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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 AND DIVISIONAL 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,

PAGES 1 TO 178, BY GORDON HUNTER, BARRISTER-AT-LAW;
PAGES 179 TO 432, TABLES OF CASES AND DIGEST,
BY ROBERT CASSIDY, BARRISTER-AT-LAW.

VOLUME II.

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JUDGES

OF THE

Supreme and County Courts of British Columbia and in Admiralty.

(During the period of this Volume.)

SUPREME COURT JUDGES.

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REPORTS OF CASES

DECIDED IN THE

SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY.

—o—

BEGBIE, C.J

Jan., 1890.

A.-G. OF B.C. v. VICTORIA.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

v.

THE CORPORATION OF THE CITY OF VICTORIA.

Public School Act (Chap. 104, 1888), sec. 37.—Constitutionality of.

It is constitutional for the Province to enact that a certain proportion of the salaries of pubic school teachers employed in a Municipality shall be paid by the Municipality.

ACTION by the Province to recover certain moneys from the City of Victoria, under the provisions of sec. 37 of the "Public School Act, 1888," (cp. substituted section 30 of chap. 40, 1891).

Irving for plaintiff; *Eberts & Taylor* for defendants.

Jan. 17th, 1890. SIR M. B. BEGBIE, C. J.:—

This is an action commenced by the Attorney-General, representing the Province, against the Corporation of the City of Victoria for the recovery of a sum of $5,780 under sec. 37 of chap. 104 (C. A. 1888): "One-third of the salaries of the teachers employed in the public schools in the Cities of Victoria, Nanaimo, New Westminster, and Vancouver shall be borne and paid by the Municipal Corporations of the said cities respectively." Judgment.

B.C. COURTHOUSE LIBRARY SOCIETY

BEGBIE, C.J
Jan., 1890.

A.-G. OF B.C
v.
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The Corporation having appeared, the plaintiff asked to sign judgment under Order XIV., but leave was given to the Corporation to defend the action on payment of the amount claimed into Court. The grounds of defence are very shortly raised by an issue settled by Mr. Justice Drake. The rights of the parties are to depend solely on the answer to one question, viz.: the constitutionality of the section above set out. If constitutional, judgment is to be signed for the plaintiff for the agreed amount. If not, then judgment is to be entered for the defendants. The question of the constitutionality of an Act of the Provincial Legislature is thus brought before me by the pleadings of the parties, for I think the issue must be treated as a pleading. The first matter, therefore, for my consideration is whether I have any jurisdiction to hear and determine this, in view of the Supreme Court of Canada Act, 1875, ss. 54, 56, as amended in 1876, and as it now stands, R. S. C., 1886, c. 135, ss. 72, 73. The original s. 56 of 1875 provided that when any Provincial Legislature should pass an Act in a certain formula, set out in s. 54, then four topics of jurisdiction were to be reserved for the sole decision of the Supreme Court of Canada or of the Court of Exchequer, as the case might be. In 1876 the section was partially modified into the form in which it now stands. The first three topics do not require to be stated. The fourth concerns "suits, actions, and proceedings in which the parties thereto have by their pleadings raised the question of the validity of an Act of the Legislature of such Province when, in the opinion of a Judge of the Court in which the same are pending, such question is material," and sec. 73, R. S. C., p. 1776, then enacts that in such fourth event "the Judge who has decided that such question is material shall, at the request of the parties, and may without such request if he shall so think fit, order the case to be removed to the S. C. C., and it shall be removed accordingly," thereby abridging, so far as this cause of action is concerned, the jurisdiction of the Court of British Columbia. It is to be observed that this abridgment is solely the result of the Dominion legislation, and not at all affected by the Provincial Legislature. There is no doubt but that the Dominion Legislature can alter, abridge, and enlarge the jurisdiction of this Court, as it has done on several occasions. And although the abridgment now under consideration is not to come into operation until the Provincial Legislature has passed such an Act, yet the abridgment is by no means affected by the Provincial Act, but solely by virtue of the Dominion enactment above set out. It is by no means a delegation of Legislative authority,

Judgment.

were such possible, but a clear case of conditional legislation within the express language of Lord *Selborne*, in *Burah's* case, 3 App. Cas. 901.

I think that the amendment of 1876 clearly shows that in the absence of a request by the plaintiffs the Dominion Legislature intended to leave a discretion in the Judge, to proceed himself or to remove the case to Ottawa. In the original statute of 1875 he had no such discretion. Although the same words "and the case shall be removed accordingly," which were in the original Act, are still retained in the amending Act, I do not think they any longer mean the same thing. In the original Act they meant "the case shall be removed in any event." In the amending Act they mean "shall be removed if the parties both request it, or if the Judge in his discretion think it fit." Now, here it is not only that both the parties have not requested me to remove the case; both have requested me not to remove it, and both have concurred in alleging grounds of economy, expedition, and convenience, which I do not feel at liberty to disregard. I conceive, therefore, that according to the true construction of the Dominion Act I have jurisdiction to entertain this suit. It is scarcely necessary to state that the question in issue is in my opinion material. It is the only question on which the parties are at variance, and it goes to the whole cause of action.

Judgment

Is then this enactment within the powers specially given by the British North America Act to the Provincial Legislature? It has been stated, almost as an axiom, by the Privy Council (*Bank of Toronto* v. *Lambe*, 12 App. Cas. 588), and it seems too clear for argument, that "the Federation Act exhausts the whole range of Legislative power, and that whatever is not given to the Provincial Legislature rests with the Parliament," each Legislature being completely sovereign over the matter entrusted to it (*Regina* v. *Hodge*). From this, however, there would be probably an exception, viz., the power to legislate so as to repeal or vary any provision in the Imperial Act itself. With this qualification the proposition seems quite undeniable. And Mr. Irving, for the Crown, attempted to draw from that an argument by asking if the defendants contended that this tax would be constitutional if imposed by Parliament? To which the answer was, that no such question arose at present, but only whether the actual provision in s. 37 of the Provincial School Act was authorized by the Federation Statute.

The *prima facie* case in favour of the Provincial Legislature is strong. It has by the British North America Act full legislative powers in all

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matters relating to municipal institutions (s. 92, sub.-s 8), to civil rights in the Province (s. 92, sub.-s. 13), to matters of a merely local nature in the Province (s. 92, sub.-s. 16), besides the power of direct tax for raising revenue for Provincial purposes (s. 92, sub.-s. 2), and the exclusive power also to make laws in relation to education (s. 93), subject to provisions which are immaterial here. The impeached provision (in s. 37 of the School Act) might well be deemed to come within every one of these powers; it relates to municipal institutions and to civil rights in British Columbia; it is merely of a local nature; it is a direct imposition in alleviation of certain charges on the Provincial revenue, and so for Provincial purposes, it is clearly a law in relation to education. And I apprehend even if it should be held not to come within all the powers above enumerated, if there be one or more item of power under which this provision cannot be classed, still if there be any item under which it can be classed, and must be classed, it is a constitutional provision. And so the plaintiffs contended; but the defendants attacked these positions one after another, endeavouring to show that they did not authorize the tax. First, it was said that laws made under colour of the power to make laws for municipal institutions must be equal laws, and did not authorize the selection of some particular municipalities and weighting them with exceptional taxation in ease of the general revenue. If four municipalities might be selected, and one-third of the school salaries, the power would logically extend to charge the whole of the salaries, and to select one municipality to bear the whole brunt. That the whole revenue of the Province was applicable for the benefit of the whole; and if any relief of the charges on the whole revenue were to be drawn from a single municipality, that would in effect be taxing such municipality for the benefit of the rest of the Province, since this relief would either enable so much more money to be expended elsewhere, or else so much less money to be levied elsewhere. That such exceptional taxation could not be, but by consent of the taxee; and that the Corporation was not represented in the Legislature as such: the representative body for the House of Assembly including all residents in Victoria, whereas the Corporation itself represents the taxpayers only. But it must occur to everybody that this is not the only case of taxation being imposed on Corporations without any assent by them or representation in the House; banks and insurance societies, and also other corporations, are not, as such, directly represented; and yet they are not only taxed, but discriminating taxes are imposed on them by the authority of the

Judgment.

Provincial Legislature; they are even by that authority handed over to the municipality to be taxed; and no municipality has ever, so far as it appears, hesitated to exercise the powers so given, nor have the corporate bodies themselves ever disputed the legality of the tax. All this appears (among other points decided) in *Lambe's case*, 12 App. Cas. 575, where none of the able counsel for the banks or the insurance companies ventured to put forward the argument now relied upon by Mr. Taylor. And as to this special impost being in relief of the general taxation, the answer is that that is not so; but the money is to be expended within the Municipality itself in part payment of the extraordinary educational advantages which have been provided for the children of the inhabitants of the four municipalities named in sec. 37 of the School Act, beyond the advantages which are provided for children elsewhere. It is admitted that the additional advantages are provided; why should the revenue from Kamloops or Barkerville be charged with the additional cost and the higher education which is provided for the school children in Victoria? The natural injustice of a discriminating tax was insisted on, and that all taxation must be equal to be equitable, and equality is the highest equity. That is an old saying, but it does not seem very accurate. It would have been more reasonable to say: *Proportion* is the highest equity. All persons (and corporations) equally should be taxed; though even that, perhaps, admits of exceptions; but certainly all persons should not be taxed equally, but proportionally, as well as the Legislature can provide; proportionally not only to the taxee's power to pay, but also proportionally to the benefit which the taxee is to receive. And that is really the discrimination which is complained of by the defendants. These considerations are not within the record submitted for my opinion. I have not to consider objections to the righteousness, but only to the constitutionality, of the tax.

Judgment.

It was argued by the defendants that this impost must be either indirect or direct. If it were intended that the Corporation should recoup themselves by taxation of the ratepayers, that was indirect taxation, and therefore illegal. To this it seems sufficient to observe that the ratepayers are the Corporation: which is merely a compendious name designating the whole body of ratepayers. There is no question here of recouping. But the defendants then said that if the tax be a direct tax, the Corporation have not the power to levy the amount, being for Provincial purposes. I have already pointed out that though, in the first instance, payable to the Provincial Treasury,

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it is to be by them applied for part payment of educational purposes within the municipality; and these are expressly enumerated (sec. 96, sub-sec. 7 of 1889) as being purposes for which the Corporation are empowered to raise money. Then the defendants' counsel contended that this imposition was not a tax at all, but merely a method employed by which the Legislature sought to relieve themselves, in part, from an indebtedness which they had incurred to certain teachers. But this seems an entire misapprehension. The Legislature has incurred no debt. The Government has been directed by the Legislature to involve the Crown in certain liabilities by engagements with teachers, and has provided this (among other) ways and means of enabling the Crown to satisfy those liabilities. It has imposed a duty on the Corporation to pay this amount to the Treasury. That is, the Legislature has imposed a tax.

I shall not attempt to define direct and indirect taxation. Scientific economists do not appear to have been very successful in such attempts. For instance, *Mill* is cited in 12 App. Cas. p. 582, as stating: "A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are such as are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." If by "pay" be here meant "hand the money to the collector," evidently every tax, according to this definition, is and must be direct; since it surely never could be intended to demand a tax from a man who it was not intended should hand over the amount. If the word "pay" means "ultimately bear and suffer the incidence of the tax," then probably every tax, according to this definition, is indirect. For suppose a landed proprietor, keeping half a dozen carriages and a score of hunters; a property or income tax is imposed; he immediately recoups himself by putting down two or three horses and carriages; and the persons who feel the tax are the carriage maker, horse breeder, coachman and horse provender merchant, out of their profits. But without giving any definition of direct taxation, I consider this to be a direct tax for Provincial purposes, authorized by several sub-sections in sec. 92 of the British North America Act, and especially by sec. 93; and so, legal.

Judgment.

But it was said, *nemo tenetur ad impossibile*, the Corporation is not by the School Act furnished as it ought to be with arms to procure this money, and the provision, even if constitutional, cannot be carried into effect. There is no certainty, it was urged, either as to the amount

or the persons chargeable. What power has the Corporation to collect a Provincial tax? Even if it had power, the Act itself should apportion the tax upon the citizens, and should state whether it is to be raised as a capitation tax or as an *ad valorem* tax upon property; and it was contended that the School Act must be amended before it can be carried into effect. And the *Bristol Railway Case*, 3 Q. B. D. 10, was cited to show that when money cannot be raised the obligation to pay it will not be enforced.

But that case has really no application here. It was an application for a *mandamus* ordering the company to pay a sum which they admitted they owed; but they had exhausted their capital and borrowing powers, and had no means of raising more money. The remedy by judgment and execution had been tried and was fruitless, and therefore the creditors applied for a *mandamus*. But as it appeared to the Court that the *mandamus* would necessarily remain as inefficacious as the writ of *fi. fa.*, they declined to grant it. Here the difficulties of raising the money appear to be quite shadowy. In fact, the money has been raised and paid into Court. But if not, all the defendants would have to do apparently, if they desired to comply with the School Act, and cannot give a cheque, is to pass a by-law under sec. 96, sub-sec. (7). Or if they desire to present a passive attitude of non-compliance, let them do nothing, and the Sheriff will levy the amount under the machinery provided by sub-sec. (187), *et seq.*, of the Municipal Act (c. 88, C. A. 1888). It has not been alleged that when the Municipality tax a bank or other corporation, they are at all careful to give any of the directions which they now insist upon as absolutely necessary in their own case. But the Corporation is not required to levy the tax, but to pay it. No Act that I ever heard of proceeds to explain to the taxee how he is to find the money, or has ever been impeached for want of such instructions. And, besides, this part of the argument, like the last, is not addressed to the only issue I am asked to decide, viz., the constitutionality of sec. 37 of the School Act. But as the difficulty and unreasonableness of the tax were much referred to in the argument, I have noticed these points, though not properly before me. I think that there is here a duty legally, *i. e.*, constitutionally, imposed upon the Corporation. I therefore direct judgment to be entered in favour of the plaintiff, and, unless the Crown choose to waive costs, the costs of the action up to the present time will follow the event.

Judgment.

Judgment for plaintiff.

BEGBIE, C.J

Feb., 1890.

Ex parte NEW VANCOUVER COAL MINING & LAND CO.

Right of non-registered foreign company to be registered as the owner of lands.

Ex parte NEW VANCOUVER COAL COMPANY.

The Registrar is justified in refusing to register a non-registered foreign company as the owner of land.

Statement.

APPLICATION for an order directing the Registrar to register the applicants, a non-registered foreign company, as the owner of certain lands. The company is alleged to be duly formed in England under the English Acts. On applying to the Registrar, he declined to register the purchase, claiming that the company, not being registered in British Columbia, had no *prima facie* right to hold lands at all.

Helmcken for the applicants; *the Registrar-General* contra.

February 3rd, 1890. SIR M. B. BEGBIE, C. J.:—

Judgment.

This appears to be a foreign company in the sense in which a judgment in the Court of Queen's Bench in England or Ontario would be called a "foreign" judgment here; or a judgment of the County Court of Oxfordshire would be called a "foreign" judgment in Bow and Stratford. I think the company ought to comply with the Provincial enactments relating to foreign companies.

Application dismissed.

JONES *et al*

v.

BEGBIE, C.J

THE CORPORATION OF THE CITY OF VICTORIA.

May, 1890.

Injury arising from exercise of statutory duty or power—Interlocutory injunction, when granted.

JONES *v.* VICTORIA.

There is no remedy for damage caused by the exercise of a statutory duty or power, unless it is given by Statute, or unless the duty or power has been negligently exercised.

Apld Roberts v Calgary (City) 57 WLR 66 (Alta SC)

The Court generally requires three things to be shewn before granting an interlocutory injunction:—(1) There must be a strong *prima facie* case that the Plaintiff will succeed at the hearing; (2) There must be some wrong suffered or threatened not sufficiently or appropriately to be covered by a money payment; (3) The preponderance of convenience must be in favour of the injunction.

BEGBIE, C.J

May, 1890.

JONES v. VICTORIA.

Judgment.

MOTION to dissolve an interim injunction.

May 21st, 1890. SIR M. B. BEGBIE, C. J.:—

In the present case the plaintiffs have obtained, *ex parte*, an interim order restraining the Corporation from allowing the sidewalk to continue in its present condition or so as to be a nuisance to the plaintiffs. This order was on Friday, the 18th instant, extended until the hearing or further order, the defendants having allowed three days to elapse without any instructions to oppose. They come now, however, to move that the injunction that was obtained *ex parte*, though on notice, be dissolved. The first objection taken by plaintiffs was that the defendants are in contempt and can take no steps except to purge their contempt. I rather think, however, that this application is in the nature of a defence, and besides, if they are to purge their contempt before they can be heard on this application, they can only do this effectually by knocking the sidewalk away, which is the very thing they now tell me they can show me that they are not bound to do. It would be Border law—hanging first and trying afterwards—to force them to knock it down as a preliminary to enquiring whether they are entitled to place and keep it there. And finally the plaintiffs do not insist on this right to notice the contempt, so that I have heard the arguments and the cases cited on either side, the latest decided (though I have not seen the judgment) being that of my brother DRAKE in the water case, *Rowland* v. *Corporation of Victoria*. And on the general question of law I am disposed to agree with him, that it is concluded by authority. Where any power or duty is created by Act of Parliament, a person aggrieved or suffering loss from the exercise of the duty or power has no remedy, unless it is given by Statute or unless the duty or power has been negligently exercised.

An action always requires evidence of two things—a wrong-doing and a loss. But if the Legislature has sanctioned the Act it is not wrong-doing, and a loss thereby occasioned to a third party is *damnum absque injuria;* he is damaged, but nobody has done wrong, or otherwise than the law permits. If, as sometimes happens, the Legislature which sanctions the Acts directs any methods to compensate persons aggrieved thereby, they may of course pursue that remedy, but they have no other resource—*Couch* v. *Steel*, 3 E. & B., 402. This is where the act is authorized by Statute. If it be not authorized there is nothing to prevent the aggrieved party from bringing his action. The

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damnum is no longer *absque injuria*. Or if the loss be occasioned by the negligent way in which the defendant has exercised his lawful powers, then again an action will lie, the *damnum* is not without *injuria*—*McGarvey* v. *Strathroy*, 10 Ont. A. R., 631.

This Statutory compensation where given at all is only intended to cover a loss "necessarily" flowing from the proper execution of the authorized work. If under the show of carrying out the Act of Parliament the defendant steps outside the Act, and so inflicts loss, that is not the subject of the compensation intended by the Statute, and the remedy is by action.

This is the principle which governs every case cited both for the plaintiffs and the defendents. In *Jones* v. *Sleaford*, 4 L. R. App. Cas., 410, *Couch* v. *Steel* is cited and followed. In *The City of Montreal* v. *Drummond*, 1 App. Cas., 384, the same point is taken. In *Nickle* v. *Walkerton*, 11 O. R., 433, it was held that the works could "and should" have been done so as to cause no loss to the plaintiff, and that, therefore, the remedy was by action; the loss not being the "necessary" result of the work authorized by Statute. In *Adams* v. *City of Toronto*, 12 O. R., 243 (which in other respects nearly resembles the present), the plaintiff had adopted the new sidewalk, and raised his buildings to meet it, he could not, therefore, be heard to say that the Corporation had done the work improperly, and so his remedy was not by action. In *Van Egmond* v. *Seaforth*, 6 O. R., 599, the Corporation having passed and followed a by-law, the remedy by action was refused, the Court remarking that if the Corporation had not passed the by-law, or had not followed it, the remedy would have been by action.

Judgment.

I think at this stage of the action, and as at present advised, that this sidewalk in its present condition is authorized by the by-law, and that the by-law is authorized by Statute. The plaintiffs alleged that another part of the sidewalk on the same block was not in accordance with the by-law. I do not see what that has to do with the plaintiffs' case. If that be so, and if anybody be damaged thereby, the remedy of the party aggrieved will be by action and not by compensation; but that cannot affect the plaintiffs' rights or wrongs. And *non constat*, that the residue of the sidewalk will not be in good time constructed according to the by-law, even if it be now otherwise. It is impossible that all the sidewalks should be made at once in their ultimate form; they must be constructed by degrees, and in parts. At any rate the plaintiffs do not show that they are hurt by that other part, even if it be illegal.

The granting of an interlocutory injunction is always a matter of discretion. Three things the Court generally requires to be proved: (1) There must be a strong *prima facie* case that the plaintiff will succeed at the hearing; (2) There must be some wrong suffered or threatened not sufficiently or appropriately to be covered by a money payment; (3) The Court will weigh the balance of convenience or inconvenience: the inconvenience to the plaintiffs of having this high sidewalk in front of his buildings and the alternative inconvenience of pulling it down. And to sustain this application the preponderance of convenience must be in favour of the injunction. But the first thing to consider is the probability of the plaintiffs' final success. Now at present I think, as I have said, they will ultimately fail. I think, therefore, this is not a case in which this injunction should have been ordered, or should now be allowed to continue.

If, however, the action be ultimately dismissed at the hearing, the plaintiffs will be remitted to their remedy of compensation at the hands of the arbitrators; and the amount will depend upon the amount of inconvenience, loss of space, loss of custom, &c., which this sidewalk at its present level occasions to them in their business. It will be compensation once for all.

Judgment.

Now, although everybody, I suppose, will agree that the rule adopted by the Corporation for constructing these sidewalks, viz., so as to have a uniform grade from corner to corner of the block is, as a general rule, not unreasonable (By-Law No. 131, rule 5), yet everybody, I equally suppose, will admit that occasional departures from this rule are also very reasonable; and the Corporation does occasionally depart from this rule by constructing the sidewalks with suitable depressions, having often regard to the level of the ground floors of existing buildings, notoriously (not to mention many other instances) in two of the greatest thoroughfares in the city, in Government street, just south of the Bank of British Columbia, and in Douglas street, a little more than a hundred yards from the plaintiffs' premises. Such variations in the level have been recently constructed (within the last six months), and I would suggest that a depression equal to either of these, and even less than either, if permitted, before the plaintiffs' premises, would greatly diminish the inconvenience and, therefore, the amount of compensation.

Any such indulgence need not be more than temporary. At present this part of Johnson street is not an important thoroughfare; when it should become such, and the present buildings are to be replaced with

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brick, the Corporation may by proper by-laws re-alter the level, should it deem expedient.

All these latter observations I am aware, and need not say, are wholly extra-judicial. At present all I order is that the injunction be dissolved, and that all costs hereto incurred be reserved until the action comes to be finally disposed of.

Injunction dissolved.

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BURK *v.* TUNSTALL.

"Mineral Act, 1888," Sec. 11—Constitutionality of.

It is competent to the Province to create Mining Courts, and to fix their jurisdiction, but not to appoint any officers thereof with other than ministerial powers.

Distd In re reference to Adoption Act (1938) SCR 398 (Sec.)

RULE absolute to prohibit defendant, a Gold Commissioner, from sitting as a Judge in a Mining Court.

Wilson for the rule.

Apld + consd F. Neilson + Son v. Marchant 61 WWR 212 (Alta SC)

June 24th, 1890. DRAKE, J.:—

Judgment.

This was an application for a writ of prohibition against George Tunstall to restrain him, as Gold Commissioner for West Kootenay, from further proceeding in an action brought in his Court by Robert Burk to recover $70 for labour performed in the Cariboo mining claim in Illecillewaet, in the District of West Kootenay.

The grounds taken by Mr. Wilson in applying for rule *nisi* were that Mr. Tunstall is a Gold Commissioner appointed by the Provincial Government, and that the powers given to a Gold Commissioner sitting as a Judge in a Mining Court under section 11 of the Mineral Act are *ultra vires* of the Provincial Legislature, the power of appointing Judges being solely vested in the Governor-General.

It is to be regretted that no argument was addressed to me in support of the powers claimed by the Gold Commissioner under the Act, as no one appeared in opposition to the rule.

The sections of the Mineral Act, so far as they are of importance with reference to this application, are as follows:—

Section 4 authorizes the Lieutenant-Governor in Council to appoint Gold Commissioners either for the whole Province or for a particular

district. Section 5 establishes in every district a Court called the Mining Court, over which the Gold Commissioners shall preside.

Such Mining Court, by section 6, is to have original jurisdiction as a Court of Law and Equity to hear and determine all mining disputes, and is to be a Court of Record, and the Gold Commissioner is to have the same powers for enforcing the judgments or orders of his Court as are exercised by the Supreme Court or a Judge thereof.

Section 10 gives jurisdiction as to disputes relating to real estate held under the Act. Section 11 gives jurisdiction as to personal claims arising between persons engaged in mining, and in respect to supplies furnished to persons engaged in mining; and section 12 authorizes the Gold Commissioner to issue writs of *ca. re.*, *ne exeat*, and *ca. sa.* in all cases in which by law he has jurisdiction, which apparently means in all cases in which the Act clothes him with jurisdiction.

We here find a very large and extended jurisdiction vested in the Gold Commissioner, unlimited as to amount, and limited only by the fact that the questions to be decided by him must be between persons engaged in mining, or in respect of supplies furnished to persons engaged in mining. This jurisdiction is, in reality, in excess of the powers vested in the County Courts, uncontrolled by any rules and unfettered by any restrictions. The issues that can be raised under these sections may involve property of a very great magnitude, and questions of the greatest importance. In addition to these judicial powers, the Gold Commissioner is vested with certain functions respecting the recording of claims, defining of boundaries of claims, laying over claims, and other matters of considerable importance to a mining community, but which are not involved in the question now before me.

Judgment.

Prior to Confederation, the Provincial Government had all the necessary authority for establishing Courts of this character, and of appointing the presiding officers, and sections 4, 5, and 6 were enacted prior to Confederation.

Since Confederation, the Provincial Legislature has power to constitute, maintain, and organize Provincial Courts, including procedure in civil matters, under section 92, sub-section 14, of the "British North America Act." So far then as that Act establishes a Mining Court and creates its jurisdiction, it was within the powers of the Colonial Legislature, but when the Provincial Legislature attempts to appoint officers of the Courts thus constituted with other than

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ministerial powers, it trenches on the powers expressly given to the Governor-General by section 96 of the "British North America Act." It is true that the language used in that section is limited to the Judges of the Superior, District, and County Courts in each Province, and it might be contended that these Courts having been expressly named, all other Courts are excluded. If this were so, the Provincial Legislature would only have to constitute a Court by a special name to enable them to avoid this clause, but in the section itself, after the special Courts thus named, the Courts of Probate in Nova Scotia and New Brunswick are excepted from the operation of the clause, thus showing that section 96 was intended to be general in its operation.

But there is a further view which I think is conclusive on this point. It is a prerogative of the Crown to appoint all Judges, and such prerogative cannot be taken away except by express words. This prerogative has been delegated to the Governor-General, and there is nothing in the Act taking this right away and vesting it in the Lieutenant-Governor. In the *Magdalene College case*, 11 Rep. 716, it was held that when the king had any prerogative, estate, or interest, he shall not be barred of them by the general words of an Act of Parliament, and Lord *Cairns*, in *Theberge* v. *Laudry*, 2 App. Cas., 102, says their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle that the prerogative of the Crown could be taken away except by express word.

Judgment.

I therefore hold that the power of appointing Judges of the Mining Courts is vested in the Governor-General, and that although the appointment of a Gold Commissioner for certain purposes of a ministerial nature, which are defined in the Mineral Act, is entirely within the powers of the Provincial Legislature, yet to clothe that officer with the important and extensive judicial jurisdiction which section 11 of this Act purports to do, is entirely beyond the power of the Provincial Legislature.

I may point out that, under the 7th section of the Mineral Act, the County Court, if there is one whose jurisdiction extends over the district for which a Gold Commissioner is appointed, has exclusive jurisdiction in all mining questions under the Act, and it will be for the Government to make provision to meet the difficulty that has now arisen.

I therefore direct that the rule for a prohibition be made absolute.

Rule absolute.

EZEKIEL HARPER

v.

THADDEUS HARPER, THOMAS DIXON GALPIN, HENRY SLYE MASON, THE CANADIAN PACIFIC LAND AND MORTGAGE COMPANY, LIMITED, THE BRITISH COLUMBIA LAND AND INVESTMENT AGENCY, LIMITED, JOHN CAMERON, AND HENRY SLYE MASON, AND JAMES CHARLES PREVOST, as Receivers of the Estate of the said Thaddeus Harper.

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General Legatee—Executor dealing with Testator's Assets as his own—Following such into a mixed Fund—Secured and simple contract Creditors—Land Registry Act—Relief grantable to Legatee—Practice.

In 1874, one E. H. became entitled to a general legacy of $10,000, bequeathed to him by his brother J., who appointed as his executor another brother, T., with whom he was in partnership.

On J.'s death, T. entered into possession of the whole partnership property, and paid half the legacy to E. in 1875. E. sued T. and recovered judgment by default for the balance, on January 24th, 1889, which judgment was registered February 28th, 1889. In the meantime, T. had charged the whole property for large sums to various creditors, who obtained and registered judgments before January 24th, 1889, before which date also judgment was obtained against T., and registered by a simple contract creditor, C. Receivers having been put in possession of T.'s estate, sold the same under Order of Court, and after certain mortgage debts and expenses were paid off, with the sanction of the Court, the balance left was insufficient to pay off the charges registered before E.'s judgment.

In an action by E. for an inquiry as to what assets of J. came into the hands of T. or the Receivers, to have his judgment declared entitled to priority over the other registered charges, and to restrain the Receivers,

Held, per Begbie, C. J., that the action must fail as against all the defendants, for E. was now a mere judgment creditor of T., and no longer a legatee, and he had not shewn that any moneys in the Receivers' hands were impressed with a trust in his favour.

But, *held*, on appeal, per McCreight and Walkem, JJ., that the action lay as against the simple contract creditor C., but not, *semble*, as against the secured creditors, by reason of sections 32-36 of the Land Registry Act.

Per Drake, J., dissenting, the action was misconceived, and should have been launched as an administration action.

Statement.

ACTION as against the defendants Thaddeus Harper, Galpin, Mason, the C. P. Land and Mortgage Company, Limited, the B. C. Land and Investment Agency, Limited, and Cameron, to have a certain judgment obtained by the plaintiff in the Supreme Court

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against the defendant Thaddeus Harper, on the 24th day of January, A. D. 1889, for the sum of $6,865.00, declared a charge upon all the real and personal estate of the said defendant Thaddeus Harper, prior to any and all charges, liens or incumbrances of the defendants Galpin, Mason, the C. P. Land and Mortgage Company, Limited, the B. C. Land and Investment Agency, Limited, and Cameron, or any of them, upon the said estate of the defendant Thaddeus Harper, and as against the defendants Mason and Prevost, as receivers of the estate of the defendant Thaddeus Harper, for an order directing them to pay the amount of the plaintiff's judgment out of any moneys in their hands as Receivers of the estate of the defendant Thaddeus Harper, and restraining them from paying to other creditors or in any way parting with the said estate or proceeds thereof until the claim of the plaintiff be satisfied and discharged.

The facts appear in the judgment of BEGBIE, C. J.

Bodwell for plaintiff. *Wilson* for all the defendants other than Thaddeus Harper. *Helmcken* for the defendant Thaddeus Harper.

The action came on for trial before BEGBIE, C. J., on April 15th, 1890, who, after taking time to consider, delivered the following judgment:—

Judgment of Begbie, C. J.

In 1871, and for many years previously, Jerome and Thaddeus Harper, two brothers, had carried on in British Columbia, and also in the neighbouring States and Territories, the business of stock-raising, and had accumulated much land, cattle and horses, and some plant and machinery. The land in British Columbia (and it is not necessary to consider any property out of British Columbia) was all registered in the sole name of Jerome; but the whole property, land and stock, live and dead, was owned in equal shares by the two brothers in partnership; and they were reputed to be wealthy, worth $300,000 in British Columbia.

In November, 1874, Jerome died. By his will he appointed the defendant, Thaddeus, sole executor, and after bequeathing several legacies, and among them $10,000 to the plaintiff, Ezekiel, another brother, he gave the residue of all his estate, real and personal, to the defendant, Thaddeus, for his own benefit. Thaddeus entered into possession of the whole property, and has ever since dealt with it as being entirely his own. In or about the year 1875 he paid the plaintiff $5,000 on account of his legacy of $10,000, and has paid, or promised to pay, interest on the balance, ever since. Ezekiel, the plaintiff, was

not only a legatee under Jerome's will, but also, according to the present statement of Thaddeus, a creditor to some extent, having advanced to Jerome sums in his lifetime which have never been paid off. But no notice was taken of this, either in the statement of claim or the argument. Ezekiel frequently asked Thaddeus for payment of the balance of the legacy, but never took any steps to enforce payment until December, 1888, when he commenced an action in which, Thaddeus admitting the amount, he obtained a judgment on the 24th of January, 1889, for $6,865, legacy, interest and costs. The writ of summons was, by amendment endorsed, not only claiming the legacy and interest, but also for the administration of the will and an account of all property of Jerome come, or which should have come, to the hands of Thaddeus. But Ezekiel sued, not on behalf of all creditors or legatees, but for himself alone. The judgment was in the usual form of a judgment against an executor, admitting assets *de bonis testatoris et, si non, de bonis propriis.* And on the 12th February, 1889, an order was made referring it to the Registrar to take all the accounts of the estate of the testator, unless in the meantime Thaddeus should produce such accounts; for which purpose the order was not to take effect for six weeks, *i. e.*, until the 26th March. Thaddeus did not produce the accounts. No steps, however, have been taken under that order, but on the 26th of August last the plaintiff commenced the present action. It was probably seen that in any contest for priority the accounts would have to be taken in the presence not only of Ezekiel and Thaddeus, but also of a great many other mortgagees and chargees. For during the fourteen or fifteen years since the testator's death, during which Thaddeus had, as has been said, dealt with the whole partnership property, his own original share as well as that which he derived from Jerome's will, he had very heavily encumbered the whole. He had, between March, 1885, and March, 1888, created five mortgages, aggregating $141,750 of principal moneys, on which there was a large arrear of interest, and was indebted to other creditors as well. So that before the date of Ezekiel's judgment there were not only these five mortgages (also secured by prior judgments), but there were registered six other creditors for about $61,000, and two of these judgment creditors, Mr. Cameron and Mr. McCulley, finding that there was nothing for the Sheriff to seize (all the other property in B. C. being in mortgage), had obtained an order for Messrs. Mason and Prevost to be appointed joint receivers, and these gentlemen had accordingly already entered into possession more than a month before the date of

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the plaintiff's judgment, their appointment and possession being in the nature of an equitable execution executed. In the course of the next six months, the receivers, by the direction of the Court, sold all the property for the sum of $225,000. After payment of the mortgage debts and some other debts and expenses, there remains in the hands of the receivers a sum of upwards of $30,000, the whole of which is insufficient to satisfy the charges registered previously to the plaintiff's judgment, but upon which he claims a priority of right for his own judgment, though posterior in time and in registration. And it is to establish this priority that the present action is brought; alleging that all the other claimants are creditors of Thaddeus alone, but that he has not only a claim upon his judgment against Thaddeus, but also against Jerome's estate, upon which his legacy was charged, which has never been fully administered, and which Thaddeus cannot be heard to say is exhausted; and that Thaddeus' own creditors cannot stand higher than Thaddeus himself. It is not exhausted, the plaintiff alleges, if Thaddeus has been strictly honest and had intended to pay his own sole creditors out of his own sole money. The $30,000 is part of a much larger sum raised by the sale of Jerome's share as well as Thaddeus' own moiety, and by the present action the plaintiff claims a right to follow Jerome's share and charge the proceeds. It is true, the two shares have become mixed; but so far as regards land, there is no difficulty, for the land included in the $225,000 sale was the identical land, neither more nor less, which was owned by the two prior to Jerome's death. And, in fact, at the time of the sale it stood in Jerome's sole name, the registration never having been altered into Thaddeus' name. There is no question, therefore, of difficulty, the plaintiff argues, as to the land; and as to the live stock, it is all either the natural increase of the stock which originally belonged to Jerome and Thaddeus jointly, or has been commercially substituted for it, and Jerome's share in the estate is thus capable of being followed as to the stock as well as the land. And *Knatchbull* v. *Hallett*, 13 Ch. D. 696, was strongly relied upon and alleged to be in point to support the plaintiff's claim, and to overrule *Pennell* v. *Deffell*, 4 DeG. M. & G., 372. But the only point in which the later case overruled the earlier one, a serious point, but not very important to be considered here, was that the rule in *Clayton's* case, 1 Mer., 572, did not apply where one set of claimants were merely creditors, and the other set were *cestuis que trustent* of the insolvent. The main doctrine that a Court of Equity will, if it can, follow up a trust estate, where it has been mis-

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applied by a trustee into all the forms of investment which it may have assumed, is not enunciated for the first time in either case, but it is recognized by both as well known and established; and it is illustrated and insisted on in the earlier case, I venture to think, more fully than in the latter, as might be expected from two such Masters of Equity as the Lord Justices Knight Bruce and Turner; nor is it easy to find any illustration or argument in the later case which had not been expressed in the earlier.

But is this doctrine, with or without the application of the rule in *Clayton's* case, available to the present plaintiff? I agree with his contention which was denied by the defendant, that his legacy is by the will charged on Jerome's estate. Nothing is given to Thaddeus except the residue, *i. e.*, what shall remain after the payment of debts and legacies. The legacies, therefore, Ezekiel's and the rest, are, according to the well known rule, charged on the testator's estate (*Mirehouse* v. *Scaife*, 2 My. & Cr. 695). But in *Conron* v. *Conron*, 7 H. L. Ca. 168d, it was pointed out that a mere general charge does not amount to a charge on any particular object; and the question is, what part of that estate is impressed with a trust in favour of the plaintiff? A charge is not a trust. A mortgagor is not a trustee for the mortgagee, not even an equitable mortgagor. The chargee has his remedies, which he can pursue against the whole estate, but he cannot point to any part of it which he is the equitable owner. Moreover, in *Pennell* v. *Deffell* and *Knatchbull* v. *Hallett*, and all cases in which a trust estate has been followed, it has only been deemed possible to do this while the trust estate, or the proceeds or new investment of it, has been in the hands or the power of the defaulting trustee. Lord Justice Turner points out that the Court will at all events endeavour to do this where the proceeds have been placed in the hands of a banker, or even where they have been employed in a partnership, of which the trustee was a member. But he points out at the same time that it is not always possible to follow a trust estate through its various forms of investment, and that a Court of Equity will be cautious not to interfere with the rights of third parties, and, in fact, it is on that ground that the Court in that case applied the rule in *Clayton's* case. Not that third parties would, in *Pennell* v. *Deffell*, have been injured by neglecting that rule, but that if it were to be neglected merely because the claimant was a *cestui que trust*, great embarrassment and injustice might arise in some future case, and, therefore, that the general well established rule was not to be departed from.

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Now, here the question is this: There is a sum of money in the hands of the receiver, by way of equitable execution at the suit of various creditors who have established their claims before the plaintiff. This sum, it is true, may have, in part or in whole, arisen from the estate formerly belonging to Jerome. But it is impossible to say positively that it did so. The identity of the particular moiety which Thaddeus derived from Jerome's will, and Thaddeus' original share, is wholly merged and indistinguishable, not by the act or default of Thaddeus at all, but by the operation of the law and the way in which the sales moneys have been, under the order of the Court, dealt with by the receivers, Ezekiel all the while standing by and not interfering. The plaintiff, indeed, by bringing his action and obtaining judgment against Thaddeus, has become a mere creditor of Thaddeus. His claim is no longer that of a legatee, *transiit in rem judicatam*, according to *Kendall* v. *Hamilton*, 4 App. Cas. 504, *Chambefort* v. *Chapman*, 19 Q. B. D. 229.

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Apart from the new position which Ezekiel has thus taken up, was Thaddeus ever a trustee for him, and of what fund? For, unless there be a trustee and a trust fund, the doctrine of *Pennell* v. *Deffell* and *Knatchbull* v. *Hallett* does not apply. Now, an executor, it is true, occupies a position of trust as soon as he undertakes the duties of his office. But that does not necessarily convert him into a trustee for everybody who claims under the will. If there be a specific legacy, suppose a gift of Russian bonds, and he assents to it, then he does immediately become a trustee of these bonds for the legatee. But that is precisely what is wanting here. Ezekiel has never been more than a mere incumbrancer, a non-registered encumbrancer, on some property which Thaddeus took under Jerome's will; and the question is whether the plaintiff is to take precedence of Thaddeus' other encumbrances after Thaddeus has dealt with the whole property for valuable consideration and without notice? This claim of Ezekiel's was fifteen years old when the present action was commenced, and the plaintiff has never yet registered any charge against the undivided moiety of land which came to Thaddeus on the death of Jerome. On the contrary, as already observed, he has chosen to get a judgment against Thaddeus (January 7th, 1889) which would bind all Thaddeus' land, held by whatever title, and has registered that before commencing the present action. It may well be argued that he has changed his security. In *Knatchbull* v. *Hallett*, the claimant did not sue, or seek to enforce judgment against Hallett or his executor, nor seek to have

satisfaction out of any assets of the testator or of the executor. She claimed the very fund itself as being hers alone, and as never having belonged really to Hallet or to them; that her proprietorship was impressed upon it in the shape of a trust, *i. e.*, on the Russian bonds, and on the money which, but for the rule in *Clayton's* case, would represent these bonds, so that that money was hers before the testator's death, and had never passed by his will. But the dispute about the rule in *Clayton's* case was quite secondary. The first thing she had to prove was that the bonds were held by the testator in trust for her; then, that he had sold them and paid in the amount to his account current with his banker. These points being satisfactorily established, then, and not till then, came the consideration of *Clayton's* case. The same distinction between a creditor and a *cestui que trust* is taken in the case of the *Metropolitan Bank* v. *Heiron*, 5 Ex. D. 324, and in the very recent case of *Lister* v. *Stubbs*, 45 Ch. D. 1. A suit founded on a breach of duty or fraud by a person in the position of a trustee, his position making the receipt (or application to his own use) of the money a breach of duty or fraud (which is the present case), is very different from the case of a *cestui que trust* seeking to recover money, or the proceeds of money, which was his own before any act wrongfully done by the trustees. In the latter case, the Court will follow up the fund: it is the plaintiff's own fund, which has been misapplied. In the latter case, there is no fund appropriated to the plaintiff; no fund, therefore, which was ever wholly his own, or which the Court can follow up. I think the plaintiff has not shown that any portion of the moneys in the receivers' hands is impressed with any trust in his favour, or is the proceeds of any fund or property impressed with such a trust, and that his action therefore fails, and must be dismissed with costs.

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From this judgment the plaintiff appealed to the Full Court, and the appeal came on to be heard on the 28th day of July, 1890, before McCREIGHT, WALKEM, and DRAKE, JJ.:—

Bodwell for the appellant: As to Cameron, he is a creditor of Thaddeus Harper in respect of a transaction negotiated upon the personal credit of the latter, so that Ezekiel's claim must prevail as against him. There was a balance due Jerome's estate large enough to meet our claim, so that the Court may dispense with the formality of an account.

Argument in Appeal.

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I submit that the mortgagees are also liable, because—

(*a.*) The evidence shews they advanced the money with notice of Ezekiel's claim:

(*b.*) The provisions of the Land Registry Act do not protect them, as the lands were then, as now, registered in the name of Jerome, and not in the name of Thaddeus:

(*c.*) By the will, this legacy was charged on the land, and the mortgagees were bound to see that the moneys were applied in its discharge. (See authorities collected in notes to *Elliott* v. *Merryman*, White and Tudor, Leading Cases, 6th Ed., p. 780.)

Further, there is a distinct declaration on the part of Thaddeus that he holds $5,000 of Jerome's estate in trust for Ezekiel. There is no difficulty whatever, upon the evidence, in tracing the original estate into the funds in the receivers' hands, and the Court only refuses to follow the trust property when it has been so dissipated by the defaulting trustee that the means of identification wholly fail: *Harford* v. *Lloyd*, 20 Beav. 310; *Pennell* v. *Deffell*, 4, De. G. M. & G. at p. 388.

Ezekiel is therefore entitled as against Thaddeus to a charge on the whole fund for the amount of his claim: *Re Hallett*, 13 Ch. D. 693.

The claim must also prevail against all the respondents, since they can recover only the interest of Thaddeus in the property.

Argument in Appeal.

Wilson for all the respondents, other than T. Harper: I submit that, in order to succeed, the plaintiff must establish—

That Thaddeus, as executor of Jerome, was a trustee for the amount of Ezekiel's legacy for him; that the whole of the personal estate of Jerome that came to the hands of Thaddeus as executor was a trust fund for the payment of Ezekiel's legacy; that the trust fund is capable of being followed; that the trust fund has not been dissipated; and that, even if it can be traced, it can be taken as against an execution creditor.

An executor has an absolute right of disposal of the whole of the personal estate of the testator, and is not necessarily a trustee: per *Kekewich*, J., *In re Rowe* (deceased), *Jacobs* v. *Hinds*, 60 L. T. 596, at p. 599.

In order to create a trust fund in favour of a legatee from the moneys in the hands of the executor, there must be an appropriation to answer the particular legacy: *Phillipo* v. *Munnings*, 3. Myl. & Cr. at p. 315.

Appropriation or no appropriation is the test, whether the executor has abandoned the character of executor and assumed that of testator, and nowhere is it shewn that there ever was any appropriation of the whole or any part of the assets of Jerome in the hands of Thaddeus set apart to answer the legacy bequeathed to Ezekiel. Hence there was no fiduciary relationship between Thaddeus and Ezekiel and no trust fund to follow.

The estate of Thaddeus and Jerome were never distinguished one from the other, and Thaddeus had been permitted to deal with it, exclusively as his own, without interference by Ezekiel. The respondent had no notice of any unpaid debt or legacy, and Thaddeus was also sole residuary legatee: *Nugent* v. *Gifford*, 1 Atk. 463; *Mead* v. *Lord Orrery*, 3 Atk. 235.

Receivership order is a delivery in execution (*Ex parte Evans*, 11 Ch. D. 691), and the position of execution creditor is equivalent to that of purchaser.

Argument i appeal.

But for the *Land Registry Act* (Con. Acts, B. C., ch. 67), the respondent might perhaps be able to follow the real property. By the sale under the receivership and subsequent orders the respondent has possession of the proceeds of the personal estate in effect as purchaser, and it is submitted that the Court will not, except upon some better equity, deprive him of it. The creditor has been diligent, the legatee dilatory.

In *Hallett's* case, 13 Ch. D. 696, cited by the appellant, it is said "you can take the proceeds of the sale, if you can identify them." This means the proceeds of the trust estate. Here there never was a trust estate, and further, the proceeds never were identified—*See* judgment of *Boyd*, C., in *Culhane* v. *Stewart, et al.*, 6 O. R. 97. As to laches, see *Kitchen* v. *Ibbetson*, L. R. 17 Eq. 46; *Thomas* v. *Cross*, 2 Dr. & Sm. 423.

He also referred to *New Zealand Land Co.* v. *Watson*, 7 Q. B. D. 374; *Maspans y Hermano* v. *Mildred*, 9 Q. B. D. 53; *Kaltenbach* v. *Lewis*, 24 Ch. D. 54; *Kirkham* v. *Peel*, 43 L. T. 172; *Geary* v. *Beaumont*, 3 Mer. 431; *Marten* v. *Rocke, Eyton & Co.*, 53 L. T. 846; *Collins* v. *Stimson*, 11 Q. B. D. 142; *In re Murray, Dickson* v. *Murray*, 57 L. T. 223.

Judgment having been reserved, was delivered on August 16th, 1890.

BEGBIE, C.J

FULL COURT.

Aug., 1890.

HARPER v. HARPER *et al.*

McCREIGHT, J.:—

This case was argued at length on the points that there was a declaration of trust by Thaddeus Harper, in favour of Ezekiel, the legatee, and that as against the general assets by reason of the will of Jerome Harper, that there was a charge in favour of Ezekiel as such legatee; but the evidence, I think, shows that whilst Thaddeus Harper assented to the legacy, he made no declaration of trust, because, as he says, he had no funds at his disposal. Even if he did, as against the mortgagees, Ezekiel would be, I think, seriously embarrassed by the provisions of the *Land Registry Act*, ss. 32, 35, and as to creditors generally by the provisions of the *Bills of Sale Act* requiring declarations of trust as to chattels to be registered.

The contention as to charge on the personal assets in favour of the legatee was carried to a length which seems to be subversive of the office and duties of the executor (*see* per Martin, B., 7, H. & N., 147 at 150), where he says an executor may sell and dispose of the testator's effects, or distribute them amongst the body of creditors, in fact he has as much dominion over them as the testator had when alive, and *Wilde* B. suggests that the remedy is against the executor on a *devastavit*.

Judgment of McCreight, J.

But I think Ezekiel, as legatee and judgment creditor, has a remedy in equity (*see Re Gorton*, 40 Ch. D. 536 (C. A.) at 541, where the relative rights of creditors of the testator and subsequent creditors of the executors were considered). Lindley, L. J., says at p. 541: "Now what is the right of the creditor of the deceased? He is a creditor, he has no equitable rights, as distinguished from legal rights, against the assests of the deceased. His right is to sue the executor at law and get a judgment at law, *de bonis testatoris*, and under that to seize under a *fieri facias* the assets of the deceased in the hands of the executors at the time of his death. But he has nothing to do with future acquired property. That is his right at law. But then if the executor has so dealt with the assets as to have increased them, the executor cannot put the accretion into his own pocket, neither can he hand it over to the legatees or next of kin so long as the debts of the testator are unpaid. Therefore, I think it is plain that the creditors of the testator can get the subsequent acquired property, but not on the same footing that they could get the property of the testator, which were assets of the testator at the time of his death. The creditor of testator can only get the after acquired property on terms which are just. * * Now let us look at the rights of those who have dealt with the executor after testator's death. The right of those is to sue the

executor. With a few exceptions, *e. g.*, for funeral expenses, the right of subsequent creditors is to sue the executors. They have nothing to do with the assets of the testator at all, etc."

This leads up to the position in the present case, where there is the additional circumstance of the executor being the surviving partner of the testator, and which is discussed in *Lindley* on Part., p. 521, *et seq.*, *e. g.*, subsequent profits when a deceased or retired partner's capital has been left in the concern, pp. 527, 528; account of subsequent profits against executors who are suing partners, pp. 530, 533; referring to *Wedderburn* v. *Wedderburn*, 4 M. & Cr. 41, and *see* at p. 613, the cases in which the legatees, etc., of a deceased partner have a right to an account from the surviving partners, plainly including the present case. The delay in the present case seems to make no difficulty, *see Wedderburn* v. *Wedderburn*, 4 M. & Cr. 41, where an account was directed thirty years after the death of the partner. The right of a legatee, *e. g.*, Ezekiel Harper, to an account against Thaddeus Harper as executor and to profits, of course to the extent of his judgment, made since 1874 are further discussed, pp. 615, 618. This right will, I think, probably not prevail against mortgagees by reason of the *Land Registry Act*, ss. 32-36, but it, I think, will as against judgment creditors of Thaddeus Harper, such as Cameron, who have taken out equitable execution which is pointed out in *Re Shephard*, 43 Ch. D. 131 (C. A.), to be merely equitable relief and to be granted according to the rules of equity. No one would contend that, *e. g.*, Cameron, as judgment creditor of Thaddeus Harper, had as good an equity, or indeed any such equity, as Ezekiel against the balance due to Jerome's estate, and to be found on taking the accounts between the two estates. Cameron has no claim whatever against that fund. If authority for this is required I refer to *Re Gorton*, 40 Ch. D. (C. A.) 536, already noticed where the relative rights of creditors of the testator and subsequent creditors of the executors are discussed.

Judgment of McCreight, J.

The principle upon which the account is to be taken between the estate of Jerome and Thaddeus Harper is discussed by *Lindley*, p. 525; probably it would be unnecessary, as the balance due to Jerome's estate must far exceed the amount of the judgment in favour of Ezekiel Harper.

The facts set out in the statement of claim, coupled with the prayer, seem abundantly sufficient to maintain this relief. No new fact could be set out, as far as I know, in a new suit. The prayer seeks, 1st, an enquiry to ascertain what portion or portions of the estate of the said

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Jerome Harper have been converted into other assets now in the hands of the receivers, &c. This, by necessary implications, involves the taking of the accounts between the two estates. 2nd. It asks for a declaration that the plaintiff's judgment is a charge upon such assets in priority to the mortgages and judgments; and this, of course, means a claim on the net balance due to the estate of Jerome Harper, which, of course, can only be ascertained by taking the accounts as between the two estates, &c. But Galpin's defence shows the receivers have in hand $45,497.50 on account of the purchase money of the personal estate of Thaddeus Harper. Half of this must almost necessarily belong to Jerome's estate, and for the purpose of realizing the sum of $6,000 or $7,000 due on Ezekiel's judgment, an account between the two estates seems to be unnecessary, as there is more than sufficient in Court. The mortgagees, according to the plaintiff's views and contention, were necessary parties, though, as I have already stated, this contention, I think, cannot, by reason of the *Land Registry Act*, prevail as against them; but the judgment creditors of Thaddeus Harper, who claim what belongs to Jerome's estate, and as I have shown, I think, erroneously, were necessary parties, and so, of course, was Thaddeus Harper. The view on which I give my judgment was not urged in the argument, but that is a very different matter from the omission of necessary averments in the statement of claim. My duty is to give judgment *secundum allegata et probata*, and no amendment that I can see is required.

Judgment of McCreight, J.

The present relief sought for is equitable relief to render available Ezekiel's judgment against Thaddeus Harper as executor, and in view of the claims of the judgment creditors of Thaddeus Harper, probably this suit was necessary. As to the two being necessary, see *Anglo-Italian Bank* v. *Davies*, at p. 288, 9 Ch. D. (C. A.). Both, no doubt, are allowable. Rule 329, "Supreme Court Rules, 1880," says: "Nothing in any of the rules of this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever."

I think there should be a decree in favour of the plaintiff Ezekiel, and that he is entitled to payment of the balance due on his judgment out of the proceeds of the personal estate in the hands of the receivers, or so much thereof as belongs to the estate of Jerome Harper, and that if an account is required for that purpose between the two estates it should be taken, but probably none will be required. I may remark as to suggested amendments, or rather new proceedings, against Galpin

for not duly seeing to the application of purchase or mortgage moneys, that it is possible that ss. 32-35 of the *Land Registry Act* may create difficulty in the application of that doctrine. Somewhat similar clauses have given trouble to the Ontario Courts (see, *e g.*, *Maclennan* v. *Gray*, 16 A. R., Ont., p. 224). No objection to the relief I now suggest can be taken on the ground that this view was not presented in argument. See *Ireland* v. *Livingston*, L. R., 5 H. L., 395, where three of the Lords gave judgment on a point not taken in argument or even referred to by the Judges who advised their Lordships' House. The dismissal of the present with leave to bring a fresh suit, where the relief can, I think, be granted now, may be dangerous—*vide Daniel's Chancery Practice*, 78. The case was worked out on different lines before the Chief Justice and Full Court from those on which, I think, relief should be granted, so that, I think, the plaintiff should have no costs, as his conduct must have caused useless expense and delay.

The judgment of the learned Chief Justice seems to have been correct as regards the view of the case presented to him, but if, in any view of the facts, the plaintiff is entitled to relief, he must have it, otherwise serious injustice may be done. The late Master of the Rolls observed that in the majority of cases where the Court of Appeal had differed from the Judge of first instance, it was owing to an omission to argue the proper points. I think the mortgagees were unnecessarily made parties, and must have their costs. In addition to the circumstance that they were probably not liable at all, there seems to be abundant assets *aliunde*, *i. e.*, from the personal estate on which Thaddeus can have no claim.

Judgment of McCreight, J.

Thaddeus borrowed largely on mortgage of the realty, and it seems at least half of the sums borrowed should have been put to the credit of Jerome's estate, and the very large deficiencies must now be made up out of the personalty, as there is no other fund; and even if it was much more than it is, the whole should be paid or appropriated to Jerome's estate.

WALKEM, J.: I concur.

DRAKE, J.:—

The plaintiff is a legatee of Jerome Harper.

In January, 1889, he obtained a judgment against Thaddeus Harper for the balance due on his legacy, Thaddeus being executor and residuary legatee of Jerome.

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The plaintiff did not attempt to realize his judgment, but commenced the present action for a declaration that the plaintiff's judgment was a charge on the assets in the hands of the receivers in priority to the mortgages and judgments made by and obtained against the defendant Thaddeus Harper, or in the alternative that the whole of the assets be charged with the whole of the plaintiff's judgment, in priority to all other charges.

The action was tried and disposed of on the relief asked for by the plaintiff.

It is now suggested that the plaintiff might be entitled to some other relief on the facts stated, but, before the Judicature Act, if the facts stated made out a claim for relief different from the relief asked for by the bill, and the relief asked for by the bill was such that the Court could not grant, the bill would be dismissed. For instance, if a mortgagor prayed a sale under a trust to which it appeared he was not entitled, he was not permitted to take a decree that the defendant might redeem or be foreclosed; and where a suit was instituted against a woman to elect between the provisions made by a will and that to which she was entitled under a settlement, it was held that a declaration that she had elected could not be obtained under the prayer for general relief (see *Chapman* v. *Chapman*, 13 Beav., 308; *Polk* v. *Lord Clinton*, 12 Ves., 48). Here the plaintiff asks for an enquiry as to Jerome's assets, converted and unconverted, and a declaration that his judgment is a charge upon such assets in priority to the mortgages and judgments of the defendants. As a legatee the plaintiff is entitled to an account of the testator's estate, but he is not entitled, in my opinion, to a declaration that his legacy is a prior charge over the mortgages and judgments created by Thaddeus Harper, until such account is taken (see *Hooper* v. *Smart*, 1 Ch. D., 90, in which money paid into Court in an administration action was held liable for testator's breaches of trust).

Judgment of Drake, J.

The fact that the plaintiff is a judgment creditor for the balance due on his legacy, does not make his position any better as regards the testator's estate, but it gives him an additional remedy as against Thaddeus Harper, in case of a deficiency of assets.

The plaintiff, in my opinion, is entitled as legatee, if he so desired, to the ordinary administration decree, which enables the Court to do justice between all parties interested under the will. There may be other unpaid legatees, or there may be unpaid creditors, and by making

the declaration asked for, the Court may be deciding the rights of parties not before it, which could not possibly arise under an administration order.

The Judicature Act and rules have greatly extended the powers of amendment by the Court of first instance, but an amendment (which a decree not asked for by the pleadings practically is) will not be granted by the Court of Appeal, although the plaintiff might have applied to the Judge of first instance to amend by making a claim for administration of Jerome's estate, and which, if the other parties to the action were not prejudiced, would be granted on terms. In the case of *Newby* v. *Sharpe*, 8 Ch. D., 39, the plaintiff sued his landlord to restrain him from preventing the plaintiff from storing cartridges in the building leased, and evidence was given that the defendant had removed the plaintiff's cartridges from the building in question. Fry, J., gave leave to plaintiff to amend, on the ground that the defendant's acts amounted to eviction. The Court of appeal said such amendment appeared entirely unprecedented, as it altered the nature of the case made, and the Court now will not give a different relief than that asked for by the plaintiff. In the case of *Stone* v. *Smith*, 35 Ch. D., 188, the plaintiff asked for specific performance of a contract. Defendant stated he was unwilling to carry contract into effect. The Court refused to give a judgment cancelling the contract, as it was not asked for, but gave judgment for specific performance, being the relief desired. Now here the plaintiff asks to obtain the same benefit, or, rather, a greater benefit than he would be entitled to under an administration decree, without an enquiry as to the position of the testator's estate with respect to the legatees and creditors under it. Without such enquiry, it will be impossible to ascertain whether or not there is a sufficient fund to meet this legacy; if there is not, Thaddeus Harper is responsible, as having admitted assets.

Judgment of Drake, J.

It is true that there is a fund in Court, the proceeds of real and personal estate of Thaddeus, but the plaintiff, as a judgment creditor of Thaddeus', has only such a claim thereto as the registration of his judgment gives him, regard being had to priorities under the *Land Registry Act*. Then, as legatee under Jerome's will, has the plaintiff any better claim than as judgment creditor to the declaration he asks for? I think that his position as legatee under the will is such that he can follow the real estate of the testator, or rather that the testator's real estate is charged with his legacy, *re Bellis*, 5 Ch. D., 504, but he has no claim against the personal assets whether in the hands of the

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receiver or executor. An executor has full power to mortgage and sell the assets of his testator, and though liable to render an account to the Court on proceedings properly instituted, he cannot be interrupted by a creditor or a legatee; and in case of misapplication by the executor of the funds which may come into his hands, the remedy is against the executor. The plaintiff by these proceedings seeks to make the money in Court responsible for his legacy in priority to all other claims. As his legacy is a charge on the realty he ought to look to that first for payment before he seeks to charge a fund which possibly may be the only source from which the judgment creditors can obtain payment of their claim.

The plaintiff argued this case on the ground of a supposed trust on account of the assent to a legacy by the executor, but the assent to the legacy does not make the executor a trustee for the legatee unless he has set apart some portion of the testator's assets, especially to meet the legacy. An executor is, under some circumstances, a trustee, but not for all purposes; if he was, no person could safely purchase from an executor any of the testator's assets without seeing to the application of the purchase money, and the executor's powers would be so greatly restricted that he could not carry out the ordinary duties which devolve upon him.

Judgment of Drake, J.

It is true that a Court of Equity will enforce administration, and will compel an executor to account on the principle of trusteeship, and the proper course for an unpaid legatee is to invoke the powers of the Court in an administration action, whereby the interests of all parties are protected. In the present case we have no information whether the other legacies given by Jerome's will have been paid. Thaddeus in his examination says that one debt of $1,000 has not been paid, and this shows the necessity of strictly following the practice which the Courts have laid down for obtaining relief in a case similar to the present.

The inquiry the plaintiff asks for as to conversion will not give the Court the information necessary to adjudicate on the rights of the parties under the will. The Court cannot presume, on the present state of facts, anything in favour of proper settlement of the testator's estate by the executor, nor can it presume that the money raised by Thaddeus Harper was or was not applied towards settlement of the testator's estate.

Before the 15 & 16 Vic., cap. 86, the practice was for a legatee, on behalf of himself and all other legatees, to file his bill in order to obtain

a distribution of the estate; since that time the practice is governed by that Act, and if the present form of proceeding is to prevail it will, in my opinion, render the administration of estates, on the principles of an equitable distribution, almost impracticable.

It is true that where there is an admission of assets and the plaintiff's claim is undisputed, the plaintiff is entitled to immediate payment without taking accounts (*Woodgate* v. *Field*, 2 Hare, 211), but where other rights have come into existence which *prima facie* are entitled to priority, then it is necessary that proper accounts should be taken.

It may be urged that the money in Court is liable to the plaintiff's judgment, because the estate has been so intermixed that it is now difficult to disentangle it and say what portion belongs to Jerome's estate and what to Thaddeus', and, therefore, it is all impressed with a *quasi* trust, in favour of the plaintiff.

Judgment of Drake, J.

I have no doubt if the Court had been called upon to administer the estate under the Act before referred to, it could appropriate the payment of this fund in the hands of the receiver in accordance with rules of equity, but until that course is adopted I do not think that the plaintiff is entitled to the decree he asks for, and I think his appeal should be dismissed with costs.

Appeal allowed in part, without costs; Drake, J., dissenting.

The following is a minute of the order made :—

1. The said order of the 21st day of May, 1890, be reversed.

2. And this Court doth declare that the appellant is entitled to be paid the amount of his judgment debt and costs, together with interest, as mentioned in the Pleadings, out of the moneys now in the hands of the Receivers, in priority to the defendant John Cameron, and doth order and adjudge the same accordingly.

3. And this Court doth declare that this action ought to be dismissed as against the defendants Galpin, Mason, the Canadian Pacific Land and Mortgage Company, Limited, the British Columbia Land and Investment Agency, Limited, with costs, and doth order and adjudge the same accordingly.

4. And this Court doth not see fit to allow the plaintiff the costs of the said action or of this appeal.

5. And this Court doth further order that the said moneys shall not be paid to the appellant until he shall have given security for the return thereof in case this Order should be reversed on Appeal from this Court to the Supreme Court of Canada, or the Privy Council.

[*An appeal from the judgment of the Full Court was dismissed by the Supreme Court of Canada.*]

DOLL *et al* *v.* HART *et al.*

DRAKE, J. *Chattel mortgage as security by insolvents—Condition outside the instrument—Pressure.*

Oct., 1890.

DOLL *et al.* *v.* HART *et al.*

To constitute pressure which will authorize an assignment by way of security, there must be a legitimate and *bona fide* attempt by the creditor to get payment of his debt, or security therefor.

It is not *bona fide* pressure for a creditor, knowing of his debtor's insolvency, to take an assignment of all his property.

Consd 9 BCR 483

A bill of sale given subject to a condition not appearing therein is void as against creditors

ACTION to set aside a bill of sale on facts and grounds that appear in the judgment.

Fell for plaintiffs; *Mills* for defendants.

October 24th, 1890. DRAKE, J.:—

Judgment.

In this case, Granat carried on business in Government Street, Victoria. He commenced in May, 1889, without any capital, but with an unpaid stock of about $1,000 value. These goods were chiefly supplied by the defendants, and the defendant Hart guaranteed Messrs. Lenz & Leiser to the extent of $250 on account of goods to be supplied to Granat, and which sum he subsequently paid. Lenz & Leiser are judgment creditors of Granat for $330 beyond the sum $250 so paid, and issued execution on this judgment, but were met by the bill of sale.

Hart, in his evidence, stated that Granat had been in his debt since May, 1889, and they had given him credit to the amount of $1,124, and had become security to other persons for Granat, and had paid the amount so guaranteed. He further stated that he had been pressing Granat since December, 1889, for payment; that he went every week and asked for his money, and told him he wanted security, and said he would certainly sue, but did not do so because he would have got nothing if he had tried. The debt owing to Hart & Davis was, in April, $730 on a note, and $283 for moneys paid, making $1,013. In consequence of this request for security, the defendant Granat, on 23rd April, 1890, gave the defendants a bill of sale by way of mortgage to secure a promissory note of $725 of even date with the bill of sale, and payable three months after date. This note was the amount of the overdue account, and no fresh advance was made. Granat and Hart

both say that the mortgage was given on condition that if $500 was paid, the mortgage should be given up, but no such condition was written in the bill of sale, as required by the 4th section of the *Bills of Sale Act*. The bill of sale enables the mortgagees, at any time during the continuance of the security, to seize and keep possession of the premises assigned. The defendants took possession of the property assigned about 15th May, 1890, more than two months before the note given by Granat to defendants became due, and for the payment of which the bill of sale was given. The plaintiffs, the other creditors of Granat, now claim that the bill of sale is void as against them, and ask for a receiver and an account.

Under cap. 51, sec. 2, of the Consolidated Statutes, any person being in insolvent circumstances or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, making any assignment or transfer of his goods with intent to defeat or delay his creditors, or with intent to give one or some of the creditors of such person a preference over his other creditors, such assignment shall be void.

Judgment.

The section contemplates, first, insolvency in the grantor, and secondly, a voluntary preference in favour of a creditor. The language used is that the assignment should be given with the intent—that is, with the intent in the mind of the grantor—to prefer one creditor to another.

An assignment or transfer made by compulson of the creditor is not such an assignment as the Act renders void. If the Act contemplated rendering all transactions between an insolvent debtor and his creditors void, different language would have been used. And this view of the Act, making the preference in order to be a void transaction a voluntary act on the part of the grantor, is the one taken by Strong, J., in *McLean* v. *Garland*, 13 S. C. R. 367, and *Stuart* v. *Tremaine*, 3 O. R. 190; and this leads to the consideration of the question as to what is sufficient pressure to take the case out of the category of a voluntary conveyance.

The evidence shows that Granat was started in business by the defendants, and it must be taken that they were fully cognizant of his position—that he was, in fact, insolvent from the day he commenced business, and this insolvency was known to the defendants, and was not a fact confined to Granat's breast only. Knowing his position, the defendants press for security. Their pressure only amounts to this: give us security or we will sue, but, as Hart candidly says, we did not intend to sue, for we should have got nothing, owing to Granat, in case

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of execution against him, being entitled to claim $500 under the *Homestead Act*, which would have absorbed the greater part of his property. This threat, then, was not a *bona fide* threat, acting on the fears of Granat, and thereby compelling him to give this bill of sale. He must be taken to have known the law as well as Hart, and he knew, therefore, that the threat of an action if enforced would enable him to claim an exemption which would leave nothing for his creditor. I consider that the pressure which would authorize an assignment by way of security must be legitimate and a *bona fide* attempt by the creditor to obtain payment of his debt, or security for it, and does not apply to such a case as the present, where the insolvency is known to the creditor, and an assignment is taken of all the property.

In *Ex parte Hall*, 19 Ch. D. 585, Jessel, M. R., says: A man says to his creditor, I am about to become bankrupt; the creditor says, pay me my debt or I will sue you for it. It would be absurd to call such a procedure *bona fide* pressure by the creditor; but if the creditor did not know the plaintiff's state of affairs, the matter would wear a different aspect. The case of *Long* v. *Hancock*, 7 O. R. 154, is very similar to the present one. In that case, the Hamilton Knitting Co., being indebted to the plaintiffs, application was made, verbally and by letter, threatening suit unless payment made or security given. The company thereupon gave a mortgage for the old indebtedness, and for a present advance. The Chancellor held that there was no *bona fide* pressure, and on this point the Supreme Court agreed with him.

Judgment.

I consider that the pressure alleged to be put on Granat by the defendants in the present case was not a *bona fide* pressure. It was nothing more than a request for a preference, and the onus of showing that there is any other property available for the creditor is thrown upon the defendants supporting the deed. I think that the pressure which will render a deed given by way of security valid must be something more than a request for security; it must impress on the debtor the fact that the creditor is in earnest, and that legal steps to enforce payment will be the necessary result of any refusal on the part of the debtor. But, even in such a case, if the debtor is known to be insolvent by the creditor, the pressure ought to take the legal form and legal remedy—*McWhirter* v. *Royal Canadian Bank*, 17 Grant, 481.

The reason why a security, taken for an antecedent debt by a creditor from an insolvent debtor, known to the creditor to be insolvent, cannot be supported is, that it is a preference, and removes from

the other creditors the property which they would otherwise have the right to take in payment of their claims. A security given for an advance, even if it is also a security for an antecedent debt, is not open to the same objection, because the future advance may enable the debtor to recover his position and carry on a profitable business, and a security taken from an insolvent debtor by a creditor who is ignorant of the financial position of his debtor can also be supported, if it is given under *bona fide* compulsion.

I have, therefore, come to the conclusion that this deed is void as against creditors, not only on the grounds above stated, but also on the ground that the bill of sale was given subject to a condition which was not written thereon. Mr. Hart, in his evidence, says: I forced him to give me a mortgage on condition if he paid us $500 from his father we would return his mortgage. If this was one of the inducements held out to Granat to give the bill of sale, it was a condition which ought to have been written thereon. It does not appear to have been an agreement made after the defendants got possession of the bill of sale, but the condition on which they got it, and the Act says that if there is any condition which is not written on the same paper as the bill of sale, the bill of sale shall be void as against the same persons and as regards the same property as if such bill of sale had not been filed according to the provisions of the Act, that is to say, the bill of sale is void as against the persons and class of persons mentioned in section 3 of the *Bills of Sale Act*, although it may be perfectly good as between the grantor and grantee.

Judgment.

Judgment for plaintiffs.

BEGBIE, C.J

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MCNEIL v. HOWE.

THE QUEEN *v.* HOWE.

MCNEIL *v* HOWE.

"Wide Tire Act, 1889."—Constitutionality of.

The "Wide Tire Act, 1889, (cap. 22) is *intra vires* of the Provincial Legislature.

ACTIONS for penalties under the "Wide Tire Act, 1889."

Davie, A.-G., for the prosecution; *Wilson* for defendant.

November 17th, 1890. SIR M. B. BEGBIE, C. J.:—

These were two actions for penalties under the *Wide Tire Act, 1889*, cap. 22, the first brought by the Attorney-General for one offence against the Act, the other by a private prosecutor for a distinct offence on a different day.

The Statute (passed 16th April, 1889, but not coming into force until October 1st, 1890,) forbids the carrying of any load of more than 2,000 pounds in any waggon on any of the highways in Victoria District, unless the tires be at least four inches in width.

Judgment.

The first question upon which I was asked to give an opinion was whether a private prosecutor might sue. The negative was scarcely contended for, and it seems quite clear that he may. Section 4 of the Act (cap. 22, 1889) says: "One-half of the penalty recovered under this Act shall be paid to the informer," &c. This inevitably implies that an informer may bring the action, and successfully; otherwise no penalty would be there to be dealt with. And, besides, the Interpretation Act (C. A. 1888, c. 1, sec. 8, sub-sec. 23) is express: "Whenever any penalty * * is imposed by any Act, then, if no other mode be prescribed for the recovery thereof, it shall be recovered with costs in any civil action" (either) "at the suit of the Crown only or" (at the suit) "of any private party suing as well for the Crown as for himself," &c.

The defendant admits the contravention of the Act in each case. And the only question really argued before me was as to the constitutionality of the *Wide Tire Act*.

Mr. *Wilson*, for the defendant, relied on two grounds only, I think: First, that this was a direct attempt to "regulate" the "trade" of a carrier, and so a direct usurpation of a subject-matter which, by *The*

British North America Act, sec. 91, sub-sec. (2), is expressly reserved to the Dominion Parliament; and, in the next place, that it was an interference, not with all trades, nor in all parts of the Province, but only with one trade and in one particular district of the Province; that it is, therefore, unequal in incidence of those engaged in carrying, and repugnant to natural justice and void.

But it was answered by the Attorney-General that such exceptional legislation is continually met with. That different and special powers are given to many of the various Municipalities within the Province, and different powers of taxation (*i. e.*, imposing burdens) on persons dwelling within the Province, and of imposing discriminating burdens upon persons pursuing different avocations in the same Municipality, all which legislation, pressing unequally, would be a mere nullity, according to the defendant's present argument. Moreover, the question to be considered is not the justice or expediency of the enactment, but its constitutionality. If this were a mere by-law, the Court might examine whether it was reasonable or equitable; but an Act of the Legislature is not liable to be treated as a nullity on such grounds. At least there is no modern authority for that view, but very much against it. And then, on the main ground, it was denied by the prosecution that this is an attempt to regulate "trade or commerce" within the meaning of sec. 91, sub-sec. (2). Even if these words, properly understood, could include the carriage for profit along a few miles of road, all that the Act says is, "you shall not carry certain weights except on certain tires." It is not addressed to carriers only—every person, whether trading or not, must have tires of the legal width. The same sort of regulation repeatedly occurs with respect to houses in towns, forbidding them to be built except of certain materials; the carrying on trades only on payment of varying licenses; the driving of carts in the streets only at certain rates of speed, and a great many of such matters, which may all be said to aim at the regulation of trade and commerce at least as much as the *Wide Tire Act, 1889*. But in fact this matter is not part of the "trade and commerce" mentioned in sec. 92, sub-sec. (2), which was not intended to comprise such matters as in the words of sec. 92, sub-sec. (16), are merely of a local character; all such being expressly given to the Provincial Legislature. And it is apparent, from *Lambe's* case, 12 App. Cas., 586, that the "sifting" there mentioned of the principles and interpretation has placed a very different meaning on these words from what was at first sight supposed to be the true meaning. For instance, in *Lambe's* case (1887) the Pro-

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vincial right to tax a bank is upheld, which was instanced in *Severn's* case (1874), without contradiction or dissent by the other Judges, as an obviously impossible contention.

But even admitting that the words "regulation of trade and commerce," in section 91, would cover this wide tire regulation, if there were no other part of *The British North America Act* to which it could be referred, yet these words do not stand alone, and have to be construed reasonably. Where a Court finds that general words in two parts of an Act may be so construed as to be in apparent conflict, it will not select or insist upon an interpretation of either set of words so as to establish that conflict, but will rather select or insist upon such an interpretation as will prevent the conflict. Now the subject matter of the *Wide Tire Act* though it might possibly, with the modifications stated above, be brought within this single sub-section of section 91, may also be brought with, I think, more ease and certainty within many sub-sections of section 92. The public highways are certainly part of the public lands of the Province, the sole management of which is reserved to the Provincial Legislature. Now, the nature of the vehicles permitted to use and wear away the roads, come, I think, within the head of the management of the roads themselves. Therefore this enactment seems to be authorized by sub-section (5). Again, the public highways are certainly local works, and laws in relation to them are, therefore, exclusively attributed to the Provincial Legislature by sub-section (10). The right to use these roads is a civil right to be exercised within the Province; and the sole power of legislation concerning this and all other such rights is reserved to the Province by section 13. Lastly, it can hardly be denied but that this wide tire regulation confined to Victoria District is a matter of a merely local nature; and, if so, it is expressly reserved to the Province alone by sub-section (16). And, besides all this, it is decided that every topic of legislation is by *The British North America Act* given out of the hands of the Imperial Parliament into the power of the two bodies of legislature thereby created, viz., to the Dominion Parliament and the Provincial. They possess between them all the power which the Imperial Parliament could have exercised; so that whatever topic is not possessed by the one falls necessarily into the power of the other. The precise matter of the tires of waggon wheels is not expressly named in either section 91 or section 92; but there are general words in each list which might, in case of necessity, be construed so as to include tires. We must put a reasonable construction on these two sets of

Judgment.

general words. Now, is it reasonable to say that the Dominion Parliament can alone regulate the width of the waggon tires in Victoria District, and that the Provincial Legislature has nothing to say in the matter? I thing it would not be reasonable. The various sub.-ss. 5, 10, 13, and 16 in sec. 92, already cited, seem to me to be much nearer to the matter in hand. Every Municipalities Act interferes with trade and commerce much more largely than this statute. But the Municipalities Acts are admittedly constitutional. I, therefore, hold this statute also to be constitutional, and the informations well laid, and I convict the defendant of the offence charged in each case. But as this is the first case under the statute, and (I am told) a test one, I shall only convict in the sum of $10. The *Interpretation Act*, s. 8, sub-s. 43, seems to carry costs; but at any rate the sentence will be for $10 and costs in each case. The whole penalty in the Attorney-General's case will go to the Crown. In McNeil's case, one-half to him and the remainder to the Crown.

Judgment for Prosecution.

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Novation.

To bring about a complete novation, there must be three things:—1st, the new debtor must assume the complete liability; 2nd, the creditor must accept the new debtor as a principal debtor; and 3rd, the creditor must accept the new contract in full satisfaction of and substitution for the old contract so that the original debtor is discharged.

Apld Re Abernethy-Lougheed Logging Co (1939) 1 D.L.R. 513 (1940) 1 W.W.R. 31.

ACTION for goods sold and delivered, whereof the facts appear in the judgment.

Consd Herald v. Bd. Amer. Oil 12 W.W.R. (N.S.) 33.

Davie, A.-G., and *Helmcken* for plaintiff: *Pooley*, Q.C., for defendant.

Dec. 14th, 1890. SIR M. B. BEGBIE, C. J.:—

Judgment.

This cases raises, I think for the first time in this Court, the question of the novation of a contract. At the conclusion of the argument I did not feel much doubt as to the rights of the parties, but in consequence of the novelty of the defence I reserved judgment.

Apld Pacific Ltd. v. R. O. Booth hold (1978) 5 W.W.R. 525 (B.C.S.C.) Consd (1979) 6 W.W.R. 458 (B.C.C.A.)

The plaintiffs are manufacturers of various preparations of grain, starch, etc., at Paisley. The defendant was in 1882 a general and

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commission merchant in Hamburg, Germany, where I believe he still carries on business. In 1882, partly by letters and partly by personal interview, an arrangement was come to and acted on for many years, the terms of which are not in dispute. The plaintiff was to supply the defendant with all goods ordered by him at stipulated rates, delivered at Hamburg; the prices ranging generally from 24 shillings to 30 shillings per 100 lbs., with 1½ per cent. commission, as it was called, but, I think more properly, a discount; defendant to pay cash on delivery of each invoice; the defendant to be the plaintiff's sole agent for sales in all Germany; and business commenced and was continued for some time on those terms. After a while, however, the defendant, alleging the custom in Germany was to sell at six months' credit, asked to be allowed similar credit himself. This the plaintiff declined; but at length allowed three months; and the course of business was, not that the plaintiff was upon every consignment to draw a three months' bill which the defendant should accept, but at the end of the three months defendant sent a cheque payable at sight. This continued until November, 1886; the defendant occasionally delaying to send a cheque for some consignments until six months after delivery, in which case he generally surrendered the 1½ commission (or discount); but all went on very satisfactorily until that date. On the 17th November, 1886, the defendant wrote and sent two letters to the plaintiffs (received 23rd November), informing them that he had handed over his Hamburg business to his brother Sigismund, who was to get in all his outstanding accounts, and forward to the plaintiffs so much as represented the goods consigned by them, and suggesting to them to continue their connection with Sigismund, who had entirely conducted that part of his business for the preceding two years; that he himself was to leave Liverpool for a new business in British Columbia on the 25th November; but not leaving any address. The other letter contained a cheque for £57 10s. 1d. for goods shipped up to 25th May. At the same time the plaintiffs also received a letter from Sigismund requesting to be continued on the same terms as Johann had held. At this time goods had been forwarded to Johann, not included in the above cheque, and still unpaid for, to the amount of £35 9s. 1d. on the 10th June, and on and since the 2nd July, amounting to £191 14s. 11d., £227 4s. in all. The plaintiffs made no attempt to see defendant at Liverpool, where he was to embark on the 25th November; but they wrote to Sigismund acknowledging the cheque for £57 10s. 1d. and taking time to consider his proposals.

Consd Re Prospect Mrtg. Invest 23 DLR (4th) 349 (BCCA)

Followed Re BK of NS + Vanc. Reno-vations 31 DLR (4th) 580 (BCCA)

Followed Re Eaton Bay Trust Co + Ling 45 DLR (4th) 1 (BCCA)

Judgment consd Can Perm. Trust v Carlyle 49 BCLR 342 (BCSC)

Consd Crown Trust v Brickett 5 BCLR (2d) 228 (BCSC)

Consd Bancorp Fin. Ltd v Darwin West Corp. 61 BCLR 120 (BCSC)

Appld Nat. Trust Co. v Mead. (1990) 5 WWR 459 (BCCA)

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On the 27th November Sigismund renews his application to be appointed agent, and sent in a new order on his own account for 30 cwt. corn flour and 20 cwt. moulding flour. On the 1st December the plaintiffs reply promising to send the goods, and stating: "We place the agency in your hands on the same terms as your brother. With regard to the old account, as some of the items are very far behind, we trust you will kindly attend to them as early as possible. In the meantime we shall be pleased to learn when we may expect a remittance for a portion of them." On the 24th December plaintiffs "acknowledged receipt of a cheque for £35 9s. 1d. on payment of our invoice for 11th June. We note another remittance will follow next month." Sigismund, however, met with disappointments in his financial arrangements with an expected partner, and in a letter apparently dated 2nd January, 1887, but I think really written 2nd February, says "I am therefore unable at present to pay your accounts. I can only say I shall work in a manner which will enable me to pay your accounts in rates (*i. e.*, by instalments). I hope you will give me so much confidence as to keep me as your agent. I would pay you the old account as soon as possible in rates, and for all new goods I might require I would promptly remit in three months. I intend also to get a partner which would facilitate the payment of your account, and by the return of my brother I should be able to pay all debts to you." To this the plaintiffs reply: "It surprises us very much that your brother left for America without making provision for paying our account, seeing we placed confidence in him. Be good enough to give us his address that we may communicate with him direct. As to continuing you our agent * * * * that must depend very much on the way in which you pay up your arrears." At this time there was not only the £191 14s. 11d. still outstanding, but Sigismund had not made any payment in respect of the £57 9s. 1d. consigned to him on the 1st Dec. But as he was to have three months' credit, nothing was as yet due from him in that respect, and the plaintiffs in this letter, 7th February, 1887, must have been referring to arrears for goods consigned to Johann, part or all of the £191 14s. 11d.

Judgment.

To this Sigismund replies on the 12th February, 1887, "I would do my very best to pay all overdue accounts as quickly as possible * * * I would fix 15th August for the first payment of £50 of the old accounts, other £50 on the 15th February, 1888, and the rest with interest on 15th August, 1888. I promise this supposing you honour me with your confidence and continue me as your agent."

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This suggestion is met by the plaintiffs in their letter to Sigismund of the 16th February: "In addition to the overdue account of your brother, we have to consider the account of goods got in your own name on 4th December last for £57 10s. This account will be due on the 1st of March, and we must ask you to pay it before we send you any more goods. At present we cannot say anything about the agency."

Sigismund never paid any part of the £191, and has never yet completed payment for the £57 10s., of which some £18 still remains due. According to the "excerpt" taken from plaintiffs' ledger, which I take to be an exact reproduction of the page, Sigismund's account is on the same folio as Johann's, but with a new heading, and a double red ink line beneath, just as at the entry of Johann's account. As to Johann's account, whenever an order was, or orders were, paid off a double black ink line is drawn under the sum total so settled (irrespective of the time of year), both on the debtor and credit side of the folio. There is no such double line at the end of the items forming the £191 14s. 11d. total.

Judgment.

At the trial, some defences taken in the pleadings were immediately abandoned, and only two were at all insisted on. The first of these was that the goods were never consigned to Johann on his own account, but only for sale on commission; that they have been sold, but as there was no *del credere* commission, Johann is not responsible. This, however, was very faintly pressed. I may say that there is absolutely no evidence of it, but, on the contrary, the whole course of business, which all parties describe as having been very satisfactory during many years, quite contradicts it. A merchant consigning for sale on commission sends what goods he chooses, with a limit, if he pleases, but the agent is bound to sell to the best advantage for his principal. The agent is bound to send in accounts of his sales from time to time. On this he charges a commission which varies, of course, but which is usually far more than one and one-half per cent. Now, the whole course of trade here completely contradicts the notion of goods being sent for sale on commission. They were always ordered by Wulffsohn, delivered to him at agreed prices, which he paid at maturity, and no inquiry was ever made by the plaintiffs, whose business seems to have been very methodically managed, as to the actual proceeds received by him. It is scarcely possible to describe a clearer case of goods bargained, sold, and delivered. It is true, the plaintiffs agreed that he should be their sole agent in Germany, but

that merely meant that they would not make any bargains with others except through defendant's firm. This is a much clearer case than *Ex parte White* in *Re Nevill*, 6 Ch. App. 497, in which case, also, Nevill was sole agent for a district. But there the manufacturer did not wait for Nevill's orders, but sent the goods as he saw fit, and Nevill returned monthly accounts of his sales. Yet, even so, the contract was held to be a sale, and not a mere arrangement for sale on commission. And I understand that this ground of defence was ultimately abandoned, and that the plaintiffs' claim was resisted solely on the ground of novation—that is, that the plaintiffs had adopted Sigismund as their debtor instead of Johann.

Novation is a doctrine well known in our law, though rarely discussed. The more common instances occur in the amalgamation of companies, generally insurance companies; as, where a person has insured with company A, which becomes absorbed by company B, and the dealings of the insured continue with company B. If B fail, the insured often endeavours to pursue his remedies (if any) against company A. The doctrine is also sometimes invoked concerning the liabilities of an old firm after a change in the persons of the firm. If the new firm fail, are the old firm discharged? And I apprehend that in order to a complete novation, three things must be established: first, the new debtor must assume the complete liability; second, the creditor must accept the new debtor as a principal debtor, and not merely as an agent or guarantor; third, the creditor must accept the new contract in full satisfaction and substitution for the old contract; one consequence of which is that the original debtor is discharged, there being no longer any contract to which he is a party, or by which he can be bound.

All these matters are in our law capable of being established by external circumstances: by letters, receipts, and payments, and the course of trade or business. And so it used to be in the old Roman law, from which our doctrine is borrowed; but, acute as they were, or perhaps by reason of their acuteness, the old Roman lawyers "found so much difficulty and nicety in forming presumptions as to whether novation was intended by the parties or not, and so many conflicting decisions were given, that our present constitution" says *Gaius* (III 176) "was enacted, which declares most openly that no novation shall take place unless the contracting parties have expressly declared it; otherwise, both the original obligation continues, and the new one is superadded, so that an obligation can be founded on either contract."

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(*Sandars' Justinian's Inst.*, p. 431.) With us, however, the intention need not be expressed, but it must be clear, though, of course, in some cases slighter circumstances will suffice than in others introducing the difficulty which *Justinian* removed. Now, here I can find no clear indication of any one of the three intentions which I have enumerated. Obviously, what Johann intended, or wished, or expected, has nothing to do with the matter. Did Sigismund ever undertake to be a principal debtor in lieu of Johann? or to do more than remit what he could collect of his brother's debt? I do not think that he ever did. The nearest approach to it is in his letter of the 12th February, 1887, when he offers to undertake to pay Johann's debt by instalments of £50 every six months. But this is only an offer, and it is on condition that the plaintiffs continue him their agent, which they immediately decline to do. And I am not sure that it is more than an offer to guarantee Johann's debt—as if, *e. g.*, he had offered to endorse a note of Johann's in consideration of the appointment as agent. Still less is there any indication, either in their letters or their conduct, that the plaintiffs assume, or are ready to assume, Sigismund as their debtor in lieu of Johann; and as to their assent to discharge Johann there is no evidence at all. On the contrary, when they find that the paymaster whom Johann has left behind (for I think they do not treat Sigismund otherwise than merely as the person through whom they are to expect payment, as was held in *Re Smith ex parte Gibson*, 4 Ch. App. 662) fails to remit according to his expressed expectation, they immediately obtain Johann's address, and on the 12th April, 1887, demand payment from him, threatening an action, and it does not appear that he has ever before alleged any abandonment by the plaintiffs of their original claim. I think, therefore, that the plaintiffs are entitled to recover, and there will be judgment for them with costs.

Judgment.

There are no less than four cases reported in 5 L. R. Ch. App., in which novation was set up. The most instructive is *Re the Family Endowment Society*, p. 118, in which it was held not to have occurred. In two of the cases, however, the doctrine was held to apply. *Cocker's* case, 3 Ch. D. 1, shows the importance of long acquiescence—in that case, 15 years.

I think this was a proper case to sue in the Supreme Court, not in the County Court, and costs will be accordingly.

Judgment for plaintiffs.

[This judgment was affirmed on Appeal.]

IN THE COUNTY COURT OF VICTORIA.

BEGBIE, C.J

Dec., 1890.

MOORE *v.* THE BRITISH COLUMBIA POTTERY COMPANY.

MOORE *v.* B.C. POTTERY CO.

Building contract—Unsatisfactory work being done—Right of aggrieved party to take over and finish the work.

Where a building contract is so far performed that the parties cannot be restored to their original position, and unsatisfactory work is being done, if the party aggrieved, in the absence of agreement *ad hoc*, interferes with the work so as to make it difficult to determine the value of that already done, he does so at the risk of having to pay the other party more than he has really earned, apart from the question of damages.

ACTION for damages for wrongfully preventing the plaintiff from fulfilling a contract to build a second kiln, the plaintiff having already built one kiln to the satisfaction of the defendants.

Judgment was delivered by SIR M. B. BEGBIE, C. J., sitting as County Court Judge, on December 17th, 1890, as follows:— Judgment.

This is an action for damages for wrongfully preventing the plaintiff from fulfilling a contract to build a second kiln, the plaintiff having already built one kiln to the satisfaction of the defendants. The second kiln was to be 4 feet wider diameter inside than the first, and 6 ft. 6 in. to the spring of the arch; in other respects to be of similar construction to the first kiln. The memorandum of contract is informally drawn and undated, and only signed by the plaintiff—but it was very properly at once admitted by Mr. Burris, the defendant's manager. It contained in addition these words: "I will also take down old kiln" (not the kiln built by plaintiff) "and use what will do for new kiln, and you furnish all material on the ground. I will do all labour and complete the kiln for $285." No time is mentioned for the completion of the contract. It was alleged by the defendants, but I think not proved, that the plaintiff had agreed to finish the kiln in ten days. There were, however, proved subsequent additional agreements concerning two other matters. The plaintiff was to get $15 additional if he completed by the 1st October. It is not shown when he commenced, but this $15 was not earned. It was also subsequently agreed that the walls were to be an extra half-brick in thickness, for which plaintiff was to be paid $25. This extra half-brick has been laid, so that the whole price was to be $310. Disputes arose during

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the work, and at length the defendants took the whole into their own hands and deducted the expenses incurred thereby, $138.50, paying to the plaintiff $171.50, the balance of the $310.

I am satisfied on the evidence that there was some delay caused by the defendants neglecting to have, as they were bound, all necessary materials on the ground when wanted. However, the work not being completed by the middle of the month, the defendants, on the 16th October, stopped the plaintiff from working there any longer, and completed the kiln with their own men.

It was obvious that this was not within the defendants' right, When a contract is to some extent performed, so that the parties cannot be replaced in the original position, the general rule is that the agreement must stand; the contractor must complete his work, and the aggrieved party (if either consider himself aggrieved) must seek his remedy (if any) in damages. Where, however, there is a partial failure of consideration, *e. g.*, here, if Moore had not properly completed his work, and yet was suing for his whole contract price, the Court will, in order to prevent unnecessary litigation, permit the defendant to set up such partial failure or incomplete performance in mitigation of damages. "The claim is to be allowed," says Lord Ellenborough, after consulting with all the Judges, "to the extent of the benefit conferred"—*Farnsworth* v. *Garrard*, 1 Camp., 38. The cases, which are very numerous and conflicting, are collected and considered in *Smith's Leading Cases*, Vol. II, p. 19, *et seq.* But the present case is complicated and difficult beyond the others, by reason of the defendants' interference; for I now have to estimate, as well as I can, what the plaintiff has lost by the loss of his bargain, as well as the defendants' loss from the imperfect execution of the contract. If the company had allowed the plaintiff to complete the work, refusing to pay until it was properly completed, it would have been comparatively easy, when Moore had delivered what he considered a proper kiln, to have estimated how much it fell short of the value of the kiln contemplated in the agreement. He would have sued the company for a *quantum meruit*. But the defendants have not followed this course. They have made it almost impossible to say how far Moore's work was deficient, and have prevented the plaintiff from the profit which he would have earned by continuing to work (estimating it, at the lowest, as his own wages as a bricklayer). They have torn down part of the plaintiff's work and rebuilt it after their own fashion, and this in the part which probably is the most important, and which they assert to be the most

Judgment.

defective, viz., the internal arch over the door and the portion of the cupola resting on it. That, as it now stands, is really the defendants' work, and not the plaintiff's. It is impossible now to judge of the nature or safety of the plaintiff's work there. The interference took place and the plaintiff's work was stopped, when the cupola was a good deal more than half finished. The plaintiff says it would have taken him three days, working with one other man, to finish it. The defendants' witness, Jones, says it actually took him and another man seven days to finish it. The difference is probably owing to this, that Jones not only completed the cupola, but made other alterations. If seven days were a reasonable time for this small portion of the whole work, ten days was surely an unreasonably short time in which to expect the whole kiln to be completed, the very site for the foundations having to be cleared away by the plaintiff and the old materials cleaned up for use. Of course a larger number of men would be employed in the lower parts, but, from this statement by the defendants' own witness, I am not at all convinced that the completion of the kiln by the 16th October showed any want of dispatch on the part of the plaintiff. And some of the delay, at least, was caused by defendants' non-delivery of materials; and yet it was this delay which was alleged as a chief reason for the plaintiff's dismissal.

Judgment.

At the request of the parties, I have inspected the kiln, and was conducted all round it, inside and out.

His Lordship then entered into the details of the building and the alleged defects, and continued:—

The defendants' secretary stated from his book that the company appear to have paid $108.23 for the various alterations and additional work to complete the kiln since it was taken out of the plaintiff's hands. They had no right at all to take it out of his hands, and if the necessary alterations had been made (as they ought, if necessary) by the plaintiff himself, he would, as a workman, have saved the wages of at least one bricklayer at $5 per day. It is impossible, in a contract worded like this, and in the absence of express stipulation (such as is sometimes, however, found in contracts for important buildings, and almost always in a very stringent form in contracts for building ships) to allow the company to take over the work when they choose, allege what defects they choose, employ what labour they choose, finish the kiln to their own notions, and then charge all the outlay to the contractor. Yet the company have themselves made it quite impossible to form any accurate notion of the cost of the defects which they

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allege they had a right to have rectified, except that they show that they have spent $108.23, one-half of which the plaintiff would probably have saved in wages.

His Lordship then stated some deductions from the plaintiff's claim, and concluded:—

I give judgment for plaintiff for $94, in addition to the $171.50 already paid; and as the defendants have, in my opinion, taken quite an erroneous, strong-handed view of their rights, they must pay the costs of this action.

Judgment for plaintiff.

McCREIGHT, J.
Feb., 1891.

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KEARY *v.* MASON.

Execution purchaser of equity of redemption—Arrears of interest—What recoverable.

An execution purchaser of an equity of redemption is entitled to redeem only upon payment of the whole arrears of principal and interest legally recoverable from the mortgagor, and twenty years of such arrears are recoverable under the usual covenant to pay.

REDEMPTION action by an execution purchaser, the dispute being as to what amount of arrears were recoverable by the mortgagee (defendant), the plaintiff claiming that only six years' arrears were recoverable by reason of the Statute of Limitations, 3 & 4 Wm. IV., ch. 27, s. 42.

The case came on to be heard by McCREIGHT, J.

McColl for plaintiff; *Richards, Q.C.*, for defendant.

The following authorities were referred to during the argument:—3 & 4 Wm. IV., ch. 27, s. 42; C. S. B. C., 1888, ch. 42 (Execution Act); *Edmunds* v. *Waugh*, 1 Eq. 418; *In re Marshfield*, 34 Ch. D. 721; *In re Roberts*, 14 Ch. D. 52; *Sutton* v. *Sutton*, 22 Ch. D. 511; *Hordeven* v. *Bradburn*, 22 Gr. 98; *McDonald* v. *McDonald*, 11 O. R. 190; *Smith* v. *Hill*, 9 Ch. D. 143; *Ford* v. *Allen*, 15 Gr. 565; *St. John* v. *Rykert*, 10 S. C. R. 258; *Brown* v. *McLean*, 18 O. R. 533.

February 10th, 1891. McCREIGHT, J.:—

Judgment.

In this case, it appears that in December, 1876, Captain Pittendrigh mortgaged to Mrs. Black certain lands for $700, falling due in December, 1878, with interest payable at one per cent. per month; and it

was also covenanted by Captain Pittendrigh that, in default of payment when due, the same rate of interest should continue to be payable till the principal was paid, and there was the usual power of sale. On the 20th July, 1878, Pittendrigh further mortgaged to one Haynes certain lands for $2,000, falling due July 29th, 1883, interest being payable at one per cent. per month, and the usual covenant as aforesaid as to payment of interest in case of failure to pay principal when due, and there was the usual power of sale. In July, 1878, the first mortgage was duly assigned to Haynes, who died leaving the defendant Mason his administrator, with the will annexed. The Crown recovered a judgment against Pittendrigh, and in pursuance thereof his equity of redemption was sold by the Sheriff under the *Execution Act* (*vide* p. 384 *et seq.*, C. S. 1888), the plaintiff herein being the purchaser.

Full notice was given in the Gazette of the present claim for interest upon payment of which alone it is contended that Keary is entitled to redeem, the present suit being one by Keary against Mason for redemption, and the question is neatly raised whether Keary, under sec. 42 of 3 & 4 Wm. IV., ch. 27, is entitled to redeem on payment only of six years' interest, or whether he must also pay the antecedent interest from the dates of the mortgages, it being admitted that none was ever paid.

Judgment.

The pleadings do not disclose all these facts, but such facts were properly admitted, and I stated that I should make all possible amendments for the purpose of raising the only question in dispute, which was as I have previously stated. I may say, however, that the Gazette of May 8th, 1890, was put in, showing the amount of interest claimed.

I think, from perusal of the sections 37 to 44 and Schedules to the *Execution Act* before referred to, that Keary can only redeem on payment of the interest in full. Sec. 44 says any purchaser may remove or satisfy any mortgage in like manner as the execution debtor might have done, and thereupon the purchaser shall acquire the same estate as the execution debtor would have acquired in case the removal or satisfaction had been effected by the execution debtor, *i. e.*, of course suit for redemption, unless the removal or satisfaction could be made by agreement.

Now, Mr. McColl admitted, and, I think, correctly admitted, that if Captain Pittendrigh had been seeking to redeem, he would have been obliged to pay all the interest recoverable under the covenant, and not merely the six years' interest, and the result seems plain that the pur-

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chaser, in order to redeem, must do the same. Consideration of the remainder of sec. 44 makes this evident, for the mortgagee is to give to the purchaser a certificate of satisfaction in Form F in the Schedule, and that the mortgage "has been paid off and satisfied." This cannot mean that the mortgage can be redeemed by Keary on payment of six years' interest only, while Captain Pittendrigh would, before the sale, have had to pay interest in full in order to redeem, for, if so, the Act operates as a confiscation *pro tanto* of the mortgagee's rights.

Section 39 shows further the anxiety of the Legislature to protect the mortgagee, and also the mortgagor, as against the purchaser at the Sheriff's sale, for if the mortgagee enforces payment against the mortgagor (as of course he might do here against Pittendrigh in full under the covenant), then the purchaser is to repay the mortgagor "the amount so paid," and until payment the lands are to stand charged with the amount. This is quite inconsistent with the theory that Keary, the purchaser, can redeem on payment of only six years' interest. If he can do so, he may defeat this machinery intended to preserve the rights of the mortgagee against the mortgagor, as well as of the latter against the purchaser, and, even if he does not defeat it, a useless circuity of action will ensue.

Judgment.

The Act (taken from an Ontario Act) is unknown to the common law. The power to purchase is a creation of the statute, and the purchaser must have simply such rights as it gives. The remarks of Mr. Justice Willes, in *Wolverhampton N. W. Com'rs* v. *Hawkesford*, 28 L. J. C. P. at p. 246, as to such purely statutory remedies, may be referred to.

That Mr. McColl's admission that Captain Pittendrigh could only have redeemed on payment in full of the interest is correct, can be proved by many cases. I refer to *Edmunds* v. *Waugh*, 1 Eq. at p. 421, fully approved by Kay, J., *In re Marshfield*, 34 Ch. D. at p. 723; *In re Roberts*, 14 Ch. D. at p. 52, per Cotton, L.J., upon which see the remarks of Kay, L. J., in *Mellersh* v. *Brown*, 45 Ch. D. at p. 230, and see 3 & 4 Wm. IV. 42, sec. 3. And the case is stronger where, as in Ontario and British Columbia, the Act in question enables the mortgagee, besides proving for the principal and six years' interest, to go into a Court of law, recover on the covenant, and put his *fi. fa.* in the Sheriff's hands, and thus charge the lands with the remaining interest: see per Blake V. C., in *Howeren* v. *Bradburn*, 22 Gr. at p. 98, and *McDonald* v. *McDonald*, 11 O. R. at p. 190. This principle applies more strongly since the Acts. No doubt there are older English cases

where contrary extra-judicial opinions have been expressed or intimated, but, if I may venture to say so, the attention of the Court was not directed to the fact that the Legislature, in passing 3 & 4 Wm. IV., ch. 27, kept in view the distinction between the extinguishment of a right (*see* sec. 34), and the mere bar of a remedy, as under sec. 42. This distinction has been more clearly pointed out in recent cases (see *Lyell* v. *Kennedy*, 18 Q. B. D. 814) not affected by the reversal in 14 App. Ca. on other points; and there is no doubt a party seeking to redeem must pay all the interest, and this is the view adopted by text writers—*see* Fisher on Mortgages, p. 990, and 2 White and Tudor L. Ca. 1229, Ed. 1886.

