on Wednesday, the 27th day of June, 1900, at the hour of 10 o'clock in the forenoon, and that the said jury was drawn on the said 27th day of June, 1900, at the said hour of 10 o'clock in the forenoon.

IRVING, J., overruled the objections, holding that the provisions of the Jury Act with reference to the procedure to be followed by the Sheriff in summoning a jury are not imperative but directory only.

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RE LAMBERT.

Sunday Observance—Keeping open—Exercising calling—Barber—Vancouver Incorporation Act, 1900, Sec. 125 (20.)—Appeal from County Court sitting as Appellate Court.

The Vancouver Incorporation Act, 1900, empowered the City to pass a by-law to prohibit "the keeping open of barber shops on Sunday," and the City thereupon passed a by-law enacting that all barber shops should be closed on Sunday and that no person should exercise the trade of a barber on Sunday within the City.

Appellant was charged with an offence under the by-law, and before the Magistrate he admitted he had shaved customers on Sunday, and the Magistrate thereupon convicted him of having "kept open."

Held, by IRVING, J., allowing an appeal, that a barber by shaving customers on a Sunday does not necessarily "keep open."

Held, also, that the City has no power to pass a by-law prohibiting a barber from exercising his trade or calling on Sunday.

No appeal lies from the County Court sitting as an Appellate Court from the decision of a Magistrate under the Provincial Summary Convictions Act.

Statement.

APPEAL from a conviction of Joseph Lambert by the Police Magistrate of Vancouver.

An information was preferred by G. W. Isaacs charging that the appellant, on 21st October "did have his barber

shop open between the hours of twelve on Saturday night and five on Monday morning, contrary to the form of the by-law in such case made and provided."

The appellant when called upon in the Police Court to plead to the charge, admitted that he had shaved customers on the Sunday in question, and the Magistrate thereupon came to the conclusion that he had "kept open" and convicted him under the by-law.

The appeal was argued 5th December, 1900, before IRVING, J.

Cane, for the appellant.
Hamersley, for the respondent.

IRVING, J.: I have taken time to examine the authorities cited to me, and as the question raised is one of importance and should be looked at from the point of view as well of the public as of the barbers. The effect of the by-law is to deprive a number of persons of a very great convenience—I use the word advisedly (*Phillips* v. *Innes* (1837), 4 Cl. & F. 234)—and to interfere with the business of a certain class of tradespeople.

Judgment.

In *Palmer* v. *Snow* (1900), 1 Q.B. 725, a decision on 29 Car. 2, Cap. 7, it is said that a barber is not a person who is prohibited by the law of England from exercising his calling on Sunday. Compare R.S.B.C. 1897 Cap. 177 where 29 Car. 2, Cap. 7 is set out.

The Legislature in 1900, conferred on the City of Vancouver power to "prohibit the keeping open of barber shops on Sunday, and during such hours of each night as may be thought expedient."

The Council thereupon passed the following by-law: "All barber shops within the City of Vancouver shall be closed from the hour of twelve midnight of the clock on Saturday night till five of the clock on Monday morning thereafter, and no person shall, during such prohibited

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hours, carry on or exercise the trade or calling of a barber within the City."

It will be noticed that the by-law has gone beyond the statute in declaring that no barber shall, during the prohibited hours, carry on or exercise his trade or calling.

The question for me is whether the Legislature has, upon a proper construction of the language it has employed, authorized the City to pass a by-law in the terms employed in the by-law in question. What it undoubtedly has done is to authorize the Council to pass a by-law prohibiting the keeping open. To prohibit the keeping open is one thing, to forbid the exercise of their calling is another thing and a different. It is quite possible for a barber to exercise his calling and not have a shop at all. I do not see how the City has any authority under the Act to deal with such a case, and yet they have, by the by-law, professed to do so.

Judgment.

Where the Legislature has meant to confer a larger power on the Council, as for example, to regulate or prevent the exercise of any trade or calling, it has usually said so in plain language. (Compare sub-section 96 as to peddlers; sub-section 102 as to bill posters.)

There is nothing in sub-section 20 to shew that a larger interpretation of the language is called for than the words used, in their plain meaning, import.

The Provincial Legislature may very well have said, "For the better observance of Sunday, the City Council may compel barbers' shops to be closed;" but who can say that it was the intention to go further and prohibit a barber from exercising his trade on his premises behind closed doors, or in the private house or rooms of his employers? Mr. *Cane* pointed out many cogent reasons why this power should not be conferred on the Council of a City which is the terminus of a railway and where travellers are continually arriving or departing after or upon long trips upon which shaving or hair cutting is impossible. And, although I am not concerned with the question of expediency, I must

not, in construing the Act, lose sight of the circumstances under which it was passed, and of the locality affected by it. At any rate the Legislature has not used express words to that effect and I think the rule of strict construction applies to the words they have used.

All statutes which encroach upon the rights of a subject, whether as regards person or property, should be interpreted, if possible, so as to respect such rights. The Legislature having, by the use of an ambiguous expression, left a reasonable doubt as to its meaning, the benefit of that doubt should be given to the subject.

Judgment.

Now, as to the facts of this case. The accused when called upon in the Police Court to plead to the charge admitted that he had shaved customers on the Sunday in question, the Magistrate thereupon came to the conclusion that he had "kept open" and convicted him under the by-law. These facts were stated to me on the appeal and my opinion sought as to the validity of the by-law. In my opinion a barber by shaving customers on a Sunday does not necessarily "keep open," and, as no evidence of "keeping open" was given I think the appeal should be allowed.

Appeal allowed with costs.

27th December, 1899.

Mr. *Hamersley* now applies *ex parte* for leave to me for appeal.

There are two ways of appealing from a Stipendiary Magistrate, either to the County Court when the merits can be gone into or to the Supreme Court when a point of law is to be argued.

Judgment.

Prima facie then an appeal to the County Court shews that the accused is not satisfied with the decision reached by the Magistrate on the facts.

In the present case, Lambert appealed to the County

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Court. It came before me on statements made by counsel —*extra cursum curiae*—in order that the validity of the by-law might be discussed.

In my decision I dealt with the by-law as if not divisible and as if devisible—I now assume that it is divisible. What took place before the Magistrate was this—counsel for the accused admitted that he had shaved customers on Sunday. The Magistrate thereupon said "then you kept open" and he entered a plea of guilty. This was stated to me by counsel and not contradicted. Mr. *Hamersley* now tells that the above does not represent all that was done in the Police Court. He now says that the accused then formally pleaded guilty to the charge. This was not stated in the County Court. The fact that the conviction had been drawn up as if the accused had pleaded guilty was brought to my notice, but as soon as it was, Mr. *Cane* said "the accused admitted the shaving but not the keeping open."

Judgment.

If the accused formally pleaded guilty there would have been an end to the matter, but the point I had to decide was the Magistrate right in deciding that an admission by the accused that he did shave was "keeping open." *Cf. The Queen* v. *The Justices of Essex* (1892), 61 L.J., M.C. 120. In my judgment I have endeavoured to point out that there is a difference between the two things. I intimated to Mr. *Hamersley* when he made the application that as I saw no grounds under section 167 for allowing the appeal I must refuse leave to appeal, I now refuse on the following additional grounds:

(1.) There is no appeal as the judgment of the County Court Judge is final and no appeal lies from his decision: section 73 Summary Convictions Act; (2.) assuming the first ground is wrong the matter came before me *extra cursum curiae*, and no appeal lies. *Cf. Burgess* v. *Morton* (1896), A.C. 136.

Application refused.

REGINA v. KING.

BOLE, CO.J.

1900.

Nov. 15.

REGINA v. KING

Practice—Summary conviction—Appeal—Entry of—Recognizance—R.S.B.C. 1897, Cap. 176.

The recognizance required by section 71 (*c.*) of the Summary Convictions Act (Provincial) must be entered into before the appeal can be entered for trial.

Statement.

APPEAL to the County Court from a conviction by G. E. Corbould, Q.C., Police Magistrate of New Westminster. Section 72 of the Summary Convictions Act enacts as follows: "In every case of appeal to any County Court such appeal shall be entered for trial not less than three days before the day on which such Court shall be held, otherwise such appeal shall not be received or heard....." Section 73 provides that when an appeal has been duly lodged in due form, and in compliance with the requirements of this Act the Court appealed to may empanel a jury to try the facts of the case.

Argument.

Dockrill, for the respondent, raised the preliminary objection that the appeal was not duly lodged because *inter alia*, the recognizance required by the Summary Convictions Act, Cap. 176, Sec. 71, Sub-Sec. (*c.*) was not entered into until the 11th of September, 1900 (the day the Appellate Court sat), while the entry of the appeal was made on the 31st of August

Henderson, *Q.C.*, and *Jenns*, for the appellant, relied on the fact that no time is fixed for giving the recognizance and therefore it was in time as it was entered into and filed on the morning of 11th September, before the Court sat, and that in any event the postponement of the appeal was a waiver of proof of the appeal.

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BOLE, Co.J.: In *Regina* v. *Crouch* (1874), 35 U.C.Q.B. 433 at p. 437-8, per Richards, C.J., "The practice in relation to appeals is thus laid down in Dickenson's Guide to the Quarter Sessions, 6th Ed., 639.—'The notice of appeal as well as the entry into recognizance, if required by statute as conditions precedent to the right of appeal, must next be proved or admitted, whether it is intended to try or only to move to respite the hearing; for, till it is made to appear to the Court that the appeal is duly lodged at the proper Sessions, as well as that due notice has been given, and recognizance entered into where so required by the Act applicable to the appeal, then jurisdiction to hear or adjourn it will not attach..... A respondent may so waive proof of appeal, or admit it so as to make proof unnecessary.'"

In this case respondent's counsel did neither, but on the contrary called attention of the Court to the fact that the appeal was not duly lodged and the adjournment was granted with the distinct understanding that strict proof of all conditions precedent to appellant's right of appeal should be proved whenever the hearing of the appeal was proceeded with. *Vide* further, *In re Meyers and Wonnacott* (1864), 23 U.C.Q.B. 611 and *Kent* v. *Olds* (1860), 7 U.C.L.J. 21.

Judgment.

It seems to me that in as much as on 31st August, when the appeal was entered for trial, the appellant had not entered into the recognizance contemplated by the statute, was not then in custody or had not deposited any money in lieu of security, the appeal was not entered for trial in accordance with the true intent and meaning of the Act and not lodged in due form. *Vide The Ganges* (1880), 5 P.D. 247. The words of section 72 are distinctly imperative and to my mind clearly indicate that no appeal can be received or heard unless the appeal is at the time of such entry one lodged in due form as required by the Act.

I am therefore of the opinion that the appeal cannot be entertained. All questions of costs are reserved for argument and further consideration.

LEBERRY v. BRADEN.

McColl, C.J.
1900.
Sept. 4.
Leberry v. Braden

Practice—Ex parte restraining order.

An *ex parte* restraining order made by a Local Judge must be obeyed until set aside.

MOTION to commit for contempt. The plaintiff brought action to recover possession of business premises, chattels and books of account used in connection with the business as lessee and assignee from the defendant, James Braden. After the issue of the writ the plaintiff on *ex parte* application to the Local Judge in Chambers obtained an injunction restraining defendant, James Braden, his servants, agents and employees from in any way interfering with the plaintiff's possession of certain premises, which the plaintiff alleged to have been put in possession of by the defendant, James Braden, before action. After the service of the restraining order on James Braden and his son, Thomas J. Braden, the latter entered upon the premises, forcibly destroying locks put there by the plaintiff, and assaulted plaintiff's agent. The plaintiff then moved to commit the defendant and Thomas J. Braden for contempt.

Statement.

Dockrill, for the motion.

Cutten, contra, contended that the injunction was altogether too broad and not authorized by the indorsement on the writ; that the writ and injunction assumed trespass on the lands and goods in possession of the plaintiff, whereas plaintiff never was in possession of them; that there was no cause of action set forth in the indorsement on the writ except detinue for the books; that an attempt was being made by plaintiff to use the restraining process

Argument.

McCOLL, C.J.
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of the Court to obtain possession of lands and goods instead of resorting to an action to recover lands and an action of replevin.

McCOLL, C.J., held, that however erroneous the order of the Local Judge might be, the defendant must obey the order until it was got rid of by application to the Court.

Judgment.

Order made committing defendant and Thomas J. Braden to gaol for one month, and unless costs of the motion were paid, for a further period of one month.

FULL COURT
At Vancouver.
1900.
Dec. 19.

ANDERSON
v.
GODSAL

ANDERSON *ET AL* v. GODSAL.

Mechanics' Lien—Mineral claim—Work done at request of holder of option—Whether or not lien lies.

Defendant, a mine owner, gave C. an option to buy a mine for $25,000.00, with liberty to work it, the net proceeds to be applied towards payment. The plaintiffs claimed liens for labour while employed by C. in working it under the agreement. C. did not exercise his option.

Held, by the Full Court (IRVING, J., dissenting), that the plaintiffs were not entitled to liens under the Mechanic's Lien Act.

There is no lien given for cooking under the Act.

Statement.

APPEAL by defendant from the following judgment of Forin, Co.J., in an action (tried 8th January, 1900) to enforce mechanics' liens:

2nd February, 1900.

Judgment of FORIN, CO. J.

This is an action brought to enforce mechanics' liens for work done on the Little Phil mineral claim.

One Thomas A. Coleman, took what is called a working bond on the property, that is he obtained from the owner, the defendant Godsal, the privilege of working the mine

and from the proceeds he was to pay the expenses and Godsal was to be paid $25,000.00 from the net proceeds as the purchase price of the mine. Coleman was to mail to Godsal on the 10th day of each month full and detailed statements of the work.* It appears from the evidence that Coleman hired men to work at the mine, that it was generally known that Coleman had no money of his own to pay the men, and the impression was that he was Manager for the owners. On the other hand Coleman says he hired the men to work for himself in pursuance with the agreement.

The wages of the men being due and unpaid they filed liens under the Mechanics' Lien Act, R.S.B C. 1897, Cap. 132.

There is no dispute as to the amount of wages due to the men, and the only objection to the form of the liens filed was that the residence of the claimant and owner was not sufficiently stated. The claimants are working men, who after leaving the mine, came to Nelson and through their solicitors filed the liens. I am of opinion that in a small town like Nelson that the residence is sufficiently stated as residing in Nelson. These men had no place of residence in the town, living at hotels and restaurants from day to day. The owner is stated as of Pincher Creek, N.W.T. It is I am sure a much smaller place than Nelson, a small village I understand, so the rule which might apply to a large city as to giving the street and number of the residence would not apply to small towns and villages.

The main argument advanced by the defence was that the bond was really a lease and that only the lessee's interest was liable for unpaid wages. He cited some cases from Barringer and Adams' Law of Mines.

*It was also provided by the agreement that Coleman might include as part of the expenses of working the claim, $100.00 a month for his services as superintendent, and either party was at liberty at any time to employ a mining engineer to report and advise regarding the working of the claim, the expenses thereof to be reckoned as part of he expenses of the mine

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I do not consider the bond in question partakes of the nature of a lease. In the interpretation clause sub-section 3, the word owner is defined.

In *Holden* v. *Bright Prospects Gold Mining and Development Co.* (1899), 6 B.C. 439, the Full Court has decided that a lien for mining work can be claimed.

Section 4 provides for work in a mine and section 7 enacts that the owner of lands having knowledge is deemed to have authorized the improvement (as to meaning of improvement see sub-section 4, section 3.)

Judgment
of
FORIN, CO.J.

Coleman says in his evidence that he advised the owner every month how work was progressing, thus bringing the owner within section 7 as to knowledge. Further, no notice was posted on the land that the owner would not be responsible.

I am of opinion that the liens should be enforced against the mineral claim. I accordingly gave judgment for the plaintiffs with costs.

The appeal came on and was partly argued at Vancouver before McColl, C.J., Walkem, Irving and Martin, JJ., on 28th and 29th May, 1900. The Court requiring further argument on some points, the appeal was re-argued at Vancouver on 23rd November, 1900, before McColl, C.J., Drake, Irving and Martin, JJ.

Davis, Q.C., and *Whealler*, for appellant.
Duff, for respondents.

19th December, 1900.

McColl, C.J.: The defendant, a mine owner, gave to one Coleman an option to buy it for $25,000.00. He was to be at liberty to work it; and, if he did so, the net proceeds were to be applied in or towards payment of the price.

Judgment
of
McColl, C.J.

He agreed, if he worked it, to keep at least ten men constantly employed. No other provision was made for the working of the mine.

The plaintiffs are labourers, and claim liens for work done in the mine, while employed by Coleman in working it under the agreement. He did not exercise his option.

It is not clear upon the notes of the evidence whether the work was stoping or was development work; but assuming that it was of such a kind as to have been within the Act, yet, in my judgment, none of the claimants is entitled to the lien claimed. It is admitted that none of them worked at the express request of the owner, and that no request by him can be implied in the circumstances. Section 4 therefore does not apply.

But it is contended that the claimants are within section 7. To entitle them to succeed under this section it is necessary to construe the words "at the instance" to mean "at the request" and to apply them to the persons doing the work instead of to the work itself. And even this is insufficient without extending the words of the section to the case of work actually done at the instance of the owner and so wiping out the provision in section 4. But this would be to make the benefit of the Act wholly illusory for the owner in order to escape altogether from it would only have had to give the notice provided for.

Section 7 does not in terms apply to, nor, in my opinion was it intended to include, work done at the instance of the owner already provided for by section 4. I know of no principle upon which an enactment that a certain thing is to be held or deemed to be the act of a person ought to be construed to apply to the person whose act it in fact is; nor is it easy to understand why a lien claimant, not having worked at the request of a supposed owner, should be in a better position than if the work had been done at the instance of the owner himself.

It seems to me plain that section 7 only applies where the owner has not authorized the construction of the building or other improvement, and was intended to provide for the case of work done under an agreement with a supposed

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owner, and to place persons engaged in such work in the like position as regards a lien as if the supposed owner was the actual owner whenever the latter, knowing that an improvement was being made upon his land, not under any agreement with himself but at the instance of some person assuming to act as owner, stands by saying nothing.

I have not thought it necessary to discuss the case of the cook, who, admittedly, cannot recover.

I must remark upon the circumstance that a form of affidavit common to all the cases in appeal was apparently adopted for the purpose of bringing the claimants within the Act without regard to the facts. It seems to me that the trial Judge in such a case might properly require some explanation at the trial, and, failing a satisfactory explanation, deal further with the matter.

Judgment
of
DRAKE, J.

DRAKE, J.: The defendant is the owner of a mining claim known as the Little Phil mineral claim. On the 1st of June, 1899, he entered into an agreement with Thomas W. Coleman to sell the claim on certain conditions. Coleman had leave to enter and extract ore, and keep at least ten men constantly employed, and the net value of the ore was to be paid into the defendant's account to go against the purchase money; but it was optional with Coleman whether he would complete the purchase or not. Coleman worked the mine for some time, and then threw it up, leaving several workmen unpaid, who thereupon filed liens against the mine. The question is whether under the construction of the Mechanics' Lien Act Godsal's property is liable for the liens.

First I will consider who is entitled to a lien. Every contractor, sub-contractor or labourer, doing work *inter alia* in connection with excavating, filling or grading any land in respect *inter alia* of a mine at the request of the owner of such land shall have a lien for the price of such work upon the buildings, and the land and premises occupied

thereby, subject to the proviso that such lien shall affect only such interest in the said land as was vested in the owner at the time the contract was made, or any greater interest which the owner might acquire during the progress of the works.

The governing sentence here is the request of the owner. Work done without such request does not give a lien. We then turn to the description of owner. In its primary meaning, it means the person in whom the property on which the work was done is vested, but the Act extends the meaning so as to include a person having any estate or interest, legal or equitable, in the lands upon which the work has been done, or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work is done. Apply this definition to the facts here. Coleman had an equitable estate in this land at the time the work was done. It was for his benefit and at his request the work was done. The request of Coleman to the workmen was not the request of Godsal, and the Court has to be satisfied that Godsal either directly or indirectly contracted with the lien holders. The Act is one which must be construed according to the language used, and not extended to cases which are not within the scope of that language. The Act specially provides for works done on mortgaged premises, and gives a formula for ascertaining to what appreciated value the liens are to attach. But even here the assent of the mortgagee in writing must be given.

Then we come to section 7. That section makes the owner, or his agent, or the person having any right in the land, liable for liens unless he gives notice of non-responsibility. To construe this section as meaning that any owner could avoid the Act altogether by giving notice, would render the Act void. To construe it so that under any circumstances the work will be held to be done at the instance of the owner, whether he requested it or not, conflicts with section 4. I think the meaning of the section is limited to

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those cases where when improvements are done upon land by mistake the owner stands by in order to take advantage of the work done. In such cases the work shall be held to be constructed at the instance of the owner.

The Legislature draws a distinction between the owner and his authorized agent and the person having, or claiming, any interest in the land. Coleman falls into the latter class. He had an interest in this land at the time the work was done. The description of the owner and the person claiming any interest in the land is in the disjunctive, thus making a distinction between the two classes. This section read with the proviso in section 4 renders it reasonably clear that the interest of Coleman which he had during the time the work was going on was liable to the lien, and not the interest of the owner who was bound to convey to Coleman on certain conditions being fulfilled.

Judgment of DRAKE, J.

I notice in all the affidavits that the lien holders do not hesitate to say that they were employed by McLaren as foreman for the defendant. This is contrary to the fact, as the time checks shew. Such mis-statements in affidavits filed for the purposes these were, deserve the severest reprobation.

In my opinion the appeal should be allowed with costs.

IRVING, J.: I have arrived at the conclusion that by section 7 of the Act the defendant Godsal must be taken to be the person "at whose instance" the work in respect of which the lien is claimed, was done. In construing that section we must, in my opinion, extend the words "other improvements mentioned in the fourth section" by referring to that section and seeing there what the "other improvements" are. In terms, we find "excavating land in respect of a mine," and those words seem to me to be applicable to the present case.

Judgment of IRVING, J.

With regard to Godsal's liability—the agreement between him and Coleman provided for Coleman doing the work

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continuously with a stated number of men—in a miner-like manner—subject to the inspection of Godsal's engineer, with power to Godsal to take possession if he was dissatisfied with the work. How can it be said that this work was not done for Godsal's direct benefit?

MARTIN, J., concurred with the Chief Justice.

Appeal allowed.

NELSON AND FORT SHEPPARD RAILWAY CO. v. DUNLOP.

IRVING, J.
1900.
Oct. 31.
NELSON AND FORT SHEPPARD RAILWAY CO.
v.
DUNLOP

Mining law—Injunction instead of adverse claim.

Plaintiffs held a Crown grant dated 8th March, 1895, of certain lands from which there were excepted "lands held prior to 23rd March, 1893, as mineral claims." Defendant held certificate of improvements dated 14th August, 1899, and plaintiffs being apprehensive as to form of Crown grant to be issued to defendant applied for injunction restraining him from applying for and receiving Crown grant.

Held, dismissing the motion, that the policy of the Mineral Acts is to compel persons claiming adversely to an applicant for a Crown grant to commence action before a certificate of improvements is obtained.

Statement.

MOTION for injunction argued before IRVING, J., on 30th October, 1900. The facts appear in the judgment.

Martin, Q.C., for the motion.
Bodwell, Q.C., contra.

IRVING, J.

1900.

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NELSON AND FORT SHEPPARD RAILWAY CO. v. DUNLOP

31st October, 1900.

IRVING, J.: The defendant is the holder of a certificate of improvements dated 14th August, 1899, in respect of a mineral claim located the 21st of August, 1890, recorded the 25th of August, 1890.

The plaintiffs, who hold a Crown grant dated 8th March, 1895, issued under the provisions of the Nelson and Fort Sheppard Railway Subsidy Act, 1892, of certain lands in Kootenay described in the schedule to the said grant, but from which said grant there is excepted "lands held prior to the 23rd of March, 1893, as mineral claims"—obtained *ex parte* from the learned Chief Justice an injunction restraining the defendant Dunlop from applying for a Crown grant to the Pack Train mineral claim and from receiving the same until the 23rd of October, and until the motion then to be made to continue the injunction shall have been heard and determined.

The plaintiff now by consent moves to continue the injunction to the hearing. At the argument it was conceded that the defendant was entitled to a Crown grant of some sort or other. It was as to the form of the Crown grant that the plaintiffs were apprehensive. The defendant says that he is not aware of the extent of surface right, if any, attachable to the mineral claim, but that he expects to receive whatever surface right is properly attachable or incident to a Crown grant issuing under the circumstances of this case.

Judgment.

The application must be refused because the plaintiffs have not been prompt. The policy of the Mineral Acts is to compel persons claiming adversely to an applicant for a Crown grant, to come into Court before the certificate of improvements is obtained, which certificate is to shew on its face what the applicant shall in the opinion of the Court be entitled to possess.

By statute originally section 37, of Cap. 34 of 1896, the plaintiffs were required to commence their action within

sixty days to determine the right of possession, or otherwise enforce their said claim. They should have taken advantage of this procedure or in the case of an action already pending by injunction (see *Stannard* v. *Vestry of Saint Giles, Camberwell* (1882), 20 Ch.D. 190) as suggested in *Nelson* v. *Jerry*, 5 B.C. 396, in June, 1897, when Dunlop advertised in respect of the Pack Train, or at any rate before the certificate of improvements was issued.

Mr. *Martin* contends that they could not oppose the issuing of that certificate and therefore this section does not apply—but observe the words of the Act—they are not confined to the opposing of certificates, but deal with an adverse right of any kind, either to the possession of the mineral claim or the minerals therein, and it is obvious from the subsequent wording of the section that the judgment or decree is to be modified so as to shew what the applicant is entitled to.

The application is refused with costs.

Application refused with costs.

IRVING, J.

1900.

Nov. 30.

WARMINGTON v. PALMER

WARMINGTON v. PALMER AND CHRISTIE.

Employers' Liability Act—Negligence—Defective machinery.

In an action by a miner against the mine owners for damages for injuries caused him by being precipitated to the bottom of a shaft when at work in the mine, the jury found *inter alia* that the system adopted for lowering the men was faulty and that the plaintiff did not comply with the printed rules of the mine.

Held, that the plaintiff was entitled to judgment although adherence by him to the rules would have prevented the accident.

Statement.

ACTION under the Employers' Liability Act to recover damages for personal injuries sustained by the plaintiff by falling down the shaft of the defendants' mine, known as the Marble Bay mine. On 7th May, 1900, the plaintiff was working in the defendants' mine as a miner and in the course of his employment as such miner had occasion to come up to the surface for blasting material. Before descending the shaft he went to the engine room to get paper for tamping and as he left he said to the engineer who was standing by the engine, "Frank, I am going down now" (this however the engineer denied). The plaintiff then walked straight over to the shaft (about 75 feet distant) and stepped into the bucket, but before he could raise his hand to notify the engineer to lower, the bucket fell and precipitated the plaintiff to the bottom of the shaft. After the plaintiff left the engine room the engineer, it appears, left the brake-handle for a moment to attend to some other part of the engine, and there being no catches on the brake-handle, the weight of the plaintiff in the bucket caused it to slip, with the result already stated. There was no regular topman employed at the mine, but the duties of a topman were supposed to have been performed by the foreman. It

was the custom at the mine at the time of the accident when the miners wished to descend the shaft, to notify the engineer verbally or by the raising of the hand, instead of the giving of the bell signals provided for in the printed rules of the mine. The statement of claim alleged that,

"(5.) Through the negligence of the said Palmer and Christie, the bucket, rope, shaft, engine, friction-brake and other machinery and appliances used for the purpose of hoisting and lowering in the said shaft were defective and not properly fitted for the work they had to perform, and such defects and negligence led to the accident set out above.

"(6.) Through the negligence of the said Palmer and Christie, their servants and agents, there was no safe and proper system of raising and lowering men in the said shaft employed in the said mine and the accident in question was caused by the dangerous method adopted for that purpose by the said Palmer and Christie.

"(7.) One Frank Viles, was the engineer in charge of the hoisting engine at the time of the said accident and the said hoisting apparatus, appliances and machinery were under the charge and control of the said Viles, and it was owing to the negligence of the said Viles while in such charge as aforesaid, that the plaintiff suffered the accident above set out."

Statement.

The defendants traversed all the allegations in the statement of claim and in addition set up,

"(1.) The plaintiff was guilty of contributory negligence.

"(2.) He had violated the rules of the mine.

"(3.) If the accident was the result of negligence it was the negligence of a fellow-servant engaged in common employment, and

"(4.) The plaintiff undertook voluntarily for valuable consideration all the risks and dangers connected with his employment."

The action was tried at Vancouver on the 13th, 14th,

IRVING, J.
1900.
Nov. 30.

WARMINGTON v. PALMER

15th and 16th of November, 1900, before IRVING, J., and a special jury.

Davis, Q.C., and *Marshall*, for the plaintiff.

Wilson, Q.C., and *J. H. Senkler*, for the defendants.

The findings of the jury were as follows:

(1.) Were McCready, Viles and Prendergast or any of them competent persons to fill the positions which they respectively occupied? Yes.

(2.) Was the defendant Palmer personally aware of the condition of the engine, hoisting engine and apparatus? Not sufficient evidence to shew that he was.

(3.) Was the system adopted for lowering the men and the machinery used for that purpose reasonably fit and proper? System faulty. (See clause 6).

(4.) Was Prendergast negligent in the exercise of his superintendence as topman? Yes.

(5.) Was Viles negligent in the exercise of his superintendence as engineer? Yes.

(6.) Was the hoisting engine defective in not having the catches (or at least one of them) which were put on after the accident? Yes.

Statement.

(7.) Is the plaintiff's statement that he said to the engineer, "Frank, I am now going down," correct? Yes.

(8.) Did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances, and thereby contribute to the accident? No.

(9.) Was it usual for the miners, when descending from the surface, to signal the engineer by means of the bells? No.

(10.) If the defendants were guilty of negligence, did the accident result therefrom? Yes.

(11.) The amount of damages, if any? $4,000.00.

(12.) Was the engine and brake taken as a whole, reasonably fit for the purpose for which it was applied? No.

(13.) Would the accident have been avoided if the plaintiff had exercised ordinary care? No; we believe he did exercise ordinary care.

(14.) Did the plaintiff voluntarily undertake the employment with a knowledge of its risks? He undertook the employment with a knowledge of an ordinary miner's risk.

(15.) Was the plaintiff acquainted with the printed rules of the mine including the bell signals? Yes, in a general way.

(16.) Did he fully comply with the said printed rules on the occasion of the accident? No.

On 30th November, the following judgment was delivered by

IRVING, J.: I have been much concerned over the 16th finding: apart from that, I think the answers to the questions point to a judgment in favour of the plaintiff.

Having regard to the facts proved, if the plaintiff had adhered to the printed rules, the accident could never have happened.

But I think I must be governed by the finding of the jury with reference to the "system adopted," which system as shewn by answer No. 3, was faulty.

The very fact that there were certain rules and that they were systematically ignored is some evidence of the want of proper system, or of no system at all, which is very much the same thing.

Judgment.

Having disposed of that point and the jury having acquitted the plaintiff of contributory negligence (8 and 13), what remains? Defective machinery and faulty system, and negligent fellow-servants. We can leave the last out and there still is sufficient to support a judgment for the plaintiff.

Judgment for plaintiff with costs.

WALKEM, J.

1900.

Nov. 6.

LAWR v. PARKER

LAWR v. PARKER.

Mining law—Assessment work—Sections 24, 28 and 53 of the Mineral Act.

The plaintiff, owner of the Rebecca mineral claim and having an interest in the Ida, an adjoining claim, performed the assessment work for both claims on the Ida, as he believed, but in reality as shewn by subsequent survey, a few feet outside the claim, but did not file the notice required by section 24 of the Mineral Act with the Gold Commissioner, who told him the work on the Ida would be regarded as done on the Rebecca. Plaintiff received in August, 1899, a certificate of work in respect of the Rebecca, and in his affidavit stated that the work was done on the Rebecca.

Held, in ejectment, that the plaintiff, being misled by the Gold Commissioner, was protected by section 53 of the Act.

The omission to file the notice required by section 24 of the Act, and the incorrect filling up of the affidavit were irregularities which were cured by the certificate of work.

Statement.

ACTION of ejectment tried at Nelson before WALKEM, J., on 2nd November, 1900. The facts fully appear in the judgment.

S. S. Taylor, Q.C., for plaintiff.

Galliher, for defendant.

6th November, 1900.

Judgment.

WALKEM, J.: The plaintiff located and recorded a mineral claim, near Nelson, named the Rebecca, in 1898. The same ground, or, nearly so, was subsequently located as the Blue Jay by a miner through whom the defendant claims title. The defendant's counsel called no witnesses at the trial, on the ground that the defects in the plaintiff's title were such as to call for a dismissal of the action.