It may be superfluous to observe that Keary thought, after notice through advertisement (see *B. C. Gazette*, May 8th, 1890), that interest from 1876 to 1878, respectively, was recoverable on the mortgages. In this respect, he seems to be much in the position of a lessee of a "tied" public house, who, having obtained the lease at a lower rent by reason of the restriction, ought not to complain that he by covenant was bound to buy his beer from the lessor alone—44 Ch. D. 503, 514.

This judgment is to be considered as given, and is given on the hearing of the case. Costs to follow the event.

Judgment accordingly.

TURNER AND JONES *v.* CURRAN *et al.*

"Land Act," sec. 26—Validity of Agreement for sale of Pre-emption Claim.

An Agreement for the sale of a Pre-emption Claim is void by section 26 of the "Land Act, 1888."

ACTION to enforce an agreement for the sale of a Pre-emption Claim, evidenced by the following writing:— Statement.

Distd 5 BCLR 373

"VANCOUVER, October 22nd, 1889.

"RECEIVED of H. A. Jones $100 as part payment of purchase of "Pre-emption Claim registered in District Registry 541, New West- "minster District, and situate south and adjoining pre-emption claim "174, New Westminster District. Purchase price $450, balance on "delivery of deed. Said claim said to contain 80 acres, more or less.

(Signed) "EDWARD J. CURRAN."

Doubted Simpson v Vroestler 18 BCR 68

McCREIGHT, J.
June, 1891.

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Allegations of fraudulent and collusive transfer by the defendant Curran to another defendant were made and denied in the pleadings, but the facts as to this are immaterial for the purpose of the report.

The action came on to be tried before McCREIGHT, J.

Campbell for plaintiffs; *McPhillips* for defendants.

June 26th, 1891. The learned Judge, after considering certain allegations of fraud, proceeded as follows:—

Mr. McPhillips for the defendants contended that the agreement for sale having been made before the issue of the Crown Grant to Curran was void, and I think this is correct. The question arises upon sec. 26 of the *Land Act*, p. 515, Con. Stat., 1888, which, however, Mr. Campbell for the plaintiff contends only means that a transfer made before issue of the Crown Grant shall be invalid till the time of such issue, but not thereafter. With a view to determine this it is proper to consider the former law, which is to be found in the Consolidated Acts of 1871, known as the *Land Act, 1870*, sec. 13, p. 496, which says the pre-emption right may be transferred after grant of the certificate of improvements, but not before. The Consolidated Statutes of 1877, sec. 37, p. 327, known as the *Land Act, 1875*, contains the section now under discussion almost word for word, and section 36, p. 327, shews that no departure was contemplated from the policy of the Act of 1870 last above quoted. Exactly the same remark applies to secs. 25 and 26, respectively, of Consolidated Acts of 1888, p. 515. I shall shew presently that even if section 26 stood alone, it would not bear Mr. Campbell's construction, and certainly not when read in connection with section 25.

Judgment.

His construction involves the obvious fallacy "that a thing denied with special circumstance imports an opposite affirmation when once that circumstance is expired," or, in other words, that a transfer rendered invalid until after issue of a Crown grant becomes valid immediately upon such issue. If this construction be correct, then it (sec. 26) operates as a more than useless affirmation of the common law principle that "the interest" when it occurs feeds the estoppel—*Dodd* v. *Oliver*, 5 M. & R.; *see* 2, Sm. L. Ca., p. 775, ed. of 1879. And it sanctions and authorizes an intending pre-emptor to transfer, or purport to transfer, to a purchaser even before pre-empting, and, as soon as the Crown grant issues, the interest will feed the estoppel in favour of such purchaser; so that Crown lands far from being peopled by *bona fide* settlers will be pre-empted chiefly in the interest of the land speculator.

Perusal of every Act relating to Crown lands, it is needless to say, indicates that the Legislature has been always careful to adopt a contrary policy, and that section 26 is intended to prevent the pre-emptor from disposing in any manner of the land until he becomes an ordinary owner in fee simple.

There must be judgment for the defendants, with costs.

Action dismissed with costs.

IN THE SUPREME COURT OF BRITISH COLUMBIA, IN ERROR.

PIEL KE-ARK-AN, PLAINTIFF IN ERROR,

v.

HER MAJESTY THE QUEEN, DEFENDANT IN ERROR.

Writ of Error—Jurisdiction of County Court Judge—Speedy Trials Act, C. S. C., ch. 175, and Amending Acts, 51 Vict., ch. 46, 52 Vict., ch. 47—Statutes 1890, B. C., ch. 8, sec. 9, validity of.

Plaintiff in Error was tried and convicted for house-breaking and larceny before the Judge of the County Court of Yale at a sittings held by him of the County Criminal Court of Kootenay, there being no County Judge commissioned for the latter County by the Governor-General of Canada.

By the "Speedy Trials Act" (C. S. Can., cap. 175), as amended by 51 Vic., cap. 46, the expression "Judge," in the Province of British Columbia, was defined to mean the Chief Justice or a Puisne Judge of the Supreme Court, or a Judge of a County Court; but by 52 Vict., cap. 47, this definition of a Judge is repealed, and in lieu thereof it is provided that in the Province of British Columbia the expression "Judge" means and includes the Chief Justice or a Puisne Judge of the Supreme Court, or any Judge of a County Court.

By the Provincial statute, 53 Vic., cap. 8, sec. 9, the "County Courts Amendment Act, 1890," it is enacted as follows:—

"Until a County Court Judge of Kootenay is appointed, the Judge of the County Court of Yale shall act as and perform the duties of the County Court Judge of Kootenay, and shall, while so acting, whether sitting in the County Court District of Kootenay or not, have, in respect of all actions, suits, matters, or proceedings being carried on in the County Court of Kootenay, all the powers and authorities that the Judge of the County Court of Kootenay, if appointed and acting in the said District, would have possessed in respect of such actions, suits, matters, and

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proceedings; and for the purposes of this Act, but not further or otherwise, the several districts, as defined by sections 5 and 7 of the *County Courts Act*, over which the County Court of Yale and the County Court of Kootenay, respectively, have jurisdiction, shall be united."

Held, on appeal, quashing the conviction, per BEGBIE, C. J., WALKEM and DRAKE, JJ., that the Judge had no jurisdiction to try the plaintiff in error either by virtue of the *Speedy Trials Act* and amending Acts, or by sec. 9 of the *County Courts Amendment Act, 1890* (B.C.), which section so far as it purports to appoint the County Court Judge of Yale to act as and perform the duties of the County Court Judge of Kootenay is *ultra vires* of the Provincial Legislature.

Per CREASE and MCCREIGHT, JJ., dissenting, that the Judge had jurisdiction by virtue of the *Speedy Trials Act* and amending Acts.

Hudson v. *Tooth*, 3 Q. B. D. 46, *Valin* v. *Langlois*, 3 S. C. R. 1, and *Crowe* v. *McCurdy*, 18 N. S. 301, considered.

Statement.

ERROR. Plaintiff in Error was tried and convicted on an information for house-breaking and larceny before His Honour W. W. Spinks, Judge of the County Court of Yale, at a sittings of the County Court Judge's Criminal Court of the County of Kootenay holden at Donald.

A Writ of Error, returnable in this Court, was afterwards obtained upon the fiat of the Hon. THEODORE DAVIE, Attorney-General; to which a return was made, and under a Writ of *Habeas Corpus* directed to the Sheriff of Kootenay the Plaintiff in Error was brought into Court in custody of the said Sheriff, and by his counsel, A. G. M. Spragge, prayed oyer of the Writ of Error and the return thereto, which were read as follows:—

WRIT OF ERROR.

VICTORIA, *by the Grace of God, of the United Kingdom of Great Britain and Ireland*, QUEEN, *Defender of the Faith.*

To His Honour WILLIAM WARD SPINKS, *Judge of the County Court of Yale, in the Province of British Columbia*,—GREETING:

Because in the record and proceedings, and also in the giving of judgment, in a certain information and complaint made against Piel Ke-ark-an at a sittings of the County Court Judge's Criminal Court of the County of Kootenay, holden at Donald, in the County of Kootenay, on Thursday, the 6th day of November, in the fifty-fourth year of Our reign, before His Honour William Ward Spinks, Judge of the County Court of Yale, for house-breaking and larceny, whereof the said Piel Ke-ark-an was accused before the said His Honour William Ward Spinks, and was thereupon convicted before him, as it is said, manifest error hath intervened, to the great damage of the said Piel Ke-ark-an, as by his complaint we are informed.

We, being willing that the error—if error there be—should in due manner be corrected and full and speedy justice done to the said Piel Ke-ark-an, in this behalf do command that, if judgment be thereupon given, you send us, distinctly and openly under your seal, the record and proceedings aforesaid, with all things concerning the same with this writ, so that we may have them before us on the seventeenth day of July now

instant, wherever we shall be in British Columbia, that the record and proceedings aforesaid being inspected we may cause to be done thereupon, for correcting that error, what of right and according to the law and custom of the Dominion of Canada and the Province of British Columbia ought to be done.

Witness ourself at Victoria, in the Province of British Columbia, the fourteenth day of July, in the fifty-fifth year of Our reign.

Let this writ issue. [L.S.]

(Signed) THEODORE DAVIE,
Attorney-General.

RETURN.

The record and proceedings whereof mention is within made appear in a certain Schedule to this writ annexed.

The answer of William Ward Spinks, the County Court Judge within named.

WM. WARD SPINKS,
C. C. J.

PROVINCE OF BRITISH COLUMBIA,
COUNTY OF KOOTENAY,
TO WIT:

Be it remembered that on Thursday, the sixth day of November, in the year of Our Lord one thousand eight hundred and ninety, at the Town of Donald, in the County of Kootenay, in the Province of British Columbia, after the coming into force of a statute of the Province of British Columbia, made and passed in the fifty-third year of Her Majesty's reign, chapter eight, intituled "An Act to amend the 'County Courts Act,'" and before any County Court Judge had been appointed for the County of Kootenay, before William Ward Spinks, Esquire, a County Court Judge in British Columbia, whose commission as such Judge is in the words following, that is to say:— Statement.

[L.S.] *W. J. RITCHIE,*
Deputy-Governor.

CANADA.

VICTORIA, *by the Grace of God, of the United Kingdom of Great Britain and Ireland,* QUEEN, *Defender of the Faith, &c., &c., &c.*

To WILLIAM WARD SPINKS, of the Town of Kamloops, in the Province of British Columbia, in Our Dominion of Canada, Esquire, Barrister-at-Law—GREETING:

JNO. S. D. THOMPSON, *Attorney-General, Canada.*

KNOW YOU that reposing trust and confidence in your loyalty, integrity, and ability, We have constituted and appointed, and We do hereby constitute and appoint you, the said William Ward Spinks, to be Judge of the County Court of Yale, in the Province of British Columbia.

To have, hold, exercise, and enjoy the said office of Judge of the County Court of Yale, unto you the said William Ward Spinks, with all and every the powers, rights, authority, privileges, profits, emoluments, and advantages unto the said office of right and by law appertaining, during good behaviour and during your residence within the territory to which the jurisdiction of the said Court extends, that is to say: The polling divisions of Cache Creek, Kamloops, Nicola Lake, Okanagan, and Rock Creek, in the Electoral District of Yale.

IN TESTIMONY WHEREOF, We have caused these Our Letters to be made Patent and the Great Seal of Canada to be hereunto affixed: WITNESS, the Honourable Sir

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William Johnston Ritchie, Knight, Deputy of Our Right Trusty and Well Beloved the Right Honourable Sir Frederick Arthur Stanley, Baron Stanley of Preston, in the County of Lancaster, in the Peerage of the United Kingdom, Knight Grand Cross of Our Most Honourable Order of the Bath, Governor-General of Canada, at Our Government House, in Our City of Ottawa, this nineteenth day of September, in the year of Our Lord one thousand eight hundred and eighty-nine, and in the fifty-third year of Our reign.

By Command.

J. A. CHAPLEAU,
Secretary of State.

Statement.

Cometh in custody of the Sheriff of Kootenay Piel Ke-ark-an, who stands committed to gaol for trial on a charge of being guilty of having, on the seventh day of September, A. D. one thousand eight hundred and ninety, at St. Eugene Mission, in the said County of Kootenay, feloniously broken and entered a certain shop, the property of one Edward Kelly, and with having committed a felony therein by taking and carrying away certain goods of the said Edward Kelly, being in the said shop, to wit: One pair of mocassins of the value of fifty cents, and certain gold dust of the value of four dollars, and the said William Ward Spinks, the Judge aforesaid, having then and there stated to the said Piel Ke-ark-an that he was charged with the said offence, and having described it, and having also at the same time and place stated to the said Piel Ke-ark-an that he had the option to be forthwith tried before the said William Ward Spinks, the Judge aforesaid, without the intervention of a jury, or to remain in custody, or under bail, as the Court might decide, to be tried in the ordinary way by the Court having criminal jurisdiction, the said Piel Ke-ark-an consents to be tried before the said Judge without a jury, and thereupon being forthwith arraigned upon the said charge, and it being demanded of him, the said Piel Ke-ark-an, how he will acquit himself of the said charge, the said Piel Ke-ark-an says that he is not guilty thereof, whereupon the said Judge appoints the same day, the said Thursday, the sixth day of November, one thousand eight hundred and ninety, for the trial of the said Piel Ke-ark-an upon the said charge, and immediately proceeds to and does try the said Piel Ke-ark-an for the said offence, and doth adjudge him guilty thereof, and forthwith it is demanded of the said Piel Ke-ark-an if he hath or knoweth any thing to say wherefore the said Judge here ought not for the said offence to pass sentence upon the said Piel Ke-ark-an, who nothing further saith than he hath said before.

Whereupon all and singular the premises being seen, and by the said Judge here fully understood, it is considered that the said Piel Ke-ark-an be imprisoned for eighteen months and kept at hard labour in the Common Gaol at Kamloops, in the County of Yale, being the Common Gaol nearest to the place where the said sentence was pronounced, and there being no Common Gaol in the County of Kootenay.

Spragge then, on behalf of the plaintiff in error, craved leave to assign error, which was granted, and he thereupon filed the following

Assignment of Errors.

ASSIGNMENT OF ERRORS.

And now, on this seventeenth day of July, A. D. one thousand eight hundred and ninety-one, before Her Majesty's Supreme Court of British Columbia, cometh the said Piel Ke-ark-an into the Court here under safe and secure custody, by virtue of a writ of *habeas corpus*

issued in that behalf, and immediately saith that in the record and process aforesaid, and also in giving the judgment aforesaid, there is manifest error in this.

That the Commission of the said William Ward Spinks is limited to the County of Yale, and that, therefore, he, the said William Ward Spinks, had no authority or jurisdiction to try the said Piel Ke-ark-an in the County of Kootenay, or to exercise the functions of a County Court Judge in the last mentioned County, and that section 9 of the *County Courts Amendment Act, 1890*, purporting to empower the Judge of the County Court of Yale to act as and perform the duties of the County Court Judge of Kootenay, and to exercise jurisdiction therein, and also purporting, for the purposes of that Act, to unite the two Counties, is beyond the competence of the Provincial Legislature, and void, or at least inoperative, in the absence of a Governor-General's Commission authorizing the County Court Judge of Yale to exercise jurisdiction in Kootenay.

There is also error in this, that the alleged offence of the said Piel Ke-ark-an is stated to have been committed within the County of Kootenay, and the trial proceeded in the County Court of Kootenay, before the said William Ward Spinks, who was not a Judge of that Court.

Assignment of Errors.

And this the said Piel Ke-ark-an is ready to verify—wherefore he prays that the judgment aforesaid, for the errors aforesaid, may be reversed and annulled, and altogether had for nothing, and that he may be restored to the free law of the land and all that he has lost by the occasion of the said judgment.

A. G. M. SPRAGGE.

Whereupon the Crown immediately joined in error as follows:—

And the Honourable *Theodore Davie*, Attorney-General, present here in Court in his proper person, who for our said Lady the Queen prosecuteth, and having heard the matters aforesaid above assigned for error in manner and form aforesaid, for our Lady the Queen saith that there is no error in the said record and proceedings, nor in the giving the judgment aforesaid: Therefore the said Attorney-General of our Lady the Queen prayeth that the Court of our said Lady the Queen now here may proceed to examine as well the record and proceedings aforesaid and the judgment thereof given as aforesaid as the matter above assigned and alleged for error, and that the judgment in all things may be affirmed.

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The question raised for the decision of the Court was whether or not His Honour Judge Spinks, being Judge of the County Court of Yale, had jurisdiction to sit and try the plaintiff in error in the County Court of Kootenay, by virtue of the Commission set out in the Return, section 9 of the Provincial *County Courts Act, 1890,* and the *Speedy Trials Act,* as amended by 51 Vic., ch. 46, and 52 Vic., ch. 47, either singly or together, the learned Judge not holding a Commission from the Governor-General as Judge of the County Court of Kootenay.

The case was argued before all the Judges of the Supreme Court, sitting in Banc.

Argument.

Spragge, for the plaintiff in error, relied on the assignment of errors, particularly that which alleged that section 9 of the Provincial *County Courts Act, 1890,* was *ultra vires* of the Provincial Legislature.

Davie, A.-G., for the Crown. The section is *intra vires.* Similar legislation is to be found in Ontario—R. S. O., 1887, c. 46, ss. 14, 15, 17, 18. To give effect to the plaintiff's contention would be virtually to hold that the Local Legislature could not alter the limits or area of a County, which clearly the Legislature has the sole power to do—*B. N. A. Act,* s. 92., s.-s. 14. The great preponderance of judicial authority is in favour of the power to enact the section in question. I refer to *In re Wilson* v. *McGuire,* 2 O. R., 118; *Gibson* v. *McDonald,* 7 O. R., 401; *Crowe* v. *McCurdy,* 18 N. S., 301. The Dominion clearly have the right under section 101 of the *B. N. A. Act* to constitute a Court for the better administration of the laws of Canada. This they have done in establishing the Speedy Trials Court. And who is to constitute such a Court? A County Court Judge of any particular district? No; *any* County Court Judge.

After taking time to consider, the learned Judges delivered the following judgments:—

SIR M. B. BEGBIE, C. J.:—

Judgment of Begbie, C. J.

In this case, the point is sufficiently raised in the Writ of Error, and the return and assignment of error annexed thereto, viz.: Whether Mr. Spinks had jurisdiction to sit and try the prisoner at Donald, in the County of Kootenay, by virtue of his Commission, dated the 19th of September, 1889, and section 9 of the *Provincial County Courts Act, 1890,* and section 2 (*a*), sub-section (5), of the *Speedy Trials Act, 1889,* together or separately.

As to section 9 of the Provincial Act, it seems, so far as it seeks to extend the territorial limits of Mr. Spinks' jurisdiction, to be beyond the competency of the local Legislature. That Legislature in 1883 constituted six County Courts, each with well defined territorial boundaries. One of these is to be styled (section 4) the County Court of Yale, having jurisdiction throughout the five polling divisions therein enumerated of the Electoral District of Yale; and another is section 7, to be called the County Court of Kootenay, having jurisdiction throughout the Electoral District of Kootenay. Each such Court is (section 11) to have its own separate seal, bearing the name of the Court, and is to be holden before a Judge, to be called * * * (section 12) "the Judge of the County Court of Yale, * * * "the Judge of the County Court of Kootenay," etc., respectively. This statute was repealed and re-enacted in the *Consolidated Acts, 1888.*

By *The British North America Act, 1867*, section 96, "the Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province."

On the 16th April, 1889, the *Speedy Trials Act* was amended by the Dominion Statute, 52 Vict., c. 47, and by section 2 (*a*), sub-section (5), "the expression 'Judge' means and includes," * * * "in British Columbia the Chief Justice, or a Puisne Judge of the Supreme Court, or any Judge of a County Court."

Judgment of Begbie, C J.

At this time (19th April, 1889), there were only two gentlemen commissioned as County Court Judges in the Province, viz.: the Judge of the County Court of Nanaimo, and the Judge of the County Court of Cariboo. But the Judges of the Supreme Court have long been authorized to act as County Court Judges in every district of British Columbia.

By the Commission set out in the return to the Writ, dated 19th September, 1889, Mr. Spinks was appointed to be Judge of the said County Court of Yale, and the powers therein granted were thereby limited to be exercised by him while resident within the five polling divisions enumerated in the Provincial Statutes, which are again enumerated and expressly declared to constitute the extent (*i. e.*, the territorial extent) of his jurisdiction.

In 1890, there being no Judge appointed to the County Court of Kootenay by the Governor-General, a Provincial Statute was passed, as mentioned in the Assignment of Errors, the 9th section of which empowers the Judge of the County Court of Yale, pending the vacancy of the Kootenay County Court, to perform all the duties, and to have

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all the powers and authority, of a Kootenay County Court Judge; and for the purpose of this Act the two districts were thereby united.

Now, the Provincial Legislature having, as it is not contested, lawfully in 1883 created two County Courts, viz.: of Yale and Kootenay, might in 1890 just as lawfully have repealed that Act, and created one County Court extending over all the territory comprised in the two County Courts Districts created in 1883. The effect might have been that the Yale Court would have become extinct. What would have been the position of the Judge it is unnecessary to inquire; but this seems clear, that he would not have been, without a fresh appointment by the Governor-General, the Judge of the new County Court thus created. The Provincial Legislature would not, probably, have attempted in such a case to appoint the Judge of the new Court, directly; but this is just what section 9 attempts to do indirectly. For the repeal and extinction and new creation is by no means the object nor the effect of that section 9. The Legislature by no means intend to extinguish the Kootenay County Court, which they had created in 1883. They carefully provide for its continuance, and expressly contemplate the appointment at some future time of a Judge of that Court (viz., by the Governor-General). They certainly abstain from appointing a Judge *de nomine;* but they confer upon Mr. Spinks, for the present, all the powers and authorities which a Judge, if appointed (viz., by the Governor-General), would have had in the district. But the person who has all the powers and duties, all the authorities and jurisdiction of a Judge, what is he but the Judge? He may also have some other designation; a Collector, a District Magistrate, etc. He is, nevertheless, the Judge, and the sole Judge for the time being in that Court in which he presides; and so the Legislature evidently intends Mr. Spinks to be. It would be absurd to suppose that section 96 of *The British North America Act* could be defeated by the simple contrivance of calling the person invested with all the judicial powers and duties of the County Court Judge, a Commissioner, or Administrator, or by leaving him without any specific title whatever, as in the present case. The Provincial Legislature might with precisely the same propriety, and a similar infraction of the same section 96 of *The British North America Act*, appoint some person during the temporary inability or absence of the Lieutenant-Governor to exercise his powers and perform his duties, carefully abstaining from calling their nominee a "Lieutenant-Governor," or some person to perform the duties and exercise the jurisdiction of a Judge of this

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Court, so long as they did not call their appointee a "Judge." Nor could these encroachments of the Provincial Legislature be validated by having received the Royal Assent, announced at the close of the Session by the Lieutenant-Governor, nor could they be validated by an Act of the Dominion Parliament. It is sufficient to point out that the power of appointment having being placed where it is by an Act of the Imperial Parliament, nothing less than another Act of that Parliament can repeal or vary the arrangement.

I am, therefore, of opinion that Mr. Spinks derived no authority whatever from section 9 to exercise any judicial authority in the Court of Kootenay.

But a much more difficult question arises when we come to consider the Dominion Act, c. 47, s. 2 (*a.*), sub-s. 1 (*The Speedy Trials Act, 1888*), defining that "in British Columbia the Judge in a Speedy Trials Court may be" * * * "any Judge of a County Court." Mr. Spinks is undoubtedly a Judge of a County Court; and these words in their plain and simple sense, and if they stood alone, would undoubtedly seem to include him; and that is the sense in which a statute is always to be construed: *loquitur ad vulgus*, and it is not to be lightly frittered away by trivial or artificial distinctions. There must be some grave inconvenience, impropriety, or inconsistency, making it in the highest degree improbable that the Legislature could have intended to use the particles "any" and "a" in the primary popular sense without any qualification, and there must also be some other construction or qualification reasonably near, and not obvious to any objection. And I think that the above objections are applicable here; and that the expression "any Judge of a County Court" must be limited by the tacit condition "within his county," or words to that effect.

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I do not think that the Dominion Legislature could have meant to authorize a County Court Judge to act outside of the territorial jurisdiction (if any) mentioned in his Commission, either expressly or impliedly. In the first place, to do so would be, I think, to infringe upon the prerogative reserved to the Executive by section 96 of *The British North America Act* almost as effectively, though not quite so boldly, as the Provincial Statute has done in section 9 of their Statute of 1890. The Executive says: "We empower Mr. Spinks by this Commission to be County Court Judge of Yale, and invest him with all the statutory powers of such a Judge. As to the County Court of Kootenay, we reserve our right of nominating the Judge there." This

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is according to section 96. It is surely an infraction of that section to make the Legislature say: "We do not care what limitations the Governor-General, by his Commission, has placed upon Mr. Spinks, or any other County Court Judge, nor what jurisdiction or rights a future County Court Judge may have; the Courts we are now creating may be held before any County Court Judge in any part of British Columbia." Now while the doctrine in *Valin* v. *Langlois* (3 S. C. R. 1) is undeniable, that the Dominion Legislature may impose new duties on the Judges and Courts whom it maintains, yet they must surely be duties compatible with those already imposed on those Courts, and such as may be discharged by a County Court Judge without derogating from his special authorization. And the Legislature must surely be taken to have respected all the terms of the Commission which they invoke as a qualification for the new office they are creating. They cannot be supposed to have intended by mere general words to run counter to the express limitations of the Commission, when those general words admit of a ready and obvious modification. Further, the construction of this sub-section (5) must be just the same whether the Kootenay County Court Judgeship be vacant or not. It seems impossible that the Legislature could have intended that Mr. Spinks should have power to go and sit in Kootenay, and try criminals there in the presence of an actually appointed Kootenay County Court Judge. It could not be intended that Mr. Spinks should have power to come and hold such a Court in Victoria next week, which is, nevertheless, the necessary result of the construction contended for by the Crown. Or that the Nanaimo County Court Judge should have power to go and preside in a Speedy Trials Court at Kamloops, while Mr. Spinks was at the other end of the town. But if these Courts may be held in any part of the Province before any County Court Judge the trial or sentence by him would be lawful. (No such objection lies to jurisdiction of a Supreme Court Judge for the reason already pointed out.) Moreover, this construction affords nothing to guide the Sheriff as to the Judge to be notified under section 6 of the Act, if he may notify "any Judge" of "any County Court": enabling, in fact, the Sheriff in each county to confer jurisdiction on whom he may select as the trial Judge. The argument for the Crown seemed to regard too much the actual vacancy of the Kootenay County Court Judgeship, which is accidental merely, and not sufficiently to consider that a construction must be adopted, which would apply not only in Kootenay, but in every County Court District in British Columbia,

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whether the Judgeship be vacant or not. Which is the Judge whom the Sheriff is to notify under section 6? The counsel for the Crown say not one word is to be added to the Act. But in that case the Sheriff may notify any County Court Judge; nor is it easy to see why, according to this, the jurisdiction should necessarily be confined to County Court Judges of British Columbia. There are County Court Judges in Manitoba; and if the Speedy Trials Court in British Columbia may be held before any person who is a County Court Judge, one of these might, according to the contention of the Crown, be invited to preside. It seems extremely inconvenient that it should be possible for every County Court Judge to be liable to wander all over the Province on the invitations of the various Sheriffs to ask prisoners how they will be tried, by himself or by jury. And so even the argument for the Crown requires the addition of the words "in B. C.," and I think the clear intention is further to add the words "within his county."

The case of *Hudson* v. *Tooth*, 3 Q. B. D., 46, very strongly shows the necessity for a strict compliance with the territorial limitations (if any) in the Judge's Commission. There, as here, full jurisdiction over persons and subject matters had been given by a Statute to the Judge, who was, however, not appointed by the Statute, but was to be appointed by the Archbishop of Canterbury. The Archbishop appointed Lord Penzance by an instrument called a "requisition," strictly analogous to the Government's commission to Mr. Spinks in the present case. This instrument only empowered Lord Penzance to hear and determine the matter in question at any place in London or Westminster, or in the Diocese of Rochester. There were no negative words precluding him from sitting elsewhere; in this respect also identical with this Commission. The hearing actually took place in the library of Lambeth—almost within hearing distance of the Palace of Westminster, just across the Thames, where the Judge would have had undoubted jurisdiction, but Lambeth was neither in London, or in Westminster, or in Rochester Diocese. The defendant had full notice of the sitting, but did not appear. No objection was taken at the time; but after judgment the whole of the proceedings were set aside on the defendant's application in prohibition, Chief Justice Cockburn, and Mellor and Lush, JJ., all expressing extreme regret, but holding that there had been, not an excess or defect of jurisdiction, but a total absence of jurisdiction to sit and hear elsewhere than according to the tenor of the instrument appointing the Judge.

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Whatever be the decision upon that point, should it ever come to be decided, it is as well to point out that in any event the construction contended for by the Crown is not necessary to prevent any defect or delay of justice. Whatever doubt there may be as to Mr. Spinks' jurisdiction, application can always be made to one or other of the five Judges of the Supreme Court, whose powers are incontestable; and some one of these can in general hold a Court in Kootenay as conveniently as the Judge of the County Court of Yale. The Legislature, indeed, seems to be aware that in British Columbia a great deal of the County Court work is done by the Judges of the Supreme Court, by giving them jurisdiction to sit in these new Courts; which is not the case in the five older and more completely organized Provinces. If I had merely a doubt on the question, I might be moved by the principle of *in favorem libertatis;* but I think upon the above grounds that the learned Judge of the County Court of Yale had no authority to sit and try the prisoner at Donald, and that the prisoner should be discharged from his present sentence. The trial was in every particular *coram non judice.* The prisoner has never been tried at all.

I give no opinion upon the point whether Mr. Spinks might not have tried the prisoner lawfully enough if sitting within his own territorial jurisdiction, for no such point arises here. There are tolerably reasonable grounds to hold that he might. An alleged criminal has a *primâ facie* right, it is true, to be tried in the bailiwick where the offence was committed; but that is merely on account of the jury. If a prisoner elects to waive a jury there seems to be no particular reason for adopting that or any particular venue. If the prisoner elect to be tried by a jury he would, of course, be remanded by the Judge to be tried in the proper bailiwick.

CREASE, J.:—

Judgment of Crease, J.

The object of the present Writ of Error is to try whether His Honour Judge Spinks, the Judge of the County Court of Yale, had jurisdiction to try a felony at Donald, under the *Speedy Trials Act*, in the County of Kootenay, without a Commission from the Governor-General, as County Court Judge also for the Province of Kootenay.

The facts are these: Mr. William Ward Spinks holds a Commission from the Governor-General, as Judge of the County Court of Yale, the limits of which, as expressed in the Commission (in accordance with section 5 of the *County Courts Act* in the Consolidated Statutes of British Columbia, chapter 25, page 172), are "The Polling Divisions of

Cache Creek, Kamloops, Nicola Lake, Okanagan, and Rock Creek, of the Electoral District of Yale." By the same local Act the County Court of Kootenay is established, having jurisdiction "throughout the Electoral District of Kootenay."

The questions which arise in this case are twofold:

(1.) Whether under the *Speedy Trials Act* Mr. Spinks, a County Court Judge for Yale, has jurisdiction to try and sentence a prisoner for felony in the County of Kootenay without having a Commission from the Governor-General as County Court Judge for Kootenay.

(2.) Whether under the B. C. Act, the 53 Vict., c. 8, sec. 9 (1890), he had the necessary jurisdiction for the purpose.

That Act enacts: "That until a County Court Judge is appointed for Kootenay, the County Court Judge for Yale shall act as and perform the duties of County Court Judge for Kootenay, and shall, while so acting, have in respect of all matters and proceedings being carried on in the County of Kootenay, all the powers and authorities that the Judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, and proceedings." "And for the purposes of this Act (it goes on to say), but not further or otherwise," the two several County Court Districts before specified "shall be united."

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The same point which is now raised first came up in the case of one Brady at the Spring Assize at Kamloops, but under circumstances which did not call for the consideration of this Court.

By the Writ of Error, however, obtained on behalf of Piel Ke-ark-an, and the state of facts set forth in the pleadings now before us, the question of Mr. Spinks' jurisdiction to try a case under the *Speedy Trials Act* in the County of Kootenay, while County Judge for Yale, has come up in such shape as calls for adjudication.

By Dominion Statute, 51 Vict., c. 46 (1888), the *Speedy Trials Act*, having been found to work well in Ontario, Quebec, and Manitoba, was extended into British Columbia; and in the interpretation clause the expression "Judge" was declared to mean and include the Chief Justice or any Puisne Judge of the Supreme Court, or "*any* Judge of *a* County Court" in British Columbia.

In 1890, by Dominion Statute, 52 Vict., c. 47, the *Speedy Trials Act* underwent amendment. By it, in Nova Scotia, New Brunswick, and Prince Edward Island "the Judge" was declared to mean and include "any Judge of a County Court in the said respective Provinces," and no higher Judge was named; while in British Columbia, as if to meet

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the question before us, it was declared that "the Judge" should mean and include the Chief Justice or any Puisne Judge of the Supreme Court," or any Judge of a County Court in British Columbia, words which are interchangeable with "any Judge of any County Court" in the Province.

And it is not for a moment denied that Mr. Spinks is in every respect a Judge of a County Court in British Columbia, and falls well within the wording of the above section.

It must not be forgotten that the Dominion Parliament had full power to pass such an Act, for by section 101 of *The British North Americt Act, 1867*, the Dominion Government has power to appoint any additional Court in British Columbia for the administration of the laws of Canada, under which category the *Speedy Trials Act* comes.

It is a Dominion law in a Dominion matter.

And while by section 92, sub-section (14), of *The British North America Act*, the administration of justice and the constitution of Courts were exclusively given to the Provincial Legislature, an exception was distinctly made of the powers retained in federal hands by section 101. I say retained, because this provision has all the force of an exception out of a grant—a something never granted or parted with—as contrasted with a reservation—a something taken back out of what has been already given—a distinction not without significance.

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The Dominion Legislature, at the time of this amendment, must be considered to have been fully aware of all the circumstances upon which they were legislating.

They must be taken to have known what counties there are in the Province like Kootenay, necessarily without a Judge. And that if the Dominion Government made a new County Court Judge for Kootenay they would be bound to insert the statutory obligation of a fixed residence within Kootenay, while the Yale Judge was still similarily bound to a fixed residence in Yale. They must, presumably, also have considered that such an expensive appointment was not yet called for by the circumstances of the country; and that they must make some general arrangement which would enable them to confer upon the scattered populations of all those outlying counties throughout Canada —Kootenay among them—the same benefits of the *Speedy Trials Act* as they had bestowed on New Brunswick, Manitoba, Nova Scotia and other parts of Canada. The main evil of non-residence of a County Court Judge in such a county as Kootenay was the chief mischief they

had to remedy. The impracticability of a Judge residing in two counties at once (Yale and Kootenay) was necessarily in their minds, They had already found the Act succeed in several other Provinces with scattered counties and scattered populations; and it was by no means surprising that they should apply the same means of giving prisoners a ready chance of avoiding a long imprisonment before trial, in the intervals between Assizes, by the option of a speedy trial before a County Court Judge. Being, therefore, prepared to cure an admitted evil in British Columbia, the Statute in question has to be construed as a remedial Act.

Of such Statutes, Endlich, in his Interpretation of Statutes, Ed. 1888, says: "They are to be construed liberally to carry out the purpose of the enactment, suppress the mischief, and advance the remedy contemplated by the Legislature; and this is all that liberal construction consists in—they are to be construed, giving the words 'the largest, fullest, and most extensive meaning of which they are susceptible.'" It may be said, being in a criminal matter, the words of the Act should be construed strictly; but the same authority, commenting on *Maxwell* on Statutes, observes: "It is true that a penal law must be construed strictly and according to its letter, but this strictness, which has run into an aphorism, means no more than that it is to be interpreted according to its language. * * * Acts of this kind are not to be regarded as including anything which is not within the letter as well as their spirit." But this Act, although it deals with criminal matters, is a remedial rather than a penal statute, for its *ratio existendi* is to save perhaps an innocent person from, possibly, long imprisonment in the upper country before he can be tried at the then next Assize. Except as a beneficial and remedial Act it was in nowise necessary, because the criminal law of Canada already provides for the trial of every conceivable crime by the machinery of the Courts of Oyer and Terminer at Assizes at regular statutory, though somewhat distant, intervals.

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The *Speedy Trials Act*, as its name imports, is to provide an earlier, almost an immediate, hearing for a prisoner should he so desire. His adoption of its provisions instead of waiting to be tried before a jury is entirely voluntarily and optional on his part. The Act, therefore, is in the best acceptation of the word remedial. The Court is there; the County Court Judge's Criminal Court of Kootenay, Seal, Sheriff, Deputy Registrar and officers are all there—indeed everything is there ready for trials under this Act except the Judge—and when we look

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for that we find the kind of County Judge contemplated by the Legislature defined in words, which it is impossible to misconstrue, in the Statute which, in section 2, enacts that the Act may be carried out by "*any Judge of a County Court*" in the Province of British Columbia.

Mr. Spinks is undisputed County Judge for Yale, and therefore it appears to me (though some of my learned brethren think differently) is, and at the trial of Piel Ke-ark-an was, the Judge within the meaning of the Act, fully qualified as far as jurisdiction goes to hold Court in any part of British Columbia, including Kootenay, and therefore to try Piel Ke-ark-an in that county.

Mr. Spinks' notice was drawn to the fact of the arrest and the crime charged in the usual manner by the Sheriff of Kootenay under section 6, as the nearest County Judge at hand to try the case.

The Sheriff's notice did not pretend to confer jurisdiction. That was already given by Statute. If the Sheriff gives notice to one Judge having jurisdiction the case might be, and often has been for convenience sake, tried by another Judge having jurisdiction, and no question has ever arisen as to the legality of a trial under such circumstances. Nor has any one complained that the Supreme Court Judges trying Speedy Trial cases, and not furnished with a special commission covering the ground from the Governor-General, were acting *ultra vires*. The Governor-General's formal assent to the Act was sufficient without special commission, *Valin* v. *Langlois*, 3 S. C. R. 1, per Ritchie, C. J., and so also in Quebec, Manitoba, New Brunswick, and Nova Scotia.

Judgment of Crease, J.

The Sheriff 's notice was a ministerial act by a ministerial officer —a notification of a fact in the same way as he might have communicated the fact to any one of the five Supreme Court Judges, the same as he might have done to any other of the four County Court Judges readily available. The County Court Act provides for county work being done in a county where, under certain circumstances, a County Judge is absent by another County Judge, and the usual practice has been in County Court matters for neighbouring Judges to reciprocate similar good offices, and to be auxiliary to each other; and where no express charge is given by the Statute to the contrary the usual course (provided it does not run counter to the spirit of the Act) may be adopted and will be sustained by the law, *Eis que frequentius acciderint jura subservient*, and this was the course adopted here.

The notice was duly given to the nearest County Judge, the prisoner arraigned, the legal questions put to him, and the choice of trials given, as allowed to him by the Act; all proper forms and conditions for trial and sentence were observed, and, on proof of guilt, a term of imprisonment was imposed in lawful proportion to the offence.

This conclusive result having been obtained under the Dominion Statute makes it unnecessary for me to enter into the second branch of the subject, namely, whether and how far Provincial legislation (particularly see section 9 of the 53 Vic. [B. C.], c. 8, already quoted) supports Mr. Spinks' authority, or enlarges his jurisdiction over Kootenay for the purposes of the *Speedy Trials Act*. And as I rely on that Act as being quite sufficient of itself for all the purposes of the Act, it becomes equally unnecessary to invoke the precedent in *Re Parker* cited by the Attorney-General from the December Law Times, or the strong judgment in the case of *Crowe* v. *McCurdy*, 18 Nova Scotia Reports, 301.

In my opinion no error has been shown, and as the Dominion Act appears to me to be clear and conclusive on the point at issue, and to have been duly followed, I consider and adjudge that the conviction of Piel Ke-ark-an should be sustained and the sentence carried out.

McCREIGHT, J.:—

Judgment of McCreight, J.

If it were not for the opinions of some of my learned brothers, I would have thought the words of the Act were plain to show that any Judge of a County Court can sit in any part of the Province to try prisoners under the *Speedy Trial Act, 1889*," cap. 47 (Dominion).

The expression "In the Province of British Columbia the Chief Justice or a Puisne Judge of the Supreme Court, or any Judge of a County Court," seems to me to admit of no other construction. It is to be observed that in the first Act dealing with the subject (Rev. Stat., Can., 2097), the exception was, as to Manitoba, "a Judge of a County Court," and I think the word "any" in the expression "any Judge of a County Court" has been advisedly substituted for "a Judge of a County Court," as regards Nova Scotia, New Brunswick, Prince Edward Island, Manitoba, and British Columbia (Act of 1889, c. 47); no doubt because of the inconvenience occasioned by the former Act, practically throwing the trials on a Supreme Court Judge whenever there was no County Court Judge available, as being within the jurisdiction, and his Court generally having jurisdiction at the place of the trial of the prisoner.

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The inconvenience of a contrary and restricted construction would be seriously felt in Manitoba as well as in British Columbia, and still more so in Nova Scotia, New Brunswick, and Prince Edward Island, where the Act would frequently be rendered useless.

The word "any" is a favourite expression of draughtsmen of bills.

Of course when I refer to "inconvenience" it is merely with reference to the fact that the Dominion Legislature is not to be understood as intending the Act to have an "inconvenient" operation, but plain rules for construing statutes seem to me to require the full meaning to be given to the word "any," unless some absurdity will be involved in that construction. The word "any" is repeatedly used in the Act; always, I think, advisedly, and with its ordinary and grammatical meaning. We cannot strike out the words "any Judge of a County Court" and substitute the words "the County Court Judge having jurisdiction in the county where the prisoner is to be tried."

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The argument that this interpretation of the Act would amount to usurpation by the Dominion Legislature of the functions of the Governor-General seems to prove too much.

Both Supreme and County Court Judges hold Courts under the *Speedy Trials Act* by virtue of legislation, and certainly not in consequence of their Commissions—and see the remarks of Ritchie, C. J., in *Valin* v. *Langlois*, 3 S. C. R., p. 1 (Can.), to the effect that the Governor-General in assenting to an Act of the Dominion puts matters substantially in the same position as if he had issued Commissions.

I think, moreover, that after the remarks of Weatherbe and Thompson, JJ., in *Crowe* v. *McCurdy*, 18 N. S. 301, the prisoner's trial would, perhaps, be justified by Provincial legislation enlarging the area of jurisdiction, if that is the meaning of 53 Vict., c. 8, B. C. But I prefer to rest my decision simply on the *Speedy Trials Act, 1889*, as there appears to be doubt on the other point. I think no error is shown in the record, and there should be judgment accordingly.

WALKEM, J.:—

Judgment of Walkem, J.

The prisoner was convicted of a felony in the County of Kootenay by Mr. Spinks, the Judge of the County Court of Yale, and has applied to have the conviction quashed on the grounds that the Judge had no jurisdiction in Kootenay, as his Commission limited his authority to the County of Yale. For the Crown it has been contended that the jurisdiction existed by virtue of section 9 of the *County Courts*

Amendment Act, 1890, and, independently of that section, or cumulatively, by the *Speedy Trials Act*.

Section 9 is as follows:—"Until a County Court Judge of Kootenay is appointed, the Judge of the County Court of Yale shall act as, and perform the duties of, the County Court Judge of Kootenay, and shall, while so acting, whether sitting in the County Court District of Kootenay or not, have in respect of all actions, suits, matters, or proceedings being carried on in the County of Kootenay, all the powers and authorities that the Judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, matters and proceedings; and for the purposes of this Act, but not further or otherwise, the several districts, as defined by sections 5 and 7 of the *County Courts Act* over which the 'County Court of Yale' and the 'County Court of Kootenay' respectively have jurisdiction shall be united."

The districts which are thus united constitute the statutory Counties of Yale and of Kootenay. In each of those Counties, a separate County Court has been created by the *County Courts Act*—with its separate seal, expressive of its title, "The Seal of the County Court of Yale," "The Seal of the County Court of Kootenay." As we have, as Judges of the Supreme Court, concurrent jurisdiction by statute with the Judges of the County Courts in their respective Courts, we may take judicial notice, also, of the fact, that up to the present each of the two Courts has had its Registrar and staff of officers, and each of the two Counties its Sheriff. Although by the section the Counties are united, their respective Courts are not. There is no extinction of either, no merger, no one Court, for example, for the united Counties. They are left as independent of each other as when first established. In this condition of things, the section proceeds in substance to enact that until a County Court Judge of Kootenay be appointed by the Governor-General, the Judge of Yale shall fill his place. What is this but the appointment of a Judge to a vacant Judgeship? The arrangement, it is true, is provisional; but it is not the less an appointment on that score. Cases were cited to show that a Provincial Legislature may extend the jurisdiction of a County Court in respect of area as well as subject matter; but the present is not legislation of that character. It does not enlarge the area of the Yale Court; but what it assumes to do is to appoint the Judge of that Court—and he is not the Court—to be Judge of the Kootenay Court. The mere device of uniting the two Counties cannot

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give the Legislature such a prerogative right, and correspondingly dispossess the Governor-General of it. By section 96 of *The British North North America Act*, "The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate of Nova Scotia and New Brunswick." As section 9 trenches upon this provision it is unconstitutional; hence Judge Spinks has acquired no jurisdiction under it in Kootenay.

The next question is—Does the *Speedy Trials Act* confer that jurisdiction?

By section 2 it is enacted that "unless the context otherwise requires,—

"*(a.)* The expression 'Judge' means and includes,—

"(1.) In the Province of Ontario, any Judge of a County Court, Junior Judge, or Deputy Judge authorized to act as Chairman of the General Sessions of the Peace, and also the Judge of the provisional districts of Algoma and Thunder Bay, and the Judge of the District Court of Muskoka and Parry Sound, authorized respectively to act as Chairman of the General Sessions of the Peace:

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"(2.) In the Province of Quebec, in any district wherein there is a Judge of the Sessions, such Judge of Sessions, and in any district wherein there is no Judge of Sessions but wherein there is a District Magistrate, such District Magistrate, and in any district wherein there is neither a Judge of Sessions nor a District Magistrate, the Sheriff of such district:

"(3.) In each of the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, any Judge of a County Court:

"(4.) In the Province of Manitoba, the Chief Justice, or a Puisné Judge of the Court of Queen's Bench, or any Judge of a County Court:

"(5.) In the Province of British Columbia, the Chief Justice or a Puisné Judge of the Supreme Court, or any Judge of a County Court:

"*(b.)* The expression 'County Attorney' or 'Clerk of the Peace' includes in the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, any Clerk of a County Court," &c.

Section 4 makes the Court a Court of Record, which is to be called (except in Quebec, which is divided into districts and not counties) "The County Court Judges' Criminal Court of the County" (or union of counties, as the case may be,) in which the trial takes place.

Section 5 specifies the offences which may be the subject of trial, provided the person charged with any of them consents.

Section 6 requires the "Sheriff of the County" to "notify the Judge" of any commitment to prison for trial, within 24 hours thereafter.

Section 7 authorizes the trial to be had without a jury. The remaining sections relate to procedure, and the duties of County Attorneys, Clerks, and other county officers.

The question of jurisdiction turns upon the construction to be given to the words "any Judge of a County Court," as they appear in sub-section (5), which relates to this Province. On behalf of the Crown, it was contended that they should be construed literally; but if that were so they would mean any Judge of a County Court in any part of the Dominion or elsewhere. The provision in the same sub-section (see *b*) that "In the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, * * the expression 'County Attorney' or 'Clerk of the Peace' includes * * * any Clerk of a County Court," would, according to the same construction, include the County Court Clerk of any place. A literal construction is therefore manifestly to be avoided. It was also said that "any Judge of a County Court" cannot mean such Judge "when acting within his county," as the latter words are not in the Act and must not be interpolated. But a proper construction of the words does not require such an interpolation; for, even if that were in the Act, they would be superfluous, as the Judge's jurisdiction within his county is *primâ facie* complete without them. On the other hand, to justify the contention of the prosecution, some such interpolation as the following is needed: "And such Judge of a County Court may sit as a Judge under this Act in any part of the Province." The rules of construction with respect to statutes and the provisions of the Act are alike opposed to this mode of interpretation. The Act does not establish one Dominion Criminal Court in each Province, with a staff of Judges and Clerks having concurrent jurisdiction in their respective positions over the whole Province; but it has established a Court in each county and district of the several Provinces, to be called (except in Quebec) "The County Court Judges' Criminal Court of the County," or "Union of Counties," where the trial takes place. In framing the Act the Legislature, evidently, availed itself of the condition of things existing in each Province with respect to the administration of justice. It employed, so to speak, existing provincial machinery to give effect to its new

Judgment of Walkem, J.

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system of criminal procedure; and it is observable that it made no alteration in that machinery. For instance, it adopted the then divisions of each Province into districts, counties, and united counties, and established the new court in each; it nominated the existing Judges of the Superior Courts (except in the older Provinces), and of the District and County Courts of all the Provinces, to be the Judges respectively of the new courts; and in like manner it made use of existing appointees of each Province, such as County Attorneys County Sheriffs, Clerks of the Peace, and County Court Clerks, for the performance of duties in the new Court corresponding with those of their respective offices. There is not a word in the Act which increases any of the territorial divisions, or extends the jurisdictional area of any of the Judges, Sheriffs or Clerks, each of whom is, manifestly, to act within the provincial limits assigned to him, and not beyond. It would be of evil consequence were it otherwise. Section 6, for instance, which requires "the Sheriff of the County" to "notify the Judge" of the imprisonment of any person committed for trial, would, if the contention of the prosecution were allowed, enable the Sheriff, at his option, to notify any County Judge of the Province, and in that way give him power to select the prisoner's tribunal. The Act would thus introduce and legalize at the outset of a trial a new and vicious principle in the administration of justice. "*Any* County Court Clerk" would also, for the same reason, consider himself entitled to intermeddle in the criminal business of any other county than his own. This, if permitted, would go far to defeat the object and general design of the Act. There is no magic in the words "any Judge." In a legal sense, he is no more a Judge beyond his appointed Province, district or county, than a Magistrate is a Magistrate beyond his district, or a Sheriff is such beyond his bailiwick. Moreover, to hold the contrary would be to hold that the words "any Judge" have conferred upon the County Court Judges an enlarged, and, therefore, new, jurisdiction in respect of area, and have consequently made Judge Spinks—what he was not and is not—a Judge beyond his appointed county. As the present Act purports to confer a new jurisdiction, it must be strictly construed. That jurisdiction cannot be implied, but must be given in explicit language—*Maxwell* on Statutes, 158, 357-363. There is an explicit gift as to subject matter, but nothing approaching one in respect of area. Judge Spinks, therefore, has not the jurisdiction which he exercised within the precincts of Kootenay; hence his conviction of the prisoner must be quashed.

Judgment of Walkem, J.

DRAKE, J.:—

There are two points urged by the Attorney-General as grounds why this prisoner Piel Ke-ark-an should not be discharged on this Writ of Error:—

1st.—That under the *Speedy Trials Act* the words used in defining a Judge who may exercise jurisdiction in British Columbia under the Act, are "any Judge of a County Court." That W. W. Spinks is a Judge of a County Court duly appointed, and that although the trial took place out of the limits of Yale County Court, yet under the words of the Statute he or any County Court Judge had jurisdiction over the prisoner.

2nd.—That under section 9 of the *County Courts Amendment Act*, the Local Legislature empowered the Judge of the County Court of Yale to act and perform the duties of the County Court Judge of Kootenay, and that the Provincial Legislature under subsection (14) of section 92 of the "British North America Act," had full power to pass that section.

Judgment of Drake, J.

With regard to the first contention, the literal meaning of the words used will confer jurisdiction on any and all County Court Judges of the Province of British Columbia who may hold appointments by Commission from the Governor-General, unless it can be shown from the context, or from subsequent parts of the Act, that such a construction is not intended, or would lead to confusion.

If we turn to section 6 we there find that every Sheriff shall notify the Judge in writing of the confinement of the prisoner and the charge preferred, whereupon such Judge shall cause the prisoner to be brought before him.

What Judge is here meant? If it is any County Court Judge of the Province, it enables the Sheriff to select the Judge, because the Judge so notified is to try the prisoner.

The meaning of this section, in my opinion, is that the Sheriff of the District is to notify either a Supreme Court Judge, whose jurisdiction is coextensive with the Province, or any County Court Judge having jurisdiction within the District where the prisoner is committed for trial.

The term "the Judge" implies that there is a Judge of, or authorized to act in, the particular District; if it were otherwise the words used would have been "a Judge."

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The Legislature of the Dominion has power to impose on the Judge additional duties, but these additional duties must be performed within the limits of the Judicial Districts to which the Judges are appointed; any other contention would interfere with the power of appointment of the Judges vested in the Governor-General by section 96 of *The British North America Act*. I therefore think that the words "any Judge of a County Court" must be read as meaning any Judge of a County Court having jurisdiction were the offence was committed, and, therefore, as W. W. Spinks holds a Commission for the County Court of Yale only, and the place where Piel Ke-ark-an's offence was committed was within the limits of a separate County Court District, that the conviction was made without jurisdiction.

The next question that arises is, whether or not the Provincial Legislature in empowering the County Court Judge of Yale to perform the duties of the County Court Judge of Kootenay were legislating within their power?

Judgment of Drake, J.

The power to establish Courts of Civil and Criminal Jurisdiction is vested in the Provincial Legislatures, except in so far as the Parliament of Canada may establish Courts under section 101 of *The British North America Act*. I think the County Court Judges' Criminal Court is a Court established under the latter section.

The limits of Yale District County Court were defined by the Act chap. 25 of the Consolidated Statutes, 1888, and are so set out in the Commission which W. W. Spinks holds; and by the same Act a County Court was established in the Electoral District of Kootenay, but no County Court Judge has yet been appointed to that District. By chap. 8 of Act of 1890, it is provided that the County Court Judge of Yale is to perform the duties of the County Court Judge of Kootenay,—in other words, the Provincial Legislature appoint a Judge to the vacant District.

I have no doubt but that the Provincial Legislature has full power to make alterations in the areas of the various County Court Districts, which the varying necessities of the country require, and can direct Courts to be held in various places, and such alterations will not require a fresh Commission to the Judges (see *Crowe* v. *McCurdy*, 18 N. S., 301); but the effect of section 9 of the *County Courts Amendment Act, 1890*, is a very different exercise of power, and so far as it purports to appoint the County Court Judge of Yale to perform the duties of the County Court Judge of Kootenay it is *ultra vires* and void.

I therefore think that the prisoner Piel Ke-ark-an is entitled to have the judgment against him reversed, and that he be discharged from custody.

Conviction quashed.

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This case has been taken to the Supreme Court of Canada by way of case stated under the provisions of section 4, ch. 25, 54-55 Vict. (D. 1891).

By the Dom. Stat. 54-55 Vict., ch. 28, sec. 1, the following provision has since been made: "The jurisdiction of every County Court Judge shall extend, and shall be deemed to have always extended, to any additional territory annexed by the Provincial Legislature to the County or District for which he was or is appointed to the same extent as if he were originally appointed for a County or District including such additional territory," &c.

HOTZ *v.* McALISTER.

DIVISIONAL COURT.
Nov., 1891.
HOTZ
v.
McALISTER.

Motion for judgment under Order XIV., Rules of 1880—Function of Judge.

Upon a motion for leave to sign final judgment under Order XIV., S. C. Rules of 1880, if the Judge thinks that a good defence is *bona fide* intended to be set up, or if he is doubtful, he must give leave to defend, but he has a discretion as to the terms of the leave, and in exercising the discretion regard should be had to the chances of the defence being successful.

APPEAL from an order in chambers giving plaintiff leave to sign final judgment under Order XIV., Rules of 1880. The action was on a promissory note signed by the testator of the executor (defendant), who intended to set up as a defence, if allowed, the imbecility of the maker. The learned Judge who made the order came to the conclusion, from the material before him, that he should give judgment for the plaintiff.

The appeal came on to be heard before SIR M. B. BEGBIE, C. J., and DRAKE, J., sitting as a Divisional Court, November 4th, 1891.

Jay for the appeal: *Helmcken*, contra.

SIR M. B. BEGBIE, C. J., delivered the judgment of the Court:—

Judgment.

The question has been misconceived. Under Order XIV. the Judge has no jurisdiction to give judgment nor to weigh the evidence of the defence proposed to be set up, but to weigh the relevancy and importance only of the defence, and see whether, if established, it would form

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an answer to the plaintiff's case. If so, the defendant must be allowed an opportunity of establishing it, *i. e.*, must have leave to defend. And this is all that a Judge under Order XIV. has any authority to decide.

The parties here seem to have entirely overlooked, and to have induced the learned Judge to overlook, the distinction. Every line of the learned Judge's short observations shows this: he has "considered the evidence;" thinks that "judgment must go for the plaintiff;" points out the defect of the absence of medical evidence, which he thinks indispensable on such an application; points out the absence of any evidence of fraud, and gives judgment for the plaintiff.

There is not one word of all this which is applicable to a motion under Order XIV. The Judge cannot give judgment; he has no authority to weigh the evidence adduced for the proposed defence, nor is it necessary to adduce before him any evidence in support of the proposed defence. Take the case of infancy; suppose the executor (defendant) alleges that on the 11th January the maker of the note was an infant. Is he not to be allowed to set up that defence at all, because he has not got together on this sudden application proper evidence of the date of his testator's birth? Or suppose that the maker was a *feme covert;* is the executor not to be allowed to prove that at the trial, because he does not now produce to the Judge in chambers full evidence of the marriage? All the judicial authority which is vested in the Judge by Order XIV. is to see whether infancy, coverture, imbecility, etc., etc., are *bona fide* intended to be set up, and would afford good defences. If so, he cannot refuse leave to defend. But the Judge has a discretion, however, as to the terms which he may impose, and in considering this question he may look at the evidence probably producible at the trial, and the view which a jury would probably take of the proposed defence.

Judgment.

We think that the defendant should have leave to defend by setting up the imbecility of his testator in any manner he may be advised, upon giving his bond within three weeks, conditioned to satisfy any judgment which the plaintiff may obtain in this action, not, however, to a greater extent than $1,500, or than the present value of the testator's estate, whichever may be the smaller sum. If he fail to give his bond within the three weeks, then the plaintiff to have leave to sign judgment.

Appeal allowed.

WILTSHIRE *v.* THE TOWNSHIP OF SURREY *et al.*

Bad By-law—Duty of Mortgagee of Debentures issued thereunder.

The lender of money to a Municipality on its debentures is bound at his own risk to see that the proceedings leading up to their creation and issue are legal and regular.

Certain by-law declared bad for non-compliance with statutory requirements.

RULE *nisi* to quash a by-law. The facts appear in the judgment.

Walker for plaintiff; *Bodwell* for defendants.

December 23rd, 1891. DRAKE, J.:—

Judgment.

This was an application on behalf of Mr. Wiltshire, a ratepayer of Surrey, to quash the Surrey Dyking and Drainage By-law, 1890, for illegality, on the grounds, amongst others,—

1. That the by-law was not passed in conformity with section 99, *et seq.*, of the *Municipal Act, 1889.*

2. That it was not reconsidered, certified, or published, as required by section 107 of the said Act.

3. That the by-law purports to take effect before the time limited by the said Act.

4. That the by-law was not signed in conformity with section 108 of the said Act.

It appears that on 10th August, 1889, a by-law was passed reciting that certain land owners had petitioned for the dyking and drainage of particular lands, and that the Council procured Mr. Hill to examine the locality and make estimates of the costs, and that an assessment should be made of the land to be benefited by such dyking and drainage. The by-law then proceeds to set out Mr. Hill's report and the list of persons and lands which would be benefited by the scheme, and the amount of assessment on the various lands, which aggregate $12,000. The by-law then enacted that the sum of $12,000 should be assessed and levied in the same manner and at the same time as taxes are levied, and should be payable one-half in 1890 and the other half in 1891, and that the sum of $400 assessed against the roads in the Municipality should be levied upon the whole rateable property in the Municipality. As far as this by-law is concerned, there is no objection taken to it.

DRAKE, J.

Dec., 1891.

WILTSHIRE v. SURREY *et al.*

But in November, 1890, another by-law is passed respecting the Surrey Dyking and Drainage By-law, 1889, which recites that it is necessary to raise the moneys provided by the above-mentioned by-law in manner thereinafter set forth, and that a further sum of $13,000 beyond the $12,000 was required to complete the works, which two sums, amounting to $25,000, it was intended to raise upon the credit of the Corporation; and reciting that it would require a sum of $2,793.97 to be raised annually by special rate for the payment of the said debt and interest. It then proceeds to enact that the moneys provided for by the Dyking and Drainage By-law, 1889, should not be assessed and levied in manner set forth in the said by-law, but in accordance with the provisions therein contained.

Section 2 enacts that the Reeve should have power to borrow $25,000, and issue debentures of the Corporation therefor.

Section 5 enacts that there be raised and levied in each year, by special rate on all property, under the said by-law (meaning, it is presumed, the by-law of 1889), a sum equal to the amount by this by-law required to be raised for the sinking fund, according to the Schedule to this by-law. This section by implication assesses the property mentioned in the by-law (1889) for the annual sum of $2,793.97, being the sum required to pay the interest and sinking fund on $25,000, as mentioned in the Schedule.

Judgment.

The next section (6) levies a special rate of 4 10/21 mills on the dollar, in addition in all other rates for the same purpose, upon all the rateable property in the Municipality during the continuance of the said debentures.

This, then, is a second rate for the same purpose, and the result might be that the Corporation having received a portion of the special rate under section 5, would, under section 6, recover from the same persons a further sum, they being liable as ratepayers of the Municipality to the general rate assessed by clause 6.

Then section 7 says in case there shall have been realized by the special rate an amount equal to the annual sum required for the sinking fund, it shall be lawful for the Corporation not to raise such rate (what rate?) in each year. If this means the general rate it is very obscurely worded. Apparently it is intended to convey the fact that the general rate is not to be levied in such a case, because the section goes on to authorize the Council in case of a partial payment to reduce the amount directed to be levied for sinking fund by the amount of such surplus.

Then section 9 says that the owner of any such real property may commute for the payment of his proportionate share of the said work, by paying such a sum as may be necessary to realize at the end of the currency of the said debentures a sum equivalent to the annual special rate then uncollected. How is anyone liable for the special rate to ascertain what this sum would be? The 40 10/21 mills on the dollar mentioned in the by-law is the rate assessed on the whole Municipality.

No separate or special rate is assessed in the by-law on the persons whose property is supposed to be benefited by this dyking and drainage scheme. Such being so, the question is whether this by-law is not a by-law for raising money which requires the assent of the ratepayers under section 100, *et seq.*, as it, in fact, borrows money on the credit of the whole Municipality.

If it is intended to be a by-law under section 98 it is invalid, as the conditions of sub-section (4) have not been complied with, the by-law not having been published for four weeks in the British Columbia Gazette, and not having been reconsidered and adopted by the Council. It is, therefore, no by-law; the language of sub-section (4) being very clear. Before any such by-law shall be valid or come into effect the publication and reconsideration have to take place.

By the amendment to section 98, passed in 1890, sub-section (1), the Council, if they wish, can pass a by-law for borrowing on the credit of the Municipality the funds necessary for draining or dyking, and can issue debentures payable within twenty years, with interest.

This is an additional power given to the Council for contracting debts, and must be exercised with all the formalities required by section 100, and following sections. It is a charge on the Municipality as a whole, and is not limited to certain portions or certain individuals, as defined by section 98.

In my opinion, if this by-law then is a by-law under section 100, it is bad, because it has not been voted on by the electors under section 102.

Mr. Walker, on behalf of the ratepayers, raised an objection that if it was a by-law under section 100 it was *ultra vires*, because it imposed a tax on real estate of four per cent., whereas by section 157 the tax is limited to 1½ per cent. on the assessed value. This objection also would be fatal to the by-law as being *ultra vires*.

Mr. Bodwell appeared for the Bank of Montreal, and alleged that the debentures had been issued under this by-law, and had been taken up

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by the Bank, and that the by-law should, therefore, be upheld. If the objection taken had been on mere irregularities I should endeavour to uphold a by-law on which money had been advanced, but the objections taken are such that they go to the root of the authority of the Council to issue any debentures at all. A person lending money on debentures to the Corporation which issues them is in no better position than a mortgagee lending money on an ordinary security. He is bound to see that the debentures are properly issued, and that the proceedings are all regular and in order. If he does not, he takes the risk. He cannot say that because the Corporation did not know their duty he is free from blame, and ought to be protected; he has no one to blame but himself. I was referred to section 26 of the Act of 1890 as curing the defects of this by-law, but that amendment must be read into the Act of 1889, and refers to cases arising before the passing of the Act of 1889, and cannot be read as referring to cases which may have arisen between the passage of the Act of 1889 and the amended Act of 1890. But even if such a construction was placed upon it, I do not see how it can validate the by-law complained of. I therefore make the rule absolute, with costs.

Rule absolute to quash by-law.

EDMONDS *et al.*

v.

WALTER (OWNER) AND TIERNAN (CONTRACTOR).

DIVISIONAL COURT.
Dec., 1891.
EDMONDS v. WALTER.

Affirmed 21 SCR 406

Mechanics' Lien—Cesser of by taking and negotiating note.

Taking a promissory note for the amount of a mechanic's lien, and negotiating the same, discharges the lien, and the lien does not revive on non-payment of the note.

Statement.

Dist'd 2 ALR 570
Dist'd 20 OLR 303
Not Appld 1 ALR 55

APPEAL to the Divisional Court from an order of Mr. Justice McCreight, confirming a report of the District Registrar in favour of certain of the plaintiffs who claimed a lien on the land of the defendant Walter. The defendant Walter appealed as against all the successful claimants.

Taylor for appellant; *Wilson* for respondent.

DIVISIONAL COURT.

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December 30th, 1891. Sir M. B. BEGBIE, C. J., delivered the judgment of the Court :—

In this case, we do not think it proper to vary the order of the learned Judge in favour of the other respondents. But, as to Mr. Edmonds' claim for a lien on Walter's land, we do not think that it can be maintained. Mr. Edmonds has supplied Tiernan, the contractor, with lumber to the value of about $1,100, and on the 19th September he took from Tiernan his promissory note for that amount, at 30 days date, which he immediately discounted. Tiernan failed to meet the note when due, and Edmonds had to take it up himself; but we think his lien on Walter's land was extinguished, at all events when he negotiated the note, and cannot be revived. In *Horncastle* v. *Farran*, 3 B. & Ald. 497, and *Bunney* v. *Poyntz*, 4 B. & Ad. 568, the taking and negotiating a note destroyed the lien to which the payee would otherwise have been entitled, though the note was afterwards dishonoured by the maker. And though, in the events which have happened, Edmonds could, after dishonour, have sued Tiernan, not only on the note, but on the original consideration, which would thus be in a manner revived, yet it does not appear to us that all the incidents of the original consideration, including Edmonds' rights thereunder against third parties, revive also. In the case above cited, without doubt, the disappointed holders of the notes could, after dishonour, have sued on the original consideration; and yet they were held to have lost their lien, though upon goods once their own, and still in the possession of the debtors; and the present is a much stronger case against the revival of the lien. For, whereas all other liens are based either on contract fulfilled on one side and not fulfilled on the other, or upon possession, or both, and upon some equity founded thereon, this lien is a mere matter of positive law, and quite inelastic. Here Edmonds had never contracted with the landowner (Walter) in respect of either the land or lumber. In *Grant* v. *Mills*, 2 V. & B., 306, the unpaid vendor of land was held not to have lost his lien, although he had taken a bill, accepted by a third party as guarantor, but he had not apparently negotiated the bill; and the lien sought to be enforced by the claimant was a lien over property once his own, and still in the possession of his debtor, who had never fulfilled his part of the contract. Moreover, in such a case as the present, the material man has had the use of the whole price of his materials during the currency of the note, which might, in some cases, be a sufficient inducement to him to waive his lien.

Judgment.

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We think, therefore, so far as Mr. Edmonds is concerned, and to the extent of the note, *i. e.* $1,100, the appeal should be allowed, and in other respects dismissed. As the appeal has thus partly failed and partly succeeded, and as we proceed entirely upon a point not taken in the Court below, we think each party should bear his own costs of the appeal.

Appeal allowed in part.

[Affirmed by the Supreme Court of Canada.]

BEGBIE, L.J.A.

Jan., 1892.

LEE v. THE OLYMPIAN.

IN ADMIRALTY.

LEE *v.* THE OLYMPIAN.

Interference with public landing—Power of municipality to license such interference—Colliding vessels—Apportionment of damage—Costs.

Whoever interferes with the free use of a public landing or wharf, erected on land acquired for that purpose only by a municipality under Act of Parliament, is a wrong-doer, and the municipality has no power to license such interference.

In Admiralty, where two colliding vessels are both to blame, each must bear one-half the total damage, but the Court has a discretion as to costs.

ACTION for damages under circumstances which appear in the judgment.

Judgment.

January 28th, 1892. SIR M. B. BEGBIE, L. J. A.:—

The amount at stake in this case is very small, and the facts are not complicated, but the principles involved are important. There was some contradiction as to matters of fact, and the variance of a few minutes (where minutes were important) on the question of time. This confusion is probably owing in part to the evidence of the plaintiff and his witnesses being filtered through an interpreter. The facts, however, seem to be that the plaintiff came about 6 a.m. on the 6th of October last with his fishing smack of eight or nine tons, the Salmon, and another fisherman with his boat, of half the tonnage, the Neptune, to the public landing at the foot of Yates Street, in order to go ashore and buy bait, intending immediately to start out for the fishing grounds near Race Rocks. This landing is at the water front of a strip of land vested in the Corporation of Victoria by a purchase from Mr. Yates. It reaches from Wharf Street to the water's edge (east and west), and measures 35 feet on Wharf Street (north to south), and

about the same on the water front (also north and south, or nearly so). The conveyance to the Corporation was specially sanctioned by an Act of Parliament, entitled *An Act to enable the Corporation of Victoria to exchange certain land for other land suitable for a public landing* (1880, c. 30—in Consolidated Acts, 1888, No. 87), and a by-law (No. 89 (15) 24th August, 1881) passed in compliance with such Act, and it seems impossible to contend that the land is not dedicated to that purpose of a public landing, and no other. And by the *Victoria Incorporation Act, 1867*, which has never, I believe, been repealed or affected in that respect, and is reproduced in the Consolidated Acts, 1888, the whole power of dealing with "public wharves" is vested in the Corporation, who, accordingly, have provided such accommodation as they desired, viz., a pontoon or floating wharf, and approaches to Wharf Street. That being so, anybody who interferes with the free use of that public landing and wharf is a wrong-doer. The Corporation itself could not grant any license to any person to interfere with the right of access or convenience. They own the soil, it is true, but only as trustees for a specific object. It is alleged that this landing, having only a frontage of about 35 feet, is quite inadequate, except for small boats, and that ocean going steamers moored to the adjacent wharves (private property) are in the constant habit of projecting across the landing, without any interference by the Corporation or by the harbour master. That may very well be, because, as the harbour master said in his evidence, there must be a good deal of give and take in the mooring and departure of ships in Victoria Harbour. That may be very proper, and when the "give and take" occurs between the owners of private wharves, or those claiming under them, there is nothing more to be said than that it may be presumed to have been licensed by full proprietors. But where the "give and take" interferes with the access to a public landing, no such license can be presumed, for there is no person or authority capable of giving it, so long as the Act of Parliament of 1880 remains. If such interference produces no inconvenience, there is no person to complain, and the act, though wrongful, passes off with impunity. But the interferer acts on his own responsibility. Now, here the mate in charge of the steamer knew that the two fishing boats were at the pontoon; he had seen them come in about 6 a.m. At that time, therefore, as well as in taking up her berth, the steamer had left convenient access for such boats as alone could use the landing. Then, at a quarter before 7 a.m., the whistle is sounded, and the paddles are moved for a few minutes.

Judgment.

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The plaintiff's evidence is, that they in the Salmon were then moving out (the Neptune got safe into the harbour) when the swaying bow of the steamer struck them, dashed them against the piles, and inflicted the damage. The defendant's evidence is, that the steamer's bow never moved at all; that it was, in fact, immoveably moored, and that nothing done on board the steamer brought her bow nearer to the line of piles on which the private wharves stand, and between which and the steamer's bow the plaintiff's boat was crushed. It is, however, incontestable that her bow was, somehow, moved nearer to the piles, for defendant's own evidence goes on to show that the plaintiff brought the whole loss on himself by trying to squeeze between these piles and the bow of the steamer—a space which was less, they say, than the beam of the Salmon, though it allowed the smaller boat, the Neptune, to pass out into the harbour. But the defendant's evidence also shows that the Salmon had come in through this gap about forty minutes earlier. The steamer was, therefore, moved into such a position as to interfere with the lawful and reasonable use of the landing, and so was a wrong-doer at the time of the accident, and, therefore, partly to blame.

Judgment.

On the other hand, that the plaintiff was also to blame, and much more to blame, for the accident is quite clear. I have no doubt but that he saw the danger, and took his chance; acting not negligently merely, but quite rashly, and this, whichever narrative of the accident be adopted, is true. If the defendant speaks truth, the gap was already too narrow. If the plaintiff is correct, he saw that the gap was much narrower than when he came in, and narrowing every moment. Had the plaintiff's case, therefore, depended on the principles of the common law, the plaintiff could have recovered nothing, and judgment must have been for the defendant. But in Admiralty, where both are in the wrong, each party bears half the damage sustained by the other party, irrespective of the degrees of blame attributed to the plaintiff and defendant. *Hay* v. *LeNeve*, 2 Shaw, Scotch App. 403; *Vaux* v. *Sheffer*, 8 Moo. P. C. 75; *The Betsy Caines*, 2 Hagg. 28; *Sylph*, 2 Spinks, 75.

It would be absurd to refer the question of damages to the Registrar and merchants. I estimate the plaintiff's damage at $75. The defendants have proved no damages. The $75 must be borne by both parties equally, and each will bear his own costs of counsel, witnesses, etc. But having a discretion about costs, I except the Court fees, which I direct to be borne by both parties equally.

Judgment accordingly.

DIVISIONAL COURT.

Feb., 1892.

REGINA v. JOHNSON et al.

REGINA v. JOHNSON et al.

53 Vic., ch. 37, sec. 23 (D. 1890)—Appeal from an Order for a Commission to take evidence.

No appeal lies to a Divisional Court from an order appointing Commissioners to take evidence under sec. 23, sub-sec. 2, of the *Criminal Law Amendment Act, 1890.*

Statement.

APPEAL against an order, as irregular, which had been obtained by the Crown for a Commission to take evidence in New Zealand, under sec. 23, sub-sec. 2, of the *Criminal Law Amendment Act, 1890.*

The appeal came on to be heard before BEGBIE, C. J., and DRAKE, J., sitting as a Divisional Court, February 3rd, 1892.

Pooley, Q, C., and *Luxton*, for defendant. The order is irregular, as it should have been obtained in the usual way by summons, as in civil cases.

Argument.

DRAKE, J.:—Has a Divisional Court jurisdiction of appeal in a criminal case?

Pooley:—Yes; sub-sec. 2 of sec. 23 says the procedure for obtaining such Commissions is to conform as nearly as practicable to the methods of obtaining such Commissions in civil cases, and those methods include an appeal to a Divisional Court from the decisions of a single Judge.

Davie, A.-G., and *Smith*, contra, for the Crown:—There is no appeal except by express words, and it can be given only by the Legislature—*Att.-Gen.* v. *Sillem*, 10 H. L., 704; *R.* v. *Justices of Cashiobury*, 3 D. & R., 35. In *Poyser* v. *Minor*, 7 Q. B. D., 329, the Court distinguishes between a substantive right and the machinery for securing that right, and procedure was said to include that machinery.

Judgment.

SIR M. B. BEGBIE, C. J.:—

These cases are undoubted, but they scarcely touch Mr. Pooley's argument, which is that the Legislature has conferred this jurisdiction of appeal; and that not by implication merely, but by adopting the code of this Court governing procedure in civil cases, which code does expressly give, in civil cases, a jurisdiction of appeal to a Divisional Court. Therefore, Mr. Pooley argues, the Dominion Statute gives an appeal to this Court in criminal cases also. In the case cited from 10 H L., 704, for instance, if an Act of Parliament had adopted the rules of the Exchequer Chamber, the decision might have been different. But I think the fallacy of Mr. Pooley's argument is in assuming that

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because the word procedure is large enough to include the method of proceeding before a Court of Appeal, where there is an appeal, therefore, if necessary, it implies that there is in such cases a Court of Appeal, as well as a Court of first instance.

The Attorney-General pointed out that, according to *Poyser* v. *Minor*, "procedure" refers to the machinery only as distinguished from the produce of the machinery only. But if I might venture a modification of that distinction, not noticed by the distinguished Judges who discussed that case, I should feel inclined to suggest that "procedure" properly means neither the machinery nor the product, but rather the rules set forth by the managers of the machine, showing not who have the right to use it, but how those who have the right are to behave. If the machine exists for you, if there is a Court of Appeal in criminal matters, these shall be the rules by which you shall approach the machine to obtain your result. And in this sec. 23, sub-sec. 2, the word "procedure" seems limited by the context, and limited (so far as obtaining the order for the Commission goes) to the proceedings before the Judge to whom the original application is made, "the practice and procedure in connection with the appointment of Commissioners under this section;" and when you read the former part of the section, the procedure seems restricted to that. Moreover, the rules of procedure cannot give you a right of appeal; but when that right exists, these rules do govern the method of appealing. No doubt if a party aggrieved by the appointment, or refusal to appoint, had no other remedy, the inclination of the Court would be to give the wider meaning to "procedure," in order that there might not be a failure of justice. But here there will be an opportunity, and one much more favourable to the defendant, viz., at the trial. Any evidence taken under this Commission and then tendered may be objected to on the ground of the irregularity of the Commissioners' appointment, and that will be decided on by the Judge of Oyer and Terminer, and on appeal from him by the Court of Crown Cases Reserved. Any opinion of ours now given respecting the appointment would not be binding on them; and if they came to a different conclusion from ourselves, there would be the unseemly exhibition of two independent Courts of Appeal arriving at opposite conclusions. The application will, therefore, be refused, and with costs, in order to strengthen Mr. Pooley's position when he shall raise his objection at the trial.

Judgment.

DRAKE, J., concurred.

Appeal dismissed with costs.

BEGBIE, C.J

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THOMPSON v. COURTNEY.

IN THE COUNTY COURT OF VICTORIA.

THOMPSON *v.* COURTNEY.

Agreement to sell land according to a plan deposited in the Land Registry Office—Warranty.

An agreement to sell land "according to a plan deposited in the Land Registry Office, and numbered 319," does not convey a warranty that the plan is deposited in accordance with the provisions of the *Land Registry Act*.

ACTION for specific performance, whereof the facts appear in the judgment. Statement.

Mills for plaintiff; *Hunter* for defendant.

February, 1892. SIR M. B. BEGBIE, sitting as County Court Judge, gave judgment as follows:—

This is in effect an action by the vendor for the specific performance of a contract under seal, dated 10th April, 1890, for the purchase by the defendant of three lots of land in the proposed City of Queenstown, Quatsino Sound, described by the number of lot and block as laid down in a certain map or plan "deposited in the Land Registry Office, and numbered 319." There is such a map; it is numbered 319; it was actually lying in the Registrar's office on the 10th April, and, as I understand, ever since; it shows the blocks and the lots. But I am told that the contract is too obscure to be carried out; that the parcels cannot be identified; that the reference to the map 319 is to be treated as a reference to a non-existing map, because not made nor certified by a certificated surveyor. The defendant urges that the word "deposited" is, in the *Land Registry Act*, used solely of a map thus made and certified, and has thereby acquired a peculiar meaning restricted to such maps, so that no other map can be said to be "deposited" with the Registrar. I cannot agree with that. It seems impossible to contend that the plaintiff might not "deposit" any map, or, indeed, any other article whatever—an umbrella, or anything else—which the Registrar would condescend to admit on his premises; and where that is earmarked and sold by the description of "an umbrella deposited with the Registrar, and numbered 319," can I seriously listen to the argument that that is too obscure, and that the umbrella had no Judgment.

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business there, as was repeatedly urged during the argument that "the map had no business there?" There is nothing in the statute forbidding the Registrar to allow this map, or any other, to remain on the premises. The statute only says he may not put it in his index. Indeed, it may often be his duty to accept irregular instruments; he cannot always at once decide upon the regularity of all the documents produced and left in his office. And it seems useless to argue that because a statute only uses the word "deposit" in reference to one class of maps (if, indeed, that be so), therefore, nobody else can, in any private contract, be supposed to use the word in reference to any other class of map. The map is now produced, and it appears to be, and the Dominion Surveyor swears that it is, as regards the lines of streets, etc., in exact correspondence with the statutory map of Queenstown now filed at the Registry Office. Other witnesses, it is true, alleged that the two maps did not quite correspond, but no single instance of difference as to the streets or blocks was pointed out. It is not pretended that the defendant has practically found any difficulty in identifying his lots. I therefore think that the contract is in this respect quite clear. The other objections, on the ground that the contract was only executed by the plaintiff, the vendor, by his attorney, etc., are abundantly met by the presence of the plaintiff here this day, adopting all the acts of his attorney and agents as his own. There will, therefore, be (treating this action as an action for specific performance) a declaration that the contract ought to be specifically performed, and payment of the instalments of purchase money made by the defendant as they become due. I think he must pay the money; he has elected not to avail himself of his option to offer services in lieu of money. But there must be the usual reference as to title, and the defendant is not to pay for land which the plaintiff cannot convey to him with a good title, unless there has been an acceptance of the vendor's title, which is not shown or alleged here.

Judgment.

Judgment for plaintiff.

IN ADMIRALTY.

ZAMBESI *v.* FANNY DUTARD.

Altering decree—Salvage.

A Judge has power to alter his decree in matters of detail before it has been drawn up and settled, but has no power to virtually reverse it.

Although salvor and salvee are both to blame for a collision, the salvor may be awarded salvage.

cited Kraubner v Ruby 21 WWR 145

MOTION to review a decree awarding salvage money to the ship Zambesi. An action and cross-action had been brought by both vessels for damages and salvage service arising out of a collision, and both were adjudged to blame; the Dutard for neglecting to carry proper lights and a mechanical fog horn, and the Zambesi for going too fast at the time of the accident. The Court also ordered that the value of one-tenth of the Dutard should be paid as salvage money to the Zambesi in the proportion of five-eighths to the owners, one-fourth to the captain, and the remaining one-eighth to the crew, according to their wages.

Pooley, Q. C., for the motion. The decree has not yet been finally settled. The Court therefore can review it—*The Monarch*, 1 Wm. Robinson, 20; *Hay* v. *Leneve*, 2 Shaw Sc. App., 403. Here it has been decided that the Zambesi was to blame for the collision. To award her salvage is contrary to the principle that no man make a profit out of his own wrong. That was acted on by Dr. Lushington in *Cargo ex Capella*, 1 L. R. Adm., 356; and again in *The Glen Gaber*, 41 L. J. 84.

Bodwell, contra, contended that the power to review a decision only extends to matters of detail, or of more or less, or evident mistakes. Having decreed that the Zambesi is entitled to salvage, it would be going too far to say now that she is not entitled.

February 14th, 1892. SIR M. B. BEGBIE, L. J. A.:—

I think Mr. Bodwell is right. The power of altering decrees after being verbally pronounced, and before being drawn up and sent from the Registrar's office, is undoubted—See *Taylor* v. *Copeland*, Q. B. D., Times L. R., 16th January, 1892. But I think it does not enable a Judgment.

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Judgment.

Judge in substance and effect to reverse his decree. Upon this application, both sets of jurisdiction arise. I shall avail myself of this opportunity to correct a clear oversight as to the cargo. That will be exempted from the order. And I shall give an additional direction to the taxing master as to the plaintiff's costs of the salvage action, viz., that they are only to be allowed so far as they are distinguishable from, and additional to, his costs of the collision case. These are matters to which my attention was not drawn to at the hearing, particularly. But as to reversing my decision on a point which I had fully considered and discussed with the Assessors, I do not think that it is within my power. I still think the decision reasonable, and not forbidden by any decided case. But even if I now had changed my mind, I could not reverse my decision; that can only be done by a Court of Appeal. There does not appear to be any reported case in point where, as here, both ships are held to blame. In the two cases cited by Mr. Pooley, the salvors had been held, at least in respect of cargo, wholly to blame. The only principle relied on by Mr. Pooley is that no man is to be allowed to make a profit out of his own wrong. Here it has been held that the Zambesi is at least partly in the wrong, and therefore she is not to derive any advantage from the disaster. This principle, like a good many other principles, cuts both ways. The question was discussed before myself and the Assessors; of course I am wholly responsible for the decision, but we did discuss it. We all agreed that the towage under the circumstances was a salvage service, and they thought $2,000 a proper amount. I pointed out that, if performed by a stranger, the remuneration, whatever it was, would have been part of the damages or loss caused by the collision, just as much as the repairs of the schooner, and so would be divided between the two ships equally; that if the Zambesi had been wholly to blame, this cost, if performed by a stranger, would have fallen on her exclusively, and she would, by performing the service herself, merely have exonerated herself from paying the strange tug. She would, therefore, have been entitled to nothing at all; the service would have accrued entirely for her own benefit. But here, as both ships were to blame, each ought to pay one-half of the towage. I thought $2,000 rather more than the service deserved. It was a very valuable service to the schooner, no doubt, but very cheaply and securely performed by the steamer. I therefore awarded to the Zambesi a sum which I thought would probably be considerably less than one-half the amount suggested by the Assessors. As to Mr. Pooley's principle, it may be retorted on him

by asking why the chief wrong-doer is to take advantage of her own wrong and get salved gratis? She would have had to pay half the expense of any other tug; why should she be excused from a similar payment to the Zambesi, whom she may be said to have lured into the collision? The award as to the salvage service will, therefore, stand as originally decreed, with the variation as to the cargo and the further direction as to costs, already indicated.

Judgment accordingly.

SAUER (APP.) *v.* WALKER (RESP.)

Liquor License Regulation Act, 1891 (B. C.), s. 4 (54 Vic., c. 21)—Validity of.

The *Liquor License Regulation Act, 1891* (B. C.), section 4, is *intra vires* of the Provincial Legislature, and is consistent with sub-sections 73, 78 and 92, of section 96 of the *Municipal Act, 1891*.

APPEAL by way of case stated, from a conviction by the Police Magistrate for the City of Victoria for selling liquor on a Sunday, contrary to section 4 of the *Liquor License Regulation Act, 1891*.

Statement.

The following was the case as stated:—

IN THE SUPREME COURT OF BRITISH COLUMBIA.

IN THE MATTER of an appeal from the determination of Arthur Louis Belyea, Police Magistrate in and for the City of Victoria, in a proceeding before me at the City of Victoria, between John W. Walker, prosecutor, and Gregory Clemens Sauer, defendant.

The information alleged that the said Gregory Clemens Sauer, within the space of three months then last past, to wit, on Sunday, the 10th day of January, 1892, at the City of Victoria, unlawfully did sell liquor on the premises known as the Bank Exchange, situated on the south side of Yates Street, in the said city, contrary to the *Liquor License Regulation Act, 1891*.

The defendant pleaded not guilty, and after hearing the parties and the evidence adduced by them, I did, on the 13th day of January, 1892, convict the said defendant of the said offence, and adjudged him to pay the sum of $25 and $5 costs for the same.

The defendant alleging that he was aggrieved by the said determination, as being erroneous in point of law, did within nine days thereafter apply in writing to me to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of this Honourable Court, and did at the time of making such application, and before the stating of this case before a Justice of the Peace, enter into a recognizance to Her Majesty in the sum of $100, with a condition to prosecute this

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appeal with effect and without delay, and to submit to the judgment of this Honourable Court, and pay such costs as may be awarded by the same, and thereupon, in pursuance of the Act in such case made and provided, I state and sign the following case:—

It was proved that the Bank Exchange was a place where liquor was sold by retail, under and by virtue of a license issued to the defendant by the Corporation of the City of Victoria, and that intoxicating liquor had been sold in the bar of the said premises by the defendant, Gregory Clemens Sauer, the proprietor of the said premises and the person named in such license, between the hours of 8 o'clock in the morning and 4 o'clock in the afternoon of Sunday, the 10th day of January, 1892.

It was admitted by the defendant that the liquor had been sold as aforesaid, without a requisition for medicinal purposes, signed by a licensed medical practitioner or a Justice of the Peace, being produced by the vendees or their agents, or any or either of them, and it was alleged by him that the sale of intoxicating liquors before mentioned was made by him on the day appointed for the express purpose of testing the validity or applicability to him of the provisions of the 4th section of the *Liquor License Regulation Act, 1891.*

It was contended on the part of the defendant that the said section did not apply to sales made on the 10th day of January, 1892, or to sales by licensed saloon-keepers within the limits of the City of Victoria, on the following grounds, namely:—

Statement.

1. That the provisions of the said section only applied to that period of time between eleven o'clock on the night of Saturday, the 2nd of January, and one o'clock of the morning of Monday, the 4th day of January, 1892.

2. That the enactment did not apply to the sale of liquor made within the City of Victoria on Sunday, on the ground that the *Municipal Act* confers power upon the Council of the said city to regulate the selling of liquor on Sunday, which Act is a later Act than the *Liquor License Regulation Act, 1891*, and the Council have not as yet prohibited the sale of liquor on Sunday.

3. That section 4 of the *Liquor License Regulation Act, 1891*, is *ultra vires* the power of the Provincial Legislature, such power being with the Dominion Parliament alone.

4. That the power to prohibit the sale of liquor on Sunday can only be exercised constitutionally through municipal legislation within the limits of the municipalities.

I determined that the matter hereinbefore stated afforded no ground of answer or defence to the said information.

The question for the opinion of the Court is whether my said determination was erroneous in point of law.

Dated this 27th day of January, 1892.

A. L. BELYEA,
Police Magistrate,
City of Victoria.

The appeal came on to be argued before BEGBIE, C. J., and DRAKE, J., February 18th, 1892.

Argument.

Hon. A. N. Richards, Q. C. (*Bodwell* with him), for the appellant. The section under which the conviction is made is inconsistent with sub-secs. (73), (78) and (92) of sec. 96 of the *Municipal Act, 1891*, which confers the power on municipalities to close saloons on Sundays. The two Statutes might be read consistently together if the *Liquor License Act* were to be held to apply only to those portions of the

Province without the limits of municipalities. [BEGBIE, C.J.: We feel no difficulty as to this point, but we should like to hear you on the competency of the Legislature to pass the Act.] *Richards:* The section is *ultra vires*, as being an interference with the regulation of trade and commerce. I refer to sections 91 and 92 of the *B. N. A. Act; Severn* v. *The Queen*, 2 S. C. R., 70; *City of Fredericton* v. *The Queen*, 3 S. C. R., 505; *Russell* v. *The Queen*, 7 App. Cas., 829. *Hodge* v. *The Queen*, 9 App. Cas., which will doubtless be referred to by the other side, was decided under an Ontario Statute which was in force before Confederation. In any event, I contend that the Provincial Legislature should work out such an interference through the medium of the municipalities—See *In re Local Option*, 18 A. R. (Ont.), 572.

Eberts, contra. *Hodge* v. *The Queen* governs this case. He was stopped by the Court.

Sir M. B. BEGBIE, C. J.:—

Judgment.

If I were of a different opinion *Hodge* v. *Reg.* would bind my judgment; and if *Hodge* v. *Reg.* were taken away, I should feel it impossible to allow this appeal. In fact, this is a much clearer case than *Hodge's* case. I shall first deal with the constitutional objection, that this matter of closing saloons on Sundays is a matter for the Dominion Legislature, and not with the Provincial Legislature at all; and so, that both chapter 21, section 4, of the Acts of 1891, which closes saloons from 11 p. m. on Saturday night to 1 a. m. on Monday morning, and chapter 29 of the same session, which confers on the various municipalities of the Province certain powers of closing saloons, not only on Sundays, but on any other days, and for such hours as the municipality may think fit, are unconstitutional and void. This can only be upheld on the ground that this stoppage of Sunday liquor selling is a "regulation of trade and commerce," which is by sec. 91, sub-sec. (2), of the *B. N. A. Act* reserved to the Dominion. In one sense of the words this is undoubtedly true. Selling liquor across a bar is undoubtedly a trade; and selling it on a Sunday is perhaps the most profitable part of the trade. But the Judicial Committee have pointed out that these two sections, 91 and 92, are to be construed leniently, and, if possible, so as to give effect to the real intention of the whole Act.

Since *Severn's* case was decided, the question has been more completely sifted before the Committee in *Parsons'* case (7 App. Ca. 96), and it was found absolutely necessary that the literal meaning of the

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words should be restricted in order to afford scope for the powers which are given to the Provincial Legislature—*per* Lord Hobhouse in *Lamb's* case, 12 App. Ca. 586. The "trade and commerce" mentioned in section 92 must be taken to mean something of general concern to the Dominion at large: "commerce" referring to intercourse between the Dominion and foreign States, "trade" referring, perhaps, to the relations of the producer and consumer in different Provinces, or else to the general trade within a Province—something larger than a particular stipulation restricting a particular trade on some particular day. The present interference can hardly be said to be a regulation of trade, within the meaning of section 91, sub-section (2). It seems to me to fall much more naturally within several of the topics which by section 92 are reserved to the Provincial Legislature. It is a restrictive power very usually placed in all civilized communities in the hands of municipalities, which are, by section 92, sub-section (8), completely in the hands of the Provincial Legislature. It seems, also, to fall more naturally under the head of "civil rights" within the Province—section 92, sub-section (13). Within the Province, the Provincial Legislature may define every man's civil rights, and, among other rights, his rights to sell liquor, the how, the when, and the where. It may also very properly fall under the head of "Administration of Justice," section 92, sub-section (14), which, I think, includes preventive justice and preventive police. And, lastly, it seems to me to be purely a matter of a private or local nature, and so, within section 92, sub-section (16), a matter in which the Dominion can have no interest at all. I, therefore, think that the Sunday liquor traffic is eminently a matter within the competency of the Provincial Legislature. Then we were told that, even if that were so, the Legislature could not itself deal with this traffic directly, but can only indirectly, by arming the municipal authorities with power to do so, at least within a municipality, and *Hodge* v. *Reg.* was cited. In that case, it is true, the local Legislature had dealt with a kindred matter by the hands of the municipality, and that was held lawful; but, if the case be examined, it will be seen that the reason why the municipal powers were held to be lawfully conferred was because the Provincial Legislature was truly sovereign in the matter, and might, therefore, either enact such provisions as it thought fit, or authorize the municipality, or such other body as it chose, to do so. Then, as to the supposed contradiction or inconsistency between the two statutes, I can see none, so that it becomes unnecessary to inquire which statute shall override the other, involving the

Judgment.

further inquiry, which is the later Act. As a matter of fact, both chapter 21 and chapter 29 received the Royal assent with a great many other Bills, in one mass, on the 20th April, 1891. The title of the Bill, chapter 29, was read before the title of the Bill, chapter 21; but afterwards, when arranged in a volume, they were numbered as they now stand. But, whichever is first or last, or supposing (what perhaps is the better opinion) that they both form part of the same enactment, what do they severally provide? Chapter 29 says that each municipality may, by by-law, close saloons on Sundays, or on such other days, or between such hours on any days as they think fit. That power came into operation immediately, on the 20th April. The chapter 21, speaking also on the 20th April, 1891, but without noticing anything that may be directed by the municipality in the meantime, says that after the 1st January, 1892, saloons shall be closed from 11 p.m. on Saturday to 1 a.m. on Monday, besides such other days, or between such other hours, as any municipal by-law may direct. It is true, this enactment restricts the power which the municipality possessed between the 20th April and the 31st December, 1891, of closing saloons for such period as they thought proper, less than the whole of Sunday. They cannot now make a by-law empowering saloons to be open at any time on Sundays. But this is no inconsistency. The gift of the power to make by-laws is to make legal by-laws: *i. e.*, such as shall not contradict any present or future Act of Parliament, or the common law, or the prerogative. And when the gift was, on the 20th April, 1891, made by chapter 29, all municipalities had full notice of the co-existing Act, chapter 21, which would, on and after the 1st January, 1892, limit their otherwise uncontrolled discretion. I think, therefore, that there is nothing, either on principle or authority, to sustain the appeal, and it should be dismissed with costs.

Judgment.

DRAKE, J.:—I am of the same opinion. The whole question is merely one of police regulation, and in no way interferes with the powers of the Dominion Parliament as to the regulation of trade and commerce under section 92, sub-section (2), of *The British North America Act.*

Appeal dismissed with costs.

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MARTIN v. RUSSELL *et al.*

MARTIN

v.

RUSSELL AND JOBSON AND THE B. C. PAPER MANUFACTURING COMPANY, LIMITED.

Apld 6 WWR 1100

Mechanics' Lien Act, 1891—Jurisdiction of Supreme Court to enforce lien.

The Supreme Court has no original jurisdiction to enforce a mechanic's lien under the Act of 1891, whatever the amount.

Statement.

APPEAL from an order of Crease, J., made in Chambers, Feb. 21st, 1892, dismissing an application of the defendants, the B. C. Paper Manufacturing Company, Limited, to have the action dismissed, as against them, on the ground that the *Mechanics' Lien Act, 1891*, confers no jurisdiction in the premises on the Supreme Court. The Company was under no liability to the plaintiff, except by virtue of the provisions of the Act, and the amount claimed was $1,724.80.

The appeal came on to be argued before WALKEM and DRAKE, JJ., sitting as a Divisional Court, on the 26th day of February, 1892

Argument.

Yates for the appellants. The remedy given against us is wholly statutory, and can be enforced only in the way pointed out by the statute, *i. e.*, in the County Court—*Endlich on Statutes*, p. 615; *Handley* v. *Moffat*, 21 W. R. 231; *Rochester* v. *Bridges*, 1 B. & A. 859; *West* v. *Downman*, 42 L. T. 340; *Queen* v. *Harden*, 2 E. & B. 188; *Vallance* v. *Falle*, 13 Q. B. D. 109; *Lamplugh* v. *Norton et al.*, 22 Q. B. D. 452.

L. Crease for the respondent. One object of the Act of 1891 was not to oust the jurisdiction of the Supreme Court, but to define the practice in these actions, when brought in the County Court, about which, under previous Acts, there had been confusion. Further as a remedial Act it should be liberally construed. By Consolidated Acts, 1888, c. 31, s. 10, the Supreme Court has jurisdiction in all pleas whatsoever, and so soon as any right is created by statute this section applies unless expressly negatived. By the *County Courts Act*, sec. 44, sub.-s. 4, the County Courts are given concurrent jurisdiction to enforce any lien or charge, and by c. 31, s. 76, the Supreme Court is empowered to transfer to a County Court any action which by said s. 44 could have been commenced in that Court. Moreover, the prior lien Acts

gave the Supreme Court jurisdiction, and only express words will oust jurisdiction once given to the Supreme Court—*Maxwell*, 152, 157; *Reg.* v. *Moseley*, 2 Burr 1011; *Jacobs* v. *Brett*, 20 Eq. 1; *Shaftsbury* v. *Russell*, 1 B. & C. 666; *Reg.* v. *Abbott*, Dougl. 553. Cases cited contra do not apply by reason of this prior legislation. *May*, by the Interpretation Act, is permissive. In any event under the Act of 1891, the Supreme Court having been given appellate jurisdiction, acquires original jurisdiction by implication—*The Alina*, 5 Ex. D. 227.

March 2nd, 1892. DRAKE, J., delivered the judgment of the Court:—

Judgment

This case raises an important question of jurisdiction. The only jurisdiction given to enforce liens is under section 16 of the *Lien Act, 1891*, which enacts as follows:—"That whatever the amount of the "lien, proceedings may be taken before a Judge of the County Court "of the district in which the land charged is situate, who is hereby "authorized and empowered to proceed in a summary manner by sum-"mons and order, and he may take accounts, try issues, and in default "of payment may direct sale of the estate charged, and any convey-"ance under his seal shall be effectual to pass the estate sold."

The power thus given to a Judge of the County Court is in derogation of the common law rights of owners of property; it is a new jurisdiction, and a new power of procedure is estabilised. It is laid down in *Maxwell* on Statutes "that where a new duty or cause of action is created by Statute out of the course of common law, there is no ouster of jurisdiction of the ordinary Courts, for they never had any." Here the Supreme Court never had any jurisdiction under the common law for dealing with liens, as defined by the *Mechanics' Lien Act*. It is true that by some previous Lien Acts, which have all been repealed by the Act of 1891, the Supreme Court had jurisdiction conferred on them by those Statutes. This, however, has been taken away by the Act in question. It is contended that notwithstanding the *Lien Act, 1891*, the Supreme Court still has a concurrent jurisdiction with the County Court arising out of the statutory jurisdiction given by section 10 of cap. 31, Consolidated Acts, 1888, which enacts that the Supreme Court shall have jurisdiction in all cases, civil as well as criminal, arising within British Columbia. This is a general clause, liable to be controlled and limited by Statute. The Supreme Court had once a jurisdiction under previous laws, but these laws being repealed and a new procedure established, the Supreme Court jurisdiction is terminated. *Maxwell* says that where an Act is repealed, it

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is, as regards its operative effect, as if it never existed except as regards matters past and closed. If it was not so, such a concurrent jurisdiction in the Supreme Court as contended for would be futile, because there is no existing machinery for enforcing it. The only procedure for giving effect to the *Lien Act* is contained in section 16, and there expressly given to the Judge of a County Court.

The case of *Regina* v. *Harden*, 2 E. & B. 188, is almost identical with the present case, and the Judges there held that when by a Statute a special cause of action was created and the party complaining might apply to the County Court for redress, there was no jurisdiction in the ordinary Courts to entertain his application, and the party was limited to the Court specified. There was no ouster of the Superior Court's jurisdiction, because they never had any. This case was followed in *Hertford Union* v. *Kimpton*, 11 Ex. 295; and we are bound by these decisions, which are consonant with common sense. We, therefore, hold that the appeal must be allowed and the action as against the defendant's company must be dismissed, with costs, without prejudice to any action the plaintiff may think proper to bring in any other Court having jurisdiction.

Appeal allowed.

BEGBIE, C.J

FULL COURT.

March, 1892.

NEVILL v. LAING.

NEVILL *v.* LAING.

"Mischievous Animals Act" (C. S., 1888, c. 5, s. 30)—Scienter—Findings of Jury.

In an action for damages for injuries caused by the bite of a dog, section 30 of the *Mischievous Animals Act* (C. S. 1888, c. 5) does not preclude the defendant from showing the peaceful character of the dog, or his ignorance of its vicious disposition, but only raises a rebuttable presumption against him.

Statement.

ACTION for damages for injuries caused by the bite of a dog.

Quoted + Appld Bebbington v Colquhaun 32 WWR 467

The statement of claim alleged that for several months the defendant kept a dog, which was of a fierce and mischievous nature, and accustomed to attack mankind; that the defendant knew the dangerous nature of the dog; that the dog set upon and badly bit the plaintiff in front of defendant's house, and the plaintiff claimed $1,000 damages.

Distd Phillips v Robinson 133 DLR (3d) 189 (PEISC)

The statement of defence denied that the defendant ever kept the dog, or that the defendant knew of its mischievous nature.

The action came on to be tried by SIR M. B. BEGBIE, C.J., and a jury, on January 12th, 1892, and in answer to questions put by the learned Judge, the jury found as follows:—

1st. That the plaintiff had been bitten by a dog:

2nd. That the dog was, at that time, kept or harboured by the defendant:

3rd. That the dog was accustomed to bite mankind:

4th. That the defendant was not aware of that fact; and they estimated the damages, if the plaintiff on these findings were entitled to judgment, at $51.

On these findings, both parties moved for judgment in their favour.

Walls for the plaintiff; *Gregory* for the defendant.

Judge v. *Cox*, 1 Stark 285; *Line* v. *Taylor*, 3 F. & F. 731; and *May* v. *Burdett*, 9 Q. B. 101, were referred to.

January 26th, 1892. SIR M. B. BEGBIE, C.J.:—

Judgment.

The *Animals Act*, section 30, was, in 1875, copied from the Imperial Act of 1865, and extended to all attacks by ferocious dogs, on men as well as on sheep and cattle, to which latter class the English Act is confined. The plaintiff now contends that the section makes the bite conclusive evidence both of the dog's viciousness and of the owner's knowledge. The defendant contends that the section makes the bite *prima facie* evidence only of these matters, leaving the affirmation of both points still necessary to support the plaintiff's right to damages. The words of the section are: "It shall not be necessary for the plaintiff to aver in any pleading, or to prove, that the dog was accustomed to bite men, but the plaintiff, if otherwise entitled to a verdict, shall not be deprived thereof by reason of the absence of such averment or evidence." It is rather a singular thing that, although this statute is 25 years old in England, and 16 years old in B. C., there does not appear to have been, either here or in England, any judicial decision on these words. It is, therefore, necessary to decide the matter on first principles. The whole gist of this action is negligence in the defendant in keeping a dangerous thing: a thing which it is lawful for him to keep, taking proper precautions, and not (as, for instance, large quantities of dynamite or other explosives) absolutely unlawful. In order to establish negligence, the plaintiff must, previously to the recent statute, have established two things besides the owner-

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ship of the dog by the defendant, viz.: 1st, that the dog was accustomed to bite mankind; and 2nd, that the defendant knew it. And this obligation still continues, notwithstanding section 30. The only effect of that section is to shift the onus, so that, while in an action before the recent statute, if no evidence whatever were given on these points, the verdict must have gone for the defendant, now, if no evidence be given on either side, the verdict must go for the plaintiff. But that does not mean that the mere bite is to be conclusive evidence, *i. e.*, that the defendant is to be precluded from showing the peaceful character of the dog, or his own ignorance of any vicious propensity. I think the statute means that the bite is to be *prima facie* evidence only, and that the defendant may give evidence on these points to contradict this presumption. And when evidence is adduced to the jury, they are bound, according to their oaths, to find according to what they consider its true weight to be. The plaintiff's present contention is that the defendant ought not to have been allowed to introduce any evidence of the dog's habits, or of his own knowledge, these things being absolutely decided by the statute. But he never during the trial objected to the reception of such evidence; on the contrary, he endeavoured, not unsuccessfully, to rebut it, at least as to the nature of the dog, by the witness Bligh, and, I think, another. In *May* v. *Burdett*, 9 Q. B. 101, the animal was a monkey, which, from its well-known mischievous nature, may be presumed to be ready to bite, and the whole judgment is based on that. "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed," is liable for any injury it may inflict, "without any averment of negligence in the securing of it. * * * Negligence is presumed, without any express averment. * * * The negligence is in keeping such an animal after notice," pp. 110, 111. But a dog is not such an animal. On the contrary, the law presumes that, until the contrary is shown, a dog is not accustomed to bite mankind. However, the jury have found against the present dog. And *May* v. *Burdett*, deciding that the mere keeping of an animal known to be dangerous is actionable rather implies that the mere keeping of an animal not known to be dangerous is not actionable. And the jury have found that the defendant did not know that the dog was dangerous. I think the words, "It shall not be necessary for the plaintiff to aver or produce evidence," are not equivalent to "It shall not be competent to the defendant to deny or disprove his knowledge." I think, therefore, the defendant must succeed: and he will get the

Judgment.

general costs of the case, but from that amount must be deducted the plaintiff's costs of those issues on which he succeeded.

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From this judgment the plaintiff appealed, and the appeal having come on for hearing on the 16th day of March, 1892, before the Full Court, consisting of CREASE, WALKEM, and DRAKE, JJ., was unanimously dismissed with costs.

Appeal dismissed.

Ex parte HENDERSON, APPELLANT.

In re the PHARMACY ACT, 1891.

BEGBIE, C.J
FULL COURT.
March, 1892.
Ex parte HENDERSON.

Pharmacy Act, 1891 (B. C.), sec. 12—Meaning of "exercising profession."

One who resided out of the Province until the coming into force of the *Pharmacy Act, 1891*, and was a partner of a druggist practising within the Province, is not entitled to be registered under sec. 12 of the Act as having practised as a druggist.

Statement.

THE appellant, who resided at Montreal, had previously to April, 1891, become a partner with one Muir, who conducted personally a druggist's shop in New Westminster throughout that year. In February, 1892, he applied to the Registrar of the Pharmaceutical Association to be registered as a chemist under that part of section 12 of the *Pharmacy Act, 1891*, which runs thus: "All persons who at any time before the coming into force of this Act (20th April, 1891,) were practising in this Province on their own account as chemists and druggists, etc., are entitled to be registered on producing before the Registrar evidence of their having exercised their profession as aforesaid." The appellant had applied accordingly to the Registrar, tendering his $10 statutory fee, under section 8, but the latter refused to register. The appellant thereupon applied to WALKEM, J., for a *mandamus* commanding the Registrar to register: but the learned Judge refused the application, whence this appeal.

A. E. McPhillips, for the appeal, cited *Palmer* v. *Mallett*, 36 Ch. D. 411.

Jay, for the Pharmaceutical Association, was not called on.

BEGBIE, C.J SIR M. B. BEGBIE, C.J.:—

FULL COURT. March, 1892. *Ex parte* HENDERSON.

All the cases cited were of this sort—where a person duly qualified, but not registered, attends patients and performs acts properly performable by surgeons, etc., that is practising as a surgeon, etc., although such person has not any pecuniary interest in the fees thereby earned: *e. g.*, although he is at the time a salaried assistant in some establishment that takes all the fees for its own use and benefit. But what you have to produce is some authority to show the converse proposition,—that a person who has a pecuniary interest in the profits of the establishment, but lives 3,000 miles away, is practising as a chemist in this Province of British Columbia in that store. I think Mr. Henderson, as a sleeping partner in a trading concern, may be properly said to have been carrying on business in British Columbia, but he cannot be said to have been "practising as a chemist or apothecary," or "exercising a profession." The decision in *Allen* v. *Taylor*, 19 W. R. 35, is founded on that distinction between a mere trading business and a professional business, which again is markedly insisted on by the late Cotton, L.J., in *Palmer* v. *Mallett*, 36 Ch. D. 422. The appellant, therefore, is not entitled to claim registration merely on the strength of the provision in section 12, and the appeal must be dismissed.

Judgment.

Whether a *mandamus* could be obtained in any case, except those mentioned in the latter part of section 12, may be doubted. We think, however, that the appellant is clearly not entitled.

CREASE and DRAKE, JJ., concurred.

Appeal dismissed with costs.

DIVISIONAL COURT. March, 1892. GRAY *et al* v. MACALLUM.

GRAY *et al* v. MACALLUM.

New trial—Weight of evidence—Misdirection—Atheist incompetent to testify—Manner of establishing incompetency.

The Court will not set aside the verdict of a jury unless it is wholly unsupported by evidence, or is contrary to such a body of evidence, or rests on so slight a foundation as to make it obvious that the jury were perverse or invincibly prejudiced.

It is no misdirection sufficient to require a new trial, that the Judge has used inaccurate language in the course of a long summing up, if the charge as a whole afforded a fair guide to the jury.

Clark v. *Molyneux*, 3 Q. B. D. 243, followed.

Total defect in religious belief makes a witness incompetent, and the question of belief may be examined into after he has sworn or affirmed, but it is not the duty of the trial Judge to so examine before receiving his evidence.

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RULE *nisi* calling on the defendant to shew cause why there should not be a new trial, on the grounds that the verdict was against the weight of evidence; that there was misdirection: that new and material evidence had been discovered since the trial; and that the evidence of the defendant should not have been received, as he was incompetent for want of religious belief.

The material facts appear in the judgment.

The argument came on to be heard before BEGBIE, C. J., and CREASE, J., sitting as a Divisional Court.

Davie, A.-G., and *Bodwell*, for the defendant, shewed cause.

Walker, for the plaintiff, contra.

The judgment of the Court was delivered on March 15th, 1892, by SIR M. B. BEGBIE, C. J.:—

Judgment.

This is an action (originally three actions, commenced on the 14th May and 5th June, 1890, afterwards consolidated by order of the 20th June) by the three brothers Gray against Macallum, alleging an agreement by the defendant to lend them $6,000, to be secured by a mortgage of their shares ($^{16}/_{30\text{ths}}$) in the Ophir Bed-rock Flume Co., and of a store and stock of goods at the mine; that the money was lent accordingly, on the 17th April, 1889, but that the assignment of the shares and of the store, of the same date, instead of being conditional was made absolute in form, on the distinct private understanding, however, that the whole property was redeemable on repayment of the $6,000, with interest at ten per cent. and a bonus of $^1/_{30\text{th}}$ interest in the mine. The defendant, by his statement of defence, claims that the assignment of the 17th April, 1889, was intended to be, as it is expressed to be, an absolute assignment: that there was no agreement for a loan, or any right to redeem stipulated for, and that the $6,000 was advanced as the consideration money for the sale to him, out and out, of the shares, store, and stock of goods.

This issue (with other matters) came on for trial before Mr. Justice DRAKE and a special jury, during fourteen days in September last. All other questions are now at rest, but the issue, as above stated, having been found in favour of defendant, viz., that the assignment of the 17th April, 1889, was a sale out and out, without any equity of redemption reserved to the plaintiffs: Mr. Walker has now moved for a new trial of that issue upon a great many grounds, which may generally be brought under these, viz., as being against the weight of evidence; on

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the ground of misdirection by the Judge in many points; on the ground of the recent discovery of new and material evidence which could not have been brought forward at the last trial, and on the ground of improper reception of the evidence of the defendant, Capt. Macallum, who, it is now insisted, ought not to have been permitted to testify at all.

As regards the consideration of the weight of evidence, it is surely unnecessary to do more than barely recall the fact that it is peculiarly the office of the jury, and not of this Court, to weigh the evidence, and that we could not on this ground set aside the verdict unless it were wholly unsupported by evidence, or were contrary to such a body of evidence, or rested on so slight a foundation as to make it obvious that the jury were perverse or invincibly prejudiced. And, as the learned counsel on each side took several days to review the evidence produced by them at the trial, it must be allowed that there was an amount on each side, surely sufficient, if it had stood alone, uncontradicted, to justify a verdict either way. But so far from thinking the verdict of the jury against the weight of the evidence taken as a whole, I do not see how they could, reasonably, have arrived at any other conclusion. The plaintiffs allege in their statement of claim, a clear, definite contract on the 17th of April, 1889, empowering them to redeem on certain definite terms the property included in the agreement of that date, though it is expressed as an absolute sale; the right to redeem, and the terms on which they may redeem being fixed at the time, and therefore necessarily known to them all from the first. This is one of the few instances in which a party may contradict or vary a written instrument by parol evidence, but the onus is on the plaintiffs, and the evidence should be clear and uniform.

Judgment.

[The learned Judge, after reviewing the evidence at length, came to the conclusion that no ground had been shewn as regards the weight of evidence or as regards the discovery of new evidence, and proceeded as follows:]—

Then, as to various alleged misdirections by the learned Judge, some of these have been abandoned, and as to none of them does the objection at the trial appear to have been made with sufficient distinctness. The rule as to this is very well laid down in many cases. I shall only cite three: In *Clark* v. *Molyneux*, 3 Q. B. D. 243, Bramwell, L. J., says: "A summing up is not to be rigorously criticized. A verdict is not to be set aside because in the course of a long and elaborate summing up,

the Judge has used inaccurate language; the whole must be considered to see if it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detailed expressions." In *Horler* v. *Carpenter*, 27 L. J. C. P. 4, Willes, J., citing approvingly *Jones* v. *Provincial Insurance Co.*, says: "Counsel cannot be heard here to argue points not raised at the trial, and which they advisedly abstained from raising." And in *Whitehouse* v. *Hemmant*, 27 L. J. Ex., p. 297, Pollock, C. B., says: "It does not appear that the document was so presented and so pressed at the trial as to entitle the parties to a new trial on the ground of its rejection * * It is not uncommon for a party at a trial to tender a document (or take objection) with no idea of pressing its acceptance, and merely to produce a certain effect. If a party intends to take advantage of the rejection of evidence (or the overruling of an objection) he should press its reception and make the Judge distinctly understand that he does so. It would be unfair to allow a party to obtain all the advantage of the rejection of a piece of evidence (or the overruling an objection) without running any of the risk of the reception of the evidence (or allowing the objection)."

Judgment.

Now what are the errors or misdirections on which the plaintiff relies? I have perused the charge carefully, and I think it gives a tolerably impartial view of the comparative credibility of the plaintiffs' and defendant's cases. It does not place them, it is true, on the same level; to do so would have been, not impartial, but grossly partial. Then as to refusing to allow the plaintiffs' counsel to ask for a direction that James Gray's statement was not evidence against John or Samuel; it does not appear by the shorthand notes that the learned Judge did at all refuse. The Attorney-General seems to have suggested that the application should be made later on; the learned Judge said nothing, the plaintiffs' counsel acquiesced. But if the Judge had been pressed upon the point he would probably have held, and rightly held, that James Gray, holding a very extensive power of attorney from his brothers to act for them in this very matter, his statements did bind them, though made in their absence. As to the production of documents, I think the order was within the power of the trial Judge. Fortunately there was no absolute necessity for further adjourning the trial,—and really there must be some attention paid to the normal duration of human life, and to the calls of ordinary occupations. Jurymen are not immortal, and have affairs of their own to attend to. I believe the trial had lasted fourteen days. As to not directing the jury that Johnson was Macallum's agent all through the transactions

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of the 17th April, 1889, the Judge did so direct them; and he was perfectly right in strongly drawing their attention to the onus of proof thrown upon the plaintiffs, who were impugning their own deed. The evidence in Mr. Hamlin's diary I have already dealt with. This covers, I think, all the grounds of misdirection.

There remains only to be considered the objection that the learned Judge erred in refusing to inquire whether the defendant, Macallum, had religious faith of such a nature and degree as to be competent to testify on the trial. At the present day, almost the only ground for objecting to the competency of a witness is by reason of his total defect in religious belief. The principle is *non nisi juratis in lite creditur* (unless some Statute invervenes in favour of his testimony), and as an atheist cannot take an oath, his statements are mere verbal allegations, not legal evidence. The most usual way of establishing this incompetency in a supposed atheist is in English Courts by examining himself personally on the *voir dire*—a proceeding described by the Judges with more or less respectful astonishment in *Maden* v. *Catanach*, 7 H. & N. 360. And the method declared legal in that case was as follows:—The opposing counsel makes a suggestion that the proposed witness is incapable of taking an oath, and therefore prays that he may be sworn, which the Court immediately directs. The counsel then examines the witness on his oath as to his religious belief; and if the witness, being an atheist, then states the truth he is immediately declared to be for that reason one unworthy of credit, and his evidence is refused. Procedure of this highly artificial nature, depending apparently on no logic or reasoning, must be strictly followed. Lord Hardwicke, who presided at the trial of Lord Lovat, 18 St. Tri., 596, states that if a witness be sworn in chief and directly afterwards alleged to be incompetent, he may be examined on that oath as to his competency in the same manner as if he had been sworn on the *voir dire*, and that he had known it done both ways. That is a very high authority both as to the person and the occasion; and it is fully recognized in *Jacobs* v. *Layborn*, 11 M. & W. 685. *Howell* v. *Lock*, 2 Camp. 14, may therefore be taken as overruled on this point; and Mr. Walker was not, after the defendant had complied with the form of affirmation, too late to examine him as to his belief, had he done so or had he attempted to do so. But this he did not do; nor did he even suggest that the defendant had no religious belief, but merely suggested that the trial Judge should examine him on that point before allowing him to be examined in chief. But this is not the duty of the trial Judge,

Judgment.

nor according to what is laid down as the legal course in *Maden* v. *Catenach*, 7 H. & N., 360. In point of fact, however, the learned Judge did immediately put to the witness a very pregnant question, covering the whole ground, as it seems to me, viz.: "Is it against your conscientious belief that you should take an oath?" To which defendant replied that it was. Now this question and answer postulate both a belief in a God and a fear of offending Him. A man may act from motives of prudence, or at the dictates of some system, if there be any, of godless philosophy, or at the dictates of conscience, which is quite a different thing. Suppose a man is so grievously offended that he desires to take his enemy's life. He may have no fear of God, may not believe in any God, but he may hold his hand through fear of the gallows. This is a prudential motive. Or he may be confident of evading human detection and human justice. But the reflection that God will see and has forbidden all murder will equally restrain him. That is the voice of conscience. There can be no conscience where there is no fear of a God.

Judgment.

But, although the objection may be taken at any time and proved in any manner (always, I think, pending the trial, and subject, I think further, to this: that if the objector attempt to prove incompetency and fail, he is not afterwards permitted to prove it), it is surely quite unheard of to say that advantage can be taken of such an objection without the smallest proof, or attempt at proof, of its being founded on fact, merely because counsel appear to have been instructed to that effect. In fact, in my experience of thirty years on the Bench, and long before that at the Bar, I never heard of the course being adopted which it is now contended should have been followed in the present case.

In our opinion, this application for a new trial fails on all points, and the rule must be discharged with costs.

Rule discharged with costs.

[NOTE.—*See* now as to objecting to a witness on the ground of incompetency, "Oaths Act, 1892," sections 16 and 17.]

BEGBIE, C. J

March, 1892.

Re BROWN.

In re BROWN AND BROWN, INFANTS. *Ex parte* BROWN.

Lending infants' moneys on mortgage of realty—Mechanics' Lien Act, 1891.

The Court will not sanction a loan of infants' moneys on mortgage of realty, without a covenant by the mortgagor to procure a binding agreement with those who may be entitled to liens under the *Mechanics' Lien Act, 1891*, to forego their rights under the Act.

Statement.

PETITION, *ex parte*, by infants, by their guardian as next friend, for the approval by the Court of a proposed loan of $6,500, part of the trust fund belonging to the infants, to the St. Andrew's Society, on mortgage of a piece of land stated to be worth $18,000.

The petition came on to be heard before BEGBIE, C. J., in chambers, March 17th, 1892.

Wootton, for the petitioners, stated the above facts, and that the mortgagors intended to expend the whole $6,500 in improvements upon the mortgaged premises.

SIR M. B. BEGBIE, C. J.:—

Judgment. Ordinarily, when trustees are investing a trust fund, they rely on the report of proper experts as to the value of the security, and on their solicitor to see that the title is good, and the premises, with all usual powers and remedies, properly secured to them. When the beneficiaries are infants, they have the additional safeguard in the watchfulness of a Judge; though the legal responsibility of the solicitor is not thereby wholly superseded. I therefore assume that proper evidence of experts is producible in support of the statements as to the value, as to which indeed the solicitors acting for the trustee are bound to protect him, and show that he has exercised due caution—*Hopgood* v. *Parkin*, 11 Eq., 74. They will also have to see that the mortgagors have power to deal with the land as proposed, and that the covenants are personally enforceable. I should not feel disposed to authorize an advance of an infant's money on loan upon the security of land alone, especially in view of recent legislation. And this leads me to point out some special precautions rendered necessary by such legislation. The security hitherto felt on all mortgages of land seems now, if it be

improvable land, and so liable to be subjected to any mechanic's lien, to be very much impaired by the Act of 1891. By the combined operation of sections 6 and 16, all the mortgagee's remedies of sale or foreclosure or taking possession may, and probably would, be entirely taken out of his hands and placed in the hands of the lien-holder or lien-holders. These, or any one of these, may by section 6 compel an immediate sale, not of the equity of redemption, but of the land itself and the mortgagee's estate and interest in it; and the mortgagee is not even to get as a matter of course, out of the proceeds of such sale, the amounts which the mortgagor has agreed by his mortgage shall be charged upon the land, but only so much as a jury may think proper to dedicate to that purpose. The mortgagee may in some cases, of course, get his principal, interest, and costs; but it is evidently contemplated by the Act that in some cases he may not; and his remedies, his powers of enforcing payment, appear to be clearly quite taken away. No trustee could be advised to expose his *cestui que* trust's money to such a risk, to say nothing of the costs of litigation by contractors, materialmen, and labourers. Now, against all these risks the mortgagor can perfectly protect his mortgagee by simply causing everybody connected with the preparation for, or the execution of, any improvements in any capacity to sign an agreement that the *Mechanics' Lien Acts* shall none of them apply. The present mortgagors, therefore, must at the very least covenant to that effect: and the observance of that covenant will have to be safeguarded by very stringent stipulations, which must be submitted to a Judge for approval. It remains to be seen whether the observance of that covenant can, by any stipulations, be sufficiently ensured.

Judgment.

Judgment accordingly.

FULL COURT.

March, 1892.

GREER
v.
REGINA.

IN THE SUPREME COURT OF BRITISH COLUMBIA IN ERROR.

SAMUEL GREER (PLAINTIFF IN ERROR)

v.

HER MAJESTY THE QUEEN (DEFENDANT IN ERROR).

Writ of Error—Reservation of Questions of Law—What Record should contain—Diminution of Record—Communications between Judge and jury in the jury-room—Criminal Procedure Act, R. S. (C.), ch. 174, sections 104, 143, 244, 245, 246, 247, 265, 266, and 267.

Commented R v Hayes 11 BCR 12

On appeal by way of Writ of Error from a conviction upon indictment for assault occasioning bodily harm, the following errors were, *inter alia*, in effect assigned :—

Statement.

(1.) That the Grand and Petit Juries were stated by the Record to be taken from the *County of Westminster* and not from the *District of New Westminster* (a smaller area included within the boundaries of the former) as required by the *Jurors' Act*, C. S. (B. C.), 1888, ch. 64,—

Held, that this was a question of law which could not have been reserved at the trial, but that section 247 of the *Criminal Procedure Act* precluded the plaintiff from raising this objection in Error ;

(2.) That the trial Judge did not deliver the whole of his charge to the jury in open Court, but, having been requested by message from the jury after they had retired, proceeded to the jury-room with the plaintiff in charge of the Sheriff, and in the absence of both counsel for the Crown, who elected to be absent, and counsel for the plaintiff, gave further instructions to the jury, the plaintiff not objecting ;

Held, that the facts as to this did not properly form part of the Record ; that it was a question which could have been reserved, and, therefore, not raisable in Error ; and that in any event, while it is inexpedient for a Judge to communicate with the jury otherwise than in open Court, yet his doing so is not necessarily a ground of error ;

(3. That the Record did not state where the offence was committed,—

Held, that sections 143 and 245 of the *Criminal Procedure Act* precluded the plaintiff from assigning this as error.

Held, further, that if the Record is imperfectly returned, the plaintiff in Error should allege a diminution of the Record, but, following *Dunn* v. *Regina*, 12 Q. B. 1026, 1031, it is too late to do so after errors have been assigned, joinder therein and argument thereon.

Morin v. *The Queen*, 18 S.C.R. 407 and certain dicta of Lord Hale specially considered.

State v. *Patterson*, 12 Am. Rep. 200 (Vt.); *Sargent* v. *Roberts*, 11 Am. Dec. 185 (Mass.); and *Bishop*, Crim. Proc., Vol. I., § 1000 not followed.

Conviction affirmed.

FULL COURT.

March, 1892.

GREER v. REGINA.

ERROR. Plaintiff in Error was convicted at the New Westminster Assizes of an assault occasioning actual bodily harm to one T. J. Armstrong, a Deputy Sheriff, who was executing his office at the time of the assault.

He afterwards obtained a Writ of Error, returnable in this Court, upon the fiat of the Hon. Theodore Davie, Attorney-General, to which the following return was made:—

GREER *v.* REGINA.

RETURN.

The record and proceedings, whereof mention is within and above made, appear in a certain schedule to this writ annexed the answer of the Justice within named.

Signed, sealed, and delivered in the presence of ARTHUR G. SMITH. } MATT. B. BEGBIE, C. J., B. C. [L.S.]

PROVINCE OF BRITISH COLUMBIA, COUNTY OF WESTMINSTER, TO WIT: }

Statement.

Be it remembered that, at the General Session of Oyer and Terminer and General Gaol Delivery, holden in the Court House at the City of New Westminster in and for the said County of Westminster, on Wednesday, the eleventh day of November, in the year of Our Lord one thousand eight hundred and ninety-one, and in the fifty-fifth year of the reign of Our present Sovereign Lady the Queen, Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, before and presided over by the Honourable Sir MATTHEW BAILLIE BEGBIE, Knight, Chief Justice of the Supreme Court of British Columbia, and also a Justice of Our said Lady the Queen, in, under, and by virtue of a Commission and Letters Patent under the Great Seal of the Province of British Columbia, bearing date the tenth day of August, in the year of Our Lord One thousand eight hundred and ninety-one, duly assigned, named, authorized, and empowered to enquire by the oaths of good and lawful men of the County aforesaid, by whom the truth of the matter might be better known, and by other means and ways whereby they could or might the better know more fully the truth of all treasons, misprisons of treasons, felonies, misdemeanors, misdeeds, offences, and injuries whatsoever; and also the accessories of the same so far as they are criminally liable, by whomsoever and howsoever done, perpetrated, or committed, and by whom, to whom, when, how, and in what manner; and of all articles and circumstances to the premises, and every or any of them, howsoever concerning; and to hear and otherwise determine the said treasons and all other the premises in the said Province of British Columbia, according to the laws of the said Province for the time being in force; and also from time to time to deliver the Gaols and every the Gaol within the said Province of the prisoners therein being, according to the laws of the said Province for the time being in force:

The same session of Oyer and Terminer and General Gaol Delivery of Our said Lady the Queen being held and continued during the said eleventh day of November aforesaid, and being then duly adjourned till Friday, the thirteenth day of November, in the year of Our Lord one thousand eight hundred and ninety-one:

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And the same session of Oyer and Terminer and General Gaol Delivery of Our said Lady the Queen being held and continued on the said thirteenth day of November, in the year of Our Lord one thousand eight hundred and ninety-one:

By the oaths of Gerald Herbert Cross, Benjamin Wirth, R. MacFarlane, A. E. Hill, Walter Andrew Gilley, Thomas Kerr, Peter Peebles, Duncan A. MacFarland, Gideon Robertson, John Manley Spinks, Ewen McPherson, J. A. Yerex, Malcolm Matheson, William Urquart, and Wilfred Thibaudeau, good and lawful men of the County aforesaid, and qualified according to the law, then and there empanelled, sworn, and charged to enquire for the said Lady the Queen, and for the body of the said County, it is presented that Samuel Greer, on the twenty-sixth day of September, in the year of Our Lord one thousand eight hundred and ninety-one, in and upon one Thomas Joseph Armstrong did make an assault, and him, the said Thomas Joseph Armstrong, did then beat, wound, and ill-treat, thereby then occasioning to the said Thomas Joseph Armstrong actual bodily harm, and other wrongs to the said Thomas Joseph Armstrong then did, to the great damage of the said Thomas Joseph Armstrong:

Thereupon the Sheriff of the County aforesaid is commanded that he omit not for any liberty within his Bailiwick, but cause him, the said Samuel Greer, to come and answer to the misdemeanor and assault whereof he stands indicted:

And the same session of Oyer and Terminer and General Gaol Delivery of Our said Lady the Queen being held and continued during the said thirteenth day of November, in the year of Our Lord one thousand eight hundred and ninety-one, and then duly adjourned till Saturday, the fourteenth day of December, in the year of Our Lord one thousand eight hundred and ninety-one:

Statement.

And thereupon, at the same session of Oyer and Terminer and General Gaol Delivery of Our said Lady the Queen holden on the said eleventh day of November, in the year of Our Lord one thousand eight hundred and ninety-one, and the succeeding days from day to day as aforesaid, before the said the Honourable Sir MATTHEW BAILLIE BEGBIE, Knight, last above mentioned, on the said fourteenth day of November, in the year of Our Lord one thousand eight hundred and ninety-one, here cometh the said Samuel Greer, under the custody of William James Armstrong, Esquire, Sheriff of the County aforesaid, and into whose custody in the Gaol at the City of New Westminster aforesaid, for the cause aforesaid, he had been before committed, being brought to the bar here in his proper person by the said Sheriff, to whom he is here also committed, and having heard the said indictment read, and being asked whether he is guilty or not guilty of the premises in the said indictment above charged upon him, he saith he is not guilty thereof, and thereof he puts himself upon the Country, and the Honourable Theodore Davie, the Attorney-General of the said Province, who prosecutes for Our said Lady the Queen, in this behalf, doth the like:

Therefore, let a Jury thereupon here immediately come before the Honourable Sir MATTHEW BAILLIE BEGBIE, Knight, last above mentioned, of good and lawful men of the County of Westminster aforesaid, qualified according to law, by whom the truth of the matters may be better known, and who are not of kin to the said Samuel Greer, to recognize, upon their oath, whether the said Samuel Greer be guilty of the misdemeanor and assault in the indictment above specified or not guilty, because as well the said Theodore Davie, who prosecutes for Our said Lady the Queen in this behalf, as the said Samuel Greer, have put themselves upon that Jury:

And thereupon James Ironside, Robert Vincent, Colin McAlpine, Arthur Austin Langley, Hugh W. Elliott, George D Cummins, W. G. Judge, Robert Duff Kinmond, J. A. Isaacs, Peter Greyall, Arthur George Johnson, John McEwen, William S. Udy, Munroe Ferguson, D. G. Shaw, John Henry Graves, William Charles Murray, and

Thomas McWhinnie, eighteen of the Jurors of the said Jury, upon the prayer of the Honourable Theodore Davie, who prosecutes for Our said Lady the Queen as aforesaid, are ordered by the Court to stand aside:

And thereupon the Jurors of the said Jury, for this purpose empanelled and returned, to wit:—Andrew Jackson Hunt, Angus Martin, Farquhar McCrimmon, James Kipp, Edmund White, Harold Disney, William D. R. Collier, Ephraim Dell, Alvin Patterson, Alexander Archibald, James Russell, Kenneth Benton, being called, come, who, to speak the truth of and cencerning the premises, are without any objection chosen, tried, and sworn:

And after the said trial has been duly proceeded with, and after the case on the part of the Crown and the said Samuel Greer, respectively, has been duly concluded, the said Chief Justice duly proceeds to charge the Jury, and afterwards, and immediately after the conclusion of the said charge of the said Chief Justice, the Jury proceed to retire from the bar here to the custody of the said Sheriff, to consult upon the verdict to be given upon the premises in the said indictment specified, and do so retire under the custody of the said Sheriff to the Jury room in the said Court House, to which said room (having been thereto requested by message from the Jury aforesaid, for the purpose of giving to the said Jury further charges and directions) cometh the said the Honourable Sir MATTHEW BAILLIE BEGBIE, Knight, Chief Justice, and cometh also the said Samuel Greer in custody of the said Sheriff; and the said Chief Justice, in the said Jury room, in the presence of the said Samuel Greer, at the request of the Jury as aforesaid, proceeds to further charge the said Jury, and immediately after the conclusion of the said charge as well doth the said Chief Justice retire from the said Jury room as doth the said Samuel Greer in custody of the said Sheriff, and the Jury do then proceed further to consult upon their verdict to be given upon the premises in the said indictment specified. and, having consulted upon their verdict, the said Jurors so chosen, tried, and sworn as aforesaid returned to the bar here, and upon their oath say that the said Samuel Greer is guilty of the misdemeanor and assault aforesaid on him charged in the form aforesaid, as by the indictment aforesaid is above supposed against him:

Statement.

And thereupon it is demanded of the said Samuel Greer if he hath or knoweth anything to say wherefore the said Chief Justice here ought not, upon the premises and verdict aforesaid, to proceed to judgment and execution against him, who nothing further saith unless as he before hath said:

Whereupon all and singular the premises being seen and by the said Chief Justice here fully understood, it is considered and adjudged that the said Samuel Greer be taken to the Penitentiary of Our said Lady the Queen at New Westminster aforesaid, and there be confined at hard labour for the space of twenty-seven calendar months.

Mills, then, on behalf of the plaintiff in error, craved leave to assign error, which was granted, and he thereupon filed the following

ASSIGNMENT OF ERRORS.

Assignment of Errors.

And now, that is to say, on this fourteenth day of January, in the year of Our Lord one thousand eight hundred and ninety-two, before Our said Lady the Queen, at the Law Courts, in the City of Victoria, in the Province of British Columbia, in the Dominion of Canada, comes the said Samuel Greer in his own proper person and says that in the record and proceedings aforesaid, and also in the giving of the judgment against him, there is manifest error in this,—

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Assignment of Errors.

1. That the indictment does not appear by the said record to have been found and presented by good and lawful men of the New Westminster Jury District; therefore, in that there is manifest error.

2. There is also error in this, that it does not appear by the record that the said Samuel Greer was tried by and before Sir MATTHEW BAILLIE BEGBIE, Knight, Chief Justice, and a jury of good and lawful men of the New Westminster Jury District according to the *Jurors' Act* and amending Acts; therefore, in that there is manifest error.

3. There is also error in this, that it appears by the record that the Chief Justice, after the said trial had been duly proceeded with, and after the case on the part of the Crown and the said Samuel Greer, respectively, had been duly concluded, the said Chief Justice duly proceeded to charge the jury, and afterwards, and immediately after the conclusion of the said charge of the said Chief Justice, the jury retired from the bar to the custody of the said Sheriff to consult upon a verdict to be given upon the premises in the said indictment specified, and did so retire under the custody of the said Sheriff to the jury room in the said Court House, to which said room (having been thereto requested by message from the jury aforesaid for the purpose of giving to the said jury further charges and directions) went the said Honourable Sir MATTHEW BAILLIE BEGBIE, Knight, Chief Justice, and also the said Samuel Greer in custody of the said Sheriff, in the absence and without the knowledge of the Honourable Theodore Davie, the Attorney-General of the said Province, who prosecuted for Our said Lady the Queen, and the said Chief Justice, in the said jury room, in the presence of the said Samuel Greer (but in the absence of the said Honourable Theodore Davie, Attorney-General aforesaid, who prosecuted for Our Lady the Queen), at the request of the jury aforesaid, did further charge the said jury; therefore, in that there is manifest error.

4. There is also error in this, that the Chief Justice did not deliver the whole of his charge to the jury in open Court, nor in the presence of the said Honourable Theodore Davie, the Attorney-General of Our said Province, who prosecuted for Our Lady the Queen, and the said Samuel Greer; therefore, in this there is manifest error.

5. There is also error in this, that it does not appear by the record that the Grand Jury had jurisdiction over the subject matter of the presentment to find the indictment against the said Samuel Greer in the said record; therefore, in that there is manifest error.

6. There is also error in this, that it does not appear by the record that the said Samuel Greer committed any offence known to the law in the County of Westminster, or in the Province of British Columbia; therefore, in that there is manifest error.

7. There is also error in this, that it does not appear by the record that the said Sheriff, for the purpose mentioned in the record, empanelled and returned the persons mentioned in the said record, or that the said jury in the record mentioned was elected, tried, and sworn to speak the truth of and concerning the premises in the said indictment against the said Samuel Greer; therefore, in that there is manifest error.

8. There is also error in this, that it appears by the record that James Ironside and other persons mentioned in the said record were ordered by the Court to stand aside before the jury empanelled had been returned by the Sheriff; therefore, in that there is manifest error.

9. There is also error in this, to wit: That the indictment and proceedings aforesaid, and in the matters therein contained, are not sufficient in law to warrant the said judgment so given against the said Samuel Greer, or to convict him of the misdemeanors, trespasses, and contempts or offences aforesaid, or either of them; therefore, in that there is manifest error.

10. There is also error in this, to wit: That the judgment aforesaid in form aforesaid is given for Our said Lady the Queen, whereas the said judgment, by law of this Province of British Columbia, and Dominion of Canada, ought to have been given against Our said Lady the Queen, and for the said Samuel Greer; therefore, in that there is manifest error; and the said Samuel Greer is ready to verify, and prays that the judgment aforesaid, for the said errors and other errors appearing in the record and proceedings aforesaid, may be reversed, annulled, and wholly held for nothing, and that he may be restored to all things which by reason of the judgment and proceedings aforesaid he has lost.

S. PERRY MILLS.

Whereupon the Attorney-General, on behalf of the Crown, joined in error.

The case came on to be heard before CREASE, WALKEM and DRAKE, JJ.

Davie, A.-G., now moved to quash the writ, on the ground that none of the errors assigned were questions of law that could not have been reserved at the trial, or were refused to be reserved, citing section 266 of the *Criminal Procedure Act*; *Morin* v. *The Queen*, 18 S. C. R., 407; *Reg.* v. *Brown*, 24 Q. B. D., 357. Argument.

Mills objected that the Crown, having joined in error, was precluded from now making this motion.

The Court decided to hear the appeal, subject to the motion.

Mills, for the plaintiff in error, referred to *Hale's Pleas of the Crown*, vol. 2, pp. 296, 307; *Bishop's Criminal Procedure*, vol. 1, § 1,000; *State* v. *Patterson*, 12 Am. Rep., 200 (Vt.); *Sergent* v. *Roberts*, 11 Am. Dec., 185 (Mass.)

Davie, A.-G., contra. With regard to the Judge going into the jury-room, Lord Hale's statement is wholly unconfirmed by any subsequent English authority, and instances of such a practice by English Judges are not uncommon; and as to the American authorities, I submit they are no guide whatever in matters of practice.

The other errors assigned are fully met by the provisions of the *Criminal Procedure Act*, which render them unavailable to the plaintiff in Error.

Reg. v. *Martin*, 12 Cox, 204; *Dougall* v. *Regina*, 22 L. C. J., 133; *Reg.* v. *Sproule*, 1 B. C., Pt. 2, 219; 12 S. C. R., 146; *Reg.* v. *Winsor*, 10 Cox, 276; L. R., 1 Q. B., 289, 390, were also referred to.

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The Court took time to consider, and on March 22nd, 1892, the learned Judges delivered the following judgments:—

GREER v. REGINA.

CREASE, J.:—

This matter comes before us on a writ of error, bringing up the record and proceedings at the trial of Samuel Greer at the late Assizes holden at New Westminster before the Honourable the Chief Justice, for an assault occasioning actual bodily harm, of which he was found guilty and sentenced to twenty-seven months' hard labour in the penitentiary.

The Attorney-General, on behalf of the Queen, joined in error upon all matters assigned by the prisoner as error on the record, and denied all allegations not properly part of the record.

The Attorney-General made a preliminary motion to quash the writ of error and all proceedings thereunder, on the grounds that under section 266 of chap. 174 of the Dominion *Criminal Procedure Act*, no writ of error can be allowed in any criminal case, unless it is founded on some question of law which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases, and that there were no law points reserved here.

Judgment of Crease, J.

It is true that if the present application comes strictly under that description the Attorney-General is entitled to succeed; but I am of opinion that this writ of error must not be quashed on this section alone: and in deciding on so important a matter it will be satisfactory to ascertain how far an opinion of the Court confirmatory of the learned Chief Justice's decision may be arrived at, after careful examination of all the alleged errors, when viewed in the light of the existing provisions of our Dominion criminal law. I will therefore now proceed to take the grounds of error in the order in which they are assigned.

The first ground (affecting the grand jury) states that the *indictment* against Samuel Greer does not appear by the record to have been found by good and lawful men of the New Westminster Jury District, as required by sections 5 and 6 and the other provisions of the *Jurors' Act*, chapter 64, British Columbia Consolidated Statutes, 1888.

The second ground of error (which affects the petit jury) is that the *trial* of the said Samuel Greer did not take place before good and lawful men of the New Westminster Jury District, under the said

Jurors' Act. It is to be observed that both the grand and petit juries were composed of good and lawful men taken from the County of Westminster, which embraces within its geographical limits the New Westminster Jury District. The first ground did not occur during (but before) the trial of Greer, which, according to *Morin* v. *The Queen*, 18 S. C. R. 407, commenced with his arraignment on the swearing in of the petit jury; and, consequently (no objection having been taken to the indictment on this ground), by section 143 cannot be the subject of a writ of error. The second ground might have been a ground of error, but the alleged defect is cured by section 246 of the Dominion *Criminal Procedure Act*, which states that no omission to observe the directions contained in any Act, as respects the qualification, selection, balloting, or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, the drafting of panels from the jury list, or the striking of special juries, shall be grounds for impeaching any verdict, *or shall be allowed upon any writ of error* or appeal to be brought upon any judgment rendered in any criminal case.

Judgment of Crease, J.

The third and fourth grounds of error are stated to be that the Judge who tried the case, after his charge was concluded in Court and the jury had retired—at their request and in the presence of the prisoner, but not of the Attorney-General—visited the jury in the jury-room and *made a further direction* to them. In this it is to be observed that this statement does not properly form part of the record, and, consequently, besides the joinder in error is traversed by the Attorney-General. The Judge's charge is not part of the record. The only valid way in which the objection here stated could have been effectually raised would have been for prisoner's counsel to have brought up the point at the trial, and have got the presiding Judge to have either reserved or refused to reserve it. In either of which events it could have been considered by the tribunal appointed for dealing with such cases. The trial, it must be remembered, commenced with the arraignment and lasted until the sentence was passed. That interval was the only period during which such an objection could have been effectually taken. This not having been done, and the point not having been then raised, it cannot now be considered in error, under the authority of section 266 of the *Criminal Procedure Act*, which I have already quoted. So that there is no error here.

In dealing with this third ground of error, prisoner's counsel dwelt on a statement, some two hundred years old, of Lord Hale, in his

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History of the Pleas of the Crown, II., p. 296, that the petit jury, after retiring to their jury room in charge, may desire to hear one of the witnesses again. This can be done in open Court. If not done in open Court (p. 307), this appearing by examination in Court, and indorsed upon the record or *postea*, will avoid the verdict.

On this point, *Reg.* v. *Martin*, 12 Cox, C. C. 204, was referred to, but it is not in point. There the jury, after they had been charged and retired, desired a view, during which certain questions were asked by the jury of the witnesses to point out the locality, neither Judge, counsel, nor prisoner being present, nor the circumstance commented on upon their return into Court. The Court of Crown Cases Reserved sustained the conviction.

Lord Hale then goes on to say: "A jury, after retiring, may desire to ask a question of the Court for their satisfaction, and it shall be granted so it be in open Court." But he does not add if it does not take place in Court (as in the case of witnesses so doing), it shall be entered of record and avoid the verdict, which is what the prisoner's counsel contends for.

Judgment of Crease, J.

However inadvisable it may be for a Judge to communicate with a jury after they have retired, and in my opinion it is a custom more honoured in the breach than in the observance, such has been the common practice of the British Judges down to the present time for a long series of years, and is therefore not unlawful.

Several American authorities and cases on this subject were referred to—*The State* v. *Patterson*, 12 Am. Rep. 201 (Vt.), and *Bishop's Criminal Procedure*, Vol. I., § 1,000—to show that in certain of the United States all communications between Judge and jury after they have retired must be in open Court, or verdict would be avoided. But there is nothing before us to show that this practice is uniform throughout the United States.

That formerly it was not the practice in the State of Massachusetts we find from the report of *Sargent* v. *Roberts*, 11 Am. Dec., p. 185 (Mass.), in which State (while it is now settled that no such communication may be had with a retired jury save in Court, on penalty of a new trial) the report of the case clearly shows that previous to that decision the practice in that particular State had been exactly the other way, and that this case introduced a new practice there. But we cannot properly be guided by American practice in criminal matters. Every American State may have its own criminal practice, and possibly in no two States are they exactly alike. Their criminal laws, too, in several

respects are, we know, different from ours, and though the principles on which their criminal laws are based are the same as our own, and their authorities are very valuable to us as authorities on the abstract principles of law as applied to a new country, and are always referred to with great and deserved respect, it is utterly impossible for us to be guided by their practice in dealing with cases governed exclusively by our own law and practice; and under these latter it is clear, upon the authority already cited, that there is, on the third and fourth grounds here alleged, neither mistrial nor error.

The fifth ground is practically the same as the first and second, which have already been treated of, and under which it has been shewn that error does not lie.

The sixth ground is: That it does not appear by the record that Greer committed any offence known to the law *in the County of New Westminster*. In other words, the record does not show where the offence was committed. In this case, the description of the particular locality where the offence was committed is not required by the law; nor is it necessary to put a venue in the body of the indictment, unless the proof of the locality is necessary in proving the offence. "British Columbia, County of New Westminster," the venue in the margin, is the venue for all the facts stated in the indictment.

Judgment of Crease, J.

By section 245 of the *Criminal Procedure Act*, no judgment upon any indictment for felony or misdemeanor shall be stayed or reversed for the want of a proper venue where the Court appears by the indictment to have had jurisdiction over the offence.

It was the same in the *Sproule* case, where the record contented itself with a general venue, "British Columbia, to wit:" Such an objection as the defect alleged to exist here on the face of the indictment, should have been taken under section 143 of the *Criminal Procedure Act* before plea pleaded, and the Act says "not afterwards." "No motion in arrest of judgment," that section adds, "shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of the *Procedure Act*."

So there is no ground of error here.

Ground seven is an objection that the judgment roll is defective, in that the jurors are described as "chosen, tried, and sworn," instead of "selected, tried, and sworn," and that the premises are not defined with sufficient clearness.

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This is no ground of error. The record is really an abstract of the indictment, and follows the form used in Archbold's Crown Practice, and employed in the *Sproule* case, 12 S. C. R. 146, in appeal, where the record, compiled in a similar manner, was affirmed in every point.

"After verdict in such an offence as this," section 246 says, "judgment shall not be stayed or reversed because of any defect of the jury process or summoning of jurors."

And the same observations apply to ground eight, namely: That, by the record, James Ironside and other jurors were ordered by the Court to stand aside before the jury empanelled had been returned by the sheriff. Section 247 of the *Procedure Act* says that no omission to observe the directions contained in any Act as respects the qualification, selection, balloting, or distribution of jurors, the preparation of the jury lists, etc., shall be a ground of impeaching any verdict, or shall be allowed for error upon any writ of error or appeal to be brought upon any judgment rendered in any criminal case.

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Therefore, this objection that there was error in the Attorney-General setting aside James Ironside and some other jurors before the trial jury was empanelled is of no value after verdict. It was not shewn that the jury had been empanelled before these were ordered to stand aside.

In no case did defendant allege a diminution of the record to correct the record; nor was there any challenge to the array. All the objections now taken to the return to the writ of error are valueless. They are too late after joinder in error and argument—*Dunn* v. *Reg.* 12 Q. B. 1026-1031. All the grounds of objection are answered by these three sections—sections 104, 143, 244—and distinctly met by section 246 of the *Procedure Act*. And not one of these points was mentioned at the trial at all.

For all these reasons I am of opinion that the judgment of the Court below should be affirmed.

WALKEM, J.:—

Judgment of Walkem, J.

The plaintiff in error was convicted on the 14th December last at the New Westminster Assizes, held by the learned Chief Justice, of an assault occasioning bodily injury to Thomas J. Armstrong. He afterwards obtained a writ of error to test the validity of his conviction on several grounds, which I shall presently refer to. On his case coming before us the Attorney-General moved, as a preliminary proceeding, to quash the writ, as none of the grounds assigned had been reserved at

the trial. The motion being an important one we reserved our decision upon it; and it was arranged that the argument of the case should, as a matter of convenience, proceed, but subject to the result of the motion. We have, therefore, now to first decide whether the motion should be granted or not; for, if granted, the case of the plaintiff fails without more. In support of the motion the Attorney-General relied upon sec. 266 of the *Criminal Procedure Act* (Rev. Stat. Can. ch. 174), which is as follows:—"No writ of error shall be allowed in any criminal case unless it is founded on some question of law which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases."

Now it is clear from the record—by which alone we, as a Court of Error, must be guided—that none of the errors now alleged were reserved; nor was there any request to, or refusal by, the learned Chief Justice to reserve any of them. The question, however, remains —Is there amongst them any one or more which, in the language of the section, "could not have been reserved," even if the plaintiff in error had so desired? In my opinion there is; for I consider that the objections now made to the constitution of the grand and petit jurors that respectively indicted and tried the plaintiff in error are objections to the trial court or tribunal to try; and, as such, necessarily existed before the trial, and hence could not have been made at or reserved during the trial. In *Morin* v. *The Queen*, 18 S. C. R. 407, the Judges were equally divided in opinion as to when a trial by jury may be said to commence—one-half of the Court holding that it commences before the jury is sworn, and the other half after the jury is sworn. I take the latter view, which was the view expressed by Chief Justice Ritchie, Mr. Justice Strong, and Mr. Justice Fournier. The judgment of Chief Justice Ritchie appears to me to be unanswerable. It is based on dicta of English Judges, including such eminent ones as Lord Campbell and Barons Parke and Alderson. Baron Alderson was of opinion that "trial is a very technical word;" and according to Baron Parke "it only begins after the prisoner is given in charge to the jury," which means, as every practitioner knows, after the jury has been empanelled and sworn. It follows from what I have said that the motion to quash the writ of error cannot be upheld, as the alleged errors in relation to the constitution of the jury are sufficient to support the writ for the purpose of having them considered. But of what avail is this to the plaintiff in error? Although I have a decided opinion in respect of

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them it is useless to express it; for the Legislature has declared in section 247 of the same Act that *after verdict* "no omission to observe the directions in any act as to the qualification and selection * * of jurors shall be a 'ground for impeaching' that 'verdict,' or shall be allowed for error upon any writ of error." This explicit language practically prohibits this as well as every other Court in Canada from allowing the objections referred to. The same is to be said of the objections taken to the venue, to the frame of the indictment, and to that of the record. Section 104, for instance, enacts that "it shall not be necessary to state any venue in the body of any indictment; and the district, county, or place named in the margin thereof shall be the venue for all the facts stated in the body of the indictment," etc.; and by section 143 "Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or motion to quash the indictment before the defendant has pleaded, and not afterwards."

Judgment of Walkem, J.

As to the frame of the record, section 244, is as follows: "In making up the record of any conviction or acquittal on any indictment it shall be sufficient to copy the indictment with the plea pleaded thereto without any formal caption or heading, and the statement of the arraignment, and the proceedings subsequent thereto, shall be entered of record in the same manner as before the passing of this Act." Enactments so unequivocal require no authority to support or explain them; but if authority were needed, *Sproule's* case, decided by this Court, 1 B. C., Pt. 2, 219, and approved of by the Supreme Court of Canada, 12 S. C. R. 146, is in point. Apart from this the record in the present case closely follows the type of record approved of in England and set out in "Archbold's Crown Office Practice." One more objection remains to be disposed of; and I shall state it as it appears in counsel's brief or summary of the assignment of errors: "The learned Chief Justice after the jury had retired to consider their verdict (at the request of the jury) went to the jury-room and gave the jury further directions. Greer was present with the Sheriff, but it does not appear that the Attorney-General, who prosecuted for the Queen, was present. The plaintiff in error will contend that the Chief Justice's charge must be in open Court; that the jury-room was not an open Court, nor were the further charge and directions given in the presence of the said Attorney-General and Samuel Greer." The substance of all this is:—

1st. That the learned Chief Justice, at the jury's request, went to their room, but accompanied, by way of precaution on his part, by the accused and the Sheriff:

2nd. That he there gave directions to the jury (which are not stated):

3rd. That the Crown was not represented on the occasion; and

4th. That for that reason and, as the jury-room was not the Court-room, the directions so given, whatever they were, invalidated the trial.

Three American authorities were cited in support of this contention: *Sergent* v. *Roberts*, 11 Am. Dec. 185; *The State* v. *Patterson*, 12 Am. Rep. 205; and section 1000 of the first vol. of *Bishop* on Criminal Procedure. English authorities were also cited, to which I shall refer later on. In both of the American cases the communications between the Judge and the Jury were by correspondence, which was undisclosed to the parties or their counsel. For that reason they were deemed ground for a new trial. *Bishop's* statement of the American practice, as expressed in the section cited, is that no communication whatever between Judge and Jury is permissible except in open Court, and after notification to the parties and their counsel to attend. But this statement would appear to be open to qualification, for in section 2555 of *Thompson* on Trials, instances are given of the different views held by different State Courts on the question. One Court, for instance, went the length of holding that there was mistrial because the Judge passed through the jury room and suffered "the jury to put questions to him without answering them." On the other hand, it was decided in the State of Maine that "a written communication sent by the jury openly and in presence of counsel," was permissible. Again, "where a jury required further instructions and the Judge, after calling upon counsel for the defendant to go with him, who refused, and after seeking the defendant himself, who could not be found, went into the jury room and gave them the information they required," it was held by a New Jersey Court that there was "no error;" and, "where a Justice of the Peace, in response to a request of the jury, went to their room and gave a correct answer," a New York Court refused to set aside the verdict on that account. The last three cases are certainly directly opposed to the contention before us. The principal English authority to which we were referred is the following in *Hale's* Pleas of the Crown, vol. 2, p. 296:—"The jury may desire to propound questions to the Court for their satisfaction, and it shall be

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granted so it be in open Court." Although this passage was written about 200 years ago, it is remarkable that not a single English case can be found which supports or confirms it. There are other passages in *Hale* which have either been overruled by judicial authority or been allowed to become obsolete. On page 297, vol. 2, it is stated that if the jury "agree not before the departure of the Justices of jail-delivery into another county, the Sheriff must send them along in carts, and the Judge may take and record their verdict in a foreign county." Is it necessary to say that such a practice is unknown now? As to polling a jury, the same author observes (p. 299) that "if the jury say they are agreed the Court may examine them by poll. In *Sproule's* case the contrary, however, was held to be the law now. Another well known passage may be referred to (*see* p. 297):—"The jury must be kept together without meat, drink, fire, or candle, till they are agreed." The observations of Sir James Stephen on this subject in his *History of the Criminal Law of England*, vol. 1, p. 305, are well worth quoting:—"It is," he observes, "a remarkable illustration of the vagueness of the criminal law on points which one would have thought could not have remained undecided, that till very modern times indeed it was impossible to say what was the law in cases in which the jury could not agree; and it was possible to maintain that it was the duty of the presiding Judge to confine them without food or fire till they did agree. It was, however, solemnly determined in 1866, in the case of *Winsor* v. *Regina*, L. R. 1 Q. B., 289, 390, that in any case regarded by the Judge as a case of necessity the jury may be discharged and the prisoner committed and tried a second time; and that a Judge is justified in regarding a case in which the jury are unable to agree after a considerable length of time as a case of necessity. One result of this decision has practically been to obviate the objections usually made to the rule requiring unanimity in jurors, all of which turned on the notion that the law required the jury to be starved into giving a verdict."

Judgment of Walkem, J.

It will thus be seen that there has been a signal departure from the practice of our ancestors, 200 years ago, with respect to polling juries, carting them from place to place, and barbarously coercing them, by starvation, into finding a verdict. This is also true in regard to the practice which *Hale* informs us regulated communication between the Judge and the Jury in his day; for, in the recent and very important trial, in the English Divorce Court, of the action brought by Lady Russell against her husband for judicial separation, on the ground of cruelty, communications in writing passed between the Judge and the Jury

after the latter had retired to consider their verdict. The circumstance is thus reported in the *Times* of 5th Dec., 1891:—"The jury retired to consider their verdict at 5:15 p. m. After they had been absent just half an hour, a written communication was sent from them to the learned Judge, who addressed to them a letter in reply. At 6:10 p. m. the jury came into Court, and in answer to the formal question put to them, the foreman stated that they had agreed upon their verdict, which was that Lord Russell had not been guilty of cruelty towards his wife." Now, I admit that such a report is not authoritative, but there is no reason to doubt its accuracy. Eminent counsel—Sir Edward Clarke and Sir Charles Russell—respectively represented the parties to the action; yet the written communication between the Judge and the Jury, though not disclosed at the time, were not objected to as either unprecedented or evil in principle. What occurred in the present case was assuredly less objectionable; for the communication between the learned Chief Justice and the jury was not private, but open and in the presence of the accused and the Sheriff, and to the knowledge of the Attorney-General, who elected, as he had a right to do, not to be present. What the nature of the communication was is not stated; and it is fair to assume that it was not prejudicial to the accused, otherwise his counsel would have certainly complained of it. But even if the communication had been contrary to English practice, we would be precluded by section 266, which I have already referred to, from giving any effect to the objection now taken, as it was not taken at the trial. No Judge can supersede the law. He cannot set himself above it, or alter or mould it to suit his own views or the views of others. He must administer it, and where it is clear and explicit, as in the present case, must obey it and insist upon its being obeyed. Every ground of error which has been advanced is declared by the several enactments, which I have quoted, to be untenable. The present criminal code and system of procedure have been framed on humane and enlightened principles, and according to those principles the plaintiff in error has been tried. What more could he expect? As to the jurors that tried him, he had a voice in their selection, and it must therefore be assumed that they were acceptable to him. There is no suggestion that they brought in a verdict contrary to the evidence, or acted otherwise than in accordance with a conscientious discharge of their public duty. The judgment of the learned Chief Justice must therefore be affirmed, and, on the present application, judgment entered for the Crown.

Judgment of Walkem, J.

FULL COURT. DRAKE, J.:—

March, 1892. I am of opinion the judgment of the learned Chief Justice should be affirmed.

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The first and second grounds of error assigned are that the grand and petit jury are by the record stated to be taken from the *County* of Westminster, and not from the *District* of New Westminster, as established by the *Jurors' Act*, chap. 64 (Consolidated Statutes, B. C. 1888). This is a point which did not arise at the trial, because the trial commences with the arraignment of the prisoner and swearing in of the petit jury (*Morin* v. *Regina*, 18 S. C. R. 407), and if it was not for sections 246 and 247 of the *Procedure Act* it would be ground of error under section 266 of the same Act. But sections 246 and 247 say that judgment after verdict shall not be stayed or reversed by reason that the jury process had been awarded to a wrong officer, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, and no omission to observe the directions contained in any Act as respecting the qualification, selection, balloting, or distribution of jurors, the preparation of the jurors' book, the selection of jury lists, the drafting panels from the jury lists, shall be ground for impeaching any verdict, or be allowed for error upon any writ of error or appeal.

Judgment of Drake, J.

The selection of the jury from the County of Westminster is an omission to observe the directions of the *Jurors' Act*, which says the jury are to be summoned only from the district as established by the *Jurors' Act*, which in this case is the Electoral District of New Westminster and New Westminster City, except the Coast District and Queen Charlotte Islands, the County of Westminster being a larger area than the New Westminster Jury District as above defined, but including that district within its boundaries. This assignment of error then is contrary to the express language of the statute. The objection could have been raised in another shape.

The next ground of error is that the learned Judge after charging the jury, at their request went into the jury-room, the prisoner being present, and further charged them. I do not understand how this statement appears on the record. The record consists of the following particulars: First, the Court; then the grand jurors by whom the indictment is found; the time and place when and where it was found, and that it was found on oath. These particulars form the caption which by section 244 of the *Procedure Act* are no longer required.

The next document to be set out is the indictment. Then comes the statement of the appearance of the defendant, his arraignment, plea, joinder of issue, award of jury, process, verdict, allocutus, and sentence.

The charge of the Judge to the jury is no part of the record, and the only mode of taking objection to the charge, or to any action on the part of the trial Judge, is by stating an objection and obtaining a ruling of the Judge thereon, either reserving or refusing to reserve the point. If this step was not taken it cannot be considered in error under section 266 of the *Procedure Act*. This was a matter that arose at the trial and could have been questioned, but was not, as appears by the record.

The prisoner's counsel cited a dictum of Lord Hale, in *Hale's Historia Placitorum Coronæ*, where that Judge says that "if the jury desire to ask any question after having retired to consider their verdict, it should be in open Court;" and he goes on to say that "if the jury desire to have the evidence of any witness repeated it should be in open Court." For the latter, authorities are cited, and in the case of *Reg.* v. *Martin*, L. R. 1, C. C. R. 378, this point is discussed. Since the time of Lord Hale no authority was cited or could be found, either in civil or criminal cases, showing that a communication between the Judge and a jury has been held to amount to a mistrial. The custom of answering questions put by the jury to the Judge after the jury have retired has been a common practice in the English Courts. As a matter of expediency I think the better practice would be that propounded by Lord Hale, but I do not consider it a ground of mistrial or error.

Judgment of Drake, J.

Two American authorities were cited, *State* v. *Patterson*, 45 Vt. 308, 12 Am. Rep. 200, and *Sergent* v. *Roberts*, 11 Am. Dec. 185, in which it was held to be error for a Judge to communicate with the jury, not in the presence of counsel for both sides, and the Judges in those cases mentioned that that practice had up to that time been very common, and they evidently laid down a new rule for future guidance. American cases are of great use in questions of principle, and valuable aid has often been derived from the decisions of Judges of American Courts, but in questions of practice they are no guide, as each Court is in fact the authority for its own procedure and practice, unless controlled by some supreme authority. I cannot, therefore, accept these cases as authorities governing our practice of criminal law.

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The fifth assignment of error is that it does not appear by the record that the grand jury had jurisdiction over the subject matter of the presentment to find the indictment against the prisoner.

This point is identical with the first error assigned, and has been disposed of.

The sixth error assigned is that it does not appear by the record that the defendant committed any offence known to the law in the County of Westminster or Province of British Columbia.

The point stated for argument on this assignment of error is that by the record it did not appear where the offence for which defendant was tried was committed.

This is not a ground of error, as it is not necessary to state any venue in the body of the indictment unless local description is required, and the district or county named in the margin thereof shall be the venue for all the facts stated; and under section 143 of the *Procedure Act*, every objection to any indictment for any defect apparent on the face thereof shall be taken before plea pleaded, and not afterwards; and no question of law was reserved at the trial, and the record shows a venue which governs the whole of it.

Judgment of Drake, J.

Assignments of error seven and eight are not well taken. In my opinion, the record is sufficiently clear; it follows the form of record set out in *Archbold's Criminal Pleading*, which do not materially differ from the form given in Taschereau, but if a record is imperfectly returned the plaintiff in error should allege a diminution of the record, but it is too late to do so after errors have been assigned, joinder therein, and argument thereon—*Dunn* v. *Reg.*, 12 Q. B., 1026, 1031.

I am, therefore, of opinion that the judgment of the Court below should be affirmed.

Conviction affirmed.

In re CLOSE & BERRY.

Cancellation of retail liquor licence obtained clandestinely and in violation of Statutory requirements—Court House, meaning of—Duty of Licensing Court in considering applications for licences.

A retail liquor licence which was obtained clandestinely and without due regard to preliminary statutory requirements was ordered to be cancelled.

A school-house which had been used on several occasions as a place of meeting by a Licensing Court, is not a Court House within the meaning of section 11 of the *Licenses Act.*

On an application for a retail licence, to obtain which a petition is necessary, the Magistrates are bound to consider all the circumstances that make against as well as in favour of granting it, and are justified in refusing it if, for good reasons, they are satisfied that it ought not to be granted.

Statement.

APPEAL by summons under section 34 of the *County Courts Act, 1888*, made by one Wolley against the issue of a retail liquor licence to Close & Berry, under circumstances that appear in the jndgment.

Irving for the appellant; *Walker* for the respondents.

January 14th, 1892. CREASE, J., sitting as a County Court Judge:—

Judgment.

This was an appeal by summons under section 34 of the *County Courts Act, 1888*, made by Clive Phillipps-Wolley against the grant of a retail licence to James Hugh Close and James Reuben Berry for the Pavilion Saloon at Oak Bay, on the ground that such licence was obtained by fraud and in a manner contrary to law.

The grounds of appeal, briefly stated, were non-compliance with the requirements of the *Licenses Act*, cap. 73, Consolidated Acts, 1888, namely:—

1. Under section 11: In not posting a copy of the notice of the intention to apply for a licence to two Justices of the Peace of the district, on the outer door of the Court House nearest to the Pavilion Saloon, the place in respect of which such petition is made.

2. Under section 13: In that Berry had not been a resident of the Province for twelve months at the time of applying for the retail licence.

3. Under section 18: In that no petition or requisition sufficient to satisfy this section was obtained, in that is was not signed by two-thirds of the residents—where the licence applied for is for Oak Bay.

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The Pavilion Saloon is a small lightly constructed building, without bed-room or any other convenience, either of a dwelling house or hotel, and merely is a saloon for the selling of intoxicating liquors by retail at Oak Bay.

It is situated on a street near the sea-shore, on a lot on the new suburban place; a map of which, by Messrs. Crane, McGregor & Boggs, was produced to the Court, but was not exhibited before the Licensing Magistrates.

This tract of land was laid out by the Oak Bay Improvement Company, but practically not opened up until May last, when tram-cars ran down to Oak Harbour. The number of residents, all told, in Oak Harbour appears to be three—Berry, the applicant, one Harris, and Clive Phillipps-Wolley (the present complainant, who has from the first openly opposed the grant of the licence to the saloon, as calculated to attract to it an undesirable class of customers).

Those appear to be all who live in the immediate neighbourhood, within the townsite of Oak Bay, as laid out on the map, and the 17 acres immediately adjoining.

Judgment.

There is no house of any size, except Mr. Wolley's. The saloon is not in any thoroughfare from one district to another, the travellers along which might require refreshments on the way, and depends entirely for its maintenance upon the casual transient passengers from Victoria by the electric tramway to Oak Bay.

It was used, before Mr. James Berry and Mr. Close took it over, as a dancing as well as drinking saloon. That, however, was discontinued when the present applicants took possession in August last.

Against their management there has been no complaint whatever.

In August last two ex-policemen, Miller and Bloomfield (the latter as agent for the applicant), were set to work to procure signatures to a petition, or requisition, of residents in favour of the grant of a retail licence to James Berry alone for this Pavilion Saloon. James Hugh Close's name was not even mentioned in it.

Altogether, from August to the 14th December, only 43 signatures were obtained to it, two or three of whom were ladies and four dealers in liquor. Miller, who collected the names, very honestly stated that his instructions were to collect all the names he could of residents in favour of this grant outside of the municipal limits of Victoria District.

Accordingly we find in the requisition the names of persons residing at Victoria Gardens, beyond the Gorge, at least six or seven miles away from this saloon, and persons residing along the Mount Tolmie

road, and miles away at Cadboro Bay, and other places where they could presumably have no interest whatever in a saloon at Oak Bay.

Mr. F. G. Walker, counsel for the applicants, after the names and residences were disclosed, very ingeniously attempted to show that "settlement" must reasonably be construed to include a tract of land, skirting along the municipality of Victoria in a line northward across Mount Tolmie road to a point from which, striking to the eastward, it could be made to include Cadboro Bay, and exactly to enclose within such limits the bulk of the names which found themselves in this petition. But that was an *ex post facto* limitation to suit his client and not in accord with the canvass made by Miller, or as I consider the law.

It only required a glance at the voters' list of Victoria District, which was produced in evidence, to see that the 43 names on the petition bore no proportion whatever to the number of residents in Victoria District, who, I take it, were the residents legally entitled to express their views on the subject. And if it should be contended that the word "settlement," coming after town or village, was not capable of so large a construction, that would reduce the area for "residents" to Oak Harbour itself, which would be reducing the Act to an absurdity. I think, therefore, this petition does not fulfil the requirements of section 18. Moreover, Mr. Close is excluded from its provisions and advantages and not entitled to a licence. And as Mr. R. Ward in his evidence shows that Mr. James Berry had not been at the time of his application a resident in the Province for twelve months, and his evidence is not contradicted, I think on that ground also the petition, were it otherwise correct and in order, fails of effect; and the decision of the Magistrates in accepting it was wrong. While on the subject of the construction of the legislation, I may add that many presiding Magistrates are under the impression that all they have to look to is to see whether they have a petition before them, signed by two-thirds of the respectable people anywhere round in the neighbourhood of the proposed saloon—indeed, that if they have that, they are under an obligation to grant the licence. There could not be a greater mistake. On the contrary, they are bound, in duty, to see and consider carefully every circumstance around them which tends against the granting of the licence, as well as those for it. They cannot grant a licence without such a requisition; but if for good reasons they are satisfied it ought not to be granted, they are quite justified in refusing it. A licence is a privilege granted, after the Magistrates are satisfied it can do no

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harm. It is not a matter of common right, but the opposite. It is a creature of the law, not a matter of necessity, and the Act has, therefore, to be considered strictly. It is a matter too of common experience that when a house for the sale of intoxicating liquors is started in a country place, away from the immediate supervision of the police, it is not long before a constable has to be appointed to prevent excess and disturbance therefrom arising.

I am also of opinion that a copy of the notice of intention to apply for the licence should have been posted up (as required by section 11) outside the Law Courts in Victoria, which certainly was the nearest Court-house to the saloon in question.

The school-house for Lake District, although it had been used on several occasions as the place where Licensing Court had been held for the Prairie Tavern licence in Saanich, and others, was not a "Court-house" at all, and certainly not the Court-house nearest to the place in respect of which the application was made.

Judgment.

The importance of this was shown by Mr. Ward's evidence, and that of Mr. Wolley, who was especially on the lookout for the posting of such notice to appear and oppose.

The Magistrates, too, should have paid some regard to the written protest of the persons who oppose the grant. The Act says: "Any person" may complain, not necessarily a "resident" only. Nor did they exercise the discretion entrusted to them by the law, when they refused to consider whether and how much the property-holders all around the proposed saloon would be injured by the grant of a licence. As part of "the public" they were entitled to be considered, and among those to whose interests and convenience "due regard" should be had. It was not only the portion of the public who would wish to use the saloon who were contemplated by the Act as "the public." Every person likely to be directly affected by its establishment and the character of the persons it would be likely to attract to the neighbourhood, were considerations well worthy of Magisterial attention.

Moreover, the clandestine mode in which the licence was obtained calls for comment. There was no good reason why the Licensing Court should not have been held at Victoria, where Mr. Ward, an experienced Licensing Magistrate, could have, and would have, attended, as well as in an out of the way school-house outside of Victoria District. John Mount Langley, a Provincial constable, testifies that Bloomfield or Miller—I am not sure which,—on the question of where to post the notices coming up at the police office, told Langley "he

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was going to post one copy of the notice at the school-house at Lake, and one at the Court-house here" (meaning Victoria), and was told by Langley "that would be all right." Mr. Wolley, Mr. Ward and Mr. Hussey, Superintendent of Police, searched round outside the Court-house in vain for this notice, and Mr. Hussey informed the Licensing Magistrates of the fact before the licence was granted at the Licensing Court. But no attention was paid to his representation. The certificate was drawn out by Mr. Bloomfield, the agent of the applicant (instead of by Hussey, the clerk), in the name of Close as well as Berry. The names to the petition were avowedly gained under the idea conveyed to them by Miller, with the consent of the applicants, that a hotel, with every accommodation of boats and seaside pleasure resorts was being established, which ladies could safely patronize, instead of merely a pavilion saloon for the sale of liquor by retail, and the agent of the appellant in drawing out the form of certificate substituted the word "hotel" for the word "saloon" used in the petition, and for which the petitioners actually signed, and from all these considerations, therefore, and as to the other matters proved in evidence, I am of opinion that the complaint of Mr. Wolley has been fully proved, and I therefore determine and adjudge that the said licence granted to Messrs. Close & Berry is and stands revoked and cancelled accordingly, and I order that the costs of and incident to this appeal be paid by the said appellants, James Hugh Close and James Reuben Berry.

Judgment.

Licence cancelled with costs.

In re LOEWEN & ERB.

CREASE, J.
March, 1892.
Re LOEWEN & ERB.

Quieting Titles Act—Title by possession.

Petitioners obtained for an order for the issue of a declaration of title to them in fee, on producing evidence of twenty years' continuous and undisturbed possession, and other acts of ownership, payment of taxes, non-payment of rent, and non-acknowledgment of title.

cited IN RE QUIETING TITLES ACT IN RE HURST ESTATE (1943) 2 WWR 666

PETITION, *ex parte*, for an order for the issue of a declaration of title in fee under the *Quieting Titles Act*.

CREASE, J.

March, 1892.

Re LOEWEN & ERB.

The facts appear in the petition, which was as follows:—

IN THE SUPREME COURT OF BRITISH COLUMBIA.

IN THE MATTER OF THE "QUIETING TITLES ACT," AND IN THE MATTER OF SUBDIVISION No. 17 OF LOTS 654 AND 655, VICTORIA CITY.

Petition.

To the Honourable HENRY PERING PELLEW CREASE, one of the Judges of the Supreme Court of British Columbia:

The humble petition of Ludwig Emil Erb and Joseph Loewen, of the City of Victoria, in the Province of British Columbia, brewers, carrying on business under the firm name of "Loewen & Erb,"

Sheweth as follows:—

1. That your petitioners first commenced to carry on the business of brewers in the month of August, in the year 1870, upon the portions of the above-mentioned Lots Numbers 654 and 655, adjoining the said Subdivision No. 17 of the same lots, and they subsequently purchased the said portions, and are now, and have since that date been, in continuous occupation thereof.

2. That at the time of their so commencing business as aforesaid, the said Subdivision No. 17 of said Lots 654 and 655 was unoccupied, but the title thereto was registered in the name of one Jean Trenis. Your petitioners made many enquiries at the time to ascertain the whereabouts of the said Jean Trenis, the apparent owner of the said subdivision, but were unable to learn anything of his whereabouts, and, acting under the advice of Mr. Leopold Lowenberg, who was a real estate agent at that time, carrying on business in Victoria aforesaid, and who had also, under instructions from your petitioners, made certain enquiries as to the said Jean Trenis, they entered into possession of the said subdivision, and at their own expense erected thereon a wooden building, which has since been in their continuous use as a cooper shop, and for other uses in their business as brewers, as aforesaid.

3. Your petitioners have, since the month of August in the year 1870 as aforesaid, been in continuous and uninterrupted and undisturbed possession of the said Subdivision No 17, and have regularly paid all the municipal taxes levied thereon.

4. Your petitioners have recently caused other enquiries to be made to ascertain where the said Jean Trenis now is, if living, from persons who have been living in the City of Victoria for many years, but, so far as they can learn, he is not known, nor has any person any recollection of him.

5. Your petitioners claim, by right of their uninterrupted and undisturbed possession of the said lands as aforesaid, to be the absolute owners thereof by prescriptive right.

Your petitioners therefore humbly pray:

(1.) That their title to the Subdivision Number 17 may be declared:

(2.) That it may be declared that they are the legal and beneficial owners in fee simple in possession of the said Subdivision Number 17, free from all rights, interests, claims, and demands whatsoever.

And your petitioners will ever pray, &c.

(Signed) JOSEPH LOEWEN,
,, L. E. ERB.

CREASE, J.

March, 1892.

Re LOEWEN & ERB.

Affidavits were filed verifying the statements set out in the petition.

Yates for the petitioners: All that is necessary under the statute (3 & 4 Will. IV., c. 27) to constitute a possessory title to real property is actual possession without payment of rent or written acknowledgment of title for the statutory period. I refer to *Chitty on Statutes*, 3rd Ed., Vol. 3, p. 30; *Devine* v. *Holloway et al*, 14 Mo. P. C. 290; *M'Donnell* v. *M'Kinty*, 10 Jr. L. R. at 526: *Bryan* v. *Cowdal*, 21 W. R. 693; *Rains* v. *Buxton*, 14 Ch. D. 537; *Jack* v. *Walsh*, 4 Jr. L. R. at 257; *Bassington* v. *Llewellyn*, 27 L. J. Ex. 297.

The learned Judge, after taking time to consider, on the 23rd day of March, 1892, made an order that a declaration of title in fee simple in possession do issue to the petitioners as prayed, after three months' notice in the Daily News and the B. C. Gazette to adverse claimants of the application, provided that no adverse claim was filed within that time with the Registrar of the Supreme Court.

Order made.

FOLEY *v.* WEBSTER *et al.*

FULL COURT.

March, 1892.

FOLEY *v.* WEBSTER *et al.*

Negligence—Duty of employer to employed—Volenti non fit injuria—Findings of the jury—Practice.

Affirmed 21 SCR 580

An employer of mill-hands is bound to take reasonable care that the mill is properly and safely constructed and fitted with machinery such as to ensure a reasonable degree of security to a careful workman, and to provide reasonably skillful and careful supervision.

The maxim *Volenti non fit injuria* considered.

Applied Wilkinson v. B.C. Electric (1939) 3 DLR 623 50 CRTC 232

Smith v. *Baker*, 1891, A. C. 336; *Clark* v. *Holmes*, 7 H. & N. 937; *Thomas* v. *Quartermaine*, 18 Q. B. D. 685; *Yarmouth* v. *France*, 19 Q. B. D. 647; *Patterson* v. *Wallace*, 1 Macq. 748; *Brydon* v. *Stewart*, 2 Macq. 30; and *Weems* v. *Mathieson*, 4 Macq. 215, referred to.

Findings of a jury explained and harmonized.

The Court may allow the plaintiff's pleadings to be amended at the close of the trial to meet the facts proved, and in accordance with the lines on which the trial has proceeded; following *Clough* v. *London and N. W. R. Co.*, L. R. 7 Ex. 30.

It is not competent to an appellant, *uno flatu*, to move alternatively for reversal of the judgment as entered on the findings of a jury, or for a new trial. *O. xxxix.* and *O. xl., R. 4*, of the *S. C. Rules of 1880* explained. *Davies* v. *Felix*, 4 Ex. D. 35 followed.

FULL COURT.

March, 1892.

FOLEY
v.
WEBSTER
et al.

ACTION for damages for injuries caused the plaintiff (employé) by defective machinery in the defendant's mill. The facts are clearly set forth in the judgments. The pleadings were as follows:—

STATEMENT OF CLAIM.

1. The plaintiff is a chainer, and the defendants are the proprietors of a mill in the City of Vancouver, called the Vancouver Saw Mill.

2. In the month of April, 1890, the plaintiff was employed by the defendants as such chainer to work for the defendants in their said mill.

3. In the course of the said employment the plaintiff had to work on a rolling tier or rollway for logs, constructed by the defendants for that purpose in their said mill.

4. The said rolling tier or rollway was by the negligence of the defendants constructed unsafely and was in an unsafe condition, and unfit for the purpose aforesaid.

5. The defendants *well knew* that the said rolling tier or rollway was constructed unsafely and was in an unsafe condition, and unfit for the purpose aforesaid, but the plaintiff was ignorant thereof.

6. In the course of his employment it was the duty of the plaintiff, by the use of machinery provided by the defendants for that purpose, to move saw logs across the said rollway, and place them upon a carriage on the opposite side of the rollway.

Statement of Claim.

7. When moving the said logs by means of the said machinery, it was necessary that the plaintiff should be provided with proper and sufficient rolling blocks with which to check the motion of the said logs and prevent their rolling upon himself and from off the said rollway.

8. On several occasions prior to the 30th day of April, 1890, the plaintiff notified the defendants that the rolling blocks with which the defendants provided him were worn out, and were not fit for the purpose for which they were to be used.

9. The plaintiff also notified the defendants that he would refuse to work longer unless proper and sufficient rolling blocks were immediately provided him.

10. The said defendants on each several occasions promised to immediately provide the plaintiff with proper and sufficient rolling blocks, and requested him to continue working.

11. The defendants wholly neglected to provide the said rolling blocks, and negligently, and carelessly, and unmindful of their duty in that behalf, omitted to take due, proper, and reasonable care of the plaintiff in his said employment and work, and improperly exposed him to unreasonable risk.

12. By reason of the premises, whilst the plaintiff was so employed as aforesaid, performing his work of rolling logs on the said rollway, one of the logs thereon rolled upon him and knocked him down.

13. The plaintiff's leg was broken and crushed by the said log, and he was permanently injured and rendered unfit for work, and incurred $95.00 expenses for surgical and medical attendance.

And the plaintiff claims $5,000.00.

STATEMENT OF DEFENCE.

Statement of Defence.

1. The defendants deny paragraphs one and two of the plaintiff's statement of claim so far as they allege that the plaintiff is a chainer and was employed as such in their mill, and say that he was employed as a log-roller.

2. The defendants deny each and every of the allegations contained in paragraphs four and five of the Statement of Claim, and say that the said rolling tier or rollway was and is in safe and first-class condition, and is of the latest design, well constructed, and perfectly sound.

3. The defendants further say that if the said rolling tier or rollway was unsafe the plaintiff well knew the fact, but they were ignorant thereof.

4. The defendants deny paragraphs seven, eight, nine, ten, eleven, and twelve of the plaintiff's Statement of Claim, and each and every of the allegations therein contained, and say in answer thereto that the blocks therein referred to were, and are, in good repair and are still in use, and that it was a part of the plaintiff's duty as such log-roller to renew the said blocks from time to time as it became necessary, and that if the said blocks were out of repair that the plaintiff knew well that fact, but that they, the defendants, were ignornnt thereof.

5. The plaintiff never at any time notified the defendants, or either of them, that the rolling blocks were worn out or unfit for use, or that he would refuse to work longer unless proper ones were immediately provided, nor did the defendants, or either of them, request him to continue such work, or promise to provide him with other blocks, but the defendants repeat the allegations contained in paragraph six, and say that it was part of the duty of the plaintiff to renew such blocks from time to time as occasion might require.

6. And the defendants say that if the plaintiff was knocked down and his leg broken, as alleged in paragraphs twelve and thirteen of his Statement of Claim, that it was by reason of his own negligence and carelessness, and that they are not in any way responsible for the injuries received.

REPLY.

Reply.

1. The plaintiff joins issue on the defendants' Statement of Defence.

2. The plaintiff says that the terms "chainer" and "log-roller" have one and the same meaning, and are used to designate a person who rolls logs on a rollway in a mill by means of a chain worked by steam power, in which capacity the plaintiff in his Statment of Claim alleges he was employed by the defendants.

3. The plaintiff says that it was no part of his duty as such log-roller to renew the rolling-blocks from time to time as it became necessary.

The action came on for trial on May 20th, 1891, before Mr. Justice McCREIGHT and a special jury, to whom the learned Judge left certain questions which, with the answers, were as follows :—

1. Was machinery and build of mill good as regards safety of workmen? A.—No.

2. Were chock blocks sufficient? A.—No.

3. (*a.*) Was slant of rollway dangerous, (*b.*) or did it require sufficient blocks to render it safe? A. (*a.*)—Yes. (*b.*)—Yes.

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4. What was the inducing cause or causes of accident, having regard to slant, chock blocks, and alleged negligence? A.—Slant of rollway and defective chock blocks were inducing causes.

5. Could the plaintiff by the exercise of such care and skill as he was bound to exercise have avoided the injury, having regard to the proper discharge of his duties as chainman? A.—No.

6. Did plaintiff complain of the chock blocks to the person or persons who appeared to be the authorized person or persons to whom he should complain? A.—Yes.

7. Did plaintiff know of slant? A.—No.

7*a*. Damages if plaintiff entitled to recover? A.—$5,000.

8. Did Burns promise to make chock blocks good? A.—Yes.

9. What was Burns' position and authority in the mill? A.—Millwright in charge of machinery.

10. (*a*) Apart from machinery, was discipline and management of mill good, (*b*) and was want (if any) of such an inducing cause of accident? A.—(*a*) No. (*b*) Yes.

11. Was plaintiff aware of the state of the chock blocks? A.—Yes.

12. Were defendants, or either of them, cognizant of defect in chock block? A.—No.

13. If they were not cognizant, ought they, or either of them, to have been so? A.—Yes; as manager and foreman, the defendant, Mr. Webster, should have taken cognizance of this matter.

14. Did they exercise due care as to rollway and blocks being in a safe and proper condition? A.—In his capacity of manager and foreman, the defendant, Mr. Webster, appears *not* to have exercised due care as to rollway and blocks.

15. If the rollway and blocks were defective, was it by reason of the personal negligence of the defendants, or either of them, or did they, or either of them, know? A.—The defective condition of the rollway and blocks appears to have been due to personal negligence on the part of one of the defendants, Mr. Webster, in his capacity of manager and foreman.

At the trial, *Jenns*, for defendants, objected to the charge in so far as it referred to the questions of the safe build of the mill and bad management, on the ground that these were not set up in the pleadings, to which the learned Judge replied:—

"All requisite amendments are to be made, necessary for determining plaintiff's claim against the defendants for injuries sustained in the mill; and the point was examined, too, by counsel as well as the jury throughout the defence."

On June 24th, 1891, a motion was made by *McPhillips*, for plaintiff, for judgment, and a cross-motion by *Jenns*, for defendants, to set aside all the findings of the jury on matters outside the record, and for a non-suit.

Judgment having been reserved, was delivered on the 29th day of December, 1891.

McCREIGHT, J.:—

This is a motion for judgment on the findings of the jury, and the only question before me is what judgment is to be entered on the findings of the jury—See *Wilson's Judicature Act*, p. 416, 5 Ed. If the defendants are dissatisfied with those findings, their course appears to be to move for a new trial. I gather this is clearly the law, as derived from *Davies* v. *Felix*, 4 Ex. D., 32, 37 (C. A.); *Rocke* v. *McKerrow*, 24 Q. B. D., 463-465 (C. A.); and see *Potter* v. *Cotton*, 5 Ex. Div., 137 (C. A.) Mr. Jenns, at the close of the case for the defence, objected that the unsafe build of the mill and its bad management were not set out in the pleadings; but I replied that all requisite amendments were to be made necessary for determining the plaintiff's real claim against the defendants, which in substance was for injury sustained by the defendants' negligence in the mill, and the point was examined, too, by counsel as well as the jury throughout the defence—See *Clough* v. *L. & N. W. R. Co.*, L. R. 7 Ex., at p. 30, for the way in which that case was dealt with by Mr. Justice Lush as to amendments. I may say that questions as to the propriety of granting or refusing amendments are to be dealt with by motion for a new trial, whereas my judgment is sought with a view to appealing (if adverse to the defendants) to the Full Court. That this is so appears from *Wilkin* v. *Reed*, 15 C. B., 192; 22 L. J. C. P., 195; 23 L. J. C. P. per *Maule*, J. p. 195, which was a motion for a new trial; and *Archbold's Practice*, pp. 372, 1213, 13th Ed., but as the propriety of the amendment was disputed, I may refer to some authorities bearing on it—See *Roscoe*, p. 270, 15th Ed., amendment for determining the real question in controversy between the parties; *Taylor on Evidence*, 223 (note), and *Wilkin* v. *Reed*, 22 L. J. C. P., above cited. Mr. Jenns made no application for adjournment to call further evidence, and though not material to my present judgment, I think the amendment was properly made. I cannot say I am dissatisfied with the findings of the jury. It is almost unnecessary to add that amendments *de facto* are not actually made on the record, and I have, further, only to consider what judgment I am to give on the findings—See *Wilson's Judicature Acts*, p. 416, 5th Ed. I think, according to the law laid down by the Judges in *Clark* v. *Holmes*, 7 H. & N., 937 (Ex. Chamb.), and 31 L. J. Ex., 356, I must direct that judgment be entered for the plaintiff on the various findings and questions; for it is admitted, as I understand, and could not be denied, that Webster knew of the slant in the rollway, whilst the jury find that the plaintiff did not know; and Webster,

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under these circumstances and according to what is laid down by the Judges in *Clark* v. *Holmes* above quoted, should have exercised some care about these defective chock blocks, especially in his character as manager as well as proprietor, as they were the only safeguards against the dangers arising from the slant in the rollway, and were in a bad state for days, though the plaintiff complained of them. As regards the maxim *votenti non fit injuria*, it is plain that even if the plaintiff was *sciens* he was not *volens*—See his evidence as to the slant in the rollway, and see *Thomas* v. *Quartermaine*, L. R. 18, Q. B. D., 696 (C. A.), per Bowen, L. J., and *Smith* v. *Baker* (1891), A. C., pp. 337, 344-364. Again, he was not even *sciens*, as the jury find. Dealing separately with question 10 and the answer thereto, I think judgment must be given for the plaintiff on the finding. I gather from the discussion that a saw-mill requires proper discipline and management as much as a ship at sea. There must be judgment accordingly for the plaintiff with costs for the damages found by the jury, with the amount of which I am not concerned.

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The defendants now moved the Full Court, alternatively, either that the judgment as entered on the pleadings be reversed, or for a new trial.

The argument came on to be heard before BEGBIE, C.J., CREASE, WALKEM, and DRAKE, JJ.

Argument on Appeal.

Jenns for the defendants: The learned Judge should not have allowed amendments, after case had gone to jury, introducing new issues, and this, an amendment introducing the fact of general negligence, was. The only evidence on this point was on the cross-examination of the defendants' witnesses, none having been given by the plaintiff or his witnesses. Had such an averment been on the pleadings, the defendants would have had their mill examined by experts, and called other employés as to the general condition and management: *Edevain* v. *Cohen*, 43 Ch. Div. 187; *James* v. *Smith*, 1 Ch. 387; *Lowther* v. *Heaver*, 41 Ch. Div. 248; *Hammond* v. *Howard*, 20 U. C. Q. B. 36; *Snyder* v. *Snyder*, 22 U. C. C. P. 361; *Green* v. *Beaver & Toronto M. F. I. Co.*, 34 U. C. Q. B. 78.

Apart from amendments as to negligence at large, only two allegations of negligence are contained in the statement of claim, one having relation to the rollway, and being an allegation of negligence in the construction of the mill; the other, contained in the seventh paragraph,

being for not providing proper and sufficient chock blocks for use on the said rollway; and, in dealing with the case, regard must be given to the fact that the accident occurred before the passage of the *Employers' Liability Act*.

First, in regard to the question of the chock blocks, the jury have found that the plaintiff knew of this defect, and that neither of the proprietors were aware of it. So far as this branch is concerned, the case is not distinguishable from *Miller* v. *Reid*, 10 O. R. 419, and the plaintiff should have been nonsuited.

As to the sloping rollway, the jury found that the inducing cause of the accident was the slant and the defective chock blocks, and that the plaintiff did not know about the slant. It is to be noticed here that in answer to the third question they say the slant was dangerous, or required sufficient blocks to render it safe. This might fairly mean that the rollway was not dangerous if there were sufficient blocks to operate it. The absence of these blocks was known to the plaintiff, and I have already pointed out that the defendants were not answerable on that head. There is no finding of the jury as to the defendants knowledge that the build of the rollway was defective, or more dangerous in its construction than other rollways, and the evidence distinctly negatives such a proposition. In such a case, to find negligence in a master it must be shown not only that the servant was ignorant of the alleged defect, but that the master was cognizant of it and negligently allowed the servant to go on, in ignorance, working with the defective machinery: *Ashworth* v. *Stanwix*, 3 E. & E. 701; *Wilson* v. *Merry*, L. R. 1 Sc. App. 326; *Dynen* v. *Leach*, 26 L. J. Ex. 221; *Miller* v. *Reid*, 10 O. R. 419; and *Matthews* v. *Hamilton Powder Co.*, 14 O. App. 261.

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But, even on the findings of the jury as they stand, we are entitled to a verdict, as the findings of general negligence cannot help the plaintiff; the negligence must be specific, and the knowledge of the master must be shown with reference to the defect complained of. Even granting, for the sake of argument, that this rollway was more dangerous than others, the master who has bought or built a mill, believing it to be sound and of the latest and most approved construction, is no more liable than a man whose house falls down by reason of some mistake made by the architect he has employed. The negligence complained of must be direct and personal, not such as here, *i. e.*, not knowing that a block in the mill had become crushed, when the master has competent and experienced foremen, millwrights, and

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sawyers, whose duty it is to see to such things—*Ormond* v. *Holland*, E. B. & E., 102; *Roberts* v. *Smith*, 2 H. & N., 213; *Burns* v. *Accrington Cotton M. Co.*, 3 H. & C., 511.

L. G. and *A. E. McPhillips* contra. As to the amendments allowed by the trial Judge, they were proper to obtain a determination upon the real question between the parties—*Laird* v. *Briggs*, 19 Ch. D., 22; *Rainy* v. *Bravo*, L. R. 4 P. C., 287-298; *Parsons* v. *Alexander*, 5 E. & B., 263—a matter for consideration on motion for new trial, and not in appeal. There was evidence of negligent management in the plaintiff's case, and defendant Webster is connected with it. *Miller* v. *Reid*, 10 O. R., 419, is distinguishable (*see* per Armour, J., p. 426, Wilson, C. J., p. 427), a similar question as to ability to avoid the accident being answered in the affirmative. The jury have found here that the slant in the rollway was dangerous, unknown to plaintiff and known to defendant Webster. It is unreasonable to argue that because a workman chooses to work with defective blocks, used for one purpose, he cannot recover when the blocks were insufficient to stop the logs rolling from a cause unknown to him, and which they were never intended to meet. This case differs from many of those cited by the appellant, for here there was the element of personal negligence of the defendants, anything that was done about the mill being done under Webster's personal supervision. Further, all that is necessary in this case is to shew that the defendants ought to have known of the defective state of the apparatus—*Patterson* v. *Wallace*, 1 Macq., 748; *Senior* v. *Ward*, 28 L. J. Q. B., 139; and the mere fact that plaintiff knew of danger is not enough to deprive him of his action—*Holmes* v. *Clark*, 31 L. J. Ex., 356. He referred also to *Mellors* v. *Shaw*, 1 B. & S., 437; *Francis* v. *Cockrell*, L. R. 5 Q. B., 184, 501; *Brown* v. *Cotton Spinning Co.*, 3 H. & C., 511; *Bartonshill Coal Co.* v. *Reid*; *Smith* v. *Baker*, 1891 A. C., 336.

Argument on Appeal.

Jenns in reply.

SIR M. B. BEGBIE, C. J.:—

Judgment of Begbie, C. J.

This case comes up before us sitting as a Full Court, on notice of motion that the judgment of the 29th December, 1891, in favour of the plaintiff, for $5,000, may be reversed, and judgment entered up for the defendants, or, in the alternative, that a new trial may be ordered by us. The action was by a chainer against the owners of a lumber mill, in which he worked, seeking damages for a broken thigh,

alleged to have been occasioned by defects in the construction and machinery and management of the mill. It was tried before Mr. Justice McCREIGHT and a special jury on the 20th May, 1891. The jury returned a special verdict in answer to fifteen questions left to them by the trial Judge, Mr. Jenns having, at the close of the plaintiff's case, moved for a nonsuit. After the trial, both parties moved for judgment in their favour; the defendants on the findings of the jury, the plaintiff for a nonsuit on those findings, and that the findings as to assessment of damages and negligence at large should be set aside. The finding as to negligence generally is, I incline to think, sufficiently issuable on the pleadings as they stand. But to meet any objections on that ground, the learned Judge directed all proper amendments to be made in the pleadings, so as to put in issue the safe construction of the mill, and negligence of the owner generally; and I think he was quite right in giving fresh directions, so as without doubt to bring before the jury the real matter in issue. I understand that no amendments have been actually formulated and placed on the record; but that would only show that a proper order made by the Judge, and not appealed against, has not as yet been fully complied with. I think the pleadings should be deemed to have been so amended, if necessary, on both sides, so as to bring the whole question in issue. I adopt on this point the principles and authorities referred to by the learned Judge below in the reasons given for his judgment. The first observations I wish to make are addressed to the form of motion before us, viz.: an alternative motion, either that judgment be reversed or a new trial directed. Assuming that this Court has jurisdiction to entertain either branch of the application, if duly brought before us, I do not think that we can entertain both branches at once without more. The difference is more distinctly seen if we refer to the position under the English Judicature Acts, upon which our own is based. Sitting as a Full Court here, we represent the Court of Appeal, which is a part of the Supreme Court in England, but not part of the High Court. Members of the High Court may be members of the Court of Appeal (*e. g.*, the Chief Justice of England), but the two Courts are quite distinct. And these two alternatives presented for our acceptance are also quite distinct: nay, proceed on exactly contrary hypotheses. The motion for reversing the judgment below, and entering it for the defendants, proceeds on the admission by the defendants that the findings are correct, and that the case was properly left to the jury by the trial Judge. It alleges in fact, that there was no error at the trial,

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either in the Judge or the jury, up to the verdict, but that on the findings thus correctly found by the jury the trial Judge should have given judgment for the defendants. The application for a new trial, on the contrary (except it be founded on the discovery of new evidence), impeaches the conduct at the trial either of the Judge or the jury, or both. The party moving for a new trial must allege that the findings were against the weight of evidence, or without evidence, or else excessive damages, or else that the Judge misdirected the jury in a point of law, or erred in admitting or rejecting evidence, or some other misconduct. An application of the first nature, which assumes the correctness of all that was done and determined below, up to and including the verdict, and merely contends that that verdict has been misunderstood, can obviously be heard and discussed before a Court of Appeal quite conveniently, without any other notice than that it is to be discussed. But how can an application for a new trial be discussed or intelligently argued unless the respondents be informed of the objection or objections intended to be relied upon? It is an application which requires much "sifting," to use James, L. J.'s words in *Davies* v. *Felix*, 4 Ex. D. 37, and consequently full notice. I think that case, which has been followed in this Court on a former occasion, clearly shows that the latter branch of the present motion cannot be now entertained; in fact, it is now completely out of time. By sec. 61 of c. 31 (code 1888), the only statute under which we can entertain the application for a new trial, such an application is to be brought within eight days, and by sec. 67 the concurrent jurisdiction thereby given to the Full Court is not to enlarge that time. And there has been no application to enlarge the time, supposing Order LVII., r. 4 of 1880 to fit the case. We have, therefore, merely to consider the findings, and, taking them to be correct, to decide whether the judgment is in accordance with them. Now, when a workman engages to do work of this description, the employer is bound to take reasonable care that the mill is properly and safely constructed, and fitted with machinery and implements such as to ensure a reasonable degree of security to a careful man. The employer is also to provide reasonably skilful and careful supervision. In the present case, there were two sources of danger: there was an unusual slant on the rollway, giving an unusual tendency to the logs to roll, and an unusual rapidity of motion when once set arolling, and an inadequate supply of chock blocks, by which the rolling logs might, perhaps, have been checked or stopped in their course. The jury find (answer 4) that these two

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were the "inducing causes." They find that the plaintiff was not guilty of contributory negligence, and could not have avoided the accident by the exercise of such skill and care as he was bound to exercise. They find, it is true, that the plaintiff was aware of the inefficiency of the chock blocks, and that the defendants were not; but they find that the defendant Webster, as manager, ought to have had cognizance of that. They expressly find that Webster did not take due care to have the rollway and blocks in a safe condition, and that the defective state of the rollway and blocks was due to his personal negligence. Mr. Jenns relied very strongly on the two findings that the plaintiff did and the defendants did not know of the defective condition of the blocks, and it is certain that if a workman is aware of a defect of which the employer is ignorant, and is content to continue at work without remonstrance, he is to be supposed to have elected to abide the consequences of any mishap. His over-daring, in fact, amounts to contributory negligence. It is true, again, the jury find that the inducing causes of the accident were the slant and defective chock blocks together, and they do not find that either defect alone would have been fatal. It is consistent with these two findings, therefore, that the rollway would have been safe enough but for the defect of the chock blocks, which the defendants knew nothing about. But the findings, I think, fully support this: that the apparatus for the log rolling was unduly dangerous, and the manager, without having first satisfied himself of the safety of this dangerous incline, set the plaintiff to work upon it, and so was guilty of the same negligence as if he had omitted to see that the winding chain was sound, or the rollway itself sufficiently underpinned. A manager who does not see to everything of this sort is a manager who does not manage. I express no opinion at all upon the evidence. As Mr. Justice McCREIGHT very significantly remarks, "with the damages I have nothing to do." We have only to deal with this application, on which the appellant comes here upholding the findings and relying on them for a reversal of the judgment. But upon those findings I think the judgment below is correct, and the appeal must be dismissed with costs.

Judgment of Begbie, C. J.

CREASE, J.:—

I agree with my brethren in dismissing the appeal, partly for the reasons given by the Chief Justice, and particularly for those given by Mr. Justice WALKEM, whose judgment I have carefully read, and in which I concur. With any question as to the amount of damages we have, at this time, nothing to do.

Judgment of Crease, J.

FULL COURT. WALKEM, J.:—

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This case is one which involves the question of an employer's liability for injuries sustained by his workman, while acting in the discharge of his duty. The defendants are manufacturers of lumber and proprietors of the Vancouver Saw-Mill, in which they carry on that business. The plaintiff was one of their workmen—filling the position of "chainer" or "log-roller" in the mill. While thus employed, his right leg was badly fractured by one of the logs rolling upon it. In his pleadings the accident is attributed to the alleged faulty construction of what is called the rollway which leads to the saw-carriage, inasmuch as it was slanting instead of being horizontal; and to the inefficient condition of the chock-blocks used for checking the downward tendency or roll of the logs on the slant in question. The action is therefore one for negligence, and consequent injuries to the plaintiff, for which $5,000 damages are claimed. The pleadings for the defence deny the existence of the defects, traverse the negligence imputed, and allege contributory negligence. The trial of these issues took place before Mr. Justice MCCREIGHT and a special jury. The plaintiff's case was properly amended at the close of the trial by the learned Judge to meet the facts proved, and in accordance with the lines on which the trial had proceeded—*Clough* v. *London & N. W. R. Co.*, L. R. 7 Ex., p. 30. The jury thereafter brought in a special verdict, in which the damages claimed were allowed; and on that verdict judgment was entered for the plaintiff. The defendants, by their counsel, now move that the judgment be reversed, or, alternatively, that a new trial be granted. The question of a new trial is not open to our consideration, as the procedure prescribed by O. XXXIX. of our Rules, respecting applications for new trials, has in no wise been followed. It would, therefore, be fruitless to point out the steps that should have been taken; besides, they are clearly indicated in the Rules, and it is sufficient to say that the defendants' counsel is now limited to his appeal from the judgment. This appeal is regulated by O. XL., Rule 4, which is as follows:—"Where, at or after the trial of an action by a jury, the Judge has directed that any judgment be entered, any party may, without leave reserved, apply to set aside such judgment, and enter any other judgment," etc.

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With reference to this Rule, the Court, in *Davies* v. *Felix*, 4 Ex. D., 35, observed: "Where the cause has been tried before a jury, the only applications allowed to be made are against the judgment as entered upon the findings of the jury; and for the purposes of these applica-

tions '*the findings must be taken as correct.*'" Hence, the findings in the present case must be so accepted; and this brings us to the point—is the judgment warranted by those findings? Before stating the legal principles involved in this question, it may be well to state the findings first, and then apply those principles to them.

[Here the learned Judge stated the findings as already set forth, *ante* p. 137.]