These defects, which are of an exceptional character, occurred owing to mistakes made by the plaintiff with reference to the annual assessment work required to be done on a mineral claim to preserve it from being "deemed vacant and abandoned" under section 24 of the Mineral Act.

The ground in dispute is on the slope of Morning mountain which overlooks the City of Nelson, and was located by the

plaintiff on the 18th of August, 1898, as the Rebecca and as an extension of the Ida in which he had an interest. The due location of the Rebecca is not contested. Under the circumstances mentioned, the plaintiff, who is illiterate, asked the Gold Commissioner, Mr. Turner, if his assessment work on the Ida would be regarded by him as assessment work impliedly done on the Rebecca, and that officer, as he states, said it would: see section 24 of the Act. This has not been denied, although Mr. Turner was, at the time of the trial, within call at the instance of the defendant if his counsel doubted the fact. I must, therefore, assume that it was true. But counsel, in substance, contends that whether it was true or not, a consent on the part of the Gold Commissioner that the benefit of any work done on the Ida should extend to, and protect the Rebecca, amounted to nothing as it was the duty of the plaintiff, if he wished to acquire such a benefit, to file, as required by section 24, a notice of his intention to do his assessment work on one or other of his adjoining claims; and that as no such notice had been filed, the Rebecca had not been protected, by any work alleged to have been done on the Ida, and must, consequently, be deemed to have been abandoned: see section 24. There are two answers to this contention. The first is that as the plaintiff was misled, no doubt unintentionally, by the Gold Commissioner, he is not to be prejudiced by that circumstance, for section 53 says that "No free miner shall suffer from any act of omission, or commission . . . . . on the part of any Government official, if such can be proved;" and to my mind an act of commission as it were, has been proved. The second answer is that as what was done was a mere "irregularity" it was cured by the certificate of work which the plaintiff subsequently received from the Recorder for the Rebecca, *viz.*, in August, 1899, and which he duly recorded; for by section 28 "Upon any dispute as to the title to any mineral claim, no irregularity happening previous to the date of the record of the last certificate of work shall effect the title thereto, and it shall be assumed that up to that date the title to such claim was perfect, except upon suit by the Attorney-General based upon fraud."

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The next objection is that the affidavit made by the plaintiff for the purpose of obtaining the above mentioned certificate of work on the Rebecca, is untrue, inasmuch as it states that the work was done, contrary to the fact, on the Rebecca. This affidavit was made in the office of the Recorder at Nelson, and on his advice; for, before the plaintiff made it, he told the Recorder that the work had not been done on the Rebecca but on the Ida, and that, by leave of the Gold Commissioner, it was to be considered as assessment work on both claims. And he, thereupon, asked the Recorder how he should fill up the blanks in the statutory form of affidavit handed to him by that officer, and was told that it would be sufficient if he simply stated that the work was done on the Rebecca, and that such a statement would be satisfactory; and the plaintiff accordingly made it, and received the certificate. A gentleman, named Inskip, happened to be present at the time, and he fully confirms the plaintiff's evidence in this respect. The plaintiff was thus misled by the Recorder, and such being the case, section 53 which I have above quoted, protects him. Moreover, in view of the facts stated, I regard the incorrect filling up of the affidavit, as a mere irregularity. What the plaintiff ought to have stated, and the Recorder should have so informed him, was, in effect, that the work was done on the Ida as assessment work for the Ida and Rebecca, by permission of the Gold Commissioner. I would also observe that I wholly absolve the plaintiff from any intention to misstate the facts in his affidavit; for he gave his evidence upon this, and other matters, in a manner that was perfectly frank.

Judgment.

The third objection is that the work alleged to have been done on the Ida, which was the sinking of a shaft, ten feet deep in solid rock, was not done on that claim, but was done on a fraction alongside of it, which had been located by a surveyor. The shaft is about twenty feet north of the Ida's upper line and at a distance laterally, and to the left of the No. 1 post of the Ida of about three hundred feet. As the Act only requires the location line of a claim to be defined by stakes, and, hence requires no boundary posts to be placed at the ends of either the upper, lower, or side lines, the mistake made by the plaintiff is an excusable one It only came to his knowledge recently through

a survey being made by the surveyor referred to with a view of ascertaining the Ida's upper line, as it was the dividing line between that claim and his fractional claim. The plaintiff, of course, loses his shaft, and the surveyor gets the benefit of it; and I consider that it would be an extremely harsh measure if I further punished him by depriving him of his claim, as I am virtually asked to do, in consequence of his inadvertent and costly mistake. The shaft was evidently sunk in good faith, and with a view of fulfilling the provisions of the Act which requires annual assessment work of the value of at least, $100.00 to be done on every location; and having regard to this fact, I consider that the plaintiff virtually complied with the spirit of the provision referred to, notwithstanding his mistake. As I have pointed out in *Peters* v. *Sampson* (1898), 6 B. C. 405, one of the cardinal principles of the Mineral Act, as appears in many of its sections, is, that a miner is not to be deprived of his claim in consequence of inadvertent mistakes such, for instance, as those I have been considering. The defendant has not alleged that he has been misled by them; nor has he shewn any merits, for as I have already stated, no evidence was put in on his behalf.

Judgment.

Apart from all this, the attack made upon the plaintiff's title, is, manifestly, in substance, a charge that he obtained his certificate of work by fraud, or in other words, by means of a false affidavit. Now, even if this were true, the certificate could not, according to section 28, be set aside, except fraud in obtaining it was proved in a suit brought by the Attorney-General. But, it is not true; for I have already shewn that the plaintiff was wholly blameless for the mistake in his affidavit and that the Mining Recorder was responsible for it, and that this last circumstance would, under the Act, of itself absolve the plaintiff from blame. I have no hesitation in saying that perjury could not be assigned as against the plaintiff on the affidavit mentioned, as there was an absence of a *mens rea* on his part when making it; and perjury would be the test of whether the affidavit was fraudulent or not.

The plaintiff is, in my opinion, entitled to judgment in his favour, with costs.

Judgment for plaintiff with costs.

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Mineral claim—Defects in location of—No. 2 post—Mistake in giving approximate compass bearing of—Whether cured by subsequent certificate of work.

The defendant's mineral claim Cube Lode was located in May, 1892, and duly recorded and certificates of work were issued in respect of it regularly since.

The plaintiff in 1896, located and recorded the Cody Fraction and the Joker Fraction claims on the same ground and attacked the defendant's location on the ground that upon the initial post the "approximate compass bearing" of No. 2 post was not given as required by the Act. The compass bearing was east by north and not south-easterly as stated on No. 1 post.

Held, by the Full Court (IRVING, J., dissenting), reversing MARTIN, J., that the irregularity in locating was not cured by a certificate of work.

Held, per DRAKE, J., that section 28 of the Mineral Act cures only irregularities arising after location and record and which do not go to the root of the title.

Statement.

APPEAL to the Full Court from the judgment of MARTIN, J., reported in 6 B. C. at p. 523.

The appeal was argued at Vancouver on 20th, 21st and 22nd September, 1899, before WALKEM, DRAKE and IRVING, JJ.

Sir C. H. Tupper, Q.C., and *Peters, Q.C.*, for appellant.
Hamilton, for respondent.

30th November, 1899.

Judgment of DRAKE, J.

DRAKE, J.: The defendant located the Cube Lode on 24th May, 1892, in the name of W. G. Coplen. He put in post No. 1, and he wrote on it "Initial Post" and the approximate compass bearing to No. 2 post, and a statement that he claimed 1,500 x 1,500 to the right of the line thus defined.

There was a post put up in the direction indicated by the compass bearing some 1,200 feet distant. On that post, according to the evidence, was written "No. 2 post Cube mineral claim located 24th May, 1892," and signed W. G. Coplen. The defendant says that this was a post put up by him for the Summit claim,

and that the word Summit had been erased and Cube instituted.

The Act, Sec. 16, says all the particulars required to be put on No. 1 and 2 posts shall be furnished to the Mining Recorder in writing, and form part of the record of such claim. The Act further says, that No. 1 and 2 posts shall govern the direction of one side of the claim.

The defendant recorded the claim as follows:—"Situate on top of divide between Sandon Creek and Cody Creek, thence along a blazed line in a south-easterly direction to stake No. 2 adjoining the Bridgett and Freddy Lee claims; the direction of side line is south-easterly; the claim is 1,500 feet square. Lies on right of side line."

One of the difficulties that has arisen in this case is inserting the words "adjoining the Bridgett and Freddy Lee claims." In the first place there is no record of a Bridgett claim, but there is one of a Budgett claim. Secondly, does the record mean that post No. 2 is adjoining these claims, or that the side line adjoins these claims? The statute requires the approximate compass bearing of the side line and does not require the locator to add the names of other claims. The approximate compass bearing is the governing indication. If this is omitted, and the names of other claims in the neighbourhood inserted, the location would not comply with the Act. If the compass direction appears, but in addition other claims are mentioned as indicating the line which do not agree with the compass bearing, the latter governs. That is the case here. The compass bearing is given as south-easterly and there is a post there, but the defendant says that this is the Summit post which has been tampered with and the name of the claim altered. The evidence on this head is incomplete and unsatisfactory.

The defendant alleges his post is in an entirely different direction, north of east, a difference of over eighty degrees, and on that post which was planted some 1,200 feet or more on ground belonging to the Chicago claims the following writing appears:

"Original No. 2 Cube Lode, A. D. Coplen. No. 1 post stands North-Westerly. Claim Lies to left of line from No. 2 to No. 1; May 24, 1892."

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The defendant urges that there must be some occult reason for this peculiar wording. The Act only requires No. 2 post to contain the name of the mineral claim, name of locator, and date of location. It does not require the compass direction which is to appear on the No. 1 post, and it does not require "Original." The plaintiff suggests that it arose from the fact that the defendant had discovered that if the line ran as recorded from No. 1 to 2 south-east, it would not touch the ground the defendant has been working on, and that it is evidence of a change of posts, or of a new post being inserted. The Act does not require a compass bearing on No. 2, as the claim is to be surveyed from No. 1 and in accordance with the compass directions written thereon. No. 2 post can be moved by the surveyor along the indicated line if it is more than 1,500 feet away, but it cannot be extended. The measurement therefore is taken from No. 1 to No. 2 and not *vice versa*, and a compass bearing on No. 2 post cannot alter the direction indicated on No. 1 post.

The learned trial Judge did not find that the defendant had fraudulently set up a second No. 2 post, but considered it was strong circumstantial evidence in support of the plaintiff's view.

Judgment of DRAKE, J.

While on this head it may not be improper to remark that the defendant preferred to rely on his suggestion that the No. 2 post in the top of the divide had been tampered with, rather than bring the post itself into Court for a critical examination; neither did he bring the man who had been doing the assessment work for some years, and who might be presumed to have some knowledge of it. In fact witness W. A. Bauer at p. 20 gives the writing on this post as follows:

"Stake No. 2 of the Cube Lode; this claim runs north to Stake 1.....is 1,500 ft.....1,500 ft. Cube Lode located..... May 24. W. G. Coplen, May 24."

This is as far as the witness could decipher it, and the post is south 23.40 east, nearly S. S. E., and both posts 1 and 2 are on the top of the divide which is from 150 to 250 feet wide, and there is a fairly blazed line between posts 1 and 2, and this tallies with the record which describes the claim as situate on the top of the divide between Sandon and Cody Creeks. If the

claim ran down the hill as claimed it would not be described as on top of the divide.

The defendant was a prospector of some years standing, and one who had taken up numerous claims in the neighbourhood, and he was quite conversant with the statutory requirements. On this branch of the case I have come to the conclusion that the No. 2 post on the top of the divide in a south-easterly direction from No. 1 is the correct post of the Cube Lode mineral claim; and the claim itself lies to the right of that line. On the other branch of the subject it appears that the defendant has obtained a certificate of work through the labour of one Fry, to whom W. E. Coplen sold part of the claim.

The plaintiff has also obtained his certificate of work on the same ground as that on which the defendant has worked. Section 28 says that the title to the claim in dispute shall be assumed to be perfect in respect of any irregularity happening prior to the record of the last certificate of work.

There is no suggested irregularity in the plaintiff's title to the Cody and Joker fractions, therefore his title should be assumed to be perfect, and the defendant relies on the same language to make his claim good. This assumption of good title applies with equal force to both parties, therefore it is clear that the intention of the section cannot be that the record of work shall be conclusive evidence of perfect title. In my opinion it only purports to cure little irregularities which may arise in various ways after location and record, and which do not go to the root of title. The section may be a valuable protection against a claimant who has not obtained any certificate of work. It is contended, and the argument goes to this extent, that if any one obtains a certificate of work he can thereby establish a bad title against all the world, and any neglect of statutory duties relating to the staking and recording the claim can be cured. For instance, if a claim has been located and recorded in accordance with the location posts and compass bearings, and the locator does work on land not touched by his record he can get a title, but to what ground? Can it be to ground never taken up? Can it be to a portion of the public lands of the Crown? If so,

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what are the boundaries? Who can define or direct them? This shews the fallacy of this argument. The statute intends that a claim which has been properly taken up and properly recorded shall be assumed to be perfect, except for fraud. If a claim is not properly taken up and recorded it never becomes a mineral claim. There is no title that can be rendered perfect by a certificate of work. On the other hand if a mineral claim has been properly and legally located and recorded, and subsequently some neglect has occurred or slip happened which does not affect the original title, then the fact that a certificate of work has been given will validate such neglect or slip.

Here the defendant has established his No. 1 post and has defined the direction of his No. 2 post in a south-easterly direction. This is in accordance with sections 14 and 15 of the Act, 1892, and those sections are compulsory in defining the mode of staking a claim, and any error as alleged here in the compass bearing is undoubtedly calculated to mislead other prospectors. The defendant has to all intents a good claim to the land he has located as far as it was open to location. If the locator is wrong as to the compass bearing he cannot rely in case of dispute on the description of other claims as overruling the compass bearing.

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The compass bearing must be approximate. It is not necessary to decide what deviation would be considered approximate, but a difference from south-easterly to north-easterly is such a wide deviation that it cannot be called approximate; it amounts to over eighty degrees.

It is of essential importance that the few directions simple and clear which the law requires should be complied with, otherwise confusion of the worst character must arise. No one but the defendant is responsible for the error, if error it be, into which he has fallen; and for these reasons I am of opinion that the appeal should be allowed, and judgment entered for the plaintiff with costs here and below.

WALKEM, J.: I concur.

Judgment of IRVING, J.

IRVING, J.: This is an adverse action brought by the plaintiff, who claims that the land in dispute is included within the

boundaries of the Cody and Joker mineral claims, located in 1896, to prevent defendant from obtaining a Crown grant of the land claimed by him as being within the boundaries of the Cube Lode mineral claim, located in May, 1892.

The first point to ascertain is what land did the defendant take up? I think the evidence supports the conclusion arrived at by the learned Judge who saw the witnesses that the defendant staked, and afterwards did his assessment work on, the ground now claimed by him.

In 1892, there was then in existence—staked but not surveyed—on the east slope of the range separating Cody and Sandon Creeks, a claim known as the Freddy Lee mineral claim.

The defendant and others on the 24th of May of that year passed along by the side of this claim to a spot about 500 feet higher up the mountain near the summit, and planted the initial posts of two mineral claims, the Amega and the Cube Lode, and then, after staking a third claim, proceeded to lay out these two claims, one on each side of the Freddy Lee, the object being to enclose the Freddy Lee, of which the defendant was the owner, within the angle formed by these two claims. Across the apex of this "A" shaped figure they had placed the third claim, to which I have already referred, calling it the Summit claim.

In describing the location line, *i. e.*, line of direction between posts Nos. 1 and 2 of the Amega, they made a mistake, namely, they described in their location notice of the Amega the line of direction as being easterly, whereas it ought to have been north-easterly.

In describing in their location notice of the Cube Lode, they fell into the same error as to the compass bearings, and called the location line south-easterly, when in fact, it was east by north. A similar error was committed in the case of the Summit claim. This error of fifty-five degrees is the cause of the present litigation.

Having indicated the relative positions of the directing side lines of these three claims, I wish to point out that the Summit claim is a claim of 1,500 x 1,500 ft. lying to the right of its line between 1 and 2, the Cube Lode is of the same dimensions lying

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to the right of the line between its Nos. 1 and 2 posts; and the Amega is a claim of similar dimensions on the other side of the Freddy Lee.

The plaintiff alleges fraud. His evidence falls far short of proving it. Suspicion is not sufficient, there must be clear proof of fraud.

The contention of the plaintiff is based on this, that a certain post, which I shall call the "A" post—to call it No. 2 post of the Cube Lode or No. 2 of the Summit claim is only adding to the confusion—situate approximately in direction south-easterly from the admitted No. 1 post of the Cube Lode is the true No. 2 of the Cube Lode. The defendant says that this "A" post is not connected with the Cube Lode, but is in fact the true and original post of the Summit claim, and that he is not responsible for the writing which now appears on this "A" post. If the contention of the plaintiff is right the defendant and his friends would have located the Cube Lode over the Summit claim—a very unlikely thing for them to have done having regard to their original intentions, the care exhibited by them in marking the posts and blazing the location lines, as well as the character of the ground and their previous knowledge of it, for the defendant was at that time the owner of the Freddy Lee, and had been concerned with the staking of the Budgett.

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That question having been decided in favour of the defendant, the case then resolves itself into this: Does section 28 apply so as to cure the failure of the defendant to correctly state in his location notice the approximate compass bearing of his No. 2 post? There cannot, I think, be any doubt that if the error is trifling this question must be answered in the affirmative, and then comes the next question, and herein lies the whole point of the case; does section 28 apply where the correct compass bearing is approximately east, or, to be exact, east by north, and the person seeking relief has called it south-easterly?

In my opinion both questions should be answered in the affirmative.

Irregularity is a very general word. It means, in an act of this character, "not according to the regulations." Its nearest

equivalent is the word "informality," "not according to form," in which connection I would call attention to the language in sub-section 1 of section 16.

So wide is section 28 that the Legislature thought proper to limit the application of its healing clauses by adding that fraud, in a suit instituted by the Crown, would be an exception.

Dealing with this particular informality in locating a claim, the Mining Act does not require the exact compass bearing to be stated, the approximate bearing will be sufficient. For practical purposes in laying out a claim I should think that a compass would be divided into eight points, *i. e*, the four cardinal points, and N.W., N.E., S.E. and S.W. In section 381 of Lindley on Mines the following passage occurs: "The pioneer prospector is neither a lawyer nor a surveyor. Neither mathematical precision as to measurement, nor technical accuracy of expression is either contemplated or required." I think that is a very reasonable way of stating it, and as the description in this case was aided by a reference to the Freddy Lee and Budgett claims, in addition to the arrow mark cut on No. 1 pointing to the true No. 2 of the Cube Lode, that this case is covered by the decision of *Book et al* v. *Justice Min. Co.* (1893), 58 Fed. Rep. 106-115, where "northerly" instead of "north-easterly" was used and the mistake was held of no moment.

Then it is argued that if a man makes a mistake in his compass bearings he is to have no relief because the Legislature has already treated him in this respect liberally. It strikes me just the other way. The Legislature gave him considerable latitude in the first place because it was a matter in which no great accuracy could be reasonably expected. Then they added, if he does his assessment work, that will cure all irregularities.

The scheme of the Act is plain. It aims at increasing the security of a man's title to his claim. In the initial stage the stakes hold the ground. After discovery of mineral, etc., non-compliance with formalities, unless calculated to mislead, shall not violate his title. After recording of his assessment work, all irregularities of title are cured. In the case of *Cullacott et al* v. *Cash Gold and Silver Mining Company* (1884), 15 Morr. 392,

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Beck, C. J., of Colorado, speaks of an error in compass course as "an irregularity of minor importance."

In this case we have the two cardinal facts, the defendant actually staked the ground he now claims, and he has performed in respect of it his assessment work for six years. The plaintiff's contention is that the defendant is now to lose this property and the benefit of all work done upon it because he had a wrong idea as to the points of the compass. I cannot agree to that. Had he described the No. 2 post as lying easterly he would, I venture to think, have been within the sweep of the words "approximate compass bearing." He instead said south-easterly, and this one mistake it is urged is fatal after six years' occupation.

To learn the true meaning of section 24 it must be contrasted with section 16, sub-section (*g.*)—section 24 goes a long way further than the sub-section. If it does not receive that construction, it is useless; there was no object gained by the enacting it. Reading it then as being wider than sub-section (*g.*) it would cover the case of non-compliance with formalities of a character calculated to mislead.

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The difficulty in deciding the question as to who shall have the benefit of the section, where both parties have obtained certificates has often arisen. The only workable rule is to hold that the dispute as to title arises and the benefit of the section attaches just as soon as the subsequent locator puts his stakes into the ground in respect of which the prior locator has recorded his work. If at that time, or, possibly, if at any time before the subsequent locator does his assessment work, the prior locator has done his work and recorded it, he is entitled to invoke the aid of the section. His title is then perfected; there cannot be two perfect titles to one and the same piece of ground.

In my opinion the appeal should be dismissed.

Appeal allowed, Irving, J., dissenting.

NOTE.—An appeal to the Supreme Court of Canada was dismissed on 8th October, 1900.

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Contract—Implied—Action for work done—Authority of Agents—Incomplete verdict.

In an action for work done and materials provided for certain steamers, the jury did not answer all the questions submitted, and the trial Judge gave judgment for the plaintiffs for the amount claimed for certain work covered by the certificate of an agent of the defendants, but discharged the jury as being unable to agree in respect of the other matters, and reserved further considerations.

Held, on appeal, that on the findings as they stood the plaintiffs could not recover any amount other than the one allowed.

ACTION for $2,984.10 for work done and materials provided in connection with the Company's steamers Strathcona and Caledonia.

R. H. Hall was the Company's factor, Captains J. H. Bonser and Odin were masters of the steamers and J. A. Thompson was the Dominion Government's Inspector of Boilers for the Province of British Columbia.

Statement.

The following statement of facts is taken from the judgment of DRAKE, J., on appeal:

"These boats were built for Klondike trade, and there was urgent need of hurry in their completion. The Company, on the 30th of December, 1897, entered into a contract with the B. C. Iron Work Company, Limited, for the construction of these boats. The contractors were to provide everything required by the specifications, and to complete the work to the satisfaction of the Dominion Government Inspector of Boilers, or in his absence, the supervisor for the time being having control of the works of the Company and his assistants. By section 5 'The supervisor, by his order in writing, countersigned by the Company's representative, may alter, add to or omit any part of the work, and may certify in writing the amount to be added to or deducted from the contract price, as the case may be, in consequence of the alterations, additions or omissions so ordered, but

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the contractor shall not make any change in or addition to or omission or deviation from the works unless directed by the supervisor and representative as aforesaid, and shall not be entitled to any payment for any change . . . . . .' By section 12 the contractors were not without the consent in writing of the Company to make any assignment of the contract or any sub-contract for the execution of any of the works thereby contracted for. Section 7 provided that the supervisor was to be sole judge both of the quantity and quality of the work and material, and no extra or additional works or changes should be deemed to have been executed, nor should the contractors be entitled to payment of the same unless the same should have been directed in writing and executed to the satisfaction of the supervisor and Company's representative, as evidenced by their signature in writing, which certificate should be a condition precedent to the right of the contractors to be paid therefor; nor should the contractors be entitled to any payment whatever under the contract, whether for extras or otherwise, except upon the written certificate of the supervisor and the Company's representative, which certificate should be a condition precedent to the right of the contractors to receive such payment.

"The contractors, notwithstanding clause 12 of the contract, obtained from the plaintiffs on the 26th of January, 1898, a tender for portion of the woodwork on the boats, and the B. C. Iron Works Company made a contract with them to carry out the tender in the same terms as the original contract, limited to the particular work that was to be done, and which contract is dated 28th January, 1898.

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"The Company being very anxious to get the boats completed in order to take advantage of the opening of the Spring trade to Klondike, appointed J. H. Bonser on the 5th of February, to look after the Company's interests in connection with the building of these boats and to hurry on the work.

"Captain Bonser was to be the master of one of the boats and was kept under pay of the Company in order to enable them to have his services when the boats were completed.

"On February 16th, the Company, by Mr. Hall, wrote to the

B. C. Iron Works Company as follows: 'I am willing that any alterations approved of by Captain Bonser and Mr. Thompson may be made, provided they will not in any way add to the expense or affect the contract you have entered into, either as to date of fulfilment or otherwise.'

"On the 1st of March, Captain Bonser wrote to the plaintiffs as follows: 'Please alter plan of cabin on H. B. Co. boat, and construct same according to my instructions, also put necessary windows in freight house,' and signed it for Hudson's Bay Co., John H. Bonser.

"On the strength of these instructions, which were not approved by Mr. Thompson or the Company's manager, the plaintiffs did what they claim to be extra work on both boats, and their claim amounts to $2,984.10, very nearly equal to the cost of the original woodwork they had contracted to do with the B. C. Iron Works Company.

"The plaintiffs first sent in their claim to the B. C. Iron Works Company, but subsequently brought this action against the Hudson's Bay Company for the amount."

The action was tried at Vancouver before IRVING, J., and a special jury, who returned the following verdict:

"(1a.) As to work (other than work included in Odin's certificate) was there a distinct contract (express) by the defendants with the plaintiffs to do this work for them? No.

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"(1b.) As to work (other than included in Odin's certificate) was there a distinct contract (implied) by the defendants with the plaintiffs to do this work for them? Not answered.

"(2a.) If yes, by which officer or officers of the Company was such contract made? Not answered.

"(3.) As to work included in Odin's certificate, was there a distinct contract by the defendants with the plaintiffs to do this work for them? Yes.

"(4.) Did Hall alone have express authority to change the plans so as to bind the Company to pay extra? No.

"(5.) If not, did the defendants hold him out or permit him to represent himself as possessing such authority? No.

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"(6.) Did Bonser alone have express authority to change the plans so as to bind the Company to pay extra? No.

"(7.) If not, did the defendants hold him out or permit him to represent himself as possessing such authority? No.

"(8.) If you answer 5 or 7 in the affirmative, then answer this: Did the plaintiffs act on the faith of such holding out or representation? . . . . . .

"(9.) Did Hall know when changes were ordered that cost of steamers would necessarily be increased? No.

"(10.) If not, when did he know this? When Macfarlane and Allan told him in Vancouver.

"(11.) Did Hall know that when the changes were ordered that they were dealing with sub-contractors and not with B. C. Iron Works Company? No, he didn't.

"(12.) If not, when did he know this? He ought to have known when he read the letter to Galbraith & Sons from Bonser of date 1st March.

Statement.

"(13.) Did Hall alone have authority, express or implied, to bind Hudson's Bay Co., by order to Odin to pay extra for the work ordered? Yes, implied."

His Lordship on motion for judgment delivered the following judgment:

22nd December, 1899.

This was an action to recover the cost of certain work performed by the plaintiffs on the defendants' steamers Strathcona and Caledonia. It was tried before me with a special jury.

The defendants had given a contract to the B. C. Iron Works Company, which contained a condition against sub-letting any part of the contract without leave from the Company.

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The plaintiffs, however, became sub-contractors under the Iron Works Company, and whilst so engaged received, so they allege, from Mr. Hall, Captains Bonser and Odin, certain orders which they executed, and they now sue for the price thereof.

The contest is chiefly with reference to the orders given by Bonser in Hall's presence or with Hall's knowledge and approval. These orders constituted a complete change in the plans. The plaintiffs' contention is that as the defendants have had the ben-

efit of the work they should pay for it. The defence set up was the defendants had contracted with the Iron Works Company for the boats for a lump sum and they knew nothing about the plaintiffs; that the so-called orders to the plaintiffs were addressed to them as the workmen of the B. C. Iron Works Company and that as there could, under the conditions contained in the original contract, be no departure from its terms so as to involve the defendants in additional expense without an order in writing, they were not to be involved without their knowledge and consent in a contract with the plaintiffs.

In *Eccles* v. *Southern* (1861), 3 F. & F. 142, where Eccles, a subcontractor under Trimlet, sued Southern for certain work which he (Eccles) contended was done not under the contract, but wholly outside of it, Channell, B., said that the question for the jury was—was there a distinct contract by the defendant, with the plaintiff, to do this work for him.

This question was left to the jury in the present case and they said as to the Bonser portion of the work (I am only dealing with that at present) that there was no express contract, but as to whether there was an implied contract they were unable to agree. But they found in answer to other questions that Mr. Hall did not know when the changes were ordered, that he was dealing with the plaintiffs and not with the B. C. Iron Works Company.

The next set of questions were framed after *Spooner* v. *Browning* (1898), 1 Q. B. 528, where the question was raised whether an alleged agent was the defendants' agent or authorized to bind them.

The questions and answers are as follows: [Setting out 4, 5, 6 and 7.]

Now, as Hall and Bonser were the only persons connected with the Company in any way with whom the plaintiffs came in contact, I was very much disposed to enter judgment for the defendants.

For the plaintiffs it was argued that they ought to recover because the defendants had the benefit of the work.

Usually there is no difficulty in inferring a promise to pay a

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man where he does work on your property, even without any express request, but that conclusion cannot always be reached if the work is done without your knowledge. Baron Pollock once said: "If a man blacks my shoes, am I not to put them on?"

Nor can an implied promise to pay A (the plaintiffs) for that which he has put upon your property and which you have permitted him to do under the impression that he was B (the Iron Works Company) with whom you had made an express contract. See *Boulton* v. *Jones* (1857), 27 L. J., Ex. 117, and *Hills* v. *Snell*, an American case, (1870), 104 Mass. 173, where a baker having ordered flour of A was, by the warehouseman's mistake, supplied with a more valuable quality of flour, the property of B, it was held that the baker was not liable on any implied contract with B.

The question now is what judgment should I enter, or should I decline to receive the verdict as being incomplete? I think, in view of the course taken at the trial, I should give judgment directing a reference as to the amount payable to the plaintiffs under the Odin certificate, and that as the main question in respect of the work not included in Odin's certificate as to whether or not there was a distinct contract by the defendants with the plaintiffs to do this work for them, remains unanswered, and as the other questions and answers were insufficient to determine the action, I should not accept the verdict as to the issues, other than the Odin matter. I discharge the jury as not being able to agree upon a complete verdict:

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The operative parts of the formal judgment were these:

"(1.) That the jury be discharged as to all issues and questions in this suit other than the amount due under the said Odin certificate.

"(2.) That the plaintiffs are entitled to recover from the defendants the value of the work and labour done and material provided which are included in the said Odin certificate.

"(3.) That it be referred to A. E. Beck, Esq., District Registrar of this Honourable Court at Vancouver, to enquire and state the amount of said work and labour and materials covered by

the said Odin certificate for which the defendants are liable to the plaintiffs.

"(4.) That the defendants do forthwith after the making of the said District Registrar's report pay to the plaintiffs the amount which the said District Registrar shall find the said defendants are liable for to the plaintiffs.

"(5.) That further consideration and costs be reserved until after the said District Registrar has made his report."

The defendants appealed to the Full Court and the appeal came on for argument at Vancouver before McColl, C. J., Drake and Martin, JJ., on 19th, 20th and 21st March, 1900.

Sir C. H. Tupper, Q.C., for respondents, took the preliminary objection, that the appeal was premature on the ground that the trial had not been completed and all the issues disposed of by the trial Court, and that the trial would not be concluded until after the reference.

Davis, Q.C., contra. This is an interlocutory appeal—we asked for judgment on the findings and were refused, hence the appeal.

Per curiam: The point is hardly a preliminary one. Let the argument proceed with leave to respondents to renew objections.

Argument.

Davis, Q.C., and Marshall, for the appeal: The answers to questions (1a.) and (1b.) are immaterial unless there was ratification. If neither Hall nor Bonser had authority, and they were the only ones who were authorized in the premises, there could have been no contract unless there was ratification or acceptance. He cited Addison on Contracts, 9th Ed., 311. As to acceptance see Hudson's Building Contracts, 2nd Ed., pp. 247, 353 and 470; *Oldershaw et al* v. *Garner* (1876), 38 U. C. Q. B. 37; *Whitaker* v. *Dunn* (1887), 3 T. L. R. 602; *Cowan et al* v. *The Goderich Northern Gravel Road Company* (1859), 10 U.C.C. P. 87.

The Full Court should now enter judgment for plaintiffs for $99.10 with such costs as are allowed on recovery of sums under $100.00. See Supreme Court Act, Sec. 95, and *Forster* v. *Farquhar* (1893), 1 Q. B. 564, *Huxley* v. *The West London Extension*

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Railway Company (1889), 14 App. Cas. 26, and *Jones* v. *Curling* (1884), 13 Q. B. D. 263.

Sir C. H. Tupper, for respondents: Owing to the finding on implied contract this Court has not now power to act in the premises as we are entitled to have the verdict of the jury as a matter of right. The trial Judge really acted on *Marsh* v. *Isaacs* (1876), 45 L. J., C. P. 505, and *Powell* v. *Sonnet* (1827), 1 Bligh, N. S. 545 at p. 553.

As to liability if benefitted even if persons ordering had no authority, see *Smith* v. *The Hull Glass Company* (1852), 11 C. B. 897. He referred also to *Panton* v. *Cole* (1841), 11 L. J., Q. B. 70; Evan's Principal and Agent, 2nd Ed., 71; *Frost* v. *Oliver* (1853), 22 L. J., Q. B. 353; *Smith* v. *McGuire* (1858), 27 L. J., Ex. 468 and *Hamilton et al* v. *Myles* (1873), 23 U. C. C. P. 300.

Argument.

Davis, in reply, cited *Boulton* v. *Jones* (1857), 27 L. J., Ex. 117 and *Faulknor et al* v. *Clifford et al* (1898), 17 P. R. 368.

Cur. adv. vult.

The judgment of the Court was delivered on the 7th of April, 1900, by

Judgment of DRAKE, J.

DRAKE, J. who [after stating the facts] proceeded: The action came on for trial at Vancouver before a special jury, and the jury found that neither Hall, the manager of the Hudson's Bay Company, nor Bonser had any express authority to change the plans so as to bind the Company to pay extra, neither did the Hudson's Bay Company hold out or permit either of these gentlemen to represent himself as having such authority.

They also found that there was no distinct express contract by the defendants with the plaintiffs to do this work, but they did not answer the question whether there was an implied contract by the defendants with the plaintiffs to do this work.

The jury were discharged, and the only judgment entered was one with reference to a claim of $99.10 which was certified by one Odin; and as to which a reference was ordered, but the defendants stated that they did not intend to dispute this claim and admitted this sum to be due to the plaintiffs. The defendants

contended that the findings as they stand are sufficient to enable the Court to enter a judgment for them.

The case comes before us in an unusual form. The only order made is one of reference to the Registrar to ascertain what amount is due under Odin's certificate. This is disposed of by the defendants admitting the whole amount to be due and therefore there is nothing to refer. The remainder of the action is reserved by the learned Judge to deal with on further directions. He has not yet dealt with it.

The main grounds of appeal are that the learned Judge upon the findings should have entered judgment for the defendants at once, except as to Odin's certificate, and that notwithstanding the findings judgment should have been entered for the defendants, there being no evidence to go to the jury against them; that the evidence shews that neither Odin, Bonser nor Hall had any authority to bind the defendants, and that there was no evidence of any contract between the plaintiffs and the defendants for the work sued on. The contract to which I have already referred is very stringent in its terms. The plaintiffs entered into a similar contract with the B. C. Iron Works Company, so unless the contract is treated as waste paper the question at once arises, when comes the liability of the defendants?

The B. C. Iron Works Company were the employers of the plaintiffs, and that Company knew that no alterations could be made without the certificate in writing of the supervisor and the Company's representative had been first obtained, and the only evidence of any suggested alteration is the letter of Mr. Hall before referred to which is strictly limited and guarded, and is not addressed to the plaintiffs. There is no contract between the defendants and the plaintiffs, and the contention is that this must be treated as a new contract, and as such the restrictive clauses do not apply. But with whom can it be said the new contract was made? The findings of the jury negative the authority to make any such contract with either Hall, Odin or Bonser, and there is no one else but Thompson, and he made no variation of the existing contract, neither did he enter into any fresh contract to which the work done could possibly apply.

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The defendants never sanctioned the extra work, and had nothing to do with the plaintiffs. The case of *Cowan et al* v. *Goderich Northern Gravel Road Company* (1859), 10 U. C. C. P. 87, is almost identical with the present case, and, if anything, stronger in the plaintiffs' favour. There the plaintiffs were sub-contractors, and Molesworth, the engineer, suggested a deviation and instructed the sub-contractors to do the work. He had no authority to give these instructions, and the Court held that Molesworth could not make a new agreement to bind the contractors. That is the case here. The plaintiffs are sub-contractors of the B. C. Iron Works Company, and no one except Thompson and the manager of the Hudson's Bay Company had any authority to make a new contract for them, or for the defendants who had no connection with the plaintiffs.

The plaintiffs contend that the defendants have had the benefit of the plaintiffs' work and therefore should pay for it. The authorities are clear that where work has been done on the defendants' property, such as erecting a building on a man's land, the owner by accepting it does not raise any evidence of a waiver of the conditions precedent of the special contract, or of entering into a new one. See *Munro* v. *Butt* (1858), 8 E. & B. 738; *Ellis* v. *Hamlen* (1810), 3 Taunt. 52 and *Oldershaw et al* v. *Garner* (1876), 38 U. C. Q. B. 37. But it is said here this is a chattel, and the considerations applicable to a building on a man's land do not apply to a ship. But the work done by the plaintiffs was done after the hull of the vessel was completed. The hull was the property of the defendants, and the work the plaintiffs did could not be torn up and removed without rendering the hull useless; and the same principle applies in my opinion as to the carpenter's work on a building. If, as Lord Campbell says in *Munro* v. *Butt, supra,* the work was done on an independent chattel such as a piece of furniture, and the party accepted it, even although some condition precedent was imperfect, an action on obvious grounds might be maintained.

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I also refer to *The Tharsis Sulphur and Copper Company* v. *M'Elroy & Sons* (1878), 3 App. Cas 1,040. In that case by the contract no payment was to be made for extras without the written order of the engineer who had control of the works.

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The engineer gave a verbal order which involved considerable extra expense. It was held the contractor could not recover. The plaintiffs here cannot allege that they were ignorant of the condition of the contract between the B. C. Iron Works Company and the Hudson's Bay Company, because the terms of their contract with the B. C. Iron Works Campany were identical with that of the original contract, and it was a condition precedent to the right to recover for alterations or extra work that the order should be given in writing by the supervisor. I do not consider that the plaintiffs can on the findings, as they exist, establish a claim against the defendants. I think that judgment should be entered for the defendants, except as to the sum of $99.10 for which the plaintiffs are entitled to judgment without costs.

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The costs of the trial and appeal should follow the event.

NOTE.—This judgment was appealed to the Supreme Court of Canada which restored the judgment of IRVING, J., with costs.

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MERRICK *ET AL* v. MORRISON *ET AL.*

Lis pendens—Cancellation of—Security on—Judge's discretion as to—Land Registry Act, Secs. 85, 86 and 87.

On a summons to cancel *lis pendens*, the Judge being of opinion that the plaintiffs could not succeed in the action, ordered that the *lis pendens* be cancelled on the applicants giving the nominal security of $1.00.

Held, on appeal, that it was not a case for cancellation of the *lis pendens*, but that the plaintiffs should be put on terms to speed the action.

Statement.

ACTION for a declaration that plaintiffs were entitled to an undivided three-fifths interest in the Greyhound mineral claim and for an injunction restraining the defendants from selling or in any way dealing with the said interest.

The plaintiffs registered a *lis pendens* against the property. The Western Copper Company who claimed through the defendants, applied on summons to have the *lis pendens* cancelled on the ground that it caused hardship and inconvenience to the Company. Plaintiffs valued their alleged three-fifths interest at $60,000.00. The summons was argued before Irving, J., who being of the opinion that the plaintiffs could not succeed in the action ordered the *lis pendens* cancelled on the giving by the Company of the nominal security of $1.00.

The plaintiffs appealed to the Full Court and the appeal was argued at Vancouver on 21st March, 1900, before McCOLL, C.J., DRAKE and MARTIN, JJ.

Argument.

Martin, Q.C., A.-G., for appellants: The only remedy the Company is entitled to is to have the suit expedited. Our affidavits (not denied) shewed the value of the property was $100,000.00, and if the applicants did not put up three-fifths of that amount, the *lis pendens* should not have been cancelled. The intention of the Act is to let both parties have fair play, and the only way to do that is to hold the property. The Court cannot now say this is an illusory claim.

He cited *Towne* v. *Brighouse* (1898), 6 B. C. 225; *Price* v. *Price* (1887), 35 Ch. D. 297; *Jameson* v. *Laing* (1878), 7 P. R. 404; *Sheppard* v. *Kennedy* (1884), 10 P. R. 242; *Foster* v. *Moore et al* (1886), 11 P. R. 447; *Bevilockway* v. *Schneider* (1893), 3 B. C. 90; *Schofield* v. *Solomon* (1885), 54 L. J., Ch. 1,101 and Armour on Titles, p. 170.

Davis, Q.C., contra: There is no such section as 87 in either Ontario or England, and so the authorities cited throw no light on the subject. The Judge had a wide discretion which should be cautiously exercised, and it must be presumed that it was cautiously exercised. The Court will not interfere with the exercise of discretion unless exercised on wrong principle. The Judge must act on the material before him on the return of the summons. The question of how much security, must be tried on affidavit—it is not an interlocutory question, but a final disposition of the question of security.

Argument.

Martin, in reply: The Judge did not exercise any discretion as to the sufficiency of the security, but believing there should be no security, he took the method of evading the Act by imposing a nominal security. We were not bound on the application to disclose our evidence.

The Court held that it was a case for exercising the discretion given by section 86 of the Act and that the order ought to be varied by imposing the terms that the plaintiffs must give the undertaking there provided for, and give, within ten days, to the satisfaction of the Registrar, security for it in the sum of $1,000.00, deliver the reply within one week, and undertake to abide by any order made from time to time for expediting the trial; upon breach of any of these conditions the *lis pendens* to be cancelled. Costs of the appeal to be costs in the cause.

The judgment of the Court was delivered by

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McCOLL, C.J.: It was contended for the applicant that the learned Judge who made the order in appeal had jurisdiction to fix the amount of the security, at a nominal sum, he being of the opinion that the plaintiff cannot succeed in the action.

On the other hand it was urged on behalf of the plaintiff, that apart from the statutory provisions it would be most unjust to

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try the case upon affidavits, and that he was not bound to disclose the nature of his defence except in the usual course of litigation.

As to this, to use the language of the Judicial Committee in the case of the *Montreal Gas Co.* v. *Cadieux* (1899), 68 L. J., P. C. 128, "the real answer to the argument . . . . is that it is not for the Court to pronounce an opinion upon the policy of the Legislature. Their only duty is to give effect to the language of the Legislature, construing it fairly."

Before the passing of the enactments in question the Court had no power to cancel a *lis pendens* except in the way of setting aside a writ of summons as being an abuse of the process of the Court. This may be done even if the facts are disputed, if it appears that a plaintiff cannot recover. "It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved." Per Lord Herschell in *Lawrance* v. *Lord Norreys* (1890), 15 App. Cas. 210 at p. 219, approved of in *Haggard* v. *Pelicier Freres* (1892), A. C. 61, by the Judicial Committee.

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The question to be decided is not free from difficulty. Suppose a plaintiff to claim against a defendant that they were partners together in the purchase of certain lands; that the defendant had taken the title in his own name and disposed of a portion; and the plaintiff to seek payment of his share of the purchase money and a lien for it upon the lands unsold; and assume the only dispute to be whether the plaintiff was a partner; and that the only evidence is that of the parties themselves, and of one witness for each. How could the Judge determine "the probability of the plaintiff's success in the action?" And so if there are a larger number of witnesses upon the one side than the other, and if the dispute is upon a matter of law the result will not be less uncertain. Is there to be a sliding scale of 100 per cent. of the value in what the Judge may

think a very strong case, a discount off in an average case, a still larger discount in a very doubtful case, and a nominal sum in what he may think a hopeless case?

The absurdity is increased when it is seen that it is not the Judge's own opinion of the plaintiff's rights that is to guide him. He himself may have no doubt on the materials before him that a plaintiff ought not to succeed, but he may know at the same time that there is evidence upon which a jury might lawfully find the other way, and from his own experience he may be confident from a variety of circumstances that they would do so.

It was said by Halsbury, L. C., and approved by the Master of the Rolls and Lindley and Lopes, Lords Justices, in *Morgan* v. *Hardisty* (1889), 6 T. L. R. 1, that "The Court must not prevent a suitor from exercising his undoubted rights on any vague or indefinite principles." But such an interpretation as that here contended for by the applicant seems to me grotesque.

The security given is substituted for the subject matter of the action as brought, and in my opinion the sections applicable do not enable a Judge to determine in effect the rights of the parties upon such an application, but the Judge's view as to the probability of the plaintiff's success is merely a circumstance to be taken into consideration when determining what is for the Judge to determine, that is, what security is "sufficient."

I think the question one emphatically dependent upon the particular circumstances of each case. Here having determined that the *lis penden* ought to be cancelled, the question for him was the value of the property, and from its nature there was a wide margin. Hence he might have adopted such value as he thought fit according to the view he took of the probability of success, but I am of opinion that he ought to have exercised a discretion in fixing some substantial amount.

It seems to me impossible to form any reasonable estimate as to the probabilities of success upon the materials before us, and I do not think it a case for cancelling the *lis pendens*. There is no reason why the trial should not be had within a short time. As the plaintiff has not chosen to bring his case fully before the

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learned Judge I think it a case for exercising the discretion given by section 86, and that the order ought to be varied by imposing the terms that the plaintiff must give the undertaking there provided for, and give, within ten days, to the satisfaction of the Registrar, security for it in the sum of $1,000.00, deliver the reply within one week, and undertake to abide by any order made from time to time for expediting the trial; upon breach of any of these conditions the *lis pendens* to be cancelled. Costs of the appeal to be costs in the cause.

Order accordingly.

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BANK OF B. C. v. OPPENHEIMER *ET AL.*

Practice—Order amending defence—Summons for jury before amended defence delivered—Whether premature.

An application for change of venue and trial by jury after an order made giving leave to amend defence, but before delivery thereof, is premature.

APPEAL from an order of DRAKE, J., refusing defendants' application for a trial by jury.

An order had been made on the application of defendants for leave to amend the defence, but the amended defence had not yet been delivered.

Statement.

On the return of the summons counsel for plaintiff took the objection that the application was premature, citing *Bank of Montreal* v. *Major and Eldridge* (1896), 5 B.C. 155.

DRAKE, J., in dismissing the summons said he must assume that defendants in asking leave to amend had not applied for a useless order and until the amended defence was delivered it was impossible to say what the issues would be.

Defendants appealed and the appeal was argued on 7th March, 1900, before WALKEM, IRVING and MARTIN, JJ.

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Duff, for appellants: The pleadings were closed by the delivery of the reply on 29th January, 1900, and notice of trial was given on 12th February. The making of the promissory notes sued on, their indorsement, notice of dishonour, and that the plaintiffs were holders in due course were all denied and fraud was set up—all substantial questions of fact for a jury.

The Court called on

Hunter, for respondent: The summons to amend defence was issued 13th February, and the order allowing proposed amendments with certain exceptions was made by DRAKE, J., on 27th February. On 28th February this summons for jury was issued, after the date of order giving defendants leave to amend as they might be advised. There is nothing to prevent the whole defence being recast, or the defences triable by a jury from being abandoned, so that it cannot be said that the issues are settled. He cited *Powell* v. *Cobb* (1885), 29 Ch. D. 493.

Duff: This is not a question of discretion for the Court. When the matter came before DRAKE, J., there was a record—leave to amend doesn't change the record: Annual Practice (1899), 342.

Where prior to the Judicature Act a party had a right to trial by jury, he has it now—either party is absolutely entitled to a jury, but in *Powell* v. *Cobb* (1885), 29 Ch. D. at p. 493, Cotton L.J., was discussing a case in which there was a discretion about a jury. There is no rule that the application cannot be made until the pleadings are closed. Just as soon as the Court could say it was a case for trial by jury then the application could be made. We told DRAKE, J., we would not accept his order nor amend as he ordered, so the pleadings were then closed. He cited *Iron Mask* v. *Centre Star* (1899), 6 B.C. 474.

Argument.

Per curiam: The order below was right, but under the circumstances the costs of the appeal and the application in the Court below will be costs in the cause.

Appeal dismissed, Martin, J., dissenting.

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BANK OF B. C. v. OPPENHEIMER *ET AL.*

Discovery—Examination of ex-officer of corporation—Reading depositions at trial—Practice.

Jury allowed to retire during evidence as to matter for Judge alone.

If an appointment is taken out for the examination for discovery of an ex-officer of a corporation, and the corporation's solicitor does not attend, and gives notice that he will object to the deposition being received at the trial—

Held, following Osler, J., in *Leitch* v. *Grand Trunk Railway Company* (1890), 13 P.R. 369, that it should not be received.

On a trial by jury after the plaintiffs' case has commenced, the Judge may, in his discretion, permit the jury to retire while proof is being given of facts with which the Judge alone is concerned.

AT the trial before IRVING, J., and a special jury, the defendants proposed to put in the examination for discovery of one J. C. Keith, who had been an officer of the plaintiff corporation, but was not so at the time of the examination, nor at the time the action was commenced.

Hunter, for plaintiffs (*Sir C. H. Tupper, Q.C.*, with him), having given notice before the examination that he would not attend or take part in the examination, and that he would object to the deposition being received at the trial, now objected accordingly, citing *Leitch* v. *Grand Trunk Railway Company* (1890), 13 P.R. 369.

Statement.

L. G. McPhillips, Q.C. (*Bodwell, Q.C.*, with him), *contra.*

IRVING, J.: I think that in a matter of practice under rules derived from Ontario I ought to follow the decisions of the Ontario Courts, and I therefore rule that the deposition cannot be used.

During the same trial the plaintiffs were proceeding to prove the loss of the promissory notes on which the action was brought, and IRVING, J., proposed to excuse the jury while this proof was being given.

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Sir C. H. Tupper, Q.C. (*Hunter* with him), objected and argued that the jury should be present during the whole trial.

Bodwell, Q.C., and *McPhillips, Q.C.*, were not called on.

IRVING, J., remarked that this was his practice, and he saw no reason why the jury should not be excused as the question to which the proof was being adduced was for him alone to decide and excused the jury accordingly.

HENLEY v. THE RECO MINING & MILLING COMPANY, LIMITED LIABILITY.

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HENLEY v. RECO

Practice—Adding parties—Third party notice—Rule 101 (a).

In an action against a Company for a declaration that plaintiff was the owner of certain shares in the Company, the Company applied to have its President added as a third party on the ground that he was the real defendant and was responsible for the action.

Held, by the Full Court, affirming DRAKE, J., who dismissed the summons, that the defendant's remedy was by third party notice.

APPEAL from an order of DRAKE, J., refusing an application of the defendant Company, that one J. M. Harris, the President of the Company, be added as a party defendant.

Statement.

The facts as set out in the affidavit of the defendant's solicitor used on the application were:

"This action is in respect to the refusal of the defendant Company to transfer to the plaintiff certain shares or scrip which the said Company allege to have been obtained from them by means of fraudulent representations.

"The defendant Company allege that the said shares or scrip were obtained from them by various fraudulent representations made by L. E. Hauk, L. Peterson and S. T. Arthur, that one J. M. Harris, the President of the defendant Company, was then indebted to them in certain sums, whereas the said J. M. Harris was not indebted to the said L. E. Hauk, L. Peterson and S. T.

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Arthur or to any of them in the sums then specified or in any sums, but that the alleged indebtedness of the said J. M. Harris was arising out of certain gambling transactions between the said J. M. Harris, L. E. Hauk, L. Peterson and S. T. Arthur.

"I am advised and verily believe that it is necessary that the said J. M. Harris be added as a defendant to this action, and the solicitors for the defendant Company undertake to appear for the said J. M. Harris, and I refer to the pleadings filed in this action as shewing the nature of the defence."

The appeal was argued on 6th March, 1900, before McCOLL, C.J., IRVING and MARTIN, JJ.

Argument.

Peters, Q.C., for appellant, relied on *Montgomery* v. *Foy, Morgan & Co.* (1895), 2 Q.B. (C.A.) 321. We wish to counter-claim to get the shares fraudulently obtained cancelled. Harris has caused all the trouble and he ought to come in and bear the brunt. Harris is the real defendant and wishes to defend and has given an undertaking by solicitor to appear.

Duff, for respondent: The defendant is now attempting to bring his case within *Montgomery* v. *Foy, Morgan & Co.* There is no suggestion in the affidavit of defendant's solicitor as to a counter-claim. It is not necessary in order to bind Harris that he be added as a party. The proper procedure is by third party notice. We have no claim against Harris and if he is added our action will inevitably be dismissed as against him. The rule is that a defendant will not be added to suit his own convenience, see Annual Practice (1900), pp. 157 and 158; *In re Harrison* (1891), 2 Ch. 353. See also *Peterson* v. *Fredericks* (1893), 15 P. R. 361.

Peters replied.

The judgment of the Court was delivered 6th March, 1900, by

Judgment.

McCOLL, C.J. who [after stating the facts] proceeded: The shares were issued by arrangement between Harris and the Company. No other question than that of the alleged fraud is raised by the pleadings.

Mr. *Peters*, for the appellants, relied upon *Montgomery* v. *Foy, Morgan & Co.* (1895), 2 Q.B. (C.A.) 321. That case decided in the words of Lord Esher, M.R., at p. 324:

"Here the matter before the Court is the contract of affreightment, and there are disputes arising out of that matter as between the plaintiff and the defendants, and the Company whom it is sought to add as defendants, and who were the defendants' principals in the matter. I can find no case which decides that we cannot construe the rule as enabling the Court under such circumstances to effectuate what was one of the great objects of the Judicature Acts, namely, that, where there is one subject-matter out of which several disputes arise, all parties may be brought before the Court, and all those disputes may be determined at the same time without the delay and expense of several actions and trials."

And as I understand the decision the question is one of discretion to be decided according to the circumstances of the particular case as said by Kay, L.J., at p. 325:

"I wish to guard myself against being supposed to decide that in all cases it would be a sufficient reason for joining a person as defendant, that, if joined, he would have a counter-claim against the plaintiff."

In the present case there is only one thing in dispute, the claim to the shares or their value. The right, if any, of Harris against the persons mentioned in the affidavit referred to does not arise out of contract, but out of the fraud alleged to have been committed by them to which the Company is not alleged to have been a party, and may not be affected by the result of this action.

Judgment.

I am of opinion that the proper course of the defendant Company as regards Harris, so far as he is concerned with the present action is to serve him with a third party notice. In *Hutchison* v. *Colorado United Mining Company* (1884), W.N. 40, the same learned Judge who made the order in *Montgomery* v. *Foy, Morgan & Co., supra,* doubted whether the procedure by a third party notice was applicable where the plaintiffs claimed against a Company the right to be placed upon the register in respect of certain shares which were claimed by a third person, but it does not appear how the third party claimed. Here, Harris procured the defendant Company to issue the shares in question, and having afterwards notified it not to register them because of the alleged

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HENLEY v. RECO

fraud it seems to me to be clear that the defendant Company has the right to be indemnified by Harris against the consequences of the position which he himself has thus brought about, and that the third party notice is therefore applicable.

Since the argument I have consulted Mr. Justice DRAKE with reference to the ground upon which he proceeded, there having been no written reasons given by him, and he has handed me his notes, from which it appears that he decided upon similar grounds, and that he referred to the cases of *Pilley* v. *Robinson* (1887), 20 Q.B.D. 155 and *Horwell* v. *London General Omnibus Company, Limited* (1877), 2 Ex. D. 365.

Judgment.

Appeal dismissed.

MARTIN, J. 1900. March 30.

FULL COURT At Vancouver. Sept. 20.

JONES v. DAVENPORT

JONES v. DAVENPORT.

Practice—Pleading Statute of Limitations—Amendment first asked for in Full Court—Terms on which allowed—Costs.

The Full Court has power to allow, on terms, an amendment for the first time of a pleading by setting up a fact which would if proved be a good answer to a plea of the Statute of Limitations.

There is no fixed rule that in all cases costs of interlocutory proceedings shall not be payable until the conclusion of the litigation.

ACTION on a foreign judgment recovered in the State of Minnesota in 1888. The trial took place at Nelson on 16th February, 1900, before MARTIN, J.

R. M. Macdonald, for plaintiff.
Whealler, for defendant.

30th March, 1900.

Judgment of MARTIN, J.

MARTIN, J.: This is an action on a foreign judgment, recovered in the State of Minnesota more than six years ago, and it is admitted that such an action would come within the first paragraph of section 3 of the Statute of Limitations, Cap. 123, R.S. B.C. 1897, were it not for Part IV., of said Statute which con-

tains three sections, 56-8, under the title "The Limitation of Certain Causes of Action Arising Abroad. Defence of Foreign Limitation." It is submitted that despite the fact that a great many years ago it was decided in England (and later in Ontario) that an action on a foreign judgment, being an action of assumpsit, came within the scope of the corresponding section 3 of 21 Jac. 1, Cap. 16, yet the law is different in this Province because the said Part IV., in our Statute is not in the English Act, and so suits on foreign judgments must be governed by Part IV., to the exclusion of section 3.

No authority is advanced in support of such a view, and I am unable to give effect to it. When a statute has received an unvarying judicial interpretation for a long course of years, the effect of which is that it has a certain scope, in order to cut down such scope there must be some unequivocal declaration on the part of the Legislature to that effect before this Court can feel justified in departing from it. To take this view does not render the provisions of Part IV., nugatory because it allows the additional defence to be raised that the judgment sued on is barred by the law of the foreign country. The reason for this provision is doubtless that the period of limitation differs in various countries, and *e. g.*, if it were shorter in such foreign country than here it would not be equitable that a foreign judgment creditor should have a longer period in this Province within which to enforce his judgment than he would have in the country in which it was recovered.

Judgment of MARTIN, J.

The action should be dismissed with costs.

The plaintiff appealed to the Full Court on the grounds *inter alia*, that the evidence discloses that the defendant did not reside six years in the Province of British Columbia prior to the date of the issuing of the writ of summons herein, and that the action is therefore not barred by section 3 of the Statute of Limitations, being Cap. 123, R.S.B.C. 1897.

The appeal was argued at Vancouver on 4th June, 1900, before McCOLL, C.J., WALKEM and IRVING, JJ.

R. M. Macdonald, for appellant.

Davis, Q.C., for respondent.

Cur. adv. vult.

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20th September, 1900.

McCOLL, C.J.: The defendant, in his statement of defence (paragraph 11), says "The debt was barred by the Statute of Limitations, Cap. 123, R.S.B.C. 1897, Sec. 3." The pleadings became closed by lapse of time, no subsequent pleading having been delivered.

The question for our determination is whether the plaintiff was entitled at the trial, without an amendment of his pleadings, to shew, as the fact is, that the defendant first came to this Province within six years before the commencement of this action, and that therefore the statute does not apply.

Inasmuch as there are three facts, anyone of which is sufficient to take the case out of the statute, I am of opinion that the plaintiff should have replied the fact mentioned upon which he relied. Odgers on Pleading, 3rd Ed., p. 220.

Judgment of McCOLL, C.J.

On the hearing of the appeal we were asked to allow an amendment now. It is now admitted that the plaintiff first came to this Province in 1897.

I am of opinion that the amendment ought to be allowed, but only on proper terms as to costs, so as to put the defendant as nearly as possible in the same position as he would have been in if the amendment had been asked for at the trial. In the circumstances I think the justice of the case will be met by allowing the amendment upon the terms that the plaintiff have judgment for the amount claimed without costs, and pays the defendant's costs of the appeal, otherwise, that the appeal should be dismissed with costs.

IRVING, J.: The plaintiff at the close of his argument in the appeal before us asked, for the first time, leave to amend.

Judgment of IRVING, J.

The defendant submitted that if such leave was granted, it should be granted on the condition that he should be allowed to amend and withdraw the admissions which he had agreed to make having regard to the then state of the pleadings.

This, we think, reasonable, and our judgment is that unless the defendant is willing that judgment should be entered as above he also shall have leave to amend and to withdraw his

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admissions. In the event of his accepting this alternative, there will be a new trial on the amended pleadings.

Plaintiff must pay, before such trial comes on and within six weeks of the settling of the judgment, all costs thrown away (*i. e.*, subsequent to the delivery of the statement of defence) in the Court below and of this appeal.

We are all agreed that there is no fixed rule that in all cases and under all circumstances costs of interlocutory proceedings shall only be paid at the conclusion of the litigation.

Judgment accordingly.

DUNLOP v. HANEY.

FULL COURT
At Victoria.
1900.
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Practice—Interlocutory injunction—Appeal from refusal to dissolve—Trial pending when appeal brought on to be heard.

Where a motion to dissolve an interlocutory injunction has been refused and notice of appeal given before trial, but not brought on to be heard until after the trial has commenced, but not concluded, the Full Court will not interfere.

Statement.

APPEAL from an order of IRVING, J., dated 23rd March, 1900. On 10th January, 1900, an order was made by MCCOLL, C.J., restraining the defendant from applying for or receiving a Crown grant of a mineral claim, until the trial of the action or until further order. Defendant moved to dissolve this injunction and to stay proceedings; the motion was dismissed by IRVING, J., on 23rd March, 1900.

Defendant appealed to the Full Court and the appeal came on for argument on 8th May, 1900, before MCCOLL, C.J., WALKEM and MARTIN, JJ., when

Argument.

W. J. Taylor, Q.C., for respondent, took the objection that the trial had now partially been heard by DRAKE, J., but owing to

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the defendant not being ready with his witnesses it did not proceed. The notice of appeal was given before the trial.

A. E. McPhillips, for appellant: The respondent is not entitled to raise the preliminary objection as no notice of it has been given. "Until the trial" does not mean until the opening of the trial—it means until the determination of the trial. It is a serious matter that we should be prevented from dealing with the Government until after the trial.

At the close of the argument the judgment of the Court was delivered by

Judgment
of
MCCOLL, C.J.

MCCOLL, C.J.: You cannot find any case in the books where an Appellate Court entertained such an appeal as the present. Without expressing any opinion as to whether the exercise of discretion was rightfully made in the original order, the present appeal should now be dismissed on the ground that at this stage this Court declines in the exercise of its discretion to intercept the operation of an injunction in the midst of a trial; it might happen that this Court might make an order dissolving the injunction and then later the trial Judge might make an order making the injunction perpetual—the result would be that this Court had improperly dissolved the injunction on insufficient materials; such an order would be nonsensical.

The proper order for this Court to make is simply one reciting that, since the notice of appeal, the trial has come on and has been partly heard and that under such circumstances the only order this Court sees fit to make is one that costs of this appeal should be costs in the cause.

IN THE COUNTY COURT OF VANCOUVER.
RE GUN LONG.

McCOLL, C.J.
1900.
Oct. 30.
RE GUN LONG

By-law—Lodging house keeper—No definition of—How construed.

Where a by-law requiring lodging house keepers to take out a license did not define what was meant by keeping a lodging house;
Held, that it did not apply to a person not engaged in such occupation for profit.

Statement.

APPEAL to the County Court from a conviction by the Police Magistrate for the City of Vancouver. The appellant refused to pay a license fee of $3.00 per quarter under the by-law which enacted that "any person or persons allowing or permitting any room in a lodging-house to be occupied by any lodgers or tenants without having first registered the said lodging house and rooms as aforesaid . . . . shall be guilty of an infraction of this by-law and liable to the penalties thereof."

Bloomfield (*A. D. Taylor*, with him), for appellant.
Hamersley, for the City.

30th October, 1900.

Judgment.

McCOLL, C.J.: The defendant is charged with breach of by-law No. 160 as amended by by-law No. 354, in not having paid a license fee in respect of a lodging house alleged to have been kept by him.

The defendant keeps a laundry in which he employs five workmen who board and lodge with him in the house in which the laundry is, and ten other men are admitted by him to have been living for varying periods at different times in the same house with his permission; and it is as regards these ten men or some of them that a license fee is claimed to be payable by the defendant.

I have not overlooked the evidence of some of the witnesses for the prosecution to the effect that as many as twenty-four men were found upon the premises at night, but the defendant denied any knowledge of more than those I have mentioned, and

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the presence of others on the occasions spoken of is quite consistent with their having been merely visiting the inmates, or some of them. Reliance was placed for the prosecution on the circumstance that the defendant had registered the premises as a lodging house. He denied knowing that the fee paid by him, $1.50 (as he claims) or $1.00 (as was stated for the prosecution) was for so registering the premises, saying that he was told by the official that there would be no trouble if the money was paid. The defendant says he paid because he thought he had to, and did not concern himself further. There is nothing unlikely in this account in the case of an ignorant foreigner such as the defendant, but in any event he is entitled upon the present charge to deny the necessity for taking out a license as a lodging house keeper if it does not appear that he is such.

The defendant's account of the way in which the ten men in question were living in the house was that some of them were related to him and the others came from the same village in China from which he himself came to this country; that they are domestic servants who when employed live where they work and only stay at his house when out of work, because they have no other place to go to, and that none of them has ever paid him anything for permission to sleep on his premises.

I see nothing in the way he gave his evidence to make me doubt his truth, and in view of the manner in which the Chinese lower classes are accustomed to herd together, there is nothing strange in the account itself.

Judgment.

The men in question were apparently well known in the Chinese quarter, and most of them were understood to be present in Court on the hearing of the appeal.