The questions submitted are so numerous and searching, and the replies so explicit, and above all, consistent, that we are fortunately relieved of the not infrequent difficulty that arises on special verdicts, of deciding what the jury meant. It is also to be observed that the unusual number of the questions is a circumstance that was highly favourable to the defendants, for had any two or more conflicting replies been given they might have disentitled the plaintiff to recover. The finding against contributory negligence exculpates the plaintiff, and clears the way for a consideration of the defendants' liability. As to the chock-blocks, the answers of the jury that the plaintiff was, but that the defendants were not, aware of their unfitness might have been of some value to the defence had they stood alone, as the legal inference, in that event, might have been that the plaintiff voluntarily risked the consequences of their defective condition, and thus brought himself within the maxim *volenti non fit injuria*. In *Smith* v. *Baker*, 1891, A. C. 336, Halsbury, L. C., observed that "a person who relies on the maxim must show a consent to the particular thing done." So far from the present plaintiff giving any consent to the use of the imperfect blocks, the evidence and findings of the jury show that he protested against being obliged to use them to the proper person in the mill, and in reply got a promise that they would be made serviceable. *Yarmouth* v. *France*, 19 Q. B. D., 660, was not as strong a case in this respect; but the remarks of Lindley, L. J., in that case may well be applied to the above findings. "If," observed that learned Judge, "nothing more is proved than that the workman saw danger, reported it, but, upon being told to go on, went on as before to avoid dismissal, a jury might properly find that he had not acted voluntarily, in the sense of having taken the risk upon himself." Besides, the jury, as appears above, found that Mr. Webster, as manager and foreman, ought to have known of the bad condition of the blocks, and that their unfitness was due to his personal negligence. In *Clark* v. *Holmes*, 7 H. & N., 937, Cockburn, C. J., laid down the rule that where, on the

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remonstrance of a workman, a promise is given by the master, and hence by a person legally representing him, to repair temporary defects, that promise is an inducement to the workman to continue in his employment, and that, in so doing, the workman waives none of his legal rights in respect of injuries resulting from the master's failure to fulfil his obligation. This language exactly fits the present case. The importance of the point in question is illustrated by the several elaborate judgments in *Thomas* v. *Quartermaine*, 18 Q. B. D., 685; *Yarmouth* v. *France*, 19 Q. B. D., 647; and *Smith* v. *Baker*, 1891, A. C., 336. As to the slant of the rollway, the jury has found that the plaintiff was ignorant of it, and that it was, moreover, dangerous. Under such circumstances, the plaintiff is protected by the legal presumption, that when he entered the defendants' service, the risk of accident, in consequence of the slant, was not an element in the contract, as he knew nothing of it. Apart from this, the defendants were bound to provide such machinery and plant as would ensure his safety, as will appear by decisions which I shall presently refer to. "Liability is due," as neatly stated in *Beven on Negligence*, p. 313, "not so much to principles peculiar to the relation of master and servant, as to the general principle that 'where fault is, liability is';" and the jury have found that the fault in the present case, both as to the defects in the rollway and blocks, lay with the defendants. In *Patterson* v. *Wallace*, 1 Macq., 748; *Brydon* v. *Stewart*, 2 Macq., 30; and *Weems* v. *Matthieson*, 4 Macq., 215—all decided by the House of Lords—it was held that "where a master employs a servant in a work of danger, he is bound to exercise due care in order to have," for instance, in view of the present case, his mill, machinery and plant "in a safe and proper condition, so as to protect his servant against unnecessary risks, and to have it superintended by himself or his workman in a fit and proper manner," and, furthermore, that "he is liable for any damage caused by defects which he knows of, or *ought* to have known of." Apart from the findings which I have been considering, the following further findings would, beyond doubt, fix the defendants with liability, according to the above decisions, viz., that the machinery and construction of their mill were not such as to ensure the safety of their workmen; that the defects in the rollway and blocks were inducing causes of the accident; and that the defects in both rollway and blocks were due to bad management and negligence on the part of the defendants, as represented by Mr. Webster, who was manager and foreman, and, as the evidence shows, also

Judgment of Walkem, J.

master—findings Nos. 1, 2, 3, 4, 10, 13, 14, 15. We are, therefore, not left to doubt whether the accident was due to the rollway or blocks, for the jury have decided that it was due to the defects in both, and to the negligence of the defendants in allowing them to exist. Taking the verdict as a whole, it seems to me that the judgment of the Court below was inevitable, and that the appeal from it must therefore be dismissed with costs. As to any question about the amount of the damages awarded, we have no power to deal with it, as it is one of the findings of the jury, and therefore one which, on a motion like the present, must be accepted as correct.

DRAKE, J.:—

Judgment of Drake, J.

The principle involved in the relation of master and servant is, that when a servant engages to serve a master he implicitly, as between himself and his employer, undertakes to run all the ordinary risks arising from the negligence of his fellow workmen, and a fellow workman includes a foreman. On the other hand the employer, impliedly, undertakes that the machinery and plant shall not be in such a defective condition as to cause injury to the servant, and that his foreman shall, as far as he knows, be competent for his position. If he is incompetent, to the knowledge of the employer, this is considered as negligence on the part of the employer, and will give rise to right of action in case an injury arises from such incompetency. An employer cannot set up as a defence to an action for injury sustained that, whether or not the servant knew of the defect, he contracted to take the risk on himself; and an employer who chooses to act as foreman is responsible for his negligence, if such negligence is the cause of injury. On the other hand, if the risk is known to the workman, and he voluntarily undertakes the risk, appreciating the danger, then, in the absence of negligence on the owner's part, the workman is brought within the maxim *volenti non fit injuria*, and if injured he cannot recover. On examining the findings of the jury I do not see anywhere that the plaintiff knew of the risk and voluntarily incurred the danger. The jury have found that the slant in the rollway was dangerous, and that it was of such a nature that the master or superintendent (which means manager) ought to have known, if he did not actually know, of the existence of the defect. The rollway was constructed with a slant of five to seven inches in twelve feet, and was so constructed under the defendant's direction. Under these circumstances the defendant Webster, who was foreman, if he did not know,

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ought to have known, of the slant, and that it was a source of danger. The jury further find that the plaintiff did not know of the slant, and there is no finding of contributory negligence on his part. But even if he did know his knowledge would only be a part to be considered by the jury, with all the other circumstances, in determining the question whether or not the plaintiff brought the accident on to himself. The jury have found that the accident arose from two causes—defective chock-blocks and the slant in the rollway; one cause was known to the plaintiff and the other not. It is impossible to say how much of the accident was due to either cause. It is quite probable that if the rollway had been horizontal the defective chock would not have been so material, and, on the other hand, it is possible if the blocks had been sound and of proper construction they would have prevented the logs from rolling; but the jury have also found that it was owing to Webster's negligence that the plaintiff sustained the injury he now sues for. I think it is sufficiently shown that the injury was caused by a breach of the duty which the defendant owed to the plaintiff in not having the rollway in a safe condition. I can not say that there is not evidence sufficient to sustain this finding of the defendants' personal negligence, and under the principles laid down in *Thomas* v. *Quartermain*, 18 Q. B. D. 685, I think the judgment of the learned Judge is right, and that the plaintiff is entitled to the judgment he has got. If the appellants desire to question the ruling of the learned Judge on the amendments allowed by him, that would be a ground for an application for a new trial on account of misdirection, which cannot be discussed on the present appeal. If the defendants desire to move for a new trial the procedure is by rule or order *nisi* under Order 39—and the respondents would then know what part they would have to meet while this appeal is, in fact, limited to the question whether or not the judgment of the learned Judge on the findings of the jury is right. I am of opinion that the judgment is right, and the appeal should be dismissed with costs.

Judgment of Drake, J.

Appeal dismissed.

[Note by His Lordship the Chief Justice.—See also per Lord Herschell, in *O'Neill* v. *Everest* (C. A.), the report of which did not arrive here until after the above judgments. "The plaintiff relies on this, that there was a concealed danger in the condition of the premises which the defendants owned, and to which they invited people to come and carry on their business."]

[*Appealed to the Supreme Court of Canada.*]

BEGBIE, C. J.

April, 1892.

SMITH v. HANSEN.

IN THE COUNTY COURT OF VICTORIA.

SMITH *v.* HANSEN.

Interest—Laches—Practice.

Laches may deprive a suitor of interest on his claim.

Claim and counter-claim are treated as distinct actions up to execution, which will go for the difference or the sum of the two judgments, as the case may be.

ACTION and counter-claim tried by Sir M. B. BEGBIE, C. J., sitting as a County Court Judge, April, 1892. Statement.

The plaintiff and defendant were both scavengers. In May, 1888' the plaintiff sold out his business, good-will, and stock-in-trade to the defendant for $300 cash and $100 on a promissory note at 90 days. On this note, the defendant had in August, 1888, paid $25. The plaintiff now sued for the balance, $75. The defendant counter-claimed on various grounds:—Failure to introduce to customers, misrepresentation of the amount of business, and delivery only of one horse instead of two, as per schedule. The defendant gave evidence upon these points, but the agreement, which was in writing, was not produced on either side. The plaintiff did not offer to go into the witness box.

The Chief Justice, in giving judgment, said:—I am obliged to decide on rather scanty materials. As to the plaintiff's claim, however, it is quite clear. It is upon a promissory note, and the whole of the law of merchants is applicable, among other things, importing that interest is to be allowed on mercantile instruments of this description. The rule, however, is not inflexible. In *Cameron* v. *Smith*, 42 B. & Ald. 308, it was held that a jury might refuse interest where there had been undue delay in the holder. At every County Court the Judge is vexed and perplexed by a conflict of testimony, owing to the defect of human memory concerning transactions of the most petty description, not brought into litigation until years have elapsed, whereas the Legislature has provided Courts to sit on the first Thursday in every month, expressly to prevent this perplexity and doubt. In the absence of any special circumstances I think it only proper to refuse interest in all County Court cases where there has been such delay as in the present instance, and I refuse interest to the plaintiff accordingly. He will Judgment.

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have judgment for $75 and costs. As to the counter-claim, the defendant is really as much to blame as the plaintiff. He now alleges that he was, almost from the day that he gave the note, aware of the plaintiff's breach of contract, non-introduction to customers, misrepresentation of business, deficiency of stock, &c. He ought, obviously, to have brought his action immediately, not only as to the other matters, but to restrain the negotiation of this note, and to have it cancelled. He could, almost certainty, have obtained this relief if he had proved what he now alleges. But the lapse of time not only impairs his means of proof, but gives his whole defence the appearance of an afterthought, merely. The only matter of complaint which stands on firm ground, is as to the non-delivery of one of the two horses; and as to that, the

Judgment.

evidence of value of the missing animal is necessarily, after the lapse of time, very vague. He does not in the witness box put it above $85; but he scarcely had ever seen the horse. The plaintiff's witness, Bloomfield, says that both the plaintiff's horses together were not worth that sum; but that did not strike me as a careful or trustworthy estimate; and in fact he was not better acquainted with the missing animal than the defendant himself. The plaintiff is in the jurisdiction, but he has not thought proper to attend or give evidence. I think I may allow $50 for this horse; the defendant will have judgment for that amount with costs.

Where there is a claim and counter-claim they are treated as entirely distinct actions up to execution; then execution will go for the difference or the sum of the two judgments, as the case may be.

BEGBIE, C. J.
April, 1892.

GOON GAN
v.
MOORE.

IN THE COUNTY COURT OF VICTORIA.

GOON GAN *v.* MOORE.

Action to recover back part of judgment paid—Proper remedy.

If one pays a judgment got against him by default, he cannot sue to recover back part thereof, but must apply to have the judgment set aside and for a new trial, which will be granted only on the ground of surprise or mistake.

Statement.

ACTION tried by Sir M. B. BEGBIE, C. J., sitting as County Court Judge, on the 21st April, 1892.

BEGBIE, C. J.

April, 1892.

GOON GAN v. MOORE.

In this case, the plaintff had contracted in August, 1891, with the defendant that the latter should build him a house for $385, with some allowances for lumber, which brought the total amount coming to the defendant to $419.20. The plaintiff paid some instalments, but Moore, getting impatient, sued him for the balance, which he alleged to be due, about $203. Goon Gan, did not defend that action, and Moore recovered judgment with costs, amounting to $230, which Goon Gan paid not long ago. It was now alleged that Moore had thus demanded and recovered $30 more than he was entitled to, and the present plaintiff brought this action to recover back the over-payment. The plaintiff swore to the items establishing the over-payment, and was prepared, with two other witnesses, to support his statement. The defendant Moore appeared in person and cross-examined the plaintiff at some length, but without shaking is testimony.

Judgment.

But the Chief Justice, upon this judgment in favour of Moore being produced, stopped the case and proceeded as follows:—Goon Gan has, in fact, admitted by record Moore's whole demand. He should have defended in that action as to $30, part of the $203. So long as that judgment stands, he is estopped from impeaching any part of it. His only remedy now is to apply to have that judgment set aside and for a new trial, which he can only get on the ground of surprise or mistake. I do not encourage any such attempt; I do not think it likely to succeed. There must be here at least a nonsuit. But as I feel tolerably sure that what the plaintiff says is true, and, further, as I think from the observations which fell from Moore that he is quite aware that he has been overpaid, I shall not allow him any costs unless he will now swear that this impression is erroneous, and that he has only received what is due under the contract.

This suggestion was not complied with, and therefore judgment of nonsuit without costs.

Nonsuit without costs.

BEGBIE, C. J.

April, 1892.

EARLE
v.
VICTORIA.

IN THE COUNTY COURT OF VICTORIA.

EARLE
v.
THE CORPORATION OF THE CITY OF VICTORIA.

Negligence—Proximate cause—Duty of Corporation.

A fire-alarm wire belonging to a municipality broke and fell upon an electric wire belonging to a private corporation, and thereby sent a fatal current into the plaintiff's horse,—

Held, that the municipality was liable.

Statement. ACTION for the loss of a horse killed by a shock from a fire-alarm wire belonging to and worked under the control of the defendants. The facts appear in the judgment.

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The action was tried by Sir M. B BEGBIE, C. J., sitting as County Court Judge.

A. E. McPhillips and *Barnard* for plaintiff; *Prior (Eberts & Taylor)* for defendants.

Judgment, having been reserved, was delivered on the 21st day of April, 1892, as follows:—

Judgment. In this case, the plaintiff seeks to recover damages for the loss of a horse, killed by a discharge of electricity from a wire in the defendant's control.

There are three wires conveying currents of electricity in various parts of the city: the circuits by which the lighting is effected and the tramway worked (both of these carrying powerful currents), and what is called the Gamewell line, carrying in its normal condition only a weak current, and used merely for the purpose of giving fire alarms. But it was proved that if this wire got connected with either or both of the other two circuits, it was capable of delivering a fatal shock. The Gamewell wire is wholly within the contral of the defendant corporation and its officers and servants appointed specially to attend to its warnings and maintain its efficiency.

There is no doubt whatever, and I find as a fact, that the horse was killed by a shock from coming in contact with this Gamewell wire. Very clear evidence was given as to this. The wire itself appeared to

have been broken previously to the accident, and it was proved and admitted that if it had fallen across the tramway wire, or even the guys of the tramway wire, it might have drawn from it a current adequate to produce the accident. Or it might have derived such a current by coming into contact with the electric light wire, or with a wet post, or any other conductor of electricity that happened to be in electric connection with either of the two larger wires. It was proved that the night had been very rainy, with a good deal of wind. The posts, therefore, would be pretty good conductors. It was not proved from what source the Gamewell wire had drawn the fatal addition to its own proper strength. The defendant relied on this obscurity, and also on the immunity which is very properly cast around public bodies who have a public duty to perform, protecting them from the consequences of performing those duties, a doctrine which is discussed in *Geddis* v. *Bann Reservoir*, 3 App. Ca. 438, and in *Cracknell* v. *the Mayor of Thetford*, 4 C. P. Ca. L. R. 629, and which I enforced in the case of *Porter* v. *Esquimalt & Nanaimo Railway Co.*, where plaintiff sued for damage to his crops set on fire by sparks from the defendants' engines as they were working their line. Without doubt where a public duty is cast upon anybody by statute, that same statute must contemplate that the duty will be performed, and that any inevitable damage arising therefrom to a third party is not actionable. But the damage must be inevitable; it must not arise from any negligence in the performance of the duty; and I do not think that any greater effect can be given to the decisions on this subject, at the most, than to say that they shift the onus of proof of negligence; perhaps they displace the ordinary rule, that the mere occurrence is *prima facie* proof of negligence. But if the injured party can show improper activity, or passive omission of proper precautions, then the public body, though performing a public duty, will be held liable.

Judgment.

Now here we had some very interesting evidence about the working of the Gamewell wire which, it was said, kept watch upon itself; requiring no continual inspection and examination, because if anything went wrong—for instance, if the wire broke an alarm was instantly sounded on a gong—and that in fact no continued supervision of this wire took place. It is admitted, and proved, that this small wire, though carrying in its normal condition a feeble and harmless current, might yet, if broken, swinging about on a wet and windy night, become charged in various ways with a powerful current, and immediately be an unexpected source of great and unusual danger,

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It was the duty of the defendants to avert this. It is quite clear that this small wire was severed—did get charged, by some means, and did slay the horse. Either the Gamewell system gave an alarm, which the defendants' servants neglected, or the Gamewell system failed to give an alarm, in which case the defendants have trusted to an insufficient machinery, and have neglected to provide and keep up a due supervision of their wire. It is not at all known, of course, when this small wire broke. It must have been broken before 6:15 a.m., when the accident happened. It was not attended to until 7:30 a. m., and then not by anybody connected with the fire department, to whom the wire belonged, but by a person in the employ of the Tramway Company. He did then what ought to have been done at first: caused all the circuits which might feed the small wire to be cut off, and so made the small wire harmless. I believe that at that hour, 7:30 a. m., there was only one current, the tramway's. At 6:15, when the horse was killed, there were two; for the lights were burning, and an early morning car had just passed. It is quite immaterial to determine from which of these currents the small wire was charged; in such accidents *causa proxima, non causa causans spectanda est.* It was the small wire that caused the mischief. This wire was entrusted to the Fire Department, which is wholly under the control of the Municipality. The defendants were bound to keep it in safety, or to make it safe in a reasonable time, *i. e.*, with all possible expedition; and this might, and would have been done, if they had, instantly on the alarm given, taken the steps which the witness Fraser took at 7:30. There will be judgment for the plaintiff for $100 with costs.

Judgment for plaintiff.

DRAKE, J.

April, 1892.

PEATT *et al* v. RHODE *et al*.

PEATT *et al* *v.* RHODE *et al.*

Injunction against digging ditch—Apprehended injury—Damnum absque injuria.

Where a person is commencing lawful operations for the purpose of enabling him to utilize his own property, the mere fact that such operations may be injurious to another is not enough to induce the Court to interfere by injunction. There must at least be proof not only of imminent danger, but also that the damage, if it comes, will be irreparable.

The owner of land may make use of any natural water-courses on his property for the purpose of improving its drainage, and if damage arising from the increased flow of water ensue to another proprietor it is *damnum absque injuria.*

Remarks on the nature of *quia timet* actions.

Statement.

ACTION to restrain the digging of a ditch under the following circumstances:—On the defendants' land there exist a swamp, hitherto only partially drained by an outlet originally natural, but since artificially enlarged, and a perennial body of water called Glen Lake with a defined natural outlet, which overflows during certain times of the year. This outlet takes its course through the plaintiffs' land and ultimately connects with a living stream. The defendants had begun to dig a ditch across a ridge which divides the swamp from the lake for the purpose of more effectually draining the swamp, when the plaintiffs obtained an interim injunction.

The action came on for hearing before DRAKE, J., without a jury, on March 25th, 1892, and was adjourned for argument till March 31st, 1892.

Argument.

Walker for plaintiffs: The ditch, if allowed to be finished, will cause us material injury, and the defendants have no right to use their property with this result—*Whalley* v. *The Lancashire & Yorkshire Ry. Co.*, 13 Q. B. D., 131. I refer also to *Dawson* v. *Paver*, 5 Ha. 415; *Potts* v. *Levy*, 2 Drew 272; *Palmer* v. *Paul*, 2 L. J. ch. 154; *Crompton* v. *Lea*, 19 Eq. 115; *Hendricks* v. *Montagu*, 17 Ch. D., at p. 646; *Reinhardt* v. *Mentasti*, 42 Ch. D. 685. Moreover the present method of draining the swamp is the natural and proper one, and would be sufficient if the ditch were enlarged.

Helmcken for defendants. Assuming that damage will follow as alleged, it is *damnum absque injuria*—*Angell* on *Water-courses*, pp. 118-142; *Rawston* v. *Taylor*, 11 Ex. at p. 382; *Broadbent* v. *Ramsbotham*, 11 Ex. at p. 615; *Chasemore* v. *Richards*, 7 H. L. Ca., at p.

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375. I refer also to *Beer* v. *Stroud*, 19 O. R. 10; *Gannon* v. *Hargadon*, 87 Am., Dec. 625 (Mass.); *Milber* v. *Laubach*, 86 Am. Dec. 522 (Penn.); *Peck* v. *Harrington*, 50 Am. Rep. 627 (Ill.). In any event this action is premature, *Fletcher* v. *Bealey*, 28 Ch. D. 688.

April 9th, 1892. DRAKE, J.:—

Judgment.

This is an action for an injunction to restrain the defendants from making a drain on their own land, which may have the effect of throwing additional water on to the plaintiff's land.

The plaintiffs are owners of section 73, 74, and 75, Metchosin District, and have brought some twelve or thirteen acres into cultivation of section 73.

These lands include a swamp and water-course running from Langford's Lake through the west side of sections 74 and 75. The swamp then runs into lot 76, which is owned by a stranger to these proceedings, and there it is joined by a swamp and water-course, which is caused by the overflow of Glen Lake. The combined overflows of these two swamps then run back through the east side of sections 75, 74, and 73, and by a regular water-course find their way to the sea.

The defendant, Rhode, is owner of sections 81, 82, 83, 84, 88, 89, 90, in which sections Glen Lake is situated, and a swamp known as Lawrence Swamp. Through the latter swamp a mountain stream, which is dry in summer, runs out into Bilston Creek, and does not touch the plaintiffs' land.

Lawrence Swamp is divided from Glen Lake by a gravel ridge about 130 yards wide, and Glen Lake is several feet lower than the swamp.

The defendants have commenced to dig a trench between Lawrence Swamp and Glen Lake, and the plaintiffs, fearing that if the whole of the waters of this swamp were diverted into Glen Lake their lands would be flooded and they would be injured, obtained an interim injunction, which was not appealed against, and no application was made to dissolve it.

It is admitted that no damage has been sustained by the plaintiffs.

The question whether or not the existing outlet to Lawrence Swamp is a natural or artificial one was much contested, but if the plan is correct there must have been some outlet at or near the existing one, which no doubt has been greatly enlarged and deepened, and has been in existence over twenty years. It was proved that in the wet season a very large body of water flows through this outlet.

The defendants say, and in this they are supported by Mr. Hargraves, C. E., that the only way to drain the east side of the swamp effectively will be into Glen Lake, as the water lies at this end all the summer, and is apparently unaffected by the existing ditch, and he further expressed his opinion that it was doubtful if the existing ditch could be lowered sufficiently to dry this portion of the land.

Arthur Peatt stated he was at one time tenant of this swamp and was able to cultivate the greater portion of it by help of the existing ditch. This shows that the existing ditch is insufficient for the entire swamp, and corroborates Mr. Hargraves' view, that the upper or east end can only be drained by an outlet into Glen Lake, and not by the present ditch.

The plaintiffs say they have constructed a ditch through portion of their lands, but it appears to be only an enlargement of the natural water-way, and is insufficient to deal with the existing water. Section 75 is entirely unditched and unimproved. Section 74 is only partially ditched, and this ditch is carried through 73, on which section about 12 acres have been utilized.

The defendant Rhode alleges that his intention is to put a stone drain or drain-pipe to deal with the surface water in Lawrence Swamp, which is not affected by the present ditch, and that a one-inch drain-pipe would be all he required.

It is quite possible that little or no damage will be caused to the plaintiffs by the proposed drain, and it is quite possible that the defendants may be able to deal with the additional water in such a way as not to increase the flow out of Glen Lake to any material extent.

It is to be remarked that the plaintiffs' land is nearly a mile by the course of the stream from the outlet of Glen Lake, and divided from it by a section belonging to others.

This action is a *quia timet* action, and the principle involved in actions of this character is divided into two classes—1st, those in which the acts intended to be restrained are illegal in their inception, and, 2nd, those which are lawful in their inception, but which of necessity must cause serious injury to others.

In cases under the first head, when the circumstances are such as to enable the Court to judge as to the illegality of the acts complained of, and the irreparability of the damage that will ensue, the Court will interfere by injunction. Of this class the most numerous are cases relating to ancient lights and nuisances, because if certain works are constructed certain damage is bound to ensue.

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On the other hand, when a man is commencing lawful operations for the purpose of enabling him to utilize his own property, the mere fact that such operations may be injurious to another is not sufficient to induce the Court to interfere by injunction. There must be proof not only of imminent danger, but also that the damage, if it comes, will be irreparable.

On behalf of the plaintiffs many authorities were cited, which, on examination, were connected with ancient lights and nuisances, a class of cases which fall under the first head above mentioned. They, however, chiefly relied on *Whalley* v. *Lancashire and Yorkshire Railway*, 13, Q. B. D., 131. That was not a *quia timet* action for an injunction, but an action for damages actually incurred by cutting trenches to let off an accumulation of water and throwing it in a body on the plaintiff's land, instead of allowing it to pass off by natural infiltration.

Here the defendants propose to use an existing natural water-course to carry off, possibly, a larger quantity of water than heretofore. They are at liberty to do so. The ditch constructed on the plaintiffs' lands, being merely an enlargement of the existing channel, does not thereby convert the natural water-course into an artificial one, and so give the plaintiffs exclusive control thereof. If the act of the defendants causes more water to flow than heretofore, it will come within the class of cases where it is *damnum absque injuria*, unless it was shown that in doing the act they were guilty of negligence, without which damage would not have been caused; otherwise, no one could be allowed to cut drains through boggy lands, because by so doing a larger quantity of water would flow than heretofore, and agricultural work would be stopped.

Judgment.

It is laid down in *Angell on Water-Courses*, sec. 108: "The obstruction of surface water, or an alteration in the flow of it, affords no cause of action on behalf of a person who may suffer loss therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil." A party may improve any portion of his own land by causing surface water to flow in a different direction, and in larger quantities than previously, and it makes no difference in the application of this rule that the land is naturally wet and swampy.

In *Rawstron* v. *Taylor*, 11 Ex. 369, Martin, B., says "the proprietor of the soil has *prima facie* a right to drain his land; he is at liberty to get rid of the surface water in any manner that may appear most convenient to him, and I think no one has a right to interfere with him."

The question of apprehended damage is discussed in *Fletcher* v. *Bealey*, 28 Ch. D., 688, and there Pearson, J., lays down the following proposition:—"If no actual damage be proved, there must be proof of imminent danger, and that the danger when it comes will be very substantial. I should almost say it must be proved that it will be irreparable. It must be shown that if the danger does occur at any time it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it, if relief is denied him in a *quia timet* action."

And in the case of *Haines* v. *Taylor*, 10 Beav., 75, the defendant was about to build gas-works near the plaintiff's residence, and an injunction to restrain the construction of the works was refused with costs.

Judgment.

I do not find in this case the ingredients necessary to cause the Court to interfere by injunction with the defendants' drain. I therefore dismiss the action with costs, without prejudice to any subsequent action which the plaintiffs conceive they may be entitled to bring if damage is suffered by or through the defendants' drainage operations. I gave the defendants leave to amend their defence by denying that they intended to drain the whole of Lawrence Swamp into Glen Lake. Mr. Walker objected, but did not allege that he was in any way prejudiced by the amendment, as it was in accordance with the evidence submitted.

Action dismissed with costs.

BYRNES v. McMILLAN.

Sheriff—Execution Act—Responsibility for error in notice of sale caused by error in Land Registry Office—Duty of Registrar—Mode of registering judgments.

A Sheriff discharges his duty under section 37 of the *Execution Act* if he publishes a correct copy of the information as furnished him by the Land Registry Office, and is not responsible for loss arising out of errors committed therein.

It is the duty of the Registrar either to comply with applications for registration or to give a written refusal forthwith.

Remarks on the faulty mode of registering judgments.

Statement.

ACTION by a purchaser at an execution sale against a Sheriff for loss caused by erroneous information appearing in the notice of sale.

DRAKE, J. April, 1892.

The action was tried by DRAKE, J., without a jury, and was reserved for argument until April 30th, 1892.

BYRNES v. MCMILLAN.

A. E. McPhillips for plaintiff. The Sheriff was negligent in performing the statutory duty cast upon him.

DRAKE, J.: But the error of which you complain occurred in the Land Registry Office. How is the Sheriff responsible for that?

A. E. McPhillips: He ought to have got a certificate.

Argument.

DRAKE, J.: The Act does not compel him to do so.

A. E. McPhillips: The Act does not tell him to go to the Land Registry Office at all, and I submit there is a duty upon him to give truthful information. He referred to the following cases:—*Hobson* v. *Thelluson*, L. R. 2 Q. B., 642; *Osborne* v. *Kerr*, 17 U. C. R., 134; *Mc Donald* v. *Cameron*, 13 Gr., 84; *Finnigan* v. *Jarvis*, 8 U. C. R., 210; *Massey* v. *Gibson*, 7 Man. R., 172; *Sexton* v. *Nevers*, 32 Am. Dec., 225, *Commonwealth* v. *Dickinson*, 43 Am. Dec., 139.

Helmcken, for defendant, was not called on.

DRAKE, J.:—

Judgment.

This is an action against a Sheriff for damages, on the ground that the Sheriff was guilty of false representation, breach of duty and negligence, whereby the plaintiff suffered damage.

The facts are not disputed. On 10th December, 1890, the Sheriff, by virtue of a writ of *fieri facies* against lands, seized and advertised for sale Lot 54, Group 1, Sayward District, containing 150 acres.

The execution was issued on a judgment of Redfern against Roycraft for $174.

The Sheriff in his advertisement for sale set out a list of charges and judgments registered against the lands, many of which were prior in date to Redfern's execution.

The plaintiff in his Statement of Claim alleges that the defendant at the sale stated that all incumbrances on the said lands prior in date to the judgment under which execution was issued, had been discharged and released. But on reading the evidence which the plaintiff gave on his examination before the Registrar, it appeared that the Statement of Claim is incorrect, for he there states that the Sheriff read the charges at the time of sale and stated that they were the only charges against the land, and that was the only conversation which took place; and he further admits that the allegation in the Statement of Claim was inaccurate.

The purchase money was paid by cheque on 10th December. On the same day, or about that time, the plaintiff had notice of Clark's claim, and found the same registered, and in fact it is in the list of charges as advertised.

The plaintiff then told the Sheriff not to cash the cheque, but how soon after the payment to the Sheriff does not appear, and the plaintiff took no steps to stop payment at the bank, neither did he take any steps to lodge a *caveat* with the Registrar of the Supreme Court, as pointed out by the *Execution Act*, but in April he took a deed from the Sheriff, which was in the statutory form, and in September following, an application was made for registration as of an absolute fee. The Registrar-General informed the plaintiff's solicitors that he would register it in accordance with the Act, but not as an absolute fee.

The Registrar was not specially asked to give his reasons in writing so that an application could be made to the Court. I think that the duty of the Registrar is clear, he should either comply with the application in due course or give a written refusal; it certainly is not intended that applications for registration should lie in the office for years, as this has done, unacted on, as certain advantages are by Statute given to those who apply for registration. If the application is one that cannot be complied with, the Registrar should at once give his reasons in writing so that the matter can be dealt with and the title cleared.

Judgment.

It appears from the evidence that the defendant applied to the Registrar-General's office for information as to the charges before he inserted the advertisement, and the advertisement is a correct copy of the list of charges furnished. On examining that list it is at once obvious when and how the mistake which the plaintiff complains of arose; in the list as furnished, the judgments are entered as from the date of application, whereas by section 26 of the *Land Registry Act*, and section 33 of the *Execution Act*, they bind lands only from the date of complete registration. Clark's charge appears in the list as of the 10th September, the day it was registered, and Redfern as of the 15th August, the date of application, whereas in fact Redfern's ought to have appeared as of the 18th of September, the time of complete registration, and list of charges would then have shown that Clark's security was prior in date to Redfern's.

It is practically for this mistake that the plaintiff sues. The error arose in the Land Registry Office. It is to that office that the Sheriff has to apply for the information which the *Execution Act* compels him

DRAKE, J.

April, 1892.

BRYNES v. McMILLAN.

to publish. A personal examination by the Sheriff of the Land Registry Office books is not permitted, and if it was, a stranger to the mode of keeping these registers would not be able to derive any satisfactory information from them.

I cannot hold that under these circumstances the Sheriff is responsible for the mistake of another department. He has fulfilled the duty cast upon him by the *Execution Act*, and with due diligence he has published the particulars furnished to him correctly, and the first intimation he had of any prior claim by Clark came from the plaintiff after the sale.

In my opinion as soon as a sale is completed the Sheriff is *functus officio*, except for the purpose of paying the purchase money to the Registrar of the Supreme Court and handing over the deed to the purchaser.

Under the Act the proceeds of the sale have to be paid to the Supreme Court Registrar, to be by him distributed as mentioned in sections 45 and 46. The plaintiff could have taken steps to prevent the money being distributed, and if he satisfied the Court of the error which has been shown here the sale would have been set aside or steps taken to protect the purchaser, but instead of availing himself of these provisions of the Act the plaintiff did nothing for twelve months, and then brought this action.

Judgment.

It appears to me that the mode in which judgments are registered in the Land Registry Office is one that ought to be altered. It takes apparently 34 days to register a judgment. The object of such a registration is defeated by this unreasonable delay. Pending complete registration an owner can sell to an innocent purchaser, and thus cut out his creditors. Every judgment ought to be registered within 24 hours of the application; and if the Act does not allow such a proceeding, it should be amended. But I see nothing in the Act to prevent the Registrar from registering judgments with much greater expedition than appears to be the practice.

It was contended that under any circumstances Clark's mortgage was not a registrable charge, and, therefore, the plaintiff could not be prejudiced. I express no opinion on this point, as Clark is no party to this action and has not been heard.

For the above reasons I must dismiss this action with costs.

Action dismissed with costs.

DRAKE, J.

May, 1892.

REGINA v. AH SING.

REGINA *v.* AH SING.

Gaming house—Order to enter—Within what time to be executed.

An order to enter a house reported to be a common gaming house must be executed within a reasonable time from the time of making the complaint.

Statement.

APPEAL from a conviction for obstructing an officer who had an order to enter a house, reported to be a common gaming house, under sec. 2, R. S. C., ch. 158. The order to enter the house was issued in January, 1889, and not executed until March, 1892.

The appeal came on to be heard by DRAKE, J., sitting as County Court Judge, on May 6th, 1892.

Walker for the appeal; *Taylor* contra.

DRAKE, J.:—

Judgment.

In my opinion, this conviction is bad. The offence charged is that of obstructing a constable, under R. S. C., ch. 158, sec. 7, in the execution of a written order under the hand of the mayor of the city, under sec. 2, to enter a house reported to be a common gaming house. The order was issued in January, 1889, but not executed until March, 1892, a lapse of over three years. No provision is made by the Act as to the time within which the order is to be executed, or the information laid, so that the case is governed by section 11 of the *Summary Convictions Act*, as amended by sec. 5, ch. 45, of the Acts of 1889. This section, as amended, enacts that "where no time is specially limited for making any complaint, or laying any information, in the Act or law relating to the particular case, that the complaint shall be made and the information laid within six months from the time when the matter of complaint or information arose," etc. It is true that the section says nothing as to the time within which the order is to be executed, but this order is distinct from a warrant for arrest of a person charged with crime, which, by section 469, cap. 174, 49 Vic., is valid until executed; but, in my opinion, every order under section 2 of the Act respecting gaming houses should be executed within a reasonable time. The Act on this head is silent, but it never was intended that after a complaint made and an order for search given the order should be filed away without any attempt to enforce it for

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years. The premises may no longer be used for an improper purpose, and it would be contrary to justice that the stringent provisions of this Act should be put in force when or how the police thought proper.

Appeal allowed.

FULL COURT.
May, 1892.
5 CHINAMEN v. NEW WESTMINSTER.

FIVE CHINAMEN

v.

THE CORPORATION OF THE CITY OF NEW WESTMINSTER.

Summary conviction—Joint action by several offenders to recover fines paid after conviction quashed—Prohibition to inferior Court.

Where several persons are fined in one summary conviction which has been quashed, they may not sue jointly to recover the fines paid, but must bring separate actions.

The only ground of prohibition to an inferior Court is that it is exceeding its jurisdiction.

Statement. APPEAL by the City of New Westminster against a judgment of BOLE, Co. J., in favour of the plaintiffs in a joint action to recover the fines paid under a summary conviction, which had been quashed on appeal by the learned Judge.

The appeal came on to be heard before BEGBIE, C.J., and CREASE and DRAKE, JJ., May, 1892.

A. E. McPhillips for the appeal; *Forin* contra.

Sir M. B. BEGBIE, C.J., delivered the judgment of the Court:—

Judgment. This case comes before us in a very singular way. On the 8th August, 1891, the five respondents were convicted before Messrs. Atkinson and McTiernan, JJ.P., of an offence against the gaming laws, and fined $100 each. There was only one conviction against the five offenders, but the sentences, of course, were distributive. The respondents appealed. Pending the appeal, the five fines, amounting to $500, ought to have been paid to the convicting Justices to abide the event —s. 77, sub-s. (*c*), of the *Summary Convictions Act*. Instead of this, the $500 was paid to the Corporation of New Westminster, who would, no doubt, have been ultimately entitled to the money if the

conviction had been sustained. On the 3rd November, 1891, the appeal was allowed by the County Court Judge, Mr. BOLE, but no directions appear to have been given for formally quashing the conviction, nor was any order for repayment under s. 77, sub-s. (*d*), of the same statute, made, nor apparently asked for; perhaps no such order could have been made, as the money had not been paid to the convicting Justices by the respondents. This order allowing the appeal has never been attempted to be reversed, even if it were not final and without appeal. The five Chinamen commenced an action in the New Westminster County Court against the Corporation for a return of the $500. I do not see how the five had a joint right of action; but that point seems not to have been taken. The Corporation applied to me on the 24th November, and again on the 10th December, for a writ of prohibition to Mr. BOLE, to restrain him from hearing that action, alleging that the appeal against the conviction had been improperly allowed by him, and that they apprehended Mr. BOLE would decide against them on the plaints in the County Court with the same impropriety as that with which he had allowed the appeal. Obviously, this was no ground for prohibition, and I refused the writ. The arguments on that occasion were all addressed to supporting the conviction, and reversing Mr. BOLE'S decision respecting it, which I could not possibly entertain on an application for prohibition. It was urged that the five Chinamen could make no application to any Court for the return of the money until the conviction was actually quashed, that Mr. BOLE had never expressly quashed it; and a conviction is now produced before us, the only conviction, we are told, that has ever been drawn up, and which, by another surprising error, is a conviction before different Justices from those who actually sat. It seemed necessary to point out, and I did point out, that all the objections raised went merely to show that the five plaintiffs would certainly fail in their action, but not in the least to show that the County Court Judge had no jurisdiction to try it, and again I refused the prohibition. The County Court action thereupon proceeded, and was tried, and judgment was given for the Chinamen with costs, and from that judgment the Corporation bring the present appeal.

Judgment.

We cannot now at all consider the propriety of the conviction of the 3rd August, or of the allowance of the appeal on the 3rd November. As to the effect of that allowance, however, it seems obvious to all of us that it necessarily involved the quashing of the conviction. The Corporation, therefore, have lost even all such inchoate right as they

FULL COURT.
May, 1892.
5 CHINAMEN v. NEW WEST-MINSTER.

had to the money; and it is quite clear on the statute that they never ought to have accepted it at all, even temporarily. It ought to have been deposited with the Justices, under s. 77, who ought to have deposited it with the County Court Judge—s. 85. It now clearly belongs to the Chinamen, and by some proceeding they are entitled to regain possession of it. On the other hand, the five have not, I think, a joint right of action which they set up in this plaint. But that is amendable; and, if we must make an order *in invitos*, I think this appeal would have to be allowed or the plaint amended. But that point (of misjoinder) seems never to have been taken in the Court below. If we make such an order, allowing this appeal and dismissing this joint action, the five respondents will immediately commence five separate actions against the Corporation for five separate sums paid by mistake, as to which I do not see what defence the Corporation could make. If, on the other hand, we amend by striking out four of the plaintiffs' names, and give judgment for the fifth in respect of $100, that would leave the Corporation liable to be sued by the other four, in separate plaints. I think, therefore, that Mr. McPhillips would very usefully and honourably exercise the power which every counsel has in conducting litigation, and, in order to save further expense and litigation, consent to a dismissal of his appeal—in fact, withdraw it, which we certainly allow him to do without costs.

Judgment.

Appeal allowed to be withdrawn without costs.

DIVISIONAL COURT.

May, 1892.

MOUNT ROYAL MILLING, ETC., CO. (LIMITED), JUDGMENT CREDITORS,

v.

KWONG MAU YUEN, JUDGMENT DEBTOR, AND JAMES LEAMY, GARNISHEE.

MOUNT ROYAL MILLING CO. *v.* KWONG MAU YUEN *Judgment debtor* AND LEAMY *Garnishee*

Judgment debtor—Garnishee—Liability of to third party—Supreme Court Rules, 1880, Order XLV., Rules 337-341—When Court may order executions against garnishee.

Where a garnishee disputes his liability to a judgment debtor, the Court has no power to order execution against him, but will direct an issue to try the same, and where the garnishee's alleged indebtedness is to a third party, such party must be summoned, and, if necessary, an issue ordered to try his liability to the judgment debtor.

APPEAL from Judge in Chambers.

Statement.

The plaintiff had obtained an order *nisi* on the 7th April, returnable April 13th, on an affidavit by Hall, a partner and resident manager of the plaintiff's company, alleging that Leamy was indebted to one Lee Hin Ching, and that Lee Hin Ching had been a partner with the defendants—who were also a company—and attaching all moneys due by Leamy to the judgment debtors to answer the judgment debt in this action. This order was served on Leamy on the 11th April. On the same day Leamy stated on affidavit that he owed nothing to the debtors. On the 13th, in chambers, the order *nisi* was made absolute and execution ordered against Leamy, on the ground, as alleged, that Leamy had not specifically answered the allegations in Hall's affidavit.

The appeal came on to be heard before Sir M. B. BEGBIE, C. J., and DRAKE, J., sitting as a Divisional Court, on May 27th, 1892.

Luxton for the appeal; *Helmcken* contra.

Luxton: The affidavit of Leamy's debt is not made by the proper party; the order requires it to be made by the plaintiff or the plaintiff's solicitor. Here the plaintiff, being a corporation, could not make the necessary affidavit. But it does not follow that, therefore, any of the shareholders can. And this affidavit is necessary to give the Judge jurisdiction.

Argument.

DIVISIONAL COURT.

May, 1892.

MOUNT ROYAL MILLING CO. v. KWONG MAU YUEN *Judgment debtor.* AND LEAMY *Garnishee.*

[The Chief Justice referred to the *Bank of Montreal* v. *Cameron*, 2 Q. B. D., 536, and *Federici* v. *Vanderzee*, 2 C. P. D., 70, under the original form of O. XIV., where leave to sign judgment was obtainable only on an affidavit by the plaintiff himself, and it was held that an affidavit by plaintiff's secretary or solicitor was insufficient, though the decision completely debarred companies from the benefit of the order. It is highly probable, therefore, that that construction would be adopted here, where it would work no hardship; for the plaintiff's solicitor may make the affidavit. The original Order XIV. was, in consequence of that case, amended to its present form.]

Luxton: The affidavit of the 7th April, even if made by the proper person, does not support the order *nisi*; for the affidavit only suggests a debt due from Leamy to Lee Hin Ching, but the order *nisi* only attaches debts due by Leamy to the defendant firm. Then Leamy denies point blank that he owes anything whatever to the defendant firm; and yet this judgment order of 13th April directs him to pay, or execution to issue against him.

The Chief Justice: The same misconception of jurisdiction seems to have arisen here which we have already pointed out in *Hotz* v. *Macalister*, 2 B. C., 77, which was under Order XIV. Neither under that order nor under the attachment order (XLV.) has the Judge in Chambers any jurisdiction to examine or decide on the merits of a disputed right; but only whether there is any real dispute. If there be any dispute, it must be tried elsewhere. And, really, Rules 338 and 339 appear most explicit. The earlier rule only permits the Judge to order execution where the garnishee does not pay, but does not dispute his liability. When the proposed garnishee disputes his liability, the next Rule, 339, expressly provides that the Judge is not to order execution, but is to direct an issue to try the right. Now here Leamy denies his liability point blank. Not only so, but Rules 340 and 341 proceed to lay down that where it is suggested that the garnishee's alleged indebtedness is to a third party, no order is to be made till that third party is summoned, and, if necessary, an issue is also to be directed to try his right. But Lee Hin Ching has never been summoned or heard at all.

Argument.

Helmcken, for the plaintiffs (the respondents), admitted that he could produce no authority in support of the order absolute, but suggested that the order *nisi* might be allowed to stand, and be amended, with a view to new proceeding being taken thereon.

DIVISIONAL COURT.

May, 1892.

MOUNT ROYAL MILLING CO. *v.* KWONG MAU YUEN, *Judgment debtor.* AND LEAMY *Garnishee.*

SIR M. B. BEGBIE, C. J.:—In the interest of the plaintiff's company, if they propose to press their claim upon the debt to Lee Hin, it is necessary that the whole of the present proceedings should be set aside *ab initio*, without prejudice to their further proceedings, if they wish to have that expressed. It is doubtful whether even the initiating affidavit is of any value, for any purpose, not being made by the proper person, the plaintiff's solicitor. We certainly can not support the order *nisi* in its present form, and if the order be now amended it would have to be served again, so there would be no economy. The question of Lee Hin's liability as a partner will probably be too intricate for a Judge to decide in a summary way in Chambers; it would probably be proper for a jury, and the result of the garnishee proceedings will, most likely, be an issue to try that question, in which the Mount Royal Company will be plaintiffs, and Lee Hin defendant.

DRAKE, J., concurred.

Appeal allowed, and both orders set aside with costs.

Appeal allowed with costs.

IN THE COUNTY COURT OF VICTORIA.

BEGBIE, C. J.

June, 1892.

HAGGERTY *v.* GRANT *et al.*

HAGGERTY

v.

GRANT (DEFENDANT) AND DUCK (OWNER).

Rel 3 BCR 28

Rel 8 BCR 298

Fold Mullen v Shirley 13 BCR 344

Mechanics' Lien—Premature action—Lien for materials—Whether saved by repealing section (30) of the "Mechanics' Lien Act, 1891"—Affidavits—What they should show—Nonsuit.

In an action to enforce a mechanic's lien the owner is entitled to defend on any ground available to the contractor, even where judgment has gone against the latter by default.

Quære, whether if credit has originally been given the contractor for a longer period than the time within which proceedings must be taken to enforce the lien, an action would be maintainable.

The lien for materials given by the *Mechanics' Lien Acts, 1888-90*, together with the procedure for the enforcement thereof, have not been abolished by the repealing section (30) of the Act of 1891.

The Court is not disposed to grant a nonsuit, where the action is brought to enforce a purely statutory right.

BEGBIE, C. J.

June, 1892.

HAGGERTY v. GRANT *et al.*

ACTION to enforce a mechanic's lien.

In this action it was alleged that the defendant Grant (either as a contractor, or as the agent of his co-defendant, Duck, or possibly under engagement with somebody else—as to which there was no evidence) being employed in constructing works or buildings on land belonging to Duck, contracted in writing, in March last, with the plaintiff for executing certain excavations, at the price of $150, and for the supply of materials at a fixed price per load or cubic yard; the quantity to be ascertained on completion. During the progress of the work it was alleged that additional excavation became necessary, at an agreed price of $100, and one hundred and eighty thousand bricks were hauled, the market rate of which would be $1 per thousand. The plaintiff had fully performed his part on the 22nd April. His whole claim amounted to $825, or thereabouts. On that day he received from Grant $300 "as part payment of supply of labour and material," and it was then agreed between them that the balance was to be paid by Grant on the 22nd of May. Grant having abandoned his work and left Victoria, the plaintiff on the 12th May brought this action for judgment against Grant for the balance, $525, and to establish a lien on Duck's land to secure that amount. The summons, under the statute of 1892, called upon Grant to file a dispute note within eight days. The summons was not personally served on Grant, who could not be found. The plaintiff procured an order for leave to proceed against Grant as if personal service had been effected, and signed judgment against him for $525 and costs.

Statement.

The case came on to be heard before Sir M. B. BEGBIE, C. J., sitting as County Court Judge at Victoria, June, 1892.

Argument.

Jay for plaintiff; *Belyea* for defendant Duck.

Belyea: We dispute the amount of plaintiff's claim.

BEGBIE, C. J.: I do not know whether it is any longer open to Mr. Duck to dispute the amount of plaintiff's claim. It has been ascertained by judgment (however obtained) in an action to which he was a party—section 17 does not exactly apply; for I have no idea whether Grant had a good defence or not. However I shall allow Mr. Duck to defend upon both the points which were originally open to him, viz., both as to the regularity of the plaintiff's proceedings to establish the lien and as to the amount.

[The case was then proceeded with, and the evidence having been given, judgment was reserved.]

BEGBIE, C. J.
June, 1892.

HAGGERTY
v.
GRANT
et al.

June 11th, 1892. Sir M. B. BEGBIE, C. J.:—

There are several objections to the defendant's proceeding in this action. The nature of it is to be kept in view. The defendant, Grant, contracted with the plaintiff to make certain payments, amounting in all to about $825, for work to be done and materials to be furnished on land belonging to Mr. Duck. Of this $300 was paid on the 22nd of April, 1892; and the plaintiff agreed with Grant that the balance should be paid on the 22nd of May. The statutes provide that the sums due by Grant shall, if the plaintiff take steps therein mentioned, be secured upon, and, in case of default by Grant, levied by sale of Mr. Duck's land. The steps required by the statutes to acquire and maintain this lien are, first, the filing of an affidavit in the statutory form within thirty-one days from the completion of the work, &c.; and next, the bringing of an action within thirty days after filing such affidavit. The present action is, as against Grant, to recover the unpaid balance of $525, and, as against Duck, to have the lien on Duck's land for that sum declared, and, if necessary, realized. The first objection is, that the action was commenced on the 12th May, before the agreed period of credit had elapsed, and therefore before anything was payable by Grant. Grant has not raised any objection on that ground; he has never appeared at all, and judgment has gone against him by default. I have decided, however, that that is not binding on the other defendant, Mr. Duck, and that he is entitled to defend on any ground which shows that the plaintiff is not entitled to succeed. *Burritt* v. *Renihan*, 25 Gr. Ch. R. 183, was cited to show that such an action is premature, but surely no authority is necessary for such a proposition. Duck's land is, in this action, only bound to make good what the plaintiff can, in this action, recover against Grant; and it is clear he could recover nothing. It is in this respect as if the holder of a promissory note were suing an endorser before the date at which the maker has promised to pay. It is true that in some cases the credit thus given to the contractor might result in a total loss of the lien-holder's lien. For instance, if the workman or material-man had agreed to give six months' credit, whereas the statute requires the lien-holder to file an affidavit within thirty-one days after completion of the work, and commence his action within thirty days more, otherwise the lien is gone. In such a case a plaintiff might have some

Judgment.

BEGBIE, C. J.
June, 1892.

HAGGERTY
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excuse for bringing his action within the time allowed for credit. I do not say that it would be valid or otherwise. Here, however, the sixty-one days from the 22nd of April, within which the action is to be brought, would not expire until long after the 22nd May; and there is no excuse or reason for commencing the action on the 12th.

But there are several other grounds of objection at least equally serious. This is a mixed claim for labour and materials; mainly for materials; the whole supplied in March and April last, and so governed by the Act of 1891, which in express terms only confers this lien upon claims for work and labour; and by section 30 repeals the previous statutes of 1888-89-90, which included material men. But notwithstanding this broad repeal, section 30 immediately proceeds to declare that "such repeal shall not affect any right of lien which would have existed but for the passing of this Act" (1891). On the best consideration I can give to this enactment I take it to mean that the previous Acts are repealed only as to liens for work and labour, which are to be governed by the new Act, but all other liens are to be left under the old law. I was told during the argument that the intention of the Legislature was otherwise—that it was meant to exclude all claims by material-men. I do not think they have expressed that intention. But if they have, then the plaintiff can evidently be allowed no claim whatever for material; he would be completely out of Court. I think, however, that the words I have quoted from section 30 modify the repeal of the former statutes, and the question is: What right of lien has the plaintiff got under the old law? Evidently none: for he has not complied with the stipulations of the old law as to the affidavit. He does not specify the particulars of the material alleged to have been provided. He has indeed taken the form in the schedule to the Act of 1891; and as that Act does not deal with the lien of material-men, the schedule form naturally omits all mention of materials. There is indeed another defect, as to which the plaintiff has failed to comply with either of the schedule forms of affidavit: he omits the address of the land-owner. The same statute which gives the inchoate right of lien, either for work or materials, declares that it shall absolutely cease unless an affidavit be filed within thirty-one days, stating the enumerated particulars, one of which is the address of the owner. That affidavit constitutes the lien (section 9 of 1888, section 8 of 1891), and in order to acquire a right of this very unusual nature, the statute must be strictly followed. On these grounds again, therefore, the claim of lien fails.

Judgment.

Then the plaintiff has closed his case without producing any evidence that the work or materials were supplied at the request of the owner, Mr. Duck (section 4 in both statutes); or that Grant, who alone contracted with the plaintiff, was at all employed by Mr. Duck; or that the labour, etc., in respect of which the plaintiff claims, was ever brought within the knowledge of the owner or his authorized agent (section 7 in each statute); or that the owner had any agent authorized to take cognizance of the work, etc. If I were to decide merely on this want of evidence, which probably could be supplied, I might, perhaps, in an ordinary action, enter a verdict of nonsuit, without prejudice to a fresh action. But these statutes do not confer ordinary rights. They must be followed and construed at least as strictly as the statutes regulating conditional bills of sale. And I do not think that the plaintiff could in any fresh action overcome the very serious objections already enumerated. The action will, therefore, be dismissed. There has not been pointed out, nor can I perceive any good cause why the costs should not follow the event, and unless there be good cause I have no discretion in the matter of costs. *Action dismissed with costs.*

REGINA *v.* HARRIS.
REGINA *v.* DUVAL.

Selling intoxicating liquors on Sunday—Detectives visiting saloons to see if law obeyed—Whether bona fide travellers or not.

A constable who, by order, visits saloons on Sundays to see whether or not the law with respect to the sale of liquor is being obeyed, is a *bona fide* traveller within the meaning of the *Liquor License Regulation Act, 1891.*

Statement.

APPEALS from convictions for selling intoxicating liquor on Sunday in violation of the *Liquor License Regulation Act, 1891.*

They came on to be heard before Sir M. B. BEGBIE, C.J., sitting as County Court Judge at Victoria, on June 10th, 1892.

Eberts and *Helmcken* for appellants; *Smith, Deputy A.-G.*, contra.

Judgment.

SIR M. B. BEGBIE, C.J.:—

It will be very difficult to persuade me that any person going from Victoria to Esquimalt merely to get liquor with which he could not lawfully be supplied in Victoria, is a *bona fide* traveller within the Statute. For then a person coming from Esquimalt to Victoria, with a similar intention, would also be a *bona fide*

BEGBIE, C.J. June, 1892.

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traveller, and by establishing a competent number of such travellers, the saloons in both places might be kept going exactly to the same extent as if all the travellers stayed at home. The *bona fides*, the honesty of intent, I think, must be measured solely with reference to the intended observance or breach of the Statute itself. A burglar or forger, travelling to effect his crime or to evade his punishment, may still be a *bona fide* traveller within the Statute. A man perfectly just in all his pecuniary dealings, may be no *bona fide* traveller within the Statute, even if he travels fifty or one hundred miles, if he undertakes the journey merely with a view of getting a drink on Sunday. Now, these two men who were served with liquor in Esquimalt in this case, I think, were travellers. They were on foot, four or five miles from home, and moving about all day. That is travelling, certainly, within *Taylor* v. *Humphries*, 7 Jur., N.S. 1288, where a drive of four miles for pleasure was held to be travelling. Then, was the travelling *bona fide?* I am told that they were trying to get supplied with liquor, and so seeking to infringe the Act. That is quite a mistake. They were seeking to enforce the Act; to detect infringers and procure their punishment by fine, etc. They were there on their most lawful business, and in obedience to superior orders, to enquire into the circumstances which had been reported to the superintendent here. Suppose a robbery or felony had been reported, and they were sent to investigate, going from house to house during six or seven hours, is it supposable that the Legislature intended to prevent anyone from supplying them with reasonable refreshment? I think not. I think, therefore, that the Justices of the Peace ought to have found that the two constables were *bona fide* travellers—that no part of the body of section 4 applied to this case—and they ought to have refused conviction. I give no opinion upon the interesting questions as to the pleading of exemption discussed by Mr. Smith and Mr. Eberts, nor upon the question whether any person is sufficiently pointed out by the Statute as an offender within the last three lines of the body of section 4. The convictions will be quashed, but without costs.

Judgment.

Convictions quashed.

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TUCK v. THE CORPORATION OF THE CITY OF VICTORIA.

Master and servant—Municipal corporation—Contract of hiring by election to office pursuant to Municipal Act—Corporate seal unnecessary—Wrongful refusal to receive into employment—Pleading—Amendment at trial.

A person duly elected, at a meeting of a Municipal Council, to municipal office, pursuant to a statute giving the Municipal Corporation power so to appoint its officers, becomes thereby the servant of the Corporation without further evidencing or ratification of the contract of hiring, either by writing under the corporate seal or otherwise, and can maintain an action for damages if not received into the employment in pursuance of the contract of hiring implied by such appointment.

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(2.) The defendants having refused to receive the plaintiff, appointed as above, into the employment, he sued for wrongful dismissal.

Held, that his action should have been for the wrongful refusal to receive into the employment; but amendment allowed at the trial.

MOTION FOR JUDGMENT.

Statement.

THE Municipal Corporation of the City of Victoria, pursuant to sec. 93 of the Municipal Act, B. C., 1891, 54 Vic., cap. 29 (set out in the Judgment), by a majority of seven aldermen to three, elected plaintiff to the office of City Engineer, Water Commissioner and Surveyor. The Mayor did not take part in the vote, though present. The salary of the joint offices had been, by by-law, fixed at $2,000 per annum, payable monthly, and plaintiff was thereupon declared elected accordingly, and a minute to that effect was made by the City Clerk in the Minute Book. No formal contract of hiring was drawn up or executed, under seal or otherwise. At the next meeting of the Council the plaintiff's appointment was discussed and disapproved, but was treated as being incomplete for want of ratification and contract in writing under the corporate seal. The plaintiff tendered his services but the defendants refused to receive him into the employment. In consequence of this refusal plaintiff did not furnish the security for due performance of his duties, provided by sec. 95 of the same Act, also set out in the Judgment. The defendants did not demand any such security.

The plaintiff's Statement of Claim was for wrongful dismissal, claiming as damages one month's salary, as in lieu of a month's notice of dismissal.

The action was tried before Sir MAT. B. BEGBIE, C. J., without a jury.

E. V. Bodwell now moved for judgment for the plaintiff.

W. J. Taylor for the defendants, contra.

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SIR MATTHEW B. BEGBIE, C. J.:—

The plaintiff in this case claims to have been, by a vote of the Aldermen in Council, elected to the office of City Engineer, Surveyor and Water Commissioner, at a salary of $2,000 per annum, but that the Corporation refuse to pay any salary for the month of March, and he sues for a month's salary and for general relief. The Corporation allege that the plaintiff never was duly elected: that the vote taken on the 2nd of March in his favour was not final, but required to be ratified at a further meeting; that no such ratification ever took place: that a mere vote, even if ratified, did not appoint to an office, but required to be communicated to the plaintiff, and to be further embodied in an appointment under the corporate seal; and that no such communication was ever addressed to him nor any such instrument ever executed. And at the trial it was further alleged and proved that at the very next weekly meeting after the 2nd of March, namely, on the 9th of March, the Council came to a contrary resolution unfavourable to the appointment of plaintiff. And it was further objected that the plaintiff, even if he were under the circumstances duly elected and appointed, had never qualified, as required by section 95, of 1891, by giving security and making the declaration there mentioned, could not, therefore, have entered on the duties of the office, and so could not become entitled to any pay, and that his claim for a month's salary must be disallowed.

Judgment.

As to this last argument, I stated that if it were upheld, and that the proper remedy were in damages, for depriving him of the opportunity of earning salary, or dismissing him without salary, I should, under the prayer for general relief, allow amendments to be made in the pleadings to enable that case to be dealt with.

The sections of the Act of 1891, which are material, are as follows: Sec. 84: "The Mayor, if present, shall preside and have a vote as member of Council. In case of equality of votes, including his own, he is not to have a casting vote, but the question is to be negatived." Sec. 93: "At the first meeting of the Council in every year, or as soon as possible thereafter, the Council may elect a clerk, water commissioner, * * surveyor, * * or such other officers as may be deemed necessary, who shall hold office during the pleasure of the Council, and may receive such remuneration as the Council shall by by-law appoint." (It is admitted by all that a valid by-law has fixed two thousand dollars as the salary for the three offices combined.) Sec. 94: "In every election by the Council for a municipal

officer or officers the voting shall be by ballot." Sec. 95: "All officers shall give security, in such manner as the Council shall determine, for the due performance of their services, and shall also, before entering on their duties, make and subscribe a solemn declaration" (as therein set forth). By sec. 91, Minutes of all meetings of the Council shall be drawn up and fairly entered in a book to be kept for that purpose, and shall be signed by the Mayor (or other person presiding at such meeting).

At the regular weekly meeting, in the evening of the second of March last, the choice of a city engineer, surveyor and water commissioner came on to be dealt with. There had been a preliminary meeting of the members of the Council in the morning, at which the various applications, six or seven in number, I think, and testimonials were read and considered, but no resolution was proposed. In the evening the candidates were ballotted for by the ten aldermen, the Mayor presiding, but not, on that occasion, voting. Of course, his vote, if for Mr. Tuck, would have been unnecessary; if against him, futile, under sec. 84. The plaintiff received seven ballots. Two other candidates received the other three ballots between them. The Clerk of the Council read the numbers. There is a conflict of evidence as to what was said by the Mayor, when the result of the ballot was thus announced. According to the recollection of Councillors Devlin and Baker, his words were: "Then I suppose there is nothing for me to do but to declare Mr. Tuck duly elected;" and this is strongly supported by the memorandum or note made by the City Clerk at the time, which is: "Mr. Tuck declared to be elected." And no councillor was called to contradict this, or to say even that he could not recollect the Mayor having used the word "elected." On the other hand, the Mayor himself, who seems from the first to have had doubts as to the propriety of the choice, says that he very deliberately, and of set purpose, abstained from using the word "elected," or any such term, and that he carefully and intentionally confined himself to a repetition of the statement made by the Clerk, namely, that Mr. Tuck had received seven votes, not even mentioning the votes cast for the other candidates. And he says (and this is not contradicted) that on the 9th of March, when the question of Mr. Tuck's appointment was again brought forward, he denied the accuracy of the Clerk's note, and denied having used the word "elected," and refused to sign the minutes as copied by the Clerk from his own note into the minute book of the Council, and did not in fact sign until the 25th of April, and then only with a

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marginal memorandum correcting the minute in accordance with his view.

Of course this want of agreement of recollection is much to be regretted, but in my opinion it is very immaterial. Whatever phrase the Mayor used, his declaration was not the election. It could only have been a declaration of the election—the announcement of a fact already consummated. Such declaration might have been followed by a sealed instrument of appointment; by a bond or other security from the elected candidate, and by the declaration by him, mentioned in sec. 95; or further by the formal instalment of the plaintiff into his office. All these would be merely consequent upon and could not be any part of the election itself. I think that the election is complete, so far as the individual voters are concerned, as soon as all the ballots are thrown into the box; and I think it is complete so far as the Council as a body are concerned, so soon as the result of the poll is declared.

That seems to be Mr. Rogers' view of the completion of a vote at Parliamentary elections (2 Rog. Elections, 15th Ed. 661), and in other parts of his work the election is treated as consummated before any return made, which, indeed, appears almost necessary from the nature of the thing. Here it was not the Mayor who elected. He had, in fact, nothing to do with the election. He did not even vote upon it, the contingency mentioned in section 84 not having arisen. I do not know that the return is any part of a Parliamentary election strictly taken, although a member could not sit until formally returned. At any rate, there could not be here anything exactly analagous to the return at a Parliamentary election, which is made by the sheriff, after taking the votes of the constituency to the Clerk of the Crown office; for here the election authority, the returning authority, and the authority requiring to be informed, are all lodged in one and the same body—the members of the Council elect: they alone ascertain the result; they alone take cognizance of it, and have to act on it. As soon therefore as the unchallenged result of the poll is made known to the Council (it seems immaterial by whom) the favoured candidate seems to be in the position of an elected and returned M. P. who is an M. P. before he takes the oaths.

Judgment.

The case of a ballot cast by any voter by mistake in favour of a candidate other than the one for whom he intended to vote is mentioned by Rogers as possibly capable of rectification, though the method is not clearly laid down. But no mistake or misapprehension is alleged here. Seven Aldermen out of ten voted and intended to vote for Mr.

Tuck on the 2nd March, though it appears some of them were anxious a day or so later to reconsider their vote. No method appears to be provided by which such reconsideration can be effected, at least, so as to annul the election of the 2nd March.

It appears to have been at first supposed that such an election was not binding unless confirmed at another meeting of the Council. Nothing has been pointed out in the Statutes which supports that view. It is true the records of the proceedings are not left merely to consist of the rough rapid notes taken by the clerk at the time. By section 91, minutes of the proceedings are to be fairly (that is without erasures or interlineations) entered into a book and signed by the chairman of such meeting. Ordinarily it is provided that the signature be affixed at the next meeting and may be the signature of the chairman of such meeting, and further that the minutes so signed shall be receivable in evidence of what took place (which, however, does not mean conclusive evidence). None of these provisions occur in the "Municipal Act, 1891," but no failures to comply with any of these provisions could affect the validity of a resolution regularly passed. Otherwise the neglect of the clerk to make a fair copy, the death, or the illness, or the obstinacy of a chairman might indefinitely delay, or even totally defeat the operation of a resolution passed by seven councillors out of ten.

Judgment.

I think the minutes, even with the alteration proposed by the Mayor, sufficiently prove the election. Of course the Council could undo what they have done. But this could not be effected by simply abstaining from stating in their minutes that the Mayor had declared a due election. If there had been, as I think, an election, the plaintiff acquired thereby certain rights. The statute directs that the person elected shall hold the office. The Corporation could only put an end to this right in the manner pointed out in section 93: "Any officer can be dismissed by giving him thirty days' notice." They are to declare their pleasure that he cease to serve, and they pay him a month's salary. Perhaps it would have been more regular if a formal deed of appointment had been made out under the corporate seal and handed to the plaintiff, if it had been intended by the Corporation that he might act. I do not know that that was necessary; if so, it was the duty of the Corporation to execute the deed. The argument now is that it was necessary, *i.e.*, that it was their duty, to give him such an instrument, but that it was never delivered to him or made out at all, and therefore that he cannot recover damages. That is to say, the

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plaintiff is to lose money, and they are to gain because they have not performed their duty. I cannot listen to that. Then I am told that the plaintiff cannot act at all, and begin to earn his salary until he has given the security and made the declaration mentioned in section 95. But it clearly would have been perfectly futile to ask the Council to determine as to the security which the plaintiff should give, or to make a declaration as to the faithful performance of the duties of an office which, it is quite evident, the Council had determined that the plaintiff should not continue to fill. The plaintiff had called personally on the Clerk of the Council on the 3rd March, informing him of his readiness at once to enter on his office, and had been requested to wait for a week. On the 4th March he had called personally on the Mayor at the City Hall, and the Mayor informed him to the same effect, and he was again informed that he must wait; that his election was not yet confirmed (apparently under the misapprehension already noticed). On the 22nd March the plaintiff addressed the Mayor and Council in writing, but this remained unnoticed. On the 26th March he again wrote to the Mayor, and on the 28th received a reply from the Clerk denying that he had been appointed. It would have been quite absurd for him to attempt to comply with the conditions of section 95. Even the strictness of the conditions of a money tender are to be deemed entirely waived when it is quite clear that no tender would be entertained.

Judgment.

The Corporation had a very simple way of remedying or entirely preventing any ill consequences from their blunder, if it were a blunder, at the ballot of 2nd of March. They could pay the plaintiff a month's salary and dismiss him. Instead of that, they ignore their own most solemn act and try to prevent the application of section 93, by disowning their own votes. The plaintiff is surely not to blame for supposing them serious, both when they elect and when they refuse to admit. The case of the defendants is, "Our ballot on the 2nd March was a mere empty form and gave you no rights; our refusal to give effect to that vote was also *brutum fulmen*, and exempted you from no liability. We are not bound, either by our vote or our refusal." I surely cannot listen to that.

It was suggested that if the plaintiff, under the election of the 2nd March, acquired any rights which the Corporation refused to recognize, he ought to have applied for a *mandamus*, directing them *e. g.*, to execute a sealed appointment to office, and to admit him to perform the duties; and that on the application for such a writ his

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right could have been more properly tested. But I doubt very much whether, on such an application, any enquiry as to his rights could have taken place. Of course if it appeared that plaintiff had no right, the *mandamus* would have been refused. But it might equally have been refused on other preliminary grounds. A *mandamus* will not be granted unless it is the applicant's only remedy. Neither will it be granted unless it clearly appear that it will be an effectual remedy. Here *mandamus* would clearly have been quite abortive, for if the Corporation had, in obedience to the writ, admitted the plaintiff to these offices, they would have had a clear right to dismiss him the very next day, and the *solatium* of a month's salary appears to be the statutory relief and more appropriate than the remedy by *mandamus*. The writ therefore would have probably been refused entirely, irrespective of any consideration of the effect of the ballot of 2nd March.

I think there must be judgment for the plaintiff for a month's salary, with costs, save so far as they have been occasioned by the amendments I have referred to. The defendants' costs of the amendment must be borne by the plaintiff, *i. e.*, must be deducted from the amount of the judgment. And I think this action more properly brought in the Supreme Court than in the County Court, if only for the sake of the power of appeal.

Judgment.

In view of the statements at the trial, it is as well again to point out that by section 84, of the "Municipal Act, 1891," the Mayor has no casting vote in addition to his own proper vote as a member of the Council. Where that vote creates a tie, the result is to be negatived without more. As described, the Mayor did, on 9th March, give a casting vote in the negative, but that, of course, he had no power to do. However, the statute itself (section 84), without his casting vote, effected the result which he desired. The provision in section 84 would have prevailed, even if his casting vote had been given in the affirmative.

Judgment for Plaintiff.

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METHERELL v. MEDICAL COUNCIL, B.C.

METHERELL

v.

THE MEDICAL COUNCIL OF BRITISH COLUMBIA,

AND

G. L. MILNE, M.D., THE REGISTRAR OF THE COUNCIL.

Medical practitioner—Refusal to register in British Columbia an English registered practitioner—Supremacy of Imperial Parliament—Mandamus.

A medical practitioner registered in England prior to June 1st, 1887, under the Imperial *Medical Acts*, is entitled to be registered, and admitted to practice in British Columbia, pursuant to Imp. Stat. 31 Vic., cap. 29, sec. 3, subject to such laws as the Provincial Legislature may have made, for the purpose of enforcing the registration within its jurisdiction of persons registered under the Imperial *Medical Acts*.

2. General provisions in the B. C. *Medical Act* (Con. Stat. B. C. 1888, cap. 81), relating to examination of candidates, payment of fees, and registration of medical practitioners, do not affect the right to be registered in the Colony, acquired under the Imperial Statute by English registered practitioners.

3. The question of supremacy in relation to subjects of legislation, as distributed by the *B. N. A. Act*, arises only as between the Dominion Parliament and the Provincial Legislatures. The Imperial Parliament is sovereign to both.

4. The B. C. *Medical Act*, (Con. Stat. B. C., 1888, cap. 81), sec. 31, authorizes the making by the B. C. Medical Council of rules, pursuant to Imp. Stat. 31 Vic., cap. 29, sec. 3, for admitting English registered practititioners upon the Provincial register.

5. The B. C. Medical Council having made no such rules, plaintiff was entitled to be admitted upon the B. C. register, upon such proof of his English registration as would be admitted in a Court of law.

MOTION FOR A WRIT OF MANDAMUS.

Statement.

PLAINTIFF was, in London, England, in 1884, duly registered as a medical practitioner, under the Imperial Medical Acts, particularly referring to *The Medical Act, 1858* (Imp. Stat 21 and 22 Vic., cap. 90, sec. 31,* as amended by Imp. Stat. 31 Vic., cap. 29, sec. 3† (1868),

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*"31. Every person registered under this Act shall be entitled * * to practice medicine or surgery * * in any part of Her Majesty's Dominions."

†"3. Every Colonial Legislature shall have full power * * to make laws for for the purpose of enforcing the registration within its jurisdiction of persons who have been registered under the Medical Act * * upon payment of the fees (if any) required for such registration, and upon proof, in such manner as the said Colonial Legislature shall direct, of his registration under the said Act."

which latter was repealed by *The Imperial Medical Act, 1886* (49 and 50 Vic., cap. 48), which however (sec. 28) preserved all rights acquired prior to 1st June, 1887.

The defendants refused to admit the plaintiff upon the Provincial Medical Register, upon proof of his London registration, or to permit him to practice medicine in the Province, without compliance with the provisions of the B. C. *Medical Act* (Con. Stat. B. C., 1888, cap. 81, sec. 29,* by passing an examination. Defendants had made no rules applicable to the admission of English registered practitioners upon the Provincial Register, or professing to deal with them.

Pooley, Q. C., for the motion:

Argument.

We rely on the Imperial Statutes. The Provincial Statutes do not govern. They do not pretend to interfere with the right to practice in the Colony given by the Imperial Statute to medical practitioners duly registered in England prior to June, 1887. If they did, they would be *ultra vires* to that extent. If there is any conflict between the Imperial and Provincial Statutes, we contend that the Imperial Statutes govern, for, though the subject of education is relegated to the Provincial Legislatures by the *B. N. A. Act*, the Imperial Parliament has jurisdiction to reassume or infringe upon any of the powers therein delegated by it—*Reg.* v. *College of Physicians*, 44 U. C., Q. B., 564.

A. E. McPhillips contra. A *mandamus* will only be granted to enforce the performance of some duty on the part of the defendants, in the performance of which the plaintiff is interested. There is no duty imposed on the defendants to register such persons as the plaintiff. If the plaintiff is entitled to practice in this Province under his English registration, then he has no interest in Provincial registration, but the reverse, if any fees were required to secure it. No provisions or rules on the subject of any kind have been made. The plaintiff has made an unnecessary application to the Court and it should be dismissed. [BEGBIE, C. J.—In England, since the *Judicature Act*, and in this Province by sec. 14, *Supreme Court Act*

* "29. The Council shall admit upon the register any person who shall produce from any college or school of medicine or surgery, requiring a three years' course of study, a diploma of qualification; provided, also, that the applicant shall furnish to the Council satisfactory evidence of identification, and pass before the members thereof, or such of them as may be appointed for the purpose, a satisfactory examination touching his fitness and capacity to practice as a physician and surgeon."

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a *mandamus* may be granted in all cases in which it shall appear to the Court to be just or convenient.] No register has been provided upon which the plaintiff could be placed. [BEGBIE, C. J.—Rules can be made and fees may be fixed so as to cover these cases. See secs. 26, 27 and 31, B. C. *Medical Act*, and when made would have to be complied with.] But in the meantime a *mandamus* cannot go. [BEGBIE, C. J.—The Council should establish a register and fix fees, under the powers given them in secs. 27 and 31 of their Local Act; and in default of their doing so a *mandamus* might issue to compel them.]

BEGBIE, C. J.:—

This is an application by the plaintiff for a *mandamus* to the Provincial Medical Council, commanding them to place the plaintiff's name on the register of practitioners.

It appears by the plaintiff's affidavit, and does not seem to be in dispute, that the plaintiff was duly registered in England in 1884, and is entitled to be registered here, subject to the various statutes which have been passed on the matter, beginning with the Imperial *Medical Act, 1858*. The whole object of all legislation on the subject seems to be very well stated in the preamble to that Act, namely:—

"That it is expedient that persons desiring medical aid should be able to distinguish qualified from unqualified practioners."

Judgment.

This is repeated word for word in the first British Columbia statute, the *Medical Act, 1867*:" and although none other of the Imperial amending Acts, nor of the British Columbia Acts, contain any preamble at all, yet all being founded on this, the principal Act, ought, I think, to be construed with reference to this object.

The Imperial Statute, 1858, c. 90, s. 31, declared that all practioners registered in Great Britain might, without further examination, qualification, or registration, practice in any of Her Majesty's dependencies. The Imperial Statute, 1868, c. 29, modified that by declaring (sec. 3) that every Colonial Legislature might require registration, within their own jurisdiction, of any such persons, and impose fees for such registration; but no other qualification, except the British registration, is to be required. The Imperial Statute, 1886, c. 48, s. 6, again somewhat modifies that; but this modification does not affect the present plaintiff, whose position, having accrued in 1884, is expressly protected by sec. 28 of 1886, and remains, therefore, under sec. 3 of 1868, already cited.

The only difficulty, and I think a not unreasonable difficulty, felt by the defendants arises from the want of local machinery, since the Provincial Statute of 1890. Previous to that date, the matter had always been dealt with according to the provisions enacted here in 1870 (enacted for carrying out the Imperial Statute of 1868, sec. 3). That section was re-enacted in 1886, and again in the Code, 1888; but in 1890, to remedy a supposed oversight in the compilation of that Code, it was enacted that the Code should be read as if that section (sec. 1 of 1870—sec. 30 of 1888,) had not been set forth therein. Of course, that could not operate as a repeal of sec. 3 of 1868. The Provincial Parliament could not repeal an Imperial Act. It was, indeed, faintly argued that medical diplomas, certificates, etc., came within the head of "education," which by the *B. N. A. Act, 1867*, sec. 93, is expressly reserved to the Province, and then applying the doctrine which I insisted on last week in *Attorney-General* v. *Dr. Milne* (being merely what the Privy Council pointed out in *Hodge's* case), the Province had complete sovereign authority given to it by the *B. N. A. Act* over that subject matter. The obvious answer is that that "sovereignty" is only as between the Province and the Dominion. Neither of these authorities, nor both of them together, can repeal or alter any clause in the *B. N. A. Act* which is an Imperial Statute. But the Imperial Parliament itself can, of course, repeal any of its own Acts, and the *B. N. A. Act* among them, or any clause of any such acts, just as lawfully and effectually as the Provincial Parliament can repeal any clause of a Provincial Act, or the Dominion Parliament of any Dominion Act. So that if sec. 3 of the Imperial Act, 1868, is absolutely inconsistent with sec. 93 of the *B. N. A. Act, 1867*, nothing done here can prevent its effect, and the latter enactment must prevail.

Judgment.

But the Provincial Statute of 1890 does not necessarily conflict with that sec. 3. It certainly says that sec. 1 of 1870 (sec. 30 of 1888) is to be repealed. But it was not that section which gave the plaintiff his right to registration, as it merely provided the machinery, and imposed a fee; and since sec. 30 gave the plaintiff no right, its repeal would deprive him of none, though such repeal probably exempted him from liability to any fee. The Legislature probably intended merely to intimate that statutory machinery was not necessary for a compliance with sec. 3, that the Council might of its own mere motion define the method and terms of compliance. And I rather think that this is a correct view. Sec. 26 of the *Medical Act, 1888*, may well

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be read to direct the registration "of all those who comply with the enactments thereinafter contained"—pointing to the examination, &c., before a board of examiners, mentioned in sec. 29—"and with the rules and regulations made, or to be made, by the Council as to the qualifications to be required from practitioners," and pointing to the power to make rules, &c., in sec. 31—which rules are expressly to extend, not only to the method and subjects of examination, but also to the regulation of the register, and the fees to be paid for registration.

I think, therefore, that the Council have it in their power to make rules for admitting the plaintiff to the register in conformity with sec. 3 of 1868, and to fix the fees payable. And as it seems clear that the plaintiff has a right to be admitted to the B. C. register, upon proof simply that he was in 1884, and is now, on the list of the London registry, I think the Council ought forthwith to make such rules.

If they do not, the plaintiff's position is simply this: By sec. 3 of 1868, he is entitled to claim registration here, upon payment of such fees, and production of such proof of the London registration, as this Legislature may direct. This Legislature did, in 1870, impose a statutory fee, and make certain statutory regulations; but all these it, in 1890, repealed, and left it to the Council to establish fees and regulations. The Council has, as yet, established nothing. It follows that the plaintiff is entitled to be registered now without any fee, and upon such proof of his London registration as would be admitted in a Court of law. I hope that the Council will, with all due speed, make rules and orders adapted to this contingency which will apply to future cases: but they must, and probably will without further litigation, admit the plaintiff at once. If they do not, a *mandamus* must issue.

Judgment.

In the case of *Regina* v. *College of Physicians*, 44 U. C. Q. B., 564, a *mandamus* actually issued. That case was almost identical with the present, but it was not embarassed with the *hiatus*, which occurs here owing to the repeal of sec. 30 and the absence of Council-made rules. I desire fully to adopt the reasoning of Chief Justice Hagarty in giving judgment in that case, and especially his concluding words:—

"We do not feel inclined to impute to a body of gentlemen standing so high in public repute a desire to do more than ascertain their legal rights, and not to evade their performance by the imposition of what may be called differential duties against those who may seek to make this country their home on the faith of the general law of the Empire."

On the contrary here, as in the Ontario case, nothing could be more handsome than the way in which the defendant's counsel left the case to the judgment of the Court.

It may be worth while to mention, concerning the Imperial Act of 1886—though it does not apply to this case—seems to be intended to meet in future the suggestion of Chief Justice Hagarty pointing to a reciprocal recognition, on Home and Colonial registers, of the Colonial and Home qualifications of medical practitioners. I say "intended," for it does not seem clear that the definition of "British possession" would enable Canadian practitioners to be registered in England. "Where there are in any such possessions central and local Legislatures, the whole is to be deemed one possession." But according to our constitution, each province, for the purpose of medical tests and registration, would probably require to be deemed a separate possession, having regard to the *B. N. A. Act*, sec. 93.

Judgment.

Mandamus to issue if Plaintiff not admitted on B. C. Register.

REGINA v. CLARK.

Criminal law—False pretences—Knowledge of the falsity of the pretence by the agent of the person defrauded—Effect of.

C., a policy holder of a fire insurance company, conspired with H., their local agent, to defraud the Company. C. handed in to H., for transmission to the Company, an unfounded claim for pretended losses by fire, supported by his (C's) statutory declaration, the whole being false to the knowledge of H. Upon this, C. obtained the money through H. from W. & Co., the general agents of the Company.

Held:—

1. The knowledge of their agent, H., of the falsity of the pretence could not be imputed as the knowledge of W. & Co., or of the Company, so as to affect the criminality of C.
2. The fact that C. and H. might have been indicted for conspiracy to defraud was immaterial.

THE following case was reserved for the consideration of the Court of Crown Cases Reserved, by DRAKE, J., who presided at the trial:— Statement.

John Clark and Albert Elgin Howse were tried before me at a Court of Oyer and Terminer and General Gaol Delivery at Kamloops, on the 6th day of June, 1892, upon

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an indictment charging them with obtaining money from Robert Ward & Co. by means of a false pretence to the Royal Insurance Company, of Liverpool, England.

At the trial it was proved that Clark, at the solicitation of Howse, insured a stable and contents in the Royal Insurance Company, Howse at the time being the agent of the Company. During the currency of the policy of insurance Clark abandoned the stable and removed the contents, and the stable was shortly afterwards destroyed by fire. Clark lost nothing by the fire. Afterwards Clark, at the suggestion and acting on the advice of Howse, made an application to Robert Ward & Co., the principal agents of the Insurance Company in this Province, through Howse, for payment of the insurance money. The matter was referred by Robert Ward & Co. to Howse, and the latter handed Clark the statutory declaration required by the Company, containing statements which Howse knew to be untrue, telling him it was a form he would have to sign, and Clark made the declaration before a Justice of the Peace, and received the amount as adjusted. This declaration is the false pretence complained of.

Statement.

Counsel for Clark objected that the defendant could not be convicted if the prosecutor knew of the pretences to be false; that Howse knew that the statements contained in the declaration were untrue, that is, knew of the alleged false pretence; that Howse was the agent of the Insurance Company, and his knowledge was the knowledge of the Company. Hence Clark could not be convicted.

I over-ruled the objection, but reserved the point for the consideration of the Court of Crown Cases Reserved. The prisoners were found guilty and sentenced. I admitted the prisoner Clark to bail, pending the consideration of the point reserved.

The question for the consideration of the Court is whether the objection taken is good or not. If good, the conviction to be quashed; if bad, the conviction to stand.

Argument.

C. Wilson for the prisoner: Where the person from whom the money is obtained is aware, at the time, of the falsity of the pretence, the crime is not proved: *Reg.* v. *Mills*—Dears & Bell, 205. Here we further object that what took place was a conspiracy between the prisoner and Howes to defraud, and they should have been indicted for conspiracy.

A. G. Smith, for the Crown, was not called upon.

Judgment.

Per curiam—BEGBIE, C. J., CREASE and WALKEM, J J.:—

Reg. v. *Mills* does not apply. Here Ward & Co. did pay on the faith of the false pretence. Howse was a mere conduit pipe, through whom the pretence was conveyed to, and the money from, Ward & Co. for the prisoner. Howse was the agent of the prisoner and not of Ward & Co. in the transaction. In any case, the doctrines of commercial agency do not apply to prevent the operation of the criminal law.

Conviction affirmed.

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THE CANADIAN PACIFIC NAVIGATION CO.

v.

THE CITY OF VANCOUVER.

Public Health Regulations—Municipal By-law providing—Provincial statute authorizing—Constitutional law—Interference with trade and commerce.

A Municipal by-law providing, "The Medical Health Officer shall have power to stop, detain, and examine every person, or persons, freight, cargoes, boats, * * coming from a place infected with a pestilential or infectious disease, in order to prevent the introduction of the same into the city," does not authorize the Medical Health Officer, or other Municipal authorities, to detain a steamship and its passengers and crew coming from an infected place, or to prevent them from landing within the Municipal limits, without reference to a proper examination for the purpose indicated and its results, as showing danger of their introducing the disease.

2. That the stopping of all the passengers without examination was not an exercise of the powers reposed in the Corporation by the By-law, but was an interference with trade and commerce, and was *ultra vires*.

3. That the By-law, and the Statute authorizing it, were *intra vires*.

MOTION to dissolve an injunction. By Stat. B. C., 1889, cap. 40, sec. 37, amending sub-sec. 92 of sec. 142 of the *Vancouver Incorporation Act, 1886*, power was given to the Corporation of Vancouver to pass by-laws "for regulating, with a view of preventing the spread of infectious disease, the entry or departure of vessels at the port of Vancouver, the landing of passengers and cargoes from such boats or vessels, or from railroad carriages or cars, and the receiving of passengers and cargoes on board of the same." Statement.

In pursuance thereof, on 2nd February, 1892, the Corporation passed a By-law, No. 131, called "The Public Health By-law," which provided, *inter alia*: "Sec. 8. The Medical Health Officer shall have power to stop, detain, and examine every person or persons, freight, cargoes, boats, railway and tramway cars coming from a place infected with a pestilential or infectious disease, in order to prevent the introduction of the same into the city."

The defendants, by their Health Officer, stopped passengers travelling on plaintiff's steamship Yosemite from Victoria to Vancouver, from landing at Vancouver, by threats that if they did so they would be confined in quarantine for 14 days, on the ground that Victoria was a

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place infected with small-pox. No examination of the passengers was had for the purpose of ascertaining their respective condition and circumstances in regard to the existence among them of the disease, or danger of any of them having contracted or having been exposed to contagion thereof. Victoria was a place infected with small-pox.

On affidavits setting out the above facts, an *interim* injunction had been granted by Mr. Justice CREASE, restraining until the hearing, or further order, the Corporation of Vancouver, their officers, &c., from preventing the landing at Vancouver of passengers from plaintiff's steamship, coming from Victoria.

Argument.

Hon. A. N. Richards and *A. E. McPhillips* now moved to dissolve this injunction. They read affidavits to show that Victoria was a place infected with a pestilential or infectious disease, within the meaning of the By-law, the affidavits alleging that 56 cases of small-pox were then reported by the Victoria Health Officer as existing in that city and its environs. They contended the powers derived by the Corporation of Vancouver, under their Incorporation Act and their By-law thereunder, are as large as the powers delegated to Local Boards of Health under the Provincial *Health Act* (Con. Stats. B. C., 1888, cap. 55), and assumed by the Provincial Health Regulations, passed under the said Act. The Provincial Legislature had jurisdiction to give the power to stop vessels, &c. It was not an interference with trade and commerce. As the Yosemite is a Provincial steamship plying between ports within the Province, all her operations, and the movements of her passengers, are subject to control by the Provincial Legislature or any authorities to whom it may delegate that control. All matters of public health, except quarantine stations and marine hospitals, are subjects of exclusive Provincial jurisdiction (*Runfret* v. *Pope*, 12 Q. L. R., p. 303). A mandatary injunction should only issue in a very clear case (*Toronto B. & M. Co.* v. *Blake*, 2 Ont. Rep. at p. 183). On the constitutional question, *Lenoir* v. *Ritchie*, 3 Can. S. C. R. 575.

E. V. Bodwell, contra: The constitutionality of sec. 37 of Stat. 1889, is not involved. If it authorized the passing of a By-law giving power to stop traffic generally, the By-law did not assume to do so. The proper construction of the language of the By-law—clause 8, "Health Officers shall have power to stop, detain, and examine," &c.,—is that the stoppage and detention shall be for the purpose of examining as to the condition and circumstances of the passengers in relation to the possibility of the introduction of the disease into Vancouver by

them, or any of them, and not a stoppage and detention at all events, without regard to any examination or its results. The authority of the Provincial Legislature only extends to making regulations for the proper control and management of subjects within their jurisdiction—here, matters of public health. The proposition of defendants is that under a power to regulate for a limited purpose, and in a method indicated, they derived authority arbitrarily to stop the volume of trade to the East through Vancouver.

CREASE, J.:—

I desire to place myself, as far as possible, in the position of the people of Vancouver, and to give to them the benefit of every means which the law, in my opinion, affords them for assuaging their fears by the exercise of every precaution which their own By-law provides. It was not within the powers of the Health Officer, under the By-law, without examination, to exclude all comers from Victoria. That is an unwarrantable interference with trade and commerce. There is no power that would enable the Vancouver authorities to prevent passengers from Victoria from landing, provided there is good and reasonable ground for believing that they have not the disease, or are not infected with it, or have not been exposed to actual contagion. I am, in this matter, placing myself in the position of one having in view only the idea of enabling the Vancouver authorities to prevent any person landing there who is infected with the disease, or in danger of spreading it. There is no law that would enable them to put all the passengers and crew, coming as they did with a clean bill of health, in quarantine, at once, merely because they came from Victoria, unless there was some reasonable ground for believing, after examination, that there was some one or more on board liable to detention on either of the grounds I have specified. Of course, one infected person might infect, and therefore might cause the detention of all those on board, as suspects. But the authorities could not detain and quarantine all the passengers and crew without being thereto warranted by examination and consequent discovery of actual danger of small-pox, in the manner and to the extent I have described.

Judgment.

Order dissolving the injunction refused, but injunction varied to read:—

"That the defendants, their officers, agents, workmen, and servants do permit all passengers upon the plaintiffs' steamers to land at the port of Vancouver, subject only to such detention, examination, and inspection as may be reasonably necessary, in order

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to ascertain the existence among the passengers of the disease of small-pox, or of actual danger of the said passengers or crew, or any of them, being infected with small-pox by reason of their, or any of them, having been actually exposed to contagion thereof. And this Court doth further order that the defendants, their officers, workmen, and servants be, and they are, hereby restrained from in any way interfering with or obstructing the said plaintiffs in landing the said passengers, or any of them, except only as to such of said passengers as shall be proved to be infected with the said disease of small-pox, or with respect to whom there shall be good and reasonable ground for believing that he or she has contracted the disease, or is in any way infected therewith, with liberty to all parties to apply as they may be advised."

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THE ATTORNEY-GENERAL OF BRITISH COLUMBIA v. MILNE.

Public Health Act, 1888—Delegation of legislative power—Power of Lieutenant-Governor in Council to dismiss Municipal Health Officer appointed by By-law—Practice—No appeal from order granting injunction, but only from refusal to dissolve.

Held, Per BEGBIE, C. J.—1. A Provincial Statute having given to the Lieutenant-Governor in Council power to make and alter such Regulations as he might deem expedient in regard to certain matters affecting the Public Health, the same to have the force of law, such regulations when passed superseded all Provincial and Municipal enactments inconsistent with themselves.

2. It is competent to the Lieutenant-Governor in Council, by Regulation under the provisions of the *Health Act, 1888*, to dismiss a Health Officer appointed by Municipal By-law.

Held, by the Divisional Court, Per CREASE, WALKEM and DRAKE, JJ., on appeal from order granting injunction, that no appeal lies from such an order but only from an order refusing to dissolve the injunction.

Held also, by the Divisional Court, on appeal from order refusing to dissolve, that the Regulations in question purported to oust defendant from further acting as Health Officer only in relation to small-pox, *i. e.*, the matter in which the Lieutenant-Governor in Council had assumed control.

MOTION TO CONTINUE INJUNCTION.

Statement

AN *interim* injunction having been obtained from BEGBIE, C. J., on the previous day, restraining George Lawson Milne from acting or assuming to act as, or from holding himself out to be, the Health Officer for the City of Victoria, on the following state of facts:

Smallpox had broken out in the City of Victoria shortly prior to the 11th July and was prevalent to some extent. The Municipal Corporation of Victoria some time previously and without special reference to any then existing contagious disease, under a By-law

passed pursuant to sec. 104, sub-sec. (54), of the *Municipal Act, 1892*, giving them power to pass By-laws for "The preservation of Public Health, including the sanitary condition of the Municipality," had appointed Dr. Milne Health Officer for the city. On the 11th July, owing to the outbreak of small-pox, the Lieutenant-Governor in Council, pursuant to section 2 of the *Health Act*, Con. Stat. B. C. 1888, cap. 55, providing: "It shall be lawful for the Lieutenant-Governor in Council, by any order duly made and passed, to make and alter such rules, regulations and by-laws as such Lieutenant-Governor in Council may deem expedient in respect to the following matters: * * (*a*) The establishment, management and maintenance of Local Boards of Health, their functions and powers"—every such regulation so made having by section 3 the force of law—had passed and issued a set of regulations providing, amongst other things: 1. "It shall be the duty of each of the corporations of the cities of Victoria, Vancouver, New Westminster and Nanaimo, to appoint a duly qualified medical practitioner to be designated and act as Municipal Health Officer for the Corporation, whose duty it shall be to co-operate with the Provincial Health Officer in arresting the spread of small-pox and, in his absence, to act in his stead. * * Where, in either of the said cities, a Health Officer has, before the date of these rules, been appointed by the Local Board, such Health Officer shall be the Municipal Health Officer during the will of the Local Board, without further appointment."

Argument.

Pursuant to section 5 of the *Health Act*, providing, "Whenever there is good and sufficient reason to apprehend the invasion of any contagious or epidemic disease, likely seriously to endanger life, the Lieutenant-Governor in Council may appoint and pay a fit and proper officer, to be called the Health Officer, whose duty it shall be to provide that the Local Boards carry out the Orders in Council, and generally to perform such duties as the Lieutenant-Governor in Council may direct," a Provincial Health Officer, Dr. Davie, had been appointed by the Lieutenant-Governor in Council. It had been found that, for some reasons, and in the respects referred to in the affidavits, the Municipal Health Officer, Dr. Milne, did not co-operate with the Provincial Health Officer, as required by the spirit and language of the regulations, but that there were material differences of opinion between them as to the mode of carrying out the regulations; and under these circumstances it had been considered necessary, in order to avoid friction and want of uniformity in the working of the regulations, to remove the subsidiary officer, Dr. Milne; and

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supplementary regulations were, on 18th July, accordingly passed by the Lieutenant-Governor in Council, providing: "1. So much of the Provincial Health Regulations, 1892, as authorizes or requires the Corporation of Victoria to appoint a Municipal Health Officer and any municipal by-law, regulation or resolution authorizing or purporting to authorize the appointment of a Health Officer for the said city is hereby discharged, and any existing appointment heretofore made of a Health Officer by the said Corporation is hereby vacated and annulled;" "2. It shall be the duty of the Provincial Health Officer to appoint a duly qualified medical practitioner to perform within the limits of the Municipality of the City of Victoria the duties allotted by said Regulations to the Municipal Health Officer for the Corporation, and to cancel and revoke such appointment at pleasure, and from time to time to make new appointments to fill the vacancy caused by any such cancellation or revocation, and such officer shall be designated the 'Victoria Local Health Officer.'" The vacancy caused by the removal of Dr. Milne had, under the last provision, been filled by the appointment of one Dr. Wade to be "Victoria Local Health Officer," accordingly. Dr. Milne, notwithstanding his removal by the above regulations and the appointment of Dr. Wade, still assumed to act as Health Officer for Victoria, published reports as such, and stated his intention of continuing that attitude.

Argument.

Theodore Davie, A.-G., moved to continue the injunction until the hearing or further order.

The Regulations of 11th July, and the supplementary regulations of 18th July were within the scope of the powers conferred upon the Lieutenant-Governor in Council by sec. 2 of the *Health Act*, and, by sec. 3 of the same Act, they have the force of law. Dr. Milne, by the exercise of the absolute discretion reposed in the Lieutenant-Governor in Council by the Statute, and for abundantly sufficient causes, though the reasons why the Lieutenant-Governor in Council "may deem expedient" to make such Regulations cannot be inquired into, has been lawfully and effectively removed from his former position of Municipal Health Officer. The injunction should be continued.

W. J. Taylor, for defendant:—Although the Lieutenant-Governor Council was given power by secs. 2 & 3 of the *Health Act*, to make and alter regulations, etc., which should have the force of law, for "The establishment, management and maintenance of Local Boards of Health, their functions and powers;" this does not include the power to put an

end to them or to depose a Municipal Health Officer appointed by them, with the approval of the Lieutenant-Governor in Council. The provision in clause 1 of the regulations of 11th July "such health officer shall be the Municipal Health Officer during the will of the Local Board," recognized the effect of section 6 of the Act, "It shall be the duty of the various Local Boards of Health to carry out the * * regulations * * of the Lieutenant-Governor in Council, * * and they may * * appoint or employ such officers and servants as may be necessary for this purpose, and may remove such officers as such Board may see fit;" and this express power of removal having been given to the Local Board alone by the same statute as that under which the Lieutenant-Governor in Council acquired the right to make the regulations in question, it follows that regulations having the effect of dismissing a duly appointed Municipal Health Officer were *ultra vires* of the Lieutenant-Governor in Council, and that the general powers to pass such regulations, conferred by sections 2 and 3 of the *Health Act*, must be understood as restricted in regard to such dismissal, which was reserved to the local boards by sec. 6 of the Act; otherwise, all of the Act except section 2 was in force only at the sufferance of the Lieutenant-Governor in Council, who might, under that section, pass regulations incompatible with the powers and duties conferred on the Local Boards by the other sections of the Act.

Theodore Davie, A.-G., in reply:—The policy, intention and effect of the Act was to repose an ultimate supreme authority in the Lieutenant-Governor in Council to assume absolute control of the whole question of health regulations when necessity demanded, and to abrogate all other authorities whatever by regulations having the force of law. These powers were only intended to be exercised on an emergency, and in the intervals the matters were properly left in the hands of the municipal authorities and Local Boards of Health. In this case the necessity for the exercise of the power, in the public interest, is apparent.

BEGBIE, C. J.:—

Judgment.

It was said that, notwithstanding the recent Orders in Council, the Corporation still retains its position as Local Board of Health, and consequently its powers under sec. 6 of the *Health Act*, Con. Stat. B. C., cap. 55; according to that section, the Municipality alone can appoint and remove health officials within its district; that if the Lieutenant-Governor wish to appoint or dismiss an official, he must effect that object mediately through the instrumentality of a Board of Health;

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that he cannot act immediately by an Order in Council. That having power to make and alter rules for the "establishment" of local Boards, he he might, it is true, if he chose, displace the Council and establish some other body in its place; then they would have the power to remove; but that he has it not himself. But, in answer to all this, surely, the power to "manage" in sec. 2 (*a*) eminently authorizes the appointment and discharge of servants, as every householder knows. And here is, on the 18th of July, sec. 1, a rule or regulation to the effect that the existing Municipal Health Officer is thereby removed. Then it was said that this despotic power to make and alter rules, &c., having the force of law, given to the Lieutenant-Governor by secs. 2 and 3 of the *Health Act*, could not mean that the Lieutenant-Governor was to have power to annul the rest of that said Act; that, deriving all his authority from that Act, he must at least respect the other provisions of the Act which alone creates his power. But that is an entirely wrong view. It is of the commonest practice in every settlement of property that unlimited power of appointment is given to the trustee or to the tenants for life, or some of them; and then the deed continues, "And until such appointment, and subject to the same when duly made in trust for this, that, or the other purpose"—all of which purposes and trusts are swept away so soon as the donee of the power has duly intimated his will. It is, besides, quite improbable that the Statute should mean, "We give you despotic powers over the whole Province, in case of any epidemic, but we shall, by sections 4 and 6, remove from your power, not only Victoria and New Westminster, but every municipality now or hereafter to be created," *i. e.*, every centre of population, every place where an epidemic is probable, or, indeed, possible.

Judgment.

Lastly, it is urged that section 104, sub-sec 84, of the *Municipal Act, 1892*, again expressly conferred this power of appointment on the Municipality. But it is to be considered that the Legislature in April last were fully aware of the existence of these provisions in the *Health Act*, and of the over-ruling powers thereby given to the Lieutenant-Governor in any epidemic, and legislated accordingly, knowing that in any emergency the powers they then gave would be swept aside.

I think, on the whole, that Dr. Milne's removal is lawful. The objection against it is of a very technical character, viz., that the Lieutenant-Governor cannot do it of himself, nor until he has removed the present local board and replaced it with another; which is so wide a step that he is desirous not to take it. But I think that the

appointment and removal of officials comes within the head of "management," and so even the technical objection fails.

Continue the order to the hearing or further order. But the plaintiff must accept notice, on any day, of a motion for vacating this order on the morrow.

The defendant appealed to the Divisional Court, and the appeal came on to be heard before CREASE, WALKEM and DRAKE, JJ., sitting as a Divisional Court on July 23rd.

W. J. Taylor, for the appeal.

Theodore Davie, A.-G., for the Crown, respondent.

WALKEM, J.:—

The proper course is not to appeal from the order granting the injunction, but to move to dissolve the injunction. The Court has no jurisdiction to entertain this appeal, or to sit as a Court of first instance to dissolve the injunction. Judgment.

CREASE and DRAKE, JJ., concurred.

Appeal dismissed with costs.