The statement said to have been made by one of them that he paid the defendant a dollar a month was, of course, not evidence.

The term "lodging house keeper" is not defined in the by-law, and its meaning therefore necessarily depends upon the nature of the by-law itself.

That being so, and this by-law being a trades' license by-law, I do not doubt that I ought to hold that it does not apply to any

person not engaged in the occupation nor business commercially for profit, although if so engaged he would not of course be exempt merely because he might be in the habit of entertaining some of the people otherwise than for gain to himself.

The appeal must be allowed with costs.

Appeal allowed with costs.

EASTMAN v. PEMBERTON.

Assignment of partnership assets only for benefit of creditors—Whether good.

An assignment by a firm for benefit of creditors which was construed by the Court to be an assignment of partnership assets only, may be a good and valid assignment within the meaning of the Creditor's Trust Deeds Act.

ACTION by the assignee for the benefit of the estate of Thomas F. Gaine and W. H. Roy, trading under the name and style of Gaine & Roy, and each of them against the Sheriff for the County of Yale.

On 15th July, Gaine and Roy made an assignment for the benefit of their creditors to one James H. Good who was subsequently discharged by the Court and the plaintiff appointed. This assignment was in part as follows:

"Whereas the said assignors have for some time conducted a business as wholesale liquor merchants and gents' furnishers at the premises known as the Yukon store in Cascade City aforesaid, under the firm name and style of Gaine & Roy;

Statement.

"And whereas the said assignors are indebted to several persons, firms and corporations, and are unable to pay and satisfy their just debts in full, and have decided to assign their property and assets to the said assignee for the purpose and upon the trusts hereinafter expressed and contained;

"Now this indenture witnesseth that the said assignors do hereby convey, assign and transfer unto the said James H. Good

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(as trustee) all the personal estate, credits and effects of the said assignors which may be seized and sold under execution, and all the real estate of the said assignors; to have and to hold the same and every part thereof, with the appurtenances thereto belonging unto the said James H. Good as such trustee; Upon trust for the said James H. Good thereout and therefrom, to pay and satisfy rateably and proportionately and without preference or priority all the creditors of the said assignors, their just debts owing to them respectively from the assignors under the provisions of the Creditor's Trust Deeds Act and the amendments thereto now in force in this province."

The defendant had several writs of *fieri fácias* against the goods of Gaine and Roy placed in his hands for execution and under which he levied on 25th August, 1899, and sold on 4th October, although he had received formal notice of the trust deed. A subsequent assignment was executed on 31st August, the plaintiff being the trustee.

The action was tried at Rossland on 21st May, 1900, before DRAKE, J.

J. A. Macdonald, for plaintiff.
John Elliot, for defendant.

24th May, 1900.

Judgment of DRAKE, J.

DRAKE, J.: The facts are very simple. Gaine and Roy were carrying on business in partnership—they got into difficulties and on 15th July, 1899, made an assignment for the benefit of their creditors to James H. Good who was subsequently discharged by the Court from his assigneeship and the plaintiff appointed. The defendant had certain writs of *fieri facias* placed in his hands for execution under which he levied on the assets of Gaine and Roy on the 25th of August, and sold on 4th October, although he had received formal notice of the trust deed.

It is alleged the amount realized was insufficient to pay the executions.

The defence on which the defendant relies is that the deed of assignment is void on the ground that it assigns both partner-

ship and individual assets and provides no means for their distribution, and he cites *Cunningham* v. *Curtis* (1897), 5 B.C. 472 at p. 477 in support of his contention. In that case the deed purported to assign all their and each of their personal estates, effects, credits, but it was held on the further language contained in the deed that the assignment was limited to partnership assets for payment of partnership debts and was set aside as being a fraud on the creditors. In *Mills et al* v. *Kerr et al* (1882), 7 A.R. 769, the deed was held void in consequence of providing for the payment of partnership debts only, but in that case, a creditor of the separate estate of one of the creditors was interested and opposed the deed, and the Court held that although the deed operated to convey to the assignee the several as well as the joint property of the debtors the trust for distribution was for joint creditors only. Here the circumstances are different; it is denied that there are any separate creditors, neither is there any separate estate. The only liabilities are those of the firm. In *Kerr* v. *The Canadian Bank of Commerce* (1884), 4 Ont. 652 a deed was upheld where it purported to assign separate as well as partnership property and the trust was to pay all the just debts of the creditors rateably, proportionably and without preference or priority, although it appeared that the partners each had several debts of a small amount. In the present case the deed is made between Thomas F. Gaine and W. H. Roy, merchants, and George A. Eastman, trustee, reciting that the assignors have been conducting a business as wholesale liquor merchants under the firm name or style of Gaine & Roy, and reciting that the assignors are indebted to several persons and being unable to pay, are desirous of having their estate equitably divided and distributed among all their creditors—witnesseth that they, the parties of the first part thereby granted unto the trustees all real estate whether partnership or private and also all goods, wares and merchandise, stock-in-trade, fixtures and book debts belonging to them and being partnership or individual private property upon trust to pay and divide the clear residue, after providing for the costs unto and among the creditors of the said parties, whether the creditors of either of the said parties respectively, or of the said parties as a partnership firm.

Judgment of DRAKE, J.

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This deed is in my opinion an assignment of both partnership and private assets and the distribution is to the joint as well as the separate creditors. Under the cases already cited, if it had been shewn that there were separate debts, then the deed would be void because a creditor of the joint estate has no right as against the separate assets until the separate creditors are paid, and a separate creditor has no right as against the joint assets until the joint creditors are paid, and a distribution equally between joint and separate creditors would be an unfair distribution.

It is not difficult to provide for this distribution by a properly drawn deed of assignment. See *Nelles* v. *Maltby* (1884), 5 Ont. 263.

The case of *Ewart* v. *Stuart et al* (1885), 12 A.R. 99, which was relied on, was different from this. A firm of two partners assigned the partnership property only upon trust to pay joint creditors—it was held that the deed was not void for intent to prefer partnership creditors as there are no separate creditors and no separate assets. I do not consider that a deed which might be objected to as a preference if a certain set of circumstances existed can be treated as a preference when those circumstances are absent. It was suggested that the house and lot on which the business was carried on being purchased in the name of one of the partners was not partnership property, but it certainly was bought for partnership purposes and the money of the firm went into it, therefore in equity it would pass under the assignment to the trustee as part of the partnership assets.

Judgment of DRAKE, J.

I therefore am of opinion that under the circumstances the deed cannot be impeached.

There must be a reference to the Registrar to ascertain the value of the goods seized and sold having regard to situation of the property and prospects of finding purchasers. The value will be what the property ought to realize at a forced sale and not the invoice price.

Judgment for the plaintiffs for the amount so found due with costs, with liberty to apply.

The defendant appealed to the Full Court, the appeal being

argued on 6th and 7th September, 1900, before McColl, C.J., Walkem and Irving, JJ.

Duff, for the appellant: A deed so limited in its operation as that of 15th July, cannot take effect under the Act unless it should clearly be shewn by affirmative evidence that neither of the assignors had any separate creditors at the time of the execution of the deed: *Tomlin* v. *Dutton* (1868), L.R. 3 Q.B. 466; *Johns* v. *James* (1878), 8 Ch. D. 744; *Siggers* v. *Evans* (1855), 5 El. & Bl. 367 at p. 379; *Cooper* v. *Dixon* (1884), 10 A.R. 50; *Badenach* v. *Slater* (1883), 8 A.R. 402 at p. 408; *Kirk* v. *Chisholm* (1896), 26 S.C.R. 111 and *Blain* v. *Peaker* (1889), 18 Ont. 109. A deed when deprived of the protection of the Statute must be regarded as only a mandate from the debtor to the so called trustee who instead of being a trustee for the benefit of the creditors is merely an agent of the debtor until the deed was communicated to some creditor who in some way acted upon it and then the deed would take effect as a declaration of trust only in favour of such creditor. It does not appear that the deed was ever communicated to any creditor who acted on it and the onus is on those seeking to uphold it as a trust deed to shew such communication.

Argument.

A. E. McPhillips, for respondent: The joint creditors are in no way prejudiced. Our Act in no way indicates that the only valid assignment is one that deals with all the property. The deed follows the Act and therefore cannot be invalid. The defect in *Cunningham* v. *Curtis* (1897), 5 B.C. 472 was that there was only a distribution amongst the joint-creditors. He cited *Ewart* v. *Stuart* (1885), 12 A.R. 99; *Ball et al* v. *Tennant* (1894), 25 Ont. 50; 21 A.R. 602. There is no restriction on the trustee proceeding to distribute according to law: see *The Attorney-General of Ontario* v. *The Attorney-General for the Dominion of Canada* (1894), A.C. 189 and American and English Encyclopædia of Law, Vol. 3, p. 41. Notice is not necessary under the Act. In order that the executions should have priority it must be shewn that they were completely executed by payment. As to what creditors can attack see American and English Encyclopædia of Law, Vol. 2 p. 132, note 4. There are no sep-

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arate debts—only one set of creditors to deal with and only one fund to distribute, and the trial Judge so found.

Duff, in reply: *Ewart* v. *Stuart* has no application. The Court was there dealing with the question of preference only. The Court only held that the deed was not bad as a preference; they expressly refrained from deciding that the deed was within the protection of the last part of section 2 of the Act. The decision can therefore have no bearing on the question here. Our contention is, not that the deed of 15th July alone was void as a preference, but that it is not a statutory deed of assignment and therefore has no operation until communicated to the creditors and then only to the extent of the claims of such creditors. The onus was on the plaintiffs to shew that such communication was made before the delivery of the writs to the Sheriff and there is no such evidence. He cited *The Official Receiver* v. *Tailby* (1886), 18 Q.B.D. 25; (1888), 13 App. Cas. 524 at p. 525; *Cooper* v. *Dixon* (1884), 10 A.R. 50; *Mills et al* v. *Kerr et al* (1882), 7 A.R. 769 at p. 774; *Re Unitt* and *Prott* (1892), 23 Ont. 78.

Argument.

Cur. adv. vult.

On 20th November the Court gave judgment dismissing the appeal and on 20th December the following judgment was delivered by

MCCOLL, C.J.: The debtors by the first assignment, as I read it, assigned the partnership assets only, upon trust to pay the joint debts only.

In my judgment, therefore, it is good, for the reasons given in *Ewart* v. *Stuart* (1886), 12 A.R. p. 99, for sustaining the assignment there under consideration, and which appear to me to be equally applicable here.

Judgment of MCCOLL, C.J.

I would have preferred to adopt the view taken in *Ball et al* v. *Tennant* (1894), 25 Ont. 50, that an assignment in similar terms vests in the assignee all the property of each of the partners several as well as joint, and to hold that the Creditors Trust Deeds Act itself sufficiently provides for the proper distribution of the proceeds among all creditors of both classes, but

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it seems to me that the words in section 3 (not in the Ontario Act), referring to an assignment "if its construction and effect shall accord with its expressed purpose" preclude my doing so, by leaving its effect, in this respect, to be tested by the language used.

I am of opinion that the appeal should be dismissed with costs.

MERCHANTS BANK OF HALIFAX v. HOUSTON & WARD.

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Bank Act—Security under section 74—Advances made to bookkeeper of saw-mill owner—Right of Bank as against chattel mortgagee.

Where the bookkeeper of a mill owner, to enable the owner to carry out a contract, bought logs with advance made for this purpose by a bank, which logs were cut up at such owner's mill and the bookkeeper indorsed the owner's notes to the bank:

Held, by the Full Court, reversing MARTIN, J., that the logs, and lumber manufactured therefrom, did not come under a chattel mortgage covering all lumber which might at any time be brought on the premises, and that the bank was not prevented by the Bank Act from taking the usual security in respect of the logs.

APPEAL from the judgment of MARTIN, J., delivered 9th October, 1899, dismissing the action of the plaintiffs.

The following statement of facts is taken from the judgment of DRAKE, J., on appeal:

Statement.

"The facts of this case are somewhat involved. Gray was a sawmill owner at Nelson, B.C., and being involved in financial difficulties, on the 25th of April, 1898, he made a bill of sale by way of mortgage of his sawmill and machinery and all lumber therein, and all lumber dressed or undressed which might at any time be brought on the mill premises. This bill of sale was apparently not duly registered, as the affidavit made in support of it was not sworn until the 26th of September, 1898, and is therefore not binding on subsequent incumbrancers. The de-

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fendant undertook at the trial to furnish certified copies of his bills of sale, but hitherto has not done so. We must therefore take the bills of sale as they appear in the appeal book to be correct.

"On the 28th of June, 1898, Gray gave to Houston a further bill of sale by way of mortgage to secure a note of $794.22 payable on demand, with ten per cent. interest. This bill of sale was apparently regular. On the 11th of August, 1898, Lawford assigned to the plaintiffs a chattel mortgage given to him by Gray on the mill and machinery to secure $800.00. Gray also made an assignment to Ward for the benefit of his creditors of all his property, and Ward, according to his evidence taken 27th January, 1899, contested the plaintiffs' right to the machinery as being subject to the security in favour of Gray's creditors. Sometime about the 1st of August, W. H. Armstrong, a contractor, applied to Gray to be supplied with a large quantity of lumber for bridge building. Gray had no means of buying the necessary logs, and applied to the plaintiffs for an advance. The plaintiffs, aware of Gray's position, refused, but the manager, Mr. Kydd, said if some person whom they could trust would undertake the contract they would advance the necessary funds to him to buy the logs, and Mr. L. C. Lawford, Gray's bookkeeper, with the approval of the plaintiffs, agreed to buy the logs, and the plaintiffs agreed to advance him the necessary funds for the purpose in order to carry out the arrangement. On the 4th of August Gray assigned the order of Armstrong to Lawford, and agreed to cut the lumber at $1.50 per M. and deliver the same to Lawford at the millside. This agreement purports to be made in consideration of an advance of $3,500.00 to Gray.

Statement.

On 6th August Lawford assigned to the plaintiffs all moneys to accrue due to them from Armstrong in respect of the contract which Armstrong accepted. On the 8th of August L. C. Lawford assigned to the Bank booms 48, 49 and 50, aggregating 545,000 feet, which were then in process of cutting, having previously assigned boom 47. This assignment purported to be made under section 74 of the Bank Act, 1890. On the 30th of August boom 49 was assigned to the Bank. On the 6th of Sep-

tember boom 50 was also assigned, and on the 20th of September a further deed confirming the former assignments, and including boom 47, was made by Lawford to the Bank. These various documents seem to have been executed by way of precaution to make the Bank secure in case any mistake had occurred in the original transfers under the Bank Act. All the moneys necessary to pay the expenses connected with the booms were advanced by the plaintiffs to Lawford, and disbursed by him, and Gray gave Lawford promissory notes for the sums he had thus advanced, and these notes were indorsed to the Bank.

These booms arrived at the mill, and when there Gray appears to have mixed the logs with other logs in his boom, and the greater part were converted into lumber, and immediately Houston as alleged mortgagee claimed them under his chattel mortgage.

The following is the judgment of

9th October, 1899.

MARTIN, J.: What the plaintiff alleges is, substantially and briefly, that the defendant Houston is wrongfully in possession of certain logs and lumber which are, or were, at the time of the said defendant's alleged wrongful taking, the property of one L. C. Lawford, the plaintiff's predecessor in title.

Apart from the question raised as to the applicability of the Bank Act to the transaction under review, the said issue of fact must be disposed of, and the onus is upon the plaintiff. A good deal of evidence was given on the point, and there is not a little conflict of testimony.

Judgment of MARTIN, J.

It is urged on behalf of the defendants that the evidence of the plaintiff's manager alone is sufficient to shew that the transaction cannot stand, in that it shews he was merely going through a form in introducing Lawford, Gray's bookkeeper, into the matter. Without going so far as this, it is nevertheless true that the evidence of the manager as a whole does not sufficiently support the case sought to be made out. His answers, to take a few examples, to question 84 of page 22 of the evidence, questions 90 and 95 of p. 23, q. 100 on p. 24, and qs. 111 and 113 on p. 25 are not consistent with the alleged ownership of Lawford. As to Lawford's evidence, it is still less satisfactory, and,

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further, his demeanour in the witness-box did not impress me favourably. The manager's evidence was also, in my opinion, given at times with a certain amount of reluctance—the not unnatural reluctance of a man who realizes too late that a mistake has been made; at the same time it is not to be understood that I think there was anything underhand about his conduct, far from it. I regard it in the nature of a risky transaction with the otherwise laudable intention on the manager's part of increasing his bank's business. Even if there were no further evidence than that of these two witnesses I should hesitate to find the facts in the plaintiff's favour. But, for the defence, Gray's testimony is important, and satisfies me, if I had any doubt, that the use of Lawford's name in the matter was but a form. It is true that he, Gray, was, in a business way, lax and careless, but I believe he nevertheless told the truth in the witness-box. The evidence of Thompson, the mill foreman, which was given in a straightforward manner, was analyzed at length by counsel on the recent argument, and while there may be in it some minor inconsistencies, yet, in my opinion, after a re-perusal of it, they are not sufficient to impair its substantial accuracy.

Judgment of MARTIN, J.

On the facts then as a whole I am forced to the conclusion that Lawford, known by the manager to be a man of straw, never had any interest in the property in dispute, and never was in possession of it. The Bank's claim thus fails, and there will be judgment for the defendants with costs.

Judgment for defendants.

The plaintiffs appealed to the Full Court and the appeal was argued at Vancouver on 22nd January, 1900, before McCOLL, C.J., DRAKE and IRVING, JJ.

Argument.

Sir C. H. Tupper, Q.C., for appellants: Lawford bought the booms with money advanced by the Bank and they were brought to the mill to be cut up—he was a wholesale purchaser of four booms. He cited *Ayres* v. *The South Australian Banking Company* (1871), L.R. 3 P.C. 548; *Cairncross et al* v. *Lorimer et al* (1860), 3 Macq. H.L. 827; Maclaren on Banks and Banking, 149; *Rolland* v. *La Caisse d'Economie Notre-Dame*

de Quebec (1895), 24 S.C.R. 408; *Stapleton* v. *Haymen* (1864), 2 H. & C. 918; *The London Joint Stock Bank* v. *Simmons* (1892), A.C. 201 at p. 215; *Parkes* v. *St. George* (1884), 10 A.R. 496 at p. 521; *Smith* v. *Fair* (1885), 11 A.R. 758; *The National Bank of Australasia* v. *Cherry* (1870), L.R. 3 P.C. 309; *Spence* v. *The Union Marine Insurance Company, Limited* (1868), L.R. 3 C.P. 427; *Lawrie* v. *Rathbun et al* (1876), 38 U.C.Q.B. 280; *Halsted* v. *The Bank of Hamilton* (1896), 27 Ont. 435; *Re Commercial Bank of Manitoba* (1894), 10 Man. 171.

S. S. Taylor, Q.C., for defendant Houston: Lawford was only a bookkeeper for Gray and not a wholesale purchaser. He referred to Maclaren pp. 148, 150 and 153 and *The Merchants Bank of Canada* v. *Smith* (1884), 8 S.C.R. 512.

Wilson, Q.C., for defendant Ward: Ward was not in possession and therefore there is no right of action against him. He cited *United States* v. *Clare* (1880), 2 Fed. Rep. 55, as to definition of wholesaler, and *Conn* v. *Smith et al* (1897), 28 Ont. 629.

Sir C. H. Tupper, in reply, cited *James* v. *Smith* (1891), 1 Ch. 389 and *Collette* v. *Goode* (1878), 7 Ch. D. 842.

Cur. adv. vult.

On 11th April, the judgment of the Court was delivered as follows by

DRAKE, J., who [after stating the facts as above] proceeded:

Judgment.

In this state of circumstances I think it is clear that no property in the logs passed to Gray, all the interest he could claim in them was a lien for work and labour in converting them into lumber; and it is possible that Houston might have a right to the money thus earned, but we have not to decide this point.

The main defence set up by Houston is that the plaintiffs were not authorized to enter into any contract with Lawford under section 74 of the Bank Act, 1890; and that Lawford was in fact Gray, and that the logs were bought for Gray. The Court is bound to look at the whole proceedings and to ascertain what are the true facts. In the first place the plaintiffs admit their knowledge of Gray's position, and refuse to have any deal-

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ings with him, but are willing to make advances to a third party, Lawford, to enable this contract of Armstrong's to be carried out. There appears to be no objection to this transaction unless it is contrary to the Bank Act, Sec. 74 of 1890. That section authorizes the bank to lend money to any person engaged in business as a wholesale manufacturer. By section 2 the bank may also lend money to any wholesale purchaser or shipper of products of agriculture, forest or mine upon security of such products; and by section 3 such security may be given by the owner and may be in form set forth in Schedule C to the Act; and by virtue of such security the bank shall acquire the same rights in respect of the goods or products as if it had acquired the same by virtue of a warehouse receipt. By section 76 if goods are manufactured from the goods covered by a warehouse receipt a security given under section 74, the bank shall continue to hold such goods during the process, and after the completion of such manufacture with the same right and title as it held the original goods subject only to the lien of any unpaid vendor subsisting at the time of the acquisition of the bank of the security.

There is no dispute between the parties as to the facts, although the opinion of the learned trial Judge as to which of the witnesses most credit should be given may be open to question on a careful examination of the transcript of the evidence which we have had the advantage of perusing.

Judgment.

The learned Judge dismissed the plaintiff's action with costs, although the defendant Ward had admitted that the Bank was entitled to a direction by the Court that they had priority over his assignment by virtue of their bill of sale of the mill machinery, etc. On this point the appeal must be allowed, and the direction asked for by the plaintiffs must be made, and on the main point, in my opinion, this transaction is one which the Bank was authorized by the Act to enter into. The Act distinctly authorizes the bank to advance to a purchaser of a wholesale transaction the money necessary to carry out such a contract. Lawford was engaged in a wholesale transaction, and the fact that he was Gray's bookkeeper at the time, and that Gray's mill would benefit to the extent of cutting the logs into

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lumber does not affect the validity of the transaction. Neither does the fact that in order to protect himself he obtained notes from Gray in respect of the sums he disbursed. The logs having gone to Gray's mill the right to the logs never passed to Gray's mortgagee Houston. Houston can have no higher right than his assignor Gray. The accounts produced shew the payments made for the logs by Lawford with the money advanced by the Bank. The appeal should be allowed and an account will have to be taken of the logs still existing, and the lumber manufactured from the logs brought to the mill, and what has become of it; an injunction as prayed in the claim, and the plaintiffs will have the costs of this appeal and of the action.

Appeal allowed.

JARDINE v. BULLEN: ESQUIMALT ELECTION CASE.

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Election petition—Rules of Court—Validity of—Payment into Court—Appointment of Master.

Payment into Court in the usual way is a good payment in within the meaning of r. 16 of the Parliamentary Election Petition Rules, 1868 (Imperial.)

A rule made by the Judges empowering the Senior Puisne Judge, or any other Judge of the Court to perform the duties devolving by the rules on the Chief Justice whenever the office of Chief Justice is vacant, or he is absent from the Province, is valid.

Appointment of a new Master under said rules operates *ipso facto* as a rescission of any former appointment, it being unnecessary to rescind any former appointment by express writing.

The Full Court on appeal allowed evidence to be adduced to prove status of petitioners although the matter was not gone into in the Court below.

SUMMONS to strike off the files of the Court a petition presented against the return of the respondent as a member of the Legislative Assembly of British Columbia for the Esquimalt Electoral District.

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The first eight grounds in the summons were:

(1.) That this Court is not seized of the said petition and had no jurisdiction to hear or determine the same;

(2.) That the said petition was not duly presented to the Supreme Court of British Columbia by delivering it to the prescribed officer, or otherwise dealing with the same in the manner prescribed by the Provincial Elections Act;

(3.) At the time of the presentation of the said petition there had been no determination by the Chief Justice of the said Court pursuant to section 269 of said Act, as to whether the duties to be performed by the officer referred to in said Act as the "prescribed officer" were to be performed by the Registrar or by the Deputy Registrar of the said Court, and by reason thereof there was no prescribed officer in that behalf;

(4.) That the rule or order made by the Honourable Mr. Justice CREASE, the Honourable Mr. Justice MCCREIGHT, and the Honourable Mr. Justice DRAKE, as in words following:

"And, it is further ordered that wherever the Provincial Controverted Elections Act, or by any rules, any power is given or anything is authorized or required to be done by the Chief Justice of the Court, in case of a vacancy in the office of Chief Justice, or in case of his absence from the Province, such power or authority may be exercised or done by the Senior Puisne Judge, or any other of the Judges of the said Court," was beyond the power, authority and jurisdiction of the Honourable Justices named, in so far as it purports to alter or amend the Provincial Elections Act;

Statement.

(5.) That the order or rule signed by the Honourable Mr. Justice WALKEM on the 25th of July, 1898, reading as follows:

"Pursuant to section 269 of the Provincial Elections Act, I hereby appoint Brian H. Tyrwhitt Drake, Registrar of the Supreme Court, to be Master under the said Act, and the Rules of Court governing the practice with respect to proceedings under the said Act," was beyond the power, authority and jurisdiction of the said Judge;

(6.) The said Act gave no power to any Court, Judge or person to nominate or appoint a "Master;" but only to determine

which of two named officials of the Court should perform named duties and functions provided by the Act for the due prosecution of election petitions and the English Election Rules relating to the office of Master are abrogated by the Act;

(7.) If a Judge of the said Court during a vacancy of the Chief Justiceship had the right to appoint a Master to perform the duties of the prescribed officer mentioned in the said Act then the following rule or order made during such vacancy of the Chief Justiceship governed:

"In the Supreme Court of British Columbia. Provincial Controverted Elections. I hereby appoint Harvey Combe, of the City of Victoria, in the Province of British Columbia, to be Master under the Provincial Controverted Elections Act, 1898, and the Rules of Court governing the practice with respect to proceedings under the said Act. Dated August 4th, A.D. 1894. Henry P. Pellew CREASE, J." And the last mentioned rule or order never having been rescinded or repealed, the rule or order made during a vacancy of the Chief Justiceship, by the Honourable Mr. Justice WALKEM, appointing Brian H. Tyrwhitt Drake, Registrar of the Supreme Court, to be such Master was of no effect;

(8.) Security was not given on behalf of the petitioners at the time of the presentation of the petition or within three days afterwards for the payment of all costs, charges and expenses payable, to the respondent either by recognizance or by a deposit of money in manner prescribed, or partly in one way and partly in the other as provided by section 214, sub-sections 4 and 5, inasmuch as there was no recognizance entered into, filed or given as such security and no deposit of money was made in manner prescribed, the manner prescribed being by r. 16 of the rules governing the practice with respect to proceedings under the said Provincial Controverted Elections Act, which requires that the deposit of money by way of security for payment of costs, charges and expenses payable by the petitioner shall be made by payment into the Bank of England to an account to be opened there in manner there provided, no such deposit as such security having been made in the said Bank by the petitioners, and said section 214 and the rules thereunder were not complied

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with and no security was given to the respondent as required thereunder.

Cassidy, for the summons.

Belyea and *Duff*, *contra*.

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MARTIN, J.: In each of these six cases a summons has been taken out by the respondents to strike the petition off the files on twenty grounds as therein set out. Of these grounds, several were abandoned on the argument, and only the first eight require serious consideration; in the case of *Jardine* v. *Bullen* the eighth ground was not considered, owing to the fact that security was given by recognizance and not in cash.

Taking this eighth ground first: the objection is that the cash was paid into this Court to the Registrar, and by him paid over to the Provincial Treasurer, instead of being paid into the Bank of England in literal conformity to r. 16 of the English Parliamentary Election Petition Rules of 1868, which by section 268 of our Provincial Elections Act, R.S.B.C. 1897, Cap. 67, "shall be observed so far as may be by the Court and Judge in the case of election petitions under the Act." As sub-section 4 of section 214 requires security to be given at the time of the presentation of the petition, or within three days afterwards, it is, as the expression is, "a manifest absurdity" that a petitioner should be required to pay $2,000.00 into the Bank of England within three days after presenting an election petition in Victoria, and I do not think that the absurdity is diminished by the fact that the petitioner has the option of furnishing security by way of recognizance, for a case can readily be imagined where, for obvious reasons, it might be impossible to secure sureties for the costs of an election petition. But it is plain that the Legislature intended to place no such obstacle in the path of the petitioner, for the Court and Judges are directed to observe the English rules "so far as may be," and the payment into Court here and subsequently to the Provincial Treasurer is a sufficient compliance with the English rule above quoted, particularly when it is borne in mind that payment into Court in England is effected by payment into the Bank of England. If authority be needed for such

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an analogy it will be found in the case of *Reid* v. *Whiteford* (1883), 1 Man. 19, where the registration of a deed by a married woman with the Registrar of Deeds at Winnipeg was held effective to bar an entail, and a sufficient compliance with the provisions of the Act for the abolition of Fines and Recoveries, 3 & 4 Wm. IV., Cap. 74, the eighty-fourth section of which required the enrolment of the deed in the High Court of Chancery, and the eighty-fifth section, in the case of a married woman, further required the certificate of her acknowledgment to be filed at Westminster with some officer of the Court of Common Pleas, appointed by the Lord Chief Justice of that Court.

Then as to the first seven grounds. These are all based on the objection that the petition is not properly before the Court, in that it was not delivered to the "prescribed officer" as required by sub-section 3, of section 214. The petition was delivered to the Registrar of the Supreme Court by virtue of an appointment made by the Honourable Mr. Justice WALKEM, on the 25th day of July last, as follows: (Setting out the appointment in the 5th ground of the summons.)

This appointment was made by the said learned Judge in his capacity of Senior Puisne Judge of this Court, at a time when the office of Chief Justice was vacant, owing to the death of the late Honourable Theodore DAVIE, and under and by virtue of one of two rules of Court, made on the 4th day of August, A.D. 1894, as follows:

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"Provincial Controverted Elections Act.

"And it is further ordered that whenever by the Provincial Controverted Elections Act or by the rules any power is given or anything is authorized or required to be done by the Chief Justice, in case of a vacancy in the office of Chief Justice, or in case of absence from the Province, such power or authority may be exercised or done by the Senior Puisne Judge, or by any other of the Judges of the said Court.

"HENRY P. PELLEW CREASE, J.
"J. F MCCREIGHT, J.
"M. W. TYRWHITT DRAKE, J."

It is submitted on behalf of the respondents that the Judges had no power to make this rule of Court, because section 269

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directs that "the duties to be performed by the prescribed officer under this Act shall be performed by the Registrar or Deputy Registrar of the Supreme Court, as may be determined by the Chief Justice of the said Court;" and it is contended that this determination can be made by one person only, the Chief Justice, and from one class only, the Registrar or his Deputy. In case this contention be sound, then the petition must be struck off the files, for owing to the then vacancy in the office of Chief Justice it was impossible for any determination to be made in literal compliance with the terms of the section. It would be lamentable indeed that anyone should be deprived of rights or privileges under such circumstances, and, as was said in the similar case of *Appelbe* v. *Baker* (1868), 27 U.C.Q.B. 486, at p. 489, "the fact of the Crown not appointing for some time a successor to the deceased Judge, ought not to deprive a party of any right, or place him in a worse position;" and the Court went on to say, "In a case like this we would strive to avoid a failure of justice." Taking these expressions as my guide, I shall now consider the question raised. The rule of Court of August 4th, 1894, in question, was made under section 60 of the old Provincial Controverted Elections Act, C.S.B.C. 1888, Cap. 40, the effect of which is preserved by section 9 of the Act of 1897, respecting the Revised Statutes of British Columbia (R.S.B.C. page cxi.) This section 60 differs from the new section 267, in that it provides that the Judges may make rules "for the effectual execution of the Act, and of the intention and object thereof" the words "and of the intention and object thereof" not being found in the new section.

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Assuming, therefore, that the new section is not sufficient (and in my opinion it is) it seems to me that, under section 60, the rule in question is one which is for the effectual execution of the "intention and object" of the Act, which can only be that in cases of election frauds, or corrupt acts of whatever nature, the candidate or other person who has been a victim of such fraud or corruption shall receive speedy redress, not that the whole of the proceedings shall fail and justice be denied because a part of the mere machinery of the Court itself has been unprovided for, owing to an unforeseen contingency which in no way affects the

merits of the matter. In my opinion the rule in no way conflicts with any provision of the Act, but is enabling in its nature simply providing for the contingeney which has occurred.

The argument in support of the objection taken against the rule proceeded on the assumption that the "prescribed officer" could only be "prescribed" by the determination of the Chief Justice under said section 269. But sub-section 3, of section 214, provides that the presentation of a petition may be made not only by delivering it to the "prescribed officer" but by "otherwise dealing with the same in mannor prescribed." Now "prescribed," according to the interpretation clause, section 3, "shall mean prescribed by the rules of Court." Here then we have the rule of Court in question, which prescribed how the appointment should be made in the happening of a certain event.

I think the rule can be supported on both these grounds. But there is a further very significant and important provision in the concluding paragraph of both sections 60 and 267, which is as follows:

"Any general rules and orders made in pursuance of this section shall be laid before the Legislative Assembly within three weeks after they are made, if the Assembly be then sitting, and if the Assembly be not then sitting, within three weeks after the beginning of the then next session of the Assembly."

The rule in question was, it must be assumed, laid before the Legislative Assembly in due course, and from that time to this there have been four sittings of the Legislature. There is nothing which more seriously affects a Legislature, and none of its rights are more zealously guarded, than questions relating to its members and their return, and yet no action has been taken to question the legality of this rule of the Judges. Not only this, but the statute has been revised and re-enacted since the rule (decision) of the Judges was made known to the Legislature. To my mind were anything needed to support the rule, this fact would be conclusive, following the principle laid down in *Casgrain* v. *Atlantic and North-West Railway Company* (1895), A.C. 282 at p. 300, where it is said, "Their Lordships cannot assume that the Dominion Legislature, when they adopted the clause verbatim in the year 1888, were in ignorance of the judi-

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cial interpretation which it had received. It must, on the contrary, be assumed that they understood that section 12 of the Canadian Act must have been acted upon in the light of that interpretation." See also *Foskett* v. *Kaufman* (1885), 16 Q.B.D. 279 at p. 286; *Jay* v. *Johnston* (1895), 1 Q.B. 25; *Danford* v. *McAnulty* (1883), 8 App. Cas. 456 at p. 460; *Ex parte Wier* (1871), 6 Chy. App. 875 at p. 879; *Ex parte Campbell* (1870), 5 Chy. App. 703 at p. 706; *Greaves* v. *Tofield* (1880), 14 Ch. D. 563 at p. 571 and *Clark* v. *Wallond* (1883), 52 L.J., Q.B. 323.

But objection is taken that the appointment of the Registrar, Mr. Drake, is invalid, because on August 4th, 1894, the Honourable Mr. Justice CREASE, then Senior Puisne Judge, the office of Chief Justice being vacant, had appointed the Deputy Registrar, Mr. Combe, to be Master, and that such appointment had never been rescinded. It appears that there had been a number of such appointments as follows:

(1.) In 1882, the Chief Justice appointed the then Registrar, Charles J. Prevost.

(2.) On June 3rd, 1887, the same Chief Justice appointed the Deputy Registrar, Mr. Combe, without having rescinded in writing the appointment of the Registrar, who held office in August, 1895.

(3.) On April 29th, 1895, the then Chief Justice (DAVIE) appointed Mr. Combe, Deputy Registrar.

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In none of these cases was there any written rescission, nor do I think it was necessary, because the latter appointment of itself had the effect of superseding the former.

Looking at it from a statutory point of view, sub-section 33, of section 10 of the Interpretation Act, R.S.B.C. 1897, Cap. 1, provides:

"Words authorizing the appointment of any public officer or functionary, or any deputy, shall include the power of removing, re-appointing him, or appointing another in his stead, in the discretion of the authority in whom the power of appointment is vested."

Holding this view, the summons must be dismissed, with costs to the petitioner in any event.

The respondent appealed to the Full Court and the appeal was argued at Victoria on 8th and 9th November, 1898, before McColl, C.J., Walkem and Irving, JJ.

Cassidy, for the appeal.
Duff, contra.

On the appeal counsel for the appellant relied on the same grounds as those already set out and on the additional ground that "the said petition was not presented by any one or more of the persons named in section 212 of the said Act, and neither of the said petitioners was qualified or competent to present the said petition in that they were not, nor were either of them persons who voted or who had a right to vote at the election at which the petition relates, or claiming to have a right to be returned or elected at such election, or alleging himself to have been a candidate at such election." This last objection to the petition was stated in the summons in the Court below but not argued, though not abandoned.

The Full Court allowed evidence to be put in to shew that the petitioners had status.

At the conclusion of the argument the Court dismissed the appeal—costs in the cause.

Appeal dismissed.

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HALL v. THE QUEEN AND THE KASLO AND SLOCAN RAILWAY COMPANY.

Petition of right—Crown lands—Kaslo and Slocan Railway Subsidy Act and Amending Acts.

Judgment of DRAKE, J., reported *ante* at p. 89, confirmed.

APPEAL from the judgment of DRAKE, J., reported *ante* at p. 89.

The appeal was argued at Victoria on 10th September, 1900, before MCCOLL, C.J., WALKEM and IRVING, JJ.

Hunter, for appellant.
MacLean, D.A.-G., for the Crown.
Duff and *G. E. Martin*, for the Railway Company.

On November 20th the Court gave judgment at Vancouver dismissing the appeal on the ground that the petitioner had no status to litigate the questions raised.

Appeal dismissed.

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Discovery—Examination of ex-officer of corporation—Reading depositions at trial—Practice.
Engineer—Certificate—Contract—Fraud—Collusion or prevention.

On an examination for discovery of an ex-officer of a corporation the corporation's counsel attended and objected to certain questions being put.

Held, that the deposition was admissible at the trial.

Where, under a contract which made the right of the contractors to receive payment for the construction of certain works dependent upon the certificate of an engineer who was also sole arbitrator of all disputes, the engineer unjustifiably delayed the issue of the certificate for seven months and acted in a shifting and vacillating, though not fraudulent manner, and probably caused heavy loss to the contractors by his mistakes,

Held, in the absence of collusion on the part of the corporation the certificate could not be set aside.

Impropriety of certain acts of the corporation remarked upon.

ACTION tried before MARTIN, J., on 4th, 5th, 6th, 23rd, 24th, 25th, 27th, 28th and 30th April, 1900.

Duff, for plaintiffs.
W. J. Taylor, Q.C., and *Bradburn*, for defendant.

During the trial on 4th April,

Duff, for the plaintiffs, proposed to put in the deposition taken on the examination for discovery of E. A. Wilmot, who had been the engineer for defendant, but was not such at the time of the examination. On the examination *W. J. Taylor, Q.C.*, counsel for defendant, attended. He did not ask any questions, but objected to certain questions and advised Wilmot not to answer them.

Argument.

Taylor, Q.C., now took the point that under the rules the examination of an officer of a corporation is not admissible in evidence at the trial against the corporation unless the corporation has attended the examination and taken part in same by

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counsel. The objection was entered on the authority of the judgment of Osler, J.A., in *Leitch* v. *Grand Trunk Railway Company* (1890), 13 P.R. 369. Rule 725 says "opposite parties." In Ontario it was necessary to pass a new rule, 461 (3), before the examination could be read: see Holmsted and Langton, 2nd Ed., 630.

Duff, relied on rules 703 and 706. The question is, does the word parties in rule 706 extend to officers of corporations; an examination of the rules contained in the same Order shews that "parties" here means "persons." Unless that construction be given to the word parties the examination of an officer of a corporation is never admissible under rule 706. The rules do not warrant the distinction suggested by Osler, J.A. As to the cases; *Union Bank* v. *Starrs* (1889), 13 P.R. 108, is an express decision that the deposition is admissible; *Leitch* v. *Grand Trunk Railway Company* was argued by the same counsel and *Union Bank* v. *Starrs* was not cited, and the point suggested by Osler, J.A., was not taken or dealt with on the argument. The practice laid down in *Union Bank* v. *Starrs* has always been followed here and should be followed in preference to Mr. Justice Osler's dictum. He cited also *The Canada Atlantic Railway Company* v. *Moxley* (1888), 15 S.C.R. 145. In any event *Taylor* did take part in the examination by objecting to questions, and even under the rule suggested the examination is admissible.

Argument.

Per curiam: Even in Ontario the rule seems to be wide enough to allow the evidence being put in, though there has been some difference of opinion on it, and a new rule was passed probably as a matter of precaution; since the practice in this Court has been to admit it, that practice should not be lightly departed from.

Deposition received.

8th December, 1900.

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MARTIN, J.: This is an action to recover the sum of $21,898.09 as the balance alleged to be due the plaintiffs by the defendant Corporation under a contract dated the 12th of July, 1895, for the construction of certain specified works, (chiefly coffer-dam,

filter beds and reservoir) at the defendant's water works at Beaver Lake, for the sum of $83,500.00. The plaintiffs allege construction and completion of the works according to contract, and non-payment of the balance due. The defendant denies such construction and completion, and further sets up that the plaintiffs have been paid all sums due them under the contract according to this final "estimate" of the engineer:

"CITY SURVEYOR'S OFFICE,
"VICTORIA, B. C.,
"December 19th, 1898.

"FINAL ESTIMATE.

"I hereby certify that Messrs. Walkley, King and Casey are entitled to the sum of $1,947.66 and a return of their deposit cheque for the sum of $4,375.00 in respect of work and labour performed, and material provided, and also satisfaction and settlement of all disputes and differences arising out of their contract with the Corporation of the City of Victoria, for the construction of the filter beds and reservoir at Beaver Lake.

"E. A. WILMOT,
"Engineer in charge."

This final estimate was, presumably, given under clause 37 of the contract:

"(37.) If any difference or dispute shall arise between the Corporation or any of its officers and the contractor either with regard to the construction or effect of the contract, specification or drawings, or to the rights, duties or liabilities of the contractor, or of the Corporation under this contract, or as to the due performance of the contract by the contractor, or as to any materials or workmanship, or as to any other matter or thing or cause of difference arising out of the contract, or the execution thereof directly or indirectly, the same shall be referred to the award and decision of the engineer as sole arbitrator whose decision shall be final, and conclusive between the parties and a condition precedent to any right of action by the contractor against the Corporation. The engineer shall have power over the course of any proceeding under this clause."

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By clause 9 the works were to be "executed in the best and most substantial and workmanlike manner with the materials of the best and most approved quality of their respective kinds . . . . . and to the full and entire satisfaction of the Corporation and their engineer according to the instructions and

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directions which the contractor may from time to time receive from the engineer or other persons authorized by him."

Clauses 20, 21 and 29 are as follows:

"(20.) The contractor shall commence, execute and carry on all the works comprised in the contract to the satisfaction of the engineer with due diligence and with as much expedition as the Corporation or the engineer shall require, and in case the contractor shall fail to do so or shall neglect in the opinion of the engineer or the Corporation to provide proper and sufficient materials, or to employ a sufficient number of workmen, or to execute the works which he shall be ordered to execute with due diligence, or the despatch required, then the Corporation shall have full power without vitiating this contract, and they are hereby authorized to take the works wholly or in part out of the hands of the contractor and to engage or employ any other person or workmen, and procure all requisite materials and implements for the due execution and completion of the said works or any part thereof and the costs and charges incurred by the Corporation in so doing shall be ascertained by the engineer and paid for and allowed to the Corporation by the contractor, and it shall be competent for the corporation to deduct the amount of such costs and charges out of any moneys due or to become due from them to the contractor under this or any other contract, or the Corporation may recover the amount of the same costs and charges from the contractor as a debt due to the Corporation from the contractor.

"(21.) Should any materials be brought upon the works, or on the land or property of the Corporation, or to the places where any operations have been or are being carried out in connection with the works, or should there be any of the workmanship which in the judgment of the engineer or person authorized by him shall be of an inferior description and improper to be used in the works, the said materials shall be removed and the workmanship amended forthwith and within such period or periods as the said engineer and person may direct. In case the contractor shall neglect or refuse to comply with the foregoing condition it shall be lawful for either the engineer or persons authorized by him on behalf of the Corporation and by their agents, servants and workmen, to remove the materials and workmanship so objected to or any part thereof, and to replace the same with such other materials and workmanship as shall be satisfactory to him or them and for the Corporation on the certificate of the engineer to deduct the expense thereby incurred or to which the Corporation may be put or be liable or which may be incident thereto from the amount of any money which may be or may become due or owing to the contractor or to recover the same by action at law or otherwise from the contractor as the Corporation may determine.

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"(29.) And provided further that such completion and delivery at the time aforesaid or at any subsequent time shall be deemed to be a

completion and delivery only if the engineer and the Corporation shall accept the same on behalf of the Corporation, and when so accepted shall not be deemed a full and complete and sufficient completion and delivery by the contractor to the Corporation, but only a permissive use of the said works for the purposes of the Corporation unless and until a certificate in writing hereinafter called a certificate of completion under the hand of the engineer shall have been given to the Corporation to the effect that the several works constructed by the contractor and all other works contracted for and directed to be executed are in a sound, watertight, workmanlike and complete and usable condition, and that the contractor has in the opinion of the engineer reasonably fulfilled and completed his contract and undertaking except so far as related to maintenance of the works as hereinafter provided; Provided always and notwithstanding anything contained in this contract, it shall be lawful for the Corporation to undertake and execute by or through other parties at any period during the continuance of this contract, any kind of work, matter or thing whatsoever which they may consider necessary or proper to be performed and executed for the purposes of and in connection with any or all of the works under this contract, and that without in any way relieving the contractor from any of his liabilities and responsibilities under or in any way vitiating or avoiding this contract."

The plaintiffs duly commenced the construction of the works, and claim to have completed them on the 15th of July, 1896; but the defendant and its engineer would not accept them on the ground that there had been no completion within the meaning of the contract. Finally, after prolonged disputes, the defendant in the beginning of August, 1897, took over the works and completed them. The evidence of the engineer in charge shews that prior to the 14th of May, 1898, the final test had been made and the works completed by the Corporation, but the final estimate was not given till the 19th of December following, and after this action had been commenced on the 15th of November.

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No engineer to take charge of the works was named in the contract, but the City appointed to that office Godfred Jorgensen, C.E., who had prepared the plans and specifications therefor. Jorgensen continued in charge till the 11th of February, 1896, when he was suspended by the Mayor of the Corporation, and that suspension was "made absolute" by the City Council.

On the 16th of March, thereafter, the following resolution was passed by the City Council:

" . . . That the City Engineer, E. A. Wilmot, Esq., C.E,

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be hereby authorized by the Corporation of the City of Victoria to act as engineer to supervise the carrying on of the work at Beaver Lake for the Victoria water works under the memorandum of agreement made on the 12th day of July, 1895 . . . . and that Mr. H. P. Bell be named by this Council as consulting engineer."

The plaintiffs contend that the certificate, or final estimate, of the engineer, Wilmot, should be set aside on the ground that, as alleged, he acted in what amounts to a fraudulent manner, and being dominated by his regular employer, surrendered his judgment into its hands, acted at its dictation, and, in short, abdicated his functions as arbitrator and dispute-preventer between the parties. This of course amounts to setting up a case of collusion or procurement, and if it can be established it is conceded that the certificate must be set aside.

It is necessary to consider the grounds on which a certificate of an engineer may be successfully or unsuccessfully attacked. In *Goodyear* v. *The Mayor, &c., of Weymouth and Melcombe Regis* (1865), 35 L.J., C.P. 12, at p. 17, Chief Justice Erle said, "We cannot inquire whether he allowed properly or improperly, though of course, if his conduct was fraudulent, his determination would be void. . . . ." And Mr. Justice Willes said, "If he has (decided in a certain way), he has decided erroneously; but that is a matter for his own conscience, and the Corporation have to blame themselves for appointing him. . . . ." These two Judges expressed themselves to a similar effect in *Clarke* v. *Watson* (1865), 18 C.B. N.S. 278, where it is pointed out that an allegation that the surveyor "wrongfully and improperly" neglected and refused to certify was not sufficient, but that if it had been alleged that the defendants wrongfully colluded with the surveyor to cause the certificate to be withheld they could not have sheltered themselves by their own wrongful act. And *Clarke* v. *Watson* was approved by the Court of Appeal in *Botterill* v. *The Ware Board of Guardians* (1886), 2 T.L.R. 621. In *Stevenson* v. *Watson* (1879), 4 C.P.D. 148, at p. 159, Lord Coleridge says: "I think this case is within the authority of the cases cited which decide that where the exercise of judgment or opinion on the part of a third person is necessary between two

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persons, such as a buyer and seller, and, in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or ignorantly, or negligently, an action will not lie against the person put in that position when such judgment has been wrongly, or improperly, or ignorantly, or negligently exercised. I will not discuss the principles on which they rest; it is enough to say that in those judgments pronounced by Courts of co-ordinate jurisdiction, and also in the Exchequer Chamber, I entirely concur, not only on authority, but on grounds of reason and sense."

And see *Smith* v. *The Howden Union Rural Sanitary Authority* (1890), 2 Hudson on Building Contracts, 71 to the same effect.

In *Re De Morgan, Snell & Co.* v. *The Rio de Janeiro Flour Mills, Limited* (1892), 2 Hudson 132, at p. 143, Lord Esher says: " . . . . . For the wrongful act of the resident engineer the Company were, as pointed out by Mathew J., not liable, unless they interfered with him."

The case of *Clemence* v. *Clarke* (1879), 2 Hudson 207, is an important one as to the question of the engineer's abdication of his functions. Mr. Justice Grove says, p. 212: "I do not mean to say that if the architect had delegated the whole of his duty to another person, if he had taken another architect and paid him a smaller sum of money than probably he would be entitled to, taken another architect of inferior station and had appointed him to supervise and look over all the work instead of him, and had abdicated his whole functions and delegated them wholly to another person—that there would not have been a ground for setting aside the certificate, because in that case it would have amounted in my mind to misconduct—it might not amount to fraud; because, though he might not think that he was doing an utterly wrong thing, it would in my mind amount to that which the law would call misconduct, since it would be delegating his own duties, upon the performance of which the parties rely, to another person."

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And see also Mr. Justice Lindley at p. 218 and Lord Chief Justice Coleridge at p. 221.

The case of *McDonald* v. *Mayor and Corporation of Workington* (1892), 2 Hudson 222, is perhaps one of the strongest

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cases on this point, all the Judges in the Court below, and in the Court of Appeal being unanimous. There, as here, it was agreed that no work should be paid for until a certificate was given by a person who was nominated, viz.: the surveyor to the corporation, who as Mr. Baron Pollock says, "for the purpose of this contract held the position of judge between the two parties, and who, although he was bound to give a certificate under the contract if he could do so, was in no sense bereft of a perfectly free judgment which he could exercise as he thought proper and fit." Lord Esher, at p. 227, sets out the duty between persons acting under such circumstances as follows: "Where a surveyor is put into that position to give a certificate I do not say that he is an arbitrator, but he is an independent person: His duty is to give the certificate according to his own conscience and according to what he conceives to be the right and truth as to the work done, and for that purpose he has no right to obey any order or any suggestion by these people who are called his masters. For that purpose they are not his masters. He is to do that on his own conscience wholly independent of them, and to act fairly and honestly as between them and the contractor. Therefore, the surveyor has different positions in this respect. As to the additional works he is to obey the instructions of the urban authority, and to make known to the contractor what he does not know already, but as regards the certificates he has an independent and further duty, which is a duty as between the contractor and the corporation, and as regards that he ought not to take any suggestion except what he thinks right either from the contractor or from the urban authority."

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And Lord Justice A. L. Smith, at p. 230, says:

"Unless he (the plaintiff) can get rid of this condition precedent by shewing that the Corporation and the architect, acting in collusion, have withheld the certificate—or I might go further and say—that the Corporation have themselves hindered and prevented the engineer from giving the certificate, the Corporation have a good answer to any claim on the contract. . . . ." And Lord Esher at p. 229 takes the same ground.

To a similar effect are *Ranger* v. *The Great Western Railway Company* (1854), 5 H.L. Cas. 72; *Scott* v. *The Corporation of*

Liverpool (1858), 28 L.J., Ch. 230; *Batterbury* v. *Vyse* (1863), 2 H. & C. 41; *Kempster et al* v. *The Bank of Montreal* (1871), 32 U.C.Q.B. 87; *Brunsden* v. *Beresford* (1883), 1 Cab. & Ell. 125; and Hudson on Building Contracts, Vol. 1, at pp. 304, 308, 316-18.

The cases of *Jackson* v. *Barry Railway Company* (1893), 1 Ch. 238; *Eckersley* v. *The Mersey Docks and Harbour Board* (1894), 2 Q.B. 667 and *Ives & Barker* v. *Willans* (1894), 2 Ch. 478, are valuable, though relating to the circumstances under which a Court will intervene to prevent a reference to arbitration. In the most recent of them, *Ives & Barker* v. *Willans* Lord Justice Lindley says, p. 488:

"Having chosen to put themselves in that position, the sub-contractors cannot complain of the legitimate consequence of their bargain; but they could complain of the illegitimate consequence, and if it were true that these engineers were in collusion with the contractor so as to act unfairly, or so as to lead the Court to suppose that they would act unfairly, there would be some ground for saying that this arbitration clause ought not to be enforced . . . . ."

At p. 491, Lopes, L.J., draws attention to the following "highly instructive words" of Lord Justice Bowen in *Jackson* v. *Barry Railway Company:* "It was an essential feature in the contract between the plaintiff and the railway company that a dispute such as that which has arisen between the plaintiff and the company's engineer should be finally decided not by a stranger or a wholly unbiassed person but by the company's engineer himself. Technically, the controversy is one between the plaintiff and the railway company; but, virtually, the engineer, on such an occasion, must be the judge so to speak, in his own quarrel. Employers find it necessary in their own interests, it seems, to impose such terms on the contractors whose tenders they accept, and the contractors are willing, in order that their tenders should be accepted, to be bound by such terms. It is no part of our duty to approach such curiously coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on

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its business. To an adjudication in such a peculiar reference, the engineer cannot be expected, nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They knew well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence."

In regard to the appointment of the city engineer, a regular salaried official of the Corporation, to the position of engineer in charge of these works, the objection is taken that such an appointment was not contemplated by the parties, and was therefore improper on that and other grounds. But it is not at all unusual to appoint the city engineer in such cases. This was done *e.g.*, in *Farquhar et al* v. *The City of Hamilton et al* (1892), 20 A.R. 86. The clause of the contract in that relation is given at p. 87, and is as follows:

"The term engineer shall apply to the city engineer for the time being, or some other officer or officers appointed by him or the council to act for him in special or particular cases, &c."

The clauses in the present contract are as follows:

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"(24.) In the absence of the engineer any other persons whom the Corporation or their engineer may appoint to superintend the works are to have full power to decide as to the manner of conducting and executing the works in every particular, and the contractor shall follow the instructions or orders of the persons so appointed.

"(38.) In this contract the word 'engineer' shall be held to mean the engineer for the time being duly authorized by the Corporation to act as engineer during the continuance of this contract."

Though here the first engineer in charge, Jorgensen, devoted his attention exclusively to the works, and was not an employee of the Corporation in the same sense that Wilmot was, the clauses here are wider than those in the case last cited, and the plaintiffs should have realized that under them the Corporation had an unfettered right of selection, Hudson, 63-4, 299-300, 325-6, and might, in case of the death, resignation or dismissal of the then

engineer in charge, choose one of its employees whose position was of a more permanent nature than that of the engineer the plaintiffs thought would be appointed at the time the contract was entered into. The remarks of Mr. Justice Osler in *Farquhar* v. *Hamilton*, at p. 95, are appropriate. After distinguishing *Kimberley* v. *Dick* (1871), L.R. 13 Eq. 1, the learned Judge says:

"It was contended that the engineer, from his desire to stand well with his employers and to avoid the admission that he had made a mistake, was necessarily so biassed in favour of, or committed to, the support of his own opinion that he could not decide impartially between his employers and the contractors. That, however, is just the bias of which the contractors under conditions of this kind always take the risk; and if the engineer's power to act under them was to depend upon whether the Court might afterwards agree with his opinion they might as well be omitted."

The case of *Good* v. *The Toronto, Hamilton and Buffalo Railway Company* (1899), 26 A.R. 133, affirmed by the Supreme Court (Nov. 29, 1899) 20 C.L.T. 49, in some respects, perhaps, goes farther than any other case in England or Canada, with the exception of *Kemp* v. *Rose* (1858), 1 Giff. 258 and *Pawley* v. *Turnbull* (1861), 3 Giff. 70, in regard to which it may be said that they have been so often questioned and distinguished that it is no longer safe to rely on them, except, perhaps, on the ground of prevention by the employer—*vide* Hudson, pp. 307, 309, 316-17. But in view of the circumstances under which *Good* v. *The Toronto, Hamilton and Buffalo Railway Company* was decided, it is difficult to see how any other conclusion could have been arrived at, because the learned trial Judge found a clear case of prevention and collusion, and that the engineer was disqualified "because he was from the beginning merely Young's man." As Mr. Justice Osler, on the appeal, puts it, p. 145, "the engineer's real position was quite unknown to the plaintiffs;" and he points out, p. 144, that very different considerations would have arisen had the contract "been one which bound them (defendants) to accept the judgment and decision on the several points in dispute of a person stated in the contract to be the

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engineer of the Company with whom they were contracting." And the learned Judge goes on to say that the contractors would in such case be bound by the decision of the engineer "notwithstanding the fact that his relation to his own employers might inevitably or insensibly prevent him from acting with what Lord Justice Bowen described as the 'icy impartiality of a Rhadamanthus.'"

It will be remembered that the clauses (9, 24 and 38) already cited of the present contract shew clearly that the engineer herein was the engineer of the defendant Corporation.

The following observations of Vice-Chancellor Knight Bruce *In re Elliott* (1848), 12 Jur. 445, at p. 446, shew that a surveyor was not disqualified as umpire under similar circumstances, even though he was otherwise connected with one of the parties concerned:

"With regard to Mr. Marmont, I am not clear that he ought to have been appointed an umpire in point of delicacy, considering his connections with the Great Western Railway Company were known; as his connection is far from being only that of a surveyor for the Company, for he holds many shares, and has a considerable interest in the Company in question. I fear I should be going too far—I am satisfied indeed that I should be going too far by setting aside the award on that ground merely. Therefore, though there are some things which I should be better satisfied to see otherwise, yet I think there are not judicial grounds on which I can set aside this award. I think the award has been saved very narrowly indeed, as far as my judgment is concerned."

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The matters relied upon to substantiate the charge that since the contract the engineer abdicated his functions, or disqualified himself from discharging his duty in consequence of his being over-awed by the Corporation are several. I shall deal with them briefly in their order.

First, the objection is taken, in regard to the appointment of Wilmot, that in 1895 he had been asked to resign his position, and it is urged that this is an undisclosed circumstance which brings the case within the principle of *Good* v. *The Toronto, Hamilton and Buffalo Railway Company.* It appears that in

that year, the Mayor, at the request of the Council, informed the engineer that the Council intended to discharge him, and asked him to resign, but that he (Wilmot) flatly refused to do so, and, as the Mayor says, the Council changed their minds very decidedly —in fact "backed down completely, and didn't discharge him." This was some considerable time before Wilmot had any connection with the water works contract, so in my opinion, the incident could not have any appreciable legal effect thereon.

Then it is objected that there was no justification for the suspension and dismissal of Jorgensen by the defendant, that the reason assigned therefor was invalid, and the whole proceeding of an arbitrary nature. This contention is in my opinion well founded. Whatever reasons there may have been for the Mayor and Council wishing to get rid of Jorgensen, it is quite clear to me that he was right in resisting the attempt of the Corporation to usurp his functions as engineer in charge with regard to giving an extension of time to the contractors. It follows, therefore, that his suspension for the reason given was improper, though I believe the Mayor and Council were not actuated by any improper motives however harsh the result might be. In their letter of February 15th, 1896, to the Mayor and Corporation the plaintiffs' solicitors protest against the dismissal of Jorgensen, the engineer in charge, on the ground that such an act was entirely beyond any powers which the Corporation could exercise in the premises. Beyond this general objection, no specific exception was taken to the subsequent appointment of the city engineer to be engineer in charge in place of the one dismissed. The effect of this incident will be considered later.

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Next as to the coffer-dam. It is alleged that the engineer surrendered his own judgment in this matter and submitted to the Mayor's dictation. The Corporation contended that the coffer-dam was a temporary work which the contractors were bound to remove at their own expense; this the contractors refused to do. A dispute arose about it in November, 1896, and the then Mayor informed the plaintiffs that no matter what the engineer said, they, the contractors, would have to remove the dam at their own expense. It would appear, though not clearly so, that Wilmot inclined to the view expressed by the former

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engineer, Jorgensen (in his, Jorgensen's, letter of November 23rd, 1896), that the contractors were not responsible for the removal; but Wilmot changed his opinion more than once, though he now is of the opinion that the contractors should not have been called upon to remove the whole of the coffer-dam, which at one time he appears to have required them to do. He had conversations with both the Mayor and the contractors on the question, but no positive decision was arrived at by him, and the dispute was subsequently settled by an agreement entered into between the parties on the 9th of March, 1897. Wilmot's conduct on this matter was indecisive, vacillating, and shifting, but I am unable to say that it was anything more than that. His action in regard to the controversy as to the testing of the works was somewhat of the same nature, though to a less extent; and he did finally, by his letter of May 5th, decide in favour of the contractors' contention.

The weightiest charge is in regard to the delay in issuing the certificate. It will be remembered that the works were completed prior to the 14th day of May, but the certificate was not issued till the 19th of December. It is suggested that the reason for this long delay was that the engineer was so terrorized by the City Council, in consequence of the occurrences already noticed, that he feared to do his duty; and in addition to what has been mentioned, the further fact is brought forward, as a clue to the engineer's conduct that during this period efforts were being made in the City Council to have him dismissed from his position. A motion was introduced to that effect on the 8th of August, 1898, and it was directed to be laid on the table for one week. On the 29th day of August the said motion "was taken from the table and the consideration thereof again deferred for one week." Finally, on the 23rd of January following, the engineer was dismissed. Before the completion of the works, and while they were being carried on under the superintendence of Wilmot, ineffective proceedings had been taken in the City Council to bring about his dismissal. He now admits that the contractors were entitled to a certificate in May, and attempts to explain the delay by saying that he considered it his duty to consult the standing counsel of the Corporation before granting the certificate, and

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that said counsel was absent part of the time, in May and June, about six weeks. Wilmot's evidence on this point is indefinite, evasive, and in every way unsatisfactory. It is clear, however, that in August he informed the plaintiff Walkley that he was entitled to a certificate; this in answer to Walkley's request for it, and Wilmot explains that he did not think it his duty to issue a certificate before it was demanded. I am quite satisfied that subsequent to this date he informed both the plaintiffs that the matter had been "taken out of his hands," and this statement of the plaintiffs (whose evidence, I may say here, was given in a straightforward manner) is largely confirmed by Wilmot's previous letter of September 8th, 1898, to Bodwell & Irving, in which he states, "that the matter was referred to the City solicitor." It is not clear when Wilmot consulted the counsel for the City, apparently about the middle of August, but I am satisfied that the substance of the reply he got from said counsel was that he was to use his own judgment and make out the certificate according to facts. Practically no reason is given for the delay that occurred after that, and it was only the issue of the writ that stirred the engineer into action.

The conclusion I have come to in regard to Wilmot's conduct is that he endeavoured to escape the responsibility which devolved upon him, and tried in every way, but unsuccessfully, to cast the burden of it upon other shoulders. He adopted every expedient open to a weak and irresolute man to put off doing his duty between his employers and the plaintiffs, but finally gave his decision when he found it was the only course left open to him. Though he was eager that the matter should be "taken out of his hands," as he puts it, yet his statement to the plaintiffs that this had been done was, I can only find, contrary to fact. It is stated in Hudson, p. 337, that "To prove fraud against an architect it is not sufficient to shew that his estimates for work done pursuant to the contract are less than the measurements of the work actually done, nor that more work was done than included in the estimate. There must be evidence that he knowingly and wilfully disregarded his duty, and rejected or condemned work which he knew fully conformed in all respects to the contract. . . . . His intention will be presumed from his

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acts. . . . . But there must be either *mala fides* or recklessness amounting to *mala fides*."

I cannot find that the conduct of the engineer here amounts to fraud, but even if it did, what would be the consequence, in the absence of collusion, so far as the plaintiffs are concerned? Hudson, p. 308, after a review of the cases, says:—

"The only effect, therefore, of a fraudulent certificate for payment or of satisfaction (given without collusion with the employer) is to make the certificate void, and to leave the builder without remedy, unless he can get an honest certificate. In fact he may be in a worse position than if he had not disputed the fraudulent certificate. The result would be different if the employer acted on the fraudulent certificate by exercising his powers under the contract to re-enter and forfeit the contract."

Again, at p. 316: "No recovery can be had also unless the certificate has been fraudulently and collusively withheld, or unless, to state the rule more accurately, there has been a prevention by the employer, whether by collusion with the architect or otherwise. If the certificate has been withheld by the fraud only of the architect, no recovery can be had unless the employer has made use of the fraud of the architect to commit a breach of contract. *Smith* v. *Howden Union, supra.* In either of these alternatives the form of the action is for damages for breach of contract: A charge of capriciously withholding a certificate is not equivalent to a charge of fraud: *Mahoney* v. *Le Rennetel* (1892), 13 N.S.W. Rep. (Equity) 7. The only case which has departed from the long line of cases supporting the foregoing rule is *Pawley* v. *Turnbull* (1861), 3 Giff. 70. . . . . but that case cannot be any longer relied upon as an authority." And to the like effect at pp. 319 and 333. The same principle is affirmed in *Sharpe* v. *San Paulo Railway Company* (1873), 8 Chy. App. 597, where a mistake in calculation of over two million cubic yards was alleged. Lord Justice James says, at p. 607: "It is not alleged that Mr. B. had wilfully made miscalculations for the purpose of deceiving them; and if so, that would be the personal fraud of Mr. B. himself."