The defendant then moved before BEGBIE, C. J., to dissolve the injunction, which motion being dismissed with costs, defendant appealed from that order to the Divisional Court.

The appeal was heard before CREASE, WALKEM and DRAKE, J. J., on August 2nd.

W. J. Taylor, for the defendant, appellant.

Theodore Davie, A.-G., for the Crown, respondent.

The judgment of the Court was delivered by CREASE, J.:—

This was an appeal against the refusal of the Chief Justice to dismiss an injunction prayed for herein, forbidding Dr. Milne from acting, or assuming to act, as Health Officer for the City of Victoria during the remaining in force of the Provincial *Supplementary Health Regulations, 1892.* Judgment.

Mr. Taylor, for defendant, contended that the appointment of Dr. Milne was based on the *Health Act*, Con. Stat. B. C., 1888, cap. 55, which directly constituted the Victoria Corporation a Local Board of Health within its limits and jurisdiction.

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And that Dr. Milne had been elected by the Corporation as Medical Health Officer of the Municipality, with the approval of the Lieutenant-Governor in Council, and so was in under a positive law.

That the Regulations of 11th and 18th July last were not of the same force as an Act, because the wording of the power there given was "to make rules, regulations and by-laws." So, he contended, they were to be considered as of only the same force as a by-law, and therefore could not be set up against an Act.

That the Legislature had given and could delegate no power to the Executive to repeal any part of the Act.

He then went on to argue that by the Statute and Regulations the Lieutenant-Governor in Council might freely appoint, and from time to time vary, officials to carry out health regulations in out-lying districts, as they were not named, like Victoria, specifically as Health Districts under the Act.

Moreover (sec. 6), the expenses incurred under the Act in Victoria are to be charged against the Municipality, those incurred in the out-lying districts against the Government, which confirmed his impression of the meaning, according to his construction, of the Act.

Judgment

But by the new Rules and Regulations, he contended, the Government had practically repealed sec. 6. of the *Health Act*, Con. Stat. B. C., 1888, cap. 55, and that they had no power to do so.

The next grounds of objection were that, in any event, the injunction was too wide, and that injunction was a wrong remedy, for that the appointment being an office it could only be abrogated by a *quo warranto—Dillon*, 4th Am. Ed., secs. 842, 843.

As to the applicability of the long proceedings which would be necessary under a *quo warranto*, specially ill-suited to an occasion of urgency, it is to be observed that that proceeding is only applicable where there is a doubt whether a person occupying an office is rightly appointed. No such doubt exists here.

Much of the above argument on behalf of the defendant was disposed of by the learned Attorney-General in a concise and forcible statement of the law governing the case, of which I shall take advantage in my decision. It appeared to me, however, to go further in the opposite direction than the facts as laid before us, the general purport of the regulations, and the law applicable to the present state of the facts seemed to warrant, and this for reasons which I am about to state.

The present law regarding the public health took its rise with the *Health Ordinance, 1869*, which was passed when I was Attorney-General, and British Columbia still a Crown Colony. Its preamble, which is still in force, affords the same reason for the passing of the present *Health Act*, as it gave for the passing of the original Act. That was passed because "it was necessaary to adopt measures, with the object of preventing or guarding against the origin, rise, or progress of endemic, epidemic, or contagious diseases, and to protect the health of the inhabitants of the Colony, and for this purpose to grant to the Governor in Council extraordinary powers, to be used when urgent occasion demands."

When Confederation with the Dominion and Responsible Government, with its necessary changes in the form of administration, were introduced, and British Columbia became a Province of the Dominion, sec. 92, *B. N. A. Act, 1867*, gave quarantine and the establishment of marine hospitals to the Dominion Parliament.

The Act of 1869 was re-enacted, with all the necessary changes in form and structure which the altered state of things required, and assumed the shape of the present *Health Act*.

In other respects, the wording and purpose of the two Acts is identical and unchanged. The effect is to make the Lieutenant-Governor in Council responsible "when urgent occasion demands," such as an outbreak of small-pox, cholera, or other epidemic disease, for the sanitary safety of the whole Province, and for that purpose arms him with extraordinary powers.

Judgment.

Now as such diseases, if not immediately checked, spread like wild-fire through a country, and endanger even neighbouring places, the Legislature has found it necessary for the public safety to arm the Lieutenant-Governor in Council with certain absolute and despotic powers to sweep out of the way—during the existence of the emergency—obstacles which prevent the freest exercise of the means of extirpating the disease in the shortest possible time.

For ordinary times and minor diseases, the ordinary routine of Municipal health institutions is sufficient, but as those who have to administer these are confined in their jurisdiction to the Municipality and are disconnected from each other, and whose advocations are not such as to prepare them to deal with epidemic diseases, and being elected, of course, naturally study the wishes of those who elect them, which hampers counsel, and prevents timely and combined action. So, when a sudden emergency happens and some epidemic begins its deadly career, and

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even puts neighbouring lands in danger, the duty of the Executive is clear, the disease has to be treated like the invasion of a hostile army—ordinary routine remedies and authorities are inadequate to cope with the occasion. The greater powers of the *Health Act*, framed expressly for such a time, are called immediately into action, and imperious necessity demands that liberty, property, and all kinds of personal convenience, and, to a certain extent, even ordinary local Municipal law should give way, while the emergency endures and the danger is acute, to consideration for the public safety, upon the old established principle approved by the experience of centuries, "*Salus populi suprema lex.*"

That is what has happened now. The "urgent occasion" contemplated by the Legislature as "demanding" from the Executive to put the extraordinary powers of the *Health Act* into active exercise over the whole Province has arisen in the recent inroad of small-pox, as evidenced by the affidavits before the Court, not only within, but outside of the Municipality, and the regulations enacted and issued by the Lieutenant-Governor in Council, in the matter of small-pox, on the 11th July, 1892, cited as the *Provincial Health Regulations, 1892*, and the *Supplementary Provincial Health Regulations* of the 18th July, 1892, were the result. These regulations so issued, the *Health Act* in sec. 3 declares, "*shall have the force of law* and be so recognized in all Courts of the Province," words which, in the ordinary construction, insisted on by *Endlich* (Maxwell) on Statutes, sec. 7, p. 10, and *York & N. M. Ry. Co.* v. *the Queen*, 1 E & B, Jervis, C. J., at p. 864 and 22, L. J Q. B., 230, can only mean shall have the force of a Statute law. This conclusion is enforced by the enactment of the *Health Act* itself in sec. 3, which provides, that "every such * * regulation * * so made *shall be laid before the Legislative Assembly immediately*, if it be in session, or, if not, as soon as possible after its next meeting, together with an account of all sums expended and all sums required for the due execution of this Act, *in order to be dealt with as such Legislative Assembly shall deem expedient*," a provision which refers the regulations law to the law-making power to confirm, vary, or repeal, and makes the Executive directly responsible in a constitutional manner to the Provincial Parliament itself.

Judgment.

That this delegation of power was itself constitutional is clear from *Reg.* v. *Hodge*, 9 App. Cas: 117, which declared in effect that the Legislature of a Province is possessed of sovereign powers in all matters on which it can legislate within the limits of the *B. N. A. Act*

1867, sec. 92, as the Imperial Parliament, in the plentitude of its power, possessed, and could bestow, and consequently can delegate any person, or body of persons, to do what it can do itself.

The Act gives the Executive power not only to make these regulations, but also "in like manner to repeal or vary them," and gives to each such enactment "the force of law." And this extends to every "order, rule and by-law" made in accordance with the Act as well as to every "regulation."

The Act makes the Corporation of Victoria a Board of Health within the limits of the city, having already defined in sec. 1 and its sub-sections its functions and powers under that Act.

The Corporation have also a general power under the *Municipal Act' 1892*, sec. 104, sub-sec. 84, to pass by-laws for the preservation of the public health, including the sanitary condition of the Municipality, and sub-sec. 55 for the giving of notices and taking precautions in the case of any infectious disease, and other general ones as to drainage, &c., not necessary to mention here.

The only by-law the Corporation has passed relating to the public health is By-law No. 131, providing for a standing Sanitary Committee, a Sanitary Inspector, and a "Medical Health Officer." The latter is thereby called on to report from time to time, first, upon all matters relating to the public health; second, on the sanitary condition of the Municipal and other public buildings; and third, on or before the 15th December in each year to report upon the sanitary condition of the city.

Judgment.

There is no by-law of the City relating specially to smallpox. It is mentioned incidentally in the general powers of the Sanitary Committee in secs. 12 and 13 of By-law No. 131, but only with reference to any case arising in a hotel or boarding house, and has no general application, so there is no by-law to clash with the Provincial *Health Regulations*. Indeed, there was no preparation whatever, whether by building or by-law, for the sudden appearance of any epidemic within the city, much less without it. So when it came, it found the Municipal Officers totally unprepared, and the result was confusion and, for a time, something like a panic.

It was just the "occasion" for which the general *Health Act* lay prepared. The small-pox quickened into life, and its powers at once overshadowed the restricted activities of the Municipality in favour of the emergency provisions of the Provincial Act, which latter were

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framed to extend over the whole of B. C., and for the public safety, to have almost despotic sway, until the direful necessity which called them into being should be proclaimed by the Executive to be overpast.

The Local Board of Health, as I have mentioned, had already been appointed, and the "Medical Health Officer" (his proper designation) appointed and approved by the Executive as Local Health Officer under the Act. The Executive which by approval appointed him could at any time (*Interpretation Act*, Con. Stat. B. C., 1888, cap. 1, sec. 8, sub-sec. 29) disapprove, whereupon his appointment, so far as such disapproval extended, would cease.

A Chief Health Officer was at once appointed whose every instruction as to small-pox matters, all other Health Officers, as a principle of the Act, were bound implicitly to obey, and to whose system of dealing with the epidemic, whatever their own private opinion, all Health Officers were implicitly and loyally to follow. Immediately on the appointment of Dr. Davie as Chief Health Officer, public confidence began to return; and to his organizing powers, skill and exertions, humanly speaking, the abatement and proximate abolition of the disease must be attributed. As to the cause of discord between himself and Dr. Milne in the management of small-pox at a critical moment of its career, it is not necessary for us to enter. Discordant views at such a crisis are a living danger to the public, and at all hazards, the *Health Act* clearly intends, must be promptly suppressed. That is especially the province of the Executive, who are directly and immediately responsible to the Provincial Parliament for their acts. They have decided to withdraw the appointment of Dr. Milne and prevent his acting as Health Officer under the Act. The injunction, however, by which this was done, in my opinion, went further than the regulations themselves warranted. Without attempting to set a definite limit to the extraordinary powers of the *Health Act*—which naturally are measured from time to time by the "urgency of the occasion," and the extent of the danger to the public health—it is clear, I think, from the Regulations of the 18th July, 1892, as read in the light of section 1, and the subsequent sections of the Regulations of 11th July, 1892, which practically have in immediate contemplation, as by the urgent occasion of small-pox, that the removal of Dr. Milne should be confined to forbidding him to act as Health Officer for the City of Victoria, so far as all matters connected with small-pox are concerned, during the remaining in force of the *Supplementary Health Regulations, 1892*. With his position as "Medical Health

Judgment.

Officer" of the Municipality, and his duties under that apart from small-pox matters, the present injunction does not interfere. The question of the appointment of any other officer, to which Mr. Taylor alluded, is not in any way before us.

I am of opinion, therefore, that the injunction should only be varied to the extent I have mentioned, and the appeal dismissed with costs.

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REGINA *v.* AH GIN.

Criminal law—Certiorari—Motion to quash conviction—Practice—Rule of Court requiring Recognizance with sufficient sureties—Necessity for affidavit of justification—Jurisdiction.

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The Court, or a Judge, has no jurisdiction to entertain a motion to quash a conviction moved up by *certiorari*, unless the defendant is shown to have entered into a *recognizance* with one or more sufficient sureties to prosecute such *certiorari* with effect and pay such costs as may be awarded against him, etc., as provided by Rule of this Court of 27th April, 1889.

2. The Court must have an affidavit of justification before it, upon which it can judge of the sufficiency of the sureties.

C. Wilson showed cause to an order *nisi* to quash a conviction against Ah Gin and others, for gambling, made by Justices of the Peace at Westminster, which had been moved into this Court by *certiorari*. The motion cannot be entertained in this Court, because the defendant has not complied with the Rule of this Court, passed 27th April, 1889, which reads as follows:— Argument.

"No motion shall be entertained by this Court, or by any Judge sitting for the Court in Chambers, to quash any conviction, order, or other proceeding which has been made by or before a Justice of the Peace (as defined by the Act) and brought before the Court by *certiorari*, unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties in the sum of $100, before a Justice or Justices of the County or place within which such conviction or order has been made, and which recognizance, with an affidavit of the due execution thereof, shall be filed with the Registrar of this Court, or unless the defendant is shown to have made a deposit of the like sum of $100 with the Registrar of this Court, such recognizance or deposit respectively being entered into or made with or upon the condition that the defendant will prosecute such *certiorari* at his own cost and charges with effect, and without any wilful or affected delay, and that he will, if ordered so to do, in case such conviction,

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order, or proceeding is affirmed, pay to the Justice or Justices, or other persons appearing to support the same, such costs and charges as shall be directed by the Court on the hearing and determination of such application, not exceeding the amount of costs and charges if taxed according to the course of the Court."

There is a recognizance, but there are no affidavits of justification from which it can be judged whether the sureties are sufficient or not—*Reg* v. *Richardson*, 17 Ont. Rep., p. 729. The order *nisi* should be dismissed, and the writ of *certiorari* quashed.

H. D. Helmcken, contra: The Court will now permit the recognizance to be perfected by the addition of affidavits of justification, and should adjourn this motion for that purpose—*Reg.* v. *Abergele*, 1 N. & P., p. 235.

Per Curiam—The objection is fatal to our right to entertain or adjourn the motion. If the appellant were now in a position to show the sufficiency of the sureties, it might be sufficient to satisfy the rule. On the material before us we have no power to make any order except dismissing the order *nisi*. The objection does not affect the validity of the writ of *certiorari*, which will stand.

Motion dismissed with costs, with leave to move again.

NOTE.—The above Rule is printed in the addenda to the *Supreme Court Rules, 1890*, p. 145.

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Re W. N. BOLE, JUDGE OF THE COUNTY COURT, ETC., IN THE MATTER OF A CERTAIN CONVICTION OF AH TIM AND OTHERS.

Prohibition—Power of County Court Judge to award costs of appeal to him from a summary conviction against a person improperly made respondent—Estoppel.

A County Court Judge, upon an appeal to him from a summary conviction, has no power to award costs of the appeal to be paid by a person not a party to the conviction or proceedings before the Justices, though improperly made respondent to the appeal, and who has not appeared thereon or objected.

2. On motion for *prohibition* statements of fact, necessary to found jurisdiction in the Inferior Court, appearing in the order of the Inferior Court in question on the motion, may be contradicted.

3. *Quære*, whether the same rule does not now apply to *certiorari* and *habeas corpus* applications.

4. *Quære*, whether it is necessary to found the jurisdiction of a County Court Judge to deal with a summary conviction on an appeal to him, that the conviction should be before him, since the statutory appeal is in effect a rehearing of the information *de novo*. An objection to the jurisdiction of the County Court Judge that the conviction was not before him, disregarded.

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MOTION for a writ of *prohibition* to W. N. BOLE, Esq., Judge of the County Court of New Westminster:—

Statement.

Ah Tim was convicted before two Justices of the Peace at New Westminster upon an information, laid and prosecuted by some person whose name did not appear in these proceedings, charging him with gaming, contrary to a By-law of New Westminster, and was fined $50. A notice of appeal to the County Court Judge of New Westminster from this conviction was served upon the Municipal Corporation of New Westminster, who had not appeared, at least *eo nomine*, as parties to the prosecution. No notice of appeal was served upon the prosecutor, or upon the convicting Justices, as far as appeared, nor, as a consequence, had the conviction, evidence and proceedings before them been returned before the County Court Judge by the convicting Justices for the purposes of the appeal. The appeal came on to be heard before the County Court Judge, and, no one appearing for the City of New Westminster, the respondents mentioned in the notice of appeal, the learned County Court Judge allowed the appeal, and ordered the costs of the appeal to be paid by the City to Ah Tim. These costs were afterwards taxed, and proceedings were being taken to realize the amount by execution, when *C. Wilson* for the City obtained an order *nisi* from this Court for a writ of *prohibition* to restrain the officers of the County Court from proceeding to levy, on the ground that the County Court Judge had no jurisdiction to make the order.

Argument.

Belyea showed cause: No *prohibition* will be granted if the subject-matter of the appeal was within the jurisdiction of the County Court Judge, however wrong his order may have been, *Ellis* v. *Watt*, 8 C. B., 614. The respondent not appearing, the County Court Judge had no option but to quash the conviction, *Reg.* v. *Purdey*, 34 L. J. M. C. 4. If the city were not proper parties they should have appeared and objected to the order for costs going against them.

C. Wilson, contra: The County Court Judge acquired no jurisdiction to deal with the appeal in any way. The statutory notices to the prosecutor or convicting Justices not having been given, the appeal was not properly before him. These prerequisites to

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jurisdiction will not be assumed, and have to be proved whether the respondent appears or not, in order to entitle the County Court Judge to deal with the matter. Even if these notices had been given, the objection that the conviction appealed from was not before the County Court Judge would be fatal to his jurisdiction to proceed—*Trotter's Appeals from Convictions*, p. 53. The city were no parties to the prosecution, and the order for costs against them was wrong.

BEGBIE, C. J.:—

Judgment.

On the 16th September, 1891, the defendants had, before three Justices at New Westminster, been convicted of being onlookers in a gambling house and fined, with imprisonment in default. On the 22nd September notice of appeal to the County Court Judge, His Honour W. N. BOLE, was presented, and due deposits made. (It was alleged that the money had come into the possession of the Corporation of New Westminster, but it was on the other side stated that there was no evidence of this). The notice of appeal was addressed to the three convicting Justices, but was served, not on them, but on the solicitor to the Corporation, and it nowhere appears that the Corporation were the prosecutors, or who was the prosecutor. The appeal was, on the 28th October, 1891, entered in the County Court books as *Ah Tim and others* (appellants) v. *The Corporation of New Westminster* (respondents). It was called for hearing before His Honour Judge BOLE, on the 3rd November, when the appellants appeared, but no person appeared for the respondents. His Honour thereupon made an order, reciting that service of the notice of appeal was proved, that there was no appearance by the respondents, and no conviction returned into his Court, and he therefore allowed the appeal, etc., with costs to be paid by the respondents, and he ordered them to return the amount of the deposit. The costs were thereupon taxed, and a warrant of execution against the goods of the Corporation was issued for the taxed amount. On the 14th December a rule *nisi* for a *prohibition* was, on the application of Mr. *Wilson* for the Corporation, granted by me, on the ground that the County Court Judge had no jurisdiction owing to the defect of service. It is true due service is alleged in the Judge's order, and that all findings of fact necessary to support the jurisdiction of an inferior court are, according to *Britain* v. *Kinnaird*, 1 B. & B., 432, and that class of cases, not to be controverted. But I apprehend that doctrine is confined to applications on *certiorari* and *habeas corpus*. It would be extraordinary to extend it to applications in *prohibition*, where the sole fact to be examined may be, are the findings

true? And *Paley Convict.*, 5th Ed. p. 401, note (*e*), doubts whether those cases would be now fully supported, and he propounds as a result of all the cases that, "If the fact found be an essential to jurisdiction, or on which jurisdiction depends, it may be shown that there was no evidence before the Justices to warrant the finding."—*Ibid.* At all events, this seems eminently true in an enquiry on *prohibition*. And on the ground on which I granted the rule *nisi*, we both think it must now be made absolute If A has a complaint against B or C, or B and C, and takes out a writ against B alone, which he serves on C alone, though neither B nor C appear at the hearing, the Judge has no jurisdiction to give judgment against either of them. Under the present circumstances the County Court Judge might very pardonably err; indeed, could scarcely help erring, being kept in the dark by the respondents, who, we are told, purposely abstained from attending or from pointing out the irregularity, which they alone seem to have detected at that time. Still, they were, of course, not bound to appear. As the parties cannot come to terms, there must be *prohibition* as to any further proceedings in the County Court—that is, the now threatened execution must be stayed.

Judgment.

I do not much regard the objection that the County Court Judge could do nothing until the conviction was before him. The recent Statutes, which have changed the nature of the appeal, have altered the position of the parties. The appeal is now a re-hearing, in which the charge must be tried *de novo*. The appellant is not now so much a prisoner seeking to quash a conviction as an accused party coming into Court to meet an accusation. If the accuser, of set purpose and with knowledge, designedly stays away, a judge must almost of necessity dismiss the charge and the accused together.

Our judgment does not affect anything that has been done or decided. We only prohibit the execution and all further proceedings before the County Court Judge.

It is not for us to say what steps are open to the appellants, or whether they can take any steps to regain possession of the deposit money. We are told that this by some extraordinary and quite illegal way has come into the possession of the respondents; but of this it is said there is no proof, and we hope it is not true. It would have been quite improper for the Corporation to have accepted the deposit, even if offered to them. The provisions of the Statute are precise, and should have been followed. The convicting Justices are to receive the deposit and enlarge the defendants; and are then to

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transmit the conviction, and the money, to the County Court. Nothing of all this has been done. It might, indeed, have been argued (but the point was not raised) that the power given to the Court of Appeal (sec. 77, *Summary Convictions Act*), to order the restitution of the deposit money, was only intended to be given when the Statute had been complied with, and when the deposit was in the power of the County Court itself, as ordered by sec 85, *i. e.*, I suppose, in the hands of the Registrar. Upon this point we give no opinion.

DRAKE, J., concurred.

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McCLARY MANUFACTURING CO. *v.* CORBETT.

Practice—Judgment by default—Special endorsement, including a claim for interest—Liquidated or unliquidated demand.

Held, per BEGBIE, C. J., CREASE and DRAKE, JJ.—A claim specially endorsed on writ for amount of an account rendered and "for interest thereon at six per cent. until judgment," is not a liquidated demand under Order III., Rule 6, and and an order setting aside judgment thereon as in default of appearance, sustained.

Statement.

APPEAL on behalf of the plaintiffs, from an order of Mr. Justice McCREIGHT, setting aside judgment by default for $3,911 against defendants, on the grounds that the special endorsement on the writ, which was in the following words: "To amount of account rendered for goods sold and delivered by the plaintiffs to the defendants at their request, $3,888, and the plaintiffs claim interest thereon at 6 per cent. until judgment," was not a sufficient statement of a liquidated demand under Order III., Rule 6, and that, if it was otherwise sufficiently certain, the claim for interest included was an unliquidated demand.

Argument.

Yates for the plaintiffs, appellants: The endorsement is sufficient as containing sufficient particulars to enable defendants to decide whether they should defend or not—*Smith* v. *Wilson*, 5 C. P. D., p. 25; *Walker* v. *Hicks*, 3 Q. B. D., p. 8; *Bichers-Speight*, 22 Q. B. D., p. 7; *Aston* v. *Hurwitz*, 41 L. T. N. S., p. 521, and the reference to the

account rendered imported the particulars, as there stated, into the endorsement.

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Wilson for the defendants, respondents: Whether the endorsement is otherwise sufficient or not, the claim for interest in the endorsement, included in the judgment, is not a liquidated demand.

Per Curiam.—A judgment in default, under Rule 68, cannot be obtained upon an endorsement including a general claim for interest, that being an unliquidated claim.

Appeal dismissed with costs.

McKAY *v.* CLARKE.

DIVISIONAL COURT.
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Execution Act - Order for payment into Court of money levied to answer claims of third persons for wages—Practice—Irregularities—Affidavits—Intituling—Observations on effect of C. S. B. C. 1888, cap. 42, sec. 21.

The plaintiff having recovered judgment and execution in this action in the Supreme Court, the Sheriff levied the amount thereof from the goods of the defendant.

Five persons, to whom the execution debtor was indebted for wages, obtained an *ex parte* order from a County Court Judge, professing to sit as a Judge of the Supreme Court—under Stat. B. C., 1891, cap. 8, and Rules of Court printed in B. C. Gazette, 4th November, 1891—for the Sheriff to pay into Court out of the moneys levied the amount claimed by them, in order that they might be at liberty to establish their claims thereto, in preference to the execution creditor, under C. S. B. C. 1888, cap 42, sec. 21.

Neither the order nor the affidavits in support of it were styled in any cause, but "In the matter of the *Execution Act* and of A. E. Clarke, judgment debtor."

Held, 1. The order and affidavits were irregular, as not being styled in any pending cause.

2. The order ought not to have been made *ex parte*.

3. Sec. 21 *supra* only authorizes the order therein provided for to be made by "a Judge of the Court out of which the process issues," and "upon proof of the claim," and the County Court Judge had no jurisdiction.

4. An order for payment into Court of the moneys levied is unauthorized.

Statement.

ON 25th January, 1892, W. N. BOLE, Esq., Judge of the County Court of New Westminster, made the following order:—

"In the Supreme Court of British Columbia. In the matter of the *Execution Act* and in the matter of A. E. Clarke, a judgment debtor.

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In Chambers before His Honour Judge Bole. Upon hearing (the five claimants) and upon reading the several affidavits of the said claimants filed herein, I do order that out of the money realized on execution against the said A. E. Clarke the amount claimed by them, the said claimants, for wages, amounting in all to $266, be paid into Court by the Sheriff of the County of New Westminster. Liberty to all parties to apply."

No notice of this application was given to the execution creditor, the execution debtor, or the Sheriff.

The defendants appealed to the Divisional Court.

P. E. Irving, for the execution creditor, appellant.

The Judgment of the Court was delivered by BEGBIE, C. J.:—

Judgment.

The plaintiff had in this action in this Court recovered a judgment by default against the defendant on the 26th November, 1891, on which execution had issued. The Sheriff had seized and sold, and had made in all $173.90, on the 25th January, 1892. On that day, on the *ex parte* application of five persons, alleging claims upon Clarke for unpaid wages, the Judge of the County Court had ordered the Sheriff to pay into Court the sum of $266. The plaintiff appealed. The five applicants had been served with notice of this appeal, but did not appear. The whole of these proceedings are quite irregular. The order of the 25th January, not intituled in any cause, nor referring at all to any action, directs the Sheriff, out of the moneys then in his hands, to pay $266 into Court. How is this to be done? Apart from the arithmetical difficulty, how is money to be paid into Court when no action or matter is named? The so-called affidavits upon which the order was made do not appear to be intituled in any cause or matter, and it may be doubted whether perjury would lie on them; in which case the order is made without any evidence at all. This makes a difficulty for us also, since we cannot rely upon the statements as to the absence of notice to the parties interested in these alleged affidavits. Mr. *Irving* contended that this defect is cured in this Court by the operation of sec. 7, cap. 3, of the Con. Stat of B. C. 1888. But the order speaks for itself. It professes to be made merely on *ex parte* statements. But it does not appear consistent with natural justice that an order interfering with the rights at once of the judgment creditor, the judgment debtor, and the Sheriff, should be made without hearing any of the three. Without entering on the question whether

a County Court Judge has any authority whatever to interfere in a Supreme Court action, on this point, or upon any point except the matters mentioned in ss. 48, 49, and 146 of the *County Courts Act*, Con. Stat. B. C. 1888, cap. 25, it is clear that sec. 21 of the *Execution Act*, Con. Stat. B. C., cap. 42, does not warrant the present order to be made by *any* Judge. That section only professes to authorize a Judge "of the Court out of which the process issued" to deal with claims for wages "proved" before him: and this order does not allege the claims to have been proved: on the contrary, it implies very clearly that they are not yet proved, for the Judge orders the money into Court. But the order which the Judge is by the Statute empowered to make is an order for payment to the proved claimants. The present order is for payment into Court, an order which no Judge is empowered to make. It is to be remembered that an execution creditor, and a sheriff, have by law very stringent rights in regard to the execution moneys, when levied and actually in the Sheriff's hands, rights which cannot be wrenched from them except by Statute, and then the Statute must be strictly followed. I do not know what has been done with the execution money under the presumed exigency of the order of the 25th January. I do not know what the parties, or any of them, suppose to be the meaning of that order, or whether it has any meaning; but whatever has been done under it must be, like the order itself, set aside with costs to be paid to the plaintiff by the five persons who have made this appeal necessary. All moneys, if any, which the Sheriff has parted with under its supposed exigency, must be repaid to him.

Judgment.

It is of some interest, from a creditor's point of view, to consider what would be the effect on his rights of the order now impeached, and what may be the apparent effect of the Statute in any case, supposing it to be regularly invoked. McKay, the plaintiff, has had all the risk and expense of the action, but as soon as it bears any apparent fruit, the five applicants seize the whole of it, leaving him to pay the Sheriff's poundage and expenses, and his own solicitor's bill of costs, and stripped of all hope or right of recovering any portion of his claim against the defendant. For even if Clarke be a wealthy man, McKay can never issue another execution on his present judgment, which has been satisfied by the levy (if Clarke be wealthy, the Sheriff must be supposed to have made a sufficient levy); and if Clarke be a poor man, there will be nothing for the Sheriff to seize. Nor could McKay ever bring another action against Clarke, having already gone

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to judgment and execution for the same cause. Nor could McKay, or the Sheriff by making an extra levy, have guarded against potential claims for wages which might be sprung upon them. The Sheriff may levy and make the sum endorsed on the writ of execution, and no more. Under such circumstances, the wisdom of any longer bringing any action, even with the most undoubted right and against the most solvent defendant, may appear more than questionable.

DRAKE, J., concurred.

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WALKEM, J.
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Re
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Re GEORGE BOWACK.

Habeas Corpus—Municipal Health By-law authorizing confinement and isolation of travellers "exposed to" certain diseases—"Exposed to" defined—Right to apply for Writ of Habeas Corpus seriatum to different Judges after refusal by one Judge.

A municipal by-law of the City of Vancouver, authorized by Provincial statute, provided, "In case any traveller coming from without the city * * * is infected with, or exposed to, any of the diseases mentioned in this by-law (of which small-pox was one), the Medical Health Officer, or Board of Health, may make effective provision, in the manner which to them shall seem meet and best for the public safety, by removing such persons to a separate house, or by otherwise isolating them, if it can be done without danger to life, and by providing nurses and other assistance necessary for them at his own cost and charges," etc.

O'BRIEN v Secre. of STATE 67 Sol Journal 553

In re Richards 38 SCR 394

Appd at 224 R v Snyder etc 61 WWR 112 (AITA SCCh)

B. having been for 36 hours in Victoria, a city of 20,000 inhabitants, in which there were 55 cases of small-pox, came directly thence to Vancouver, where he landed. He was thereupon, by direction of the Medical Health Officer of Vancouver, under colour of above by-law, arrested and confined in quarantine as a traveller, etc., "exposed to" the disease. Upon motion for a writ of *habeas corpus*:—

Held, per McCREIGHT, J.—That B. was a person "exposed to the disease," and that the detention was lawful. *Writ refused.*

Subsequently, upon similar motion to WALKEM, J.

Held, per WALKEM, J.:—

1. A person imprisoned may make fresh application for a *habeas corpus* to every Judge or Court in turn, who are each bound to consider the question independently.
2. The detention was unlawful and not within the scope of the by-law. The authority to detain, isolate and nurse, could only apply to persons suffering from the disease.
3. B. could not be said to be a person "exposed" to the disease merely because he came from and had been 36 hours in a city infected with it to the extent proved. *Writ granted.*

Statement.

BY the *Vancouver Incorporation Act*, Stat. B. C. 1886, cap. 32 sec. 94, sub-sec. 194, the city was empowered to make by-laws, "for providing

for the health of the city and against the spreading of contagious or infectious diseases," and by Stat. B. C. 1889, cap. 40, sec. 37, amending sub-sec 92 of sec. 142 of the said *Incorporation Act, 1886*, power was given to pass by-laws "for regulating, with a view of preventing the spread of infectious diseases, the entry or departure of vessels at the port of Vancouver, and the landing of passengers and cargoes from such boats or vessels, or from railroad carriages or cars, and the receiving of passengers or cargoes on board of the same."

Statement.

In pursuance of these powers, on 2nd February, 1892, the Corporation of Vancouver passed a By-law, No. 131, called "The Public Health By-law," which provided, *inter alia*, by clause 8: "The Medical Health Officer shall have power to stop, detain and examine every person or persons, freight, cargoes, boats, railway and tramway cars, coming from a place infected with a pestilential or infectious disease, in order to prevent the introduction of the same into the city." By clause 29 the City was empowered to remove and isolate any traveller "exposed to" the disease coming from without the city. (*See* head-note and judgment of McCREIGHT and WALKEM, JJ.)

The circumstances under which the arrest was made, and was sought to be justified, more fully appear in the judgments of McCREIGHT and WALKEM, JJ. (*post*), upon the respective applications to them for writs of *habeas corpus* to obtain the discharge of B. from confinement.

E. P. Davis obtained a summons from McCREIGHT, J., returnable at New Westminster, to show cause why a writ of *habeas corpus* should not issue to discharge Bowack from confinement.

A. St. G. Hamersley, for the Medical Health Officer and City of Vancouver, showed cause.

E. P. Davis, for Bowack, supported the summons.

McCREIGHT, J.:—

Judgment.

In this case a summons was served on the Vancouver City Council to show cause why George Bowack should not be discharged from the quarantine hospital in Vancouver, where he had, by direction of the authorities in Vancouver, been detained against his will, was argued before me at length yesterday and to-day, and speedy decision, in view of his being in custody, is obviously desirable.

From affidavits it appears that he was in Victoria, a city proved to be an infected locality, for 36 hours only, taking, no doubt, all the

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precaution in his power against infection from small-pox. That, on the morning of the 15th, he arrived in Vancouver by the Yosemite, was arrested on landing, and placed in quarantine, from which he claims his discharge as being illegally in custody.

His discharge is resisted and his detention justified by the city, under the Health By-law of March 17th, 1892, especially under sections 7, 8, 10, 16, 18, and 29, but especially under the last section (sec. 29), which is as follows: "In case any traveller coming from without the city * * is infected with, or exposed to, any of the diseases mentioned in this by-law (of which small-pox was one), the Medical Health Officer, or Board of Health, may make effective provision, in the manner which to them shall seem meet and best for the public safety, by removing such persons to a separate house, or by otherwise isolating them, if it can be done without danger to life, and by providing nurses and other assistance necessary for them at his own cost and charges," etc.

Judgment.

With a view to construe this and other sections of the by-law, it is proper to observe the powers given to the city by their Incorporation Act of 1886, sec. 142, sub-sec. 94, "For providing for the health of the city and against the spreading of contagious or infectious diseases."

By their Act of 1889, sec. 37, this was amended by adding: "For regulating, with a view to preventing the spread of infectious diseases, the entry or departure of boats or vessels at the port of Vancouver, and the landing of passengers and cargoes from such boats or vessels, or from railroad carriages or cars," &c. It seems plain from this last section that the City Council have power to pass by-laws which should warrant their action in the present case, and the only question is whether their by-law is sufficient for the purpose.

The by-law must be construed by the usual rules and canons employed in the construction of Statutes, subject, of course, to certain exceptions, which, however, are not revalent in this case—*Endlich (Maxwell) on Statutes*, pp. 18 and 19, *Re Learesley*, 1891, 2 Ch. pp. 3 and 9 C. A.

It must be remembered that quarantine regulations are framed, no doubt, with the assistance of medical advice, which affords the best information as to how to prevent the spreading of infectious diseases, and it is common knowledge that quarantine regulations are directed to prevent such spreading of disease from ships arriving from infected localities.

The 29th section may not be framed as clearly as it might be, but I think that it covers the present case, bearing in mind the principles of construction I have referred to. It deals with travellers coming from without the city, &c., and "infected with or exposed to" any of the diseases mentioned on the by-law. I must construe the words "infected with or exposed to" in connection with the sections of the by-law referred to, and the fact that medical science and experience demonstrate that infection lurks on the sufferer for some time before it becomes palpable, and that such cases have to be provided for. Sec. 29 seems to me to have been intended to, and that the words do, cover such cases, without which the by-law would have been imperfect and of little use.

It was contended that the section only authorized the detention of persons actually shown to be infected on examination (see sec. 8), but this contention ignores the words "exposed to" in sec. 29. The evidence is ample that Victoria is an infected locality, and recognized as such on the Sound and other places, and I think the by-law is obviously a very beneficial measure, and as such to be liberally construed.

Judgment.

Mr. *Davis*, in his argument, for which I am obliged to him, put illustrations, each intended as a *reductio ad absurdum*, of the position taken by the City Council and their construction of the expression "exposed person." But the affidavits show that Seattle and Whatcom, in the United States, are adopting the same course of treating all persons arriving in those towns from Victoria as "exposed persons." If the Island and Mainland were under separate Governments, as was actually the case some years ago, no objection could be taken, any more than to the action of those towns, and the circumstance that Victoria and Vancouver are under the same Government can make no difference as to whether an individual is an "exposed person" or not. The fact is that quarantine regulations treat persons arriving from infected localities as "exposed persons." Lord Brunwell alludes somewhere to the difficulty of drawing a line between daylight and darkness, because of the long intervening twilight, but legislation attempts to do so for certain purposes. Likewise, quarantine regulations seem to consider it correct, practically speaking, to define individuals coming from infected localities as "exposed persons." The expression, no doubt, is very elastic, and it may not be very logical to classify an individual who has been in the outskirts of Victoria, say for half an hour, together with a nurse, in a small-pox hospital,

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but this only shows that we have imperfect knowledge as to how infection is propagated, and must adopt general and even arbitrary measures to check it.

Mr. *Davis*, for Bowack, suggested, though he did not much press it, that sec. 41 of the Provincial Rules of July, 1892, repeals the city by-laws.

I think that section is intended merely as a saving and not a repealing clause; moreover, considering, for the sake of argument and illustration, that the Provincial Rules may have the same force, in the way of repealing, as a Statute, yet they, operating as such, must be restricted by the decisions that a Public Act of Parliament does not repeal a Private Act, unless such object is clearly shown. See *Lord Bramwell—Pellas* v. *Neptune Marine Ins. Co.*, 5 C. P. D. 40, at p. 2.

A general later statute does not abridge an earlier special one—*Garnet* v. *Bradley*, 3 App. Cas., pp. 952, 653, 966, and 969, containing the observations of the Law Lords. I was told that the decision of CREASE, J., in Victoria, covered the question as to the Provincial Regulations governing the present case. I am by no means sure that the case before him is the same as the present, which is Bowack's alone, and relating to his detention on land. No report of his decision was produced, and I must repeat what the late Master of the Rolls said, that "he could not act on a case unless a report of it was produced." CREASE, J., may have thought that, on the evidence, he could not dissolve the injunction he had granted, and I may observe that, in *habeas corpus* applications, each Judge or Court is free to act, subject, of course, to the decision of a Court of Appeal

Judgment.

As an illustration of this in the Canadian prisoners' case in the Court of Exchequer, reported as *Leonard Watson's* case, 9 Add. & Ell., p. 731. *The writ is, therefore, refused.*

Statement.

Bowack, on July 25th, obtained a fresh summons for a writ of *habeas corpus* from Mr. JUSTICE WALKEM, returnable before him at Victoria.

C. E. Pooley, Q. C., and *A. E. McPhillips*, for the Medical Health Officer and the City of Vancouver, showed cause:—

Sections 8 and 29 of the Vancouver Health By-law (No. 131), in question, were within the powers conferred by their Incorporation Act and amendments.

The confinement in quarantine of Bowack was warranted by clause 29 of the by-law, as he was a traveller coming from without the city and "exposed to" small-pox within the meaning of the clause, having admittedly come direct from Victoria, where he had remained for 36 hours, Victoria being a place infected with the disease, the affidavits showing that there were 55 cases of small-pox there during his stay in that city. The circumstances constituted, in the opinion of medical men, a danger of infection to himself, and, therefore, a corresponding danger of his spreading the disease. A difference of opinion between the medical men, on either side, as to the degree of that danger could not affect the question, as the duty of deciding was cast by the by-law upon the Medical Health Officer or Board of Health, and all that was necessary was that their action should not be without reasonable and probable cause.

It was not necessary, under clause 29, that any examination of the suspect should take place, with a view to ascertaining whether he actually had contracted the disease or not, or had been in actual contact with it, as a preliminary to his detention and confinement. It was enough that he appeared to the satisfaction of the Medical Health Officer, or Board of Health, on reasonably sufficient grounds, such as are admitted here, to have been exposed to the disease.

Argument.

C. Wilson and *E. V. Bodwell*, for the applicant, supported the summons.

The construction of the statute and by-law must be that most favourable to the liberty of the subject. Clauses 8 and 29 of the by-law must in this case be read together. Bowack was an inter-provincial traveller, going from port to port, and could not be detained and confined unless after and upon the result of the examination required by clause 8. See *C. P. N. Co.* v. *Vancouver*, ante p. 193. The power of confining upon bare suspicion was not intended to be vested in the Health Officer or Board of Health. They had no reasonable grounds for their action in making the arrest, as they made no enquiries as to whether Bowack had been exposed or not. They were put upon enquiry. They had nothing to go on except that he was a passenger on a steamer coming from Victoria. Supposing it to be an infected place in the narrow sense disclosed in the affidavits, it could not be said that this constituted evidence of exposure sufficient to meet the requirements of clause 29. That it now turned out that Bowack had, in fact, been 36 hours in Victoria did not meet the meaning of the by-law. It was never held that, under quarantine regulations, there

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was a general right to confine passengers coming from an infected port, irrespective of whether they carried a clean bill of health and medical certificates or not. Otherwise, the obtaining of them was of no avail. The language of clause 29 indicated that it was a provision having reference to persons suffering from the disease. The provision was not for nurses, if required, but for removing and isolating and providing nurses and other assistance necessary for them. If the power assumed by the by-law, or intended to be given by the enabling Provincial Statute, was to stop and confine interprovincial passengers, at all events, and without examination, &c., it was *ultra vires*, as an interference with trade and commerce.

Argument.

C. E. Pooley, Q. C., in reply: It is possible in construing clause 8 of the by-law, which was intended to prevent the landing of ships and other conveyances and their passengers in the city, that the words "Stop, detain, and examine," required an examination, and regard to its results, as indicating positive immediate danger arising from actual presence of the disease among the passengers, or something amounting to proved actual recent contact with it on the part of some of them, so as to justify the strong measure there pointed at, of stopping public travel and trade, which pushed the powers devolved on the Corporation to their extreme limit. Here, however, Bowack was permitted to land. At all events, he had landed, and his case was no longer governed by clause 8, and no examination was necessary, but he was dealt with as a traveller who had been "exposed," &c., under clause 29. The provisions for supplying nurses, &c, to persons quarantined do not import anything controlling the generality of the power to quarantine an exposed person, irrespective of whether he is actually suffering from the disease or not, but is a provision to be adopted in case of necessity.

WALKEM, J.:—

Judgment.

An application similar to the present one having been made to, and refused by, my brother McCREIGHT, I intimated to Mr. Bowack's counsel, when he moved for the *rule nisi*, that I had doubts as to my jurisdiction, in view of the recent decision of the House of Lords in what is familiarly known as *Bell-Cox's* case, which was one of *habeas corpus—Cox* v. *Hakes*, 15 App. Cas. 506. The question of jurisdiction has now been raised, as I anticipated would have been the case, by counsel for the Vancouver authorities. In *Bell-Cox's* case the point decided was that in England no appeal lies in *habeas corpus* from an order of release, under the general appeal clause in the *Judicature Acts*:

but their Lordships studiously refrained from giving any authorative decision as to whether, in case of the release being refused, an appeal would lie under the same enactment. Different opinions on the latter point were, however, expressed by members of the House; and those opinions, it is needless to say, are most valuable, now that that point has been submitted to me for decision, especially as it was suggested in the English tribunals, that if the appeal existed the inference possibly was open that the Legislature intended that it should displace the practice in force prior to the *Judicature Acts*.

That practice, as stated by the Lord Chancellor, was that "if release was refused, a person detained might—see *Ex parte Partington*, 13 M. & W. 679—make a fresh application to every Judge or every Court in turn, and each Court or Judge was bound to consider the question independently, and was not to be influenced by the previous decisions refusing discharge." By the English *Judicature Acts*, a fusion of the English Superior Courts into one High Court of Justice was effected; but the jurisdiction in matters of *habeas corpus* was left, according to Lord Bramwell's view of the matter, if not unsettled, pretty much as it was before—*Cox* v. *Hakes*, 15 App. Cas., at p. 523. Our *Judicature Act*, on the other hand, mainly relates to procedure. No fusion of Courts was effected by it, for none was needed, none possible, as we have had all along but one Superior Court—the Supreme Court. We have in our *Judicature Act* the same appeal clause as appears in the English *Judicature Act*; in addition to that, an appeal to the Divisional Court is specially given in cases of *habeas corpus* by sec. 62 of the *Supreme Court Act*. How that appeal is to be enforced where a discharge has been ordered, I fail to see, for no machinery is provided for the purpose of bringing "the body," that is gone, before the Appellate Court: at all events it is not with a case of that sort that I am concerned; but it is with the converse one of a discharge being refused.

Judgment.

An appeal on Mr. Bowack's behalf to the Divisional Court, from Mr. Justice McCREIGHT, may, in its details of procedure, perhaps be launched, as it was in the *Bell-Cox's* case, though Lord Bramwell seems to have disapproved of the whole proceeding, as there was no *lis* in which to appeal, and no question of judicature involved. Be this as it may, I shall assume that Mr. Bowack's right of appeal could, if he chose to assert it, be in some way legally presented. Then comes the question—Does the fact that the Legislature has expressly given him that remedy impliedly operate as a bar to the

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proceedings before me? These proceedings undeniably involve the question of his personal liberty, and, as such, have in the past been regarded as a part of the subject's constitutional rights, and therefore as rights of which he should not be deprived by mere implication, for "the spirit of our free institutions requires that the interpretation of all statutes shall be favourable to personal liberty"—per Lord Abinger, in *Henderson* v. *Sherborne*, 2 M. & W. 239, as cited in *Maxwell*. Hence I must hold, that as the enactment giving the appeal has not expressly substituted it for the old practice, Mr. Bowack is entitled to the advantages which that practice gives him, by seeking, as he now does, my opinion as to the legality of his arrest and detention regardless of the fact of his failure before another Judge. I might add that his application to me is in no sense an appeal from my brother MCCREIGHT, but is one as to which I have to exercise a primary jurisdiction without knowledge of the materials before him and upon much more evidence, as I am informed, than was presented to him. The present case has arisen under the *Public Health Act* and a set of by-laws passed under its provisions by the Corporation of Vancouver. The by-laws are within those provisions, and the Act itself, in so far as it relates to the question I have to decide, is constitutional, as the subject of public health falls within the class of legislative matters assigned to the Province by section 92 of the *British North America Act*. Acts relating to the public health are to be liberally construed so as to suppress the mischief and advance the remedy, but when any reasonable doubt exists in respect of their language, or of that of their subsidiary by-laws, the benefit of that doubt must unhesitatingly be given to the subject on the important constitutional principle that I have already stated, which will well bear re-quoting, viz.: "That the spirit of our free institutions requires that the interpretation of all statutes shall be favourable to personal liberty."

Judgment.

According to Mr. Bowack's affidavit, he is a merchant and resident of London, England: he arrived in Victoria on the 13th instant, and left at 2 a. m. on the 15th, by the steamer "Yosemite" for Vancouver, which place he reached six hours afterwards. He further states that while in Victoria he was aware that cases of small-pox existed in the city; that he took every precaution against contagion and exposure to it; that to the best of his knowledge he was never exposed; that he was successfully vaccinated on the day of his arrival and got a medical certificate to that effect; that the "Yosemite," on which he departed, had, as he believed, complied with the small-pox regulations before

leaving Victoria: that upon his quitting the steamer and landing on the C. P. R. Co.'s wharf at Vancouver he was taken in charge by a Vancouver policeman named Grady, by instructions of the Vancouver chief of police, and, against his will, thereupon taken to a hospital on Cambie street, and there detained till now: that before he was so taken and detained he was asked no questions respecting his exposure to small-pox or as to the places where he had been previously staying, by any health officer or other officer in authority: that his arrest and detention are not the result of any criminal charge, but that he was so arrested and has been so detained under colour of certain government regulations relating to small-pox: and further, that during his detention he showed the policeman his certificate of vaccination, and that the policeman informed him that he was held under verbal instructions of the chief of police acting as an officer of the Vancouver Board of Health. The affidavit of the Vancouver Medical Health Officer, Dr. Herald, alleges that, according to his information and belief, the City of Victoria "*is an infected locality within the meaning of* the government regulations as to small-pox," there having been for the last fourteen days, viz., from the 9th of July to the 23rd (the date of his affidavit), a large number of "small-pox cases existing therein," that those cases had "broken out in various parts of the said city, and the said disease had been thereby widely spread through the said city:" that the Health Officer and authorities in Victoria, owing to the increase of small-pox in the said city and to the great danger there was of the contagion spreading, had "ordered that no meetings should be held, and that the law courts should be closed for the trial of actions, and that the public examinations should not take place:" that when the "Yosemite" reached Vancouver on the 15th instant he "boarded her as Health Officer for the purpose of having the freight and cargo disinfected, and *examining* and if necessary detaining any passengers that might be on board the said steamer, so as to prevent, as far as possible, the spread of the contagion of small-pox in Vancouver:" that "he then informed the passengers that if any wished to land at Vancouver it would be necessary that they should be held and detained in a place isolated from its inhabitants for a period of time, so that the danger of their spreading the disease might be averted:" that "George Bowack, not heeding what was thus said, went on shore from the same steamer and defied the regulations;" that "Bowack was thereupon restrained from going among the citizens of Vancouver and was taken to a building provided by the city where persons coming from an infected

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place and who had been exposed to contagion were to remain until all danger of their spreading the disease should be past:" that as a "medical practitioner and health officer" he considered "that it would be extremely dangerous to the inhabitants of Vancouver if persons coming from an infected locality, such as Victoria was between the 15th and 23rd inst., were allowed to go about the streets of Vancouver without having been thoroughly disinfected and excluded from intercourse with people for a period of fourteen days; that it is impossible to discover whether a person has the disease of small-pox on him by physical examination until the disease has actually broken out, as the disease takes fourteen days to incubate, and though the person afflicted may be thoroughly well, to all outward appearances, yet he might have the disease upon him and thereby be capable of spreading it; that there are no modern appliances in Vancouver, or, as far as he knows, on the Pacific coast to insure a thorough disinfection, and that therefore there is greater danger in allowing people who come from an infected place to go at large." He then instances the case of two arrivals in Vancouver from Victoria prior to the 15th, who shortly afterwards fell ill of small-pox and who, as he alleges, doubtless quite correctly, must have had the disease in an undeveloped state in Victoria and on the steamer. He also expresses the opinion, with which one must as a matter of common knowledge agree, that the spread of small-pox may be effected by vaccinated persons, as they may carry its germs about them. Affidavits of many other medical gentlemen of Vancouver, who pledged themselves to the statement that Victoria "is," according to their "information and belief," an infected locality, have also been placed before me; but as they were all made on the 23rd instant and refer to the sanitary condition of the city at that time, they are not evidence of its sanitary state on July 13th and 14th, when Mr. Bowack was in the city, for it is only with the latter period that I have to deal. Dr. Morrison of Victoria, however, states that on the 15th there were about fifty cases in the city, but he abstains from giving an opinion as to whether Victoria was or was not on that account an "infected locality." There is an affidavit of the Mayor of Vancouver, to the effect that he received a telegram from the State of Washington that some of its cities and towns had, to quote the language used, "declared their cities to be quarantined against British Columbia in consequence of the prevalence and spread of small-pox in Victoria." This information, as I pointed out when it was read, is hearsay evidence of such a character that it must be unhesitatingly rejected. It has not

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even the virtue of being vouched for, as to its truth, by the Mayor. It may be too true, but would a man on trial for his life or liberty lose either on a telegraphic dispatch of this sort? I felt surprised when asked to give the telegram any consideration. Independently of this, the authorities of Vancouver, as well as those of all other classes, must, in matters concerning the health of the public under their guardianship, act on their own judgment, and on substantiated facts within their own knowledge. The next evidence of importance is that of Doctors Davie and Watt, of Victoria. Dr. Davie occupies the important position of Medical Health Officer for the Province. He states that having read Mr. Bowack's affidavit, he is of the opinion that the latter "ought not" to have been quarantined "unless a personal examination resulted in the discovery of disease," and that the facts deposed by Mr. Bowack are sufficient to have justified any Medical Health Officer, in allowing him to go at large. Dr. Watt, who is a Deputy Inspector of Health for Victoria, alleges that, in accordance with his public duty, he inspected and examined all the passengers who went on board of the "Yosemite" prior to her departure from Victoria on the 15th instant, and that "none were infected with small-pox," and that, to the best of his belief, "none had been exposed" to such contagion so as to create danger of their developing it; and that on that day he consequently gave the master of the "Yosemite" a clean bill of health. In a second affidavit of Dr. Davie, put in yesterday, he controverts the opinions expressed by Drs. Herald and McGuigan to the effect that vaccination does not prevent the spread of small-pox, and alleges that those opinions are opposed to scientific knowledge and experience, which show "that fourteen days after a person has been successfully vaccinated, and for some years afterwards, while it is possible he may contract and spread small-pox, the probability of his contracting and spreading it is reduced to almost a nullity, unless such a protected person has been brought in immediate contact with the disease, when the danger of that person communicating the disease to others is limited to his clothing." He also states "that as Provincial Health Officer, he has a knowledge of the circumstances connected with the cases of small-pox in Victoria," and that in his "opinion the city was not on July 13th, or at any time since, an infected locality to such an extent that every person going from the city on the 13th inst., or since, was likely to infect others, unless such person had been brought in direct contact with the said disease;" that "having regard to the number of persons afflicted with

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the said disease on July 15, not more than one or two per cent. of the population could be said to be at all likely to carry the infection;" and that "a few days' or hours' residence" in Victoria from the 12th instant "to the present time," (that is yesterday), at the Driard Hotel could in no sense without "more be an exposure to infection." The reference to the "Driard" is made as Mr. Bowack put up at that hotel while in Victoria, as appears by an affidavit of Grady, the policeman, which I have not hitherto referred to. I have given at considerable length the substance of every pertinent affidavit read in this case lest any fact of importance should escape attention. Moreover, the opinions of many medical gentlemen, which I have stated, are not only valuable to me as a guide, but are of unquestionable value to the community at large, in so far as they impart information as to contagion or infection. Dr. Davie, at first sight, seems to disagree with some of his medical brethren at Vancouver on questions of pathology, but upon a close examination of their affidavits, I find that in the main they are in accord. On one most important fact they materially differ. All the affidavits of the medical gentlemen in Vancouver with respect to Victoria being an infected locality, refer to its having been so on the 23rd instant; but suppose, for the sake of argument, that instead of the 23rd instant, the date had been the 13th and 14th instant, when Mr. Bowack was in the city; even in that case their statements, as they are based upon mere "information," cannot prevail against those of the Provincial medical officer, whose knowledge derived from experience on the spot justified him, as he must have deliberately thought, in pledging his oath that Victoria *was not* "at the time mentioned or since an infected locality." Being an officer appointed for the Province at large, he is responsible for the protection, not only of Victoria, where he happens to reside, but of Vancouver and every other locality in the Province, against the inroads of small-pox. His opinion therefore is entitled to much weight. While this must be the case, equal weight would be due to the opinion of his brethren in Vancouver, if uncontroverted facts called for decision. There is a broad distinction between information that is second-hand, and positive knowledge that is first-hand. In deciding between the two, the latter must as a matter of common sense prevail. Dr. Morrison states that there were fifty cases of small-pox in Victoria on the 15th instant. The population of Victoria is 20,000 or over: hence out of every 400 people there was but one patient: but taking the Dominion census of 15,000, there was, on the Doctor's showing, one patient to every 300.

Judgment.

Dr. Davie's statement, that from 1 to 2 per cent. might at that time have borne infection, seems therefore a fair, if not a very liberal estimate. In view of these facts, can any medical man of repute deliberately stamp such a locality as "an infected locality." Take a village of 100 inhabitants, would a physician who valued his reputation pronounce it to be "an infected locality," if two or even five of its inhabitants happened to have small-pox? Yet this is what the medical gentlemen of Vancouver have unwittingly done in consequence of information that misled them.

The authority under which Dr. Herald is alleged to have acted appears in secs. 8 and 29 of the Health By-laws passed by the Vancouver Corporation. Sec. 8 is as follows: "The Medical Health Officer shall have power to stop, detain, and examine every person or persons, freight, cargoes, boats, railway and tramway cars, coming from a place infected with a pestilential or infectious disease, in order to prevent the introduction of the same into the city." Admitting, for the sake of argument, that during the period in question Victoria was an infected locality, the question arises, did Dr. Herald comply with this enactment—for it has the force of a Statute— in what he did on the 15th instant? He seems to have been fully aware of his duties, for in his affidavit he makes the important statement that he went "on board of the steamer for the purpose of having the cargo disinfected, and examining, and, if necessary, detaining any passengers so as to prevent the spread of the contagion of small-pox in Vancouver." The by-law authorizes him to stop, detain, and examine—not disjunctively to stop, detain, or examine. He did not "examine," because, as he virtually says in his affidavit, "What was the use of an examination, for it takes fourteen days for small-pox to show itself?" But he was bound to obey the by-law, and to examine the passengers as directed; and if, upon examination, he discovered a case of disease, to detain the patient. That is the meaning of the by-law. As observed by my brother McCREIGHT, such by-laws are drawn with the assistance of medical men, who must have known as well as Dr. Herald that small-pox takes about fourteen days to develop itself; hence the requirement to "examine" can have only one sensible meaning, viz., to examine with a view to ascertaining whether a developed case existed. Dr. Herald cannot be said to have acted under sec. 8, for he did not detain and examine Mr. Bowack, but detained him without examining him. We have, therefore, to ascertain whether his course was justified by the terms of sec. 29, which is as follows: "In case any traveller coming

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from without the city, or any person residing within the city, is infected with or exposed to any of the diseases mentioned in this by-law, the Medical Health Officer, or Board of Health, may make effective provision, in the manner which to them shall seem meet and best for the public safety, by removing such persons to a separate house, or by otherwise isolating them, if it can be done without danger to his life, and by providing nurses and other assistance necessary for them, at his own cost and charges," &c. I need not read the rest of the section. Common sense suggests that this section means that if an incoming traveller is infected with small-pox, or has, according to the Health Officer's knowledge, "been exposed to it," the Health Officer may remove him and isolate him; and what else? "Provide nurses" for him. The last very proper provision could only apply to sufferers, because only such would need nursing. The authority to detain, isolate, and nurse can only refer to patients. To put any other construction on the section would be manifestly improper. Reading the by-law in the light of Dr. Herald's course with respect to Mr. Bowack, the section would give him authority to practically imprison for fourteen days every person belonging to Victoria, whether afflicted with small-pox or not, who ventured to land at Vancouver. Travellers, as in Mr. Bowack's instance, would also meet with the same penal fate. The Vancouver authorities, as well as all similar bodies, may usefully follow the example set in matters of public health by England and other civilized countries. No ship with its cargo and passengers coming even from a notoriously infected port is ever quarantined, if she is found on examination at the port of destination to be free from disease. Quarantining is necessarily a severe measure, and no one has ever heard of its being resorted to on mere surmise or apprehension of danger. The imprisonment of one or one hundred individuals for fourteen days for the purpose of finding out whether he or they might develop small-pox would not be tolerated in barbarous countries, much less within the boundaries of an empire that justly prides itself on the fact that throughout its legal history of several hundred years the liberty of the subject has been the foremost principle of its constitution. The zeal of the Vancouver Board of Health in endeavouring to protect its wards and guard them against the attack of a loathsome disease is assuredly commendable in the abstract, but that zeal has been carried beyond even the legal limits of the by-laws of their own municipality. For this reason alone, Mr. Bowack would be entitled to his release. But supposing that this

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were not the case, he would be entitled to his discharge on the evidence before me which I have not yet referred to. Dr. Davie's evidence, as well as Mr. Bowack's, shows that Mr. Bowack could not be said to have been "exposed" to small-pox when living in Victoria. It was not incumbent on Mr. Bowack to prove this; but it was clearly incumbent on Dr. Herald to prove exposure, as sec. 29 only justified detention in cases of disease or exposure to it. Neither one nor the other existed, so far as the evidence goes, in Mr. Bowack's case: and there is not a word in any of the by-laws which would warrant arrest and detention on suspicion or mere surmise. Dr. Davie also, in positive language, swears that, from what he daily saw about him, Victoria was not on the 13th instant, and has not since been, an infected locality in a medical sense. Such evidence, as compared with statements made on information and belief must, according to a well established rule, as well as to common sense, prevail. Mr. Bowack seems to have dreaded the disease, and as far as possible kept out of its way. As I pointed out during the argument, that might be a difficult thing to do. The germs of the disease may be in this court room: but would any sensible person say that on a mere surmise of their presence, every one of us should be marched of to Ross Bay as "suspects?" I think that by putting the case thus the absurdity of the whole proceeding at Vancouver must be apparent. On the facts deposed to, as well as to the legal construction of the by-laws of Vancouver, Mr. Bowack has been illegally arrested and detained. I must, therefore, order his immediate release, and give him, as requested, the costs connected with his present application.

Judgment.

BEGBIE, C. J.

1891.

17th Nov.

Ex parte ETTAMASS.

Ex parte ETTAMAS.

Ex parte ETTAMASS.

Criminal Law—Habeas Corpus—Warrant of Commitment not showing conviction—Effect of—Form of rule nisi—Dispensing with—Presence of Prisoner on Argument of.

A warrant of commitment by an Indian Agent recited that E. had been charged with having an intoxicant in his possession contrary to the *Indian Act*, "and thereupon having considered the matter of the said complaint, I adjudged the said Ettamas should be imprisoned in the common gaol * * * for * * * thre calendar months."

Held, 1. Warrant defective for not showing any conviction.

2. The prisoner could be discharged without the writ of *habeas corpus* actually issuing, and without the prisoner being personally brought before the Court.

Statement.

Re Habeas Corpus O'Brien v. Sec. of State 67 Sol. Journal 553

RULE *nisi* calling on the gaoler of the common gaol at Victoria to show cause why a writ of *habeas corpus* should not issue, and why, if the rule be made absolute, the prisoner should not be discharged from custody without the writ actually issuing and without the prisoner being personally brought before the Court.

Barton, for the Crown, showed cause to the rule *nisi*.

Argument.

The statement of the Justice, in the warrant, that he considered the charge and adjudged imprisonment thereupon constitutes a sufficient allegation that he convicted the prisoner. The order for the discharge of the prisoner cannot be made without the personal presence of the prisoner—*Paley on Convictions*, 7th Ed., p. 339.

S. P. Mills, for the prisoner, *contra*.

BEGBIE, C. J.:—

Judgment.

A *rule nisi* was obtained in the first instance with a view to the discharge of the prisoner on a great many grounds. It was obtained in the form now usual, calling on the gaoler to show cause why a writ should not issue, and why, if the rule be made absolute, the prisoner should not be discharged from custody without the writ actually issuing, and without the prisoner being personally brought before me.

It appears that the only warrant or authority which the gaoler holds for detaining the prisoner is a warrant of commitment which is produced. The warrant recites that a sentence has been passed, but does not allege that the prisoner has been convicted of any offence, and it then proceeds to order the gaoler to detain the prisoner for a period different from that to which he is thereby stated to have been sentenced.

Formerly it was necessary in a warrant of commitment to set forth all the facts requisite for showing the jurisdiction of the Justice of the Peace enabling him to issue the warrant. Both the order and the default were required to be set forth in the warrant of commitment; for instance, if the order were for the payment of a sum of money, and in default of payment imprisonment. Since 18& 19 Vic, cap. 126, sec. 13, in England (imported into B. C. upon its establishment in 1858, and adopted in 1870 in the Eastern Provinces of the Dominion, and now in the Rev. Stats. Canada, 1886, cap. 178, sec. 83), no commitment is to be held void for any "defect," which would include any omission therein, provided only it allege that the defendant has been convicted, and if there be in fact a conviction. This commitment does not, however, satisfy even these easy conditions. Other errors have been alleged in other proceedings, but on a *habeas corpus*, unaided by a *certiorari*, the only document before me is the commitment, which, on either of the two extraordinary errors, the omission of all statement of any conviction, and the contradictory nature of its own scanty contents, must be declared an utterly impotent warrant of detention.

When the prisoner's discharge was then prayed, however, it was objected that the Court could not, in making absolute the rule *nisi*, though obtained in the present form, order such discharge without the writ actually issuing, and without the prisoner being actually produced, on the strength of the expressions in *Paley on Convictions*, 7th Ed., p. 337. This is not, indeed, expressly asserted by him to be necessary where the rule *nisi* is in the form here adopted: but it may be admitted to be a fair inference from a passage in his text, at least where no cause is shown against the rule. The only authority he cites is *Ex parte Jacklin*, 2 Dowl & L., 103. It is true there is below the headnote in that case an observation of the reporter to that effect. But nothing of the sort is decided in that case or alluded to by the Court, nor could be, for the point did not there arise. The rule *nisi* in *Jacklin's* case had not been obtained in the form now adopted. It merely called on the respondent to show cause "why the writ should not issue, and why, if this rule be made absolute the prisoner should not be discharged without being personally produced in Court." It did not, as in the present form of the rule *nisi*, further pray cause to be shown "why the prisoner should not be discharged without the writ actually issuing." When a rule *nisi* is made absolute it adheres to the very words of the rule *nisi*. That which had been ordered conditionally

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is now ordered absolutely; and thus the rule *absolute* necessarily ordered the writ to issue, and upon the return of the writ, of course, the prisoner would have to be produced. The rule *nisi* in *Jacklin's* case was at that time a novelty, suggested, probably, by the decision in *Ex parte Martins*, 9 Dow., 194 (1840), where the rule *nisi*, being in the old form, merely calling on the gaoler to show cause why the writ should not issue. The Court, on making that rule absolute, held, with regret, that they had no jurisdiction until the return of the writ, and the prisoner was before them, to order his discharge. That seems to have suggested the form of the rule in *Jacklin's* case; and *Jacklin's* case seems again to have suggested the further innovation set out in *Paley's Conv.*, p. 409, *note*, now generally adopted by the Judges. The effect of the further innovation seems to have been first discussed in *Eggington's* case, 2 El. & B., p. 717, and *Heswood's* case, *ibid*, p. 952, in 1853, where it was strongly objected to, but the Court, after argument, upheld it as being both convenient and inexpensive, the cost of issuing the writ being considerable, and the cost and delay of bringing a prisoner, perhaps from a distant part of the country, very inconvenient. Lord Campbell, C. J., said he had frequently acted on it, and the prisoners in both cases were dealt with accordingly. There appears to be no case in the books in which when a rule *nisi* has been obtained in this form either the writ or the production of the prisoner has been deemed neccessary for the prisoner's discharge, when such a rule is made absolute. But it is easy to conceive a case in which the Court might desire a second argument on the legality of the imprisonment, in which case they might make the rule absolute for the writ to issue, and not at once order the prisoner's discharge.

Judgment.

In the present case there seems no reason for supposing that the commitment can be supported.

The gaoler is holding the prisoner without any sufficient warrant, and he must be discharged. And, following the cases in 2 Ell. & Bl., I order his discharge without any writ issuing, or personal production of the prisoner.

Rule nisi made absolute.

DIVISIONAL COURT.

BEGBIE, C. J.
DRAKE, J.

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Re ELLARD.

Re ELLARD.

Practice—Divisional Court, time for appealing to—Notice of Appeal is bringing of Appeal—Jurisdiction—Chamber Summons not issued from Registry wherein action brought—Effect of—Sec. 27 Supreme Court Act.

The giving of notice of intention to appeal is the bringing of the appeal, within sec. 61 *Sup. Court, B. C. Act*, and when such notice is given within eight days from the perfecting of the order appealed from, it is no objection that the appeal is not either set down or argued within that time.

Commented Postill v Jaques 5 B.C.R. 378

A Judge in Chambers has jurisdiction to entertain a motion made upon summons issued out of a Registry, other than that out of which the writ of summons issued, notwithstanding sec. 27 *ibid.*

Statement.

APPEAL from an order of Mr. Justice CREASE, dated October 29th, 1892, that the costs of all parties to the action and proceedings should be taxed as between solicitor and client, and paid only out of the estate of the late James Ellard. The writ of summons in the action, pleadings, etc., were issued and filed in the Westminster Registry. The summons upon which the order appealed from was granted was issued out of the Registry at Victoria.

Notice of intention to appeal to this Court had been given within eight days from the date of perfecting the order appealed from, but the appeal had not been entered with the Registrar until after the expiration of the eight days.

Argument.

Luxton, for James Harvey and Esther Harvey, two of the defendants, the respondents on the appeal:

We take the preliminary objection that the appeal is too late, not having been brought, that is, set down for argument, within eight days from the date of entering the order, though a notice of an intention to appeal was given within the eight days. The words "appeal shall be brought" are not in effect different from the words of the English Order LIV., Rule 24, "appeal * * shall be made within eight days," under which it was held that such notice must be given that the appeal must be heard within the eight days—*Steedman* v *Hakim*, 22 Q. B. D., 16.

Helmcken, for appellants: The serving of the notice of intention to appeal was the bringing of the appeal, within the meaning of the section—*Christopher* v. *Croll*, 16 Q. B. D. 66: *Reg* v. *Lynch*, 12 O. R. 372.

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BEGBIE, C. J.—Though we might have thought otherwise if the matter had been *res integra*, we must hold, upon the authority of the cases cited, that the appeal was brought when the notice of intention to appeal was served. Objection overruled.

DRAKE, J., concurred.

Argument.

Helmcken, for the appellant: Mr. Justice CREASE had no jurisdiction to make the order appealed from, as the summons upon which it was made was not issued out of the registry office in which the action was pending, namely, Westminster, as provided by sec. 27 of the *Supreme Court Act*, and the whole proceedings upon it were irregular and void. Also the order is for taxation of the costs upon the attorney and client scale. Under Order LV., Rule 4, there is only one scale of costs allowed in this Province, namely, that provided in schedule H to the rule.

Luxton, contra: The provisions of sec. 27, *supra*, are not imperative, but directory. A Judge of the Court has power to entertain a motion in any action, though the summons may not be issued out of the registry in which the action is domiciled. The same effect could be produced by issuing the summons out of the registry indicated returnable before a Judge elsewhere. A chamber motion is not a "proceeding to be taken and recorded" in the action within the meaning of that section which refers to proceedings and other matters of record in the action. A summons does not require to be recorded.

Although there is only one scale of costs provided under Order LV., Rule 4, the solicitor and client items provided for in the schedule should be allowed where the work was actually done. This was intended to be provided for by the direction that the costs should be taxed as between attorney and client.

Judgment.

Per Curiam—It was a matter of discretion in the learned Judge to hear the motion or refer it to the domicile of the action. The provision in sec. 27 is directory and not imperative, and that objection to the order appealed from is overruled. The Court do not, however, desire to express approval of the practice of making motions in an action away from its proper domicile.

As a previous order for taxation of costs and payment out of the estate was made on 18th August, 1888, the order appealed from will be varied by limiting the taxation to take place thereunder to costs incurred since that date, excluding the costs of the arbitration, which

can be afterwards dealt with, and by striking out the words "as between attorney and client." The trustees are entitled to their charges and expenses in addition to costs, and the taxing officer should report what charges and expenses the trustees have been put to with reference to this action. Cost of order appealed from, and of the appeal to be paid out of the estate.

DIVISIONAL COURT.
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19th August.
COLUMBIA RIVER CO. *v.* YUILL AND OTHERS.

THE COLUMBIA RIVER LUMBER CO.
v.
YUILL AND OTHERS.

Water privileges—Provincial statutory grant of use of water—Limitations of—Riparian proprietor—Right of to injunction against statutory licensee of use of water so using it as to foul stream—Injunction—43 Vic. B. C., cap. 11—Placer Mining Act, B. C., 1891.

Plaintiffs were entitled, as riparian proprietors, to the use of the natural flow of the water of a stream, Quartz Creek, running through timber lands leased by them from the Dominion Government. The lands so leased were part of the lands in the railway belt granted to the Dominion by the Province of British Columbia by 43 Vic. B. C., cap. 11, in aid of the construction of the C. P. R.

Defendants, as free miners licensed by the Provincial Government, obtained from it a grant of the right to use, for mining purposes, the water of a stream running into Quartz Creek above the plaintiffs' saw-mill, by record under the *Placer Mining (B. C.) Act, 1891*, secs. 56 and 57.

Defendants so used this water as to foul Quartz Creek and stop the plaintiffs' mill.

Held, 1. No person, unless by grant or prescription, is entitled to deprive another of the beneficial use of water which would naturally descend to him.

2. A right granted by a Statute, which does not, in express terms, derogate from the rights of others, cannot be held to have done so by implication.

3. A grant of water privileges under the Provincial Mining Acts does not sanction the user of the water to the detriment of the rights of others, however acquired, to the same water at another part of the stream.

4. The Dominion Government, under 43 Vic. B. C., cap. 11, were in possession of the lands, as trustees to administer same, and it was competent to them to grant a lease to the plaintiffs, carrying the ordinary rights to the water of a riparian proprietor.

MOTION TO DISSOLVE AN INJUNCTION.

Statement.

THE action was for an injunction to restrain the defendants from fouling the waters of Quartz Creek in such a manner as to prevent the proper working of the plaintiffs' saw-mill.

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COLUMBIA RIVER CO. v. YUILL AND OTHERS.

Statement.

The plaintiffs had owned and operated their saw-mill by means of water power derived from the stream for several years prior to the defendants commencing operations at their mine.

The stream, after passing defendants' mine, ran through the lands upon which plaintiffs' saw-mill was situated, they being in possession of said lands as holders of timber licenses from the Dominion Government.

The defendants were "free miners," holding their claim under the *Mineral Act, 1891*, Stat. B. C., 54 Vic., cap. 25, and were using the water from the stream for hydraulic mining, a system in which a jet of water is employed to wash down a bank of gold-bearing gravel or earth. This resulted in fouling the stream, and by forcing down earth, roots and "tailings," obstructed the plaintiffs' mill-race, blocked its flume and machinery and prevented the operation of their mill.

The fact that the plaintiffs were injured in the operation of their mill by the operations of the defendants was not denied, but defendants claimed that it was *damnum absque injuria*.

An *interim* injunction having been granted by Mr. Justice DRAKE,

Argument.

Charles Wilson and *E. V. Bodwell*, for the defendants, now moved to dissolve same.

The relative rights of the parties acquired respectively from the Dominion of Canada and the Province of British Columbia depend on the effect of the Provincial Statute, 43 Vic, cap. 11, granting to the Dominion Government public lands of the Province, 20 miles wide on each side of the track as located by the Canadian Pacific Railway, in aid of the construction of the Railway, as varied by 47 Vic., B. C., cap. 14. The statutory grant by the Province to the Dominion was subject to all servitudes and Crown rights. The only conveyance intended by the Statute was a transfer to the Dominion of the Provincial right to manage and settle the lands and to appropriate their revenues for the purpose indicated. It was neither intended that the title to the lands should be taken out of the Province, nor that the Dominion should occupy the position of a freeholder within the Province—*Attorney-General of B. C.* v. *Attorney-General of Canada*, 14 App. Cas., Lord Watson, at pp. 301, 302.

The plaintiffs ought to have obtained a license from the Provincial Land Commissioner of the District in order to obtain the right to the water privileges claimed by them—see *Land Act*, C. S. B. C., cap. 66, sec. 45. The defendants having the Provincial recorded grant to use

the water the plaintiffs' rights, since they hold no license from the Provincial Government, are subrogated to the rights of the defendants.

A. E. McPhillips, for the plaintiffs, *contra*.

The plaintiffs as occupiers of the land under lease from the Dominion of Canada are entitled to all the rights of riparian proprietors. The effect of the statutory grant was to place the Dominion in that position at least, and the plaintiffs hold under them. *Attorney-General of B. C.* v. *Attorney-General of Canada* only decided that prerogative rights of the crown as represented by the Provincial Government, did not pass by the statutory grant. The defendants were wrongdoers, and possession was sufficient as against them—*Booth* v. *Ratte*, 15 App. Cas. 188. The only exception to the statutory grant is contained in sec. 2 of the Act 43 Vic. B. C., cap. 11, "This Act shall not affect * * the rights of the public with respect to common or public highways," etc. *Expressio unius exclusio alterius.* Argument.

The Dominion Government, as administrator of the lands in the railway belt, can grant privileges of cutting timber, and nothing in the Act prevents it granting the use of the water. The power of dealing with the lands, and incidents thereto, in any manner in order to raise a revenue, was vested in the Dominion by the Act, and therefore it was competent for it to have granted the use of the water, which was by implication conveyed to the plaintiffs, as riparian proprietors, under the lease—*Chasemore* v. *Richards*, 7 H. L. Cas., 349; *Stockport Railway Co.* v. *Patton*, 3 H. L. Cas. 300; *Goddard on Easements*, p. 84; *Orr Ewing* v. *Colquhoun*, 2 App. Cas., 839.

DRAKE, J.:—

The defendants move to dissolve the injunction granted by me on 16th June last, restraining the defendants, who are mining on Quartz Creek, from so fouling the stream as to inflict a serious injury on the plaintiffs, by allowing their tailings to run into plaintiffs' flume and so stop the saw-mill owned and occupied by them. Judgment.

The plaintiffs have been in occupation of their mill for the last four years. The mill is erected on timber limits granted to them by the Dominion Government under an annual license.

The plaintiffs therefore are in possession as tenants of the Dominion, and the use of water for their mill is an easement necessary for the full enjoyment of their property.

The defendants, on 16th September, 1890, recorded a discovery claim some two miles above the mill on Quartz Creek, and on 5th

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December, 1890, recorded 280 inches of water in Graham and Youill Creeks, to be utilized in working their dam. These creeks naturally flowed into Quartz Creek below the mining claim. This year the defendants commenced work, and the effect was to fill up with their tailings a small dam constructed by the plaintiffs for the purpose of obtaining a sufficient head of water to work their mill, and also partially filled a box flume which led the water from the dam to the mill; the result was to stop the mill and the plaintiffs suffered serious loss and inconvenience.

If the matter rested here it is admitted that the plaintiffs would be entitled to the protection of the Court, for water is public property, and no one unless by grant or prescription is entitled to deprive another of the beneficial use of the water which would naturally descend to him—*Chasemore* v. *Richards*, 7 H. of L. 349.

The defendants' contention is that they have, as miners, a statutory right to use water for mining, and this statutory right is equivalent to a grant, and if, in the use of water by them another is injured, it is *damnum absque injuria*.

Judgment.

I do not think it necesary for the decision of this case to discuss at length the respective rights of the Dominion and the Province in regard to the precious metals and the right to work them. The precious metals have been authoritatively decided to belong to the Province, and the effect of the decision of the Privy Council in the *Attorney-General of the Province of British Columbia* v. *The Attorney-General of Canada*, 14 App. Cas., as I understand it, is practically to allow the working of gold and silver mines in the lands of the railway belt; but whether this working is to be carried on under the Provincial regulations as regards water rights and privileges, or under Dominion regulations, may be a matter of interest, but, is not, I think, necessary to be now decided, because neither the Provincial regulations nor the Dominion Statutes in any way sanction the user of water to the detriment of other riparian proprietors. Sec. 64 of the *Placer Mining Act, 1891*, expressly protects the rights of persons lawfully using water for any purpose whatsoever, and there are no Dominion regulations affecting gold and silver mining in British Columbia. Can, then, any statutory authority which does not in express terms give the right here contended for, be considered as impliedly sanctioning the injury which admittedly has been caused to the plaintiffs by the defendants' mining operations.

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The plaintiffs are, in my opinion, lawfully using the water in Quartz Creek for their mill, but it is contended that the Dominion Government are not freeholders of the lands in the railway belt under the decision of the *Attorney-General of B. C.* and the *Attorney-General of Canada*, supra; therefore they have no riparian or other water rights in the waters and streams flowing through these lands, and can give no rights in these streams. The Dominion Government are lawfully in possession of the lands in the railway belt, practically as trustees for future settlers, and can administer these lands as they think most advisable. In issuing timber licenses to the plaintiffs they are acting within their power, and all licensees, while in occupation, have the right to the use of the water flowing through their limits in its ordinary and natural condition. In *Booth & Ratte*, 15 App. Cas. 188, it was held that if the plaintiff occupied the lands by permission of the owner he had a sufficient title to enable him to maintain an action for injury caused by the fouling of the stream by the defendant.

Judgment.

I see nothing in any Act or regulation which authorizes the defendants to commit the nuisance complained of. If the defendants desire to continue their mining operations, they must take steps to prevent the tailings coming from their workings being an injury to the plaintiffs. I therefore refuse the defendants' motion to dissolve, with costs.

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McKENZIE AND McGOWAN v. BELL-IRVING *et al.*

McKENZIE AND McGOWAN
(ASSIGNEES FOR THE BENEFIT OF THE CREDITORS OF H. T. READ & CO.)
v.
BELL-IRVING, PATERSON & CO. AND ALEXANDER McEWEN.

Insolvency—Fraudulent conveyance—Assignee for benefit of creditors—Right of to impeach prior fraudulent conveyance of his assignor—Pleading—Misjoinder.

Apart from statutory provision, an assignee for the benefit of creditors is in no better position than his assignor, to impeach previous conveyances by the assignor, and cannot be treated as occupying the place of the creditors for that purpose.

Misjoinder by a plaintiff of unconnected causes of action against different defendants is not objectionable on demurrer by any of the separate defendants, but is proper subject of motion to strike out as embarrassing, &c.

Statement.

THE plaintiffs, who sued on behalf of themselves and all other creditors, in their statement of claim alleged that they were the assignees of the whole of the real and personal estate of H. T. Read & Co. for the benefit of their creditors under a certain indenture of

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assignment from them for the benefit of such creditors, *pro rata*. That two several chattel mortgages, previously made by H. T. Read & Co. to the defendants respectively, were made with intent to defeat, etc., his creditors, other than defendants, and to prefer said defendants, and prayed that they be set aside as void against said creditors.

The defendants demurred on the ground that no right in the plaintiffs (the assignees) to the relief sought was shown, as they were in no better position than the assignor himself to impeach his chattel mortgages in question; and also on the ground that the joinder in the same action of the claim against the defendants to set aside an entirely separate transaction, with which defendants where wholly unconnected, was a misjoinder.

Argument.

Clinton, for the demurrer: The assignees did not acquire by the conveyance to them any further rights or better position than the assignor had himself at the time it was made. The assignees are, under it, the representatives of the assignor for the voluntary distribution of the estate among his creditors to the extent to which it professes to convey it. They are not the representatives of the creditors to take proceedings against their assignor. Under most insolvent acts the assignees provided for are made the representatives of the creditors for all purposes. There is no such provision in 53 Vic. B. C., 1890, cap 12, under which the assignment was made. As the assignor had no right to impeach his own previous deeds, his assignees have none—*Robinson* v. *McDonald*, 2 B. & Ald., 134; *Burland* v. *Moffatt*, 11 S. C. R., 76; *Clarkson* v. *Ontario Bank*, 15 Ont. App. Rep., p. 166. There is also a joinder of two causes of action, unconnected, except so far as they both arise out of the same transaction, against different defendants, and the action should be dismissed on that ground—*Burstall* v. *Byfus*, 26 Ch. D. 35.

D. M. Eberts, Q. C., for plaintiffs: The assignment being of all the property of the assignor, without stating of what it consisted, to the plaintiffs, as trustees, for the benefit of all the creditors, *pro rata*, gave to the plaintiffs, as such assignees, the right to enquire what property was properly available under that disposition, and, for that purpose, not to impeach the grant of the assignor contained in the mortgages, but while maintaining it as against him, to claim that the grant enured for the benefit of all the creditors, on the ground that it constituted a preference, and that the property conveyed should be brought into distribution as if it passed under the assignment. The alleged misjoinder, if objectionable, is not so on demurrer—*Roberts* v. *Roberts*, 12 Jur. 148; *Anderson* v. *Maltby*, 2 Ves. 254; *Ex parte*

Chaplin, In re Sinclair, 26 Ch. D. 319; *Porteous* v. *Reynar*, 13 L. R. App. Cases, 120.

DRAKE, J:—

I think this demurrer must be allowed. The plaintiffs, who are the assignees of Thos. H. Read & Co., and appointed by them, claim to set aside two certain bills of sale which Read & Co. executed in favour of the defendants separately. This is not a creditors' action, as certain creditors who had originally been plaintiffs jointly with the present plaintiffs have discontinued.

Read & Co. were at liberty to assign all or any portion of their estate to trustees for any purpose they pleased, and the only persons who could attack that assignment, or any other assignment of theirs affecting their property, are their unpaid creditors.

In the present case they assigned to the plaintiffs the whole of their real and personal estate, that is all the property they then possessed. The property they had already parted with they no longer possessed and could not assign.

Read & Co., in the absence of fraud, could not set aside the deeds to the defendants, and their trustees are in no better position than themselves. Judgment.

But the plaintiffs contend that in cases where there has been an assignment to trustees for the benefit of creditors, the assignees have all the rights which the creditors could claim of setting aside voluntary deeds on the ground that they are void under cap. 51, Con. Stats. 1888. But the authorities cited for this proposition are distinctly limited to assignees governed by the English Bankruptcy Statutes. Power is given to such assignees to represent the creditors for all purposes. Here there is no statutory authority giving trustees, for the benefit of creditors, any greater powers than those conferred by the grantor. The Provincial Statute before referred to appears to me to give the creditors of the assignor the right to attack any bills of sale by which any particular creditor or creditors are preferred to the general body, and to no one else.

The first objection raised by Mr. Clinton, that this was an action against two separate defendants for two separate causes of action, in which no privity as between them was shown, is an objection which can always be taken by summons to amend the pleadings as embarrassing, but is not a ground of demurrer.

If the demurrer had been disallowed, I should have ordered an amendment of the pleadings in the line indicated, but as I am of opinion that the present plaintiffs cannot by any amendment succeed in their action, I allow the demurrer with costs, without leave to amend.

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Re
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Re J. H. TURNER.

Land Registry Act, 1888—Cancellation of ordinary certificate of title under sec. 17, upon issue of certificate of indefeasible title under sec. 63—Authority of Registrar to cancel ordinary certificate.

The Registrar-General has power, under sec. 61 of the *Land Registry Act, B.C., 1888*, to cancel an ordinary certificate of title issued under sec. 17 of the Act, upon the issue to the registered owner of a certificate of indefeasible title, under sec. 63 of the Act.

Statement. THE facts appear from the judgment delivered 7th December, 1892.

DRAKE, J:—

Judgment. Mr. Aikman applies for an order calling upon the Registrar-General of Titles to issue an indefeasible title to lots 3, 4, 5, and 6, Block "H," Harbour Estate, and lot 6, Block "K," same estate, in the name of the registered owner.

The Registrar does not object to do so, but refuses to cancel the ordinary certificates of title which are now existing in respect of the said lots, alleging that there is no authority in the Act authorizing him to do so.

Section 61 of the *Land Registry Act* enacts that in case of a transfer of registered real estate, the Registrar is empowered to register the new owner and cancel the former certificates, and the reason is obvious there should not be two certificates of title existing at the same time to the same piece of property. But the Registrar contends that this section does not apply to the present case because there is no transfer, only the substitution of an indefeasible certificate of title for an ordinary certificate.

Under section 65, if the necessary preliminaries have been complied with, the Registrar shall issue a certificate of indefeasible title.

If he does so without cancelling the ordinary certificate, there will exist two certificates in respect of the same property of different values, and these could be made use of by a dishonest owner to the prejudice of a purchaser ignorant of the scope of our Land Registry Laws.

Section 66 defines what a certificate of indefeasible title is. It is conclusive evidence that the person named therein is the absolute

owner of the property described against the whole world (except the Crown), and such owner shall hold the same subject only to such incumbrances, liens, estates, charges or interests as appear on the register.

An ordinary certificate implies that the owner is *prima facie* owner of the land described therein for such estate of freehold as he legally possesses therein subject to registered charges.

The difference between the two classes of certificates is very marked. The one cures defects in registration and bars all other estates in the land not registered. The other is only a record of a legal *prima facie* title.

The two certificates cannot exist together.

Judgment.

A person purchasing land held under an indefeasible title is entitled under section 61 to be registered as the owner of the same estate as his grantor possessed, and thereupon a new certificate should be granted to him and the old one cancelled.

If in such a case all the old certificates are to be cancelled, why should not the old certificates be cancelled on obtaining an indefeasible title?

The object and intention of the Act can only be carried out by clearing the register of all prior certificates which are merged in the indefeasible title and enabling the owner to deal with the property as if the indefeasible certificate was his sole root of title.

I therefore order that on the granting of a certificate of indefeasible title to lots above mentioned that the Registrar-General do cancel all existing certificates of title effecting the same property.

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July 15.

KERR & BEGG v. COTTON.

KERR & BEGG v. COTTON.

Contract—Uncertainty—Agreement to print a book by specifications "equal to sample" to be produced—No sample produced—Effect of—Power of Divisional Court to enter final judgment.

Where a contract provides for the manufacture according to specifications of an article "equal in every respect to a sample to be produced," and no sample is produced and agreed upon, the contract is void for uncertainty, and no action can be brought for breach of it by either party.

The Divisional Court, on a motion for new trial, has power to enter a final judgment for defendant where there is no evidence to sustain the verdict.

Statement.

MOTION for a new trial for misdirection and that verdict was against the weight of evidence, and that the damages were excessive.

The action was for damages for breach by the defendant of a contract in writing, whereby the defendant agreed with the plaintiffs "to print for them 400 volumes of a work called 'A Biographical Dictionary of Well Known British Columbians,' of 500 pages each, on 80 lb No. 2 book paper, uncalendered, and to bind the same in full Russia or Morocco leather, gilt edges, and equal in every respect to a sample volume submitted and approved by the plaintiffs, not later than 13th July, 1890," charging that the defendants did not deliver in time, did not print and bind as agreed, nor equal to sample, but printed and bound in a negligent and unworkmanlike manner.

The defendant counter-claimed against the plaintiffs for damages, as set forth in the judgment of Sir M. B. BEGBIE, C. J.

The evidence at the trial did not show that a sample volume had been submitted and approved by the plaintiffs as provided, but that two books of materially differing styles of binding and make-up had been produced, and that it was agreed that the volume to be produced was to be a compromise between them.

The jury found a verdict for the plaintiffs on both the claim and counter-claim.

Argument.

C. Wilson, for defendant, supported the motion.

E. V. Bodwell and *A. E. McPhillips*, for plaintiffs, *contra*.

BEGBIE, C. J.: Ought not the Judge at the trial to have withdrawn the case, both on the claim and on the counter-claim, from the jury on

the ground that the sample copy, which was to be the basis of the contract, was never produced or agreed upon, or the parties ever *ad idem* as to the character of the work to be done, and ought not judgment to be now entered against the plaintiffs on the claim, and against the defendant on the counter-claim, if the Court has upon this motion power to enter final judgment?

E. V. Bodwell and *A. E. McPhillips*—No; the reference in the written agreement to the "sample volume" therein provided to be "submitted," to which the book to be made was "to be equal in every respect," was not a controlling term of the contract, which was, outside of that reference, certain to every intendment, as to all requirements, viz., number of pages, weight, style, and quality of paper, kind of binding, and edging, and title of book, etc. The size being deducible from the number of pages in relation to the weight of the paper. The legal effect of the contract was that the book was to made strictly by the specifications, in a workmanlike manner, in such luxury of style as a proper treatment, for the purpose intended, of the materials indicated, would demand. The meaning of the agreement was not that the "sample" was to control the particulars of the contract in any way, but was merely "to enable the purchaser to form a reasonable judgment of the commodity"—*Gardiner & Gray*, 4 Camp, 144: or, at most, was intended to furnish a criterion of general style, *i. e.*, the book contracted for was to be "equal to" the sample to be produced, which intention was as well carried out by the parties by reference to two books, different to that specified in detail, and to each other, as to one book, also necessarily differing in some respects from the controlling particulars in the specifications.

Argument.

On the question of power of Court, sitting as a Divisional Court, to finally dispose of the case, the provisions of sec. 60 of the *Supreme Court Act, 1888*, "The Divisional Court * * shall * * concurrently with the Full Court, have all the powers and authorities held and exercised by the Full Court in interlocutory matters, including the granting of new trials, and its judgment shall be deemed a judgment of the Full Court," does not give to the Divisional Court all the powers conferred on the Full Court by Order 58, Rule 405, for the powers conferred on the Divisional Court are only the powers "held and exercised by the Full Court in interlocutory matters," it does not, therefore, confer, but *ex vi termini* excludes, from the Divisional Court, the power to make a final order putting an end to the action.

C. Wilson, for the defendant, in reply.

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SIR MATTHEW B. BEGBIE, C. J.:

In this case the defendant is applying to have judgment entered up for him, or for a new trial, the jury having found a verdict for the plaintiffs for $3,000, for an alleged breach of a contract whereby the defendant had agreed to deliver 400 volumes printed in a certain type, and on a specific style of paper, "and to bind the same in full Russia or Morocco leather, gilt edges, and equal in every respect to a sample volume submitted (*i. e.*, to be submitted) and approved by the plaintiffs, not later than 13th July, 1890." No such sample has ever been produced or submitted at all, or in fact ever existed either on the 13th July or at the trial, or up to the present time. The defendant, nevertheless, printed and bound a number of volumes, which he tendered as being in accordance with the contract. These volumes were rejected by the plaintiffs on the ground that they were not bound as the contract stipulated. The whole claim and counter-claim, action and cross-action, turn on this point. The plaintiffs claim damages for the non-fulfilment of the contract; the defendant claims damages for the improper rejection of his work. Although, as stated, no sample was ever prepared or approved, it is alleged that at an interview between plaintiffs and defendant, subsequent to the contract and before action, it was verbally agreed that the volumes contracted for were to be delivered bound and got up in a style which should be a "compromise" between two volumes then produced and afterwards shown to the jury at the trial (Exhibits F. & G.). Now, the two volumes are nearly as different as any two volumes of the same size and shape can well be, the one being in "split cowhide," the other in "full Russia." What can be the meaning of a compromise between cowhide and Russia leather? Assuming that this verbal agreement were added to the written agreement (for which *Chambers* v. *Kelly*, 7 Ir. R. C. L., 231 (1873), was cited, and is I think a much weaker case), this proposed "compromise" leaves matters nearly as indefinite as they were before. I thought at first that the plaintiffs might complain that the defendant had broken the contract in other respects, but they do not complain of any other breach than this, viz., that the copies delivered were not equal to the approved sample. It seems to have escaped everybody's attention at the trial that there never has been a sample in existence at all, and that it is quite impossible for any jury or any tribunal whatever to decide whether the agreement has or has not been complied with, for it is abundantly clear that the plaintiffs and defendant never had any model to work up to, so that, in fact, there never was an

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agreement at all. This, not only that the one party has not agreed to that which the other has proposed, as there never has been put forward any proposition to agree to. In all this my brothers Crease and Drake quite agree. It follows that the plaintiffs asking damages for breach of an agreement must fail, and so the Judge at the trial would doubtless have directed, if his attention had been drawn to the defect. But the defendants, by their counter-claim, ask damages, viz, payment for the volumes which they tendered and which they say were finished in accordance with this so-called contract. Evidently they are under the same impossibility of proceeding. They cannot prove that they have bound these volumes according to the sample. The verdict cannot stand, and the only question is, what is to become of the action? It seems quite absurd for us to send it down to be tried again, when the only ground for setting aside the first trial is that there is not and never has been anything to try. The only reasonable course for us is to follow the case of *Adams* v. *Coleridge*, 1 The Times L. R., p. 84. That was an action for libel, in which the defendant pleaded privilege. The jury found for the plaintiff with, I think, £3,000 damages. On applying for a new trial, or to have judgment entered for the defendant, on the ground that the trial Judge should have withdrawn the case from the jury, the Divisional Court held that it was undoubtedly a privileged occasion and that no actual malice had been proved, and that the case should have been withdrawn from the jury; they therefore did not send the action again to be tried, but at once directed judgment to be entered up for the defendant.

Judgment.

DRAKE, J.:—

I agree that on the facts there was no concluded contract sufficient to enable the plaintiff to recover damages for the alleged breach. As the order which we propose to make is apparently one which has not been made before by a Divisional Court, I think it is as well to examine the authorities to ascertain what are the powers of a Divisional Court on applications for a new trial. Applications for new trials are governed by Order XXXIX. and Rule 298. Under the latter rule, upon a motion for judgment or new trial, the Court may, if satisfied that it has before it all the material necessary for finally determining the questions in dispute, give judgment accordingly. The Court here is the Divisional, or Full Court, before which the motion is made. Under Order XXXIX., the Full Court is named as the Court before which applications for new trials are to be heard, but by sec. 60 of the *Supreme Court Act* all the powers given to the Full Court on

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applications for new trials is vested in the Divisional Court, therefore Rule 298 applies to the latter Court, and in *Watkins* v. *Rymill*, 10 Q. B D., 178, and *Daun* v. *Simmins*, 40 L T. N. S., 556, affirmed by the Court of Appeal in 41 L. T. N. S., 783, the Court held on the facts that judgment ought to be entered for the defendant without a new trial, for there was no evidence upon which the jury could properly find for the plaintiff—See also *Hamilton* v. *Johnson*, ibid, p. 461. I therefore concur in the judgment of the Chief Justice.

CREASE, J., also concurred.

Order that the verdict and judgment below be set aside, and judgment entered for the defendant on the claim, and for the plaintiffs on the counter-claim, costs to follow the event in each case.

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POST v. JONES

IN THE COUNTY COURT OF VICTORIA.

POST *v.* JONES.

County Court—Jurisdiction to make personal order over $1,000 in mechanic's lien suit.

Claim for personal order to pay amount over $1,000 entertained in the County Court as auxiliary to relief by way of enforcement of a mechanic's lien.

Statement.

PLAINTIFF claimed against the defendants jointly $1,044, for work done and materials supplied in building two frame dwelling houses for them. At the time of the contract the land was the property of the defendants jointly, but before any proceedings were taken it was conveyed to the defendant Agnew. The plaintiff also claimed, in the action, the enforcement of a mechanic's lien for $1,044 against the owner, the defendant Agnew.

Argument.

Fell, for the defendants, objected that the Court had no jurisdiction to entertain the action *in personam* for $1,044, as it was $44 in excess of the jurisdiction of the Court in a personal action.

Prior, for the plaintiff, submitted that as the personal liability of defendants was joint and several, and as, in effect, a personal order against Agnew, was a necessary incident of a judgment against him enforcing the lien against his land for the $1,044, it would be highly inconvenient to compel plaintiff to sue Jones separately in the Supreme

Court in order to get a personal judgment against him on the same matter. Indeed, a separate judgment could not be got against him on the joint liability without abandoning the personal claim against Agnew, nor could a personal order *eo nomine* be taken against Agnew in this Court without abandoning the claim against Jones.

SIR M. B. BEGBIE, C. J.:—

The difficulty of the position is apparent, and I will assume that the County Court has jurisdiction to hear the case and make the order, subject to the observation that the opinion of the Supreme Court on appeal may very properly be taken on the question.

Judgment.

FOLEY *v.* WEBSTER.

Security for judgment debt and costs on appeal to Supreme Court Canada—Whether giving same to satisfaction of a Judge supersedes registration against lands of a certificate of the judgment—Whether such certificate and registration is a proceeding by way of execution—O'Donohoe v. Robinson, 10 Ont. App. 622, distinguished—Practice—Second application—Res Judicata—Jurisdiction of Provincial Courts to make order in action after appeal brought to Supreme Court Canada.

Held, per McCREIGHT, J., on original motion, and per DRAKE, J., on appeal:—

This Court cannot make an order in the action controlling proceedings under its judgment after perfecting of appeal to Supreme Court Canada.

Held, per WALKEM, J., on second application to him, and per BEGBIE, C. J., and DRAKE, J., on appeal:—

Registration against lands of a certificate of the judgment appealed from is not a proceeding by way of execution thereof, and is not superseded by appellant giving security for the whole judgment debt and costs under R. S. C. cap. 135, sec. 47 (*e*).

Apld Hughes v Sharp 6 7 NWR 130 (BCCA)

O'Donohoe v. *Robinson*, 10 Ont. App. Rep. 622, distinguished.

Apld Roadburg v Cedar-hurst Ltd 8 BCLR 171 (BCSC)

Remarks of WALKEM, J., on *res judicata* and second application.

SUMMONS to vacate certificate of judgment and registration thereof against defendants' lands, pending defendants' appeal from said judgment to the Supreme Court of Canada, the application being based on the ground that the defendants had given security to the satisfaction of a Judge for the full amount of the judgment debt and costs, as well as for the costs of the appeal, pursuant to sec. 47 (*e*), *Supreme Court Canada Act*.

Statement.

Apld Roadburg v R 21 BCLR 144 (BCCA)

McCREIGHT, J.
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Statement.

The plaintiff had obtained a verdict and judgment thereon for $5,000 and costs, which was, upon appeal, sustained by the judgment of the Full Court. From this judgment the defendants appealed to the Supreme Court of Canada. The defendants, on the 20th May, 1892, obtained an order from Mr. Justice WALKEM under the *Supreme Court Canada Act*, sec. 47 (*e*), allowing a bond for $6,500 as security to his satisfaction for the whole amount of the judgment debt and costs and the costs of the appeal, with the object of staying all proceedings under the judgment, pending the appeal. In the meantime the plaintiff had issued a certificate of his judgment from the office of the Registrar of the Court, and had registered the same against the lands of the defendants, which they were now mortgaging for $50,000. The defendants, in attempting to make title to certain of the lands, discovered the registration of the certificate of judgment, and obtained a summons, returnable before Mr. Justice MCCREIGHT at Westminster, to show cause "why the registration of the certificate of judgment should not be set aside," on the ground that the bond allowed operated as a *supersedeas* of all other methods of securing or enforcing the judgment.

L. G. McPhillips, for plaintiff, showed cause to the summons.

E. A. Jeans, contra.

MCCREIGHT, J., made an order dismissing the summons upon the ground that this Court had no jurisdiction to make any order in the action after the allowance of the appeal to the Supreme Court of Canada.

Statement.

The eight days for appealing from this order having elapsed, the defendants obtained a fresh summons, returnable before Mr. Justice WALKEM at Victoria, "(*a*) to set aside and supersede the certificate of the judgment issued out of this court, and all proceedings thereunder: (*b*) and that, or that the registration of the said certificate against defendant's lands should be discharged and vacated: (*c*) or that the order of 20th May, allowing the security, be amended by declaring all proceedings which had been taken under the judgment superseded, and all future proceedings stayed, by the allowance of the said security; or for leave to appeal to the Divisional Court from the order of MCCREIGHT, J., notwithstanding the lapse of the eight days."

Argument.

A. E. McPhillips, for the plaintiff, showed cause to the summons.

The matter is *res judicata* by the order of McCREIGHT, J., and this is an attempt to reopen it. A Judge of this Court has no jurisdiction to make any order in the action after the allowance of the appeal to the Supreme Court of Canada, whereupon the action is transferred out of this and into that Court—*Lakin* v. *Nuttall*, 3 S. C. R. 685. The eight-day limit for appealing from an order is absolute, unless extended by the Court or a Judge, and such extension must be by order made within the eight days—*Runtz* v. *Sheffield*, 4 Ex. Div. 150; *Stirling* v. *Du Barry*, 5 Q. B. D. 65.

Robert Cassidy, contra: The form of the motion to McCREIGHT, J., was misconceived. As long as the certificate of judgment stood its registration against the lands could only be removed by a separate action. The registration of the certificate was not, but its issue was, a proceeding in this action. This motion is analogous to a motion to set aside a writ of *fi. fa.* against lands and all proceedings thereunder, *e.g.*, by consequence, to withdraw the writ from the hands of the Sheriff, where it binds the lands and forms a cloud on their title, as the registration of the certificate, which is only another means of effectuating the same purpose, does here. If the order setting aside the certificate is made it can be served on the Land Registrar as an order setting aside a *fi. fa.* would be served on the Sheriff, and would operate in the same way—C. S. B. C. 1888, cap. 67, sec. 70. The effect of the allowance of the bond for the whole debt and costs by WALKEM, J., as being to his satisfaction, was to declare the bond the sole and sufficient resource and security of the plaintiff for the recovery of his judgment if sustained on appeal, and it operated, not merely as a stay, but as a *supersedeas* of all other proceedings to secure or execute the judgment—*O'Donohoe* v. *Robinson*, 10 Ont. App. Rep. 622. A party will not be permitted wilfully and without just cause to tie up the lands of another under colour of securing a judgment for which he has taken other security declared to be sufficient. Argument.

This motion is not *res judicata* by the order of McCREIGHT, J., who repudiated his jurisdiction and declined to adjudicate upon the question. We admit that after the allowance of an appeal to the Supreme Court of Canada the Court below can make no order affecting the contest between the parties involved in the action. The litigation is absolutely transferred to the Higher Court, but the judgment, though reopened for the purposes of the Appellate Court, stands in the Lower Court, and any misuse of it or improper proceeding under it

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by use of the process of the Lower Court and the machinery given to enforce its judgments, all of which are in its control, is a matter in the hands of the Lower Court, notwithstanding the appeal, and it is submitted that this Court only has jurisdiction in this matter.

Defendants, if necessary, ought now to be permitted to appeal from the order of McCREIGHT, J., to the Divisional Court.

Re Manchester Economic Co., 24 Ch. D. Brett M. R., at p. 496; *Sievewright* v. *Leys*, 9 Ont. P. R. 200, *Re Gabourie*, 12 Ont. P. R. 252; *Langdon* v. *Robertson*, ibid, 139.

WALKEM, J.:—

Judgment.

In this case the plaintiff recovered a judgment on the 29th of October, 1891, against the defendants for $5,339. From that judgment they appealed unsuccessfully to the Full Court in March last. They, thereupon, gave notice of appeal to the Supreme Court of Canada; and on the 20th of May last I made the necessary order approving of the appeal bond, which was a bond of the defendant and one Jacques for $6,500. At my suggestion, the terms of the order were arranged beforehand between the solicitors in the action, and when it was submitted to me I signed it, first taking the precaution of having the words "and by consent" inserted in it. The defendants have now applied for an order directing (*a*) that the certificate of the judgment taken out on plaintiff's behalf should be set aside and superseded; (*b*) and that, or that, in the alternative, the registration of the certificate against the defendants' lands should be discharged and vacated, or, (*c*) in substance, that I should vary my order of the 20th of May by an amending declaration to the effect that the issue, and subsequent registration, of the certificate should be deemed void. On the 16th of August last, the defendants made an application to my brother McCREIGHT to have the registration cancelled, but he refused it. The latter or alternative part of the application now made is virtually a repetition of the same application; hence, as *res judicata*, I have no power to entertain it. The fact that the defendants now apply to have the certificate superseded does not, in my opinion, remove this objection, for in so doing they are merely attempting to get, in a circuitous way, what my brother McCREIGHT has refused, namely, the cancellation of the registered charge.

A certificate is in itself a perfectly harmless document, for a party entitled to it may, undeniably, take it out, and yet make no use of it. In such an event, there could be nothing to complain of: hence no

redress could be sought, as there would be no mischief to remedy; and Courts of Justice, need I add, do not make orders in such cases, as they would be fruitless. In the present case, therefore, it is not the issue of the certificate that can be complained of, but it is the use that has been made of that certificate—its registration, for instance—that is in reality complained of. The avowed object of getting the certificate set aside is to have its registration cancelled. I repeat, therefore, that what I am virtually asked to do, under a different form of application, is to grant what my brother McCREIGHT has refused.

On behalf of the defendants, it was suggested that it might be said that my brother McCREIGHT'S refusal was correct, as a change in the registry could only be effected by a suit successfully brought for the purpose; and it was further contended that as the certificate was taken out in the present, and therefore in a pending action, an order superseding it might be made. In the first place, the charge cannot be removed except by an action; and, in the next place, a mistaken view is taken of the certificate of judgment, for such a certificate is not a document issued in an action. It forms no part of its proceedings under our procedure Acts, but is an extraneous and independent proceeding authorized by the *Land Registry Act*. The form of the certificate should be headed "In the matter of the *Land Registry Act, 1888*," or should contain a statement that it was "issued in pursuance of the *Land Registry Act*," etc. In any event, it is not a proceeding in an action, and the present form, which I find is intituled "In the Supreme Court," etc., and, in the cause, is therefore wrong and misleading. The land registry system and the judicature system and practice are distinctive systems, with different objects; the former, like the mechanic's lien law, being designed by the Legislature for the purpose of giving the creditor a security which he would not otherwise possess. In *Darling* v. *Weller*, 22 U. C. Q. B. 363, somewhat similar views were expressed. An action, moreover, merely to set aside the certificate would, in all probability, fail, for the reasons I have already given; and assuredly the same object could not be attained by an application such as the present one, which is improperly made in this action, as the issue of the certificate is not a proceeding in it. The order of the 20th May last might have been made on terms that the registration of the judgment should be cancelled, but I was not asked to impose such a condition. The respective solicitors framed the terms of the order and consented to it, and I cannot now change those terms in opposition to

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the wishes of one of the consenting parties. There is no evidence before me that the defendants' solicitor was not aware that the judgment had been registered when the order was agreed to; and even if there were, I should decline to interfere, as he must be taken to have known that it is the common practice to register a judgment against lands, where there are any, the moment it is entered up.

In one of the affidavits the defendants are said to be "wealthy"; but what is the meaning of "wealthy," in view of the further statement in the same affidavit that they are desirous of borrowing $50,000 on the security of their lands, but are disabled from doing so in consequence of the plaintiff's charge on them of $5,339. There is no evidence before me as to the value of those lands, and I can only act upon evidence and not upon conjecture. As the plaintiff's solicitor very fairly observed, the defendants' personal bond might, and possibly would, have been refused on the 20th May if there had been any intimation or prospect of their mortgaging their lands to the extent of $50,000. The fact, moreover, that the plaintiff's judgment had been registered, doubtless influenced his solicitor in accepting the bond. His contention that the relative positions of the parties to the action, as they existed when the bond was accepted, should not be changed to his client's detriment, as I am bound to believe would be the case, as there is no evidence to the contrary, and a Judge can, as to matters of fact, only act upon evidence. An Ontario case, *O'Donohoe* v. *Robinson*, 10 Ont A. R. 622, was cited as showing that a judgment creditor would not be permitted to keep a writ of *fi. fa.* against lands actively alive in case of an appeal, after the appeal bond securing his debt and costs had been given. Now, without questioning the soundness of such a decision, it is observable that there is a wide distinction between the effect of such a writ and a registered charge. Under the writ the lands of the debtor would not only be bound, but might eventually be sold; but with respect to a registered charge, a suit for foreclosure would be necessary to realize it. In the present case, for instance, the plaintiff would, in the event of success in his appeal and the appeal bond proving worthless, have to seriously consider the question of foreclosing, for he could not do so without offering to redeem the $50,000 mortgage (with interest) if registered, when it became due. Being a labourer, admittedly without means, the collection of his judgment debt would thus be indefinitely postponed. A registered charge against lands is sometimes valueless, by reason of prior incumbrances, defective title, or the lands themselves having no

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commensurate value. Again, the principle of *O'Donohoe* v. *Robinson* does not exactly apply to the present application. In that case a stay of execution, and even the superseding of the writ, was, under the Ontario practice, the necessary consequence of the appeal bond being perfected. The registration of a charge against lands under our system is in no sense execution, hence there could be no stay. It was contended that, as the plaintiff had his charge on the defendants' lands and also his appeal bond, he had a double security, and that, therefore, the principle alluded to applied; but it appears to me that the answer to this is that the Legislature has seen fit to give him, in addition to his right to resort to execution, the right to the charge now complained of, whatever it might be worth. If the latter, for instance, were worthless, there would be no double security. But, admitting that the charge is good for its purpose, I think that the defendant's application must fail on the two grounds I have stated, viz., as the matter is *res judicata*, and as the order of the 20th May was a consent order which ought not now to be changed in opposition to the wishes of one of the consenting parties, especially in view of the fact that the defendants must diminish the value of their personal bond by the proposed heavy mortgage on their property.

If a deposit in Court of the amount of the appeal bond can be legally made without interfering in any way with the proceedings in appeal as transmitted to Ottawa, I would suggest that that course should be adopted, but I give no opinion as to whether this can be done or not, as no offer of a deposit has been made.

Judgment.

I have also been asked to extend the time for appealing from Mr. Justice McCREIGHT'S order, on the ground that the defendants' solicitor was engaged in consulting counsel in Victoria with respect to the order, and thereby allowed the eight days given to him for appeal purposes to elapse. The Legislature having considered that the eight days were sufficient to enable parties to conclude whether an appeal was advisable or not, I am not at liberty to say that that time was too short for such a purpose. Indeed, I am of a contrary opinion. Besides, such an application should have been made promptly, and it cannot be favourably considered after seventeen days have been allowed to pass since the order was made. The order is dated the 16th of August; the time for appeal expired on the 24th; and from that time till the present (September 2nd) no extension has been applied for. The question of appealing was one involving no abstruse points. The present summons must be dismissed with costs.

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The defendants appealed to the Divisional Court, and the appeal was heard before Sir M. B. BEGBIE, C. J., and DRAKE, J., on September 23, 1892.

The defendants, under Order LVIII., Rule 7, filed fresh affidavits that they were unaware of the registration of the certificate of judgment when the bond was allowed, and that since Mr. Justice WALKEM'S order they had offered the plaintiffs' solicitors to pay into Court $6,500 in cash as security additional to the bond, for the whole judgment, debt and costs, and costs of appeal, if the plaintiff would consent to vacate the registration of the judgment against defendants' lands, which was refused.

That the effect of the registration was to hamper them in dealing with their lands, as it had to be indemnified against in every transaction. Defendants also, under Order LVIII., Rule 7, asked that the Divisional Court should make such order as ought to have been or ought to be made in the premises.

Robert Cassidy for the appeal.

Whether Mr. Justice WALKEM was concluded by the order of McCREIGHT, J., or not, this Court can now make the order which ought to have been or ought now to be made. Mr. Justice WALKEM was not concluded by the order of McCREIGHT, J. The motions were different both in form and substance. Mr. Justice McCREIGHT having held that he had no jurisdiction, did not apply his mind to or decide the matter of the motion to him, and it was not *res judicata* by his order—*Connecticut, etc.* v. *Moore*, 6 App. Cas., at p. 655. The Judge allowed the bond as being to his satisfaction, and it derived its efficacy entirely from his order. It did not rest in any way on the consent of the parties—see *Macdonald* v. *Abbott*, 3 S. C. R., 278, where, by consent of the parties, the apellant deposited $500 in Court as security for $500 for the costs of appeal, and the Court held the appeal not properly constituted, as the security had not been allowed by a Judge.

Argument.

The certificate of judgment was properly issued in the style of the cause (*Chitty's Forms, 383*), and was a proceeding in and within the control of the Court. The issue of the certificate and its registration being a statutory proceeding to effectuate the judgment, was an "execution" within sec. 47, *Sup. Ct. Can. Act.* It was at all events a procedure in aid of execution and therefore within the meaning of the Act *Dawson* v. *Moffatt*, 11 O. R. 484. *O'Donohoe* v. *Robinson*, 10 Ont. A. R. 622, is not distinguishable. There a *fi. fa.* lands placed in the Sheriff's hands prior to the allowance of the security, and binding

the lands, though no attempt was being made actively to enforce it, was declared to have been superseded by the mere allowance of the security, so that it ceased to be a charge on the lands. The Court has complete control over proceedings taken to enforce its own judgment, at all stages—*Campbell* v. *Royal Can. Bk.*, 19 Grant, 334; *Clutton* v. *Lee*. 7 Ch. Div., 541: *Schofield* v. *Solomon*, 52 L.T. N.S., 679; *De Medina* v. *Grove*, 10 Q. B., 151. Apart from the effect of sec. 47 *S. C. Can. Act*, all proceedings under a judgment should, as a matter of discretion, be set aside as an abuse of the process of the Court, where payment into Court of its full amount has been offered and refused.

Argument.

This Court alone has jurisdiction to deal with the matter; the litigation is re-opened and transferred to the Appellate Court, upon the allowance of the appeal, which takes place upon the allowance of the security for the costs of the appeal, but the judgment stands in, and in the control of, the Lower Court, unstayed, to be executed notwithstanding the appeal, subject to the right of the appellant to stay or supersede all proceedings under it by giving the sufficient security for its amount provided for by sec. 47 (*e*) *supra*, and subject also, apart from that section, to the inherent jurisdiction of the Court to prevent its judgment being wilfully used as an engine of oppression.

A. E. McPhillips, for the plaintiff, *contra*, was not called on.

Judgment.

BEGBIE, C. J.:—

Assuming, as was argued, that Mr. Justice McCREIGHT misconceived the application before him, deeming it to ask for the judgment to be set aside, instead of merely for the removal of the registration, that he dealt therefore on that day with an application which was not before him, and did not deal with that which was before him. Assuming further that Mr. Justice WALKEM, on the 6th September, misconceived what had taken place before Mr. Justice McCREIGHT, conceived himself incapable of reviewing, sitting alone, the order of another Judge, whereas that Judge had in fact made no order on the application; that the real application has therefore never been considered, and is in fact now understood for the first time, that might be a reason for us, sitting as a Court of Appeal, to decline to hear any further and to remit the case to Mr. Justice McCREIGHT to hear and determine. But we have also, I think, power to consider the application and to make now the order which Mr. Justice McCREIGHT ought, in our opinion, to have made on the 16th August, as to the cancellation of the registration of the judgment, and I am of opinion that the Court cannot accede to the motion. The ground of it is, that the registration operates as an

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extreme hardship upon the defendants. That is not always a sufficient ground to cause a Court of Justice to act. The judgment for the $5,000 and costs, as soon as obtained, became, under 1 and 2 Vic., cap. 110, (Imp. Stat.), as much a charge upon the lands of the defendants as if they had agreed in writing to charge all their lands with its payment. That judgment operates, therefore, as an equitable mortgage, whether registered or not: but, like the most formal mortgage, it will be liable to be postponed to any subsequent encumbrance, unless registered. Defendants now wish to raise $50,000 on mortgage, and wish to postpone the charge of the plaintiff to that encumbrance. On 20th May last the defendants entered into a bond as security for the judgment satisfactory to all parties and to Mr. Justice WALKEM. Did that bond supersede the charge created, not by the registration of the certificate of judgment, but by the judgment itself? *O'Donohoe* v. *Robinson*, 10 Ont. App., p. 622, decided that no proceeding could be permitted to press execution pending appeal after security for the debt and costs is allowed, under a section in the Ontario *Court of Appeal Act*, similar to sec. 47 *Sup. Ct. Can. Act*, in question here. That decision is surely correct. If any attempt were made to enforce the lien pending the appeal, the Court would interfere. In my opinion the proceeding by way of registration of certificate of judgment is not a proceeding by way of execution; to my mind it is only execution, *i. e.*, some proceeding for raising the money and satisfying the debt, whether by *fi. fa.* or by action for foreclosure or sale, etc., which is restrained by sec. 47. This is in effect an appeal from Mr. Justice WALKEM'S order of the 20th May. On that day he approved the bond, with the consent of the parties. The only duty of the Judge was to see if the bond was sufficient. If the two parties say they are satisfied, it his duty to accept it. It is now sought to vary that order against the consent of the plaintiff, and to introduce, as a condition for the security then given, that the equitable mortgage, created by the joint operation of the statute and the judgment, be left unregistered and so be liable to be defeated. We are asked to interfere with the exercise of the discretion of the Judge. When the tribunal has once exercised the discretion there is no appeal from that. Judge WALKEM could not now reverse or vary his own order, unless perhaps by consent. The motion must be dismissed; but, as we think the defendants by offering to bring the whole $6,500 into Court to abide the events of the appeal made a very liberal offer, which the plaintiff acted very unreasonably in refusing, we give the plaintiff no costs of this appeal.

Judgment.

DRAKE, J.:—

I agree with the Chief Justice. If I thought we had any jurisdiction, it would only be exercised on terms, and the imposition of those terms would be a variation of the order of Mr. Justice WALKEM allowing the security. I think we have no jurisdiction to do that or to make any order in the matter. *Walmsley* v. *Griffiths*, Cassel's S. C. Dig., p. 404, and *Starrs* v. *Cosgrave*, ibid, p. 405, show that after the allowance of the security on appeal the Court below is *functus officio*. The learned counsel argues that the registration of the judgment was a step equivalent to execution. I refer to secs. 47, 48, and 49, of *Supreme Court of Canada Act*, providing for directions to the Sheriff on the allowance of the security, as to stay of execution in his hands, return of money, if any, already realized, etc., as showing that the word "execution," in sec. 47, means what it says. Execution means enforcement by writ, not registering a judgment or *lis pendens*. In order to issue execution against lands here, the step is by action, or *fi. fa.*, but the registration itself is not an execution. The registration of the certificate of judgment may have been in the mind of the plaintiff when he accepted the bond. It may be that if the plaintiff had not got the judgment registered his solicitors might not have accepted the bond. We cannot make an order after the allowance of the security on appeal. If any motion is necessary to vary the existing state of affairs as to the security, it should be made to the Supreme Court at Ottawa. I think we have no jurisdiction to deal with it.

Judgment.

Appeal and motion dismissed, without costs.

NOTE.—See *Vigeon* v. *Northcote*, 15 Ont. P. R., 171.

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1892.
Nov. 28.

Re DICKINSON.

B. C. Creditors Trusts Deeds Act, 1891—Removal of assignee having private interest conflicting with his trust.

Re DICKINSON.

There is inherent jurisdiction in Courts of Equity to remove trustees and appoint new ones in proper cases.

A trustee for creditors who is also employed as solicitor to manage an insolvent estate is a person whose interest conflicts with his duty to the creditors as trustee.

The constitutionality of a Statute will only be considered where necessary to a decision of the question before the Court.

Statement. MOTION to remove a trustee for creditors. The facts appear from the judgment.

L. P. Eckstein, for the motion.

Whiteside, contra.

McCREIGHT, J.:—

Judgment. This is a petition by John Parker as to the removal of John Briscoe Cherry from the position of assignee of the estate of W. W. Dickinson. The assignment was made under chapter 12, B. C. Statutes, 1890, and the application for removal is made under sec. 5 of the same Act. It was pointed out to Mr. *Whiteside*, who appeared for Mr. Cherry, that the latter was placed by the deed, as a solicitor of this Court, in a position where his duty and interest would probably conflict. His duty as trustee is to realize the estate as promptly and economically as possible, while his interest as solicitor is widely different. I have no complaint to make as to Mr. Cherry's conduct. The difficulty is that he is placed in a position which the Courts will not allow anyone to occupy, and I think this is sufficient to oblige me to accede to the petition of Parker, who is a creditor to the amount of $781.65, and who prays that C. W. R. Thomson, whose Company is creditor to the amount of $10,730.51, may be appointed assignee in place of Cherry. The claims of Parker, Thomson, and the Bank of British Columbia, comprise nine-tenths of the total liabilities.

Mr. *Whiteside*, for Mr. Cherry, resists the petition, on the ground that sec. 5 of the Act is unconstitutional. I am not satisfied that this contention is made out, and even if it was, I think, independently of the Act, I should accede to the petition. Any objections on the score

of alleged unconstitutionality would, I think, apply equally to the Act to abolish priority amongst execution creditors and an Act respecting the fraudulent preference of creditors by persons in insolvent circumstances. Both these Acts have been in force in Ontario for, I believe, many years, and though sometimes doubted—see, as to the former, *Roach* v. *McLachlin*, 19 O. A. R., Osler, J., at p. 500: and as to the latter, see *Clarkson* v. *Ontario Bank*, 15 O. A. R., 166; *Edgar* v. *Central Bank*, ibid. 193: *Kennedy* v. *Freeman*, ibid. 216: *Clarkson* v. *Stirling*, ibid. 234—they have not been held to be unconstitutional. I shall follow the advice given by Mr. Justice Cooley in his book on *Constitutional Limitations*, 5th Ed., pp. 182, 183, where he says that a reasonable doubt must be solved in favour of the Legislative action, and the Act be sustained.

Even if the Act was unconstitutional, I think it would be the duty of a Court of Equity to interfere by the removal of Mr. Cherry. This appears from *Letterstedt* v. *Broers*, 9 App. Cas., p. 371. The marginal note is "there is jurisdiction in Courts of Equity to remove trustees and substitute new ones in cases requiring such a remedy." The main principle on which such jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate. See the judgment of the Court (Judicial Committee) delivered by Lord Blackburn, at p. 386, which applies a *fortiori* to the present case, as Mr. Cherry is Mr. Dickinson's nominee. I refer also to *Lewin on Trustees*, Am., from 8th Eng. Ed., p. 846, *et seq.* The remarks in the judgment delivered by Lord Blackburn, 9 App. Cas., at p. 386, as to the necessity of harmonious working between the trustee and those who are beneficially interested apply forcibly here. And for all the above reasons, I think I must order the removal of Mr. Cherry from the office of trustee.

Judgment.

I have considered a good deal the reasons urged against the appointment of Mr. Thomson, and Lord Blackburn's remarks as to the necessity of harmony must be borne in mind when I appoint him in in the place of Mr. Cherry. I think the best thing I could do is to order that Mr. Thomson should give security in $10,000, not merely to account, etc., but to furnish and deposit in the Registry in New Westminster accounts, monthly, of his trusteeship, and such further and other accounts as the Judge may from time to time require. Such security must, of course, be to the satisfaction of the Registrar.

I think Mr. Cherry should have his costs of realizing the estate, but to prevent any difficulty in taxation I think he should have five per

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cent. on amount realized by him as compensation for his trouble, and also legitimate expenses out of pocket. I think I may order, by consent, that Mr. Cherry should receive $15 as and for his costs of this application, he undertaking, by his counsel, Mr. *Whiteside*, that he shall continue to be bound by his previous undertaking.

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1887.
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REGINA *v.* HART.

REGINA *v.* HART.

Criminal law—Habeas Corpus—Quashing conviction—Interest of convicting Justice in the prosecution—Appointment to office by resolution of Council—Sufficiency of—Assent of Lieutenant-Governor in Council.

The fact that the fines imposed by a Police Magistrate appointed by a Municipal Corporation are paid into the Consolidated Municipal Fund, and that he holds another office under the Corporation, the salary of which is drawn from such fund, does not incapacitate him as Magistrate by reason of interest in the prosecution.

A Provincial Statute authorized an appointment to be made by a Municipal Corporation, subject to the consent of the Lieutenant-Governor in Council.

Held, 1. Such appointment was well made by resolution under the corporate seal, and a By-law was unnecessary.

2. It is immaterial whether the assent of the Lieutenant-Governor in Council is obtained before or after the resolution.

Statement.

MOTION for a writ of *certiorari* to bring up and quash the conviction of one Jessie Hart, for keeping a house of ill-fame.

W. N. Bole, Q. C., and *A. J. McColl*, for the motion.

T. C. Atkinson, contra.

The facts sufficiently appear from the judgment.

McCREIGHT, J.:—

Judgment.

This was a motion for a writ of *certiorari* to bring up and quash the conviction of Hart for keeping a house of ill-fame.

It appears she was convicted by T. C. Atkinson, P. M. of New Westminster, and the grounds of this motion are:—

1. The Local Legislature (see sec. 85, *B. C. Municipal Act, 1881*, cap. 16) had no power to authorize the Municipal Council to appoint a Police Magistrate.

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2. That the Magistrate had no jurisdiction, meaning that he was incompetent to sit owing to interest in the case, as he was a salaried officer, and such fines are part of the Consolidated Revenue Fund of the City. Some other points were discussed, which I shall deal with presently.

As to the first point, there is no delegation of authority to the Council by the Legislature, for no appointment is valid till assented to by the Lieutenant-Governor in Council (sec. 85, *supra*), and it is unnecessary to discuss whether the plenary powers of legislation given under section 92 of the *British North America Act* do not fully meet the objection—see *Hodge* v. *The Queen*, 9 App. Cas., at p. 132, and *Powell* v. *Appollo Land Co.*, 10 App. Cas., at pp. 289 and 290, both before the Judicial Committee ; and see *O'Rourke's* case, 32 U. C. C. P. 388, and 1 O. R. 464.

As to the second point, that Mr. Atkinson should not have sat, owing to interest in the case, Mr. Cochrane's affidavit was relied on, which states that Mr. Atkinson was and is the solicitor for the Corporation, and further that he has, as Police Magistrate, inflicted many fines for offences against Dominion Acts, and some for offences of the like description with that in the present case, and that Mr. Atkinson has paid all such fines when collected to the clerk of the said city for the use of the city for Municipal purposes. It was argued by Mr. *Bole*, in moving for the rule, that Mr. Atkinson, in this case, as such solicitor, and at the same time Police Magistrate, was, in effect, both prosecutor and judge, and if this had been proved the argument would I think have succeeded, and the case would have been governed by *Queen* v. *Meyer*, 1 Q. B. D., 173, and see *Reg.* v. *Lee*, 9 Q. B. D., at p. 396, where the Court of Queen's Bench held that Meyer was sitting as a judge on an information arising out of a matter in which he was a litigant party with the defendant, and they intimate that where there is a "real bias" (see *Reg.* v. *Handsley*, 8 Q. B. D., at p. 386), the Court will interfere; but the affidavits of Atkinson, and of Frank Devlin, chief of police, satisfy me that the latter preferred and prosecuted the charge against Hart, as he says, solely and entirely on his own motion: that he was not instructed to do so by Atkinson: that he acted throughout the whole proceedings wholly without any instructions or consultation regarding the same with the Police Magistrate, but solely on his own account as Chief of Police for New Westminster.

Judgment.

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These affidavits seem effectually to dispose of the argument.

Mr. *Bole*, with whom was Mr. *McColl*, then argued further, with reference to Mr. Cochrane's affidavit that it showed the funds went into the consolidated fund of the City, and that Mr. Atkinson was a salaried officer, and so interested in the fine of $50 which he imposed upon Hart in addition to imprisonment, but Mr. *Atkinson* pointed out that this was not the case, for, by the *Summary Trials Act*, Rev. Stat. Can., cap. 176, sec. 32, the fine was payable to the Treasurer of the Province. But supposing even that by some arrangement between the Provincial Government and the Council the fine was ultimately payable to the latter (of which, however, there was no proof), I think that would make no difference.

I believe in most English-speaking communities fines, penalties, and forfeitures, when recovered, are paid into the Consolidated Fund, on which the salaries of the Judges are charged, yet no one argues that the Judges thereby are disqualified from sitting in such cases, and the fallacy lies in assuming that Mr. Atkinson's legal position is, or rather, on the above supposition of the fines being retained by the Council, might be the same as if some part of the fine was actually payable to himself.

Judgment.

If the Corporation should ever make the salary of the Police Magistrate depend on the amount of the fines recovered in his Court, I have no doubt the Superior Courts will know how to deal with such a case, but I need hardly add that no suggestion of this nature was made before me.

It was also argued that there was no by-law for the appointment of Mr. Atkinson, and secs. 8, 68, and 85 of the *Municipal Act, 1881*, were referred to, but I cannot gather from the Act that such a by-law is necessary.

Sec. 85 authorizes the Council to make the appointment, subject to the consent of the Lieutenant-Governor in Council. The appointment, I think, is to be made, as was done in the present case, by resolution. If a by-law is necessary, then the provisions in secs. 70, 71, and 72 must be complied with, and the revocation of the appointment must also be by a by-law (see *Reg.* v. *Zeger*, 1 Ont. Prac. Rep. 219), which, I think, was not intended by the Legislature. The creation of an office may be a matter of law or by-law, but the appointment to that office, I think, is not a legislative but an executive duty, and see sec. 104 as to the subjects on which by-laws may be made.

Mr. *Bole* lastly objected that there was no sufficient evidence of a

resolution appointing Mr. Atkinson a Police Magistrate, and that sec. 8 of the *Municipal Act*, as to the seal of the Council, was not complied with.

An affidavit of James A. Robinson, City Clerk, was produced, and he proves that on January 24th, 1887, the Police Committee recommended the appointment of Atkinson as Police Magistrate, and a resolution was carried that the Lieutenant-Governor be asked to appoint him to be Police Magistrate *vice* W. N. Bole resigned, and on February 7th a resolution was carried that the Clerk notify T. C. Atkinson of his appointment by the Municipal Council as Police Magistrate, also that such appointment had received the assent of the Lieutenant-Governor, and that he is authorized to assume the duties pertaining thereto.

When the Council passed a resolution that the Lieutenant-Governor should be asked to make the appointment, it was, of course, a necessary implication that they had first made the appointment under sec. 85, as far as in them lay, and the resolution of February 7th repeats the same and indicates the assent of the Lieutenant-Governor, which is further shown by Mr. Elwyn's letter of 1st of February.

Judgment.

It seems to me the resolution was complete before such assent was given, but I think further that it is immaterial in what order the action of the Council and of the Lieutenant-Governor took place. What is required is the consent of both.

The letter of the City Clerk of the 7th February is under the seal of the Council, and fully satisfies sec. 8 of the *Municipal Act, 1881*, and the law as to appointments being made under seal.

I think the rule *nisi* to remove into this Court and quash the conviction must be discharged.

WALKEM, J.

1892.
Nov. 30.

CASCADEN *et al.* v. McINTOSH *et al.*

Fraudulent preference—Pressure—Innocent purchaser—Con. Stat. B. C., 1888, cap. 51.

CASCADEN *et al.* v. McINTOSH *et al.*

M. & Co., being then insolvent, upon demand of one of their creditors, O. Bros., and in fear of legal proceedings, executed a Bill of Sale to them of their stock-in-trade and effects.

Before the commencement of this action by the other creditors to have the Bill of Sale declared void, as being made with intent to give O. Bros. a preference, the latter had sold the goods to a *bona fide* purchaser for value and received the purchase money.

Held, 1. The Bill of Sale was not made voluntarily or with intent to give a preference, but was made under pressure sufficient to take the transaction out of the Statutes.

2. O. Bros. could not, in any event, be called upon to account for the purchase money to the other creditors.

CROSS MOTIONS FOR JUDGMENT, BY BOTH PARTIES.

Statement.

THE action was brought by the plaintiffs on behalf of themselves and all other creditors (except defendants Oppenheimer Bros.) of defendants McIntosh, Sloan & Magar, to set aside as fraudulent under 13 Eliz., cap. 5, and Con. Stat. B. C., 1888, cap. 51, a Bill of Sale made by defendants McIntosh *et al.* to defendants Oppenheimer Bros.

The Bill of Sale had been demanded by defendants Oppenheimer Bros., and was given by defendants McIntosh, Sloan & Magar, in fear of legal proceedings being otherwise taken.

Prior to the commencement of this action, the defendants Oppenheimer Bros. had taken possession of the goods under the Bill of Sale, and had sold the same to *bona fide* purchasers thereof for value, without notice of any fraud, and received the purchase money ($800) which was not ear-marked in any way.

Argument.

E. P. Davis, for the defendants Oppenheimer Bros.: There should be a nonsuit. Whether the Bill of Sale in question was made by the defendants McIntosh, Sloan & Magar, with intent to give to the defendants Oppenheimer Bros. a preference over the other creditors, or not, the Court cannot grant relief, as the *corpus* of the property has passed into the hands of an innocent purchaser for value, and the proceeds, not being ear-marked in any way, are not in a condition to be followed by the Court—*Davis* v. *Wickson*, 1 O. R., 369, Boyd, C., at p. 374; *Masuret* v. *Stewart*, 22 O. R., 290; *Dunn* v. *Ross*, 16 O. A. R., 552.

But the Bill of Sale was not given with that intent and is not within either 13 Eliz., cap. 5, or Con. Stat. B. C., 1888, cap. 51. There was such pressure as to take the transaction out of the Statutes—*Stephens* v. *McArthur*, 19 S. C. R., 446; *Molsons Bank* v. *Halter*, 18 S. C. R., 88; *Totten* v. *Bowen*, 8 O. A. R., 602; *Long* v. *Hancock*, 12 S. C. R., 532.

J. A. Russell and *Godfrey*, for plaintiffs.

It being admitted that Oppenheimer Bros. received $800, the proceeds of the sale of the goods, we submit that if the question of intent to prefer is found in our favour, and that the Bill of Sale was void as against us, the Court should make an order declaring that Oppenheimer Bros. hold the proceeds as trustees for all the creditors. Argument.

E. P. Davis, in reply: That question is settled in Ontario—*Stuart* v. *Tremain*, supra: *Harvey* v. *McNaughton*, 10 O. A. R., 616.

WALKEM, J.:—

This action was brought by Cascaden & Co. and Langley & Co., on 20th February, 1892—a date which is material—on behalf of themselves and the other creditors of the defendants, McIntosh, Sloan & Magar, who lately carried on business as traders at McDonald's Landing and Dewdney, to set aside a Bill of Sale given by them, of their stock-in-trade and effects, to the other defendants, Messrs. Oppenheimer & Co., as being contrary to the policy of 13 Eliz., cap. 5, and the local *Fraudulent Preference Act*, Con. Stat. B. C., 1888, cap. 51. Judgment.

At the close of the plaintiffs' case Mr. *Davis* moved for a nonsuit, his first ground being that the goods covered by the mortgage or Bill of Sale had been sold by Oppenheimer & Co. prior to the issue of the writ in this case, viz., in January, 1891, the writ being tested on the 20th February following.

On this point the cases of *Davis* v. *Wickson*, 10 O. R. 369, Boyd, C. at p. 374; *Stuart* v. *Tremain*, 3 O. R. 190; *Robertson* v. *Holland*, 16 O. R. 532; *Masuret* v. *Stewart*, 22 O. R. 290; *Dunn* v. *Ross*, 16 O. A. R., 552, cited by Mr. *Davis*, seem too conclusively in favour of his application to allow of any doubt. It must be borne in mind that our Statute is a copy of the Ontario Act, except as to slight amendments in the latter which have since been considered immaterial. The principle laid down and followed uniformly by the Ontario Courts is that the plaintiffs' right to relief is to have any obstruction removed which, to use the language of Chancellor Boyd, "intercepts the action of his writ of execution" after the property which is subject-matter

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of the action reaches *bona fide* purchasers, no remedy is provided for by this Act or 13 Eliz. It was contended by Mr. *Russell* that as a sum of $800 was admitted on the pleadings to have been received by Messrs. Oppenheimer & Co. as the proceeds of a sale under the mortgage, it was subject to the control of the Court, but no attempt was made on plaintiffs' behalf to ear-mark the money, doubtless, very probably, owing to his inability to do so. The money was not, so far as the evidence shows, placed, for instance, on deposit in a bank where it might have been identified, but was paid to Messrs. Oppenheimer & Co. in the ordinary course. In the case of *Massey* v. *Stewart & Lampton*, Lampton never received the money as a creditor of Stewart, but, on the contrary, received and attempted to hold it for and on behalf of Stewart, and in fraud of the latter's creditors. It was Stewart's money; money that it was Lampton's duty to pay him, and, as such, could have been reached in Lampton's hands by attachment.

In the present case the $800 was not McIntosh & Co.'s but Oppenheimer & Co.'s. The case is so clearly distinguishable from the authorities already referred to that they have no bearing upon it.

Judgment.

In the next place, dealing with the second objection taken by Mr. *Davis*, that the mortgage was not a voluntary preference, but was made under pressure, I find that the evidence supports this. Pressure is a word of degree. A mere demand for a settlement, as in the present case, constitutes pressure. Such has been held to be the case by the Supreme Court of Canada in *Stephens* v. *McArthur*, 19 S. C. R. 446. Mr. Sloan, it will be remembered, and he is the plaintiffs' witness, swore that the mortgage was not given voluntarily, but in fear of legal proceedings.

But even if collusion had been shown to have existed between Oppenheimer & Co. and McIntosh & Co., the relief asked for by the plaintiffs could not be granted. They first seek to have the mortgage set aside and Oppenheimer & Co. declared trustees of the chattels, etc., included in it, as being in their possession. But the chattels are gone, and out of their possession. They next seek, in the alternative, to have the proceeds which have admittedly reached Oppenheimer's hands made available, but the proceeds have not been ear-marked or identified, and the Court is therefore without jurisdiction, either under 13 Eliz., cap. 5, or the local *Preference Act*, to deal with them.

Further than this, the Ontario Courts have held that even if the transaction had been fraudulent and contrary to the policy of both Acts there is no statutory or other remedy given where the mortgaged

property has been sold and parted with. In *Massey's* case the sale was a sham, but not so in this case.

It might be said that the mortgage being payable on demand showed fraud, but promissory notes are often made payable on demand at the creditor's instance and for his security. There is therefore nothing in this point beyond the fact that Messrs. Oppenheimer & Co. took the best mode of protecting themselves, and this is the right of every creditor, provided the transaction is free from fraud. This point is, however, immaterial in view of what I have said.

Judgment.

The nonsuit will therefore be allowed with costs.

POOLE *v.* THE CITY OF VICTORIA.

Municipal License law—Constitutionality of—Power of Provincial Legislature to authorize Municipality to impose License tax—Discrimination between resident and non-resident traders—Variation in terms of By-law from language of Statute authorizing—Statute—Construction of—"And" construed "or."

P. was convicted before a Justice of the Peace for soliciting in Victoria orders for the sale by retail of goods to be supplied by a firm doing business outside the Province of British Columbia.

By the *Municipal Act, 1891*, B. C. 54 Vic., cap. 29, sec. 166, "Every Municipality shall, in addition to the powers of taxation by law conferred thereon, have the power to issue licences for the purposes following, and to levy and collect by means of such licenses the amounts following:—

"(12.) From every person who, either on his own behalf or as agent for another or others, sells, solicits, or takes orders for the sale by retail of goods, wares or merchandize, to be supplied or furnished by any person or firm doing business outside the Province and not having a permanent and licensed place of business within the Province of a sum not exceeding $50 for every six months."

By By-law, following the language of sub-sec. (12) *supra*, except that the words "permanent *or* licensed place of business" are substituted for "permanent and licensed place of business," the license fee was fixed at $50.

Held, 1. The Statute, By-law, and license tax thereunder, are not, as contended, *ultra vires*, (*a*) for interference with trade and commerce, or (*b*) for unlawful discrimination against traders outside the Province.

2. The imposition of the license tax in question is within the powers relegated to Provincial control by the *B. N. A. Act*, sec. 92, sub-sec. 16.

3. The word "and" in the Statute, *supra*, should be construed "or."

Statement.

APPEAL to the County Court, under the *Summary Convictions Act*, from the above conviction.

BEGBIE, C. J.
1892.
Aug. 12.

POOLE
v.
VICTORIA.

The appeal came on for hearing before Sir M. B. BEGBIE, C. J., sitting as a Judge of the County Court of Victoria.

Gregory, for the appeal.

Argument.

The by-law, being a taxing by-law, must be strictly construed, and must strictly follow the Statute authorizing it, which it does not do in this case—*Endlich* (Maxwell) *on Statutes*, pp. 4, 27, 507. The word "or" in the by-law cannot here be read "and," or *vice versa* in the Statute, *Green* v. *Wood*, 7 Q. B., 178, for the language is in each case plain as it stands, *Endlich* (Maxwell) *on Stats.*, pp. 384, 507; and this even though the consequences are to defeat the Statute. Parke, B., in *Vixon* v. *Phillips*, 7 Ex. at p. 192, and Lord Tenterden, in *Reg.* v. *Barham*, 8 B. & C., 99. The by-law is, therefore, bad.

Sub-section 12 of sec. 166 of the *Municipal Act, 1891*, 54 Vic., B. C., cap. 29, under which the by-law was passed, is *ultra vires* of the Local Legislature, as an interference with trade and commerce, and creating a tax discriminating against business houses outside of the Province, and in favour of firms within the Province but outside the Municipality, which latter, by sub-sec. (9), have only to pay a license fee of $5 instead of $50, to sell by retail within the Municipality—See *Doutre's Const. of Can.*, p. 122; *Jonas* v. *Gilbert*, 5 S. C. R., 356; *Saunders* v. *S. E. Ry. Co.*, 5 Q. B. D., 456, at p. 463; *Ward* v. *State of Maryland*, 12 Wall., 418.

C. J. Prior, for the City of Victoria, *contra*.

SIR MATT. B. BEGBIE, C. J.:—

Judgment.

In this case the appellant, Poole, has been convicted and sentenced to $50 fine, in addition to $50 for a license, under the following circumstances:—

The *Municipal Act, 1891*, sec. 96, sub-sec. 73, gives the Corporation power to make by-laws as to shop and trade licenses. By sec. 166, sub-sec. 12, every person who, either as principal or agent, solicits or takes orders for the sale by retail of goods, wares, or merchandise, to be supplied or furnished by any person or firm doing business outside of the Province, and not having a permanent and licensed place of business within the Province, may be charged with a license fee not exceeding $50 for six months. It is admitted that Poole is a person coming within this description. By sec. 168, "every person using or following within the Municipality any of the trades, occupations, or professions enumerated in sec. 166, or the sub-sections thereof, shall

take out a periodical license therefor for such period as is in the said section set out, paying for such license such periodical sum as is there specified," payable to the collector in advance.

It is observable that in sec. 166, sub-sec 12, and, indeed, in all the sub-sections, no precise license fee is specified at all. By sec. 170, "no person shall use, practice, carry on, or exercise in the Municipality any trade, occupation, profession, or business described or named in sec. 166 and the sub-sections thereof without having taken out and had granted to him a license in that behalf," under a penalty not exceeding $250.

By a by-law, dated 29th July, 1891, the amount of license fee chargeable to a person soliciting orders, etc., is fixed at the full amount indicated in the Statute, viz., $50. The by-law follows the exact words of sec. 160, sub-sec. 12, above set out, except that the statutory phrase, "and not having a permanent *and* licensed place of business in the Province," is in the by-law changed into "and not having a permanent *or* licensed place of business." In 1892 another *Municipal Act* was passed, which repealed that of 1891, but by sec. 8 every by-law of 1891 was kept in full force. This Statute of 1892 again modifies the section empowering or imposing taxation on these commercial travellers. The new sub-section taxes all such agents whose principals are doing business outside the Municipality, instead of outside the Province. It was argued that although sec. 8 of 1892 professes to keep in force by-laws passed under the Act of 1891, yet that such by-laws must be conformable with the latter Act.

Judgment.

I am not impressed with this argument. Sec. 8, at all events, seems very clear, as the by-laws of 1891 are to continue to be regulated by the Act of 1891, until changed or repealed by some proceedings under the Act of 1892. Nor do I think there is such a want of conformity between the new section and the old by-law as to be fatal to the latter. Every Municipality must be at least within the Province, so that any taxee answering the description in the by-law would *a fortiori* answer the description of the taxee in the new Act. Then it was said that the by-law was invalid for not following the very words of the Statute of 1891, inasmuch as the taxee would escape the tax if he had a permanent *or* licensed place of business here, whereas the Statute imposed a tax unless the agent in question had a permanent *and* licensed place of business. But this is clearly a case where *and* in the Statute is to be constructed *or*. I must confess I do not understand the object of mentioning a "licensed place of business" in

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this connection at all. So far as I can learn, there is only one occupation which requires a license for its place of business, viz., the sale of alcoholic liquors by retail. There is no provision that I know for licensing any other description of business. And this is precisely the one occupation which it seems physically impossible for any firm outside of the Province to carry on by means of an agent travelling about within it. The "licensed place of business" seems to me an impossible condition, and it is much more proper to treat it as annexed merely by a disjunctive to the possible condition, viz., the occupation of a permanent office. It was then argued that the Statute itself was void and unconstitutional for trenching on trade and commerce, which, by sec. 91 of the *British North America Act*, are reserved to the Dominion; and *Severn* v. *Reg.*, 2 S. C. R. 70, was referred to.

But the whole question of the force of this reservation in sec. 92, and also the views expressed in *Severn's* case, have been discussed in *Citizens' Insurance Co. of Canada* v. *Parsons*, 7 App. Cases, 96; *Attorney-General of Ontario* v. *Mercer*, 8 App. Cases, 778; *Hodge* v. *Reg.*, 9 App. Cas. 117; and *Bank of Toronto* v. *Lambe*, 12 App. Cases, 575. In all these the power of the Provincial Legislature to authorize Municipalities to levy taxes on different trades and occupations carried on within their boundaries is upheld as undoubted; and the objection would go far beyond this one case, it would go to all the licenses. Every tax on a tradesman, *pro tanto*, touches "trade and commerce."

Judgment.

But, then, it was said that the taxation authorized by those cases was a purely internal trade, and that this is purely an external "trade," therefore within the true and higher meaning of sec. 91, and not of a merely "local nature" within sec. 92, sub-sec. 16. Moreover, that this by-law tax discriminates between different classes of tradesmen, and is therefore unjust, inequitable, and void. But when it is laid down as a rule that all taxation must be equal; that means equal on all who fall within the same category; all wholesale trades must pay alike; all retailers alike, all bankers alike; but there may be, and is, very great inequality of taxation between a wholesale merchant and a petty trader, between a banker and an auctioneer. Even between persons following the same occupation, *e. g.*, retailers of alcoholic liquors, there is a difference between town and country licenses.

Nor has such discrimination ever been here held unjust merely for its inequality, although in one case, *Re Mee Wah*, I held that an

enormous tax laid on Chinese wash-houses was void, not for its inequality merely, but because it seemed clearly to have been imposed, not for the purpose of raising a revenue, but in order to extinguish a trade. Moreover, this is to be considered. This power of taxation exists somewhere, either in the Dominion or in the Provincial Legislature. It is pointed out in *Lambe's* case that the *B. N. A. Act* places every possible topic of legislation in the different Legislatures, so that in one or the other this power of taxation resides.

The appellant asserts that it falls to the share of the Dominion as an interference with trade and commerce. The respondent points out that "shop, tavern, and other licenses," "civil rights," and "matters of a local nature," are handed over to the Provincial authorities.

Now, it does not seem at all probable that the statesmen who contrived this ingeniously balanced system would hand over to the several Provinces the taxation of all their occupations, but would reserve the right of taxing bag-men to the Dominion Legislature alone, and though, of course, the question is not what they intended, but only what is the meaning of the words they have used, yet, when we find ambiguous expressions, which might stretch so as to include these agents within either section, it is only becoming to attribute a reasonable intention to the framers of the Act.

Judgment.

The only difficulty I perceive in the way of this conviction, or of any conviction under this section, is what I hinted at in my opening remarks. The offence is created by the Statute: sec. 170 says that nobody shall carry on or practice, etc., any of the trades, occupations, etc., mentioned in any of the twenty-six sections of sec. 166, without having taken out a license in that behalf, under a penalty of not more than $250. The appellant has solicited, as described in sub-sec. 12, and he has taken out no license. And the only difficulty is, could he have taken out a license? For if not, the prosecution would fail; *nemo tenetur ad impossibile.* The Act which makes it an offence to trade without a license should indicate or refer to a sufficiently clear means of obtaining it. Now sec. 166 says that the Corporation may grant licenses for the various occupations there enumerated. Sec. 169 gives the form of the license—Form C in the schedule. The by-law fixes the amount, and the only incongruity is in sec. 168, which says that everybody should pay for his license the amount specified, not in the by-law, but in the Act itself, where no definite amount is, in fact, specified, but only a limit which the by-law is not to exceed, and which, in fact, it does not exceed. Sec. 168, however, is not in the

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least referred to in sec. 170, which creates the offence. No man is to trade unless he first obtain and pay for a license, and I do not think that either the slip, if it be a slip, in sec. 168, or the other slip, if it be a slip, in the by-law which I have already dealt with, can have embarassed the appellant, or, in fact, leave any obscurity as to his duty to take out and pay for a license. The appeal therefore fails.

Conviction affirmed.

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HEATH *v.* THE CITY OF VICTORIA.

Municipal License Law—Sale—Wholesale or retail.

A sale to a person in British Columbia by an agent of a firm doing business outside the the Province of 1,100 business cards, to be supplied by them, is a sale by wholesale and not a sale by retail within the *Municipal Act, 1891*, 54 Vic., cap. 29, B. C., sec. 166, and a conviction for making such sale, without the license required by the Statute for making such sales by retail, quashed.

Statement.

APPEAL, under the *Summary Convictions Act*, Con. Stat. Can., cap. 178, sec. 76, from a conviction, which is fully set out in the judgment, for soliciting orders for the sale by retail of goods to be supplied by a firm doing business outside the Province without the license required by the *B. C. Municipal Act, 1891*, sec. 166, which is as follows:—

"166. Every Municipality shall * * have power to issue licenses for the purposes following, and to levy and collect by means of such licenses the amounts following: * * * In City Municipalities (12), from every person who, either on his own behalf, or as agent for another or others, sells, solicits, or takes orders for the sale by retail of goods, wares, or merchandize, to be supplied or furnished by any person or firm doing business outside of the Province, and not having a permanent or licensed place of business within the Province, a sum not exceeding $50 for every six months."

By by-law of the City of Victoria (see *Poole* v. *Victoria*, ante p. 271) the license fee was imposed and fixed at $50.

H. D Helmcken, for the defendant, the appellant.

C. J. Prior for the prosecutor, the respondent.

BEGBIE, C. J.:—

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In this case the appellant was convicted of soliciting orders for the supply of goods by retail, to be furnished by a firm outside the Province, neither he nor they having any permanent place of business here, and without having taken out a license, contrary to the *Municipal Act, 1891*, which forbids such retail transactions

The defence is limited to this, that the sale solicited was not by retail, but wholesale.

The goods are business cards—trade circulars. On the face of each card is a printed calendar for 1893. On one half of the back is printed a sprig of flowers or other ornamental device. The other half is left a blank space, upon which the name of the proposed trader may be printed. In the present instance the customer, a chemist and druggist, chose his patterns and ordered eleven hundred of different sizes. His intention is to distribute these at the close of the year to his own actual or potential customers, gratis, as an advertisement.

The prosecutor contends that a wholesale merchant is one who sells, not to a consumer but to other tradesmen, goods in large quantities, with the intention that they shall be sold over again in smaller quantities, or even one at a time to consumers; that these cards were sold, it is true, to the chemist in sufficient quantities to justify the epithet "wholesale," but that as the chemist did not re-sell by retail, nor at all, but distributed them gratis, he was really the consumer, and the first sale by the appellant to the chemist was a sale by retail.

Judgment.

There is no doubt that a merchant who sells as above in large quantities to another trader, in order that the second may distribute piece-meal to actual consumers, is a wholesale merchant. The fallacy is in assuming that this, which is only an example of a class, exhausts the whole class. In fact, a wholesale dealer may know nothing, and certainly cares nothing, about the way in which his immediate customer deals with the goods. A liquor merchant with a wholesale license sells to a customer a cask of wine. The customer is a saloon-keeper. This is all right. But, if instead of selling any portion of it, the customer consumes it all by inviting his friends to a series of dinners, the wholesale merchant would, on the prosecutor's theory, find himself liable to be fined for want of a retail license. A ship-load of coal bought at Christmas direct from the colliery would generally be thought a wholesale transaction. And so it would be, according to this theory, if bought by a middle-man for re-sale at a profit. But it

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would be a retail sale on the part of the colliery if the purchaser distributed it among the poor gratis. Surely Schweppes buys his soda water bottles wholesale; yet he makes no special charge for them to people who buy his soda water. It is needless to multiply examples. The act of vending must be of one nature, not of two natures; the same transaction cannot be a retail sale and a wholesale purchase. I shall not attempt to define "wholesale." Quantity enters no doubt into the conception. But the only trade in which the quantity is defined is, I believe, the liquor trade; and there it is fixed at no enormous volume—two gallons. It certainly has nothing to do with the price which the first vendor subsequently obtains for the separate articles, nor with the mode in which he seeks repayment. Here, in fact, the chemist expects to get recouped for his outlay on the cargo of 1,100 cards by the profits coming from the customers whom he hopes to attract by distributing them. He does, therefore, in fact, sell these cards, singly, though they are, in form, distributed gratis; they are sold on credit; he hopes to be repaid on the whole, though some distributees may disappoint him. In my opinion the sale effected by the appellant was wholesale, not retail, coming even within the prosecutor's own definition of goods sold in bulk, to be re-sold piecemeal; and I so find, and dismiss the complaint.

Judgment.

Appeal allowed and the conviction quashed.

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Defamation—Libel—Poster advertising accounts for sale—Discretion to grant interlocutory injunction in actions for libel.

Defendant, a debt collector, printed a poster containing the names of persons from whom he was employed to make collections, showing the amounts and the nature of the accounts, set opposite the respective names under the heading, in large letters, "Accounts for sale. Victoria, B. C. The British Columbia Commercial Agency offer the following accounts for sale at their office," etc. This poster, which showed the name of the plaintiff as debtor for a drug bill of $9.67, defendant sent to him, and to each of the persons on the list, together with a circular stating "You may still have your name lifted by paying the amount on or before the 27th inst., after which date the posters will positively be issued."

An *interim* injunction having been granted to restrain further publication—

Held, per BEGBIE, C. J., on motion to continue the injunction till the hearing:

That the poster was libellous, and the innendo implied was not merely that the plaintiff was justly indebted in the sum mentioned, but that he was dishonest and insolvent.

Held, per BEGBIE, C. J., on motion to dissolve injunction:

The Court will interfere by interlocutory injunction restraining until the trial the publication of what clearly appears to be a libel.

On appeal to Divisional Court—

Held, per CREASE, J.:—

That the poster was libellous. It was, in fact, in the eyes of the public a black list, implying that all ordinary efforts to obtain payment had failed, and that the debtor was either dishonest or insolvent.

That, though in England the Courts have not of late restrained publication before the question of libel had been submitted to a jury, there is undoubted power to do so under C. S. B. C., cap. 31, sec. 14, and appeal should be dismissed.

Held, per DRAKE, J.:

That as the jurisdiction is one never admitted before the *Judicature Act*, and the exercise of it may prejudice the trial of the action, as being a conclusive opinion that the matter complained of is defamatory, it should be very sparingly used and in practice confined to trade libels, and appeal should be allowed.

Statement.

MOTION to continue till the hearing or further order, an *interim* injunction restraining the further publication by the defendant of the libel complained of in the action.

The defendant had printed a large yellow placard containing the names of about 38 well-known Victorians, with alleged debts of small amounts set opposite their names as due per "druggist's bill," "tailor's bill," "grocer's bill," etc., and announcing a sale of such

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alleged debts by auction at an early day. A copy of this placard was sent round to the persons named therein, with a circular announcing that if the demands were paid by the plaintiffs on or before the 27th July, their names would be "lifted" from the list, otherwise the placard would most assuredly be published on that day.

The plaintiff's name was inserted in respect of an alleged druggist's bill for $9.67. The plaintiff brought this action, endorsing the writ for an injunction to restrain the publication, and for damages, etc.

J. P. Walls, upon an affidavit of the plaintiff, stating in substance that he knew nothing of any such debt, or of any previous demand, and that, as far as he could recollect, none such was due by him, and that he believed nothing was due, and that he was always ready to pay any just demand, had obtained an *interim* order restraining the publication, and now moved to continue the order till the hearing.

A. L. Belyea, for the defendant, *contra*.

SIR M. B. BEGBIE, C. J.:—

Judgment.

Whether the publication of the impugned list would be a libel or not, taken by itself, may be doubted, though it would probably be so held. It was argued that it is not libellous to state that another man owes you money; that it is perfectly lawful to sell and assign any debt, and that there is no law to prevent the announcing of any intention to sell. The combination, however, of these three circumstances might lead to a breach of the peace. But there is in this yellow list, and the circumstances attending its threatened publication, matter amounting to a good deal more than this. It would, I think, be naturally taken to imply the very clear innuendo that the sums mentioned were justly due and were not disputed, but that the alleged debtors were not in the opinion of the alleged (unnamed) creditors, worth powder and shot, *i. e.*, that ordinary litigation would probably be merely throwing good money after bad. But surely it is libellous to publish of a man anything clearly insinuating that he is dishonest and insolvent. If a libel be justly defined as anything written which tends to bring a man into dislike, or discredit, or contempt, the publication of this list seems libellous. It would, perhaps, not be quite accurate to charge a jury that they might find any publication to be libellous which they would greatly dislike to have published concerning themselves: but I can conceive that some men would be less annoyed at an accusation of a crime than at being gibbetted in this placard.

I was told that even such insinuations would not be libellous, if they were true; and that the plaintiff did not venture absolutely to deny his indebtedness. But he does deny his belief of his indebtedness, and does allege circumstances to show that that belief is reasonable. The defendant, does not, on the other hand, even allege his belief in the truth of the libel. I refuse to assume the truth, rather than the falsehood, of a scandalous placard. Besides, the argument is entirely unfounded. The libellous nature of a statement has nothing whatever to do with its truth or falsehood. In a criminal proceeding the truth of the libel was, till recently, no defence at all: nor is it any defence now, unless the defendant allege and prove that the publication was of public advantage. In civil proceedings, where a man asks damages for sullying his fair fame, if it can be shown that the libel is true, his fair fame turns out to be all a pretence, and he can get no damages for an injury done to that which he was not entitled to. On the other hand, if the libel be shown to be false that may greatly swell the damages. But in no case does the truth or falsehood of the fact alleged enter into the question, whether the statement is a libel or not.

I was then told that I was incompetent, since *Fox's Act*, to form any opinion whether the matter complained of was libellous or not—that that is the peculiar function of a jury, and that in the rare cases in which a libel has been restrained by injunction, it had always been already found to be such by verdict. To which it is enough to answer that *Fox's Act* only applies to criminal matters; and *Fox's Act* itself, by section 3, expressly enacts that the trial Judge is to give his opinion and directions to the jury as in any other criminal case. That not very long ago an action for damages for libel was tried in this very Court by a Judge alone, without any jury at all, and that the only case in which a libel was restrained in this Court was that of *Muldoon* v. *Johnson*, in 1881, which was never appealed against, and in which the libel had not been even presented to any jury. In fact, as a general rule, any application for an injunction must necessarily be prior to any decision by a jury: for it is one of the principles in granting injunctions, that the application must be made at the earliest opportunity. This Court will not make an order for shutting the stable door after the steed is stolen.

Judgment.

Now, taking this list in connection with the defendant's circular, which refers to it, I have no doubt on the subject. That circular discovers the *mala mens*, viz., the intention to extort money from the plaintiff, entirely irrespective of any just liability to pay, and merely

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to avoid annoyance by the defendant. There is no affidavit that any of these sums are justly due by the persons proposed to be annoyed, nor that any demand has been made for any of the sums. There is no disclosure of the names of any creditor, nor dates, nor any certainty that the defendant is employed by the alleged creditor, or authorized to give persons a discharge in their name, nor form any opinion whether these or any other sums are due from them or not.

It is at the best a demand of somebody, under the mask of the defendant, for the payment of a sum certain, under threat of what many would dread more than personal violence. This is not the method prescribed by law for collecting debts. Courts are maintained at the public expense, in which the justice of a claim and its amount are first to be established. Not even then, in any civilized country, is the creditor entitled to go and satisfy himself by his own methods. Satisfaction is taken through an appointed officer and by methods sanctioned by the Legislature. I believe in some societies, in another plane of civilization, a creditor, either in person or by his attorney, takes up a position before his debtor's house, on the door-step, and starves him into submission. That would, perhaps, not be permitted here—it is at any rate not likely to acquire much vogue among the legal practitioners. However, a creditor cannot be listened to if he complains of the delay and uncertainty and risk of further loss attending the methods laid down by the Legislature of his adopted country, in endeavouring to recover what may ultimately turn out to be a bad debt. A bad debt is like the small-pox: except in the most rare and peculiar circumstances no man need have either the one or the other unless he chooses. It has long ago been pointed out that there are dishonest creditors as well as dishonest debtors; there are as many tradesmen who give credit without properly considering whether a customer will be able to pay, as customers who buy on credit without intending to pay.

Judgment.

Hitherto I have merely regarded the matter from the defendant's point of view. But when we turn to the plaintiff's affidavit what case does he present? He is a well-to-do government official. The claim against him is on behalf of some unnamed "druggist's account" for $9.67. It is the merest mockery to say that there is the least apprehension of his not being able to make good any judgment for debt and costs that a County Court could possibly give against him. Then why should not his unnamed creditor sue in his own name? Why is he to shoot this poisoned arrow from an ambush? The plaintiff says that

he only remembers dealing with one druggist, whom he names—a highly respectable man; that he has paid him many accounts, and, as he believes, all that have been sent in; that he has no recollection of the present account, and there are no dates or details to refresh his memory; but he says he will not swear that this account is not due, though he has no recollection of it.

It appears to me that this is eminently a case in which a Court of Justice should exert the power placed in its hands since the *Judicature Act*. It is quite true, as urged for the defendant, that the former Court of Chancery could not have granted an injunction in such a case. I think it even highly probable that the Legislature, when it directed an injunction to be awarded "whenever justice or convenience required" (permissive words here are imperative, within *Julius* v. *Bishop of Oxford*, 5 App. Cas., 214) never contemplated such proceedings as the present; but deeming it "just" and convenient—C. S. B. C., 1888, cap. 31, sec. 14—I must allow the order for an injunction to continue till the hearing or further order of the Court. Judgment.

The defendant then moved, before Sir M. B. BEGBIE, C. J., to dissolve the injunction, in order to found an appeal to the Divisional Court—see *Attorney-General* v. *Milne*, ante p. 201.

The parties appeared by the same counsel.

SIR MATT. B. BEGBIE, C. J.:—

This is an application by the defendant, on new materials, to dissolve the injunction which I granted on the 30th July. On this occasion the tradesman to whom the plaintiff is alleged to be indebted—an indebtedness to which the plaintiff on affidavit stated that he does not admit—has now made affidavit that his demand is just. And Mr. *Belyea* again produced the authorities before relied on, and added others in support of his propositions, that the Court will not restrain an alleged libel until its libellous nature has been affirmed by a jury, nor at all, if the alleged libel be true. Judgment.

As to the first point, it is quite settled by the more recent cases, which are numerous, but seem to have escaped Mr. *Belyea's* attention, in which the jurisdiction to interpose by interlocutory injunction is quite clearly maintained and exercised. I shall only cite *Bonnard* v. *Perryman*, 1891, 2 Ch. D., 269, and *Pink* v. *Federation of Trades*, etc., in the present year, as yet only reported in 8 T. L. R., 216.

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As to the second point, I had hoped that on the former occasion I had made it sufficiently clear that, in my opinion, the libellous (looking to the law of conspiracy as laid down in *Rex* v. *De Berenger*, 3 M. & S. 67, and *Regina* v. *Aspinall*, 2 Q. B. D. 48, I had almost said the criminal) character of the proposed line of action is not changed or affected by the justice or injustice of the alleged claim. Nor is there anything libellous, at least as appears to me at present, in a simple allegation by A that B owes him money. In any society, beyond the earliest state of civilization, every man must be indebted, at least to some extent: unless he pays his servants, his baker, and his butcher, and every tradesman with whom he deals, in advance; and then they, perhaps, would be indebted to him; which mode of dealing is very usually adopted by co-operative stores. Simply to say that I owe money to my butcher or my tailor, is to say what is true of every householder in Victoria on most days of the month, and I should be surprised to hear that called libellous. There is nothing disparaging or degrading in that bare statement, though there may be an innuendo which may make it libellous. And here, as I explained on the former occasion, there is a very clear innuendo. Now, however just his claim may be, no tradesman is at liberty to assault or threaten to assault his customer unless he at once submits and discharges the whole demand without examination or discussion, or the intervention of a court of law. Still less has a tradesman any right to hire a bravo or a stranger to make this threat, or this assault. Such a course everybody, I should hope, would see to be utterly inadmissible. But this is just parallel to what is done, or threatened to be done, here: and this is all that is forbidden by the order which I am now asked to dissolve. The only difference is that the defendant does not threaten a physical assault upon the alleged debtor's person which would probably be despised: but for a money consideration, or commission, he threatens a more insidious assault upon the alleged debtor's reputation, which very few men can afford to despise, and which, therefore, it is hoped will be more effectual than the threat of a bludgeon or a knife. It is in vain for the defendant to parade the innocence of his statements and his firm belief in the justice of his claim. Among the ingredients which are of the essence of the character and mischief of libels are the disparagement of character, the pain inflicted on the individual libelled, the tendency to provoke a breach of the peace. When all these are combined, with the view of terrorizing an alleged debtor into a waiver of the protection of a Court of Small

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Debts, and to enable an alleged creditor to evade the necessity of proving his claim in the method appointed by the Legislature, it becomes difficult to characterize the proceeding calmly. And it is equally childish for the defendant to allege that he intends no disparagement, no unlawful pain, to the present plaintiff. The mere fact that he uses the proposed publication as a threat to induce the plaintiff to submit to his demands without further proof or investigation belies all such pretences. The defendant must not only know, he must hope and believe, that the publication is a very serious imputation, very derogatory to the plaintiff's character, to such a degree as will terrorize the plaintiff into submission. It is absurd to suppose anybody attempting to extort money from a man by threatening to publish a statement which is either eulogistic or colourless. *Habemus confitentem rem.* There is therefore no necessity to go to a jury to say whether the publication is libellous or not. The defendant threatens this because it is libellous, and, as he hopes, will be feared by the plaintiff as so deeply libellous as to oust the jurisdiction of the ordinary Courts, in itself a matter of grave importance, and only permitted in case of consent, as where a reference to arbitration has been agreed upon. Otherwise it is always held that it is a matter of the highest policy to maintain unimpaired, and exclusive of all private methods, the jurisdiction of a Court to investigate and enforce payment of debts. It may very well be that there is no reported case where an attempt such as this has been restrained, but I do not remember ever to have heard of such an attempt being offered.

Judgment.

On these grounds and on the grounds which I stated at some length on the previous occasion, I refuse the present application with costs.

The defendant appealed to the Divisional Court, and the appeal was argued before CREASE and DRAKE, JJ.

A. L. Belyea, for the appeal.

J. P. Walls, contra.

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CREASE, J.

CREASE, J.:—

This is an appeal from an order of the Chief Justice, of 22nd August, 1892, dismissing, with costs, the application of the defendant for an order to dissolve the injunction granted herein on the 29th July, 1892.

Judgment.

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The facts of the case, stated generally by the Chief Justice in his judgment of July 30th, 1892, are as follows:—

The defendant had printed a large yellow placard containing the names of about thirty-six well-known Victorians, with alleged debts of small amounts set opposite their names, as due for "druggist's bill," "tailor's bill," "grocer's bill," etc., and announcing a sale of such alleged debts by auction at an early day.

A copy of this placard was sent round to the persons named therein, with a circular announcing that if the demands were paid by the persons named in the placard, on or before the 27th July, their names would be "lifted" from the list; otherwise the placard would most assuredly be published on that day.

The particular shape which the application took was this:

On the 20th July last, plaintiff received from the defendant his circular, showing clearly his private method or system, *one applicable to all persons* on the placarded list, for enforcing the collection of the alleged debts, outside of any reference to the Courts:—

16 BROAD STREET, VICTORIA, B. C., 1892.

DEAR SIR:—Enclosed you will find sample Poster.

You may still have your name lifted by paying the amount on or before the 27th July, after which date the posters will positively be issued.

Judgment.

The object of advertising this *and other claims* for sale is, that in default of payment by the *debtors* of the amount due by them *in full* (the italics are my own), "the largest possible amount may be realized by *their* creditors from the claims, and for no other purpose.

Yours truly,

THE B. C. MERCANTILE AGENCY.

The Sample Poster referred to was a conspicuously printed large yellow poster headed:

ACCOUNTS FOR SALE.

THE B. C. MERCANTILE AGENCY

Offer the following accounts for sale at their office, 16 Broad Street:

W. ——— ———, residence ———————, groceries, $44.08.

And so on, in the case of 33 other names, including that of the plaintiff for a druggist's account of $9.67.

On the top of the poster were the words, "George Giles, Manager," and in the opposite corner (an insertion, it appears, entirely unauthorized) the names of a firm of solicitors in Victoria.

There was no note appended to it to qualify the ill-effect of such a poster on the mind of every person reading it, nor was the name of

the druggist offering the debt for sale mentioned. Upon the receipt of this threatening document, the plaintiff applied to the Court on affidavit of the above facts, and obtained the injunction now in question, restraining the further publication and placarding of the above poster.

Plaintiff's affidavit stated that the poster itself had been widely circulated in Victoria, and the posting thereof was calculated to do him further injury and bring him into ridicule and disrepute, especially in his position of a public officer; and stating in substance that he knew nothing of any such debt, or of any previous demand, and that as far as he could recollect none such was due by him, and that he believed nothing was due, and that he was always ready to pay any just demand.

His counsel took up the position that he neither affirms or denies: and rests his case on the state of matters at the time of seeking the injunction as presented to the public—who could not be expected to inquire as to the correctness of the debt, and would draw only one inference from what was to be read there.

The evidence goes to show, and it is not denied, that "George Giles, Manager," and "The B. C. Mercantile Agency," are one and the same person.

Judgment.

And it is to be remarked, and it is singular, that there is no affidavit whatever from the defendant himself, but only one from A. E. Church, as "secretary" of the alleged "Mercantile Agency," that is himself, (and this is on the second motion after the injunction), stating that he had "sent notices" to the plaintiff to call and pay the account which he "believes" were disregarded. He does not say they were delivered.

And there is also an affidavit from Thomas Shotbolt (also on the second motion, and after the injunction) of the correctness of the debt, and of its being overdue, and that he handed the amount to Giles, "with instructions to sell the amount;" but not a word of any instructions to endeavour to extract the full amount from the plaintiff by the process and threat of publication if not paid in full by a certain day—which is the real ground of the injunction, and the gravamen of the injury complained of.

It is also clear that no effort has been made to ascertain and obtain the alleged debt through the medium of the Court expressly provided by the Legislature for the collection of such debts and for enforcing the payment by the penalty of all costs in collecting them.

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Mr. Belyea, for the defendant, contended that a creditor is not bound to sue his debtor. The learned counsel did not, in view of the recent cases, dispute the jurisdiction of the Court to restrain a libel before verdict, but claimed that only applied to trade libels and where the facts in the libel were denied; and argued that this publication was not a libel: that there was the authority for the sale; there had been repeated applications for payment: that the account had never been disputed: and that the creditor had a right to deal with the account of his debtor as he would deal with a promissory note; or so long as any debt is due he could deal with it in any legal manner without any notice whatever.

Also that no inference of libel could be drawn from the fact that the credit of the debtor might be impaired: that it was the practice of "the agency" to sell accounts, after a certain time, and to offer them for sale by advertisement; and plaintiff had been notified that if he paid up his would not be sold: so that he had notice before it was given to the public; and therefore the plaintiff could not complain of the circular notice.

Judgment.

Defendant's counsel cited in support, *The Quartz Hill Gold Mining Co.* v. *Beall*, 20 Ch. D., 501; *R.* v. *Hemmings*, 4 F & F., 50; *R.* v. *Coghlan*, 4 F. & F., 316; *Bonnard* v. *Berryman*, 1891, 2 Ch. D., 269.

Mr. Walls, for the plaintiff, contended that none of the cases cited by his learned opponent applied to the facts of this case. That the general power of the Court to restrain by injunction the publication of what was injurious to the character and feelings of any person, and likely to bring him into ridicule and disrepute was (as Mr. Justice Kekewich described it) "*undoubted*," although the particular case which that learned Judge was then treating, in his opinion, did not call for its exercise; that in this case an injunction was both just and convenient. He did not deny the right of a creditor to sell a debt, if done *bona fide* and in the usual way: but that this was neither a *bona fide* nor usual mode of collecting a debt, and carried on the face of it an injurious threat, and the threatened publication had no regard to whether the alleged debt was correct or not; an injury, and a most unnecessary one, to character and reputation, was still there, and should be restrained by injunction from this Court.

As the case is one of considerable interest and affects every man in the community, for everyone must necessarily be almost daily indebted to some tradesman or other person, and so be liable to be "placarded," I have gone through the cases adduced by the defendant here at some

length, and they appear to me in several material respects to be inapplicable to the present case; which, on all the evidence, I regard as the making use of a combination of different processes of collecting debts (to each of which separately there may be no objection) in such a manner as to convey, however unintentionally, to the public the *prima facie* aspect of a libellous meaning—very injurious indeed to the reputation, feelings and financial credit of the parties affected by it: and for the purpose of extracting the payment in full of alleged debts without trial, and thereby practically to supersede the jurisdiction of the regular Courts, and that by what I cannot but regard as a system of threats of exposure.

The Quartz Hill G. Min. Co. v. *Beall*, 20 Ch. D., 501, which was a case of privileged communication between shareholders, affirmed the jurisdiction of the Court to grant an *interim* injunction to restrain a libel, inculcated caution in its exercise, and that such exercise should not (generally) be without an affidavit that the statement in the document complained of is untrue. This affidavit has already been referred to.

Here there is no privileged communication, and the correctness or incorrectness of the alleged debt—as I regard the case—is not the real question before us. It cannot at this stage be tried by affidavit. We have to deal with it as it was presented on the application for an injunction. Judgment.

Bonnard v. *Berryman*, 2 Ch. D, 1891, 269, cited in support of defendant, was a case where the right of speech was involved—a right which it is for the public interest that individuals should possess—indeed that they should exercise without impediment so long as no wrongful act is done.

On the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel.

But this was on public grounds and in the public interest; where it was important to leave free speech unfettered and a strong reason, in that case, for dealing most cautiously in granting an *interim* injunction. But here there is no such overruling reason. The public interest lies rather the other way, as this is practically a private process for superseding the public tribunal for the collection of small debts by circular and poster.

The posting itself could not be *bona fide*, or the circular would not have been first sent. On such an advertisement none would give a cent. at a sale for a black list debt. *Le jeu ne vaudrais pas la chandelle.*

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And it is a fair presumption that the defendant must have well known this beforehand.

Moreover, the present injunction could do no possible injury to the defendant in the collection of the alleged debt from a person in the position of the plaintiff.

If the defendant had threatened to sue and had sued, no possible objection could have been offered to that course.

Each injunction must depend on its own merits, *R.* v. *Hemmings*, 4 F. & F., 50. All this case showed was, that an assault to collect an acknowledged debt, through an unlawful proceeding, was not a felony. That was a criminal case, and does not apply to a case like this, where a third party intervenes with a private method peculiarly his own, not authorized by the owner of the alleged debt and which involved a *prima facie* libel.

Nor does *R.* v. *Coghlan*, 4 F. & F., 316, apply. That was another criminal matter, which is dealt with on different grounds from a civil case. It was an indictment for publishing a libel with intent to extort money. The intent decided the case. It was shown to be merely an intent to extort a statement of accounts. So the indictment failed.

Judgment.

There the parties were dealing direct with one another, and it is not libellous for one man to publish of another that he owes him money. There, too, it was all *bona fide*. It was merely an offer to sell an alleged debt, and it did not imply inability to pay it. Here it was very different. Here it was in fact, in the eyes of the public, a black list. The placard implied to any reasonable man looking at it that all ordinary efforts to obtain payment had been made and had failed. The debtor either would not or could not pay it; was either dishonest or insolvent. And this through the medium of a third party—a so-called association as a new system of debt collection in B. C. outside of the ordinary process of law.

Searles v. *Scarlett*, Times, 8 L. R., 562, quoted by defendant, is rather in favour of the plaintiff.

There the defendant published in a weekly journal a list of County Court judgments, directed to be kept by Act of Parliament, and to be open to public inspection.

In an action of libel brought by a person whose name appeared in this list as one against whom there was a judgment of £23, it appeared that a note was appended to the published list that some included in it might have been paid or settled, or have been obtained against some in a representative capacity.

An injunction was refused, as it was a privileged occasion. The note took the sting out of it. The Master of the Rolls said the question was whether the question was a privileged one: adding, "if the lists of judgments had been made by a private person, and not under Legislative authority, in his opinion the ground of privilege would not exist." And this is the case here.

Lee v. *Gibbings*, Times, 8 L. R., 4th August, 1892, p. 773, is a case which at first sight appears in favour of the defendant, but an examination and a comparison of the different circumstances of the two cases do not impress me with its applicability.

It was an action to ascertain whether when an author, *who has sold the copyright* in a work, can prevent the work from being sold by the purchaser in a condensed form, with such omissions and alterations as constituted a libel on the author.

The Court refused an *interim* injunction, on the ground that the plaintiff's remedy (if any) was an action of libel, and would not grant an injunction before the question was decided whether or not such publication constituted a libel on the plaintiff's author.

In the course of his judgment, Mr. Justice Kekewich, distinctly claiming the power in the Court to grant an interlocutory injunction in the case of a libel, said "the power of the Court to restrain a libel was undoubted," adding, "of late there has been (as far as his Lordship knew) no such thing as an injunction to restrain a libel, except in a case of a trade libel, such as *Collard* v. *Marshall*, 1892, 1 Ch. 571, and *Pink* v. *Federation of Trades and Labor Unions*, 8 Times L. R., p 711. Judgment.

With that exception (as far as his Lordship knew) the Court had not of late granted an injunction to restrain a libel before the point had been submitted to a jury; in other words, on an interlocutory application. He saw no reason for making that particular case an exception.

The reason he gave for this was not one applicable, I think, in the present case. For that was determined in the learned Judge's mind upon the balance of convenience.

There the balance of convenience was not, in his opinion, in favour of granting an injunction because if the sale of the defendant's work went on, and was injuring the plaintiff's reputation, the injury might be compensated by damages in an action for libel. It could not be said, that the sale of a few copies would place him in a worse position.

Therefore, on the balance of convenience, he did not think he ought to grant an injunction.

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In that case, although it took the shape of an action for libel, it was a disputed point as to the right of property in the book, and whether the sale of the copyright did not convey the right to sell it in a condensed form; so there was a disputed right of property to be determined. What mischief could be done to the author had already been done. The sale of a few copies, more or less, was not of sufficient importance to call for an injunction before the trial. The application was too late.

Here there was no right of property involved; the application for an injunction was, as is expected in such cases, prompt and in time to arrest the mischief at the commencement; and the balance of convenience, as will shortly more plainly appear, was in favour of the injunction.

There is a case analagous to the present one, which took place in this Court in 1881, *Muldoon* v. *Johnson*, B. C. Gazette, 1881, p. 221. There the defendant dubbed himself an association (The B. C. Trades Protection Society), with the object of collecting debts. There also the defendant had compiled and published a black list (which any one could purchase for one dollar) of persons from whom he had debts to collect, specifying names and amounts, and signed by him as secretary; but it did not appear that there was any Society registered, or, indeed, any existing, in the ordinary sense of the word. The defendant was "secretary"; he alone compiled the lists, and managed and directed sales, etc. His offices were the only "offices" of the "Society." He alone took all the purchase money for this sheet, or quarterly list. These he called "subscriptions," and a purchaser of his quarterly sheet he called a "subscribing member of the Society."

Judgment.

The defendant paid $10 into Court and filed a statement of defence, by which, and the statement of claim, the ingredients of a libel were in effect admitted. Judgment was, on motion, entered for plaintiff, with perpetual injunction and costs.

So that this was in principle a similar method of collecting accounts. There also it was stopped by injunction, and the order of the Court was not appealed.

Since the hearing of the argument herein, I have found a case still more nearly on all fours with the present one, viz., *Green* v. *Minnes, et al*, 22 O. R., p. 177, the history of which is quite instructive. There

an actual company, not one man figuring as a *quasi* company, wrote to a Mrs. Green (it reads like an old story over again):—

We must realize immediately on all accounts now in our hands, and unless yours, with Minnes and Burns, amounting to $39.45, is paid or secured at our office before the 26th inst., it will be dealt with as accompanying poster shews, and shall grace the wall of every bill-board in this city.

Respectfully yours,

THE CANADIAN COLLECTING COMPANY.

Then comes an important

P.S.—Make satisfactory arrangements for payment at our office before Sunday next, and your account will be withdrawn from the list.

A polite euphuism for the more vigorous "lifted" of the B. C. Mercantile Agency.

The description of the process adopted in the *Green* v. *Minnes* case, as given by Chief Justice Armour, fits into the present one with considerable minuteness, with this difference in the cases, viz.: That was an action for libel for a poster which had been placarded, and sanctioned and adopted by a meeting of merchants who had descended to its use. This is the case of an injunction issued in good time to prevent the plaintiff's agent being put to the expense and worry of a libel suit, and perhaps worse. "The poster," he said, "was striking in its colour and unusual in its character. It advertised accounts for sale by the company; a sale unlikely to be made by a collecting company until the means of collection had proved abortive. It did not shew to whom the accounts were due, nor on whose account they were to be sold, nor when nor where the sale was to be effected. It shewed the quality of the debtor, and the quality of the goods supplied by them.

Judgment.

"Reasonable men reading the poster would understand from it that the debtors referred to therein were persons from whom the accounts they were therein alleged to owe could not be collected by process of law, and were insolvent or dishonest debtors.

"And this poster would have the effect of bringing discredit upon the debtors mentioned therein, of lowering them in the estimation of their neighbors, and would be consequently libellous."

Capital & Counties' Bank v. *Henty*, 7 App. Cas. 741, gives as the test of the proper construction of a placard, "would reasonable men understand this poster in a libellous sense?"

Chief Justice Aarmour calls this "a very reprehensible method of collecting accounts," and distinctly intimates that in such cases the law will be administered with strictness.

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Mr. Justice Street, another Judge on that appeal, "entirely concurred in the remarks of the Chief Justice as to the reprehensible nature of the means employed by the defendants for the collection of the debts due," adding: "It was a matter of surprise to find in the evidence a statement that a number of traders and business men had deliberately resolved to descend to such a device."

The learned Judge added: "The publication complained of by the plaintiffs in that case was clearly of a character which a jury might properly hold to be libellous. It is clearly not a matter of public interest or concern, and, whether true or false, it is therefore a matter for which the defendants might be indicted."

It is here treated as a civil case.

The learned counsel for the defendant argued this case throughout as if it had been entirely disconnected from the other cases of placarded men, and from the unauthorized threatening private method adopted by the intermediary, the defendant, as a system of extorting payment. But I think, speaking for myself, it is impossible to disconnect the placard and to sever the names on the list, as Mr. Giles, in the latter part of his letter, has distinctly avowed its general application to all the cases he includes in his poster, and his object to force them and his practice by this threat of exposure to make the alleged debtors pay up those accounts, as he expressly states, "in full," without the intervention of a Court of law—a process which appears to me even likely, sooner or later, besides the injury to reputation and feeling, to provoke a breach of the peace.

Judgment.

The Legislature has provided a cheap and orderly process of speedy determination and collection of all small debts through officers paid for the purpose. If the statutory provisions to this end more or less fail in their effect, as notably in the case of the *Homestead Exemption Act* (there can be no such doubt for one moment in the plaintiff's case), the Legislature, upon proper representation, would readily amend and make it more effective, and thus do away with the temptation which leads any collecting "association" or "agency" to have recourse to such a reprehensible method of enforcing the payment of debts.

Upon a review of the whole case, I have come to the same conclusion as the learned Chief Justice; and that cannot be better put than in his words, that this poster is, at best, a demand of somebody, under the mask of the defendant, for the payment of a sum certain, under threat of what many would dread more than personal violence.

This is not the method prescribed by law for collecting debts.

Courts are maintained at the public expense, in which the justice of a claim and its amount are first to be established.

Not even then is the creditor entitled to satisfy himself by his own method.

Satisfaction is taken through an appointed officer, and by methods especially prescribed by the Legislature.

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It appears to me that this is a case in which a Court of Justice should exert the power placed in its hands by the *Judicature Act*, Con. Stat., B. C., 1888, cap. 31, sec. 14, which prescribes that "an injunction may be granted by an interlocutory order of the Supreme Court in *all* cases in which it shall appear to the Court to be just and convenient."

The Court, acting on the same principles of construction as prevailed before the *Judicature Act*, has in practice greatly extended the number of cases in which an injunction can be obtained.

In my opinion, the present is particularly one of those cases, although I have not found any closer precedent than I have given, probably because of the unusual nature of the mischief to be remedied, and the infrequency of its appearance in a civilized community, which keeps steadily in view the enforcement of law and order. Judgment.

The law can scarcely be expected to encourage a private system of collecting debts, perhaps of unlimited amount, which is calculated at once to produce a whole crop of libels and litigation and ill-blood, with its natural consequences, when all the effect desired can be obtained in a cheap, speedy, and effective way, under the ordinary law.

For the reasons I have given, I consider this is, emphatically, a case where the application of a stringent remedy which does not interfere with the ready establishment and enforcement of a debt, is both "just" and "convenient;" and, for myself, fully concur in supporting the judgment of the Chief Justice, and consider that the present appeal should be dismissed with costs.

DRAKE, J. :—

In this case the plaintiff, an employé of the Provincial Government, has obtained an injunction against the publication of a poster in which his name appears as a debtor for $9.67 ; and a threat is held out that if he does not pay the amount the account will be sold by the defendant.

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It was not attempted to be disputed that this Court has power to restrain the continued publication of a libel before trial. But the defendant's counsel contended that to advertise for sale the book Judgment.

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accounts of a trader was not libellous, as a creditor having a *prima facie* right to be paid by his debtor, and the debt being an asset of the creditor, he was justified in realizing his debts in whatever way suited him best, and the case of *R.* v. *Coghlan*, 4 F. & F., 316, was cited, where it was held by Bramwell, B., that it was not libellous to publish of another that he owed money.

But this is a different case. The defendant is not a creditor of the plaintiff. As far as appears by the affidavits filed herein, one Thomas Shotbolt gave to the defendant an account for collection against the plaintiff, and the defendant advertised this as if it was a debt owing to himself, under the name of the British Columbia Mercantile Agency. If, therefore, Mr. Shotbolt had a legal right to advertise and sell the book accounts of customers trading with him, no such right can be claimed by a stranger, unless the debt has been assigned to him. But the chief, and in fact the only, question which it is necessary to consider is: In what cases and under what restrictions will the Court exercise the extraordinary powers of restraining a libel before the fact whether or not it is a libel has been submitted to and decided by a jury, the tribunal which alone can say whether the defamatory matter complained of is a libel or not.

Judgment.

There are several cases of late years in which this subject has been considered. In the *Liverpool Household Stores Co.* v. *Smith*, 37 Ch. D., 170, it was decided by the Court of Appeal that the Court had power to restrain the publication of a trade libel, but then only in the clearest cases and where the jury, if they found the matter not libellous would have their verdict set aside as unreasonable. In *The Quartz Hill Consolidated Gold Mining Co.* v. *Beall*, 20 L. R. Ch. D., 508, the Master of the Rolls there held that, as a general rule, the plaintiff who applies for an interlocutory injunction must show the statement to be untrue. Here the plaintiff says that it is possible he is indebted to Mr. Shotbolt, but he nowhere alleges he is not indebted to the defendant, although that may be implied from the whole tenor of his affidavit. I do not think the plaintiff is called upon to make any statement as to his indebtedness to Shotbolt except in so far as he states his belief that the claim mentioned in the poster refers to a claim of Shotbolt's. But the poster, which is in these words: "The British Columbia Mercantile Agency offer the following accounts for sale, at their office, 16 Broad Street,"—(then follow a lot of names, among others the plaintiff's drug bill for $9.67)—gives no information as to there being any other person interested than the defendant under

the name of the British Columbia Mercantile Agency. In *Bonnard* v. *Perryman*, 1891, 1 Ch. Kay, L. J., at p. 285, the Court says that unless an alleged libel is untrue, it is not clear that any right has been infringed. I think that it may be considered in this case that the alleged libel is untrue. But the Court, in the case just cited, although they considered the matter complained of libellous, beyond dispute, refused to grant an injunction, considering that the effect of that libel on the reputation of the plaintiff could only be disposed of by a jury.

This case was subsequently followed in *Collard* v. *Marshall*, 1892, 1 Ch., 571-6, and in *Pink and the Federation of Trades*, 8 T. L. R., p. 711, and still later in *Lee* v. *Gibbings*, 8 T. L. R., 773, decided in August last, in which case Mr. Justice Kekewich expresses his concurrence with the first two cases cited, in which an injunction was granted, and goes on to say, "That of late years there has been no such thing as an injunction to restrain a libel, except in the case of a trade libel, until the point has been submitted to a jury, and refused the injunction asked for on that ground.

I think that as the jurisdiction we are called upon to exercise is one which was never admitted to be within the power of the Court before the *Judicature Act*, and the exercise of which may prejudice the trial of the action, as being a conclusive opinion that the matter complained of is defamatory, the power should be very sparingly exercised and limited to trade libels. If the matter complained of is defamatory, the continued publication is an aggravation of the offence and may readily be considered by the jury in the question of damages. For these reasons I regret that I cannot concur in the judgment of the learned Chief Justice, and I feel that it is very probable that the view I have taken may be incorrect. However, I think that the costs of this appeal, as well as the costs of the Court below, should be costs in the cause (this I find was the course adopted in *Bonnard* v. *Perryman*), as I do not consider the defendant's conduct commends itself to the Court.

Judgment.

Since my judgment was prepared I have been referred to the case of *Green* v. *Minnes*, 22 Ont., 177, an exactly analagous case; but this case was decided on its merits, and the question of injunction was not raised.

The Court being equally divided, the appeal was dismissed without costs.

NOTE.—In *Brown* v. *Hart*, Ch. D., decided 30th May, 1893, Stirling, J., in refusing to restrain further publication of an alleged libel by interelutory injunction, is reported to have said that the Court should not exercise the jurisdiction "unless the Judge comes to the conclusion that a jury would inevitably find that there was a libel."

CREASE, J

1892.
July 21.

C. P. N. Co.
v.
VANCOUVER.

THE CANADIAN PACIFIC NAVIGATION CO. (L'D.)
v.
THE CITY OF VANCOUVER.

Injunction—What notice of sufficient—Disobedience of—Committal—Attachment in lieu of.

Apld
Nissho (CAN) Ltd
v
Int'l. Longshoremans
etc (No 2)
54 DLR (2d) 764

A mandatory injunction required "the defendants, their officers, agents, etc., to permit all passengers upon the plaintiffs' steamers to land at the Port of Vancouver, subject only to such detention, examination and inspection as may be reasonably necessary in order to ascertain the existence among them of the disease of small-pox, or of actual danger of said passengers or crew or any of them being infected with small-pox, by reason of their or any of them having been actually exposed to contagion thereof," etc.

Notice of the effect of the amendment was telegraphed to the defendants' solicitor by his agent in Victoria, upon whom the amended order had been served.

Defendants afterwards, by their agents, met plaintiffs' steamships at the wharf at Vancouver and, without any inspection or examination of them, informed the passengers that they could land, but if they did so they would be subject to quarantine for 14 days, under the City Health By-law; and thereby prevented them from landing.

Held, 1. That defendants had sufficient notice of the terms of the injunction as amended.

2. That the conduct of defendants was a breach of the injunction, and attachment ordered to bring before the Court those proved to have been actively concerned in the breach.

Statement.

MOTION to commit Frederick Cope, Mayor, A. St. G. Hamersley, City Solicitor, and Joseph Huntley, Health Officer, of the City of Vancouver, for disobedience of a mandatory injunction issued herein on 13th July, 1892, which upon motion to dissolve was, on the 16th day of July, amended so as to read as follows:—

"That the defendants, their officers, agents, workmen and servants, do permit all passengers upon the plaintiffs' steamers to land at the port of Vancouver, subject only to such detention, examination and inspection as may be reasonably necessary in order to ascertain the existence among the passengers of the disease of small-pox, or of actual danger of the said passengers or crew, or any of them, being infected with small-pox by reason of their, or any of them, having been actually exposed to contagion thereof. And this Court doth further order that the defendants, their officers, workmen and servants be, and they are, hereby restrained from in any way interfering with or obstructing the said plaintiffs in landing the said passengers, or any of them, except only as to such of said passengers as shall be proved to be infected with the said disease of small-pox, or with respect to whom there shall be good and reasonable ground for believing that he or she has contracted the disease, or is in any way infected therewith, with liberty to all parties to apply as they may be advised."

It appeared from the affidavits that the injunction order as amended had been, on the 16th July, served upon A. E. McPhillips, who was

the agent of the defendants' solicitor in Victoria, and who appeared as counsel for them upon the motion when the amendment was made, and that he had on the same day telegraphed to the defendants' solicitor the full effect of the amended injunction.

The plaintiff filed an affidavit of George Rudlin, master of the steamer Yosemite, showing breach between 13th and 16th July of the injunction as originally framed, and that the persons proceeded against were actively concerned in the proceedings constituting the breach; and proceeding:

"10. On the 19th day of July, instant, I made a trip to Vancouver aforesaid with the said steamer Yosemite, having on board a number of passengers who desired to land at Vancouver. Before leaving for the port of Vancouver all the said passengers were examined by the Medical Health Officer at the City of Victoria and found free from disease; the certificate of the said Health Officer to that effect is marked Exhibit "A." hereto.

"11. On my arrival at the dock with the said steamer a policeman of the said city was stationed there. I said to him—'What are the orders of the day?' He said—'As usual, you will have to wait until the Doctor comes down.' About half an hour after that Huntley, the Health Officer, arrived. He came on board with the Medical Officer, into the saloon. I spoke to him and asked him if he wished to see my clean bill of health? He said—'It is not necessary.' I asked him if he wished to examine the passengers? He said—'No, no one can go ashore without going into quarantine.' Subsequently, two passengers did go ashore and I saw them taken into custody, and, as I verily believe, are now in quarantine in Vancouver. Statement.

"13. None of the passengers on any of the occasions to which I have referred have ever been examined by the Health Officer or any medical man on his behalf, and the Health Officer has never examined any of the bills of health which I have always been ready to produce to him, except on the morning of the 13th July.

"14. To the best of my knowledge and belief, on any of the occasions to which I have referred, there has not been on board the said steamer any passenger or any of the officers or crew who either were infected with small-pox or had been in any way exposed to the contagion thereof."

The motion to commit was argued before CREASE, J., on July 20th.

E. V. Bodwell, for the motion, stated that the plaintiff would be content to take an order for a writ of attachment to bring into Court the persons in contempt to answer to their contempt and all other charges that might be brought against them, in lieu of an order for their committal to be made now, citing *Daniels' Chy. Forms*, 4th Ed., p. 401, note (*b.*) Argument.

C. E. Pooley, Q. C., and *A. E. McPhillips*, for the defendants, stated that they had not had time to procure affidavits in answer to those in support of the motion.

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CREASE, J.—I will grant an adjournment until 23rd, but will require your undertaking to produce the persons appearing on the affidavit read to be in contempt, personally in Court on that day.

Pooley, Q. C.—We are not in a position to give any undertaking.

CREASE, J.—Then I will reserve judgment until to-morrow as to the order which I will make.

CREASE, J. :—

Judgment.

The Court was adjourned until to-day to enable me to satisfy myself by a quiet perusal and consideration of the law, and of the evidence brought before me yesterday for the first time in a formal shape—first, as to the certainty of a committal of a breach of the order of this Court; and, secondly, to see whether there was sufficient evidence of the connection of the parties sought to be committed with such breach, before the Court could satisfy itself of the propriety of issuing a writ of attachment against them. On both these points my opinion is clear.

There has been a deliberate and continuous contempt by some parties or other in Vancouver, of the orders of this Court, from 13th July instant to the injunction of the 16th instant, and during the pendency of that injunction down to the present time; and the evidence so far, is such as to implicate the three gentlemen charged with contempt.

Full warning was given to the defendants and the several individuals now before the Court, through their counsel and other sources, of the real state of the law bearing on the case, and against their creating, allowing or assisting in offering any impediment to trade and commerce, by interfering in any way with passengers, whether in or after landing, at the port of Vancouver, if they bring a clean bill of health (and after medical examination) do not show reasonable grounds for detention—as suffering from small-pox itself, or because they may be reasonably suspected on sufficient grounds (after such personal medical examination) of having been exposed to actual contagion; so as to make it likely the disease might be developed. Notice was given to each of the three persons alleged to be in contempt, of the motion to commit, in time to have presented themselves personally before the Court yesterday, had they been inclined to avail themselves of it.

They all or each had either seen or had sufficient notice of the several orders and of their purport or effect, or by law were sufficiently

bound not only to know their purport and effect, but also to assist and aid in carrying out the orders of the Court (*Ker on Injunctions*, p. 641, and cases there cited).

Not only must such an injunction be implicitly observed, but every diligence must be exercised to obey it to the letter.

Public warning was given, especially applicable to the defendants, and all their officers and servants, which would include these gentlemen, by the Court, that these orders must be implicitly observed so long as they exist, however erroneously or irregularly obtained.

No one can affect to treat any injunction as a nullity while it is in existence. If he wishes to get rid of it, he must have it discharged in the only way, viz., upon a proper application to the Court.

The mode of doing so is easy and swift

A man who does not obey an injunction to the letter, so long as it exists, is guilty of contempt, unless there is something to mislead upon the plain reading of the order.

This excuse the parties do not for a moment advance here, because the wording is unambiguous, and they had themselves previously assisted in its preparation.

Judgment.

It seems strange to have to set forth in these days the very A B C of the laws of injunctions: but such is the ignorance, or affected ignorance, of the law of injunctions here exhibited: so petty the pretexts put forth for their evasion in this case, that such remarks become absolutely necessary, in order that people generally may see how the highest process of their own Supreme Courts of law are evaded or set at defiance, and the necessity of applying a timely remedy.

The telegram of Mr. A. E. McPhillips to the city solicitor, Hamersley, one of the gentlemen now charged with contempt, after the motion to dissolve the injunction had been heard and refused, gave a concise account of the views of the Court as to the mode in which the injunction and the landing under it must be carried out.

If the evidence now before the Court should be sustained, that the dealing of these three parties with the injunction had been the same throughout as the evidence describes it, then there has been a continuous contempt on their part. The moment passengers landed, although with a clean bill of health (fresh from an examination by the Health Officer at Victoria), in defiance of the laws, they were at once, without medical examination—which when requested by Rudlin was refused—without any other pretext, pounced upon, arrested and kept

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in what must have been to them worse than a prison, for the space of fourteen days. And the three gentlemen alleged to have been in contempt are pointed out as having taken a prominent and active part in all these forcible proceedings.

Already, if the evidence is correct, eight persons have been so unlawfully deprived of their liberty.

It is impossible that such a state of things can be allowed to continue, unless it be also intended that disorder and anarchy should take the place of law.

It is the interest of every good citizen throughout British Columbia that this wrong should be set right, and the law of the land supported.

Judgment.

I therefore order that writs of attachment do forthwith issue to the Sheriff of New Westminster, to attach the three persons of the three gentlemen alleged to be in contempt, and to bring them before the Court here, to give them an opportunity of answering to their contempt, and to whatever charges may be brought against them, and to abide by such orders as the Court may make.

Order for writs of attachment accordingly.

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MORE *et al.* v. PATERSON *et al.*

Practice—Writ of summons—Sufficiency of special endorsement—Obtaining judgment under Order XIV. after amendment of—Time.

In an action to recover the amount of a promissory note, presentment for payment, dishonour, and notice thereof to the endorser must be stated in the special endorsement of the writ to warrant an order for judgment against the endorser, under Order XIV., but need not be alleged to warrant judgment against the maker.

When an order amending the special endorsement upon a writ of summons is made, the writ with the new special endorsement must be re-served upon every defendant affected by the amendment. If such defendant has already appeared such appearance stands as an appearance to the amended writ (following *Paxton* v. *Baird*, 1893, 1 Q. B. 139), and the plaintiff can apply for judgment under Order XIV., but judgment cannot be directed to be entered against him before the lapse of 8 days from the service of the amended writ.

Statement.

APPEAL from an order for judgment under Order XIV. The action was commenced on the 5th November, 1892, by the

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plaintiff, the holder of a protested promissory note, against Paterson, the maker, and Smith and Clark, the endorsers. The writ was specially endorsed to recover $317.40, being the amount of the note, setting it out, interest, and the cost of protest. On 14th November appearances were entered on behalf of all the defendants. On 16th November, after due notice, plaintiff moved for leave to sign judgment against all defendants, under Order XIV. DRAKE, J., before whom the motion was made, gave leave as against the maker Paterson, but refused it as against Smith and Clark, the endorsers, on the ground that there was no allegation in the special endorsement of the writ that the note had been duly presented for payment. On 21st November the plaintiff obtained an order for leave to amend the special endorsement by alleging presentment, dishonour, and proper notice thereof to the endorsers, and on the same day served the solicitors who had appeared for the endorsers with the amended writ, and also with a fresh summons returnable on the 24th November, for leave to sign final judgment against the endorsers, the defendants Smith and Clark, under Order XIV. Defendants Smith and Clark had not entered a new appearance to the amended writ. On 24th November this summons was made absolute by order of Mr. Justice CREASE.

The defendant Smith appealed from this order to the Divisional Court, upon the ground that judgment could not be ordered to be signed against them until after the lapse of eight days from the service of the writ as amended, *i. e.*, the same time as they had to appear to to the writ as originally served upon them.

The appeal was argued before Sir M. B. BEGBIE, C. J., and DRAKE, J., on December 6th.

H. D. Helmcken for the appeal.

Argument.

An amended writ must be served in the same way as an original writ—The *Cassiopeia*, 4 P. D., 188; *Elliott* v. *Roberts*, 36 Solrs. Jour. 92; *Gurney* v. *Small*, 1891, 2 Q. B. 584. Defendants have the same time to appear to an amended writ as they had to the original writ. If a fresh appearance to the amended writ is not necessary, the same time as that for appearance must elapse after the service of the amended writ before judgment can be ordered to be signed thereon.

A. E. McPhillips for the plaintff, contra.

The amendment of the special endorsement was not such as to make any new case against defendant Smith, but was a formal amendment

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stating with greater certainty the same claim as that which was set out on the original endorsement, though not then set out with sufficient particularity to enable judgment to be obtained under Order XIV. The defendant Smith was apprized by the original endorsement that he was sued as endorser of the note, and that it had been protested for non-payment, and the protest fee of notifying him, etc., was claimed. The amendment was therefore a mere re-statement of the original endorsement with greater particularity—*Satchwell* v. *Clarke*, 66, L. T. N. S. 641. [BEGBIE, C. J.:—Nobody attacks the propriety of the amendments. They may be, and probably are, most proper. But they either make a new case against the defendant Smith or they do not. If by these amendments a new case is made out, why should not the defendant have eight days to consider whether he will appear, *i. e.*, resist the claim as then first advanced?] The appearance of the defendants, Smith and Clark, stood as an appearance to the writ as amended. Service of an amended writ on the solicitors who have appeared to the original writ is sufficient. Personal service was unnecessary—*In re Hartley Nuttall* v. *Whittaker*, 1891, 2 Ch. 121. There is no authority requiring the lapse of a further eight days from the date of the amendment before judgment can be ordered, nor is there any reason for it, unless the amendment advances a new claim, and then the question of time can be dealt with, if asked for, on the summons to sign judgment on the amended writ. It never was held that a new appearance had to be entered to an amended writ. The original appearance stands as an appearance to the writ as amended, and unless otherwise provided, or some further time before which no further step may be taken is fixed, by the amending order, the amendment relates back to the time of the original service of the writ. No contrary provision appears in the Rules of Court.