Judgment.

Though as a result of the large amount of evidence taken in

this matter I have more than a suspicion that the engineer made grave mistakes in his method of completing the works by reason of which large sums were wasted, which otherwise would be coming to the plaintiffs, yet error, of itself, is no ground, as has been seen, for setting aside the certificate.

As regards the action of the Corporation in dismissing Jorgensen, and the Mayor's attitude towards the coffer-dam dispute, and the attacks at the Council-board on the engineer while he was acting in his capacity as arbitrator, they not only cannot be justified but must be deplored. The peculiar position of the person attacked should have been borne in mind as well as the possible danger of practically forcing a servant of the Corporation to commit a fraud on the contractors. It is only fair to the engineer to say that he was improperly placed in a most unenviable position by such tactics, one in which he would almost necessarily be suspected of not doing his duty as arbitrator. Though I am unable to say that the defendant Corporation colluded with the engineer, yet it has acted throughout this matter in an indelicate and arbitrary way, and the contractors have not been treated as they were entitled to be treated as between man and man. It would have required very little more to have rendered the Corporation legally liable. However, even though the plaintiffs have, from a moral point of view, suffered a wrong, yet I must deal with matters as I find them according to law, and the only course open to me is to dismiss the action with costs.

Judgment.

Action dismissed.

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STODDART v. PRENTICE: LILLOOET ELECTION CASE.

Election petition—Rules of Court—Validity of—Proposed security—Meaning of.

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In section 216 of the Provincial Elections Act "proposed security" means "intended security" and a notice by petitioner informing respondent that security would be given by depositing $2,000.00 with the Registrar was held a good notice pursuant to the section.

The additional rules made 27th January, 1875 (*i.e.*, in addition to the Parliamentary Election Petition Rules, Michaelmas Term, 1868), are in force in British Columbia.

The petitioner after serving notice of the presentation of the petition and of the proposed security omitted to file an affidavit of the time and manner of such service thereof.

Held, by MARTIN, J., that the petition should not be struck off the files of the Court on that ground.

Statement.

SUMMONS to strike off the files of the Court a petition presented against the return of the respondent as a member of the Legislative Assembly of British Columbia for the Lillooet Electoral District (East Riding.)

Only the thirteenth and seventeenth grounds in the summons were dealt with and they are set out fully in the judgment.

Duff, for the summons.

W. J. Taylor, contra.

12th December, 1898.

Judgment.

MARTIN, J.: In this matter, which I dispose of at the request of the parties, there are seventeen objections to the petition, but with the exception of two of them, Nos. 13 and 17, the only ones argued, they are similar to those which have been disposed of in the judgment given by me on the 26th of October last, in the Esquimalt and other election petitions, which judgment was subsequently upheld by the Full Court. (See *Jardine* v. *Bullen*, 7 B.C. 471.)

Objection 13 is that "No notice of the presentation of the said petition and no notice of the proposed security was ever signed or served on the respondent herein as required by the Act."

Section 216 of the Provincial Elections Act requires "Notice of the presentation of a petition under this Act, and of the nature of the proposed security" to be served on the respondent. What purported to be a notice pursuant to this section was served on the last day for giving such notice, informing the respondent that "security as required by the Provincial Elections Act will be given on behalf of petitioner by depositing the sum of $2,000.00 in cash with the Registrar."

Mr. *Duff* contends that under the section "proposed security" means the security "offered" or "put forward," not what is "intended" in the mind of the petitioner to be put forward, and that to hold otherwise would lead to the respondent being left in a state of suspense as to whether the "intention" to give security in cash would be carried out. On the other hand Mr. *Taylor* argues that "proposed" here includes "intended," and that so far as the period of suspense is concerned the Act contemplates such suspension, *e.g.*, in case the petition were served on the same day it was presented the respondent would then be in doubt for a period of three days as to the petitioner's intentions, *i. e.*, until security was furnished or not. I think I must decide this point in favour of the petitioner, and hold that the notice was a sufficient compliance with the section.

The seventeenth objection is "That no affidavit of service of the said petition or notice thereof was filed in accordance with the rules in that behalf." The rule referred to is No. 70 of the English Parliamentary Election Petition Rules of January 27th, 1875, as follows:

Judgment.

"The petitioner or his agent shall, immediately after notice of the presentation of a petition and of the nature of the proposed security shall have been served, file with the Master an affidavit of the time and manner of such service thereof."

It is admitted that this provision has not been complied with, but Mr. *Taylor* takes the point that this rule is not in force here, and that the operation of section 268 of the said Provincial Elections Act, which provides that the rules framed in England under The Parliamentary Election Act, 1868, shall be observed so far as may be by this Court (until Rules of Court have been made under section 267 by the Judges of the Court), relates back to

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the Revised Statutes of British Columbia, 1871, Cap. 167, Sec. 25, where the present section 268 will first be found. It is argued that the consolidation of the Statutes of 1888, and the late revision of 1897, are a mere carrying forward of the original provision of 1871, and that the present section should be construed as if it had read in 1871, as the rules "now framed."

It is further argued that applying the principle laid down by Chancellor Boyd in *License Commissioners of Frontenac* v. *The Corporation of the County of Frontenac* (1887), 14 Ont. 741 at p. 745, to section 9 of the Act Respecting the Revised Statutes (R. S.B.C. cxi.), the rule in question does not apply for the reason that the revision of 1897 is merely declaratory of section 268 as it stood in 1871.

I had the benefit on Saturday, the 10th instant, of an interesting and instructive argument on this point, and I should like to have the time to discuss it fully, but as I was requested to give judgment at the earliest possible moment, in view of the urgency of the matter, and the departure of the petitioner's counsel for England, I must content myself, at present, with stating that after a consideration of said section 9, and also sections 3, 5 and 6 of the Act Respecting the Revised Statutes, I have arrived at the opinion that even if the Act of 1871 had read "now framed" instead of "framed," and had been so re-enacted in the revision of 1897, I should not be forced to construe it by a revision of 1871: to hold otherwise would be, it appears to me, to construe section 6 as directing the Revised Statutes to come into force and have effect "as of and from the day on which the various Acts were originally enacted." If the Legislature contemplated the construction suggested by the petitioner it would, I should think, have used language similar to that employed by the Dominion Parliament in 1874, when by the Controverted Elections Act, Cap. 10, Sec. 45, in making a similar provision to ours for the use of the English Election Rules, it was provided that the English rules "at the time of the passing of this Act" should be observed by the Courts and Judges.

Judgment.

This rule 70, then, in my opinion being in force here, it becomes necessary to consider, briefly, the result of the seventeenth objection above stated.

It is argued by Mr. *Duff*, that this requirement, though subsequent in point of time, is nevertheless, to adopt the language of Patterson, J., in the *Lisgar Election Case* (1891), 20 S.C.R. at p. 10, "something prescribed to be done by the petitioner at the institution of the proceedings," the lack of compliance with which must be held fatal to the petition. The case of *Williams* v. *The Mayor of Tenby* (1879), 5 C.P.D. 135, is also relied upon in support of this contention, and my attention is called to the language of the concluding paragraph in the judgment of Grove, J., at p. 138. Reports of this case will also be found in 42 L.T.N.S. 187 and in 49 L.J., C.P. 325, and a careful consideration of these three reports leads me to believe that the learned Judge was not considering the effect of the present rule 70, which was raised in one of the objections before him but not argued owing to its being dependent upon another and more weighty objection which was sustained.

The *Lisgar Election Case* assists more in the determination of the present point than any other case I have been referred to. There the neglect of the petitioner to leave, as required, at the time of filing the petition, a copy thereof with the clerk for the purposes of publication, was held to be a fatal objection on the ground, as stated by Ritchie, C.J., that this was "an essential part of the presentation or filing of the petition." As appears from the judgment of Patterson, J., the fact that the neglect of the petitioner to leave the copy of the petition prevented its prompt publication by the Returning Officer was apparently deemed by the Court a matter of considerable importance. It is to be noted that though Fournier, J., concurred in giving effect to this objection, yet he stated that if he had been sitting in the Court of first instance, he would probably not have given effect to it, and Strong and Gwynne, JJ., overruled the objection. It is true that the judgment of the Court upheld the point taken, yet I mention these circumstances as a guide to my action in the present case, where the objection taken is certainly not so weighty.

Judgment.

To give effect to the point under consideration I shall have to hold that immediate filing of the affidavit of service, after the notice of presentation of the petition, which is directed to be

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done for no apparent or declared purpose as existed in the *Lisgar Case*, is nevertheless "an essential part of the presentation or filing of the petition" as above quoted. Am I justified in doing this? It is admitted by both counsel that the rule is of no benefit to either of their respective clients, and such being the case, Mr. *Duff* contends that it must have been passed for the benefit and protection of the public, in order, for example, to enable proof of the service of the petition to be available in case of the death of the petitioner, and thus prevent a dismissal of the petition for lack of the important and primary proof of service, thus avoiding collusion. On the other hand it is argued by Mr. *Taylor* that if I hold this requirement peremptory, it would put a premium on collusion by leaving it in the power of one man, the petitioner, to prevent the trial of a petition simply by wrongfully neglecting to file the affidavit. What should be done under such circumstances? An answer to this will be found in the judgment of Strong, J. (now the Chief Justice), in the *Lisgar Case*, at p. 7, where he says that a similar case might have been met by a stay of proceedings until compliance, and if that were not sufficient I think this Court has other means of supplying the lack of evidence if the affidavit were not forthcoming.

I have come to the conclusion, after a very careful, I may say an anxious, consideration of this matter, and in spite of the exhaustive and able argument of Mr. *Duff*, which I regret I am unable, for reasons above stated, to deal with at greater length, that the objections to the petition cannot prevail. In arriving at this decision, which I do with hesitation, I am not a little influenced by the following expressions of Chief Justice Sir Henry Strong in the case last referred to:

Judgment.

"I think that in dealing with election cases it should be a golden rule that if there is any possible way of avoiding giving effect to technical preliminary objections and thus preventing the trial on the merits we should act upon it."

Summons dismissed; costs to petitioner in any event.

DUNN v. HOLBROOK AND BAIN.

BOLE, CO. J.

1899.

Nov. 13.

FULL COURT At Vancouver.

1900.

Jan. 26.

DUNN v. HOLBROOK

Mechanic's lien—Certificate of action imperative—Sections 8 and 24 of R.S. B.C. 1897, Cap. 132.

The certificate of action required under section 24 of the Mechanics' Lien Act, must be filed within the time therein limited, otherwise the lien ceases to exist.

APPEAL from a judgment of Bole, Co. J., in an action to enforce a mechanic's lien for $218.30.

The facts are as follows: Holbrook was the owner, Bain the contractor, Gilley a sub-contractor, and the plaintiff a sub-contractor under Gilley.

The Cunningham Hardware Company sued Gilley and garnished Bain. The plaintiff then filed a mechanic's lien and brought action to enforce the same, making Holbrook and Bain defendants, but did not join Gilley. Defence was entered on behalf of Holbrook and Bain. After the plaintiff's case was closed, Holbrook withdrew his defence, and asked leave to pay $500.00 into Court, being the amount due Gilley by Bain. Bain did not consent to such payment in, but continued to defend the action. No certificate of action as required by section 24 of Cap. 132, R.S.B.C. 1897, was ever filed.

Statement.

The following is the judgment of

13th November, 1899.

BOLE, CO. J.: This action is brought for the purpose of establishing and realizing an alleged lien, under the Mechanics' Lien Act. A number of objections have been taken to the validity of the lien claimed, but it will not be necessary, in the view I take of the case, to discuss any save that which relates to the non-filing of a certificate of action, commenced to realize the lien, pursuant to section 24.

Judgment of BOLE, CO. J.

The validity of a lien depends, *inter alia*, upon: (*a*) The filing of a lien in the office of the Government agent, within thirty days after the completion or discontinuance of the work

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in respect of which the lien is claimed (section 8); (*b*) on the institution of proceedings to realize the lien; (*c*) the filing in the Land Registry Office, etc., of a certificate of the Judge or Registrar of the Court, certifying that such action has been commenced, and such proceedings must be instituted and such certificate filed within thirty days after the filing of the lien, under section 8, or the lien absolutely ceases to exist.

This certificate, imperatively required by the 24th section does not appear to have been filed within the proper time, or at all.

It has been strenuously contended that the filing of this certificate is not a matter of substance or importance, and in no way affects the validity of the lien. I fear this contention cannot prevail against the distinct words of the 24th section, which, in clear language, declares that, if all the conditions of the section are not fulfilled "every lien shall absolutely cease to exist." To decide against the plain and unmistakable words of the Act, would be entirely to ignore the rule laid down by Lord Blackburn in *The Caledonian Railway Company* v. *North British Railway Company* (1881), 6 App. Cas. 114 at p. 131; *vide* also, *The Queen* v. *The Judge of the City of London Court* (1892), 1 Q.B. 273, *per* Lord Esher; *Walsh* v. *Trebilcock* (1894), 23 S.C.R. at p. 705; *Davis* v. *The City of Montreal* (1897), 27 S.C.R. 539, and as to necessity for strictly following the statutory mode of creating the lien, *vide Neill* v. *Carroll* (1880), 28 Gr. 30, confirmed on appeal, p. 339; *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592 at p. 602, affirmed, Cassels' Digest, 526; *McNamara* v. *Kirkland* (1891), 18 A.R. 271.

Judgment of BOLE, CO. J.

"The statute does not give a lien but only a potential right of creating it. It is quite clear that when a statute gives a privilege in favour of a creditor the creditor must bring himself strictly within its terms." *Per* Strong, J., in *Edmonds* v. *Tiernan* (1892), 21 S.C.R. at p. 407; and, while I cannot help sympathizing with the plaintiff, I am not on that account, at liberty to disregard the plain and positive provisions of the statute. I do not think, after a careful consideration of the evidence adduced, and the authorities cited, that the plaintiff's claim for a lien can be maintained, and judgment will be entered accordingly.

I make no order at present with respect to the money paid

into Court, and reserve all questions of costs for further consideration.

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The plaintiff then appealed to the Full Court on the grounds (1.) That the judgment so rendered entirely ignores the fact which appears upon the record of the trial that after the plaintiff had proved his case at the trial, the defendant, Henry Holbrook, the only defendant against whom the said plaintiff claimed any relief, withdrew his defence to the action and paid $500.00 into Court to satisfy the plaintiff's claim. (2.) That after the defendant Henry Holbrook had withdrawn his defence the learned Judge refused to give judgment in favour of the plaintiff against the defendant Henry Holbrook, when moved so to do by the plaintiff, without assigning any reason for such refusal. (3.) That the said judgment so rendered would apparently indicate that the defendant Henry Holbrook was represented in Court and was opposing the claim of the plaintiff for judgment against him the said defendant Henry Holbrook, which is not in accordance with the facts, the defendant Henry Holbrook having been entirely unrepresented in Court after he had withdrawn his defence to the action, immediately after the plaintiff had closed his case. (4.) That the defendant David Bain, who was defendant for notice only, should not have been allowed to conduct the defence of the action on behalf of the defendant Henry Holbrook in his absence and after he had withdrawn his defence and confessed the plaintiff's action, and that such proceedings were irregular. (5.) That the defence to the action was entirely of a technical character, and affected the defendant Henry Holbrook only, and the defendant Henry Holbrook having withdrawn said defence and consequently waived all irregularities, if any, the plaintiff was and is entitled to judgment against said defendant Henry Holbrook for the relief claimed in his plaint.

Statement.

The appeal was argued at Vancouver on 26th January, 1900, before DRAKE, IRVING and MARTIN, JJ.

Argument.

W. Myers Gray, for appellant: The lack of the certificate under section 24 of the Act is a matter of defence to the action and must be so raised, but here it was waived. Bain has noth-

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ing to do with Holbrook and is not liable to Dunn and never was. He cited *Moser* v. *Marsden* (1892), 1 Ch. 487; *Hovenden* v. *Ellison* (1877), 24 Gr. 448; *Real and Personal Advance Company* v. *McCarthy* (1881), 18 Ch. D. 362 and section 154 of the County Courts Act.

Reid, for defendant Bain: Bain was served with a garnishee summons before the lien was filed so he had to contest the action or he might have had to pay twice. On the trial I appeared for both defendants, but was afterwards retired for Holbrook and retained for Bain. Any party to the suit had a right to draw the Court's attention to the fact that the lien had determined; further if the parties had not appeared the Court in its own discretion could have disposed of the matter on the ground that its jurisdiction was at an end. "It is the duty of the Judge to see that the laws of England are observed." See judgment of Pollock, C.B., in *Barbat* v. *Allen* (1852), 7 Ex. 609 at p. 616; see also *Emden* v. *Carte* (1881), 19 Ch. D. 311.

Judgment.

Per curiam: This appeal should be dismissed on the grounds given in the Court below. All persons whose rights are affected by lien proceedings should be made parties in order that their rights should be ascertained and dealt with. The fact that the property owner, in order to avoid litigation, pays into Court the amount due by him under his contract, does not settle the rights of the various sub-contractors, neither does it preclude the other parties from raising any defences which the nature of the case permits.

Appeal dismissed with costs.

KETTLE RIVER MINES, LTD. v. BLEASDEL *ET AL.*

WALKEM, J.

1900.

Dec. 22.

KETTLE RIVER MINES *v.* BLEASDEL

Joint stock companies—Shares purporting to be fully paid—Whether purchaser liable for calls made in respect thereof.

A portion of the shares in a joint stock company, purporting on the face of their certificates to be of a certain par value and paid up were allotted to three promoters. One of them sold part of his allotment at a discount and had them transferred by the Company direct to the purchasers who were not aware that the shares were not really paid up.

Held, in an action by the Company, that the purchasers were not liable for the discount on such shares, inasmuch as the Company was bound by its statement in the certificates that the shares were "fully paid and non-assessable."

ACTION tried on 21st November, 1900, at Rossland, before WALKEM, J.

Nelson, for plaintiff.
Galt, for defendants.

22nd December, 1900.

WALKEM, J.: The question I have to decide is one of considerable importance, especially to mining companies. It is stated in a "Special Case," which, in substance, is that the plaintiff Company was incorporated under the provisions of the Companies Act, 1890, as the Kettle River Mining and Development Company, Ltd., and afterwards re-incorporated as the Kettle River Mines, Ltd., under the Companies Act of 1897, by virtue of section 5 thereof, with a capital of $1,200,000.00, represented by that number of shares of a fixed par value of $1.00 each.

Judgment.

The shares were sub-divided by the original Company as follows: 405,000, called vendors' shares—which it was specially agreed should be non-assessable—were issued at par to Hagelman and Hagen, as the price of the Christina mineral claim which the Company bought from them; 300,000 were set apart as Treasury shares for the development of the mine, but they were never used as they proved to be unsaleable; and the remaining

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shares were allotted to three promoters, namely, 330,000 to Fear and Repass, and 165,000 to one Langley.

Upon the Company being organized the promoters mentioned became its trustees, and thus had control of it.

Fear and Repass sold 112,000 of their allotment, and issued the share certificates direct from the Company to the purchasers, and afterwards abandoned the remaining 218,000 shares. This abandonment virtually means that they voluntarily threw up the chance, at least, of a prospective fortune of $218,000.00, if there ever was any truth in the representations which they and Langley had made, as promoters, that the shares of the Company were worth $1.00 each. In any event, it may be fairly inferred that Fear and Repass considered that the Christina was worthless; and that it would, consequently, be better, in their own interests, to throw up the shares and be satisfied with what they had made out of the Company and the public than retain them and be subject to assessments which, judging from these proceedings, they correctly foresaw would have to be made.

I now come to Langley's share in the transaction. Amongst other things, 30,000 of his shares were, at his request, issued by his co-trustees, Fear and Repass, direct from the Company to the defendants, who had previously bought them from him at four cents each on the faith of his statement—which proved to be untrue—and of the further statement on the face of the certificates—which was also untrue—that the shares were "fully paid and non-assessable."

Judgment.

In view of these facts, the defendants bought, as it were, in open market, and with every reason to believe that the shares were non-assessable.

The Company becoming embarrassed, a special general meeting was held for the purpose of re-incorporating it under the Companies Act, 1897, and making all promoters' shares assessable so as to obtain means to pay its debts. 400,000 vendors' and 235,010 promoters' shares were represented at the meeting; but the defendants were neither present nor represented, because, as Mr. *Galt*, their counsel, states, they understood from the notice calling the meeting that their shares would not be made assessable; but the notice, as I read it, plainly states that the

meeting would be asked to consent—which it eventually did by a large majority—to all promoters' shares being made assessable.

Again, Mr. *Galt* contends, on the authority of *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350, that this vote, representing, as it did, at least 400,000 vendors' non-assessable shares, was oppressive and illegal, as it enabled the majority to benefit itself at the expense of the minority; but I fail to see this, for the vendors had a right to insist upon the debts of the Company being paid, and the mine which they had sold to it being developed, without cost to themselves.

In accordance with the decision of the meeting, calls amounting to two cents each were made on all promotion shares; and, as the defendants refused to pay them, these proceedings were brought against them (see section 34, Act of 1890.) It is said that they are liable, in any event, for the calls, by virtue of section 20 of the Act of 1890, which is as follows:—

"Each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the Company to an amount equal to that not paid up thereon, but shall not be liable in an action therefor by any creditor before an execution against the Company has been returned unsatisfied in whole or in part; and the amount due on such execution shall . . . . . be the amount recoverable with costs against such shareholder."

But this section refers to a case where a creditor sues, and not to a case, such as the present one, where a Company sues; and it merely states to what extent a shareholder in a Company formed under the Act of 1890, may be held liable in an action brought against him personally by a creditor.

Judgment.

It is also contended by Mr. *Nelson* on the Company's behalf that, in its general effect, the section is similar to section 25 of the Companies Act (Imperial), 1867, which enacts that

"Every share in any Company shall be deemed to have been issued, and to be held, subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

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The section is, obviously, more stringent than our section 20; for nothing less than a full payment in cash for shares, whether they are marked "paid up" or not, is to have the effect of relieving the holder from liability to calls properly made; but in other respects, the object of the two sections is the same. Notwithstanding the clear language of section 25, it was unanimously held by the House of Lords, in *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1,004, that shareholders, who, like the defendants, have bought shares, marked "paid up" on the certificates, from third parties (*i. e.*, not from the Company), in ignorance of the fact that they have not been paid up, are not liable at the suit of the Company for calls on such shares, on the ground that the Company is bound by its statement that the shares are "paid up" shares, and that, as against it, such a statement is evidence on which the shareholders are entitled to rely; *per* Lord Cairns at p. 1,016. Moreover, as the law of estoppel is in no way affected or modified by the Companies' Acts, the plaintiff Company is estopped from saying that the shares which it issued as being "non-assessable" are, on the contrary, assessable.

Again, Fear and Repass ought not, as trustees, to have issued the certificates in question, as they must have known that the shares were not paid up.

In *Hirsche* v. *Sims* (1894), A. C. 654, the Privy Council held (at p. 657), that "It is not competent for trustees, or directors, to issue any shares at a discount, so as to make the holder liable for less than their full amount," and that where shares marked "paid-up" have passed, as in this case, into the hands of *bona fide* purchasers from the first holder, the Company will be estopped from saying that they are not paid-up. It was also held that directors, or, trustees, who issue shares at a discount are the persons who are answerable to the Company for that discount.

Judgment.

Counsel for the Company further contends that the defendants should not have resisted this action, but have taken proceedings to have the contract under which they purchased the shares rescinded. But that would only have been the case if the contract had been made with the Company and not with Langley.

In view of the above mentioned decisions, the defendants are entitled to judgment with costs.

BIRD *ET AL* v. VIETH *ET AL.*

MARTIN, J.
(In Chambers.)

1900.

July 31.

BIRD
v.
VIETH

Costs—Security for by foreign plaintiffs—Appeal.

Plaintiffs, resident outside the jurisdiction, lodged in Court an undertaking as security for costs. At the trial the plaintiffs succeeded, and defendants appealed, but before the determination of the appeal plaintiffs applied for a release of the undertaking.

Held, by MARTIN, J., that the security should stand pending the appeal.

SUMMONS for release of an undertaking by the Bank of British Columbia which had been lodged as security for costs by plaintiffs who were resident out of the jurisdiction. The action had been tried and judgment given for the plaintiffs and the defendants had given notice of appeal.

Argument.

A. D. Crease, for the summons: By the institution of the original proceedings the defendants were brought into litigation on an untried issue, hence their right to security. But that question has now been definitely decided in favour of the plaintiffs and any further litigation on the same issue (*e.g.,* by appeal) must be instituted by defendants, thereby shifting to themselves the liability to give security. If plaintiffs' security be retained in Court to abide event of appeal the practical result is that respondents will be giving security to appeal which would be both inequitable and contrary to the practice. He cited *Hamill* v. *Lilley* (1887), 56 L.T.N.S. 620; 3 T.L.R. 549.

Duff, contra: The defendants are entitled to have the security remain so long as the action is pending in this Court. The case cited has no application because there the appeal was to the House of Lords which is equivalent to proceedings in error, the appellant becoming plaintiff in what is practically a new action. The Full Court on the other hand gives judgment in the original action as does the Court of Appeal in England and the action is pending until the appeal is disposed of. He cited *Hately* v. *The Merchants' Despatch Company et al* (1886), 12 A.R. 640, Osler, J. A., at p. 658; *National Insurance Company* v. *Egleson* (1882),

MARTIN, J. (In Chambers.)
1900.
July 31.

BIRD v. VIETH

9 P.R. 202; *Wilson* v. *Beatty* (1883), 10 P.R. 71; *Marsh et al* v. *Webb et al* (1892), 15 P.R. 64 and *Hawkins Hill Consolidated Gold Mining Company, Limited* v. *Want, Johnson and Co.* (1893), 69 L.T.N.S. 298.

Crease, in reply: *Hamill* v. *Lilley* decided a principle quite irrespectively of a question of Court and if decisions of Ontario Court of Appeal conflict, a judgment of the English Court of Appeal must prevail.

Held: The appeal being to the Full Court of the Supreme Court of British Columbia, the security should not be released pending that appeal.

Summons dismissed.

NOTE.—Compare *Rombrough et al* v. *Balch et al* (1900) 19 P.R. 123.

IRVING, J.
1900.
March 3.

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED v. MANUFACTURERS GUARANTEE AND ACCIDENT INSURANCE COMPANY.

B. C. ELECTRIC RY. CO. v. MANUFACTURERS GUARANTEE AND ACCIDENT INS. CO.

Discovery—Examination of ex-officer of corporation—Reading deposition at trial—Rule 725.

An examination for discovery of an ex-officer of a corporation is not inadmissible at the trial merely because the person examined was not such officer at the time of examination.

DURING the trial of the action on 3rd March, 1900, the defendants sought to read as evidence transcript of examination for discovery of a past officer of the plaintiff Company, who had been dismissed. The officer had been superintendent of the Company.

Argument.

A. E. McPhillips (*L. G. McPhillips, Q.C.*, with him), for the plaintiffs, objected. The evidence is inadmissible under r. 725. The co-relative Ontario rule had to be enlarged to admit like evidence, and this change was the result of various conflicting

IRVING, J.
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March 3.
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decisions of the Courts. Mr. Justice Burton's judgment in *Leitch* v. *Grand Trunk Railway Company* (1890), 13 P.R. 369 at p. 377, where he comments upon the decisions of the Supreme Court of Canada in *The Canada Atlantic Railway Company* v. *Moxley* (1888), 15 S.C.R. 145, is in point. This man was not an officer of the Company when examined, and does not satisfy the provision that he must be one of the parties.

Davis, Q.C. (*Marshall*, with him), for defendants: The cases referred to, apply as much to a present officer as to a past officer. The case of the *Union Bank* v. *Starrs* (1889), 13 P.R. 108 decides that an officer is included in the expression "the opposite party."

Judgment.

IRVING, J.: I must follow the case of the *Union Bank* v. *Starrs*—the only difference between it and the case under discussion being, that in that case the party examined was at the time of the examination an officer of the Company, and in this he is a past officer. I have not been able to distinguish between the two grounds.

Objection overruled.

THE QUEEN v. THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE DISTRICT OF MISSION.

McCOLL, C.J.
1900.
Nov. 2.
THE QUEEN v. CORPORATION OF MISSION

Municipal law—Limitation of action against municipality—Whether action includes mandamus proceedings.

The limitation of one year prescribed by section 244 of the Municipal Clauses Act, for commencing actions against a municipality applies to *mandamus* proceedings to compel a municipality to appoint an arbitrator to determine the amount of compensation for land taken for road purposes.

MANDAMUS to compel the defendant to appoint an arbitrator for the purpose of determining the compensation to be awarded Robert Law for land taken for road purposes.

McCOLL, C.J.
1900.
Nov. 2.
THE QUEEN v. CORPORATION OF MISSION

Godfrey, for defendant, took the preliminary objection that the action was barred by section 244 of the Municipal Clauses Act, as the land was taken some five or six years previous to the issue of the writ of *mandamus*.

J. R. Grant, for the motion.

2nd November, 1900.

McCOLL, C.J.: Having come to the conclusion that I must give effect to a preliminary objection taken, though not argued, that the limitation of one year prescribed by section 244 of the Municipal Clauses Act applies to this matter, I do not discuss any of the other points dealt with by counsel. What is the meaning of the words "all actions?"

Judgment.

Section 11 of the Interpretation Act provides that "the interpretation section of the Supreme Court Act so far as the terms defined can be applied shall extend to all enactments relating to legal matters" and section 2 of the Supreme Court Act defines the word "action" as meaning "a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court." I am therefore of the opinion that the motion must be refused with costs.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council.

CALLAHAN v. COPLEN (p. 422).—Affirmed by Supreme Court of Canada. See (1900), 30 S.CR. 555.

GALBRAITH & SONS v. HUDSON'S BAY COMPANY (p. 431).—Reversed by the Supreme Court of Canada, 7th December, 1900.

KIRK v. KIRKLAND *et al* (p. 12).—Affirmed by Supreme Court of Canada. See (1900), 30 S.C.R. 344.

MERCHANTS BANK OF HALIFAX v. HOUSTON & WARD (p. 465.)—Appealed to the Supreme Court of Canada. Appeal of Houston dismissed and appeal of Ward allowed. See (1901), 21 C.L.T. 401.

REGINA v. UNION COLLIERY COMPANY (p 247).—Affirmed by Supreme Court of Canada. See (1901), 31 S.C.R. 81.

SUN LIFE v. ELLIOTT *et al* (p. 189).—Reversed by Supreme Court of Canada. See (1901), 31 S.C.R. 91.

Cases reported in 6 B.C., and since appealed to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council.

HARRIS v. DUNSMUIR (p. 505).—Affirmed by Supreme Court of Canada. See (1900), 30 S.C.R. 334.