Argument.

H. D. Helmcken in reply.

DRAKE, J.:—

Judgment.

Three questions arise on this appeal, viz.:—

First—Is a defendant bound to enter a second appearance to an amended writ when the writ is changed from an ordinary writ to a specially endorsed writ?

Secondly—If no such appearance is necessary, what time, if any, has the defendant before an application to enter judgment under Order XIV. can be made?

Thirdly—Can a judgment be entered upon a writ not specially endorsed when appearance was entered, but which is subsequently converted into a special endorsed writ.

Order XIV. only authorizes judgment when the defendant has appeared to a writ specially endorsed under Rule 16.

If the writ is subsequently amended so as to make it a specially endorsed writ after order for judgment has been refused, the writ, in my opinion, has to be re-served, and then a fresh summons under Order XIV. can be taken out.

This was the mode adopted in *Paxton* v. *Baird*, decided in the Divisional Court on 24th November last—W. N. 10 Dec., 1892—1893, 1 Q. B. 139—when the Court decided no fresh appearance was necessary.

In the case of the *Cassiopeia*, 4 P. D. 188, it was held by the Court of Appeal that when a writ was amended by the addition of a plaintiff, and by an alteration in the endorsement, it had to be served in the same way as if it had been an original writ, and, if the defendant had not already appeared, he had eight days to appear after such re-service. Judgment.

In the case before us the judgment was irregularly obtained. The writ was amended after appearance and after judgment under Order XIV. was refused, and the amended writ was served on the defendant's solicitor on 21st November, and a summons taken out the same day for judgment under Order XIV., returnable on 24th November. The defendant did not appear on the summons, and leave was given to sign judgment against him. In the present case the defendant has the same time after service of the amended writ as if he had not appeared before proceedings under Order XIV. can be enforced against him.

The judgment must be set aside with costs.

The Chief Justice concurred.

Appeal allowed.

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Affirmed
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THE CANADIAN PACIFIC RAILWAY COMPANY
v.
THE CITY OF VANCOUVER.

Foreshore—Crown grant of to take, hold, and use for specific purpose—Construction of words—Public way—Dedication—Trespass—Injunction—Parties.

In 1881, by letters patent under the great seal, and issued pursuant to Statute, of Canada, 49 Vict., cap. 1, sec. 18A, and having, by sec. 2, the force of an Act of Parliament, plaintiffs were granted the right to "take, use, and hold the beach and land below high water mark in any * * navigable water, gulf, or sea * * to such extent as shall be required by the Company for its railway and other works, as shall be exhibited upon a map or plan thereof deposited in the office of the Minister of Railways."

In November, 1885, plaintiffs deposited a plan of the townsite of Vancouver and made sales of lots by it, such plan showing a street, Gore Avenue, opening at right angles upon the foreshore of Vancouver Harbour at the point in question.

In March, 1886, plaintiffs deposited in the office of the Minister of Railways a plan exhibiting that they required for their railway and works all the land below high water mark along the shore line at the point in question; and they afterwards constructed their line of railway upon an embankment along such foreshore about half way between high and low water mark in such manner as to cut off public access to the sea by way of the street.

In May, 1892, defendants proposed to run Gore Avenue across the plaintiffs' railway embankment and to continue the street as a wharf to deep water, and for that purpose commenced an embankment to run across the foreshore and plaintiffs' embankment.

Plaintiffs thereupon obtained an injunction restraining such proceeding.

Upon motion after the trial for judgment.

Held, per McCREIGHT, J., dissolving the injunction and dismissing the action :—

1. That the registration of their townsite plan in November, 1885, operated as a dedication by plaintiffs of a public way over the forshore from the foot of Gore Avenue, shown as opening upon it, and as an estoppel against their setting up their subsequently acquired rights over the foreshore against such public right of way.

2. That if plaintiffs, in 1886, acquired any title to the foreshore inconsistent with such public right of way, such title fed the estoppel.

3. A public right of way is extinguished by Act of Parliament only by express words or where it clearly authorizes the doing of a thing which is physically inconsistent with the continuance of such right, and sec. 18A, *supra*, does not do so.

4. The Crown was a necessary party to the action.

Upon appeal to the Full Court—

Held, per BEGBIE, C.J., (WALKEM and DRAKE, JJ., concurring), over-ruling McCREIGHT, J., giving judgment for plaintiffs, and reinstating and continuing the the injunction :—

1. The plaintiffs' right to occupy the foreshore under sec. 18A, *supra*, was exclusive.
2. There was no dedication by plaintiffs by the registration of their map of 1885, as there can be no dedication except by owners of the soil.
3. There is no power of dedication where there is no power to alienate.

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MOTION FOR JUDGMENT.

THE action, which was tried before McCreight, J., without a jury, was for an injunction to restrain the defendants from proceeding with the construction of a certain embankment by which they proposed to extend Gore Avenue, a street in Vancouver abutting at right angles upon the foreshore of Burrard Inlet, to the sea at deep water, by carrying it across the foreshore, and upon and across the plaintiffs' line of railway, which ran upon an embankment along the shore line, about half way between high and low water mark.

An interlocutory injunction, until the hearing, had been granted by Mr. Justice WALKEM.

The material allegations in the Statement of Claim, which were supported by the evidence, were :— Statement.

1. The plaintiffs are a Railway Company, duly incorporated, etc., and the defendants are duly incorporated as the City of Vancouver.

2. Before the admission of British Columbia into confederation, there was a public harbour on Burrard Inlet, at the portion of the foreshore in paragraph 4 mentioned, to which ships resorted for the purposes of commerce.

3. The said harbour has been and is now immediately in front of the said city, and since its incorporation ships on the said harbour resorted to and now resort to the said city for the purpose of commerce.

4. The portion of foreshore or beach of Burrard Inlet lying south of the track of the plaintiffs' railway and opposite the north end of Gore Avenue, in the said city, always formed and still forms part of the beach and land below high water mark in said Inlet, and was until acquired by plaintiffs owned by the Crown.

5. The plaintiffs, by letters patent, dated 16th February, 1881, were authorized to lay out, construct, acquire, equip, maintain, and work a continuous railway from, etc., to Port Moody, in this Province, and to lay out, construct, acquire, equip, maintain, and work branch lines of railway from any point or points along the main line of railway to any point or points within the Dominion of Canada; and were given

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the right (*a*) to take, use, and hold the beach and land below high water mark, etc. (following the words of the Statute).

6. In the year 1884 the said Railway was opened for traffic to Port Moody, and worked and operated by plaintiffs.

7. In the early part of the year 1886 the plaintiffs determined to continue their railway down Burrard Inlet, on the south side thereof, to and beyond the said portion of foreshore in paragraph 4 mentioned, to the centre of the frontage of the present City of Vancouver, and for that purpose to take, use, and hold the said portion of the foreshore in paragraph 4 mentioned, under the authority of the said letters patent, and cause a map or plan to be prepared upon which it was exhibited, that they would require the whole of the said portion for their railway, etc., and the plaintiffs caused the said plan to be deposited in the office of the Minister of Railways on the 31st day of March, A. D. 1886.

Statement.

8. Afterwards the plaintiffs constructed and continued their railway down Burrard Inlet over the said portion of foreshore to the centre of the frontage of the said City of Vancouver, where they erected extensive docks, warehouses and stations, and worked the said extension as part of their main line of railway, and are now in possession of the said portion of the foreshore which is required by the plaintiffs for their railway station, yards, docks, etc.

9. On or about the 10th day of May, 1892, the defendants broke and entered into and upon the said portion of the foreshore, and constructed thereon an embankment, etc.

The plaintiffs prayed:—

1. $5,000 damages.

2. That defendants be ordered to forthwith remove the said embankment.

3. An injunction restraining the defendants from repeating the erection of said embankment.

The material allegations in the Statement of Defence, which were proved at the trial, were:

NOTE (*a*)—Can. Stat. 44 Vic. (1881), cap. 1, sec. 18*a*. The Company shall have the right to take, use, and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the Crown, and shall not be required by the Crown, to such extent as shall be required by the Company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways.

That a plan was registered by the plaintiffs in the Land Registry Office, New Westminster District (in November, 1885), showing the said Gore Avenue as a public street down to high water mark, and that the plaintiffs and others at the time of so registering as aforesaid owned certain lots of land in the neighbourhood of Gore Avenue, and have, since the date of so registering, caused a number of said lots to be sold.

It also alleged that the portion of the foreshore in question forms part of Gore Avenue, the same being a public street in the City of Vancouver and used by the public as a highway and means of passing to and fro from the waters of Burrard Inlet to the said city; and that the alleged act of trespass was committed in the exercise of defendants' right upon the said premises, and that the public are entitled to a right of way over the premises as a way of necessity.

The evidence given at the trial sufficiently appears from the judgment of McCREIGHT, J., upon the motion for judgment, and of SIR MATTHEW B. BEGBIE, C. J., upon the appeal therefrom to the Full Court.

A. N. Richards, Q. C., for the plaintiffs.

A. St. G. Hamersley for the defendants.

McCREIGHT, J.:—

Judgment.

In this case the plaintiffs have obtained an interlocutory injunction to restrain the defendants from constructing an embankment of stone and earth in continuation of Gore Avenue in Vancouver on to the railroad track of the Company, such embankment being intended to facilitate the crossing of the Canadian Pacific Railroad track so as to obtain access to the harbour, but not so far as appears to obstruct railroad traffic more than absolutely required for the purpose of crossing, or more than usual under similar circumstances at other crossings; and the cause came on to be heard before me, the object of the plaintiffs being to turn the interlocutory into a perpetual injunction. In November, 1885, the Company deposited in the Land Registry Office a map of the townsite shewing Gore Avenue, and, at all events, one other street, Heatley Street, extending to the foreshore of the harbour, *i. e.*, Coal Harbour. There was a red line on the map shewing the intended track of the Company crossing the line of Gore Avenue at a point beyond the foreshore and the line of Heatley Street before such street reached the foreshore. Several sales have been made by the Company according to this map, and it was agreed that they at

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one time owned one-third of all lots covered by such map, or more, including some in the neighbourhood of Gore Avenue. It appeared from the admiralty map that Coal Harbour, extending from the Hastings Mill site to Brockton Point, as well as the intervening water, had been a public harbour for many years prior to 1885. It appeared to me during the argument that the deposit of the map in November, 1885, coupled with the surrounding circumstances, operated as a dedication by the Company of streets marked thereon as produced to the foreshore and to be used in connection with the use of the harbour for purposes of commerce, trade intercourse, and fishing. The right of the inhabitants to make use of the harbour for the above purposes is referred to by the Judges in *Blundell* v. *Catterall*, 5 B. & Ald. at pp. 290, 293, 294, 295, 298, 301, 302, 304, etc. It is evident that, had the map indicated a total absence of communication between these streets and the water so that the Company might at their option entirely stop the passage to the harbour, their sales of lots would have been seriously prejudiced, and it appears to me that there was substantially an undertaking by the deposit of the map, etc., on their part that they should not stop such access to and fro *by acquirement of the foreshore from the Crown or otherwise.* It seems to me that they were estopped from setting up such adverse rights, and that if they acquired the land marked red on the map deposited with the Deputy Minister of Railroads *on March, 1886*, by virtue of sec. 18 of their Act passed in 1881, or any interest in the land, such interest, as the expression is, fed the estoppel, as to which see the judgment of the Court in *Doe dem. Chistmas* v. *Oliver*, 2 Smith's Leading Cases, 9th Ed., p. 803, and their interest is accordingly subject to such rights of the inhabitants. In addition to this there are other grave difficulties in the way of the success of the plaintiffs. If the Company intended by the deposit of the map of March, 1886, to cut off all access to the harbour across the piece of ground or foreshore colored red thereon they should have given notice to parties interested in disputing such a claim; judgment and rights, or supposed rights, acquired in the absence of such notice, if not absolutely worthless, are certainly such as a Court will not enforce by injunction. The authorities on this point are numerous—*see* especially *Wood* v. *Woad*, L. R. 9 Ex., at pp. 196 and 197, and *Smith* v. *The Queen*, L. R. 3 App. Cas., at pp. 624 and 625. The principle is one of common sense, that a man shall not lose his rights any more than he shall suffer punishment without being heard.

Judgment.

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Again, the language of sec. 18A of the Act of 1881, partly set out hereafter, by no means warrants the construction contended for, namely, that it enables the Company to take the foreshore regardless of the rights of the inhabitants and their claim to have uninterrupted access to the harbour, especially, if by dedication or otherwise, they have recognized such rights. In *Maxwell on Statutes*, 1st Ed., p. 184, I find the following under the title: "Construction against impairing obligations or permitting advantage from one's own wrong."

"On the general principle of avoiding injustice and absurdity any construction (of a statute) would be rejected if escape from it were possible which enabled a person to defeat a Statute or impair the obligation of his contract by his own act or otherwise to profit by his own wrong." I quote this passage because it was approved and adopted in full by Lord Esher, M. R., in *Gowan* v. *Wright*, 18 Q. B. D. (C. A.), at p. 204. Again in *Wilberforce on the construction of Statutes*, at pp. 47 and 48, we find the following: "Public or private rights cannot be affected in the absence of express words or necessary implication: a public right of way may indeed be extinguished by an Act of Parliament, but only when the Legislature clearly and distinctly authorizes the doing of a thing which is physically inconsistent with the continuance of such a right." One seeks in vain for anything of this kind in sec. 18A: "The Company shall have the right to take, use," etc.

Judgment.

Again, it cannot be contended, I think, from the words of sec. 18A of the Act of 1881—"The Company shall have the right to take, use, and hold the beach and land below high water, etc., in so far as the same shall be vested in the Crown and shall not be required by the Crown," etc.—that the Company acquired by deposit of the map of March, 1886, the fee simple, either at law or in equity, in the piece of foreshore coloured red thereon, especially regardless of public easement like that of access to a harbour. Lawyers would not, I think, use such language for the purpose of conveying a fee. Many clauses of the statutory contract between the Dominion Government and the Company contained in the schedule to the Act, *e. g.*, clauses 10, 11, 14, 16, 18, 20, and 41, presuppose the issue of Crown grants or patents to the Company, and comparison of them with sec. 18A seems to shew that the Company, if they claimed to stop up access to the harbour, should have obtained a patent from the Crown, though language used by the Judges in the case I referred to of *Blundell* v. *Catterall* 5 B. & & Ald. (*see* especially p. 304), makes it questionable whether even the

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Crown could legally do so. Moreover, care probably would be taken in the frame of a patent to provide for necessary access to the harbour, or at least there would be no attempt to control it, and this brings me to a practical difficulty in the way of the plaintiffs' case, namely, that prior to the *Judicature Acts* they must have failed in this action for not joining the Crown as a party, both at law and in equity, from want of the legal estate (and, I am disposed to think, also from want of even the equitable fee), and a long list of cases under the *Judicature Acts* shew that no difference has been made by them in jurisdiction but only in procedure. I may refer to *North London Railway Co.* v. *Great Northern Railway Co.*, 11 Q. B. D. (C. A.) 30, at pp. 39 and 40 (bearing in mind that the order I am asked to make is final—not interlocutory), and *Joseph* v. *Lyons*, 15 Q. B. D. (C. A.), at pp. 280, 285, 286, 287, 288, where it was held that those Acts had not abolished the distinction between legal and equitable interests and that they merely enabled the Court to administer legal and equitable remedies.

Judgment.

The latest case of which I am aware on the subject is *Stumore* v. *Campbell & Co.*, 1892, 1 Q. B. D. (C. A.) 314, where it was pointed out again that the *Judicature Acts* did not alter the rights of parties, but only affected procedure—*see* at pages 316 and 318.

It is questionable whether the Crown would allow its name to be used under such circumstances, especially considering the length of time that Coal Harbour had been recognized as a harbour by the authorities.

I think the injunction, though it might have been "just and convenient" as an interlocutory proceeding at the time it was granted (*see* per Cotton, L. J., *North London Railway Co.* v. *Great Northern Railway Co.*, 11 Q. B. D. (C. A.) at pp. 30, 39 and 40, before referred to), cannot be continued at the hearing of the cause. "There being no legal right" (*see* by the same Lord Justice in the same case at p. 40) "which, independently of the *Judicature Act*, was capable of being enforced either at law or in equity."

And I think plaintiffs have failed, and that my judgment must be in favour of the defendants—costs, as usual to follow the event.

Judgment for defendants.

The plaintiffs appealed to the Full Court, and the appeal was argued before SIR MATTHEW B. BEGBIE, C. J., WALKEM and DRAKE, JJ., on 12th December, 1892.

A. N. Richards, Q. C., and *H. D. Helmcken* for the appeal.

The construction of the portion of the plaintiffs' railway in question was within its original chartered rights—*C. P. R.* v. *Major*, 13 S. C. R., 233—as confirmed by 50 and 51 Vic. (Can.), cap. 56, sec. 5 (1887).

The evidence shows that Burrard Inlet was a public harbour at the time of Confederation. As such, by section 108 of the *B. N. A. Act*, it vested in the Crown, in the right of Canada, and the bed or soil of the Harbour, including its foreshore, and all proprietory as well as prerogative rights in and over it, thereby became the property of the Dominion of Canada—per Strong, J., *Holman* v. *Green*, 6 S. C. R., 707, at pp. 717-19; *The Queddy Driving Boom Co.* v. *Davidson*, 10 S. C. R., 222; *see* also, per Drake, J., in *C. P. R* v. *Vernon*, B. C. Rep., date 10th November, 1891. The Dominion Parliament had full power to grant exclusive or any lesser rights over it, either including the fee or not, and to extinguish all inconsistent public easements. The word "take," means take from the land owner that which he has got, that is, his title—*Spencer* v. *Metropolitan Board of Works*, 22 Ch. D., 142; 47 L. T., N. S., 459—per Jessel, M. R., at p. 465. The Statute 49 Vict. (Can.), cap. 1, sec. 18A, upon the filing by plaintiffs, in March, 1886, of their plan of the portions of the foreshore required by them for the Railway, with the Minister of Public Works, vested in the Company the absolute right to hold the lands so exhibited, to the exclusion of all other rights and franchises, public or private, the exercise of which would interfere with the requirements of the railway and its works. The Railway Company is made the judge of its own requirements, and to the extent which its necessities and convenience demand, it is entitled to hold, to the exclusion of all others, the lands exhibited on the plan. The construction by defendants of the roadway across the foreshore required by the railway for its works, and across the plaintiffs' line at a level, interfering with it and all future works and parallel lines of railway along the foreshore, if submitted to, would seriously affect the working and be inconsistent with the fair and legitimate requirements of the railway in regard to the premises. At all events, in order to obtain the right to cross the plaintiffs' line, the defendants should have applied to the Railway Committee of the Privy Council of Canada, under 51 Vic. (Can.), cap. 29, sections 11 and 14. The true construction of the grant is, that the Company are entitled to take, use, and hold the lands as their own, to the extent and as long as required by their railway. They have everything except the right of alienation. The registration of the townsite plan, in 1885, did not

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operate as a dedication, as suggested. Dedication is a question of fact, and it must be by the owner of the fee—*Wood* v. *Veal*, 5 B. & Ald., 454; *Angell on Highways*, 3rd Ed., ss. 132-4. There must be an intention to dedicate—*Poole* v. *Huskisson*, 11 M. & W., 827; *Elliott on Streets*, p. 120; *Reg.* v. *Spence*, 11 U. C. Q. B., 31, Draper, C. J., at p. 44. A Railway Company cannot make a grant inconsistent with the limitations of its charter, and cannot grant a right of way over land required by the company—*Mulliner* v. *Midland Ry. Co.*, 11 Ch. D., 611; *Pratt* v. *G. T. R.*, 8 Ont. R., 499. The extent of dedication by plan is to be determined by a consideration of the whole instrument, since the chief object is to ascertain the intention of the donor—*Elliott on Streets*, p. 112. The registration of a plan, showing a street and sale of lots thereby, is not necessarily a dedication of the street—*Re Morton* v. *Corporation of St. Thomas*, 6 Ont. App., 323. The Company are not bound by the act of their Engineer or Surveyor—*Schliehauf* v. *Can. Southern Ry.*, 28 Grant, 236. There can be no dedication where there is no power to alienate.

Argument.

The registration of the plan cannot have constituted an estoppel against the plaintiffs meeting the subsequently arising requirements of their railway. Estoppel by representation is only as to a fact in existence at the time, not as to something yet to come, or as to a matter of future intention—*Citizens Bank of Louisiana* v. *First National Bank of New Orleans*, 43 L. J. Ch., 269.

The common law right of the public of access to the foreshore operated so long as Parliament had not appropriated and granted, as it did, the exclusive possession to the plaintiffs, in so far as required by them. The public right of access never included the power to make erections and obstructions on the foreshore such as is here objected to, or even a right of way for vehicles over it—*Blundell* v. *Catterall*, 5 Barn & Ald, 267. The right of the public consists of navigation, access, and right of fishery—*Moore on Foreshore*, p. 654. The Crown is not a necessary party. The assent of the Crown is presumed, from user—*Attorney-General* v. *Midland Ry.*, 3 Ont. Rep., 511. The defendants were mere wrongdoers and lawful possession was sufficient as against them—*Booth* v. *Rutte*, 15 App. Cas. 188. The plaintiffs rely entirely on their own rights and not on those of the Crown or of the public. If the defendants, pretending to rely on the rights of the public, were plaintiffs seeking to enforce them by action, the Crown, by the Attorney-General, would be a necessary party to their action, but it is not here a proper party.

A. St. G. Hamersley, contra.

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Assuming that the property in the soil of the foreshore was in the Dominion of Canada, prior to the statutory grant, the whole public had a right to an easement of free access over it for the use of wharves and purposes of shipping and navigation, and the right of the Crown was subject thereto, and held to public uses to that extent—*Moore on Foreshore*, 669, note (*h*); *Gann* v. *Free Fishers of Whitstable Co.*, 11 H. of L., cas. 192; *Mayor of Colchester* v. *Brooke*, 7 Q. B., 339. The jurisdiction of permitting and regulating erections upon the foreshore by private persons for the public convenience, and the granting of rights therein to that end, was admittedly in the Dominion of Canada, but the doctrine of the infallible justice of the Crown is against the destruction of the public right of way. A grant by the Crown of the soil of the foreshore, in fee, to a private person is subject to the right of the public to pass over the water and land to it—*Atty.-Gen.* v. *Burridge*, 10 Price, 350, and *see* per *Henry J.*, in *Holman* v. *Green*, supra, at p. 772. At all events, the statutory grant must be strictly construed in favour of the continuance of the public right of access to the foreshore. There is no derogation from such an existing right except by express words—*Endlich (Maxwell) on Stats.*, p. 94. We do not contend that we have a right to interfere with the working of the railway, but the evidence shows that the continuance of the street across the railway would not constitute such an interference as is inconsistent with the enjoyment by the Company of the use of the foreshore to the extent contemplated by the grant. If the grant is construed to give exclusive occupation and enjoyment of the foreshore, then the public are as much cut off from the sea as if a high wall were erected all along the sea line. [BEGBIE, C. J.:—Have the public a right of way through a private dock warehouse to get to the sea?] We say that the right of user was given to the C. P. R., subject to the common law right of access of the public. [DRAKE, J.:—The C. P. R. are not trespassers on this foreshore—you are.] Not as long as no injury is done to them. [WALKEM, J.:—The C. P. R. have an exclusive user, they could put a fence round the foreshore if necessary.] We submit not. The grant must be given a narrow construction, with no greater derogation of public right than is necessitated, in the strict sense, by the purposes of the railway. If it had been intended to grant the fee, or the rights of an owner in fee, to the Company, provision was made for such

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a grant by clause 10 of the contract in the schedule to the Act, 44 Vic. (Can.), Cap. 1. (*a*.)

For the purpose of construction of the grant, surrounding clauses must be looked at—*Walsh* v. *Trevanion*, 19 L. J. Q. B., 458.

On the question of dedication it was not contended below, and we do not contend here, that any part of the foreshore was dedicated by the registration of the townsite plan in 1885, but that, since that plan shewed access from the foot of the street on to the foreshore, and thence by public right of way over the foreshore to the sea, the plaintiffs are estopped from setting up any after acquired exclusive grant of the foreshore against the continuance of the right of way indicated. There was no practical inconvenience or interference with the operation of the railway by what defendants were doing—See *Wells* v. *Ody*, 7 C. & P., 410. As to prospective user, see *Blanchard* v. *Brydges*, 4 A. & E., 176.

Argument.

A. N. Richards, Q. C., in reply :—Whether a Crown grant, by patent, of the foreshore, would be held to be subject, by implication, to the public right of access, or not, Parliament had a clear right to extinguish it, and the only question is one of construction of the words of the Act, and whether what the defendants propose to do conflicts with the holding and "use of the beach, etc., to such extent as required by the Company for its railway and other works," and we say it clearly does.

Judgment.

The judgment of the Court was given by SIR MATTHEW B. BEGBIE, C. J.:—

But for the fact that judgment in the Court below has been given for the defendants, I should have thought that this was a remarkably clear case. By the Statute of Canada of 1881, chap. 1, sec. 18A (the charter of the Company), power is given to take, use, and hold the foreshore of any navigable waters of the Dominion to such extent as shall be required by the Company for their railway and other works, saving the rights of the Crown. This does not apply to any foreshores east of Nipissing, but does extend over all the undertaking in B. C., including, of course the line and embankment across the foot of Gore

NOTE (*a*.)—"10. In further consideration of the premises the Government shall also grant to the Company the lands required for the road-bed of the railway, and for its stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards, and other appurtenances required for the convenient and effectual construction and working of the railway in so far as such land shall be vested in the Government."

Avenue. By sec. 5 of the Statute 1885, chap. 56, the then existing location of the Company's line, which is the same as at present, is ratified and confirmed as part of the undertaking. This clause was in conformity with the suggestion made by myself in the course of litigation in which the Company had become involved in 1886. The Company, therefore, have, by the combined force of these two Statutes, power to take, use, and hold their present line, and probably to erect on the adjoining foreshores any works, sidings, sheds, or warehouses which may be found necessary. This last point, however, is not before us, and I only mention it because it certainly seems a power contemplated by their charter of 1881 and which would be greatly obstructed if the defendants' views are carried out. Their line is now carried on an embankment along the foreshore, and I cannot conceive anything more clear than the right of the Company to hold it and use it. And I apprehend that this must be an exclusive right. Even rights of way, such as are alleged by the defendants to exist in all Her Majesty's subjects, in and over and across every foreshore, are taken away by such a direct grant from the Legislature.

The plaintiffs must recover by the strength of their own title, not by the weakness of their adversaries, and it is scarcely worth while to examine the extraordinary nature of the defendants' arguments in favour of their own alleged rights. They assume to represent the public, but this is an entire mistake; they cannot do so; they are a corporation, like the plaintiffs, probably with a less numerous and less cosmopolitan constituency; but each is now contending solely for its own advantage. It is only the Crown, as represented by the Attorney-General, who can pretend to safeguard the rights of the public. Their next misapprehension is that because the public generally have certain rights of way, *i. e.*, of access upon and across foreshores, therefore any individual, and therefore they themselves, may erect on the foreshores such works as they conceive desirable: and they so justify their projected continuation of Gore Avenue. But if every person or body politic has this right and insists on exerting it, irrespective of what anybody else has done, or may do, in the exercise of his own supposed right, it is obvious that every foreshore must soon become a chaos, and every man's rights, as advanced by the defendants, would be inconsistent with everybody else's rights, and nobody would have any rights, properly so called, at all. Then, beyond all this, these defendants assert a right and a purpose to carry their own embankment across the plaintiffs' embankment (it is true, at the same level),

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not only as far as low water mark, the limit of the foreshore, but "to deep water." Whatever that may mean, it includes a claim to extend Gore Avenue for some distance beyond the foreshore, a right which is quite inconsistent with any authorities quoted by their counsel. And yet without such a further extension their present works seem quite purposeless, except for obstruction to the Company.

Nor is the proposition of the defendants less erroneous that the Company have dedicated, as and for a public thoroughfare, the foreshore thus reclaimed by them and the embankment on which their line is laid. It was and is quite impossible for the Company to effect any such dedication. That can only be done by the owner of the soil in fee simple, or by the combined act of several owners, if these be tenant for life and reversioner. It is to be noticed that the Statute of 1881, the charter of the Company, gives them no estate in the soil, nothing that they can alienate—nothing, therefore, that they can dedicate; but only empowers them to "take, hold, and use" the soil, and that strictly for the purposes of their undertaking. The rights of the Crown are reserved. Allowing the railway to be a highway, it is only a modified highway, giving the public a right to use it for purposes indicated in and consistent with the charter, and for no other. (See *Harrison* v. *Duke of Portland*, before the Court of Appeal, on the 3rd December last, overruling and correcting Lord Coleridge's views at *nisi prius* according to all the cases there cited, from *Doraston* v. *Payne*, 2 H. B. C., 527, down to *Reg.* v. *Pratt*, 4 E. & B., 860.) It would clearly interfere materially with the use of the line as a railway if the whole general population had a right to use the embankment in any way they thought fit. And it is necessary to consider that this railway, though in one sense it is merely a dividend earning adventure of private interest to the Company's shareholders, is yet, at the same time, a great national undertaking—I had almost said an Imperial undertaking: that it is as yet only in its infancy; that it may at no distant period become expedient, as commerce extends, to have sidings, duplicate lines of rails, and wharves and warehouses in connection with the present line, upon this very foreshore; which, indeed, seems to be distinctly contemplated by the clause in the Company's charter already quoted (sec. 18A). And in the exercise of their powers under that clause they would find themselves extremely embarrassed if it were now to be held that the Corporation had any such rights as are now claimed by them.

Judgment.

A great deal of all this is at present, however, not ground for our decision, although the weakness of the defendants' contention greatly strengthens the clear nature of the plaintiffs' case, which is this:— We find the plaintiffs in possession of certain works and constructions according to powers granted to them by one statute, and on a line ratified and confirmed to them by another. All we have to do is to declare what we take to be the clear meaning of the two statutes. The whole of those constructions by the Company, not the surface merely, on which the sleepers and metals are laid, but the whole embankment on which they rest, and the sole right to use the foreshore as a foundation, must be theirs; and all interference with it must be prevented. The Company are responsible for the maintenance of their permanent way, just as much as for the safety of their rolling stock. How could this be enforced against them if everybody is to be permitted to interfere with these permanent works. The materials which the defendants, as we are informed, have placed against that embankment and upon its slopes may be such as the Company very reasonably object to. The defendants must remove what they have wrongfully placed there, if the Company think fit to insist on its removal, and there will be a mandatory injunction to that effect. It is to be hoped that the Company will not so insist, unless it be found from the nature of the material or otherwise, that there is some danger thereby caused to their permanent way. If the defendants' embankment in extension of Gore street on to the foreshore enable cattle or strangers to have undue access to the Company's line, that may perhaps be prevented by fencing. The Company are, at any rate in our opinion, entitled to protection satisfactory to themselves against any risk of that sort. As to the actual appeal, it will be allowed with costs here and in the Court below with an inhibitory injunction as prayed. An order will be drawn up in accordance with these views.

Judgment.

WALKEM, J., and DRAKE, J., concurred.

Appeal allowed. Judgment entered for plaintiff, reinstating and making perpetual the injunction prayed for.

Re WING KEE.

BEGBIE, C. J.
Jan. 1893.

Re
WING KEE.

Sanitary By-law—Over-crowding—"Suffering to be occupied"—Proof of knowledge of defendant.

In order to support a conviction under the clause in the Victoria Consolidated Health By-law, 1886, providing: "17. No person shall let, occupy, or suffer to be occupied, as a dwelling or lodging, any room which (*a*) does not contain at least 384 cubic feet of space for each person occupying the same," it is necessary that there should be some evidence of guilty knowledge, actual or constructive, on the part of the person charged.

CASE STATED by Farquhar Macrae, a police magistrate, to the Supreme Court, under Con. Stat. (Can.), 53 Vic., cap. 37, sec. 28, as follows:— Statement.

"Wing Kee was, on the 15th December last, convicted upon an information charging that he, 'at the City of Victoria, unlawfully did suffer to be occupied as a dwelling or lodging a certain room which does not contain at least 384 cubic feet of space for each person occupying the same, contrary to Consolidated Health By-law, 1886,' and fined $10 and costs.

"It was proved that the room in question was occupied as a lodging by such a number of Chinamen that there was not 384 cubic feet of space in the room to each; that Wing Kee is a lessee of the building, which is divided into about 54 rooms utilized for lodgings, and had sub-let the room in question to another Chinaman at a monthly rental of $1.50, which tenancy subsisted at the time of the alleged offence. All moneys paid by other persons for the use and occupation of the said room were paid to and received by the tenant and not by Wing Kee. Wing Kee was not in possession or occupation of said room at time of offence. Wing Kee is a merchant residing and carrying on business in premises different to those where the offence occurred, and did not himself or by his agents superintend the internal management or arrangements of said rooms when let. At the time of letting said room, Wing Kee had notified said tenant that said room could not lawfully contain more than three lodgers, and had requested him to comply with said by-law."

The clause in the by-law is as follows:—

Consolidated Health By-law, 1886. "17. No person shall let, occupy, or suffer to be occupied, as a dwelling or lodging, any room which

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(*a*) does not contain at least 384 cubic feet of space for each person occupying the same."

Lindley Crease for the appeal :—

Argument.

The over-crowding was not shown to have been with the privity or consent of the defendant. His lessee of the room was not his agent for any purpose, nor is defendant bound in any way by his lessee's wrongful acts in the management of the room : certainly not by his breaches of the law. In a case of master and servant, it might be different, but even then, unless there was conduct which would make the defendant *particeps criminis*, or a principal to the offence, there would be no liability. Wing Kee cannot be said to have "suffered" the room to have been occupied by the number of lodgers of his sub-tenant as proved. The sub-tenant "suffered" that. It is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that the offence is being committed on his premises, from which it can be inferred that he connived at what was going on—*Bosley* v. *Davies*, 1 Q. B. D., 84.

D. M. Eberts contra :—

The intention of the by-law is to throw upon the owners of premises the responsibility of seeing that they are not occupied so as to infringe the provisions against over-crowding. Constructive knowledge will be imputed to them. Constructive knowledge is sufficient. A man may be said to suffer a thing to be done if it is done through his negligence. The dominion of a house is in the landlord—*Halligan* v. *Gonly*, 19 L. T. N. S., 268.

BEGBIE, C. J. :—

January 10.

Judgment.

The facts stated in the case, which are all I have now to consider, are, in my opinion, insufficient to fix the landlord with guilty knowledge or participation in the commission of the offence or liability therefor.

Appeal allowed with costs, and conviction quashed.

Re THE MAPLE LEAF AND LANARK MINERAL CLAIMS.

(IN THE MATTER OF THE "MINERAL ACT, 1891," AND AMENDMENTS.)

DIVISIONAL COURT.

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Re MAPLE LEAF AND LANARK MINERAL CLAIMS.

Mineral Act—Adverse Claim—Extending statutory time for bringing action—Appeal—Divisional Court—Jurisdiction—Practice—Notice abandoning appeal.

The order of a Judge extending the 30 days provided by the *Mineral Act (1891) Amendment Act, 1892*, within which to commence proceedings in a Court of competent jurisdiction to enforce an adverse claim is appealable to the Divisional Court under sec. 67, *Supreme Court Act*, although not made in any pending cause.

It appeared that a writ endorsed to prosecute the adverse claim in the Supreme Court had been issued before the application for the order appealed from was made; but that fact was not disclosed to the Judge upon the application.

Held, allowing the appeal, that the fact of the issue of the Supreme Court writ was material to the original application and should have been disclosed.

Such a circumstance can be taken advantage of upon an appeal from as well as upon a motion to rescind the order.

After judgment allowing the appeal, and adjournment of the Court, but before the order was drawn up, the matter was spoken to before the Court upon a subsequent day, in presence of counsel for both parties, by special leave, and it appearing that a notice (of which respondents' counsel was not instructed) abandoning the appeal had been served by appellants solicitor upon respondents' solicitor on the morning of, but before, the argument of the appeal.

Held, That the appeal was at an end upon the giving of the notice abandoning it, and the order allowing the appeal not having been drawn up no order would be issued, but the appeal should stand as if struck out of the paper.

Statement.

APPEAL from an order of Mr. Justice DRAKE, made in chambers on 10th December, 1892, allowing Alexander F. McKinnon, the owner of the Maple Leaf mineral claim, a period of 30 days' further time within which to commence proceedings in respect of an adverse claim filed by him on the 10th day of November, 1892, against the issuance of a certificate of improvement in favour of N. P. Snowden, for the said Lanark claim, under sec. 37 of the *Mineral Act (1891) Amendment Act, 1892*, 54 Vict., (B. C.), cap. 25, which provides:—

"37. 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 in default of such filing, no objection to the issue of a certificate of improvement shall be permitted to be heard in

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any Court, nor shall the validity of such certificate, when issued, be impeached on any ground, except that of fraud.

"(2.) Any adverse claim to be filed shall be on oath of the person or persons making the same, and shall show, with reasonable particularity, the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing the affidavit thereof, shall be stayed until the controversy shall have been decided by a Court of competent jurisdiction, or the adverse claim shall have been withdrawn or waived. An adverse claimant shall, within thirty days after filing his claim (unless such time shall be extended by special order of the Court upon cause being shown), commence proceedings in a Court of competent jurisdiction to determine the question of the right of possession, and shall prosecute the same with reasonable diligence to final judgment, and a failure so to commence or so to prosecute proceedings shall be deemed a waiver of his adverse claim."

The facts upon which the application was based appear in the following judgment appealed from :—

DRAKE, J. :—

Judgment.

The property in question is at Illecillewaet. The claimant has filed his notice of claim within time allowed by sec. 36 of the Act. Under sec. 37 of the Act, the claimant must, within thirty days after the filing, unless the time is extended by order of the Court, commence proceedings in a Court of competent jurisdiction, and prosecute with diligence. Here notice was given on November 10th, 1892, and the time within which the claim was to be prosecuted expired December 10th. The claim can be prosecuted either in the Supreme Court or the County Court. As no time had been fixed for the sittings of the County Court, it is doubtful if it is possible for proceedings to be commenced, as the plaint is the first step, and plaints are only issued by the Registrar when a day is fixed for holding County Court. An application for a plaint which will not then be issued can hardly be treated as commencement of proceedings. The claimant is therefore driven to the Supreme Court, and unless he is prepared with a proper survey, showing the overlapping, he cannot well proceed. No survey can be made until the snow is gone, and a delay of thirty days will not prejudice the applicant for a Crown grant.

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The Lanark Company appealed to the Divisional Court, and the appeal was argued on January 10th, 1893, before Sir M. B. BEGBIE, C. J., CREASE and WALKEM, JJ.

W. J. Taylor for the Maple Leaf Company:—

We take the preliminary objection that the appeal does not lie. The order was not made in any action or proceeding pending in any Court. The right to make such orders in mining matters is a special jurisdiction conferred by the Statute, and there is no appeal from them unless provided in express terms. Section 67 of the *Supreme Court Act** does not cover the case, as its language cannot be extended further than to cover appeals from orders, final or interlocutory, made in actions or matters pending in the Supreme Court. To cover the case the Statute should have provided for an appeal from any order which the Court was by any Statute empowered to make, whether in a matter pending in the Court or not.

E. V. Bodwell, for the Lanark Company, for the appeal:—

Section 67 (*supra*) is wide enough to cover the right to appeal. The fact that an order is not made within the frame of a pending action is immaterial if it is in contemplation of and directory in regard to one to be brought, *e. g.*, orders for *ca. re.*

Per Curiam:—We think we have jurisdiction to entertain the appeal.

Objection overruled.

E. V. Bodwell for the appeal:—

Argument.

Although it did not appear in the materials filed, the appellants have discovered, since the making of the order appealed from, that at the time of the respondent's motion to Mr. Justice DRAKE to extend the time for bringing an action, the respondents had commenced an action by issuing a writ out of the Supreme Court. This fact Mr. Justice DRAKE was not made aware of, or he would not have made the order appealed from, which was therefore useless and without proper foundation for the exercise of the discretion.

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*"67. Excepting from those orders mentioned in sec. 65 of this Act (orders by consent or as to costs in discretion of Court), an appeal shall lie * * from every judgment, decree or order made by a Judge of the Supreme Court, whether final or interlocutory, and whether such judgment, decree or order be in respect of a matter specified in the rules or not."

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W. J. Taylor, contra :—

We admit the issue of the writ before the motion to Mr. Justice DRAKE. It was done as a precaution against the possible refusal of the extension upon, the respondents believed, the last day to sue. The respondents desired the extension of time to enable them to sue in the County Court in the mining district, which would be much more convenient. They never intended to prosecute the Supreme Court writ if the leave was granted. The suppression, if any, was of an immaterial fact, as, if it had been before DRAKE, J., with this explanation it would not, it is suggested, have affected his discretion in granting the extension of time in order to sue in the County Court, permitting the applicant to abandon the Supreme Court writ. At all events the suggestion that there was a suppression of facts in the original motion is not a matter which can be urged on an appeal. It is proper subject of a motion to the Judge whose discretion is said to have been misled, to rescind his own order. Here there was material before the Judge below to found the exercise of his discretion.

Judgment.

Per Curiam.—We think the order appealed from would not have been made if the fact of the commencement of the action had been before the learned Judge, and that it was a fact material to be shown, and that its non-disclosure can be taken advantage of on this appeal as well as on a motion to rescind the order.

Appeal allowed with costs, and order below dismissed with costs.

January 12.

Present:—BEGBIE, C. J., WALKEM and CREASE, JJ.

Argument.

W. J. Taylor, by special leave, spoke to the question of the order to be made upon the appeal. After the judgment allowing the appeal, and the adjournment of the Court, counsel for respondents were for the first time instructed that the appellant's solicitor had, on the morning of and before the argument of the appeal, been served by appellant's solicitor with a notice abandoning the appeal. The argument, therefore, proceeded upon a mistake on the part of counsel. Upon receipt of the notice the appeal was at an end, and no other could be made, except to strike it out of the paper—*Conybeare* v. *Lewis*, 13 Ch. D., 469.

E. V. Bodwell contra :—

If the appeal had been dismissed with costs, the appellants would have been concluded, notwithstanding the notice of abandonment, by the appearance of their counsel in support of the appeal. What took place in effect was a withdrawal by consent of the notice and an agreement to argue and abide by the result of the appeal, for, by not instructing their counsel of the notice, but permitting him to argue the appeal, by which they would have obtained full costs if successful, they are estopped from now going back to the notice. In *Conybeare* v. *Lewis*, the action was discontinued. Neglect to place material before the Court on a motion is no ground for re-opening it after judgment.

SIR M. B. BEGBIE, C. J. :—

Judgment.

Notice abandoning the appeal having been given, the appeal was at an end; and it would have appeared that the Court had no jurisdiction to make any other order than to strike it out of the paper, had the notice of the abandonment been brought to its attention. The order of yesterday allowing the appeal not having been drawn up, no order will now be drawn up, but the appeal will stand as if struck out of the paper.

CREASE and WALKEM, JJ., concurred.

Order that appeal stand struck out accordingly.

DRAKE, J.
WALKEM, J.

Jan. 1893.

MASON
v.
OLIVER.

MASON v. OLIVER.

Appeal from County Court—C. C. Amendment Act, 1892, sec. 3—Question of law—Jurisdiction.

Defendant appealed from the judgment of the County Court, upon the grounds that the verdict was against the weight of evidence, of misdirection, and that a nonsuit moved for on the trial should have been granted. The objection as to misdirection was not taken below.

Held, that the only point of law open to defendant on the appeal, under 55 Vict. (B. C.), cap. 10, sec. 3, was the question of nonsuit, and that the Appeal Court had no power to consider the weight of evidence.

January 17.

Statement.

APPEAL from the County Court of Westminster to two Judges of the Supreme Court sitting as a Court of Appeal from the County Court, under *County Court Amendment Act, 1892*, 55 Vic. (B.C.), cap. 10, sec. 2. The action was for damages, charging that the defendant, who had hired the plaintiff's horse, had so ill-used it that it died. The trial took place before BOLE, Co. J., and a jury, who found a verdict for the plaintiff. Judge BOLE refused to disturb the finding of the jury, and entered judgment for plaintiff for $125.

The defendant appealed on the grounds: 1, that the verdict was against the evidence and the weight of evidence: 2 and 3, that there should have been a nonsuit: 4, for misdirection; 5, that the question of contributory negligence in the plaintiff in not informing defendant that the horse was weak in limb and a poor feeder, was not left to the jury; 6, that the verdict did not decide the question of contributory negligence. No objection in point of law was taken at the trial, except that there was no evidence to go to the jury.

Robert Cassidy, for the respondent:—

Argument.

The *County Court Amendment Act, 1892, supra*, sec. 3,* excludes all grounds of appeal going to questions of fact or weight of evidence, and the misdirection complained of does not appear on the notes to have been objected to. The only question open is, possibly, the question of nonsuit, and as it appeared that there was some evidence to go to the jury, the Court on this appeal has no jurisdiction to inquire further.

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* "3. In appeals from final judgments, decrees or orders, if the amount involved be under two hundred and fifty dollars, the appeal shall be limited to some question of law or the admission or rejection of any evidence, or for misdirection."

DRAKE, J. WALKEM, J.

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MASON v. OLIVER.

The question of law must appear to have been distinctly raised at the trial—*Smith* v. *Baker*, App. Cas., 1891, p. 325. A nonsuit was moved for at the close of plaintiff's case, but no motion for nonsuit on the whole case was made.

Yates, contra.

Per Curiam.—The only question open to appellant, is whether there was any evidence whatever to go to the jury, and we think that there was.

Appeal dismissed with costs.

REGINA *v.* MORGAN.

WALKEM, J.

Feb. 1893.

REG. v. MORGAN.

Criminal law—Speedy Trials Act—Substituting charge at trial—Adjournment during trial—Depositions—Evidence of witness being out of Canada—Forgery.

Per WALKEM, J., on a trial under the *Speedy Trials Act*.

1. Evidence that the captain of a schooner had cleared from a Canadian port a week before the trial and put to sea is insufficient evidence of his being out of Canada to satisfy sec. 222 *Criminal Proc. Act*, and his deposition taken on the preliminary examination refused.
2. An adjournment of the trial to procure better evidence of the witness being out of Canada refused, as contrary to the spirit of the *Speedy Trials Act*.
3. The prisoner having elected to be tried speedily upon the charge of forgery, for which he was committed to trial, and being charged and tried for that offence accordingly, there was not sufficient evidence to convict, but there was evidence upon which he might be convicted of obtaining money by false pretences.

Held, that the Crown could not then substitute a charge for the latter offence for the charge of forgery, upon which the prisoner had elected to be tried.

February 4.

Statement.

TRIAL before WALKEM, J., under the *Speedy Trials Act*, of one Morgan, upon a charge that he, "on the 18th January, 1893, did forge and utter, well knowing the same to be forged, a certain cheque upon the Bank of British Columbia, Victoria, for the sum of $65, with intent to defraud."

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The prisoner had been committed for trial and had elected to be tried speedily upon this charge.

Evidence having been given that the prisoner had cashed the cheque in question, pretending that he had received it from, and that it was the cheque of one H. F. Sieward, by whom it purported to be signed.

Argument.

Gordon E. Hunter, for the Crown, proposed to put in, under section 222 *Criminal Procedure Act*, the deposition of H. F. Sieward, taken before the magistrate at the preliminary examination, to show that the cheque was not signed by him, upon proof that he was absent from Canada: and called for that purpose Thomas Roberts, who deposed: "I am manifest clerk at the Customs: I know Captain Sieward: he cleared from the Customs with his schooner on 28th January. The document produced shows the outward report of the schooner Mascot, from Victoria for the North Pacific Ocean—Signed, F. H. Sieward, master."

Carson Downey, deposed:—I am a sailor and know the schooner Mascot and her captain, Sieward. I saw him on Sunday, 28th January, at noon. He was on board the Mascot. He was getting under weigh. I was bidding him good-bye. The vessel heaved up anchor and hoisted sail. I then left her. I did not see her leave. I last saw two men on the jib-boom hoisting the jibs. Captain Sieward's son was with me, both on board and ashore. We came off together and went to the Captain's house. The vessel was not lying at her anchorage the next day.

Cross-examined:—I do not know where the schooner now is: I cannot swear she is not in the harbour: I have not examined the harbour.

Hunter: The evidence is sufficient to found a finding that the witness is out of Canada—*Reg.* v. *Nelson*, 1 Ont. Rep., 500.

WALKEM, J.—The evidence is insufficient. I cannot admit the deposition. The section No. 222 says: "When proof being given of the absence," etc. I cannot say that it is proved, and I cannot so find it.

Hunter then moved for an adjournment for two days to procure satisfactory evidence.

Robert Cassidy, for the prisoner:—We object to that. We should not be in a worse position than if we had been given in charge of a jury at the assizes, when such a course could not be pursued. If the Crown take the responsibility of going into the case on insufficient

evidence, and fail to make a case, the prisoner should not be remanded on the chance of their procuring better. The Crown should have asked an adjournment before the case began if they were not ready to go on. In order to justify the postponement of a criminal trial there must be a clear case of legal necessity, and there is no authority that in any case legal necessity can be created but by the act of God or the conduct of the prisoner or his friends (Hale, P. C., note to *Reg.* v. *Windsor*, 4 F. & F., at p. 268), and even in a civil case a judge could not adjourn the trial on account of difficulty after the jury were charged with the evidence (*ibid*, p. 371, *Reg.* v. *Russell*, 4 Taunt., 129). We do not say that there is here no jurisdiction to adjourn, but the discretion should be exercised according to the rule governing at the assizes.

WALKEM, J :—

Some definite rule should be adopted. My own opinion was that I ought not to remand the prisoner, and, after retiring for that purpose, without stating my own opinion, I put the point to the Chief Justice, who thought that to remand in such a case would be contrary to the spirit of the *Speedy Trials Act*. I will, therefore, refuse the adjournment.

Adjournment refused.

The Crown conceded that the evidence was insufficient to secure a conviction upon the charge as laid, but moved to substitute the charge of obtaining money by false pretences.

Argument of this question was adjourned by consent.

February 7th.

Gordon E. Hunter, for the Crown, moved accordingly. The lesser charge of obtaining money by false pretences was necessarily included in the charge of forging and uttering the check. The forgery was the making of a false document, which the prisoner pretended was, and uttered to the prosecutor as, a true one, with intent to defraud thereby obtaining the money. The Crown have proved the falsity of the pretence and of the document, and have only failed to make out the actual forgery by the prisoner because of the strictness of proof required. Forgery is very closely allied to obtaining by false pretences. "If there were no special provisions on the subject many cases of forgery would be punishable as cases of obtaining goods or money by false pretences"—*Fitz J. Stephen*, 141; *Harris Criminal*

Argument.

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Law, 306. We admit that if the prisoner had elected to be tried speedily on the lesser offence there would be no jurisdiction to try or convict him for the greater—*Goodman* v. *Reg.*, 3 Ont. Rep., 18; but, having elected to be tried for the greater, he is not injured by being convicted of a lesser offence included in it.

Robert Cassidy, for the prisoner:—

Argument.

Forgery and obtaining money by false pretences, though allied in regard to the nature of the facts on which they are based, are not, as crimes, cognate offences, either in regard to quality, degree, or the nature of the evidence required to support the respective charges. Forgery is a felony. Corroborative evidence to that of the person interested is also required—and the prisoner may here have assumed that it could not be given when he elected to be tried speedily on that charge. Obtaining money by false pretences is a misdemeanor, and no corroboration is required. The test is whether a jury, on an indictment for forgery, could, as an alternative, find the prisoner guilty of obtaining the money by false pretences. They could not. The Judge here has no more power—sec. 13, *Speedy Trials Act*, governs. The meaning of sec. 12 is not that the prisoner may be convicted of any charge, whether preferred against him before trial or not, or whether he elected to be tried speedily upon it or not; but that, before trial, the Crown may prefer against him any charge which the evidence given before the magistrate may appear to warrant, though the magistrate committed him for trial on a different charge—See *Cornwall* v. *Regina*, 33 U. C. Q. B., 106; also *Goodman* v. *Regina*, supra. It makes no difference, as to the operation of the consent, that the charge proposed to be substituted is a lesser offence instead of a greater.

WALKEM, J.:—

Judgment.

Whatever my opinion as to the merits of this case may be, I am clear that I cannot convict the prisoner. When he was brought before me to elect as to the mode of his trial, I stated to him, as was my duty under sec. 7 of the *Speedy Trials Act*, that he was charged with the offence of forging and uttering the cheque in question, and that he had the option of being tried upon it speedily before me or awaiting trial at the next assizes before a jury. He elected to be tried before me. Now, in the proceedings under this Act, there is no formal indictment, but the prisoner stands charged with the offence stated in the same manner as if there were one drawn up formally, setting out the charge

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stated to the prisoner. He cannot be tried for any offence with which he is not charged, or which is not included in that charge. Here I have proceeded to the end of the trial, and find no evidence upon which I can convict him of any offence included in the charge stated to him. It is suggested that I should convict him of a different offence, on the ground that the evidence adduced would support a charge for that offence. I am in the same position as a jury would occupy if the prisoner were on trial before them on the charge of forgery. I do not see how I can convict the prisoner of one offence after trying him for another. I think a Court of Appeal would look upon that with considerable astonishment. The prisoner must be discharged.

Prisoner discharged.

CROFT *v.* HAMLIN, *et al.*

DIVISIONAL COURT.
1893.
January 18.

CROFT
v.
HAMLIN
et al.

"Bills of Exchange Act"—Presentation for payment of note payable at particular place—Necessity for as against maker—Practice—Judgment under Order XIV.—Special endorsement—Sufficiency of.

Under sec. 86 of *Bills of Exchange Act*, 53 Vict., (Can.), cap 33, where a promissory note is made payable at a particular place, presentation at that place must be alleged and proved in order to make a cause of action against the maker.

A special endorsement upon a writ of summons in an action to recover from the maker the amount of a promissory note, stated the note as being made payable at a particular place, but did not allege presentment.

Upon motion for judgment under Order XIV., WALKEM, J., dismissed the application on the ground that the special endorsement disclosed no cause of action.

Upon appeal to the Divisional Court, Sir M. B. BEGBIE, C. J., and DRAKE, J., affirmed the judgment of WALKEM, J.

Aprvd 19 MAR R 404

Obsd 9 BCR 53

Not Followed Schonemeier v King & Jardine 50 BCR 174

APPEAL from an order of WALKEM, J., refusing an application to sign judgment under Order XIV. upon a writ especially endorsed to recover $1,850, the amount of a promissory note made by the defendants, payable to the plaintiff at the Bank of Montreal at Victoria.

Statement.

Not Followed Evans v Allen (1938) 2 WWR 353

The special endorsement did not state that the note had been presented for payment.

Not followed Ponti v Marathon Ltd 9 BC LR 46 (BCCA)

DIVISIONAL COURT.

1893.

January 18.

CROFT v. HAMLIN *et al.*

The plaintiff appealed to the Divisional Court, and the appeal was argued before Sir M. B. BEGBIE, C. J., and DRAKE, J., on 18th January.

P. E. Irving for the appeal:—

The cases upon the English Statute do not apply, the words of the English Statute being that "where a promissory note is in the body of it made payable at a particular place it must be presented at that place (in order to render the maker liable). In any other case presentment for payment is not there necessary in order to render the maker liable."

The effect of the Canadian Statute, 53 Vict., cap. 33, sec. 86: "Where a promissory note is in the body of it made payable at a particular place it must be presented for payment at that place. But the maker is not discharged by the omission to present the note on the day that it matures. But if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the Court. If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable," is that presentation may be made at or before the trial, subject to the question of costs.

Argument.

The bracketted words in the English Act, "in order to render the maker liable," being omitted, it is not in Canada necessary to prove presentation in order to maintain an action against the maker of a promissory note, whether made payable at a particular place or not.

D. M. Eberts, Q. C., contra.

SIR M. B. BEGBIE, C. J.:—

Judgment.

The omission in the Canada Statute of the bracketted words may have been due to the opinion that they were unnecessary. In fact, the curtness of the Canadian enactment adds, I think, to its emphasis: "Where a particular place for presentment is named in the body of the note, it must be presented at that place." Any addition to that could only weaken its effect. The provision which immediately follows has, I think, been misunderstood by *Mr. Irving*. It is not that the maker is not discharged by failure to present at the special place of payment, but on the exact day of payment. And if there be any force in the maxim, *expressio unius est exclusio alterius*, the express conservation of the maker's liability, notwithstanding the holder's disregard of the day, would seem to emphasize the previous enactment, that his disregard of the place of payment is fatal to his

right to sue. It follows that presentment at the proper place, or facts excusing such presentment, must be averred and proved in the pleadings, if there are pleadings, and if judgment be desired under Order XIV., then it must be endorsed on the writ: according to all the cases from *Spindler* v. *Grellet*, 1 Ex. Rep., 384, down to *Fruhauf* v. *Grosvenor*, 8, the Times L. R., 744; and see *Bullen and Leak*, 4th Ed., 108, and authorities there cited. *More* v. *Paterson*, 2 B. C., 302, was referred to, but that differed from the present in two respects. On the one hand there was no special place mentioned for presentment for payment, but, on the other hand, it was an action by the holder of a note against an endorser, and the due presentment and notice of dishonour were held necessary endorsements on an application under Order XIV. However, it is perhaps right to call attention to the observations on another point in that case, as to the necessity for re-service of a writ when the endorsements have been so altered as to make it, in fact, a new writ. This appeal will be dismissed in the usual way, but we can save the plaintiff the necessity of a separate application for leave to amend the endorsement, and we give leave at once.

Judgment.

DRAKE, J., concurred.

Appeal dismissed, with leave to amend the special endorsement.

IN THE COUNTY COURT OF VICTORIA.

BEGBIE C. J.

March, 1893.

Re
KWONG WO.

Re KWONG WO.

Liquor license—Summary conviction—Appeal—Practice—Jurisdiction—Evidence—Construction of words "spirituous liquor."

Upon an Appeal to the County Court from a summary conviction, expressed to be for selling spirituous liquors by retail without a license, contrary to the Statute in such case, etc., and to a certain Municipal By-law, fining and ordering the defendant to pay $50.00, and in addition $75.00 as the amount payable for such a license:

Followed R v Zarelli & Newell 55 CCC 314

Per SIR M. B. BEGBIE, C. J., sitting as a County Court Judge—

Applied R v Duplin 31 WWR 5

The following objections were over-ruled:—

(1.) To the jurisdiction.

(*a.*) That the conviction was not returned to or before the Court upon the appeal.

(*b.*) That the deposit as security for the appeal had not been returned.

(2.) That the By-law referred to in the conviction, exercising the Statutory power given to the Municipality by the *Municipal Act, 1892*, sec. 204, sub-s. (3), to issue licenses for the mode of liquor selling charged, and to levy and collect by means thereof an amount not exceeding $75.00 for every six months, was not proved.

It was *Held*:

(3.) That an appeal from a conviction is a proceeding *de novo*, as if the information were then first brought to be tried.

(4.) That section 208 of the Statute *supra*, providing: "No person shall sell * * liquors * * by * * retail, and no person shall use, practice, carry on, or exercise in the municipality * * any trade * * or business described or named in section 204 and the sub-sections thereof, without having taken out and had granted to him a license in that behalf, under a penalty not exceeding * * $250.00 * * together with the amount which he should have paid for such license, which * * penalty shall for the purposes of recovery * * be held to be one penalty," made it an offence to sell liquor by retail, without a license in that behalf, independently of whether a By-law providing for the issue of such licenses and fixing the amount of fees thereon had been passed or not, and that the appeal could proceed, as a hearing *de novo*, for such statutory defence.

(5.) It appearing upon such hearing that the liquor sold was intoxicating, but no evidence being given as to its having been produced by distillation, that the evidence was insufficient to sustain a charge of selling spirituous liquor.

(6.) That the absence of proof of the By-law would have been fatal to proceedings by way of *certiorari* and motion to quash the conviction.

Statement.

APPEAL to the County Court of Victoria from a conviction dated the 24th day of January, 1893, whereby Kwong Wo (the appellant) was convicted of having, "at the City of Victoria aforesaid, on or about

the 14th day of January, 1893, sold by retail spirituous liquor, to wit: one quart bottle of spirituous liquor in a store other than an inn, saloon, ale or beer house, or other house of public entertainment, situated on Government Street in the said city, without having taken out and had granted to him, the said Kwong Wo, a license in that behalf, contrary to the statute in that case made and provided and the *Revenue By-law, 1889*, of the said City of Victoria," and the said Kwong Wo was thereby ordered to pay the sum of $50, and in addition thereto the sum of $75, the amount of fee payable for such a license, and in default thereof imprisonment for the term of three months.

The convicting magistrate, though notified of the appeal, had not returned into the County Court the conviction appealed from, or the deposit made by the appellant under section 77, *Summary Convictions Act, 1886*.

C. J. Prior for the convicting Justice and the City of Victoria:

Argument.

The appeal should be dismissed. This Court cannot proceed to hear the appeal till the conviction appealed from is before it. Till it is made to appear to the Court that the appeal is duly lodged, the jurisdiction to hear, or adjourn it, will not attach—*Trotter's Appeals from Convictions*, p. 54: *Reg.* v. *Allen*, 15 East, 333; *Ryer* v. *Plows*, 46 U. C. Q. B., 206, per OSLER, J.: *Paley on Convictions*, 5th Ed., p. 367. The Court can only look to the record of conviction returned by the convicting justices—*Trotter*, supra, at p. 55. If the magistrate, after receiving notice of the appeal, fail to return the conviction, whereby the party is prevented from prosecuting his appeal, he is liable to an action for special damages—*Prosser* v. *Hyde*, 1 T. R., 414; *Ex parte Hayward*, 3 B. & S., 546. See *Summary Convictions Act* (Can.), secs. 77 and 85, from which secs. 71 and 81* *Summary Convictions Act* (B. C.), 52 Vic., cap. 26 (1893), are copied, with mere verbal variation. The decisions on the Canadian Act therefore apply.

NOTE—"81. Every Justice before whom any person is summarily tried, shall transmit the conviction or order to the Court to which the appeal is herein given, in and for the district, county, or place wherein the offence is alleged to have been committed, before the time when an appeal from such conviction or order may be heard, there to be kept by the proper officer among the records of the Court; and if such conviction or order has been appealed against, and a deposit of money made, such Justice shall return the deposit into the said Court; and the conviction or order shall be presumed not to have been appealed against until the contrary is shown."

BEGBIE, C. J.

March, 1893.

Re KWONG WO.

H. D. Helmcken for the appellant:

This is a hearing *de novo*, and it is immaterial whether the original conviction is before the Court or not. It is a re-opening *ab initio* of the prosecution at the instance of the defendant. If it is necessary to found the jurisdiction of this Court that the original conviction should be returned before it, we will ask an adjournment to obtain it. The default is not that of the appellant.

Prior: There is no power to adjourn, as the adjournment must be by indorsement on the conviction—*Sum. Con. Acts*, sec. 71 (*e*) B. C., and sec. 77 (*e*) Can., *supra*; *Reg.* v. *Allen*, *supra*.

Helmcken: That provision is not imperative, but directory merely—*Reg.* v. *Read*, 17 Ont. R., 185.

Per Curiam: Objection to jurisdiction overruled.

The prosecution then called evidence in support of the charge, and the defendant called evidence on his own behalf. The prosecution did not prove the *Revenue By-law, 1889*, referred to in the information.

Argument.

Helmcken: The appeal must be allowed, and the information dismissed. The charge is that of infraction of the By-law, and there is no power to substitute another charge on the appeal, but merely to amend formal defects in the charge as laid.

The jurisdiction of this Court is (sec. 80, *Sum. Con. Act*, Can.); sec. 76, *Sum. Con. Act* (B. C.) to "hear and determine *the charge* or complaint *on which such conviction has been had* or made, upon the merits, notwithstanding any defect of form, or otherwise, in such conviction; and if the person charged * is found guilty, the conviction * shall be affirmed, and the Court shall amend the same if necessary."

Prior, contra: The words in the information and in the conviction, "and the *Revenue By-law, 1889*," after the words "contrary to the Statute in that case made and provided," are surplusage * The offence was fully provided for by *Municipalities' Consolidation Act* (B. C.), *1892*, 55 Vic., cap. 33, secs. 204 (*e*) and 208. Though it is not competent to this Court to convert the charge into one under a different enactment to that under which it falls as originally drawn, yet the Court may entertain the appeal, and upon conviction amend the charge, in accordance with the case made on the evidence—*McKenna* v. *Powell*, 20 U. C. C. P., 394.

Helmcken, in reply: There is no offence without proof of the By-law. The Statute, sec. 208, prohibits selling liquor without a license in that behalf. The Statute, sec. 204, sub-sec. (3)*, merely empowers the City to provide for a license in that behalf, not to exceed $75 for every six months. Till such license is provided sec. 208 does not apply, for there is no license in that behalf which could be taken out. There is no evidence that the liquor sold was spirituous liquor.

Sir M. B. BEGBIE, C. J. :—

Judgment.

No doubt section 81 ought to have been complied with. The conviction and the deposit money ought to be here. That may show great negligence in the prosecution and be very wrong; but why should it stay the defendant's appeal from being heard? It is possible that the conviction when produced may refer to the By-law; indeed, it must, if the sentence included the $75 mentioned in the *Revenue By-law*. And it is true, I cannot take judicial notice of that By-law. I cannot of myself say whether that $75 be a proper sum or not. It is also true that the information does allege an offence against a By-law; and hence again it is argued that I cannot upon this appeal sustain the conviction unless the By-law is produced. But I think that the Statute does not so strictly confine me to the regularity or sufficiency of that conviction. By section 76 of the *Summary Convictions Act, 1889*, I am to hear and determine "the charge or complaint on which the conviction was made on the merits." And I think that this information discloses an offence against the Statute itself (the *Municipalities Act, 1892*, section 208), quite irrespective of any By-law. "No person shall sell spirituous or fermented liquor by wholesale or retail * * * without having taken out a license in that behalf, under a penalty of $250." Then section 204 tells the man where he can get a license, who may grant it, and the schedule gives the form (not a very proper form it is true). All this can be done without reference to any By-law.

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* 204 (3.): "Every municipality shall, in addition to the powers of taxation by law conferred thereon, have the power to issue licenses for the purposes following, and to levy and collect, by means of such licenses, the amounts following: (3.) In City municipalities, from every person * * who sells, barters, or traffics, by retail, in fermented, spirituous, or other liquors, in a shop, store, or place other than an inn, ale, beer-house, or other house of public entertainment, in quantities of not less than a reputed pint bottle, at any one time to any one person, and at the time of sale wholly removes and takes away the liquor in quantities of not less than a reputed pint bottle, for each house or place where such vending is carried on, not exceeding seventy-five dollars for every six months."

BEGBIE, C J
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That same section 204 does also, it is true, empower the Corporation to charge a fee for a license; but the amount of the fee has nothing to do with the prohibition in section 208, and, therefore, no By-law showing the amount of fee is necessary to be proved in order to establish a breach of the prohibition.

If I had now to examine the validity of the conviction as on a *certiorari*, Mr. *Helmcken's* argument would hold good: it would be essential to prove the By-law: for the magistrate's sentence refers to the amount of the fee, which is only definable by by-law: and the sentence is part of the conviction, and every part of the conviction must be justifiable in law, and shown to be so before me. A conviction is a whole, indivisible: it cannot be good in part and bad in part. Therefore, if I were examining the conviction as on *certiorari*, the non-production of the By-law would be fatal to the respondent. But I am, by section 76, to neglect all such matters, and to try the case *de novo*, on the merits, as if the information were now brought first to be tried before myself. Now, the information, omitting a great deal of verbiage, in express terms charges the defendant with having on each of two several days, "unlawfully sold by retail spirituous liquor, to wit, one quart bottle of spirituous liquor," in a store in Fisgard Street, without a license. I omit the words referring to the By-law. This charge enunciates an offence against section 208, irrespective of any By-law. And the evidence satisfies me that the defendant did on Saturday, January 14, sell one of the bottles produced, and the other bottle on the 15th of January, without any license, in his shop on Fisgard Street, and so within a municipality.

Judgment.

One objection by Mr. *Helmcken* was, that there was no proof that these bottles were quart bottles (as alleged in the information), or even reputed quart bottles. I rather suspect that they are not: they seem not of greater capacity than an Imperial pint. But by virtue of the videlicet in the information I can strike out the words about a quart bottle. There remains the clear charge of "selling by retail": and I decline to require the evidence of an expert to demonstrate that each of them contains less than two gallons, and so a sale of them would be a sale by retail under section 204, sub-section (4). But, then, no evidence whatever was given either here or before the magistrate, that the contents were "spirituous liquor," *i. e.*, liquor whose strength is obtained by distillation as distinguished from fermentation. The expert merely stated that he had gauged them and found them of 34°.7 strength. He admitted that some wines go beyond this, but did

not seem much informed on the point, which is singular in a custom house official—for the Canadian custom house tariff provides for duties on wines up to the strength of 40°, and it would be a matter of some surprise if these very bottles had been classed at the custom house here as spirits. The British tariff goes even higher: it lays an even rate on wines up to 42°, and a special extra rate of 3d. per gallon on wines for every degree above 42°. It is matter of common knowledge that wines come from Spain and Australia having a natural unfortified strength above 36°: and Trinity College audit ale is probably stronger. It is therefore impossible to assume that the contents of these bottles are spirituous, merely because they show a strength of 34°.7. Even the Canadian tariff does not deny that wine, *i. e.*, fermented liquor, may have a strength, by fermentation, above 40°; but in the interest of the revenue it provides that wines of that strength are to pay duty, not on the wine, but on the spirits they contain, and which can readily be extracted by distillation.

The magistrate's attention does not seem to have been directed to this, that the only offence charged was a sale of *spirits*; that there are many intoxicating preparations which are not spirits, and that not one of the witnesses before him ever thought of calling the stuff spirits, or anything but wine. There are very many liquors called "wine" besides those from the fermentation of grape juice. The Germans call cider "apple wine," and the ancients called beer "barley wine," besides the numberless domestic and chemical compounds.

Judgment.

I believe a little inquiry will show that the liquor, the subject of this investigation, is prepared like beer. The ground of my decision, however, is that there is not the least evidence that it has been distilled or at all connected with distillation. I say nothing as to what would be the result if the contents were shown to be whiskey diluted down to 34°.7.

If it be urged that if the defendant did not sell spirits, he at least sold a fermented liquor, which is equally within the Act, the answer is that he is not charged with that offence. New milk and cream contain butter, but a conviction for stealing a pound of butter evidently could not be maintained upon evidence showing that the prisoner had stolen a gallon of cream, though many pounds of butter could be extracted from it.

If there were a jury here, under section 73, *Sum. Con.* (Can.) *Act*, section 78, I should feel compelled to direct an acquittal. I think the same result should have been on the evidence in the Police Court,

BEGBIE, C. J.
March, 1893.

Re KWONG WO.

therefore the conviction must be quashed. But it is only proper to allow Mr. *Helmcken* to remove the impression on my mind that the defendant has infringed the Act, unless he produces some evidence that the defendant was duly licensed, or that he required no license to sell this stuff, or was not responsible for the sale of it. I shall not allow him any costs.

Conviction quashed without costs, the deposit to be returned.

BOLE, CO. J.
March, 1893.

YOUDALL *v.* DOUGLAS.

YOUDALL *v.* DOUGLAS.

Costs—Taxation—Scale—Procedure—Retrospective legislation.

Upon taxation of costs, it appeared that some of the items had reference to proceedings taken before the introduction by Statute of a new scale of taxation, and others to proceedings taken since the introduction of the new scale.

Held, per BOLE, Co. J., sitting as local Judge of the Supreme Court, overruling the Registrar, that the introduction of the new scale of costs was legislation in regard to procedure and had a retrospective effect, and that all the items must be taxed upon the new scale.

overruled HARRIS v. DUNSMUIR 9 BCR 317

Statement.

APPEAL from decision of the Registrar upon a taxation.

E. A. Jenns for the appellant.

A. J. McColl, Q. C., contra.

Appld PIDHANY v. WHITE 68 BCLR 29 (BCSC)

The facts sufficiently appear from the judgment.

Judgment.

BOLE, (Co. J.), L. J. S. C.:—

This suit was entered in and carried on through the past year, and was continued in 1893, the judgment being finally given a few days since. The successful party applied to have costs taxed under the new rules, which came in force January 1st, 1893. The Registrar held on taxation that such of the costs as were incurred prior to December 31st, 1892, must be taxed according to the old scale, and such as were incurred since the new scale came into force must be taxed according to it.

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The question for my decision is whether those costs which are incurred prior to 31st December, 1892, shall be taxed according to the old or new scale, the new rules being silent on the question.

Having regard to the rule laid down by Lord BLACKBURN, in *Gardner* v. *Lucas*, 3 App. Cas., 603, I think it is perfectly settled that if the Legislature intended to frame a new procedure, *i. e.*, that instead of proceeding as formerly provided you should in future proceed in another and a different way, then, clearly, the settlement of by-gone transactions must be conducted according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. Now, the taxation of costs has been, by *Reg.* v. *London, Chatham and Dorer Ry. Co.*, L. R., 3 Q. B., 170, 37 L. J. Q. B., 428, decided to be "a proceeding;" and further, having regard to *Brown* v. *Burdett*, 37 Ch. D. (C. A.), 207, and *Todd* v. *Union Bank of Canada*, 6 Man. L. R., 457; *Wright* v. *Hale*, 30 L. J. Ex., 40; *Attorney-General* v. *Sillem*, 10 H. L. Cas., 704; *Freeman* v. *Moyes*, 1 Ad. & E., 338; *Burn* v. *Carvalho*, ibid., 883; *Kimbray* v. *Draper*, L. R., 3 Q. B., 160; *Ings* v. *London & S. W. Ry.*, L. R., 4 C. P., 17, I am of opinion that the taxation of costs being a matter of procedure, the new rules must be taken to be retrospective, and that the costs incurred prior to 31st December, 1892, should be taxed according to the scale laid down in new rules, and I direct the said costs to be taxed accordingly.

Judgment.

Appeal allowed.

In re AH GWAY, *ex parte* CHIN SU.

BEGBIE, C. J.
March, 1893.
Re AH GWAY.
Distd 7 BCR 291
not follod Fong Yuk 8 BCR 118

Habeas Corpus—Custody of Infant—Affidavit—Translation from deponent's language—Evidence—Admissibility.

The Court will not interfere by *habeas corpus* to take an infant out of the custody of a person not lawfully entitled thereto, for the purpose of enabling a person equally unentitled to obtain possession of it.

An affidavit drawn up in a language not understood by the deponent cannot be read in Court, it must be drawn up and sworn to in the language of the deponent, but a sworn translation of it may be read.

MOTION for a writ of *habeas corpus*.

H. D. Helmcken moved for a rule *nisi* for a writ of *habeas corpus*, directed to the managers of the Chinese Home, commanding them to

Statement.

BEGBIE, C. J. March, 1893. *Re* AH GWAY.

produce the body of Ah Gway, a Chinese girl, alleged to have been forcibly seized by them and detained from the custody of Chin Su, the applicant. In support of the motion he proposed to read the affidavit, drawn up in English, of the applicant, who, counsel stated, did not understand English, but that the affidavit had been read over and explained to her in her own language before it was sworn to.

Sir M. B. BEGBIE: This is not admissible. I am told that the contents were translated to her before she swore to their truth. That is not at all the proper method, she being quite unacquainted with the English language. The affidavit should be written in Chinese and read to or by her, and sworn so: then a sworn translation of that will be used on the application to me. Obviously, by the inverse method now proposed the deponent may be made to swear to matters she never intended, and it would be very difficult to maintain an indictment for perjury in case of false statements. The application may be renewed.

Statement.

H. D. Helmcken afterwards obtained the rule *nisi* upon an affidavit in the language of the deponent, of which a sworn translation was read, stating that Ah Gway was her niece, daughter of her sister, a resident in China. This sister had lately lost her husband, and being in poor circumstances had entrusted her daughter, the infant in question, now about fifteen years old, to applicant (who was then on a short visit to China, but who had, with her husband, long resided in British Columbia) for nurture and education, until marriage, the infant being alleged to be betrothed to a young man in China. The infant arrived here accordingly with applicant and her husband in December last. In January, Ah Gway was taken out of applicant's house, where she was then residing, and placed under the charge of the manager of the Home: and the present application was with a view to having her restored to the custody of applicant and her husband. He now moved same absolute.

Fell, for the managers of the Chinese Home, opposed the motion: The infant, being produced in Court, deposed that she had never known her mother or any parent; her earliest recollection was of being under the care of a woman in Shanghai, who did not profess to be her mother. Some years ago this woman handed her over, she believed in consideration of a sum of money, to another woman, who carried her to Canton and who, in Canton, handed her over (again supposed for a money consideration) to Chin Su, the present applicant. She denied all

knowledge of her alleged betrothal and refused to return to the applicant.

Rev. Mr. Gardener, the chaplain, and the matron of the Home, both deposed that no manner of force or restraint was now placed upon the movements of the infant: that she could leave the Home at any time, and although Chin Su or other strangers were not allowed unlimited liberty of access, still she might see and converse with the infant at all reasonable hours, in the presence of two other Chinawomen, residents there.

Mrs. Morrow, the matron of the Home, deposed that she was ready, if the infant were restored to the Home, to give her undertaking to maintain and educate the infant during the next five years, or until she could be placed out in a suitable situation of service or otherwise, to the satisfaction of a Judge of this Court.

Sir MATTHEW B. BEGBIE, C. J.:—

Judgment.

The writ of *habeas corpus* has for its immediate object one sole condition: There must be somebody unlawfully detained in custody; otherwise the application has no *ratio existendi*. Here, in point of fact, there seems to be no restraint, lawful or unlawful, of any personal liberty. What is complained of is, an interference with Chin Su's claim to the sole custody of the infant. It does not appear that any person has a valid claim to that custody. Nobody can have a valid claim except the father, or a duly appointed guardian; or some person, as a schoolmaster, to whom the infant has by proper authority been confided or apprenticed. Even assuming Chin Su's statements to be true, viz., that Ah Gway is her niece, confided to her by her widowed mother for education, etc., that would hardly give Chin Su the absolute right for which she contends, or any legal rights at all over the infant's person. The authority of a mother, and especially of a widowed mother, over the person of her infant child, has in England been greatly extended by Stat. 49 Vic. (Imp.), cap. 27, secs. 5 and 9. And an English widowed mother could certainly select for her child a school or a mistress, with whose exclusive custody no person would be permitted to interfere. But I am not aware that this legislation has been adopted in Canada, or what is the state of the law in China, and there would be some difficulty in satisfactorily ascertaining that a Chinese widow possessed similar authority, or had legally deputed it. This Court has of course jurisdiction on a proper application to appoint a guardian who would have exclusive control; but no such application is before me. The

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Court, however, always considers what is the most advantageous course for the infant to pursue. And in the presence of Mrs. Morrow's undertaking, and the infant's own wishes (very emphatically manifested), I must decline to order the writ to issue. In fact, what I am asked to do is to remove her from one unauthorized custody, where she desires to remain, and where, I think, her best interests are lodged, and deliver her over to another custody equally unauthorized, where, I feel sure, she could not be retained except by physical means, and where she would be exposed to risks from which she is at present protected. The writ will, therefore, be refused; but looking to the circumstances under which the original change of domicile is alleged to have been effected, and which are not contradicted or explained, I shall refuse it without costs.

Application refused without costs.

DIVISIONAL COURT.
April 13th.

PARKS *v.* BLACKWOOD.

PARKS *v.* BLACKWOOD.

Practice—Reference back by Divisional Court to supply evidence necessary to decision of motion for a new trial—Rule 441—Evidence.

The Divisional Court, upon a motion for a new trial, being of opinion that there was no evidence upon which the damages assessed could be calculated, directed a further enquiry as to such damages, and adjourned the motion in the meantime.

Statement.

MOTION by defendant by a new trial.

The action was tried before BOLE, Co. J., sitting as a Local Judge of the Supreme Court, without a jury.

The plaintiff's claim was for breach of contract, whereby the defendant, owner of certain lands, agreed to take the plaintiff and his wife to work for him upon such lands for the period of one year, the the profits to be divided in equal shares: the plaintiff alleging that before the end of the year the defendant had turned the plaintiff and his wife off the premises and prevented them from completing their part of the contract.

The defendant pleaded, justifying under a clause in the agreement providing that in the event of a breach of any of the conditions in the agreement he was to have the option of terminating the contract, and alleging breach.

The Judge, at the trial, found all the issues in favour of the plaintiff, and assessed the damages at $400.

The grounds of the motion were, that the verdict was against the weight of evidence, that there was improper admission of evidence, and that there was no evidence upon which the amount of the damages could be calculated.

The only evidence upon the question of damages consisted of expressions on the part of the plaintiff that he would not have been turned off in the manner described for $500, and other general expressions as to the extent to which he considered himself injured; but there was no specific evidence as to the amount of profits which the plaintiff would have made had the agreement been carried out; or any evidence upon which a calculation could be made as to his damages for the breach of the contract.

Statement.

The motion came on for argument before DRAKE and WALKEM, JJ., sitting as a Divisional Court, on 13th April.

Thornton Fell for the plaintiff.

A. C. Brydone-Jack for the defendant.

WALKEM, J.:—

Judgment.

The Judge at the trial was the sole judge as to the credibility of the witnesses, and his finding upon the issues should not be interfered with unless the Court are perfectly clear that his decision was erroneous. There is nothing in the objections as to the improper admission of evidence.

Upon the question of damages, there is no evidence upon which they could have been properly estimated. The verdict cannot be sustained. The Court will not, however, re-open the question of the findings of the learned Judge upon the issues, but, under Rule 446, will direct the present motion to stand over for further consideration, and direct an enquiry as to the amount of damages sustained by the plaintiff, to be taken before BOLE, Co. J.

DRAKE, J.:—

It would appear from the judgment of BOLE, Co. J., that there must have been some evidence, going to the measure of damages, not contained in the Appeal Book. I do not think that the judgment that there was a breach of the contract is against the evidence. I agree with WALKEM, J., that, though there is evidence of damages, there is no evidence before us upon which the amount of such damages can be

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estimated. How, then, must we deal with the matter? A new trial is an expensive proceeding. In my view, the judgment is right, except upon the question of damages, and I agree that there should be an enquiry directed, under Rule 446, to be taken before BOLE, Co. J., as to the amount of damages. This motion will stand, in the meantime to come up for further consideration; and the question of costs will be reserved to be then dealt with.

Order directing further enquiry as to damages, before BOLE, Co. J.

DIVISIONAL COURT.
May, 1893.
TAI YUN CO. v. BLUM.

TAI YUN CO. *v.* BLUM *et al.*

Divisional Court—Jurisdiction—Refusal of ex parte application—Appeal.

There is no appeal to the Divisional Court from the refusal of an *ex parte* application for leave to issue concurrent writs of summons against defendants, who are citizens and residents of the United States, as such application is not an interlocutory matter within sec. 60, *Supreme Court Act*.

Semble, Such application is not a proceeding in an action.

Statement. APPEAL to the Divisional Court from an order made by Sir M. B. BEGBIE, C. J., dismissing an *ex parte* application by the plaintiffs for leave to issue concurrent writs of summons against all the defendants and to serve notice thereof on two of them, who are citizens and residents of the United States of America.

The appeal was heard on April 15, before CREASE, WALKEM and DRAKE, JJ.

A. P. Luxton for the appeal.

May 15.

WALKEM, J.:—

Judgment. This is an appeal from an order made by the learned Chief Justice, dismissing an application by the plaintiffs for leave to issue concurrent writs against all the defendants, and serve notice thereof on two of them, who are citizens and residents of the United States—the third defendant being within the jurisdiction. The appeal is brought under O. LVIII. Rule 11 (No. 680), which is as follows: "Where an *ex parte*

application has been refused by the Court below, an application for a similar purpose may be made *ex parte* to the Full Court, if sitting, or to the next Divisional Court." This rule can only be applied in this Court to matters within its jurisdiction: and that jurisdiction is limited by section 60 of our *Supreme Court Act* to a jurisdiction—concurrent with that of the Full Court—"in interlocutory matters, including the granting of new trials." The application before us is clearly not an "interlocutory matter." It is not a proceeding in, but is one antecedent to an action—not one between writ and judgment, or after judgment, as in *Smith* v. *Cowell*, 6 Q. B. D., 75; and hence it is intituled "in the matter of a proposed action." There is a wide distinction between procedure and jurisdiction, as pointed out by the House of Lords in the well known case of *Attorney-General* v. *Sillem* 10 H. of L. Cas., 704. Our Rules of Court are framed for the purpose of carrying out the *Supreme Court Act*, and cannot override or extend its enactments—per BRETT, L. J., in *Longman* v. *East*, 3 C. P. D. at p. 156, Judgment. A jurisdiction, whether original or appellate, must be conferred by the Legislature—*Cookney* v. *Anderson*, 32 L. J. Chy., 427, and *Atty-Gen.* v. *Sillem*, supra. The distinction between proceedings in an action and "in a matter not being an action," is well understood and is recognized in the rule which immediately precedes the one under discussion. It has been suggested that we might deal with the application as one of first instance, and as having concurrent jurisdiction with the learned Chief Justice in that respect: but apart from other reasons, which are clearly against such a course, it is sufficient to say that whether the application be by way of appeal or of first instance, the want of jurisdiction precludes us from dealing with the matter at all, as it is not of an interlocutory character. We can therefore make no order "in the matter of the proposed action."

CREASE and DRAKE, JJ., concurred.

Order refused.

DIVISIONAL COURT.

May, 1893.

WILSON v. PERRIN.

WILSON *v.* PERRIN.

Practice—Order LVIII., Rule 15—Appeal—Security for costs—Jurisdiction.

Held, per BEGBIE, C. J., CREASE and WALKEM, JJ., overruling DRAKE, J.—

An application to the Divisional Court for a new trial is an appeal within the meaning of Order LVIII., Rule 15, and a Judge has, under it, jurisdiction to order the applicant to give security for costs of the motion.

Statement. APPEAL from an order of DRAKE, J.

The action was for false imprisonment. The plaintiff recovered a verdict and judgment and issued execution, which was returned *nulla bona*. On examination as a judgment debtor, it appeared that the defendant had conveyed certain property to his brother shortly before judgment, and had no means or property in his own name.

Defendant made a motion to the Divisional Court against the verdict and judgment, and for a new trial upon the ground of misdirection, improper reception of evidence, and that there was no evidence that the defendant caused the arrest of the plaintiff.

The plaintiff moved in chambers, before DRAKE, J., upon summons, for security for his costs on defendant's motion to the Divisional Court, under Order LVIII., Rule 15, (684): "Such deposit or other security for the costs, to be occasioned by any appeal, shall be made or given as may be directed by the Full Court or a Judge" And Order LIX., Rule 3, (689): "Order LVIII. shall, as far as applicable (as to notices of appeal or otherwise) apply to appeals to the Divisional Court."

Argument. *H. Bernard*, for defendant, showed cause, contending that the motion for a new trial was not an appeal within the meaning of the rule, and that there was no power to order the defendant to give security for costs.

Robert Cassidy, for plaintiff, *contra*.

April 14.

DRAKE, J.:—

Judgment. It appears to me that if a notice of motion is simply for a new trial, which, of course, can only be grounded upon certain circumstances, *e. g.*, that the verdict is against the weight of evidence, misdirection, improper admission of evidence, etc., it is not intended that security for costs should be allowed. It is possible that the notice which the defendant

has given in this matter goes beyond a simple notice of motion for a new trial, and may be considered, in fact, an appeal notice: if so, it cannot be dealt with by the Divisional Court. The Divisional Court cannot deal with appeals from judgments of the Court below in matters of this kind. It can only deal with a motion for a new trial; and, as far as the notice of motion goes beyond that, it may be struck out. Upon a motion for a new trial simply, I do not think the Court should order security for costs—*Heckscher* v. *Crossley*, 1891, Q.B., 224: *Walklin* v. *Johns*, 7 T. L. R., 181. Rule 689 reads, "Order LVIII. shall, as far as applicable (as to notices of appeal and otherwise), * * apply to all appeals to Divisional Court." I do not think a motion for a new trial can be held to come under the description of a "notice of appeal."

Summons dismissed.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal came on for argument, and was partly heard before Sir MATTHEW B. BEGBIE, C. J., and WALKEM, J., on April 20th, when further argument was adjourned, and the appeal was reargued before the same Judges, together with CREASE, J., on May 18th.

Robert Cassidy, for the appeal:

Argument.

The defendant's motion to the Divisional Court is a motion by way of appeal within the meaning of the rules. The common law motion against the verdict and for a new trial, to the Court in which the action was pending, sitting *in banc*, might not be an appeal in the strict sense of the term; but all motions to the Divisional Court here are appeals, the Divisional Court, as such, having a purely appellate jurisdiction. The defendant's motion asks that the judgment below be set aside; it also, in effect, asks a final judgment for defendant since it submits that there was no evidence to connect the defendant with the arrest, and, under Rule 446, upon motions for new trials, the Divisional Court has all the powers of the Full Court to reverse the judgment below, and give a final judgment. The cases of *Heckscher* v. *Crossley*, 1891, 1 Q. B., 224, and *Walklin* v. *Johns*, 7 T. L. R., 181, are distinguishable, as in England the Divisional Court is not given power to grant security for costs on any appeals to that Court, while here the effect of Rule 689 is to give our Divisional Court that power upon all appeals to it. Defendant's contention is that "all appeals or otherwise" means only appeals from interlocutory orders, which, in his construction, are the only appeals to the Divisional Court.

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The power could not have been intended to be applicable to appeals from interlocutory orders only, as it is not usual to grant security for costs on such appeals, but was intended to cover such motions as the present by way of appeal from verdicts and judgments on the main case. The general rule is that poverty is no bar to a litigant: there is an exception in the case of appeals, because the appellant has had the benefit of a decision, and so an insolvent party is not excluded from the courts, but only prevented, if he cannot find security, from dragging his opponent from one court to another—*Per* BOWEN, L. J., in *Cowell* v. *Taylor*, 31 Ch. D., at p. 38. Apart from the provisions of the rule, there is an inherent jurisdiction in the Court to order a party to give security for costs.

A. E. McPhillips and *G. H. Barnard*, contra.

May 22.

Sir MATTHEW B. BEGBIE, C. J.:—

Judgment.

This case, an appeal from a decision of Mr. Justice DRAKE, at Chambers, has twice been argued before us at considerable length. On the first argument, before Mr. Justice WALKEM and myself, when, though we did not disagree, yet we could not exactly agree: and, in view of this, and of Rule 688A, of 1893, and in view also of the great importance of the general question, we directed a second argument to be had before ourselves, with the assistance of Mr. Justice CREASE. And having discussed between ourselves the various clauses in the Statutes and General Orders, and considered more narrowly the only English case which really deals with the matter, we have been able to come to a unanimous conclusion, perhaps on shorter grounds than might have been anticipated.

The question is merely whether the Divisional Court, or any Judge thereof, has power, when an unsuccessful defendant is applying for a new trial, to order security to be given by him for the costs of such application. Wilson, the plaintiff, having obtained at *nisi prius*, before myself and a jury, a judgment against Perrin for $650 and costs, Perrin, in due course, gave notice of an application to the Divisional Court to set aside the verdict and judgment and for a new trial. Wilson, thereupon on grounds which he deemed special and sufficient, applied to Mr. Justice DRAKE (being one of the Judges who might sit on that Divisional Court) for an order that Perrin should give security for the respondent's costs of the application.

Mr. Justice DRAKE, without entering into any consideration of the propriety of the application, or the special circumstances alleged by

the plaintiff, refused, in fact, to entertain it at all, on the ground of want of jurisdiction considering that an application for a new trial is not properly an "appeal," though very much in the nature of an appeal; that by Rule 689 of 1893, the Divisional Court, and the judges thereof, have expressly given to them the same powers as the Full Court, and the judges thereof, but that those powers, as to security for costs, are by Rule 684 limited to the costs occasioned by an "appeal" to the Full Court, which designation, he held, is to be construed strictly, and that the powers of the Divisional Court, and judges, as to security for costs of an "appeal," must also be deemed to be confined to "appeals," strictly so termed, and of which there are many instances, *e. g.* all appeals from interlocutory orders; and finally, that in the case of *Heckscher* v. *Crossley* (1891), 1 Q. B., 224, the Court of Appeal in England, which has now exclusive jurisdiction to entertain these applications, refused to order security for costs. The difference between the jurisdictions here and in England is this, that whereas up to 1890 the Divisional Court alone had jurisdiction to order a new trial, exclusive jurisdiction was in that year given by 53 and 54 Vic., cap. 44, to the Court of Appeal, but here the Full Court alone had jurisdiction up to 1885, and in that year the Divisional Court was created, with not substituted but concurrent jurisdiction over all interlocutory matters, "including the granting of new trials;" and in 1888, cap. 45, sec. 10, with "all the powers and authorities held and exercised by the Full Court in such matters, including the granting of new trials." Now at that time, 1885, the Full Court had, by Rule 412 of General Orders, 1880, which deals with all appeals (expressly including appeals from interlocutory orders), power to direct "such deposit or other security to be given for the costs to be occasioned by any appeal" as might be thought fit "under special circumstances." The Legislature which created the Divisional Court in 1885, as above stated, and empowered it in 1888, must be taken to have been aware of the powers belonging to the Full Court; and by the sections above quoted, invested the Divisional Court with all those powers, expressly including the case of an application for a new trial; invested the Divisional Court, therefore, with the power of requiring security for the costs of such an application, and that power has never been expressly taken away. All these enactments are most conveniently dealt with by referring to the *Consolidated Acts, 1888*, 33-59, *et seq.*

Judgment.

Neither do we think that this power is inferentially taken away by the new Rules of Court, which came into force on the 1st of January

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last. Rule 689 does not, as the argument for the defendant requires, in any manner limit, or even describe, the powers of the Divisional Court. It merely states that, so far as Rule 684 (among other rules in Order LVIII.) is applicable and shall apply to all appeals to the Divisional Court. Rule 684 says that in all "appeals" to the Full Court, security for the costs of appeal may be required. Now, there is strong ground for holding that the term "appeals" includes applications for a new trial.

1st. These are, in fact, the most important of all matters which the Divisional Court deals with by way of review:

2nd. They are generally termed "appeals to the Divisional Court," and an Act of Parliament *loquitur ad vulgus*, and these rules are equally with the Statutes for general information, *i. e.*, the terms used are to be taken to mean what they are generally understood to mean:

3rd. By section 61 of the *Consolidated Acts, 1888*, c. 31 (a re-enactment of 48 Vic. B. C. (1885), c. 5, s. 3), all matters brought before a Divisional Court are expressly termed appeals; and this section has always been held to include these applications, and to limit the time within which they are to be brought. But, in short, the term either includes them or it does not. If it does, then clearly by the joint operations of Rules 684 and 689 of 1893, the Divisional Court may order security for the costs of the application. If it does not, then there is not a word either in any Statute or General Order to weaken the express enactment of 51 Vic., B. C. (1888), cap. 4, sec. 10, and the Rule 412 of 1880, the abrogation of these rules, as from the first of January last, cannot have the retrospective effect of depriving the Divisional Court of the powers with which it was furnished by the Legislature in 1888. It is as if that Rule 412 had been repeated in the Statute of 1888.

Judgment.

But the matter appears, in fact, quite clear when we examine into the real nature of what was done in *Heckscher* v. *Crossley*. It is, in fact, a very clear authority for the existence of the power. The Court of Appeal having been only invested with jurisdiction over applications for new trials in 1890, this was the first case in which application was made that the appellants should give security for costs. The Court at once accepts the jurisdiction, but the Master of the Rolls said as this was the first case before them in which security had been asked, they would wish to follow on the lines pursued by the Divisional Court, so as not to introduce a new practice, and would therefore consult the Judges who usually sat in Divisional Courts. This alone shows that

the Judges of Appeal thought that they had the power, but were merely deliberating how they should exercise it. And what did these Judges report? That they had no power to order security? Not at all; but that they do not order security "as a general rule," clearly implying that when there are special circumstances, they would accede to the proposal. That is, it implies that it possesses the exact powers expressed in the old Rule 412, of 1880.

We are, therefore, clearly of opinion, both on principle and authority, that the learned Judge had power to order such security as he might deem proper if there were special circumstances rendering such an order, in his opinion, proper. He had a discretion which he has not exercised. We, therefore, allow the appeal, and refer it back to him to inquire whether there are such special circumstances, and, if he finds in the affirmative, to fix the nature and amount of the security. The defendant must pay the costs of this appeal. We make no order as to the costs of the original application.

WALKEM, J:—

Judgment.

Concurring as I do in the judgment of this Court, as delivered by the learned Chief Justice, I desire to add a few words expressive of my view of *Heckscher* v. *Crossley*. By our Rules of Court of 1880, which were confirmed by Statute, motions for new trials were assigned to the Full Court, which answers here to the Court of Appeal in England. The Full Court, therefore, had, from the first, authority in cases of appeal to require the appellant to give security for costs; and the person moving for a new trial would surely be an appellant in the Court, and his application be one in the nature of an appeal. The Imperial Legislature having, as stated, given the Court of Appeal in England exclusive jurisdiction with respect to motions for new trials, thereby placed such motions on the same footing as appeals, for there are no restrictive words to the contrary in the Statute. The *ratio decidendi* in *Heckscher* v. *Crossley*, was not that the Court had no power to order security for costs, for it seems to have assumed that it had; but that it would be advisable to adhere to the former "general rule" of the Divisional Courts, which exacted no security. The question, therefore, of applying the Appeal Court practice or not was regarded as one of discretion, and on that basis the decision was apparently given.

Our Full Court, it seems to me, has therefore always had this discretionary power, and as our Divisional Court has now concurrent

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jurisdiction with that Court with respect to motions for new trials, it becomes necessary to establish a practice that will be uniform and common to both Courts, which we may well do, as the present Bench consists of a majority of the Judges who would constitute either Court; otherwise the practice would be left uncertain and to conflicting opinions between the Full Court, consisting as it must of at least three Judges, and the Divisional Court, constituted as it may be of any two Judges. A system of practice that might be expedient in England might be inexpedient here; hence our Rules of Court, framed as they have been from the English rules, have in many respects been more or less modified in order to adapt them to our own exigencies. The responsibility in cases like the present being cast upon us, we have been enabled, and I think fortunately, to come to a unanimous conclusion that the granting of security for costs should be left to the discretion of both of our Appellate Courts, subject, of course, to well-known judicial rules. Speaking for myself, I make these observations to explain why I, for one, venture to depart from the course adopted after due consideration by the Court of Appeal in England.

Judgment.

CREASE, J., concurred.

Appeal allowed, and application referred back to DRAKE, J.

THE "CUTCH."

BEGBIE, L. J. A.

April, 1893.

The "CUTCH"

Collision—Navigation Act—Articles 16 and 20—Party to blame.

The steamships J. and C. cleared from the same wharf at Nanaimo Harbour at about the same time, the J. first. Each backed from the wharf in a direction different from the other, and each executed a manœuvre in the harbour for the purpose of making exit to the sea by a narrow channel between an island situated at the mouth of the harbour and a shoal, and approached its entrance and each other in directions convergent and almost at right angles, the J. being on the starboard side of the C. The relative courses and speed of the vessels were such that unless altered by one or the other a collision was imminent. Both vessels kept their courses, but a few seconds before the collision took place, the C. stopped and reversed her engines, notwithstanding which she struck the J., which was then crossing her bow, forward of amidships, almost at right angles.

Held, 1. That the J. was not an overtaking ship within the meaning of Article 20, or bound to keep out of the C.'s way.

2. That the C. had the J. on her starboard side, within the meaning of Article 16, and was bound to keep out of her way.

3. That the C. was solely responsible for the collision.

ACTION for damages for collision between the steamship "Cutch" and the steamship "Joan." The trial took place on 26th and 27th April, before Sir MATTHEW B. BEGBIE, L. J. A., with Lieut. Masters, R. N. (H. M. S. "Garnet"), and Lieut. Nugent, R. N. (H. M. S. "Champion"), as assessors. Statement.

C. E. Pooley, Q. C., for the owners of the "Joan," the plaintiffs.

E. V. Bodwell and *P. E. Irving* for the owners of the "Cutch," the defendants.

The facts and arguments fully appear from the judgment.

28th April, 1893.

Sir MATTHEW B. BEGBIE, L. J. A.:—

This case has been somewhat embarrassed by the different views taken of the facts by the witnesses for the plaintiffs and defendants; a difference not altogether unprecedented in the case of maritime collisions, and naturally accounted for by the well-known, though unaccountable, sympathy that every man feels for the vessel in which he happens to be; by the suddenness and unforeseen nature, in general, of all collisions; and by the erroneous views too often taken by the masters of vessels, of their own rights and of the rights of others. Judgment.

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The evidence, which has occupied the Court nearly eleven hours on two days, refers wholly and entirely to events which, in fact, from first to last, were commenced and concluded in eight minutes of time on the morning of November 19, 1892.

A great deal of contradictory evidence was given upon a preliminary, and I think an immaterial point, viz.: which of the two colliding vessels was the first to leave the wharf; the master and mate and some passengers aboard the "Cutch" alleging (what she also insists upon in her preliminary act) that the "Cutch" was clear of the wharf at which they had both peacefully lain all night, *i. e.*, had all her lines thrown off before the "Joan." Upon this point, however, I am quite clear that they are all in error. Nominally, perhaps, and for a moment, two of the "Cutch's" lines were the first removed from the mooring pile; she had come into the wharf on the 18th, later than the "Joan," and her head and spring lines were thrown over the "Joan's," so that it was necessary to remove them in order to let the "Joan's" lines go, and that is what the wharfinger says he did, but he immediately, and as soon as ever he had lifted the "Joan's" lines, replaced the "Cutch's" lines on the pile; and he says he cleared the "Joan" first, and that he saw her completely detached from the wharf, although quite alongside of it, before he cast off the last line of the "Cutch," and while the "Cutch" was still swinging to her stern line. Other, quite independent witnesses (Mr. Thompson and Mr. Jensen) also saw from the shore that the "Joan" was free while the "Cutch" was still fast. Now, in weighing these contradictory statements, we must consider that the wharfinger's business was to free these lines; that none of the defendants' witnesses handled or could have handled the "Cutch's" ropes, or could probably have seen exactly what the wharfinger did with them, or could have seen the "Joan's" lines; that all the defendants' witnesses were either crew or passengers on board the "Cutch," and so liable to the mysterious sympathy already attested to; and that the wharfinger's statement is supported not only by the "Joan's" crew, but by independent witnesses. I am quite clear that the "Joan" was the first to get clear of the wharf And the chief conclusion I drew from all this evidence of the defendants was, that they placed great reliance upon the point which vessel cast off first (which I consider quite immaterial as regards the actual collision), and imagined that it gave them priority of right of entry into the South channel (by which both vessels proposed to leave the harbour), whereas that would depend entirely upon the subsequent manœuvres of the two vessels; and I think this

Judgment.

erroneous notion of right probably influenced the subsequent conduct of the "Cutch" and the views of her master. And the positiveness with which the "Cutch's" witnesses swore to these things, which could not have been within their own knowledge, and as to which they were clearly in error (although there is no suggestion against their firm belief that they were right), very much impairs the force of their statements upon other points which they believe they saw.