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APPEAL BOOK—*Mistake in—Preliminary objection.*] An objection to the hearing of an appeal on the ground that the appeal books are defective and erroneous is not a preliminary objection within section 83 of the Supreme Court Act. ROGERS *et al* v. REED. - - - - - - - - - 139

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ARREST—*Ca. re.—Affidavit—Sufficiency of—Irregularity—Waiver by giving bail.*] Statements in affidavit as to debt and intention to leave considered. A defendant arrested under a writ of *ca. re.*, admits by implication his intention to leave the Province by denying his intention to leave it

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permanently. By the giving of bail, a defendant so arrested waives his right to object to irregularities in the writ. ROBERTSON *et al* v. BEERS. - - - - - - - 76

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BANK ACT.—*Security under section 74—Advances made to bookkeeper of saw-mill owner—Right of Bank as against chattel mortgagee.*] Where the bookkeeper of a mill owner, to enable the owner to carry out a contract, bought logs with advance made for this purpose by a bank, which logs were cut up at such owner's mill and the bookkeeper indorsed the owner's notes to the bank: *Held*, by the Full Court, reversing MARTIN, J., that the logs, and lumber manufactured therefrom, did not come under a chattel mortgage covering all lumber which might at any time be brought on the premises, and that the Bank was not prevented by the Bank Act from taking the usual security in respect of the logs. MERCHANTS BANK OF HALIFAX v. HOUSTON & WARD. 465

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BENNETT-ATLIN COMMISSION ACT, 1899—*Appeal by consent from Commissioner purporting to sit as County Court Judge—Whether competent.*] The Special Commissioner appointed under the Bennett-Atlin Commission Act, 1899, cannot confer the right of appeal to the parties to a dispute tried before him by purporting to sit as a County Court Judge. JOHNSON v. MILLER. - - - - - - - - - - - 46

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2.——*Lodging house keeper—No definition of—How construed.*] Where a by-law requiring lodging house keepers to take out a license did not define what was meant by keeping a lodging house: *Held*, that it did

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COMPANIES, JOINT STOCK—*Shares purporting to be fully paid—Whether purchaser liable for calls made in respect thereof.*] A portion of the shares in a joint stock company, purporting on the face of their certificates to be of a certain par value and paid up were allotted to three promoters. One of them sold part of his allotment at a discount and had them transferred by the Company direct to the purchasers who were not aware that the shares were not really paid up. *Held*, in an action by the Company, that the purchasers were not liable for the discount on such shares, inasmuch as the Company was bound by its statement in the certificates that the shares were "fully paid and non-assessable." KETTLE RIVER MINES, LTD. v. BLEASDEL *et al.* - - - 507

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CONTRACT—*Implied—Action for work done—Authority of Agents—Incomplete verdict.*] In an action for work done and materials provided for certain steamers, the jury did not answer all the questions submitted, and the trial Judge gave judgment for the plaintiffs for the amount claimed for certain work covered by the certificate of an agent of the defendants, but discharged the jury as being unable to agree in respect

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of the other matters, and reserved further considerations. *Held*, on appeal, that on the findings as they stood the plaintiffs could not recover any amount other than the one allowed. GALBRAITH & SONS v. HUDSON'S BAY COMPANY. - - - 431

2.——*Engineer—Certificate—Fraud—Collusion or prevention.* - - - - 481
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COSTS—*Of garnishee proceedings—Not allowed when defendant pays money into Court before judgment.*] Where a defendant in a County Court action pays the full amount of the claim and costs called for in a default summons within the five days' limit mentioned in the summons, the plaintiff will not be allowed the costs of a garnishee summons. SHAWNIGAN LAKE LUMBER CO. v. FAIRFULL: COBURN, Garnishee. - - 58

2.——*Security for on appeals—Amount of.*] The amounts for which security for costs of appeals will be ordered, considered. ROGERS v. REED. - - - - - - - 79

3.——*Of trial when point disposing of case could have been raised for decision before trial—Rule 233.*] Under rule 233 the plaintiff may have a point of law raised on the pleadings disposed of before trial, but there is no duty cast on a defendant to do so, and therefore where a defendant succeeds on a point of law at the trial which could have been so disposed of he is entitled to the usual costs of trial. HALL v. THE QUEEN AND THE KASLO AND SLOCAN RAILWAY COMPANY. - - - - - - - 120

4.——*Of appeal—Security for—How application should be made.*] Applications for security for costs of appeal to the Full Court should be made to a Judge in Chambers and not to the Full Court. ROGERS v. REED. 183

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5.——*Security for by extra-provincial company.*] An extra-provincial company must give security for costs under R.S.B.C. 1897, Cap. 44, Sec. 144, notwithstanding it is suing along with a resident of the Province and has assets within the Province. MCCLARY *et al* v. HOWLAND. - - 299

6.——*Security for by foreign company carrying on business in British Columbia—R.S.B.C. 1897, Cap. 44, Sec. 144.*] An American Steamship Company having its head office in Seattle was the lessee of certain premises in Victoria where applications for freight and passage could be made to an agent. *Held*, by DRAKE, J., that the Company was a foreign company within the meaning of section 144, of the Companies Act, and was bound to give security for costs. ALASKA STEAMSHIP CO. v. MACAULAY. 338

7.——*Of separate defences—Who liable for.*] Where defendants separate in their defence, a plaintiff who obtains judgment against them is entitled to costs against them jointly, and each defendant is liable for the costs of his separate defence, but not liable for any costs occasioned solely by the other. MERCHANTS BANK v. HOUSTON *et al.* 352

8.——*Security for—Two appeals included in one notice of appeal.*] An order was made in Chambers allowing plaintiff to amend his writ and another order was also made dismissing defendant's application to set aside the writ. Defendant by one notice appealed from both orders. *Held*, two separate appeals and that security for costs as of one appeal was insufficient. SEHL v. TUGWELL. 359

9.——*Interlocutory proceedings—Amendment first asked for in Full Court—Terms on which allowed.*] The Full Court has power to allow, on terms, an amendment for the first time of a pleading by setting up a fact which would if proved be a good answer to a plea of the Statute of Limitations. There is no fixed rule that in all cases costs of interlocutory proceedings shall not be payable until the conclusion of the litigation. JONES v. DAVENPORT. - - - - - 452

10.——*Security for by foreign plaintiffs—Appeal.*] Plaintiffs, resident outside the jurisdiction, lodged in Court an undertaking as security for costs. At the trial the plaintiffs succeeded, and defendants appealed, but before the determination of the appeal

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plaintiffs applied for a release of the undertaking. *Held*, by MARTIN, J., that the security should stand pending the appeal. BIRD *et al* v. VIETH *et al.* - - - **511**

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COUNTY COURT—*Jurisdiction of—Personal injuries—Mineral Act, Sec. 117, Sub-Sec. 2.*] An action for damages for personal injuries received by an employee in a metalliferous mine may be brought for any amount in the County Court. BEAMISH v. WHITEWATER MINES, LIMITED. - - **261**

COUNTY COURT JUDGE—*Sitting in county other than his own—Jurisdiction of when requested so to sit by Supreme Court Judge.*] A County Court Judge for one county was requested by a Supreme Court Judge, being the Acting County Court Judge for another county, to sit in lieu of himself whenever absent. *Held*, that the County Court Judge had no jurisdiction to sit by virtue of such request, and that section 8 of the County Courts Act empowers only a County Court Judge to make such request. BELL & FLETT v. MITCHELL. - - **100**

CREDITOR'S TRUST DEEDS ACT—*Exemption of personal property under Homestead Act—Remuneration of Trustee—Costs.*] Debtors assigned, under the Creditor's Trust Deeds Act, all their personal property, credits and effects that might be seized and sold under execution and afterwards claimed, as exempt, chattels to the amount of $500.00. *Held*, on an originating summons for directions, that by the form of assignment the claimants were precluded from claiming exemption. Trustees remuneration in this case fixed at five per centum. *In re* LEY *et al.* **94**

2.——*Assignment of partnership assets only for benefit of creditors—Whether good.*] An assignment by a firm for benefit of creditors which was construed by the Court to be an assignment of partnership assets only, may be a good and valid assignment within the meaning of the Creditor's Trust Deeds Act. EASTMAN v. PEMBERTON. - - - **459**

CRIMINAL LAW—*Common gaming house —Black jack—Criminal Code, Sec. 196.*] Certain persons played the game called black jack in a room to which the public had access, there being no constant dealer. *Held*, that the lessee of the room was legally convicted of keeping a common gaming house. REGINA v. PETRIE. - - - **176**

2.——*Manslaughter—Grievous bodily injury—Indictment of corporation—Punishment—Criminal Code, Secs. 191, 192, 213, 252, 639 and 713.*] The defendants, a corporation, were indicted for that they unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining a bridge forming part of their railway which was used for hauling coal and carrying passengers, and that on the 17th of August, 1898, a locomotive engine and several cars then being run along said railway and across said bridge, owing to the rotten state of the timbers of the bridge, were precipitated into the valley underneath, thereby causing the death of certain persons. The defendants were found guilty and a fine of $5,000.00 was inflicted by WALKEM, J., at the trial. *Held*, *per* MCCOLL, C.J., and MARTIN, J., on appeal affirming the conviction, that such an indictment will lie against a corporation under section 252 of the Code. *Per* DRAKE and IRVING, JJ.: Such an indictment will not lie against a corporation. Sections 191, 192, 213, 252, 639 and 713 of the Code considered. A corporation cannot be indicted for manslaughter. *Per* MCCOLL, C.J.: The words "grievous bodily injury" in section 252 have no technical meaning and in their natural sense include injuries resulting in death. *Per* DRAKE, J.: The indictment charges the Company with the death of certain persons owing to the Company's neglect of duty and is a charge of manslaughter, the punishment of which is a term of imprisonment for life and because a corporation cannot suffer imprisonment therefore the punishment laid down in the Code is not applicable to such a body. When death ensues the offence is no longer "grievous bodily injury," but culpable homicide. REGINA v. UNION COLLIERY COMPANY. **247**

CROWN—*Prerogative of—Right of Attorney-General to injunction to restrain action—Public harbour.*] It is a prerogative right of the Crown to stop a suit between subjects in the subject matter of which it is alleged that the Crown is or may be interested and in respect of which suit has been brought in behalf of the Crown to have its interest declared. If the Crown right alleged is a

CROWN—*Continued.*

right in behalf of the Province then the Attorney-General of the Province is the proper officer to exercise the prerogative. Observations by MARTIN, J., on the history of the Supreme Court of British Columbia. ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND THE NEW VANCOUVER COAL MINING AND LAND COMPANY, LIMITED v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY. - 221

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CROWN LANDS—Petition of right—Status of petitioner. - 89, 480
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DISCOVERY—Examination for—Nature of—Cross-examination. - 354
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2.——*Examination of ex-officer of corporation—Reading Depositions at trial—Practice.*] If an appointment is taken out for the examination for discovery of an ex-officer of a corporation, and the corporation's solicitor does not attend, and gives notice that he will object to the deposition being received at the trial—*Held*, following Osler, J., in *Leitch* v. *Grand Trunk Railway Company* (1890), 13 P.R. 369, that it should not be received. BANK OF B. C. v. OPPENHEIMER *et al.* - - - - - - - - 448

3.——*Examination of ex-officer of corporation—Reading depositions at trial—Rule 725—Practice.*] On an examination for discovery of an ex-officer of a corporation the corporation's counsel attended and objected to certain questions being put. *Held*, that the deposition was admissible at the trial. WALKLEY *et al* v. CITY OF VICTORIA. 481

An examination for discovery of an ex-officer of a corporation is not inadmissible at the trial merely because the person examined was not such officer at the time of examination. B.C. ELECTRIC RAILWAY CO., LTD. v. MANUFACTURERS GUARANTEE & ACCIDENT INS. CO. - - - - - 512

4.——*Documents—Sufficiency of description in affidavit of.* - - - - - 104
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5.——*Privilege—Photographs.* - 171
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DISMISSAL OF ACTION—Application for after notice of trial—Want of prosecution. - - - - 133
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ELECTIONS ACT, PROVINCIAL—*R.S.B.C. 1897, Cap. 67, Sec. 8—Validity of—Right of naturalized Japanese to be registered as voters.*] Section 8 of the Provincial Elections Act which purports to prohibit the registration of Japanese as Provincial voters is *ultra vires*. *Union Colliery Company of British Columbia, Limited* v. *Bryden* (1899), A.C. 580, considered and followed. *In re* THE PROVINCIAL ELECTIONS ACT AND *In re* TOMEY HOMMA, A JAPANESE. - - 368

2.——*Rules of Court—Validity of—Payment into Court—Appointment of Master.*] Payment into Court in the usual way is a good payment in within the meaning of r. 16 of the Parliamentary Election Petition Rules, 1868 (Imperial.) A rule made by the Judges empowering the Senior Puisne Judge, or any other Judge of the Court to perform the duties devolving by the rules on the Chief Justice whenever the office of Chief Justice is vacant, or he is absent from the Province, is valid. Appointment of a new Master under said rules operates *ipso facto* as a recission of any former appointment, it being unnecessary to rescind any former appointment by express writing. The Full Court on appeal allowed evidence to be adduced to prove status of petitioners although the matter was not gone into in the Court below. JARDINE v. BULLEN: ESQUIMALT ELECTION CASE. - - 471

3.——*Rules of Court—Validity of—Proposed security—Meaning of.*] In section 216 of the Provincial Elections Act "proposed security" means "intended security" and a notice by petitioner informing respondent that security would be given by depositing $2,000.00 with the Registrar was held a good notice pursuant to the section. The additional rules made 27th January, 1875 (*i.e.*, in addition to the Parliamentary Election Petition Rules, Michaelmas Term, 1868), are in force in British Columbia. The petitioner after serving notice of the presentation of the petition and of the proposed security omitted to file an affidavit of the time and manner of such service thereof. *Held*, by MARTIN, J., that the petition should not be struck off the files of the Court on that ground. STODDART v. PRENTICE: LILLOOET ELECTION CASE. - - - - - 498

ELECTION PETITION—Amendment of petition at trial. - - - **128**
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EMPLOYERS' LIABILITY ACT. **6**
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2.——*Negligence—Accident in a mine—Excessive damages.*] In an action under the Employers' Liability Act the jury found that defendants were guilty of negligence in not having a platform so fixed as to prevent drills which were thrown down from bounding into the tunnel and that plaintiff was unaware that drills were being thrown down when he was about to pass through the tunnel; and the jury assessed the damages at $3,000.00. *Held*, by the Full Court, IRVING, J., dissenting, reversing WALKEM, J., who dismissed the action, that the defendants were liable but that the damages should be reduced to $500.00. PENDER v. WAR EAGLE CONSOLIDATED MINING AND DEVELOPMENT CO., LIMITED. - - - - - - **162**

3.——*Negligence — Defective machinery.*] In an action by a miner against the mine owners for damages for injuries caused him by being precipitated to the bottom of a shaft when at work in the mine, the jury found *inter alia* that the system adopted for lowering the men was faulty and that the plaintiff did not comply with the printed rules of the mine. *Held*, that the plaintiff was entitled to judgment although adherence by him to the rules would have prevented the accident. WARMINGTON v. PALMER AND CHRISTIE. - - - - - - - **414**

ENGINEER—*Certificate—Contract—Fraud—Collusion or prevention.*] Where, under a contract which made the right of the contractors to receive payment for the construction of certain works dependent upon the certificate of an engineer who was also sole arbitrator of all disputes, the engineer unjustifiably delayed the issue of the certificate for seven months and acted in a shifting and vacillating, though not fraudulent manner, and probably caused heavy loss to the contractors by his mistakes. *Held*, in the absence of collusion on the part of the corporation the certificate could not be set aside. Impropriety of certain acts of the corporation remarked upon. WALKLEY *et al* v. CITY OF VICTORIA. - - - **481**

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FRAUD—In location of claim. - **59**
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FRAUDULENT CONVEYANCE—*Counsel electing to take judgment in lieu of issue being ordered—Effect of—Whether such judgment appealable.*] Plaintiffs' counsel, on motion for judgment after trial, was given the option of having an issue ordered as to a point on which evidence was not sufficiently directed or of taking judgment against one defendant with costs and dismissing the action against the other defendant without costs, and elected to take the latter course. *Held*, IRVING, J., dissenting, that such judgment was in effect a compromise and therefore unappealable. SUN LIFE v. ELLIOTT *et al.* **189**

2.——*Collusion—Immoral consideration—Statute of 13 Eliz., Cap. 5—Practice—Pleading—Amendment of to conform to evidence.*] V., a miner and prospector, engaged in 1896, B., as a servant in an hotel kept by him in Revelstoke, on the understanding that the rate of wages would be fixed when he found out what she was worth, and some weeks afterwards he fixed the rate at $50.00 per month. A few months after V. built a house and he and B. lived there as man and wife. In November, 1898, V. made an assignment for the benefit of his creditors, having seven days previously conveyed to B. the house property for an alleged consideration of $1,200.00 as representing her wages for two years. She had never asked for wages before October, 1898, and then V. was hopelessly in debt. *Held*, by WALKEM, J., in an action to set aside the conveyance on the ground of its being fraudulent under the statute of 13 Eliz., Cap. 5, that there was collusion between V. and B. to defeat V.'s creditors. *Held*, also, that the conveyance was void on the ground that it was based on an immoral consideration; also, that if necessary the statement of claim could be amended to conform to the evidence. HOLTEN *et al* v. VANDALL *et al.* **331.**

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HABEAS CORPUS—Infant—Practice—Vacation. - - - 291
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INFANT—*Right of person standing in loco parentis to custody of, as against stranger—How lost—Habeas corpus—Practice.*] A girl aged fourteen was taken by a Refuge Home from the custody of a person standing in *loco parentis* who was proved to be leading a bigamous life. *Held*, in *habeas corpus* proceedings that such person had lost his right to the custody of the infant. An application in vacation for a rule *nisi* for a writ of *habeas corpus* should be made in Chambers. *In re* SOY KING, AN INFANT. 291

INFRINGEMENT—*Of patent.*] A patent for a mechanical combination which produces a new result is infringed if the combination is taken in essence and in substance. SHORT v. FEDERATION BRAND SALMON CANNING COMPANY. - - - - - 197

INJUNCTION—Crown, prerogative of. 221
See CROWN.

2.——*After dismissal of action to preserve property pending appeal.*] An injunction may be continued, after dismissal of action, to preserve property in dispute pending appeal, though such jurisdiction will only be exercised under exceptional circumstances. DUNLOP v. HANEY. - - - 300

INJUNCTION INSTEAD OF ADVERSE CLAIM. - - - - - 411
See MINING LAW. 12.

INSPECTION OF METALLIFEROUS MINES ACT—R. S. B. C. 1897, Cap. 134, Sec. 25—Duty of mine owner to use reasonable precaution against accidents to miners. 39
See NEGLIGENCE. 2.

INSURANCE ACT OF CANADA—*Constitutionality of—Right of Insurance Company to carry on business in British Columbia without compliance with provisions of Insurance Act.*] H. was the authorized agent at Vancouver of the Equity Fire Insurance

INSURANCE ACT OF CANADA—*Ct'd.*

Company, a Company incorporated in Ontario, but which was not registered or licensed under the provisions of any British Columbia statute or of the Insurance Act of Canada. H. was convicted under the provisions of the Insurance Act for carrying on an insurance business without a license. *Held*, by DRAKE, J., on appeal confirming the conviction, that the Act is *intra vires* of the Parliament of Canada. REGINA v. HOLLAND. - - - - - - 281

INSURANCE, LIFE—*Premium note—Non-payment—Forfeiture—Extended insurance.*] A life policy was issued 27th June, 1894, for $5,000.00, an annual premium of $84.50 being payable on the 20th of March in each year. The second premium was paid 20th March, 1895, but the third was not paid, the insured giving a note dated 20th March, 1896, at ninety days instead, the note providing that if it was not paid at maturity the policy should become null and void but subject, on subsequent payment, to reinstatement under the rules for lapsed policies. Payments on account of the note were made and in February, 1898, the insured died. *Held*, in an action by the beneficiary that the giving of the note was not a payment of the premium such as would entitle the insured to the extended insurance allowed in case three full annual premiums had been paid. TILLEY v. CONFEDERATION LIFE. - - - - - - - 144

INTEREST—*On judgment entered by Full Court in accordance with verdict, reversing trial Judge—When computed from—57 & 58 Vict., Cap. 22, Sec. 3.*] Plaintiff obtained a verdict at the trial, but the trial Judge dismissed the action. The Full Court allowed the plaintiff's appeal and ordered that judgment be entered in plaintiff's favour for the amount of the verdict. *Held*, that plaintiff was entitled to interest from the date of the verdict. GORDON v. THE CORPORATION OF THE CITY OF VICTORIA. - - - 339

JAPANESE—*Right to vote.*] Section 8 of the Provincial Elections Act, which purports to prohibit the registration of Japanese as provincial voters is *ultra vires*. *In re* THE PROVINCIAL ELECTIONS ACT AND *In re* TOMEY HOMMA, A JAPANESE. - - - 368

JUDGMENT—Counsel electing to take in lieu of issue being ordered—Whether appealable. - - - 189
See FRAUDULENT CONVEYANCE.

JUDGMENT—*Continued.*

2.——*When pronounced or delivered.* 312
See PRACTICE. 33.

JUDICIAL SEPARATION — *Cruelty — Condonation—Cruelty revived by subsequent acts.*] Where the husband had been guilty of cruelty, which had been condoned, but within the six months subsequent to the condonation had been guilty of violent and harsh treatment which would not originally of itself constitute a ground for separation, the Court granted a separation to the wife. TOWN v. TOWN. - - - - - 122

JURISDICTION—Of County Court Judge when sitting in County other than his own. - - - - - 100
See COUNTY COURT JUDGE.

JURY—*Allowed to retire during evidence as to matter for Judge alone.*] On a trial by jury after the plaintiff's case has commenced, the Judge may, in his discretion, permit the jury to retire while proof is being given of facts with which the Judge alone is concerned. BANK OF B. C. v. OPPENHEIMER *et al.* - - - - - 448

2.——*Summoning of — Procedure on — Whether directory or imperative.* 394
See PRACTICE. 34.

LAND REGISTRY ACT. - - - 12
See TAX SALE.

2.——*Registered judgment—Whether mortgage given by debtor affected by or not—C. S. B. C. 1888, Cap. 67, Secs. 26, 27, 33 and 34, and Cap. 42, Sec. 32.*] A registered judgment binds only the interest of the debtor existing at the time of registration and therefore cannot affect a mortgage already given by the debtor although such mortgage is not registertd before the judgment. YORKSHIRE GUARANTEE AND SECURITIES CORPORATION v. EDMONDS *et al.* - - 348

3.——*Secs. 85, 86 and 87.* - - 442
See LIS PENDENS.

LICENSE—Transient trader. - - 112
See TRADER.

LIFE INSURANCE. - - - 144
See INSURANCE, LIFE.

LIS PENDENS—*Cancellation of—Security on—Judge's discretion as to—Land Registry Act, Secs. 85, 86 and 87.*] On a summons to cancel *lis pendens*, the Judge being of opinion that the plaintiffs could not succeed in the action, ordered that the *lis pendens* be cancelled on the applicants giving the nominal security of $1.00. *Held*, on appeal, that it was not a case for cancellation of the *lis pendens*, but that the plaintiffs should be put on terms to speed the action. MERRICK *et al* v. MORRISON *et al.* - - - - 442

LOCAL JUDGE—A Local Judge of the Supreme Court has no jurisdiction to make a winding up order. *In re* KOOTENAY BREWING COMPANY. - - - - - - 131

2.——An *ex parte* restraining order made by a Local Judge must be obeyed until set aside. LEBERRY v. BRADEN. - - 403

3.——*Jurisdiction of—Ex juris writ.* 262
See PRACTICE. 47.

LODGING HOUSE KEEPER—*By-law—No definition of—How construed.*] Where a by-law requiring lodging house keepers to take out a license did not define what was meant by keeping a lodging house; *Held*, that it did not apply to a person not engaged in such occupation for profit. *Re* GUN LONG. - - - - - - - 457

MALICIOUS PROSECUTION—*Reasonable and probable cause—Belief of defendant —Malice—Questions to jury.*] In an action for malicious prosecution the Judge intimated that he thought there was no evidence to go to the jury, but he decided to let the case go to the jury so that the Full Court might have the benefit of the findings in case an appeal was taken. The jury found that defendant had not taken reasonable care to inform himself of the facts before he proceeded against the plaintiff, and that he did not honestly believe in the charge, being actuated by an indirect motive, viz.: to obtain recompense for the loss of his horse. Damages were assessed at $200.00. On motion for judgment, MCCOLL, C.J., dismissed the action, holding that there was not a want of reasonable and probable cause. *Held*, by the Full Court, reversing MCCOLL, C.J., that on the findings the plaintiff was entitled to judgment. *Shrosbery* v. *Osmaston* (1877), 37 L. T. N. S. 792, followed. BAKER v. KILPATRICK. - - 150

MASTER AND SERVANT—*Employers' Liability Act, R.S.B.C. 1897, Cap. 69—Findings of jury—Apparatus causing injury—Necessity to use—New trial.*] To entitle plaintiff to judgment in an action under the Employers' Liability Act the jury's findings must shew that it was reasonably and practically necessary for him to use the apparatus causing the injury. Where the facts proved shew absence of such necessity a new trial will not be granted. DAVIES v. LE ROI MINING AND SMELTING COMPANY. **6**

MECHANICS' LIEN—*Certificate of action imperative—Sections 8 and 24 of R. S. B. C. 1897, Cap. 132.*] The certificate of action required under section 24 of the Mechanics' Lien Act, must be filed within the time therein limited, otherwise the lien ceases to exist. DUNN v. HOLBROOK AND BAIN. **503**

2.——*Mineral claim—Work done at request of holder of option—Whether or not lien lies.*] Defendant, a mine owner, gave C. an option to buy a mine for $25,000.00, with liberty to work it, the net proceeds to be applied towards payment. The plaintiffs claimed liens for labour while employed by C. in working it under the agreement. C. did not exercise his option. *Held*, by the Full Court (IRVING, J., dissenting), that the plaintiffs were not entitled to liens under the Mechanics' Lien Act. There is no lien given for cooking under the Act. ANDERSON *et al* v. GODSAL. - - - - **404**

3.——*Woodmen's wages—Action to enforce in Small Debts Court.* - - - - **328**
See SMALL DEBTS COURT ACT. 2.

MINING LAW—*Action to set aside certificate of improvements instead of adverse action.*] An adverse claimant who neglects to take the remedy provided by section 37 of the Mineral Act cannot sue to set aside a certificate of improvements on the ground of fraud. *Semble*, that under such circumstances the Crown alone is entitled to sue. HAND v. WARREN. - - - - - **42**

2.——*Adverse claim—Certificate of improvements—Crown grant—Rectification of.*] An application was made to the Chief Commissioner of Lands and Works for the rectification of a Crown grant of certain mineral claims and was opposed by parties who had obtained a certificate of improvements covering a portion of the ground included in the grant. *Held*, affirming the Chief Commissioner, that the applicant was entitled to have the grant rectified notwithstanding the said certificate. *Held* also, by the Chief Commissioner, that the holder of a certificate of improvements is not bound to adverse any subsequent applicant for a certificate. *In re* THE AMERICAN BOY MINERAL CLAIM. - - - **268**

3.——*Adverse claim—Extension of time after lapse of time fixed by a previous order—B. C. Stat. 1898, Cap. 33, Sec. 9, and B. C. Stat. 1899, Cap. 45, Sec. 13.*] The time for filing affidavit and plan in an adverse action under the Mineral Act may be further extended on an application made after the lapse of the time fixed by a previous order. NOBLE v. BLANCHARD. - - - **62**

4.——*Adverse claim—Mineral Claim—Bill of sale—Fraud.*] W. sold certain mineral claims called the Big Four group to A., who sold in turn to the defendants after which W. as agent for the plaintiff, located a fraction between two of the claims in the plaintiff's name. *Held*, that defendants had no right to the fraction in the absence of proof of fraud by W. and that the plaintiff was a party thereto; and held also, that the defendants could not invoke against the plaintiff a statement in a bill of sale from H. to W. that the ends of the two claims between which the fraction in question was located, adjoined each other. GIBSON v. MCARTHUR AND LUEKMAN. - - **59**

5.——*Adverse proceedings—Overlapping—Evidence of—Measurements—Abandonment and re-location—Evidence of—B. C. Stat. 1898, Cap. 33, Sec. 11—Practice.*] *Per* MARTIN, J.: In adverse proceedings if the plaintiff wishes to attack the defendant's title he must attack it while proving his own title and not wait till rebuttal. The plaintiff must shew the measurements of the ground in dispute in order to prove overlapping of claims. An affidavit by a re-locator that the ground is unoccupied may be regarded as a statutory abandonment of his former claim. On appeal the judgment of MARTIN, J., was varied. DUNLOP v. HANEY *et al.* - - - **1, 305**

6.——*Adverse claim—Staking—Admissibility of documents—Mineral Acts.*] In adverse proceedings where it is not established with reasonable certainty (1.) that the ground was properly staked; (2.) that assuming the ground had been properly staked it was identical with the ground mentioned in the record, and the defendant

MINING LAW—*Continued.*

shews title and produces certificates of work for several years, judgment will be given in favour of defendant. Before a substituted certificate will be admitted in evidence there must be proof of loss of the original. Conditions of the admissibility of a Mining Recorder's certificate as to issue of free miner's license and as to issue of certificates of work considered. Copies of certain recorded instruments held admissible without proof of originals. PAVIER v. SNOW. **80**

7.——*Assessment work—Sections 24, 28 and 53 of the Mineral Act.*] The plaintiff, owner of the Rebecca mineral claim and having an interest in the Ida, an adjoining claim, performed the assessment work for both claims on the Ida, as he believed, but in reality as shewn by subsequent survey, a few feet outside the claim, but did not file the notice required by section 24 of the Mineral Act with the Gold Commissioner, who told him the work on the Ida would be regarded as done on the Rebecca. Plaintiff received in August, 1899, a certificate of work in respect of the Rebecca, and in his affidavit stated that the work was done on the Rebecca. *Held*, in ejectment, that the plaintiff, being misled by the Gold Commissioner, was protected by section 53 of the Act. The omission to file the notice required by section 24 of the Act, and the incorrect filling up of the affidavit were irregularities which were cured by the certificate of work. LAWR v. PARKER. **418**

8.——*Crown suit to set aside certificate of improvements—Fraud—What constitutes—Whether application under section 10 of the Mineral Act Amendment Act, 1899, must be in writing.*] In an action by the Attorney-General to set aside a certificate of improvements on the ground that it was obtained by fraud, the fraud alleged was a statement in an affidavit of defendant's agent sworn on 10th August, 1899, that the defendant was in undisputed possession of the Pack Train mineral claim. On 10th August, 1899, an action was then pending as to the title of the Pack Train claim and judgment was not delivered till 11th August, 1899, in favour of defendant. As it was after the 11th of August, when the affidavit reached the Gold Commissioner; *Held*, not fraud within section 37 of the Mineral Act. The application to the Minister of Mines under section 10 of the Mineral Act Amendment Act, 1899, need not be in writing. ATTORNEY-GENERAL v. DUNLOP. - - **312**

MINING LAW—*Continued.*

9.——*Damages for personal injuries in a mine—Action for in County Court.* - **261**
See COUNTY COURT.

10.——*Defects in location—No. 2 post—Mistake in giving approximate compass bearing of—Whether cured by subsequent certificate of work.*] The defendant's mineral claim Cube Lode was located in May, 1892, and duly recorded and certificates of work were issued in respect of it regularly since. The plaintiff in 1896, located and recorded the Cody Fraction and the Joker Fraction claims on the same ground and attacked the defendant's location on the ground that upon the initial post the "approximate compass bearing" of No. 2 post was not given as required by the Act. The compass bearing was east by north and not south-easterly as stated on No. 1 post. *Held*, by the Full Court (IRVING, J., dissenting), reversing MARTIN, J., that the irregularity in locating was not cured by a certificate of work. *Held, per* DRAKE, J., that section 28 of the Mineral Act cures only irregularities arising after location and record and which do not go to the root of the title. CALLAHAN v. COPLEN. - - - - - - - **422**

11.——*Failure to record transfer of mineral claim—Right of locator subsequent to such transfer—Mineral Act, Secs. 9, 49 and 50.*] In May, 1897, B. located and recorded the May Day claim and six days after location conveyed a half-interest to defendant by a bill of sale which was not recorded till April, 1898. B's free miner's certificate lapsed in July, 1897, and in October, 1897, the plaintiff, a free miner, re-located the May Day as the Equalizer claim. *Held*, in adverse proceedings that the defendant's title could not prevail against the plaintiff. *Held*, on appeal by the Full Court, reversing MARTIN, J., that the defendant's title should prevail against the plaintiff's. GRUTCHFIELD v. HARBOTTLE. - - - **186, 344**

12.——*Injunction instead of adverse claim.*] Plaintiffs held a Crown grant dated 8th March, 1895, of certain lands from which there were excepted "lands held prior to 23rd March, 1893, as mineral claims." Defendant held certificate of improvements dated 14th August, 1899, and plaintiffs being apprehensive as to form of Crown grant to be issued to defendant applied for injunction restraining him from applying for and receiving Crown grant. *Held*, dismissing

MINING LAW—*Continued.*

the motion, that the policy of the Mineral Acts is to compel persons claiming adversely to an applicant for a Crown grant to commence action before a certificate of improvements is obtained. NELSON AND FORT SHEPPARD RAILWAY CO. v. DUNLOP. - **411**

13.——*Location embracing unconnected strips of land—Whether good—Mineral Acts of 1891 and 1893.*] Two strips of land unconnected with each other, although within the statutory limit of 1,500 feet, cannot be embraced in one location and record. DART v. ST. KEVERNE MINING CO., LIMITED. - **56**

14.——*Practice—Adverse claim—Onus of proof—Duty of counsel to press objection at trial.*] In adverse proceedings the onus of proof is on the adverse claimant, who has to give affirmative evidence of his own title. Counsel for adverse claimant in deference to a remark of the trial Judge, did not complete the proof of his own title. *Held*, that he should have pressed to be allowed to complete it, but under the circumstances there should be a new trial. CALDWELL *et al* v. DAVYS. - - - - - **156**

15.——*Unoccupied ground—Overlapping—Abandonment—Proof of.*] In adverse proceedings the party locating over a claim alleged to have been abandoned must produce clear evidence of abandonment and it is not enough for this purpose to rely upon the non-production of certificates of work. *Semble*, a locator cannot after abandonment by a prior locator rest on a location made before such abandonment, but must relocate. CRANSTON *et al* v. THE ENGLISH CANADIAN CO. - - - - - **266**

16.——*Res judicata.*] *Held*, by DRAKE, J., that the order of the Full Court reported *ante* at p. 305 operated to prevent the plea of *res judicata* being set up by the defendant in this action. DUNLOP v. HANEY. **307**

MUNICIPAL LAW—*Agreement between Street Railway Company and Municipality—Whether Company compelled to operate to City limits extended after agreement made—B. C. Statutes 1890, Cap. 52, and 1894, Cap. 63.*] The promoters of a Street Railway Company entered into an agreement with the City in 1888, and agreed to run cars along Douglas Street to the northern boundary of the City limits. They became incorporated as a joint stock company, and in

MUNICIPAL LAW—*Continued.*

1890, obtained a charter authorizing the construction of tramways connecting the country districts with the City system, and in pursuance of the new powers continued the Douglas Street tramway northerly along the Saanich Road. Traffic on this extension was discontinued in 1898, because it did not pay. In 1892, the City limits were extended so as to include a portion of the Saanich Road on which the tramway had been built. In 1894, the Company obtained a private Act for the consolidation and confirmation of its rights, powers and privileges and ratifying the agreement of 1888, between the City and the original promoters. *Held*, in an action for a declaration that the Company was bound to operate its tram system along Douglas Street to the extended City limits, that the Company was not bound to do so. *Quaere*, whether a ratepayer could sue. YATES *et al* v. B. C. ELECTRIC RAILWAY COMPANY, LIMITED. **323**

2.——*Limitation of action against municipality—Whether action includes mandamus proceedings.*] The limitation of one year prescribed by section 244 of the Municipal Clauses Act, for commencing actions against a municipality applies to *mandamus* proceedings to compel a municipality to appoint an arbitrator to determine the amount of compensation for land taken for road purposes. THE QUEEN v. THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE DISTRICT OF MISSION. - - - **513**

3.——*Revising by-law—Printed roll not attested by Mayor and City Clerk at time of passage of by-law—Proceedings by Municipality under a by-law not quashed—Municipal Clauses Act, R.S.B.C. 1897, Cap. 144, Secs. 91 and 92.*] Where a revising by-law purports to bring into effect a number of by-laws contained in a printed roll alleged to be attested by the Mayor and City Clerk, but such roll was not, in fact, so attested until after the final passage of the revising by-law, such by-law has failed to bring into force any by-law contained in such roll. Sections 91 and 92 of the Municipal Clauses Act do not prevent suit to restrain a municipality from proceeding under a by-law which has not been quashed, but only prevent an action, for damages already suffered, till the by-law is quashed. The validity of such a by-law may be determined in *certiorari* proceedings. TRAVES v. CITY OF NELSON. - - - - - **48**

NEGLIGENCE. - - - - - 162
See EMPLOYERS' LIABILITY ACT. 2.

2.——*Accident by falling rock—Statutory duty of mine owner—Inspection of Metalliferous Mines Act, R.S.B.C. 1897, Cap. 134, Sec. 25.*] Section 25 of the Inspection of Metalliferous Mines Act was not intended to impose unreasonable burdens upon the mine owner, and therefore he is only required to use reasonable precaution against accidents to miners. MCDONALD v. THE CANADIAN PACIFIC EXPLORATION COMPANY, LTD. 39

3.—*Defective machinery.* - - 414
See EMPLOYERS' LIABILITY ACT. 3.

4.——*Railways—Regular station—Personal injury to passenger alighting—Omission or non-feasance.*] Special tickets at reduced rates were issued by the defendant Company to persons living along the line and one was held by W., limited to the use of himself and the members of his family between Vancouver and Central Park station. The plaintiff who lived in Vancouver went to visit the W's, travelling, as was her custom, on W's ticket, although not a member of the family. W. lived beyond Central Park station and the Company gratuitously and for her own convenience carried the plaintiff some four hundred yards farther on where she was allowed to alight. At this place the ground was not level and a person living along the line had been permitted for his own convenience to lay down on the right of way a platform, one end of which rested on the ground and the other upon a plank. The plaintiff descended safely to the platform, but in passing from it she fell and was injured, owing, as alleged, to some defect in the condition of the plank supporting it. *Held*, in an action for damages that the Company was not liable. BURKE v. B. C. ELECTRIC RAILWAY CO., LTD. - - 85

NEW TRIAL—*Whether or not expedient in view of result of other decisions by Privy Council arising out of same accident—Municipal Corporation—Negligence by allowing bridge to get rotten.*] In an action for negligence against a Municipality (reported 5 B. C. 553), the Judge gave judgment for the defendants, holding that the findings of the jury amounted to a verdict of non-feasance only. Other actions by other plaintiffs arising out of the same occurrence had been decided against the defendants by the Privy Council. *Held*, by the Full Court, that it was useless to send the case to

NEW TRIAL—*Continued.*

another jury and that the plaintiff was entitled to judgment for the amount of the verdict. GORDON v. THE CORPORATION OF THE CITY OF VICTORIA. - - - 342

PARTIES—Adding—Third party notice—Rule 101 (*a*). - - - 449
See PRACTICE.

PATENT—*For combination producing new result — Infringement.*] A patent for a mechanical combination which produces a new result is infringed if the combination is taken in essence and in substance. SHORT v. FEDERATION BRAND SALMON CANNING COMPANY. - - - - - - 197

PAYMENT INTO COURT. - 471
See ELECTION PETITION. 2.

2.——*Garnishee proceedings.* - 58
See COSTS.

PETITION OF RIGHT—*When it lies—Crown lands—Kaslo and Slocan Railway Subsidy Act and Amending Acts.*] Suppliant applied to be allowed to purchase certain lands under section 31 of the Land Act, tendering the proper amount therefor. The application was refused on the ground that the lands had been granted to the Railway Company. The suppliant alleged that such grant was illegally issued and void and the Crown allowed a petition of right to be brought. *Held*, dismissing the petition, that the suppliant had no *locus standi* to obtain any relief. HALL v. THE QUEEN AND THE KASLO AND SLOCAN RAILWAY COMPANY. 89, 480

PLEADING — Statute of Limitations — Amendment first asked for in Full Court. - - - - - 452
See PRACTICE. 38.

PRACTICE—*Adding parties—Third party notice—Rule 101 (a).*] In an action against a Company for a declaration that plaintiff was the owner of certain shares in the Company, the Company applied to have its President added as a third party on the ground that he was the real defendant and was responsible for the action. *Held*, by the Full Court, affirming DRAKE, J., who dismissed the summons, that the defendant's remedy was by third party notice. HENLEY v. THE RECO MINING & MILLING COMPANY, LIMITED LIABILITY. - 449

PRACTICE—*Continued.*

2.——*Amendment of style of cause—Irregularity or nullity.*] J. S. trading under the name of the B. C. Furniture Company commenced an action on 10th March, 1899, in such name in respect of a promissory note dated 20th January, 1893, payable sixty days after its date. A summons under Order XIV., having been dismissed on the ground that one person cannot sue in a firm name, plaintiff obtained an order amending the style of cause. *Held*, by the Full Court, affirming DRAKE, J., that the writ was not a nullity and that the irregularity was properly amended. B.C. FURNITURE COMPANY v. TUGWELL. - - 361

3.——*Appeal—Failure to set down for two successive sittings of the Full Court—Preliminary objection.*] Failure to set down an appeal is an irregularity only, within section 83 of the Supreme Court Act. No preliminary objection will be heard unless proper notice has been given under the same section. BAKER v. KILPATRICK. 127

4.——*Appeal—On from Small Debts Court—New witness.*] An appeal from the Small Debts Court is by way of a re-hearing and witnesses may be called, although not called at the trial. MALKIN v. TOBIN: MARTIN, Garnishee. - - - 386

5.——*Appeal—Right to in Yukon cases—62 & 63 Vict., Cap. 11, Sec. 7—Application to pending case tried before and decided after passing of.*] The Act, 62 & 63 Vict., Cap. 11, giving the right of appeal to the Judges of the Supreme Court of British Columbia sitting together as a Full Court in cases from the Yukon as therein specified, does not apply to a case tried before the Act came into force and decided after. CANADIAN AND YUKON PROSPECTING AND MINING COMPANY, LIMITED v. CASEY *et al.* - 373

6.——*Appeal—Right to in Yukon cases—62 & 63 Vict., Cap. 11, Sec. 7—Application to pending case tried and decided after passing of.*] The Act, 62 & 63 Vict., Cap. 11, Sec. 7, which gives a right of appeal to the Supreme Court of British Columbia in cases from the Yukon Territory as therein specified, applies to an action pending when the Act came into force, but tried and decided afterwards. COURTNAY *et al* v. THE CANADIAN DEVELOPMENT CO. - - 377

PRACTICE—*Continued.*

7.——*Appeal—Supreme Court Act, Sec. 79—Filing of notice of appeal.*] Under section 79 of the Supreme Court Act, the provision as to the fourteen clear days applies to the service and not to the filing of the notice of appeal. ARCHIBALD v. MCDONALD *et al.* - - - - - - 125

8.——*Appeal—Time for—Supreme Court Act, Sec. 76—Meaning of "refusal of a motion or application."*] The time for bringing an appeal from a trial judgment runs from the date of signing, entry or perfection thereof, as the case may be, and not from the date of pronouncement. *The International Financial Society v. City of Moscow Gas Company* (1877), 7 Ch. D. 241, discussed. SHORT v. THE FEDERATION BRAND SALMON CANNING CO. - - 35

9.——*Appeal from refusal to dissolve interlocutory injunction—Trial pending when appeal brought on.*] Where a motion to dissolve an interlocutory injunction has been refused and notice of appeal given before trial, but not brought on to be heard until after the trial has commenced, but not concluded, the Full Court will not interfere. DUNLOP v. HANEY. - - - 455

10.——*Appeal in Yukon cases—Extension of time for—Costs—Security for—Appeal books.*] The Court may extend on terms the time for appealing to the Full Court from the Territorial Court of the Yukon. The respondent is entitled to a copy of the appeal book. BANKS v. WOODWORTH. 385

11.——*Ca. re.—Affidavit—Sufficiency of—Irregularity—Waiver by giving bail.* - 76
See ARREST.

12.——*Costs—Security for—Joint plaintiffs, one an extra-provincial Company—R.S.B.C. 1897, Cap. 44, Sec. 144.*] An extra-provincial Company must give security for costs under R.S.B.C. 1897, Cap. 44, Sec. 144, notwithstanding it is suing along with a resident of the Province and has assets within the Province. MCCLARY *et al* v. HOWLAND. 299

13.——*Costs—Security for by foreign plaintiffs—Appeal.* - - - - 511
See COSTS. 10.

14.——*Costs—Security for on appeals.* 79
See COSTS. 2.

PRACTICE—*Continued.*

15.——*Costs—Taxation of—Solicitor and client.*] A charge in a bill of costs although not justified by the item under which it is framed may nevertheless be allowed if it can be sustained under any other item of the tariff. *In re* COWAN. **353**

16.——*Costs—Two appeals included in one notice.* - - - - - - - **359**
See COSTS. 8.

17.——*Costs of appeal—Security for—How application should be made.*] Applications for security for costs of appeal to the Full Court should be made to a Judge in Chambers and not to the Full Court. ROGERS v. REED. - - - - - **183**

18.——*Costs of separate defences—Who liable for.*] Where defendants separate in their defence, a plaintiff who obtains judgment against them is entitled to costs against them jointly, and each defendant is liable for the costs of his separate defence, but not liable for any costs occasioned solely by the other. MERCHANTS BANK v. HOUSTON *et al.* - - - - - - - **352**

19.——*Cross-examination of deponent on affidavit—Rules 385, 401 and 429.*] Rules 385 and 429 taken together compel the production for cross-examination of a deponent on his affidavit if required by the opposite party before such affidavit can be used. RUSSELL v. SAUNDERS; WESTPHALEN v. EDMONDS. - - - - - **173, 175**

20.——*Discovery—Affidavit of documents—Sufficiency of description in affidavit—Privilege.*] An affidavit of documents which described certain bank books as bill registers, current accounts and ledgers for stated periods was held sufficient, IRVING, J., dissenting. Privilege was claimed for the first time in respect of such books in a supplementary affidavit filed subsequently to the issue of a summons for a further and better affidavit. *Held*, reversing MARTIN, J., that this affidavit defeated the summons and that the claim of privilege must be allowed. BANK OF BRITISH COLUMBIA v. OPPENHEIMER. - - - - - **104**

21.——*Discovery—Examination of ex-officer of corporation—Reading depositions at trial—Jury allowed to retire during evidence as to matter for Judge alone.*] - **448**
See DISCOVERY 2, AND JURY.

PRACTICE—*Continued.*

22.——*Discovery—Examination of ex-officer of corporation—Reading depositions at trial.* - - - - - - **481, 512**
See DISCOVERY. 3.

23. —— *Discovery — Privilege — Photographs.*] Photographs sworn to be part of the materials of the defendants' evidence in the action are privileged from production. Documents sworn to be called into existence in the *bona fide* belief that litigation might ensue are not for this reason only privileged from production. FEIGENBAUM v. JACKSON & MCDONELL. - - - - - - **171**

24.——*Dismissal of action for want of prosecution after notice of trial—Rule 340.*] A Judge sitting in Chambers has power to dismiss an action for want of prosecution notwithstanding that the action has been entered for trial. SULLIVAN v. JACKSON. **133**

25.——*Evidence—Exclusion of witnesses—Parties to action.*] The mere fact that a party intends to give evidence does not entitle the other party to call for his exclusion as in the case of an ordinary witness. If a party has been wrongfully excluded it is not necessary for him to shew that he was substantially prejudiced thereby in order to get a new trial. *Quaere*, in case of harmless exclusion. BIRD *et al* v. VIETH *et al.* - **31**

26.——*Election petition—Trial of—Amendment of petition at trial.*] At the trial of an election petition based on bribery, the petitioner asked for leave to amend by setting up that the election was void on the ground that the list of voters used at the election was compiled and signed by an unauthorized official, this fact having been discovered only after the commencement of the trial. *Held*, that the amendment must be refused. MARTIN v. DEANE—NORTH YALE ELECTION CASE. - - - - - - - **128**

27.——*Examination for discovery—Nature of—Whether or not cross-examination allowed—Rule 703.*] The examination for discovery under r. 703 is in the nature of a cross-examination but limited to the issues raised in the pleadings. *Carroll* v. *The Golden Cache Mines Company* (1899), 6 B.C. 354 overruled. The amendment of 15th June, 1900, to r. 703 is retroactive. BANK OF BRITISH COLUMBIA v. TRAPP *et al.* - **354**

PRACTICE—*Continued.*

28.——*Ex parte restraining order by Local Judge.*] An *ex parte* restraining order made by a Local Judge must be obeyed until set aside. LEBERRY v. BRADEN. - - **403**

29.——*Extending time for depositing appeal books—How application for should be made.*] Appeal books were not deposited in time and on an application to extend the time, it was *Held*, by the Full Court, that such applications should be made as soon as possible to a Judge in Chambers if the Full Court is not sitting at the time, but if so sitting that the better course is to apply at once to the Full Court. HALEY v. MCLAREN. **184**

30.——Extension of time for filing affidavit and plan in adverse action under Mineral Act. - - **62**
See MINING LAW. 3.

31.——*Garnishee proceedings—Order that money remain in Court until new action commenced—Whether nullity or not.*] An order made by a County Judge that garnished moneys remain in Court to abide the event of a new action to be commenced forthwith (a former suit in respect of the same cause of action being dismissed by the same order) is not a nullity and if not appealed against is valid. So *held* by MCCOLL, C. J., and WALKEM, J.: IRVING and MARTIN, JJ., dissenting. KING v. BOULTBEE. - - - - - - - **318**

32.——*Injunction — Trial — Undertaking not to proceed further till—Proceeding before formal order drawn up but after judgment delivered—Whether breach of undertaking.*] An undertaking not to proceed further until the trial of the action is observed although proceedings are taken before the formal order or decree is drawn up, but after judgment delivered. DUNLOP v. HANEY. - **300**

33.——*Judgment—When pronounced or delivered.*] *Held*, by MARTIN, J., that a judgment signed by him and left by him for deposit in the mail at Victoria on August 11th, 1899, was pronounced on that date although the judgment did not apparently reach the Vancouver Registry to which it was addressed until the 15th. ATTORNEY-GENERAL v. DUNLOP. - - - **312**

34.——*Jury — Summoning of — Procedure on—Whether directory or imperative.*] If on the trial of an action in the Supreme Court twenty persons do not appear from which a jury may be selected, the panel may be quashed. The provisions of the Jurors Act relating to the procedure to be followed by the Sheriff in summoning a jury are not imperative but directory, and an irregularity in respect thereto is not *ipso facto* a ground for setting aside the panel. ROSS v. BRITISH COLUMBIA ELECTRIC RY. CO., LTD. - - - - - - **394**

35.——*Jury—Summons for before order amending defence delivered—Whether premature.*] An application for change of venue and trial by jury after an order made giving leave to amend defence, but before delivery thereof, is premature. BANK OF B. C. v. OPPENHEIMER *et al.* - - - **446**

36.——*On transfer to Supreme Court of County Court action—Can original claim be extended?*] After an action has been transferred from the County Court to the Supreme Court the plaintiff can extend his claim beyond the sum he originally claimed in the County Court. THURSTON v. TATTERSALL. - - - - - - - **160**

37.——*Pleading—Amendment of to conform to evidence.* - - - - **331**
See FRAUDULENT CONVEYANCE. 2.

38.——*Pleading Statute of Limitations —Amendment first asked for in Full Court—Terms on which allowed—Costs.*] The Full Court has power to allow, on terms, an amendment for the first time of a pleading by setting up a fact which would if proved be a good answer to a plea of the Statute of Limitations. There is no fixed rule that in all cases costs of interlocutory proceedings shall not be payable until the conclusion of the litigation. JONES v. DAVENPORT. **452**

39.——*Service out of jurisdiction—Agreement to transfer shares in a British Columbia Company—Order XI.*] An *ex juris* writ having been issued to enforce an agreement between residents of British Columbia and England for transfer of shares in a Provincial Company not in terms providing for its performance within the jurisdiction: *Held*, that the writ should be set aside. OPPENHEIMER *et al* v. SPERLING *et al.* - - **96**

40.——*Special indorsement—Account stated—Mistake in appeal book—Preliminary objection—Order XIV.*] An objection to the hearing of an appeal on the ground that the

PRACTICE—*Continued.*

appeal books are defective and erroneous is not a preliminary objection within section 83 of the Supreme Court Act. The particulars of the plaintiffs' claim indorsed on the writ were:

"1899.
"November 30.
To balance of account rendered, which balance has been stated $51.70
" balance of account rendered and stated owing to Hunter Brothers and duly assigned for value by an assignment dated the 1st day of December, 1899, to the plaintiffs, and of which express notice in writing has been given to the defendant..... 167.15

"Total..... $218.85"

Held, not a special indorsement such as would support a judgment under Order XIV. ROGERS *et al* v. REED. - - **139**

41.——*Suing in firm name—Rule 104—Order XIV.*] One person cannot sue in a firm name. B. C. FURNITURE COMPANY v. TUGWELL. - - - - - - - **84**

42.——*Trial—Costs on adjournment of.*] Defendants got an order at the trial for the inspection of a vein in the plaintiffs' claim which they alleged was the continuation of a vein, the apex of which was within the limits of their own claim, and plaintiffs alleging that such order necessitated inspection by them of other similar places on their property, with a view to furnishing evidence to rebut that which might be adduced by reason of the plaintiffs' inspection, and therefore an adjournment for that purpose, were allowed the adjournment but only on the terms that all costs occasioned thereby should be borne by them in any event. *Held*, on appeal that such costs should abide the result of the issues to which the inspection related. IRON MASK v. CENTRE STAR. - **66**

43.——*Trial—Duty of counsel to press objection at.* - - - - - - **156**
See MINING LAW. 14.

44.——*Venue.* - - - - - **278**
See VENUE.

45.——*Winding up—No jurisdiction to make winding up order—Local Judge of Supreme Court—Appeal or motion to rescind—Rule 1,075—R.S. Canada, 1886, Cap. 129, Sec. 9.*] A Local Judge of the Supreme Court has no jurisdiction to make a winding up order. An order made *ultra vires* should be moved against, not appealed from. *In re* KOOTENAY BREWING COMPANY. - **131**

46.——*Winding up—Voluntary—When interfered with by Court—Liquidator—Whether he should be served with notice of appeal—Costs—Application to increase security for—Waiver.* - - - - - **388**
See WINDING UP. 2.

47.——*Writ—Ex juris—Affidavit leading to order for—Jurisdiction of Local Judge—Order XI.—Rule 1,075.*] A Local Judge of the Supreme Court has jurisdiction to make an order for an *ex juris* writ. The affidavit leading to the writ should be reasonably precise as to the essential facts alleged to constitute the cause of action, and if there are omissions of substance the order should not be made. A Supreme Court Judge has power on motion to set aside an *ultra vires* order made by a Judge of limited jurisdiction. TATE *et al* v. HENNESSEY *et al.* **262**

48.——*Writ for service out of jurisdiction—Affidavit leading to order for—What it should shew.*] An affidavit leading to an order for an *ex juris* writ should shew the grounds on which deponent believes that the plaintiff has a good cause of action. THE NORTHERN COUNTIES INVESTMENT TRUST, LIMITED (FOREIGN) v. NATHAN. - **136**

49.——*Writ of summons—Service out of jurisdiction—Shares in ship—Receiver—Order XI.*] Action by execution creditors against a mortgagee of a British ship to recover the surplus of sale proceeds under power of sale. *Held*, (1) That the creditors not having got a receiver appointed of the shares they had passed to the purchaser. (2) That an order for service out of the jurisdiction on the mortgagee could not be made. WILSON BROS. v. DONALD. - **33**

PRECIOUS METALS—*Conveyance of land by grantor to whom precious metals have passed—Whether precious metals pass without being mentioned.*] Where the precious metals have been passed out of the Crown to a grantee, a conveyance of the land by the latter to a third person in the ordinary form will pass the precious metals although not specially mentioned. *Re* ST. EUGENE MINING CO., AND THE LAND REGISTRY ACT. **288**

PRELIMINARY OBJECTION. - **139**
See PRACTICE. 40.

PRIVILEGE—Discovery. - - **104**
See PRACTICE. 20.

2.——*Discovery.* - - - - - **171**
See PRACTICE. 23.

RAILWAYS—Injury to passenger alighting. - - - - - - **85**
See NEGLIGENCE. 4.

RES JUDICATA—*Held*, by DRAKE, J., that the order of the Full Court reported *ante* at p. 305 operated to prevent the plea of *res judicata* being set up by the defendant in this action. DUNLOP v. HANEY. - **307**

SALE FOR TAXES. - - - **12**
See TAX SALE.

SMALL DEBTS ACT—Appeal from—New witness. **386**
See PRACTICE. 4.

STATUTE—13 Eliz., Cap. 5. - **331**
See FRAUDULENT CONVEYANCE. 2.

57 & 58 Vict., Cap. 22, Sec. 3. - **339**
See INTEREST.

62 & 63 Vict., Cap. 11, Sec. 7. - **373, 377**
See PRACTICE. 5, 6.

B.C. Stat. 1890, Cap. 52. - - **323**
See MUNICIPAL LAW.

B.C. Stat. 1894, Cap. 63. - - **323**
See MUNICIPAL LAW.

B.C. Stat. 1898, Cap. 33, Sec. 9. - **62**
See MINING LAW. 3.

B.C. Stat. 1898, Cap. 33, Sec. 11. - **1, 305**
See MINING LAW. 5.

B.C. Stat. 1898, Cap. 35, Sec. 19. - **112**
See TRADER.

B.C. Stat. 1899, Cap. 45, Sec. 10. - **312**
See MINING LAW. 8.

B.C. Stat. 1899, Cap. 45, Sec. 13. - **62**
See MINING LAW. 3.

B.C. Stat. 1899, Cap. 52. - - - **46**
See BENNETT-ATLIN.

STATUTE—*Continued.*

B.C. Stat. 1899, Cap. 68, Sec. 4. - **115**
See SUCCESSION DUTY.

B.C. Stat. 1900, Cap. 54, Sec. 125 (20.) **396**
See APPEAL.

Canadian Stat. 1890, Cap. 31, Sec. 74. **465**
See BANK ACT.

Criminal Code, Sec. 196 - - **176**
See CRIMINAL LAW.

Criminal Code, Secs. 191, 192, 213, 252, 639 and 713 - - - - - - **247**
See CRIMINAL LAW. 2.

C.S.B.C. 1888, Cap. 67, Secs. 26, 27, 33 and 34; Cap. 42, Sec. 32. - - **348**
See LAND REGISTRY ACT. 2.

R.S.B.C. 1897, Cap. 11. - - **94, 459**
See CREDITOR'S TRUST DEEDS ACT. 1, 2.

R.S.B.C. 1897, Cap. 44, Sec. 144. **299, 338**
See COSTS. 5, 6.

R.S.B.C. 1897, Cap. 52, Sec. 59. - **160**
See PRACTICE. 36.

R.S.B.C. 1897, Cap. 56, Sec. 76. - **35**
See PRACTICE. 8.

R.S.B.C. 1897, Cap. 56, Sec. 79. - **125**
See PRACTICE. 7.

R.S.B.C. 1897, Cap. 56, Sec. 83. - **127, 139**
See PRACTICE. 3.
APPEAL BOOK.

R.S.B.C. 1897, Cap. 69. - **6, 162, 414**
See MASTER AND SERVANT.
EMPLOYERS' LIABILITY ACT. 2, 3.

R.S.B.C. 1897, Cap. 111, Sec. 23. - **12**
See TAX SALE.

R.S.B.C. 1897, Cap. 111, Secs. 85, 86 & 87. **442**
See LAND REGISTRY ACT. 3.

R.S.B.C. 1897, Cap. 132, Secs. 8 and 24. **503**
See MECHANICS' LIEN.

R.S.B.C. 1897, Cap. 134, Sec. 25. - **39**
See NEGLIGENCE. 2.

STATUTE—*Continued.*

R.S.B.C. 1897, Cap. 135, Sec. 28. - **422**
See MINING LAW. 10.

R.S.B.C. 1897, Cap. 135, Secs. 9, 49 and 50. **186, 344**
See MINING LAW. 11.

R.S.B.C. 1897, Cap. 135, Secs. 24, 28 and 53. **418**
See MINING LAW. 7.

R.S.B.C. 1897, Cap. 135, Sec. 117, Sub-Sec. 2. **261**
See COUNTY COURT.

R.S.B.C. 1897, Cap. 144, Sec. 171. - **112**
See TRADER.

R.S.B.C. 1897, Cap. 144, Sec. 244. - **513**
See MUNICIPAL LAW. 2.

R.S.B.C. 1897, Cap. 144, Secs. 91 and 92. **48**
See MUNICIPAL LAW. 3.

R.S.B.C. 1897, Cap. 176, Sec. 71. - **401**
See SUMMARY CONVICTION.

R.S. Canada, 1886, Cap. 124. - - **281**
See INSURANCE ACT OF CANADA.

R.S. Canada, 1886, Cap. 129, Sec. 9. - **131**
See PRACTICE. 45.

STREET RAILWAY. - - **323**
See MUNICIPAL LAW.

SUCCESSION DUTY—*Principle of calculation of—B.C. Stat. 1899, Cap. 68.*] Under section 4 of the Succession Duty Act where the aggregate value of the property exceeds $200,000.00 only the excess over that amount is subject to a duty of $5.00 for every $100.00 of the value. *In re* TODD: TODD v. TODD. **115**

SUMMARY CONVICTION—*Appeal—Entry of—Recognizance—R.S.B.C. 1897, Cap. 176.*] The recognizance required by section 71 (*c*) of the Summary Convictions Act (Provincial) must be entered into before the appeal can be entered for trial. REGINA v. KING. - - - - - - - **401**

SUNDAY OBSERVANCE—*Keeping open—Exercising calling—Barber—Vancouver Incorporation Act, 1900, Sec. 125 (20.)—Appeal from County Court sitting as Appellate Court.*] The Vancouver Incorporation Act, 1900, empowered the City to pass a by-law to prohibit "the keeping open of barber shops on Sunday," and the City thereupon passed a by-law enacting that all barber shops should be closed on Sunday and that no person should exercise the trade of a barber on Sunday within the City. Appellant was charged with an offence under the by-law, and before the Magistrate he admitted he had shaved customers on Sunday, and the Magistrate thereupon convicted him of having "kept open." *Held*, by IRVING, J., allowing an appeal, that a barber by shaving customers on a Sunday does not necessarily "keep open." *Held*, also, that the City has no power to pass a by-law prohibiting a barber from exercising his trade or calling on Sunday. No appeal lies from the County Court sitting as an Appellate Court from the decision of a Magistrate under the Provincial Summary Convictions Act. *Re* LAMBERT. - - **396**

TAX SALE—*Certificate of Title based on—Whether ousts a prior certificate in hands of former owner or not—Land Registry Act.*] A certificate of title based on a tax deed does not *ipso facto*, oust a prior certificate of title outstanding in the hands of the former owner, and the holder of such later certificate must affirmatively shew the regularity of all the tax sale proceedings in order to make good his title. KIRK v. KIRKLAND *et al* - - - - - - - - **12**

TIME—Extension of after lapse of time fixed by a previous order. - - **62**
See MINING LAW. 3.

2.——*Extension of for appeal in Yukon cases.* - - - - - - - **385**
See PRACTICE. 10.

3.——*For depositing appeal books—Extension.* - - - - - - - **184**
See PRACTICE. 29.

TRADER, TRANSIENT—*License—Occupant of premises—Conviction—R. S. B. C. 1897, Cap. 144, Sec. 171, Sub-Sec. 23, and B.C. Stat. 1898, Cap. 35, Sec. 19.*] Where goods are consigned by the owner to be sold on commission and they are sold by the consignee by auction in premises rented by him, the owner is not an occupant of such premises nor a transient trader within the Municipal Clauses Act (R.S.B.C. 1897, Cap. 144, Sec. 171, Sub-Sec. 23), as amended in

TRADER, TRANSIENT—*Continued.*

1898 (Cap. 35, Sec. 19.) To support a conviction it is essential that the person charged occupy premises in the Municipality. REGINA v. WILSON. - - - - 112

TRIAL—Costs of adjournment of. - 66
See PRACTICE. 42.

TRUSTEES—Remuneration of. - 94
See CREDITOR'S TRUST DEEDS ACT.

VENUE—*Change of—Grounds for—Criminal libel—Political bias.*] In criminal libel, in order to obtain a change of venue, it is not sufficient to allege that the prosecution is interested in politics in the place where the libel is alleged to have been committed and that therefore the defendant cannot obtain a fair trial. The fact that two abortive trials have taken place is not *per se* a reason for change of venue. REGINA v. NICOL. - - - - - - - 278

VERDICT—Incomplete. - - 431
See CONTRACT.

WAIVER—*Ca. re.*—Bail. - - 76
See ARREST.

2.——*Costs.*] A respondent by applying to increase the amount of security for costs waives his right to object that the security was not originally furnished in time. *In re* THE ORO FINO MINES, LIMITED. - 388

WINDING UP. - - - - - 131
See PRACTICE. 45.

2.——*Voluntary—When interfered with by Court — Liquidator — Whether he should be served with notice of appeal—Costs—Application to increase security for—Waiver.*] The Court will not interfere with a voluntary winding up of a Company by its shareholders and order a compulsory liquidation unless it is shewn that the rights of the petitioner will be prejudiced by the voluntary winding up. Service on the liquidator of a notice of appeal on behalf of the Company from a compulsory winding up order is not necessary. A respondent by applying to increase the amount of security for costs waives his right to object that the security was not originally furnished in time. *In re* THE ORO FINO MINES, LIMITED. - - - - 388

WITNESS—Exclusion of, if parties to action, not ordered as of course.] BIRD *et al* v. VIETH *et al.* - - - - - - 31

WRIT OF SUMMONS—Amendment of style of cause — Irregularity or nullity. - - - - - 361
See PRACTICE. 2.

2.——*Service out of jurisdiction.* - 33
See PRACTICE. 49.

3.——*Service out of jurisdiction* - 96
See PRACTICE. 39.

4.——*Ex juris—Affidavit leading to order for.* - - - - - - - 136
See PRACTICE. 48.

5.——*Ex juris—Affidavit leading to order for—Jurisdiction of Local Judge—Order XI.—Rule 1,075.* - - - - - - 262
See PRACTICE. 47.