The defendant's case is that she got clear of Gordon's wharf before the "Joan," and so obtained a *prima facie* right of priority of leaving the harbour, by such channel as she might select; that she was the first to get into the open harbour, and was making at a moderate speed for the South channel, as the leading ship, with the "Joan" on her starboard quarter, when the latter exerting her full power overtook the "Cutch," and, making for the wrong side (viz., the port side), of the South channel, for which they were both bound, threw herself at full speed on the "Cutch's" bow, who was actually reversing her screw to mitigate the force of the collision which the extraordinary conduct of the "Joan" had rendered inevitable; the "Cutch" being thus entirely innocent, and the "Joan" guilty of various infractions of the Articles of the *Navigation Act*: As an overtaking ship she ought to have kept out of the "Cutch's way (Art. 20). There being risk of collision, the "Joan" ought to have slackened her speed (Art. 18). Moreover, the "Joan," intending to leave by the South channel, ought to have left by the south or starboard side, and was guilty of gross misconduct in endeavouring to get to the north side (Art. 21).

Judgment.

To all this there are several answers. In the first place, it is clearly made out, in the opinion of myself and assessors, that the "Cutch" was not and that the "Joan" was, the first to leave the wharf. As already intimated, the mere fact of casting loose did not confer on either vessel the unqualified right of being the first to take the channel. But whatever expectations the "Cutch" founded on her supposed priority were founded on a complete misconception of the facts; and this double error, both of the facts and of the rights founded on these facts, probably influenced the subsequent conduct and belief of the master. In the next place, from a very careful measurement of distances and bearings, as given by the defendants themselves, quite irrespective of the plaintiff's witness, or of the natural probability of the case, the assessors have come to the conclusion that it is quite impossible that the "Joan," which was always on the starboard hand of the "Cutch," could ever have been abaft her beam; and therefore

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that the "Cutch's" second contention that she was the leading vessel at the start for the South channel, is equally devoid of foundation. It is true, some of the passenger witnesses of the "Cutch," and one or two others on board, were of opinion that the "Joan" was at the commencement of their course abaft the "Cutch's" beam; which would make the "Joan" a following or overtaking ship within Art. 20. But the times and distances and bearings given by the master and other skilled witnesses on the "Cutch" (the defendants' own witnesses) quite contradict this; though it would, of course, be possible that in turning and twisting in the neighbourhood of the "Babcock" she might momentarily have turned her quarter towards the "Joan." That would have been an accident merely; but we are of opinion that it never did so happen; and that in fact during all her manœuvres in the harbour she had the "Cutch" forward of her beam. And then when we look at the plaintiffs' witnesses—they produce three who are quite independent of either ship—Mr. Thompson, Mr. Jensen, and the mate of the "Quadra," who all agree as to the relative position of the vessels, viz., that the "Joan" was, from the time when the "Cutch" first began to move her head towards the South channel, always nearer than the "Cutch" to that channel. And the probabilities of the case are so great in the same direction that it would require the greatest unanimity of testimony to make one believe that the "Cutch" could ever have been the leading ship. She had on leaving the wharf eight points, an entire right angle, to make good more than the "Joan," before she could head for the channel. On backing out it would manifestly be her natural manœuvre to turn her stern through the north towards the west as well as she could, and that the curve so described would probably carry her to the north much further than the point assigned by her master, and, indeed, according to the time and rate of speed given by him, very nearly to the position assigned by the plaintiffs in the chart submitted by them, leaving the "Joan" several points forward of the beam; but even from the point indicated by the defendants on the charts submitted by them—not, as I have said, borne out by the times and rates of speed sworn to by their own master—and supposing (what is incredible, and contrary to the evidence) that the "Joan" remained stationary all that time off the north end of Gordon's wharf, she would still be forward of the "Cutch's" beam, and therefore entitled to have way given to her, under Art. 16, and not bound to give way to the "Cutch," under Art. 20, as contended by the defendants. But it can be mathematically

Judgment

proved that the theory of the "Cutch" as to the conditions of the actual collision is entirely baseless. It would be mathematically impossible that the "Joan," throwing herself at the rate of ten knots per hour across the bow of the "Cutch," nearly stationary, as the defendants' witnesses would appear to suggest, could cause the injuries described and not disputed, viz., a cleft nearly perpendicular to her beam. If the injuries were occasioned, as the defendants contend, the rent would extend in a direction from the stem of the "Joan" towards her stern, and would be mainly external, without much penetration.

But if two vessels of nearly equal size and speed, of equal momentum, collide at an angle of about 45°, the injury will extend inwards into the vessel that receives the shock, in a direction nearly perpendicular to her beam. This will be apparent on drawing the necessary diagram so as to show the resultant thrust; the impetus of the recipient being exactly represented by an equivalent thrust in the direction opposite to her motion. That is to say, the injury inflicted and shown to have been suffered by the "Joan," is exactly explained by the plaintiff's account of the position and speed of the vessels, though their witnesses did not seem to understand that; and is quite irreconcileable with the circumstances suggested by the defendants.

Judgment.

Neither is there any force in the defendant's contention that the "Joan" ought to have entered the South channel close on the starboard hand, and to the southward of the mooring buoys, Art. 21, and that it was improper navigation for her to attempt to pass to the north of the buoys. If the "Cutch" were, as the defendants contend, the leading vessel, surely it was equally her duty to make for the southward of the buoys; but she was herself making for the north side. In fact, I am advised that on the evidence and the statement of the practice, it is a reasonable and proper course of careful navigation, having regard to the risk of lines from the buoys to the wharves, and other matters, to pass to the north of these buoys, especially when another vessel is lying between the mooring buoys. Neither vessel was in fault in this respect. I believe the "Cutch" did, in fact, go to the starboard side of the channel, south of the buoys, after the collision.

The "Cutch," therefore, we consider to be in fault, under Art. 16, which throws upon her the duty of keeping out of the way of the "Joan." Even if the "Joan" had been utterly mismanaged, had been steering a wrong course, it was the duty of the "Cutch" to keep out of her way; to take all possible precautions to prevent a collision. Now, what precautions did she take? None whatever, except stopping

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and reversing her engine two or three seconds before impact, when such a stoppage could produce no sensible effect; and, in fact, two independent witnesses, who were watching the proceedings, decidedly declined to believe that the "Cutch" ever stopped her engines at all. Yet the "Joan" must have been in sight, and the possibility of a collision evident, if the "Cutch" had any sort of a look-out (and if she had none, she is again in fault) from the first moment that she began her forward progress, especially if, as some of her witnesses say, that was only about 300 feet off. It is possible, of course, that the master of the "Cutch" had no eyes for anything but his rival, the "City of Nanaimo," just disappearing with a few minutes' start. If so, that again makes him in default. A master cannot claim to be blameless if, being on deck, he fails to see a vessel of his own size right ahead, and her own length off.

But there is another section which imposes on a colliding ship a duty which seamen generally eagerly accept as a privilege, requiring no Act of Parliament to command them to assist fellow seamen in distress, but which was entirely neglected on the present occasion. I refer to Sec. 10. In the absence of a reasonable excuse, he is to be taken to be in default. Now, what is the reasonable excuse put forward? That the "Joan" did not whistle. But there was no evidence that she could whistle. The force of the blow was so great, and on such a part of the ship as to burst the steam gear and drive all the engineers from below, the steam escaping in clouds. The master of the "Cutch" says he saw nothing of this, which seems almost incredible, but, if true, it shows that he was not in a state of attention properly to conduct the navigation of any ship; and the accuracy of all his disculpatory observations may be questioned if he did not observe this. His other excuse is that there were other ships not far off; but they were at anchor, and otiose; he was on the spot, with all his crew in hand. Life might have been at stake. If the "Joan" had drifted ashore she might have been a total loss, at all events much more extensively injured. As it was, she was only brought up on the edge of the flat, and made fast to the black buoy on the south side of the channel, drifting helplessly in high wind across the tail of the middle bank, while the "Cutch" went straight on in full chase of her rival, the "City of Nanaimo." I am bound by this section to say that it alone fixes the consequences of the collision as being due to the default of the "Cutch."

Judgment.

But then, was the "Cutch" alone in default? Upon this point Mr. *Bodwell* urged Art. 18, which says that every steamer approaching another so as to involve risk of collision shall slacken speed, or stop and reverse if necessary. Now, as to this, it is to be observed that the whole of these rules are intended to prevent collisions, if possible; and that it is the most mischievous pedantry to insist on a literal compliance with a rule when such compliance would increase the probability of a collision. Now, the position of the "Joan" was this: She was making, probably as fast as she could, though she had perhaps not acquired full headway, for what we think was a proper way of entering the South channel. She saw the "Cutch" coming down on her port bow, probably not quite so fast as herself, but yet fast. She would say, "'Cutch' has, under Art. 16, to keep out of my way, she will probably slacken speed, perhaps pass under my stern, though she seems, like myself, to prefer to make for the north side of the mooring buoys. If I slacken speed, under Art. 18, I shall very likely run into her. If she keeps on as at present and I slacken, I shall certainly run into her, and then I shall be liable for damages; I should be in default under Art. 22. Much my best plan is to keep my course according to that Article; if 'Cutch' slows down I shall get abundantly clear.'" And I am advised that reasoning is founded on good and careful seamanship.

Judgment.

I therefore declare the defendants' ship, the "Cutch," to be alone in default, and that the "Joan" was not in any default, and there will be the consequent condemnation as to damages and costs referred to the Registrar and Merchants to ascertain the amount of damage.

I cannot conclude without some observations as to the very serious consequences of allowing several steamers to leave the wharves, especially in narrow waters, at the same hour. In time of war, when two belligerents are in a neutral harbour, they are never permitted to leave together, nor, I believe, until after a period of 24 hours. In the present case the "Cutch" and the "City of Nanaimo" are not in one sense belligerents. They do not fire red hot bullets or shell at each other, but they run the manifest risk of inflicting on each other, or on innocent neutrals, as the present case shows, quite as important damage and loss, both of property and life. Two steamers colliding in the Gulf, or bursting their steam chests, may settle their differences quite as substantially by going to the bottom with all their cargo and passengers as they could possibly manage it with the most improved projectiles or explosives. And although it was in evidence that these

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vessels never race—that is forbidden by the Pilot rules—yet it was ingenuously confessed that they never meet without seeing which of them can go the fastest. This the Harbour Master can hardly prevent. But a fine of $200 upon any master who leaves this confined wharfage until some small interval—eight minutes is, according to the present case, far more than is necessary—say five minutes after the other; or even $10 on the wharfinger who throws off a line earlier, might be effective.

Judgment for plaintiff.

HARPER VS CAMERON.

CREASE, J.

1892

August 18.

DIVISIONAL COURT.

1893,

Jan. 16.

HARPER v. CAMERON.

Estoppel—Default Judgment—Waiver—Lunatic—Contract—Fraud—Practice—Res Judicata—Pleading—Evidence—New Trial—Rule 674.

Action to cancel promissory notes as being obtained by defendant, without consideration, from plaintiff, while he was, to defendant's knowledge, of unsound mind and incapable of transacting business; and to set aside a judgment by default of appearance obtained Dec. 10, 1888, in an action by defendant against the plaintiff upon the notes.

The jury found that the plaintiff, at the time of the contract represented by the notes in question, was of unsound mind; (2) That the transaction was not fair and *bona fide*; (3) That there was no consideration; (4) That the transaction was without deliberation; (5) Without independent advice; (6) That the defendant at the time of making the notes was aware that the plaintiff was of unsound mind. The jury also stated that they were all for a verdict for the plaintiff.

Upon motion for Judgment, held:

(1.) That the plaintiff was not estopped by the default judgment in Cameron v. Harper.

(2.) That the issues were not *res judicata* by a decision in chambers, in *Cameron* v. *Harper* affirmed by the Divisional Court, refusing to set aside the default judgment and admit plaintiff to defend and set up in that action the plaintiff's case herein.

(3.) That the answers and general verdict of the jury included a finding that the plaintiff was in fact *non compos mentis* at the time of and ever since the transaction impeached, and that he was consequently not estopped by conduct.

(4.) A finding by inquisition of the insanity of the plaintiff was not a necessary preliminary to this action.

Upon motion for new trial and appeal.

Per BEGBIE, C. J., WALKEM AND DRAKE, J. J. (Sitting both as a full court and Divisional court). Judgment of Crease, J., affirmed.

(2.) The verdict of a jury should not be disturbed as being against evidence unless it is one which the jury on the evidence could not reasonably have formed.

(3.) An action lies to set aside a judgment in another action.

(4.) Where documentary evidence is rejected at the trial, and the propriety of the rejection is not made a ground of appeal, the court will not allow that evidence to be read on appeal as fresh evidence under Rule 874.

(5.) *Per* WALKEM, J.—Insanity once established is presumed to continue.

(6.) *Per* DRAKE, J.—Where a contract is attacked the defence of ratification must be pleaded to admit evidence of ratification.

MOTION for Judgment. The Action, which was tried before Statement.

R V Anderson 5 WWR 1052

See CAN. SCR 61 p. 608

See CAN Ency Digest Vol. 5 Default Sec. 4

See Bower Actionable Non-disclosure 393-397

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Crease, J., with a Special Jury, was for a Declaration that certain promissory notes, dated 18th November, 1887, for $20,000.00, $10,000.00, and four for $5,000.00 each, made by the Plaintiff, payable one year after date to the order of the Defendant, and which were substituted for a note of same tenor and date made by plaintiff to defendant for $50,000.00, were obtained by Defendant by fraud and without consideration, and while the plaintiff was, to the knowledge of the defendant, of unsound mind, and for an order for the delivery up of same to be cancelled; and for an order to set aside a judgment obtained by the defendant in default of appearance, for $50,029.00 debt and costs, in an action brought by him on the 28th. November, 1888, against the plaintiff to recover the amount of the said notes, and also to set aside all proceedings under said Judgment, and for repayment by the defendant to the plaintiff of $20,000.00 realized and paid over to him by the Receivers appointed under the Judgment.

Statement.

The judgment by default, in Cameron *v.* Harper was signed on tenth December, 1888. The following proceedings were also had in that action:

On 18th. December, 1888, upon affidavit showing that all the available property of the plaintiff herein was mortgaged and the equitable estate alone outstanding, Sir M. B. Begbie, C. J., made an Order appointing two Receivers by way of giving to defendant herein equitable execution upon the said Judgment.

On the 14th January, 1889, the Receiver being about to effect a sale of certain mining shares, the plaintiff herein, by his counsel, intervened, and filed affidavits resisting the sale, and the Chief Justice, before whom the matter was heard, made an order directing a sale on the terms offered by the proposed purchaser, whereupon the plaintiff appealed from that order to the Divisional Court, which dismissed the appeal.

On the 15th. May, 1889, the defendant Cameron obtained an order authorizing the Receivers to sell the real and personal estate of the plaintiff herein, under said judgment.

On the 12th. July, 1889, the Chief Justice made an order, on consent of solicitors for both plaintiff and defendant, for the

sale by the Receivers by auction of a flour mill, part of the assets in their hands under said judgment.

On 6th. August, 1889, the Chief Justice made an order, on hearing counsel for both parties, postponing the sale of said flour mill.

On 17th. August, 1889, the Chief Justice approved of the tender of one Galpin for the purchase of the whole of the remaining real and personal property in the hands of the Receivers, at a sum not exceeding $225,000.00.

On 26th. August, 1889, the plaintiff having appealed from the last mentioned order to the Divisional Court, the said court dismissed the appeal.

On the 12th. February, 1890, Matthew Warmsley, the plaintiff's next friend herein, filed a petition in the Supreme Court, setting forth that the plaintiff herein was then and had for some time previously been of unsound mind, and praying for a commission *de lunatico inquirendo* and certificate thereunder, and the said petition was shortly thereafter heard before the Chief Justice and dismissed.

Statement.

On the 15th May, 1890, the plaintiff herein obtained a summons in the said action of Cameron v. Harper, calling upon the defendant, the plaintiff therein: "To show cause why the judgment signed herein on the 10th day of December, 1888, should not be set aside and the defendant be at liberty to appear and defend this action on the ground that the promissory notes the subject matter of this action were obtained from the defendant when he was in an unfit state of mind," and in support of that application there was filed an affidavit of the plaintiff herein, containing the following allegations:

"3. That on or about the 1st day of July, 1884, I received a severe kick on the head from a horse which injured my brain so as to deprive me of the use of my mental faculties, and I remained in that condition for some time thereafter, and, up to this date, I have not wholly recovered from the effects of the said kick.

"5. That the notes sued upon herein were obtained from me

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by means of false representations. The plaintiff succeeded in making me believe that shafts had been sunk on Lightning Creek, from the town of Stanley down to the shaft of the "Eleven of England," but that the inflow of water was so great that it could not be kept dry or worked without a drain tunnel, and also succeeded in making me believe it was worth millions, stating it to be worth $5,000,000.00, if I could only get a lease to work it.

"7. While of unsound mind and incapable of understanding the consequences of my own act, as the plaintiff well knew, I gave the note for $50,000.00, partly in consideration of his said information, and partly under the impression that he was entitled to a half interest in the lease.

"9. Subsequently, in or about the year 1886, the plaintiff said he wanted to get some money and wanted to hypothecate the note and would be able to do so if the note was broken up into smaller sums, and, still being of unsound mind, as the plaintiff knew, and induced by the plaintiff's representations that the mining ground was valuable, I gave the notes as requested, which are the notes sued on herein, and on which the said judgment was obtained.

Statement.

"10. That the said mine was worthless, and I verily believe the plaintiff knew that his information as to its great value was false at the time of giving it to me, and that he did so knowing my weak condition mentally, with the view of getting me to sign the said notes, &c.

Also an affidavit of Dr. J. C. Davie, stating:

"1. That in or about August, 1884, I was medical attendant of Thaddeus Harper who was at that time suffering from the effects of a severe kick on the head from a horse which injured his brain so as to deprive him of the use of his mental faculties, and he continued in that condition for some time thereafter.

"2. That said Thaddeus Harper is still suffering from the effects of the said accident to the best of my judgment."

And an affidavit of Dr. Helmcken in almost the same terms,

alleging that the kick from the horse "deprived him of the complete use of his mental faculties, and he remained in that condition for some time thereafter, and he has not yet wholly recovered from the effects of the said accident to the best of my judgment."

And an affidavit of R. P. Rithet, alleging:

"2. That in the month of July, 1894, I had the management of the said defendant's business, and continued to manage the same until November, 1885, at which date, in consequence of being unable to control the said Thaddeus Harper, I was compelled to give up, and did give up the management thereof."

"3. That, at the time, I considered the said Thaddeus Harper wholly unfit to manage his own affairs."

This application was heard before the Chief Justice, who, on the 20th June, delivered judgment (*a*), and made an order reciting the grounds of, and dismissing the said summons.

Statement.

(a) Judgment.

SIR M. B. BEGBIE, C. J.:—

Mr. Helmcken asked leave to have the judgment of 10th December, 1888 (obtained by default of pleading), set aside, and for leave to defend, on the usual affidavits of merits, and on affidavits by defendant and Drs. Davie and J. S. Helmcken, as to the defendant's mental incapacity, and alleged misrepresentations and undue advantage by the plaintiff. He afterwards modified this by asking an issue to determine the state of the defendant's mind at the time of giving the promissory note for $50,000.00 and the further notes of equal aggregated amount, substituted for that $50,000.00 note, which were the notes on which the plaintiff had obtained the judgment now sought to be impeached.

Applications of this nature ought to be made at the earliest possible moment, at least in a reasonable time. Here there is an interval of 18 months to account for, and the defendant endeavours to account for it by alleging weakness of mind from an accidental kick from a horse in August, 1884, to establish which he produces two affidavits by medical men and one by himself.

Not one of these affidavits contains the slightest suggestion that for the last two years, at all events, and for some time before this action was commenced in 1888, the defendant has not been quite "*compos mentis.*" Indeed, the two medical certificates, though they speak of some mental deterioration, the one says the kick "deprived defendant of the complete use of his mental faculties," the other, "injured his brain so as to deprive him of the use of his mental faculties," which, literally, would probably mean any use, i. e., that

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The plaintiff appealed from this judgment to the Divisional court, which, on 15th July, 1890, dismissed the appeal.

This action was commenced on the 12th day of September, 1890.

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he was in a state of mere idocy, or insensibility appears to have been the case, and both the medical witnessess allege that that condition continued "for some time thereafter," i. e., after August, 1884. yet neither of them fix any date up to which the mental deterioration continued, nor do they give any opinion as to its extent or duration. The mental faculties may be to some extent blunted without rendering the patient incapable of transacting business, even of considerable importance, as is every day seen in the execution of wills by sick men, although both these deponents say (in identical words), "that in their judgment, the defendant has not yet wholly recovered from the effects of the said accident." Yet they do not say that the mind is now at all affected, and they even refer to some bodily infirmity. Evidently an injury to the brain may and often does affect not only the intellect but various organs, the tongue, the ear, the hand, the foot, which effects may and often do continue long after the intellect has recovered its full vigor, or at all events sufficient vigor to enable the patient to transact business, especially where the business is merely to retain an attorney to defend an action. The imputations of fraud, therefore, in respect of which the defendant seeks this relief, at present depend solely on the defendant's own affidavit, for Mr. Rithet's affidavit does not speak to defendant's incompetency beyond 1885, and the notes on which judgment was signed were given much more recently. The defendant says he gave these notes and the previously dated larger note for which these notes were substituted, while not only mentally weak, but while under the influence of Cameron's representations as to the value of the mining ground on Lightning Creek, Cameron being aware of the defendant's mental weakness. In order to establish this defence, the defendant would have to prove his mental weakness, and that the representations were untrue to Cameron's knowledge. But so far from this being so, the representations are probably true. There is, I believe, no doubt that pay dirt, more or less rich, has been generally met with on Lightning Creek, nor that the underground water is in very large quantities, more than can be dealt with by existing pumping facilities. Whether the suggested bed rock drains or tunnel would be a sufficient, or would be the only, means for clearing the mine is a mere matter of speculation. I do not see anything in these representations which would enable Harper to maintain an action (see observations in *Derry* v. *Peek*, 14 app: Cas : 337) of deceit against Cameron to have the notes delivered up to be cancelled, and his defence to Cameron's action on the notes would have to cover merely the same ground, and if he had defended the action he would certainly have counter claimed for such a return. And the strength of the defendant's affidavit is its weakness. It appears strange that if quite or nearly imbecile he could now remember so much, or so accurately, what occurred during his imbecility. But whatever may have been his weakness when he gave the notes, there is not a suggestion

Statement.

The plaintiff's statement of claim alleged that he was a person of unsound mind, not so found by inquisition, and suing by his next friend, and then set out the injury he had received from the kick of the horse on 1st July, 1884, whereby he became and ever since continued of unsound mind and incapable of attending to business. It also set out the manner in which the defendant Cameron had procured from him his note for $50,000.00, and the notes substituted therefor, and the judgment by default obtained in the action brought thereon and stating further that various other proceedings had since been taken in execution of the said judgment, the allegations being, in effect, the same as those set out in his affidavit filed for the purpose of setting aside the judgment in *Cameron* v. *Harper*.

Statement.

The defendant's statement of defence admitted that the plaintiff sustained an injury by the kick of a horse as

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that he was under utter incapacity, extending to disability to give instructions to his attorney to defend the action in December, 1888, or from that time to the present. Nor is there any explanation of the laches in all the subsequent judgment creditors of the defendant (later in date than Cameron's), all of whom are much more interested than Harper himself in having Cameron's judgment set aside. It is not suggested that all these were, by Cameron's machinations, kept in ignorance of the circumstances now alleged. Any one of these creditors might have brought an action to get Cameron's judgment set aside which, obtained on these fraudulent notes, was sweeping away the whole of Harper's estate. Lord Justice Bowen has observed upon the danger of reading anyhting into an affidavit, i. e., inferring facts which the defendant himself abstains from alleging. And on the affidavits I am by no means satisfied that the defendant was not sane enough to be perfectly "*sui juris*" when he gave these notes. I am by no means satisfied that the defendant could at any time have procured the return of these notes in an action of deceit. I cannot help thinking that the defendant was perfectly aware of his position, when he allowed it to go by default in December, 1888, and has been so ever since. It is not alleged that the ten or a dozen judgment creditors of the defendant, whose remedy is wholly forfeited by reason of the plaintiff's judgment, are all under mental or any other disqualification, and it seems quite clear that none of them have ever had any belief that they could thus easily obtain satisfaction of their claims. And it is not clear what pecuniary interest the defendant himself has in setting this judgment aside, or in having it reviewed, for if the whole fund in Court be taken from Cameron none of it will ever come to Harper.

I, therefore, refuse the application.

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alleged, but denied that the injury seriously affected the brain of, or that it rendered the said Thaddeus Harper of unsound mind and incapable of attending to his affairs and conducting his business generally. It then set out the transactions of which the giving of the $50,000.00 note by the plaintiff was the outcome, alleging that they were *bona fide* and without fraud.

It then alleged the various proceedings taken in the action of *Cameron* v. *Harper* as above set out, and claimed that the question of the validity of the judgment by default, was *res judicata* by the judgment of the Chief Justice dismissing the motion to him to set it aside, and by the decision of the Divisional Court upon appeal sustaining his judgment; and also that the plaintiff herein was estopped by his laches delay and waiver by reason of the part that he had taken in the said proceedings.

Statement.

The proceedings in *Cameron* v. *Harper*, and the plaintiff's conduct in relation thereto, as alleged, were not disputed.

At the close of the case, MR. JUSTICE CREASE, in charging the Jury, left the questions of fact in dispute going to the question of fraud and undue advantage in the obtaining of the notes, and the question of the mental incapacity of the plaintiff, to the jury, in questions to which they returned answers as follows:—

Q. Was Harper at the time of the contract of unsound mind? A. Yes.

Q. Was the transaction of the $50,000 note fair and bona fide? A. No.

Q. Was the consideration unconscionable? A. There was no consideration.

Q. Was the act without deliberotion? A. Yes.

Q. Was it without independent advice? A. Yes.

Q. If Harper was of unsound mind at the time of the making of the notes, was Cameron aware of it at the time?

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To this question six of the jury answered "yes," and two "no." (a)

The jury also stated *mero motu suorum* that they were all for a verdict for the plaintiff.

Hon. A. N. Richards, Q.C., and E. V. Bodwell now moved for judgment for the plaintiff and resisted a cross motionfor judgment for defendant and argued.

The findings of the jury are conclusive for judgment for plaintiff. He is not estopped by the judgment by default in *Cameron* v. *Harper* or by the judgment of the Chief Justice or of the Divisional Court on the motion to set it aside, or by his course of conduct or that of his solicitor in that action after notice of the judgment, from raising in this action the question of his mental unsoundness throughout from the time of the making of the note and substituted notes in question down to the date of the verdict, and the incidental question of the fraud of the defendant. *Carew* v. *Johnston*, 2 Sch. and Lef. 280; *Gore* v. *Stackpole* 1 Dow 18; *Flower* v. *Lloyd* 6 Ch. D. 297. A judgment by default does not operate as an estoppel—*Howlett* v. *Tarte*, 10 C.B., N.S., 813. There must be an adjudication upon the merits for that purpose—*Baker* v. *Booth*, 2 Ont. O. S. 373; *Chisholm* v. *Moore*, 11 U.C.,C.P., 589; *Palmer* v. *Temple*, 9 A. & E., 508; *Sedden* v. *Tuton*, 6 T.R., 607; *Baggott* v. *Williams*, 2 B. & C., 235; *Earl of Bandon* v. *Becher*, 3 Cl. & F., 479. The application against the judgment was for leave to raise the issue of plaintiff's insanity in that action, and was to the discretion of the Court for an indulgence, which the Chief Justice refused, leaving the plaintiff to his remedy by independent action. A judgment may be relieved against by independent action upon the ground that the defendant was incompetent to defend himself—*Carew* v. *Johnson*, 2 Sch. & Lef. at p. 292. The Court could only have admitted plaintiff to

Statement.

"(a) By the Supreme Court Act C.S.B.C., 1888, cap. 31, secs. 48 and 49. In civil actions except on behalf of the Crown for fines or forfeitures it shall be lawful to receive the verdict of three fourths or of any proportion equal to or greater than three fourths of the jury, after the expiration of three hours from the time when such jury shall have returned to consider their verdict, in case (at the end of such three hours) they shall not be unanimous."

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defend by deciding in his favour on that motion the question of his unsoundness of mind up to that date, for, if he was of responsible and competent understanding, his conduct, laches and acquiescence barred him from setting it aside; and that question of his then or previous mental condition the Court rightly refused to decide in Chambers upon affidavit, as it was a proper subject of enquiry before a jury as a main issue in an independent action. It cannot be said that the plaintiff was estopped from bringing this action or that the question of his mental unsoundness and the incident fraud of the defendant became *res judicata* by a judgment which refused to admit him to be heard upon a trial of those issues. The question must now be regarded in the light of the finding of the jury that plaintiff was of unsound mind. There are no laches as against a lunatic—*Carew* v. *Johnson, supra.* There is no express finding by the jury that plaintiff was of unsound mind at the date of, or since the judgment by default, but insanity once found is presumed to continue. Pope on Lunacy, 2nd Ed. p. 408 and cases cited. The verdict is also in effect a general verdict for plaintiff and includes all findings necessary to sustain it. Rules 36, 66, 117, 134, 357 and 244 for the protection of persons under mental disability in regard to legal process against them apply, and that judgment is now, by the finding of the jury, void as against the plaintiff for non-compliance with those rules.

Statement.

Charles Wilson and *A. E. McPhillips*, contra.

The proper course for the plaintiff was to apply as he did to set aside the judgment by default; Supreme Court Act C.S.B.C. Cap. 31, Sec. 13, s.s. (7)—*Vint* v. *Hudspith*, 29 Ch. D., 322. The conduct of the plaintiff after the judgment bars him from setting it aside in this action to the same extent as it did upon his motion in that action, the question being one of estoppel by waiver, which can only be rebutted by an express finding that he was not of competent mind to defend himself or to understand the nature and effect of the judgment against him. There is no such finding by the jury. The contrary was found by the Chief Justice on the plaintiff's affidavits made at the time, and the fact of his moving against the judgment shows that he knew its nature and effect, but, though he

swore that he was of unsound mind at the time of giving the notes, he did not pretend that he was so then, or that it was by reason of want of understanding that he suffered the judgment to go against him. A judgment by default constitutes an estoppel—*Williams* v. *Richardson*, 36 L.T., N.S., 505; *Kendall* v. *Hamilton*, 4 App. Cas. 504. No presumption of continuation of insanity arises except upon a general finding by inquisition; in any case it is a presumption of fact and rebuttable, and must be left to the jury as a fact and a finding obtained upon it. It is not a conclusion of law. There is no such presumption as against a judgment, which, at all events, if it is not an absolute estoppel, shifts the onus and is *prima facie* evidence of every fact necessary to sustain it. Where there was a finding of a jury on an inquisition of insanity which over-reached the period in dispute, it was held that the finding afforded a presumption of insanity, but there being some evidence that some time after the lunacy was stated to have existed or commenced, the party was not of unsound mind, an issue was directed whether he was of unsound mind at the time in question. *French* v. *Mainwaring*, 2 Beav. 115. Here there is evidence and a previous finding, that plaintiff was not of unsound mind at the date of the judgment, and no finding to the contrary. The contract of a lunatic, who, by reason of lunacy, is not capable of understanding its terms or forming a rational judgment of its effect on his interests, is not void but only voidable at his option, and this only when his mental state was known to the other party, as was found here. *Pollock* on Contr. 4th ed. Page 160; *Moulton* v. *Camroux*, 2 Exc. 487, 4 Exc. 17; *Jacobs* v. *Richards*, 23 L.J., Ch., 557; *Matthews* v. *Baxter*, L.R., 8 Exc. 132. Adopting therefore the findings of the jury as to the unsound condition of plaintiff's mind at the time of making the original note, or even of the substituted notes, although that is not found, and that defendant knowingly and fraudently obtained the notes, the contract was one capable of being ratified in a subsequent lucid interval, and the suffering of judgment to be obtained upon it, and the subsequent conduct of

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plaintiff, in the absence of a finding of the jury that he was of unsound mind at that time, constitutes a ratification. The contract was also executed and the parties cannot be restored to their original position.

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The jury after hearing the evidence as to Cameron's conduct in the $50,000 transaction and after eleven days patient trial found that: It was not *fair and bona fide and that there was no consideration for it*, in other words that it was a fraud: "That the act of Harper was without deliberation; that it was done without independent advice," of any solicitor of his own, and that Harper himself, at the period of the contract, was of unsound mind, and that Cameron was aware of Harper's insanity at the time of giving the notes. And the jury also stated that they were all for a verdict for the plaintiff, so that there was, in effect, a general verdict for the plaintiff, and such a verdict given in addition to the specific findings of fact returned in answer to the questions put to them, imports a finding of every additional fact necessary to sustain such a verdict.

Judgment.

Combining these several specific findings into one, we have the jury declaring that the $50,000 note transaction was neither more or less than a deliberate fraud on the part of the defendant, practised upon a man whom he knew to be of unsound mind. So much for the facts.

It is when we come to the law, as applicable to the state of facts here disclosed, that we reach the most important portion of our task, and find ourselves face to face with that difficult section of English jurisprudence, known as the law of Estoppel; and particularly that portion of it called into exercise here—the question of *res judicata*: the law on estoppel by record.

At the commencement of the plaintiff's case, a preliminary objection was raised by the learned counsel for the defendant, that as one issue in this case was the plaintiff's

sanity or insanity, the action could not be maintained under any circumstances; and that a commission should issue under the 16 and 17 Vict. cap. 70 (Imp.), section 38, et seq., to ascertain plaintiff's sanity or insanity, when the proof of the latter would be a bar to all the subsequent proceedings, which would then fall to the ground.

This I over-ruled, on the ground, among other things, that it would be a roundabout, expensive and ineffective way to proceed, first by a commission *de lunatico*, to enquire as to total insanity, as, assuming that to be ascertained, another proceeding, not very feasible for a pauper, would be required to carry its conclusions into practical effect. Whereas, by the present pleadings, as amended by the Divisional Court, in accord with numerous precedents, the lower grades of insanity, such as weakness of mind, mental incapacity to contract, would at once be effectively reached, and the contract fraudulently made with a person under such influence could be set aside, together with the judgment by default which was the result.

Judgment.

It is with the effect of fraud on mental incapacity that we have now particularly to deal.

Under these circumstances it became next to imperative to proceed by a distinct action, bringing forth the fraud and the unsoundness of mind of the plaintiff to the light of day. This, since the Judicature Act, with its equitable predominance, became law, the plaintiff by this action has been enabled to do.

We may learn something from a case which occurred in 1877, not directly in point, but very suggestive. Now, as to the form in which the present action is brought, for the plaintiff here is asked by the defendant to proceed backward, *i. e.*, to open up the last decisions which affect him first, instead of at once attacking the root of the matter—the *causa causans* and its effects. The case cited above was that of *Flower* v. *Lloyd*, 6 Ch. D., 297.

The plaintiff in that suit sued for and obtained judgment

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against the defendant for infringing a patent. The Court of Appeal reversed the judgment. *After the order of appeal was passed and entered,* the plaintiff applied to the Court of Appeal for a re-hearing, because the expert of the court had been fraudulently misled in examining defendant's works for the court, so that no opportunity could be had of examining the point in which the defendant's process resembled that of the plaintiff. It was held that the Court of Appeal had no jurisdiction to rehear the appeal and that *plaintiff's remedy was by original action without leave of the court,* analagous to a suit under the old practice to set aside a decree as obtained by fraud.

I must not omit to mention that besides a commission *de lunatico* which the defendant's counsel, at the opening of the case, considered a *sine qua non* if the plaintiff wished to succeed in his present contention, it was suggested on the motion for judgment on the part of the defendant that Harper's only means of redress would be by an action of deceit against Cameron, which counsel sought further to limit, on the authority of a common law case, by insisting that it should first be preceded by a successful application to the court to restore the action of Cameron v. Harper, by admitting Harper to defend. In fact the defendant appeared ready to adopt any kind of attempt to remedy the gross injustice under which Harper has suffered, except the method sanctioned by the Divisional Court. An action of deceit would not only have been a not very practicable proceeding, but would have raised up a new set of difficulties of its own; would have shut out all recourse against the notes and the property, or at least Cameron's share of the proceeds of the promissory notes, and have been particularly ineffective for the cure of the injustice which with the accident, has reduced the plaintiff to his present miserable condition.

Judgment.

There are several cases upon the extent to which matters of record operate as an estoppel, which may usefully find a place here.

A judgment recovered for a defect in pleadings, and not on the merits, *Baker v. Booth*, U.C. Jur. 407, is no bar to another action.

Mr. Anson in his work on Contracts, p. 322, is to the same effect. He gives as the conclusion derived from a consideration of numerous authorities which he refers to on the subject that it is important to bear in mind that an adverse judgment in order to discharge the obligation by estopping the plaintiff from reasserting his claim, must have proceeded upon the merits of his case.

In *Chestnutt* v. *Fraser*, 6 Baxter 217, we find to the effect: That, if the decision was rendered upon a mere motion, *or non appearance of the plaintiff*, the parties are at liberty to raise the main issue again in any form they may choose.

Lampen v. *Kedgewin*, I Mod. 207 (an old case), is an authority that a judgment to work an estoppel against another litigation upon the same cause must have been on the merits. In that case where judgment was given against the plaintiff on the insufficiency of his declaration, the defendant was not allowed to plead this judgment to a second action for the same cause, although the entry of the record, by some mistake or design, was "*nihil capiat*" instead of "*eat sine die.*" In giving judgment, Chief Justice Sir Francis North decided: "There can be no question, but that if a man misstate his declaration, and the defendant demur, the plaintiff may set it right in a second action. We must take notice of the defendant's plea, *for upon the matter as that falls out to be good or otherwise the second action will be maintainable or not.*" The other judges ATKINS, WYNDHAM and ELLIS, as the old note has it, agreed with him "*in omnibus.*" Lord Romilly's view of *res judicata* also implied the necessity of an actual trial to constitute an estoppel by record. *Res judicata*, by its very words, he has told us, meant a matter upon which the court had exercised its judicial mind, and, having come to the conclusion that one was right, and having pronounced a decision accordingly.

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This was the opinion of the House of Lords, and is in accordance with the weight of reasoning on the subject at the present day. *Nottawasaga* v. *Hamilton &c. Railway Co.*, 16, Ont., App. p. 52, HAGARTY, C.J., Ont., in delivering judgment as to *res judicata*, cited with approval *Concha* v. *Concha*, 11 App. Cas. "That case," he says, "gives a clear exposition of the law as to *res judicata* as applied to that case." It is *not*, but if it *were* necessary for the decision and judgment in a former suit to determine the question now in controversy, then the doctrine (of *res judicata*) would apply, otherwise presumably not. In *De Mora* v. *Concha*, 29 Ch., Div. 268, it was held that the decree of the Probate Court was not conclusive *in rem* as to domicile. For it did not appear that the decree was based on the finding of domicile. The judgment is only taken, says Lord Ellenborough, for its proper purpose. *Hobbs* v. *Henning* 17 C. B. N. S. 791, sums up all the cases as to *res judicata*, and arrives at the same conclusion. A judgment is final only for its proper purpose and object.

Judgment.

We now turn to the defence.

The defence consisted of the assertion of the capacity of the plaintiff, reliance on the laches of the plaintiff in the non-production of any allegation of his insanity until a recent date, and the succession of transfers which had taken place of the property, and of judgments and other admissions which it was alleged had passed *in rem judicatam*, and so estopped the plaintiff from any further action in the matter.

While the plaintiff laboured under mental disability, delay and conduct which would otherwise be attributed to him as laches would in point of fact be the laches or misapprehension of other men, and would not legally affect him or his rights. There were no such laches, in any case, as to create an estoppel by conduct, whether by negligence, waiver or election, irrespective of the fact that Harper from his unsoundness could not create such an estoppel. To me, now better informed, it is not at all surprising that the

Court also should not have paid more attention to his malady. The evidence given on the changes that have taken place in the plaintiff's mental condition, from the accident to the present day, have never before, I venture to think, been brought distinctly to the notice, or, supported by suitable proofs been submitted for the serious consideration of any one of the judges; if once they had, the case would never have gone further, and this, in my opinion, affords an ample explanation of the delay. I do not dwell on Harper's own application to be declared *non compos* upon his own personal affidavit of his own insanity because the evidence of a lunatic of his own insanity is inadmissable, *Greenslade v. Dare 20 Beav.*, p. 284; and the affidavit thereon, as to that can only be treated as it was epitomised by the learned Chief Justice, "Its strength was its weakness." If it had any effect at all it would, I venture to think, point rather in the direction of non-sanity of the applicant. As to the delays in the course taken by his latest legal advisers, they are easily understood. Had Harper gone, or rather been sent to them, when the contract was being framed, or even when the writ was served, as any sane man would have done, it is not a violent presumption, from the evidence, that the present proceedings would have been rendered unnecessary. It is quite conceivable that Harper, while advancing his claims through his former legal advisers, perhaps with the unconscious cunning of his malady, though against his own interests, concealed, as well as he could, his infirmity.

Judgment.

The evidence at the trial, coupled with these considerations fully accounts for the lapse of time, and the apparent incongruities, which gave rise to the accusation of laches from the learned counsel for the defence. The foregoing explanation, it appears to me, fully harmonises also with the more decided conclusions of the jury, acting upon fuller knowledge of the unsoundness of the plaintiff's mind, after his accident of the 1st July and at and during the period of this contract and all its necessary incidents, an unsoundness according to several respectable witnesses—having the best opportunity of knowing—which has continued up to

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the present day, of which latter fact the general verdict of the jury includes a finding. These considerations make it difficult to resist the conclusion that although ever since his accident he has not been of sound mind he has had just enough gleams of sense to be able, though only for a time, to conceal the full extent of his aberration from his former professional men. Had they been placed in the box we should probably have had interesting information on this point. The defendant's counsel referred to the affidavit sworn by Harper on his application in chambers to set aside the judgment as a proof of his sanity, and an instance of his collected thought. But Harper, however imperfectly they were framed, had to bring forth his reasons for his application, and if the party concerned in the preparation of it had been produced by defendant in court, he probably would have given a statement of his opinion of what Harper's sanity was.

Judgment.

If defendant really brought it forward as an indication of sanity, that is a two-edged sword, as it would have proved most completely the plaintiff's case. The fraud, the weakness of mind, the defendant's knowledge of it—and the total want of consideration. But as I said at the trial, I do not lay much stress on that; for insanity could not be proved by affidavit—it is quite sufficient that the decision then, which was a matter in the judge's discretion, could not act as an estoppel any more than any interlocutory order could have that effect.

I think that the law is sufficiently clear that a judgment obtained under the circumstances of this case works no estoppel. We heard during the argument that estoppels had been described by several judges as odious. That might have been so in early days, when under a strict construction of the Common Law Estoppels were at times an instrument of oppression, but under modern English law, as now administered, they are the reverse of odious—seeing that under the doctrine of estoppel it has been settled that a subject matter once thoroughly heard and determined in all its parts by a competent tribunal, according to law, cannot

be revived again, but passes *in rem judicatam* and becomes a perpetual bar. And as to estoppels, otherwise than by record, it is but just that the rights between two parties should be regulated on the basis that that is accurate which one person has induced the other party to take as the basis upon which he was to act.

The law by a long series of decisions, very rarely interfered with by legislation, has recognized the existence and value of estoppels. "Unless," says Lord Bramwell in *Simm* v. *The Anglo-American Telegraph Co.*, 5 Q. B. D., p. 202, "that were the case I do not know how the business of life could go on." But though estoppels are useful and necessary in certain cases, and much of the old prejudice against them has, on that account, disappeared, still they are to be received with caution, and applied with care. *Howlett* v. *Tarte*, 10 C. B. N. S., p. 813 in the same direction lays down the principle to the effect that, without adopting the old maxim that estoppels are odious, it is enough to say that the doctrine is not to be extended beyond what there is authority for. In the present case we have to deal with the question of estoppel by record. The defendant here sets up the judgment he obtained against the present plaintiff upon the same cause of action in *Cameron* v. *Harper*, which has been unreversed, as an estoppel, and claims that that is a perpetual bar. Now, a man can only be estopped in any legal proceeding which has become matter of record, when the subject matter has been thoroughly and properly sifted and tried between competent parties, without fraud or surprise, or other circumstance which prevents the decision from being a complete settlement of the matter in dispute, and of every point which belonged to that subject calling for judicial determination. *Henderson* v. *Henderson*, 3 Hare, 115, and cases there cited. In the present case the judgment set up as an estoppel, and now sought to be set aside, was a judgment by default for want of appearance, in short a judgment *ex parte*. It could not, therefore pretend to be a judgment on the merits, and, therefore, could not work an estoppel.

Judgment.

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Judgment.

Taylor on evidence, Vol. 1, p. 98, lays down the principle that "estoppel must be *certain to every intent;* because it may exclude the truth, for no one shall be prevented from setting up the truth, until it is in plain contradiction to his former allegations and acts." There can be no certainty to every intent in such a judgment as that set up here as an estoppel. Bigelow on estoppel, p. 185, treating of a judgment by default says: "A judgment by default is not equivalent in principle or authority to a judgment on an issue fought out. A judgment by default for the plaintiff is good for the primary purpose of giving him a right to have the sum adjudged collected; but it has not the full effect of a *res judicata*, because in reality it has been *ex parte*." It is argued by the defendant that the same facts which are now brought forward by the plaintiff to-day might have been adduced by him in *Cameron* v. *Harper*, and, that, having had his opportunity, and neglected it, he cannot now be heard, being barred. But *Howlett* v. *Tarte*, 10 C.B., N.S., is an authority that defendant is not estopped, by an omission to set up in his first action the same facts as the defence pleaded in a second action. It was never held that a defendant is concluded by a judgment by default in an action for former arrears. Moreover, estoppel does not operate conclusively where the thing averred is consistent with the record. Estoppel by record rests on the same grounds as admissions, a default is not to be treated as an admission and a bad plea is not an estoppel. And admissions must be voluntary, a point on which I shall subsequently enlarge. In *Outram* v. *Morewood*, 3 East, 354, where the mere fact of a recovery was claimed as an estoppel, it was settled, that it was not the recovery, but the *matter* alleged by the party, and upon which the recovery proceeds, which creates the estoppel; and when it has been "distinctly," which I understand to mean completely, put in issue.

Vice-Chancellor Knight Bruce, in his learned judgment in *Barrs* v. *Jackson*, Y. & C. at p. 585, referring to the case of *Outram* v. *Morewood*, says: "We find Lord Ellenborough

laying it down in that case, that a judgment is final for its own proper purpose and object and no further." In another part of the same judgment the learned Vice-Chancellor lays down what is now the law very accurately. He says: "Lord Ellenborough and the Court of King's Bench, in *Outram* v. *Morewood*, decided most accurately, with reference to the pleadings in that action at common law, that an allegation on record, upon which the issue has been once taken and formed, is between the parties taking it, conclusive according to the finding thereon, so as to estop them respectively from litigating that fact once so tried and found." The action, however, in *Outram* v. *Morewood*, raised as stated in the judgment of the Court, "*as to the same property and for the same purpose, the same issue as was raised and tried* in the action, the judgment wherein was pleaded; and there are (the learned Judge is speaking before the Judicature Act) material points of distinction between the system of pleading of the English Courts of Common Law and those of other Courts of Justice." "But it is, I think, to be collected that the rule against re-agitating matter adjudicated is subject generally to this restriction—that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not at all necessarily established conclusively between the parties; and that either may again litigate them for any other purpose as to which they may come in question—provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. The limitation of the rule appears to me, generally speaking, to be consistent with reason and convenience, and not now to be opposed to authority."

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In *Evelyn* v. *Haynes*, Lord Mansfield allowed a second action for obstructing a watercourse to be tried before him on a plea of not guilty, where a verdict for plaintiff in another action brought against the defendant for another

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obstruction to the same watercourse, was given in evidence. Lord Mansfield decided there was not such a determination of right by the former verdict as the law considered conclusive.

Howlett v. *Tarte*, *Supra*, decided that, if there had been a previous action between the same parties, founded upon the same contract, and the defendant had *suffered judgment by default* in that action, *the defendant is not precluded from setting up in a subsequent* action any defence which he could have pleaded in bar of the former, notwithstanding the defence is in confession and avoidance of the agreement which is the foundation for the action. In the same case we find the emphatic words, "Nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action."

Judgment.

In the motion for judgment the learned counsel for the defendant cited on behalf of his client the case of *Williams* v. *Richardson*, 36 L.T., N.S., 506, which was a judgment in default of appearance and was deemed a bar. But that is not in point, because under section 3, Interpleader Act 1831 (1 and 2 W. IV. c. 58, s. 3 Imp.) and this was a decision under that Act, a judgment in default of appearance is created by statute forever a bar to claimant and all claiming through him. It is a case of a statutory bar. It is required legislation to make it so. But an ordinary judgment by default like the present one is not so interpreted.

Price v. *Berrington*, 3 Mac. N. & G. 485, *et seq.* cited by counsel for the defendant against, is, when rightly considered, in favor of the plaintiff. It was a case in 1851 long before the Judicature Act of 1873. It was a bill in 1836 to set aside a conveyance in fee executed in 1809, on the ground of *unsoundness of mind of and of fraud and imposition upon* the grantor.

The *fraud* was not established. The insanity was. The position of parties was this: The *grantor*, previous to conveyance, settled and incumbered the property by a term

of 1,000 years and had only a life interest in it, his children and other parties being entitled subject to that interest. The purchaser had dealt with and encumbered the property in various ways. Judgment was first given in favor of the plaintiff, but on appeal the question was whether the insanity in 1809 entitled those representing him, or others interested in the estate to call upon a Court of Equity in 1836, 27 years after the transaction, to declare the conveyance void, and order an account. Now, the position of the parties in the case before me differed almost *toto cœlo* from that of the parties in that case, for there the sale was convenient to the Grantor to pay off a £600 mortgage. The consideration was fair. There was no notice of the insanity. No circumstance of fraud was proven. There had been an enjoyment of 27 years. There were family arrangements by settlement of the daughter of the purchaser and her children, and the party acted *bona fide*.

Judgment.

Here the very reverse was the case. The reason given by the Lord Chancellor for the dismissal of the bill was, not that a proper case of fraud and insanity could not be entertained in equity, but because the bill under comment violated an established doctrine or canon in equity, viz.: that "when a bill sets up a case of actual fraud" (and fails) "and makes the fraud the ground of the prayer for relief, the plaintiff is not entitled to a decree by establishing some one or more of the facts independent of the fraud, but which might themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated." But—the judgment proceeds—"a cause of direct and positive fraud of which the lunacy forms one part or circumstance is clearly the subject of equitable interference," which is the case here. So that this decision is not against, but in favor of the plaintiff; and as, under the Judicature Act, the principles of equity prevail, would seem to support the mode in which the plaintiff's case has been presented to the Court.

In some part of the trial a suggestion was made that the plaintiff was estopped by his signature to the promissory

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notes from saying there was no written assignment from Cameron to him of the of the half interest, and this arose from plaintiff's counsel calling attention to the fact that there was no written evidence before the Court to show any actual assignment of one-half interest in the Lightning Lease to Harper from Cameron for the $50,000. None was produced. But as to this, it is not necessary to say more than that since it was found by the jury that the notes were signed by him while of unsound mind, they can not be taken as admissions such as estop the plaintiff because admissions must be voluntary, which these could not be without reason to guide the exercise of the will, and make them so.

It was advanced by defendant's counsel *en dernier ressort* that fraud had not been really made out in this case; and that the jury had only found "no consideration" for the contract and that "it was not *bona fide*."

Judgment.

That is taking as I have shown a very partial view of the pleadings, evidence and findings, and of my charge to the jury, in one part of which I distinctly stated to the jury:

"Now fraud is a thing which has to be, and it is, alleged in the pleadings; and it is a thing which has to be proved; and proved by the plaintiff. If you come to the conclusion, for instance, that Harper, at the time of the alleged contract, was incapable of contracting, from unsoundness of mind, and Cameron knew of it, and of course used it for his own purposes, employing fraud. If all the evidence adduced before you brings you to that conclusion, your verdict will then be for the plaintiff," and the converse was just as fairly put.

It is scarcely possible to put the question of fraud in plainer words, and the jury answered them by their findings, and a verdict for the plaintiff, and, coming after the charge, most clearly constitutes and includes a finding of fraud.

But even if only those two things were found, which defendant's counsel treats as all the findings, *i.e* that there was no consideration for the contract, and that it was not *bona*

fide, taken with the pleadings and the charge to the jury, they would constitute a finding of fraud see *Davy* v. *Garrett* 7 Ch. Div. 489, which after laying down the law as I have given it with respect to the allegation and proof of fraud says: "*It may not be necessary in all cases to use the word fraud.* Indeed, in one of the most ordinary cases, it is not necessary. It appears to me a plaintiff is bound to show distinctly that he means to allege fraud. If defendant made to plaintiff representations which he intended plafntiff to act upon and which were untrue and known to the defendant to be untrue, that is fraud." And that is the case here.

The learned counsel's second contention founded upon *Price* v. *Berrington*, *supra*, that fraud and lunacy must both be proved to induce the intervention of the Court to afford the desired relief, was inapplicable here, where both fraud and unsoundness of mind have been found.

Judgment.

In the argument on the motion for non-suit, *Mr. Richards* for the plaintiff dealt with the question of fraud, in language in the general effect of which I concur—"The case is full of fraud from beginning to end. He is a man who has walked off with $50,000 from this poor unfortunate lunatic, and has never given him 5 cents for it. I am sure there is plenty of evidence of fraud. The whole case is fraud."

Mr. Wilson for defendant made a passing reference to the fact that Mr. Harper had not been medically examined preparatory to the trial. If defendant had wished for such an examination it would not have been refused. I do not lay any stress on the absence of this, but it certainly is not in defendant's favor.

But the evidence of the men and the medical witnesses was of a much more satisfactory character. All these, each in his own manner, differing in detail, but identical in substance, described plaintiff's mental malady as continuing more or less strongly, and producing continuous incapacity, from the time of the accident up to the present day. There is no evidence to justify the presumption of a lucid interval *nor such a finding by the jury, but the reverse.* Of course

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every man is presumed to be sane until he is proved to be, or to have been insane. But insanity, once proved in this case to have existed, is presumed to continue until it is proved to have ceased—*Attorney-General* v. *Parnther* 3, B.C. C 443 p. *Pope on Lunacy* 2nd. Ed. 408, and the numerous cases there cited, and accordingly the burden of proof attaches to the party who alleges a lucid interval or recovery. And what the learned counsel who suggests the possibility of a lucid interval, seems to have forgotten, is, that "the evidence in support of a lucid interval should be as strong and as demonstrative of the fact as when the object of proof is to establish derangements." *Attorney-General* v. *Parather Supra. That question has, however,* been amply disposed of, *and by the verdict of the jury as I have already indicated.* Harper having been shown to be of unsound mind at the date of the giving of the notes, the onus of proof of any complete subsequent recovery during the period now picked out by counsel as not specially included *nominatim* in the finding of the jury, was on the defendant *Attorney-General* v. *Parnther; Supra*, and see Pope on lunacy 408, and this was not done. What evidence there was was considered by the jury, and was decided against him, in this new theory.

Judgment.

A dictum in *Hall* v. *Levy* 10 L.R.C.P. 154, was cited by defendant's counsel against the plaintiff, "that when the very same subject matter has been determined in a previous action, the plaintiff cannot sue again, arguing that that was determined in the judgment of Cameron obtained against Harper, which consequently suspended the right of action, and that a right action once suspended is gone for ever." In other words, that the matter became *res judicata* by that judgment. If the learned counsel had gone a little further he would have found a complete answer to his own proposition.

In estimating whether a particular judgment by default can form the subject of a fresh action on the merits on "the very same subject matter," it may be asked what is the same subject matter? That is settled by the same case, which declares that to be "the same subject matter" when

the same evidence is necessary to prove the right of action. And that is exactly the case here, where the then defendant is the present plaintiff. Estoppel is mutual. Notwithstanding a judgment has been entered for default of appearance, the subject matter of that action, viz., the validity of the contract where fraud and insanity are alleged, has not yet been tried, and consequently the right of action has not yet been suspended; to effect that the evidence which is now produced is the evidence which would have had to have been brought forward in that action. And this is the sufficient reason why "the very same subject matter" is now being tried in the present case, because it was neither tried nor determined in the previous action.

One of the learned counsel for the defendant Mr. A. E. McPhillips in the argument on the motion for judgment, took up a somewhat different position from his leader.

It will be remembered that at the opening of the case, Mr. Wilson, for the defendant, laid down the condition as a *sin qua non* for the successful conduct of any action against him, that a *commission de lunatico inquirendo* should first issue, and that insanity once established, everything would be made clear. Every other subsequent proceeding would fall to the ground in due course. Now, his learned colleague changes front, conceding that the Commission *de lunatico* is not an indispensable preliminary after all—could it have been in the light of the emphatic verdict of Harper's insanity, which had then been rendered?—but that, insanity or no insanity, plaintiff was estopped from the first by not having attacked the record, the default judgment in question at the time.

Judgment.

Now there are several things the learned counsel loses sight of in advancing this proposition—such for instance as:

1. That it is not a good contention that a party can only set aside a judgment by default in one way, namely, by application to a Judge in Chambers.

2. That Cameron knew at the time of Harper's nonsaneness.

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3. That a judgment by default is no bar.

Yet the learned counsel went on to argue that at the time when Harper did attack that judgment in Chambers, the presumption must then have been the presumption of sanity, and that any other construction would affect all regular practice, where one served a man supposed to be sane and it then was nothing to them that he was insane. And that the learned Judge in Chambers in dismissing the application must have felt that Harper, upon whom the onus was then supposed to lie, had not made out a sufficient reason for setting it aside, that the latter is therefore now without remedy. This conclusion may, he adds, be hard. Harper may have suffered a grievous wrong. He does not deny that the decision was not on the merits. But substantial right must give way to technical rule. Everything must bend to that; and so he would have justice itself suffer under the Juggernaut of uniformity. In support of this position he cites *Vint* v. *Hudspith*, 20 Ch. Div., 322, a case as far back as 1855. There a Court of Appeal refused to hear a direct appeal from a judgment by default. The Court of Appeal admitted *they had jurisdiction to hear a direct appeal from such a judgment*, "but to prevent the Court of Appeal from being flooded" by having to hear cases of first instance, decided that it would be the proper course to send it back to the Court whence it came, to correct the record, to restore the case and allow the defendant to defend on the merits. The effect of this decision therefore appears to be: That while reserving to the Court the right and jurisdiction to hear the appeal, they decided, for the convenience *of that particular Court*, to refer the case back to the original Court to restore the case for trial on its merits there. There is nothing in this on the defendant's own showing, to make it applicable to the present case, or to support, as of right this more recent contention of the defendant's, viz.: The fear is lest a new precedent for making it necessary to examine into every man's presumable saneness before serving him with process. Yet that, after all, is a thing which is clearly contemplated by the Supreme

Judgment.

Court Rules as possible and even necessary under the circumstances of such a case as this, as was most clearly shown by *Mr. Richards* in his admirable opening address and statement at the trial. Cameron, it was abundantly shown, with the knowledge he was proved to have of the plaintiff's unsoundness of mind, was bound to have taken advantage of Supreme Court Rules 36, 117, 56, 134, 244, and 357, or such of them as suited the case of a defendant under such disability. But these, for purposes of his own which are no longer a matter of conjecture, Cameron avoided calling into requisition. The reason of this is self-evident. It was imperative on him to appear to consider Harper of sound mind and to hurry on legal process at all hazards, and at whatever injury to Harper, if he wished to get a penny of the anticipated plunder, lest the poor weak-minded man should find some early way of bringing out before the court the incapacity on his part which the result of the trial has now made so clear. And counsel's next quotation, which he averred to be his highest authority, is not more appropriate. It is *Huffer* v. *Allen*, L.R., 2 Exch. p. 15. There, a defendant, after being served with a writ of summons for a certain debt, paid the plaintiff £20, a part of the debt, on account, instead of paying it into court to abide the result of the action, and then signed a confession of the debt. Upon execution issuing under a *fi fa* for the whole debt, without credit being given for the money he had paid on account, and without attacking the record, the defendant there sued the plaintiff for malicious prosecution. The record was produced as for the whole amount, and, of course, being incontrovertible, barred the action, and the defendant took nothing by his application. It was against all analogy and precedent, and he, of course, was referred back to the court of first instance, to correct the record before, if at all, he could proceed for malicious prosecution. There the debt, the cause of action, was doubly admitted, partly by payment on account and partly by the confession, and the only question on the merits was the excess of the amount. So this, which was cited as the defendant's strongest authority,

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has in reality no application to the present case, where, in addition to no trial on the merits, unsoundness of mind, and incapacity known to the then plaintiff at the time, and deliberate fraud are prominent ingredients in the action, and the object of it being not to open up, but to set aside the Cameron judgment altogether.

The present action, moreover, is under the Judicature Act. The above case does not therefore apply. Up to this point I have contented myself with giving authorities showing that a judgment by default of appearance cannot of itself be successfully pleaded in estoppel; and what the general rule is as to estoppel by record at the prasent day.

We have now to consider it in relation to the peculiar position of the plaintiff Harper, whom the Jury *una voce* have declared to have been of unsound mind at the period of the contract and the transaction of the $50,000 notes, and whom the evidence generally and the finding of the jury has declared to have been of unsound mind ever since his accident. On this point the law speaks with no uncertain sound.

Judgment.

Story in his work on Equity Jurisprudence, at p. 242, tells us that Courts of Equity view with jealous care dealings with persons *non compotes mentis*. There must be *uberrima fides;* and those dealings must be just and beneficial to the person so afflicted. Purchases made from them must be made without knowledge of their incapacity. Equity will even relieve against acts done, and contracts made, under the temporary insanity of drunkenness; where procured by fraud or imposition of the other party.

Morton v. *Camroux*, 2 Exch. p. 487, was cited as an authority against the plaintiff having the Cameron judgment set aside. That was the case of a person apparently of unsound mind, not known to be otherwise, entering into a *bona fide* contract, executed and completed—where the parties could not be placed in *statu quo*—and was quoted as an instance of a contract which could not be set aside. But it is a precedent not applicable to the present case, for here Cameron knew the plaintiff was of unsound mind, and the

contract has been found to have been not *bona fide* but fraudulent. If either of such conditions had been developed in the case under citation the conclusion would have been exactly the reverse. The courts deal with persons not of sane memory very much as they regard infants. *Pothier on Obligations*, c. I. s. I. Art I., defines an agreement as the consent of two or more persons to form some engagement, or rescind or modify an engagement already made *Duorum vel plurium in idem placitum consensus.* Again, speaking of persons capable or incapable of contracting he says in Art, 4: "The essence of a contract consisting in consent, it follows that a person must be capable of giving his consent, and consequently must have the use of his reason, in order to be able to contract." Lord Mansfield considered a lunatic "like an infant," and described the privilege which the law gives to persons under such disability, as a shield, not a sword.

In *Morton* v. *Camroux*, *Supra*, Pollock, C.D. for the Court, said, "The old rule—no man can stultify himself" now is no doubt relaxed, and unsoundness of mind (as also intoxication) would now be a good defence to an action upon a contract, if it could be shown that the defendant was not of capacity to contract and the plaintiff knew of it. *Dane* v. *Viscountess Kirkwall*, C. & P. 679, and *Gore* v, *Gibson*, 13 M. & W., 623, fully support this doctrine.

Judgment.

In the case 3 C. & F. (509) *Earl of Brandon v. Becher*, Lord Brougham, while giving the decision that the Court of Chancery had no right to review a decree of the Court of Exchequer, and that nothing less than a Court of Appeal could give redress if such decree is erroneous, added that proposition is true, but it is equally true that if a decree has been obtained by fraud it *shall avail nothing for or against the parties* affected by it, to a prosecution of a claim or defence of right. These two propositions are undeniably true; they are recognized in practice, they are independent of each other, and they stand well together. That was the rule stated in the *Duchess of Kingston's* case, as deduced from all the authorities in a case, which, having been decided in

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the Court of Arches, was conclusive and binding on all the other Courts, not Courts where that judgment was before them on appeal. In that case Mr. Solicitor-General Wedderburn, whom Lord Brougham quoted in extenso "because of the aptness of his words"—thus summoned up the effect of all the authorities as to *res judicata*:—"A sentence is a judicial termination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a sentence there must be a real interest, a real argument, a real prosecution, a real decision." Of all these requisites not one takes place in a fraudulent and collusive suit. There is no judge, no party litigating, no party defendant, no real interest, brought into question. This rule of estoppel is quoted by Vice-Chancellor Knight Bruce in *Barrs* v. *Jackson*, I. Y. & C. 585, and, although the judgment in that case was reversed, yet this rule of estoppel was left untouched, and is quoted with approval by Chief Justice Earle, and other eminent judges. It is especially applicable to the judgment in *Cameron* v. *Harper*, for there, there was no defendant, no real interest, no real argument, and no real decision.

Judgment.

A judgment like the present one, taken *ex parte*, is at the peril of the party who takes it. It is not a judgment pronounced by the court, but the act of the party conceiving what the judgment of the court would be if the other party had appeared. If such a judgment, as was signed by Cameron, had been made against an infant, it would not have bound him, and I ought to consider this judgment against Harper, a man proved to be of unsound mind, as if it were a judgment against an infant.

In the eye of the law they are and were at the time of the contract, under a similar disability to contract, and a contract so made is not only voidable but void. The learned counsel for the defendant who in an eleven days' trial exhausted every argument in favor of his client that learning, long experience and forensic skill could supply, and left not a single point unemployed which appeared in any way to further the object of the defence, contended that the judgment by default had been affirmed by the learned Chief Justice on the application to set

aside, in Chambers; that his decision had been confirmed by the Divisional Court, from which at that time there was no appeal, and that the plaintiff was therefore out of Court. That a receiver had been appointed at Cameron's instance, sales of all Harper's property of all kinds had taken place, had been confirmed by the Court, and the whole position of parties had been so entirely changed that, whatever Harper's claims originally were, however great his sufferings, and however miserable the condition to which he had been reduced, by no fault of his own, in consequence of this fatal judgment, matters could never be replaced in their original position, he had now no remedy and no resource, and Cameron, the origin of all this, was now legally entitled to judgment. But the strength of all this argument falls to the ground upon a closer inspection of the basis on which it rests. It will already have been apparent to all who have followed my previous observations on the cases, that the judgment by default upon which every subsequent proceeding in Chambers had taken place, has been successfully attacked, and even if considered, without the admixture of insanity or mental unsoundness of Harper which has been so fully disclosed—even at law, was never *res judicata*, and when its fraudulent origin was in due course of law exposed before the court, its reversal became imperative *ex debito justitiæ*. The subsequent application in Chambers to set it aside under the circumstances already set forth in this judgment, could not give it a vitality which it did not itself possess, it was not possible that the learned Chief Justice should try a case of suggested insanity upon affidavit, or in Chambers—and the decision of the Divisional Court which necessarily under these circumstances, as brought before it, or rather owing to the way in which they were attempted to be brought before it—could not go any higher than the final judgment itself, or be of higher force in the direction of *res judicata* than the Chamber decisions themselves. The superstructure could not be stronger than the foundation; and when that was undermined, and fell in, all that was erected upon it, up to the point to which I have gone, necessarily fell with it. And it is a remarkable instance of the legal acumen and patient research of the learned leader on behalf of the plaintiff and those who

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assisted in the preparation of the case as well as of the cross-examining skill and ability of his learned junior on the same side, that under circumstances of such great difficulty, evidence of the best quality and character has been collected and arranged in such abundance and order, and so clearly educed, in as complicated and difficult case as has ever been before this court, as to leave no doubt, on the minds of the jury of the justice of the plaintiff's claim.

And this, simply at law. But if, notwithstanding the conscientious care which has been taken, in a prolonged and earnest analysis of all the evidence, of every authority, and every argument adduced during so lengthened a trial, and of the cases bearing on so difficult a section of British jurisprudence as that of estoppel, anything should have escaped observation and treatment in the foregoing remarks, the deficiency will be more than amply supplied by a consideration of the disability under which the unfortunate suitor in this case labored, from his unsoundness of mind. The additional strength which this adds to each portion of his case makes the justice as well as lawfulness of the plaintiff's present contention, in my opinion, simply irresistible.

Judgment.

It is true that the situation of parties has been partially changed. Certainly, it is not what it was at the time the alleged contract was made. Indeed, it may be assumed, for the purposes of this case, that all Harper's property of every kind has changed hands, but that, I take it, need not affect the present decision.

If I understand the pleadings aright, only Cameron's interest, the $20,000 of plunder which he so unrighteously obtained, is practically and immediately affected by them. He alone is made defendant in the action, and, although the names of other persons have been so freely used and some were present as witnesses throughout the trial, none have been made parties to the suit, consequently no decision can be now made as against them. Cameron, and Cameron only, the *causa terterrima mali* is the object aimed at in this case.

And I think it will be conceded by any one who can, without any previous bias, go carefully through the facts, and the law which I have taken pains to elucidate, that, as against Cameron, the plaintiff has conclusively proved his case.

That for him, the only one out of the numerous actors on the scene who has thoroughly conducted himself with *mala fides*, to the ruin of an unhappy man already afflicted by an incurable and tormenting malady—to this defendant, at least it is to be hoped, a day of retribution has come.

Not only the deliberate verdict of his fellows, with universal approval, has been declared against him—and even if it could be technically disturbed—in the minds of honest men, would still remain indelible ; but after close consideration and research I find it my duty to decide that the findings of the jury are conclusive for judgment for the plaintiff, so that the conduct of the defendant will not go unwhipt of justice, but, so far as at the long interval of time is practicable, he must refund what he has so unrighteously obtained, and make what imperfect compensation the law can enforce for the great injury he has so remorselessly inflicted on an innocent and helpless man.

Judgment.

My decision, therefore, is that the judgment of the 10th December, 1888, be set aside, and (so far as relates to the defendant) in the terms of the motion for judgment, with costs.

Judgment for plaintiff.

Statement.

The defendant entered a motion to the Divisional Court to set aside the judgment for the plaintiff, and the findings of the jury, and for a new trial upon the grounds that the said findings were against evidence, and also entered an appeal to the Full Court upon the ground that the judgment for the plaintiff was not warranted by the findings of the jury. Both motions were argued together at the Regular Sittings of the Full Court, the Court also sitting as a Divisional Court.

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Present—BEGBIE, C.J., WALKEM and DRAKE, J.J.

CHARLES WILSON for the defendant, the appellant.

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A. N. RICHARDS, Q.C., and A. E. MCPHILLIPS for the plaintiff, the respondent.

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BEGBIE, C. J.—In this case, we have all come to the same conclusion. The matter comes before us in two ways; to the Full Court by way of appeal from the judgment, to the Divisional Court by way of application for a new trial on the ground that the verdict is without evidence and against the weight of evidence, or, in other words, is such as no reasonable men could have come to upon the evidence before the jury. As a matter of convenience, the whole matter was argued before us, constituted so as to have jurisdiction both as a Full Court and as a Divisional Court. The question mainly turns on the motion argued before us as a Divisional Court, viz: for a new trial on the ground that the verdict is without evidence or against evidence. At the trial, it was necessary for the plaintiff to establish two things as constituting the fraud by reason of which he claims relief. First, that Harper was at the time of the contract, viz., in November, 1887, intellectually unable to manage his own affairs; and, second, that Cameron was aware of this, and took advantage of it to induce him to enter into the impeached contract. The jury have found for the plaintiff. The defendant, in order to set aside their verdict, must be prepared to establish that the findings of the jury were without sufficient evidence, and such as no reasonable men could have found. That is the rule now perfectly established. It is unnecessary to refer to anthorities; it is strikingly adhered to in the very recent case in the Privy Council of *Ellis* v. *South British Insurance Company* (not reported.) The two allegations therefore are that Harper was incompetent, and that Cameron knew it. The first of these propositions, viz.: Harper's incompetence was surely abundantly proved. I have read and digested the evidence as well as I can. Of course there is some evidence the other way. A case must be very bad indeed when there is no evidence on the losing side. It is, however, the function of the jury to weigh the evidence,

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and in this case I quite agree with the jury on the first proposition ; the great preponderating weight of evidence is to the effect that Harper was incompetent after his accident in 1884, and continued so not only to the time of the contract in 1887, but up to the date of the trial. That alone, however, is very far from showing that Cameron knew of such incompetence and took advantage of it, which is the further combination that must be established in order to the success of this action. If it can be shown that Cameron was aware of the incompetence, very slight evidence might induce a reasonable man to believe that he was taking advantage of it when Harper concluded such a one-sided bargain as the present contract manifestly was. Now, as Cameron's knowledge and his motives were necessarily in the first instance confined to his own breast, it would almost seem that they must be made out from his own statements or admissions, either at the trial or to strangers ; failing which, the jury would consider such circumstances as lead naturally to that inference. I have not found any evidence, any actual admissions by Cameron, as to his motive or intentions. But there is evidence, even in his own statement in the witness box, upon which reasonable men could have properly come to a conclusion unfavorable to the defendant on both points. It is to be remembered that the jury, not this bench of judges, is the constituted tribunal to determine such points. It is considered, and I am far from disputing it, that the jury being more nearly of the education and habits of mind of litigants, can, better than the judges, enter into the motives and appreciate the acts of plaintiffs and defendants, And it is only when the judges are satisfied that the first jury have acted merely unreasonably that we are authorized to interfere and take the opinion of another jury. Now, have the jury acted unreasonably here ? They are told by Cameron himself in his own evidence that Harper, after his accident, had changed in many important particulars. There was loss of memory, not recollecting the names or faces of his acquaintances, not even of Cameron himself. Cameron remarked, and was much struck with that. Then Cameron also told the jury that from having previously been reserved and taciturn about his business affairs, Harper had become talkative

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and garrulous about them, even with strangers. Cameron told the jury that he noticed a great change—that every one would notice it. Although, upon re-examination, in answer to a rather leading question, "Was the change you noticed in Harper physical or mental?" he answered, "Physical," yet the changes which he had admitted having noticed, and some of which I have just pointed out, garrulity and loss of memory, etc., are mental much more than physical. In one sense, all the matters mentioned by the witnesses—carelessness in dress, slovenly, not to say dirty, habits, boastful and coarse conversation—in direct contradiction of his former habits—are probably merely indications of a physical change, viz., of the physical injury to the brain from that unfortunate kick, but they may also be held to indicate a mental change. Nor is it unreasonable, but highly reasonable, for the jury to conclude that a change which persuaded so many people of Harper's incompetence, had conveyed the same persuasion to Cameron as well. All this evidence was before the jury, and is before us in the shorthand writer's notes. It is quite unnecessary for me to give an opinion whether this evidence, or the counter-statements of Cameron's witnesses, are the weightier. That was wholly for the jury. It is, however, to be noticed that Cameron's own counsel never ventured to ask him whether Harper after the accident was as keen and competent in business as he had been before the accident or whether, noticing a physical change, he had not noticed also a mental change. In point of fact, Cameron does describe a mental change, at least a change in habits, whence the jury might well infer a mental deterioration, accompanied probably with a physical deterioration as well. But even if contradicted, it would be entirely for the jury to weigh the evidence and give effect to that which they believe. But we must recollect that the jury had before them as an object lesson, a great deal of evidence, perhaps the most persuasive of any, which cannot be brought before us here. They had the opportunity of seeing and hearing Cameron himself under examination and cross-examination. Of this the Court have not and cannot have the opportunities of judging which the jury had. Upon an examination involving a question of fraud, perhaps the most important thing to be

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noticed—perhaps more important than his verbal statement—is the conduct of the party himself, his look and carriage and whole demeanor; the tones of the voice, evidences of surprise, etc. This we cannot have. No photograph of the man's manner or the tones of his voice can be introduced before judges on appeal. The impression of the learned judge at the trial as to Cameron's demeanor and the effect produced on his mind is briefly but emphatically dealt with in two or three lines of his judgment, and there can be little doubt that the jury formed the same opinion of Cameron's knowledge and intentions. Then the nature of the whole transaction is such as to excite grave suspicion. The application for the lease is entirely Cameron's suggestion. It is to be taken in Harper's name, who alone is to be liable for covenants and contracts of every description. Cameron is to be a silent partner (statement defence, par. 4 and 5,) but to have a moiety of all profits, and in the meantime to be employed at $10 per day upon works requiring considerable engineering skill, which Cameron does not profess to have ever acquired—everything to be paid for by Harper. Then, when Harper's hopes have been carefully excited by Cameron reporting an alleged offer of $250,000 and in other ways, Cameron closes instantaneously, as he himself says, with Harper's offer of $50,000. I am not surprised at the view the jury took of the transaction. I do not think it unreasonable. I think it a very reasonable view. And they have found that Cameron had practically nothing to sell. I have not here at all examined the evidence adduced at the trial in favor of Harper's competency. There is, as I have said, some evidence to establish this. The jury have, however, rejected it; they cannot be allowed to do that without some reasonable evidence to support their verdict, and we are only at liberty to look at the whole evidence to see whether they have some such, not with a view of weighing conflicting evidence or giving any opinion of our own. All I need say is that there is here abundance to support the verdict. I think, therefore, that the application for a new trial wholly fails and must be dismissed with costs. As to the appeal to the Full Court, I think that judgment should be entered against the defendant in accordance with the verdict, and therefore the appeal should also

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be dismissed with costs. My brother Walkem will deal more particularly with that. But the verdict, and indeed the whole action, can only be treated as affecting Cameron's beneficial rights acquired in the former action of *Cameron* v. *Harper* in 1888. Many matters have been dealt with in that action affecting many parties, not parties to the present action and not in any wise implicated in or concerned with the frauds which the jury have now denounced. The judgment must be carefully drawn and in part modified so as not to affect innocent parties. It will be more in the nature of a Chancery decree, and will be prefaced by a declaration in accordance with the verdict, and then give consequent directions. Lord Redesdale's decree in *Carew* v. *Johnson*, 2 Sch. Lef. 280, will afford a useful precedent. There will be a reference to a judge to settle the exact form of decree.

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WALKEM, J.—This action is brought by the next friend of the plaintiff for a declaration (a) that a promissory note for $50,000, dated the 18th November, 1887, and six substituted notes of the like date and like amount in the aggregate, made by Harper in Cameron's favor, were obtained from Harper while he was of unsound mind—and that to the knowledge of Cameron; (b) for an order for the delivery up of all the notes to be cancelled; (c) for an order setting aside a judgment obtained by Cameron against Harper, on the 10th of December, 1888, for the full amount of the six notes, for default of appearance, together with all proceedings taken on that judgment; (d) for an order for repayment of all monies realized on that judgment by Cameron; and (e) for an injunction—the plaintiff's case being also that no consideration was given for the notes.

The defence, in substance, is that Harper was not, before, at, or since the time alleged, of unsound mind; that valuable consideration was given for the notes; and that the impeached judgment cannot be set aside in this action, and is, moreover, a bar to it.

The trial took place before Mr. Justice Crease and a special jury, who found—(1) that "the transaction of the $50,000 was not fair and *bona fide*";—(2) that "there was no consideration"

—(3) that "the act was without deliberation, or (4) "independent advice";—(5) that "Harper was at the time of the contract of unsound mind";—and (6) that "Cameron was aware of it at the time." On these findings the trial judge made an order for judgment on the 18th of August, 1892, in favor of the plaintiff, and in the terms of his prayer for relief.

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The defendant now seeks to have that order set aside and judgment entered for him on the ground already stated, of estoppel; and also moves for a new trial on the ground that the verdict was against evidence, and that there was not sufficient evidence for the finding that Cameron knew of Harper's incapacity.

"A verdict," to use Lord Herschell's language, "ought not to be disturbed unless it is one which a jury, viewing the whole of the evidence reasonably, could not properly find." *Metropolitan Railway Co.* v. *Wright*, 11. App. Cas. 152; *Commissioner for Railways* v. *Brown*, 13 App. Cas. 133; *Phillips* v. *Martin*, 15 App. Cas. 193. "The test of reasonableness," as observed by Lord Halsbury in the first case: "is right, in order to understand whether the jury have really done their duty"; and such a test necessarily implies a review of the evidence.

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Upon the issue of insanity, fifteen witnesses, including four medical practitioners, were examined for the plaintiff. It was proved that on the 1st of June, 1884, he had been kicked on the face by one of his horses, and so severely that when examined shortly afterwards, at the St. Joseph's Hospital where he was, by Drs. Helmcken and Davie, it was found that his upper jaw and teeth had been broken away and his brain injured, and that "he was," to use Dr. Davie's words, "absolutely insane, as insane as a person could be," and continued to be so "for several weeks" while under his care; and that when he left the hospital, he did so in charge of a keeper. Dr. Davie also stated that he had seen him, professionally, on three or four later occasions in relation to the injury, and had recently met him several times in a casual way, and that from what he had observed, Harper had improved but slightly, and was still insane. Dr. Helmcken expressed a similar opinion. (The learned judge reviewed at some

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length the evidence upon the issue of plaintiff's insanity and as to defendant's knowledge of it and proceeded.)

In any event, it was for the jury to decide whether the $50,000 transaction was affected by, or which is the same thing, resulted from the delusion—*Jenkins* v. *Morris* 14 Ch.D. 674. In view of all that has been stated, it cannot be said that the evidence was insufficient to support the finding that Harper's insanity was known to Cameron at the time of the impeached transaction. Cameron's conduct in the witness box was of itself evidence for the jury; and it must have given additional force to every fact unfavorable to him, for it is described by the learned judge, who presided at the trial, as having been "downcast, shuffling and evasive." Moreover, the learned judge was of opinion that the verdict was a proper one; and, as observed by Lord Esher in *Webster* v. *Friedeberg* 17 Q.B.D. 736, "it is idle to say that in determining whether a verdict was against the weight of evidence, you must not take into serious consideration the opinion of the judge who tried the case."

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Again, Harper's insanity on the 18th of November, 1887, having been established, its continuance is presumed, unless proved to have ceased—*Pope on Lunacy*, 408, and cases cited. No such proof was given, nor was a lucid interval pleaded or attempted to be proved. The presumption, therefore, covers the subsequent period during which the six notes were given by Harper in substitution of the $50,000 note, and the further period when the impeached judgment was recovered—it having been shown in connection with the judgment that Harper had been sued as *sui juris*, and that the judgment had been entered for default of appearance. At any rate, counsel for the defendant expressed himself satisfied with the questions formally submitted to the jury when the case was closed; hence, whatever objection he might have had on the ground that a further question as to a lucid interval had not been put, was waived. I mention this because it was suggested in the argument here by counsel that the giving of the six notes by Harper was an instance of mental recovery; but such was not pleaded. Besides, the circumstance was manifestly open to the opposite remark that it was the repe-

tition of an irrational act on Harper's part, and no doubt the jury thought so.

Objection was taken at the trial, and renewed here, that the present action was not maintainable, and that the impeached judgment should have been set aside in the action which it determined. There are several obvious answers to the objection ; but it is sufficient to say that it is disposed of by *Carew* v. *Johnston* 2 Sch. & Lef. 280 ; *Gore* v. *Stacpoole*, 1 Dow. 18 ; *Earl of Bandon* v. *Becher*, 3 Cl. & F. 479 ; and *Flower* v. *Lloyd*, 6 Ch.D. 297 ; and S.C. 10, Ch.D. 327.

Another objection was that as a Receiver had been appointed under the impeached judgment, and the plaintiff's real and personal estate sold by him, the Court would not interfere, as the parties could not be reinstated in their original position. But they can *inter se*, be reinstated, for Cameron can get back his half-interest in the lease, and Harper any monies that may have been realized under the judgment. Those who bought from the Receiver, can, as innocent purchasers, be also protected—*Gore* v. *Stacpoole* and *Earl of Bandon* v. *Becher*, *supra*.

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Granting, for the sake of argument, that the jury were wrong in finding that Harper's incompetence was known to Cameron, still the defendant must fail—*Molton* v. *Camroux*, 2 Exc. 487, upon which his counsel relied would not assist him ; for it was there held, amongst other things, that to uphold a contract with a lunatic, it must have been fair and *bona fide*. Here the jury have found that it was not so ; that the contract was made " without deliberation," or " independent advice ;" and that there was no consideration. In such a case the plaintiff is entitled to relief—*Story's Equity Jurisprudence*, 2nd ed. p.p. 234-248 ; *Clarkson* v. *Hanway*, 2 P. Wms. 203 ; *Blachford* v. *Christian*, 1 Knapp, 73.

The appeal must therefore be dismissed and the order *nisi* for a new trial discharged—with costs.

The order for judgment of the 18th of August, 1892, requires to be varied by inserting a correct statement of the findings of the jury, and provision for the protection, as mentioned, of innocent purchasers, and for the re-assignment, on proper terms, to the defendant of the moiety of the lease.

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DRAKE, J.—The claim in this action is to set aside an alleged contract of Nov. 1888 and that the notes given in pursuance thereof be delivered up to be cancelled and that the judgment obtained against Harper in respect thereof be set aside on the ground that the contract and notes were given by Harper while he was insane to the knowledge of Cameron. The defence denies the insanity or that Cameron knew it and sets up as a defence *res judicata* and no other defence, and the jury found that the transaction of the $50,000 note was not fair and *bona fide*, that there was no consideration, that the act was without deliberation and without independent advice, that at the time of the contract Harper was of unsound mind and Cameron was aware of it.

On these findings, the learned Judge entered judgment for the plaintiff and ordered the judgment of 10th December, 1888, to be set aside and the notes given up to be cancelled.

Mr. Wilson contends that he is entitled to judgment irrespective of the findings of the jury and that the action ought to have been dismissed because the only mode of attacking this judgment of December, 1888, was by a proceeding in that action and those proceedings had been taken and having failed, the judgment was irrevocable. In support of this contention, he relied on section 13 of the Supreme Court Act, sub. sec. 7 which he said rendered it compulsory on the Court to consider every claim that might be brought forward in any cause or matter, so that multiplicity of legal proceedings might be avoided.

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This section is merely an enabling clause for the purpose, where practicable, of closing all matters in controversy ; but it is obvious there are cases where a hard and fast rule that all proceedings between two parties should be setttled in one action, could not be usefully enforced, and in the case before us, as Harper could not defend, being alleged to be of unsound mind, the proceedings would have to be taken by some one on his behalf. It appears to me that there is no legal ground for saying that the course adopted to set aside the judgment against him was so irregular that this action would not lie and one reason is that in applications to set aside a judgment for frand, the fraud must be proved before the propriety of the judgment can be investi-

gated and in many cases this can be more conveniently done by independent action.

It was further contended that this judgment was in fact an estoppel; it must be remembered that this judgment was a default judgment and no decision was given on the merits. It is true 10 months after the judgment an application was made to set aside the judgment and certain affidavits were produced alleging mental incapacity of Harper at the time the notes sued on were given, but, owing to the delay that had taken place, the Court refused the application and this refusal was upheld by the Divisional Court, but the question of capacity or incapacity of Harper or of fraud on Cameron's part, was not decided as in fact it could not be, and therefore there was no adjudication on the merits. Vice-Chancellor Knight Bruce states the rule as to estoppel thus: "That however essential the establishment of particular facts may be to the soundness of judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may be as to its immediate and direct object, those facts are not all necessarily established conclusively between the parties and that either may again litigate them for any other purpose as to which they may come in question." Here the original judgment was on the notes, the present action is by Harper's next friend to set aside the contract for which the notes were given and the judgment itself on the ground of fraud; the judgment on the notes is not an estoppel against litigating this question. In *Flower* v. *Lloyd*, 6 Ch.D. 297 where an action had been dismissed the plaintiffs discovered fresh evidence and asked to have the judgment re-opened; the Court of Appeal refused but said the plaintiffs must bring a fresh action. The judgment for defendant was held no estoppel against an action on further evidence, so here the judgment for Cameron is not an estoppel because the merits have never been discussed and there is no judgment on the issues raised in this action.

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I am of opinion therefore that the judgment on the findings of the Jury was rightly entered for the plaintiff, but it may be necessary to vary the order for judgment so as to protect all

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those whose interests may be affected and who have had no opportunity of being heard.

The rule *nisi* for a new trial was granted on the grounds that there was no sufficient evidence that the defendant was aware at the time the contract was entered into, that Thaddeus Harper was a person of unsound mind and that the verdict was against the weight of evidence and contrary to the evidence.

It was suggested, but not pressed, that even if Harper was of unsound mind at the date of the original contract, yet his giving smaller notes in April, 1888, in exchange for the single note of $50,000 was a ratification of that, which at most was a voidable contract at its inception and not absolutely void. This defence is not pleaded, and no issue on it could therefore be left to the jury. A defendant is bound by the rules of pleading to set up all his defences, and his omission to raise any special defence debars him from raising it at the trial, except by amendment, and no amendment was asked for here.

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The question on this rule is, was there any evidence that the defendant knew or might be presumed to know that Harper was of unsound mind at the date mentioned; if there was, then the verdict ought to stand, unless it can be shewn, that the verdict was one which the jury acting as reasonable men and viewing the whole evidence reasonably ought to have come to. The further rule is, that where the question is one of fact and there is evidence on both sides properly submitted to the jury, the verdict once found ought not to be disturbed. See *Webster* v. *Friedeberg* 17 Q.B.D. 736; *Metropolitan Rwy. Coy.* v. *Wright* 11. App. Cas. 152; *Phillips* v. *Martin* 15 App. Case 193, and in the case of *Ferrand* v. *Bringley Township District Local Board* decided in the Court of Appeal, 8 T.L.R. 70, the Master of the Rolls in discussing the preceding cases says that the Court will not interfere merely when the case on one side is stronger than the case upon the other, and Lord Justice Kay says, the verdict must be very strongly against the evidence to induce the Court to grant a new trial. It is not here contended that the learned judge's summing up was incorrect or that the evidence was not properly submitted to the jury. The defendant's contention was

that there was no direct evidence shewing Cameron's knowledge of Harper's insanity, but it was only an inference derived by the jury from impressions which other witnesses had formed of Harper's actions. In cases such as this, I do not know that better or more cogent evidence could be adduced; on this point, however, there was evidence both for and against the inference, and the jury came to a conclusion adverse to the defendant.

The evidence of the medical men was quite sufficient to enable the jury to conclude that Harper after his accident and in fact down to the present time, was of weak mind. Is there any evidence from which the jury as reasonable men could arrive at the conclusion that Cameron knew of Harper's insanity?

This may be placed under 4 heads:

(1.) The knowledge that Cameron is shewn to have had of Harper prior to the accident;

(2.) The knowledge of the change that took place in Harper physically and mentally after the accident;

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(3.) The reckless character of the transaction which Cameron induced Harper to enter into;

(4.) The conclusions which others arrived at who had had opportunities of seeing Harper both before and after his accident.

It must be remarked that Cameron was, in the opinion of the trial judge, a very unsatisfactory witness. A witness' demeanor in the box is often better evidence of his veracity than the answers he gives; a jury have the advantage of seeing the witness as well as hearing him, and forming an opinion of his evidence which no Court of Appeal can possibly do, reading only from the notes of evidence as printed. With regard then to the first point, Cameron admits that he had a business acquaintance with Harper before the accident, limited apparently to buying his supplies and matters of that sort, and Harper before his accident was universally known as a close business man; he further says he had no other business connection with Cameron until the lease was suggested by him, which apparently was in January, 1886. The application was eventually made to the Government

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for a lease early in the year 1887 in the name of Harper. Cameron was to be a sleeping partner, to have wages and Harper to find all the money. After the accident (but whether at the time of the discussion about the lease or not Cameron does not say), Harper did not know Cameron's name, although he knew him personally, and he admits he had changed a good deal, which he afterwards endeavours to qualify by saying he was older. Harper, before his accident, was a close, shrewd, business man, keeping his affairs to himself and not taking strangers into his confidence; afterwards he became talkative to comparative strangers about his business, and, Cameron says, he knew Harper was a wealthy man, and he apparently thought, if he could induce him to enter into this speculation, it would be greatly to his advantage. The terms which Cameron admits he made, were that he was to be manager at a salary, although he had no experience of engineering works such as would be required in this case. All expenditure required was to be found by Harper, who would get no return unless the speculation was a success. This speculation was agreed to by Harper without an enquiry as to its feasibility, a proceeding very much at variance with Harper's business habits before this accident. Afterwards, it appears, Cameron found out that Harper was in financial difficulties and could not possibly comply with the terms which the Provincial Government would insist on, respecting the heavy annual expenditure on the work. Harper had a very exaggerated idea of the value of everything he owned, and used to talk about millions. These exaggerated ideas, which apparently never existed in Harper's mind before his accident, were used by Cameron to induce Harper to buy him out; now what had he to sell, and what had Harper to buy? There had been an application for a lease, and either party could withdraw that application. If Harper had withdrawn Cameron's position was valueless. In fact Cameron had nothing to sell. The Government had agreed to give a lease but had not done so, and could at any time have refused to do so. Cameron appears then to have put forward a man named Bradley, as offering $250,000 for the proposed lease, and this proposition was successfully used by Cameron to obtain the $50,000. Cameron must have

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relied on Harper making no enquiry as to Bradley, in the same way as he had made no enquiry as to the feasibility of the mining scheme which Cameron induced him to enter into, and the result justified Cameron's prevision. Harper made no enquiries, walked into an office, wrote out a note for $50,000 without a word; this conduct contrasted as it is with all that was known of Harper before, his close attention to business and careful management of his affairs to Cameron's knowledge, his subsequent extravagance and changes of life and habits is surely evidence that Cameron was aware of Harper's want of business capacity, arising from mental infirmity. There is the further evidence of a number of witnesses who spoke of Harper's insanity from their knowledge of him prior and subsequent to the accident, and reading the whole of the evidence as submitted to the jury, I have come to the conclusion that the verdict should not be disturbed. I may remark that in considering questions of this character, it is essential, in alleging unsoundness of mind as a ground for avoiding a contract, that it should be shewn that the contract is one by which the alleged insane person has been imposed upon, and I think there is abundance of evidence here to support that conclusion. I may say further that where insanity is shewn to exist shortly before or shortly after the date of the impeached transaction and the probable knowledge of it by the adverse party, the onus of proof is shifted, and the party whose contract is impeached must satisfy the jury that he was entirely ignorant of the insanity of the other party and that the transaction was, under any circumstances, fair and reasonable.

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7. ——*Divisional Court.*] The refusal of an *ex parte* application for leave to issue concurrent writs of summons is not an interlocutory matter, and is not appealable to the Divisional Court - - 348
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8. ——*Motion for new trial—Order LVIII Rule 15—Jurisdiction—Security for costs.*] An application to the Divisional Court for a new trial is an appeal within the meaning of Order LVIII-Rule 15, and a Judge has under it jurisdiction to order the applicant to give security for costs of the motion. WILSON v. PERRIN - - - 350

9. *Fresh evidence on—Rule 674—Attempt to introduce as fresh evidence on appeal evidence rejected at the trial.*] Documentary evidence was rejected at the trial, and the propriety of the rejection was not made a ground of the appeal. *Held*, That the Court would not allow the evidence to be read on the appeal as fresh evidence under Rule 874. HARPER v. CAMERON - 365

ASSIGNEE—*For benefit of creditors—Right of to impeach prior fraudulent conveyance of his assignor.*] Apart from statutory provision, an assignee for the benefit of creditors has no right to impeach a prior fraudulent conveyance of his assignor. MCKENZIE & MCGOWAN (Assignees &c.) v. BELL-IRVING PATERSON & Co. *et al* - 241

2. ——*For Creditors—Removal of, whose interests conflict with his duty* - 262
See TRUSTEE.

ATTACHMENT—In lieu of committal for breach of injunction - - 278
See INJUNCTION.

2. ——*Of debts—Judgment debtor—Garnishee—Liability of to third party—Supreme Court Rules Order (1880) XLV—Rules 337-341—When Court may order execution against garnishee.*] Where a garnishee disputes his liability to a judgment debtor, the Court has no power to order execution against him, but will direct an issue to try the question, and where the garnishee's alleged indebtedness is to a third party, such party must be summoned, and, if necessary, an issue ordered to try his liability to the judgment debtor. MOUNT ROYAL MILLING, ETC. Co. (Ltd.) v KWONG MAN YUEN (Judgment debtor) AND JAMES LEAMY (garnishee) 171

BILL OF SALE—*Conditions outside the instrument—Pressure—Fraudulent preference.*] To constitute pressure which will authorize an assignment by way of security, there must be a legitimate and bona fide attempt by the creditor to get payment of his debt or security therefor. It is not bona fide pressure for a creditor knowing of his debtor's insolvency to take an assignment of all his property. Bill of sale given subject to a condition not appearing therein is void as against creditors. DOLL v. HART 32

BILLS OF EXCHANGE ACT—*Presentation for payment of note payable at particular place—Necessity for as against maker—Practice—Judgment under Order XIV—Special Endorsement—Sufficiency of.*] Under Sec. 86 of Bills of Exchange Act, 53 Victoria (Can.), cap. 33, where a promissory note is made payable at a particular place, presentation at that place must be alleged and proved in order to make a cause of action against the maker. A special endorsement upon a writ of summons in an action to recover from the maker the amount of a promissory note, stated the note as being made payable at a particular place, but did not allege presentment. Upon motion for judgment under Order XIV, Walkem, J., dismissed the application on the ground that the special endorsement disclosed no cause of action. Upon appeal to the Divisional Court, Sir M. B. Begbie, C. J., and Drake, J., affirmed the judgment of Walkem, J.. CROFT v. HAMLIN *et al* - - - 333

BUILDING CONTRACT—*Unsatisfactory work being done—Right of aggrieved party to take over and finish the work.*] Where a building contract is so far performed that the parties cannot be restored to their original position, and unsatisfactory work is being done; if the party aggrieved, in the absence of agreement *ad hoc*, interferes with the work so as to make it difficult to determine the value of that already done, he does so at the risk of having to pay the other party more than he has really earned, apart from the question of damages. MOORE v. B. C. POTTERY Co. - - - 45

CANADIAN PACIFIC RAILWAY ACT, 1881—49 Vic. Cap. 1, Sec. 18A—Right of Company to exclusive use of foreshore - 306
See ESTOPPEL.

CERTIFICATE OF JUDGMENT—The issue of a certificate of judgment for registration against the lands of the judgment debtor is not a proceeding in and should not be styled in the action.—*Per* WALKEM, J. FOLEY v. WEBSTER - - 251

CERTIORARI—Motion to quash conviction—Practice—Security for costs—Rule of Court requiring recognizance with sufficient sureties—Necessity for affidavit of justification—Absence of- - 207
See CRIMINAL LAW. RÉGINA v. AH GIN.

CHATTEL MORTGAGE—Condition outside the instrument—A Bill of Sale given subject to a condition not appearing therein is void as against creditors. DOLL v. HART - 32

COLLISION—Navigation Act—Articles 16 and 20—Collision—party to blame *See* MARITIME LAW (pt. 2) [357

COMPANY—Foreign, unregistered in this province—Right of to hold lands and be registered as owner in B.C. denied - - - - 8
See LAND REGISTRY ACT.

CONFLICT OF LAWS—*Supremacy of Imperial over conflicting Provincial Statute on same subject.*] The question of supremacy in relation to subjects of legislation, as distributed by the B. N. A. Act, arises only as between the Dominion Parliament and the Provincial Legislatures. The Imperial Parliament is sovereign to both. *See* MEDICAL ACT B.C. METHERELL v. THE MEDICAL COUNCIL OF B.C. - - 186

CONSTITUTIONAL LAW—*Taxation—B.N.A. Act, Sec. 93—Provincial law taxing municipality for educational purposes—Direct or indirect taxation—Public School Act Stat. B.C. 1888, Cap. 104, Sec. 37.*] It is constitutional for the Provincial Legislature to enact that a certain proportion of the salaries of Public School teachers employed in a municipality shall be paid by the municipality. THE ATTORNEY-GENERAL OF B.C. v. THE CITY OF VICTORIA - - 1

2. ——*B. N.A. Act—Power of Provincial Legislature—Constitution of Courts.*] It is competent to the Provincial Legislature to create Mining Courts and to fix their jurisdiction, but not to appoint officers thereof with judicial functions. BURK v. TUNSTALL [12

3. ——*Interference with trade and commerce.*] The Wide Tire Act B.C. 1889, Cap. 32, forbidding the carrying of any load of more than 2,000 lbs. in any wagon on any of the highways in Victoria District unless the tires be at least four inches in width, is not an interference with trade and commerce so as to *ultra vires* of the Provincial Legislature. THE QUEEN v. HOWE - - 36

CONSTITUTIONAL LAW—*Continued.*

4. ——*Stat. 1890 B.C. Ch. 8, Sec. 9, empowering a County Court Judge to act as Judge within the territorial limits of another County Court—Whether ultra vires—Speedy Trials Act—"Any Judge of a County Court."*] PIEL-KE-ARK-AN v. THE QUEEN - 53

5. ——*Liquor License Regulation Act B.C. 1891.*] The Liquor License Regulation Act, B.C. 1891, Sec. 4, providing for the closing of saloons between 11 P.M. on Saturday night and 1 A.M. on Monday morning is *intra vires* of the Provincial Legislature as a police regulation, and is not an interference with trade and commerce. SAUER v. WALKER - - - - - 93

6. ——*Interference with trade and commerce*—Provincial Statute and by-law thereunder authorizing stoppage of persons, freight, cargoes, boats, &c., coming from place infected with pestilential disease. *See Health Regulations.* CANADIAN PACIFIC NAVIGATION CO. v. THE CITY OF VANCOUVER [193

7. *Delegation of legislative power—Public Health Act, 1888—Power of Lieutenant-Governor-in-Council to dismiss Municipal Health Officer appointed by by-law.*] *See* HEALTH REGULATIONS. THE ATTORNEY-GENERAL OF B.C. v. MILNE - - - 196

8. ——*The constitutionality of a statute will only be considered where necessary to a decision of a question before the Court. Re* DICKENSON - - - - - 262

9. ——*Interference with Trade and Commerce—Special tax on non-resident traders—Power of Provincial Legislature to authorize municipality to impose.*] P. was convicted before a Justice of the Peace for soliciting in Victoria orders for the sale by retail of goods to be supplied by a firm doing business outside the Province of British Columbia. By the Municipal Act, 1891, B.C. 54 Vic., Cap, 29, Sec. 166, "every municipality shall, in addition to the powers of taxation by law conferred thereon, have the power to issue licenses for the purposes following, and to levy and collect by means of such licenses the amounts following: "(12.) From every person who, either on his own behalf, or as agent for another or others, sells, solicits or takes orders for the sale by retail of goods, wares or merchandise, to be supplied or furnished by any person or firm doing business outside the province and not having a permanent or licensed place of business within the province of a sum not exceeding $50 for every six months." By by-law, following the

CONSTITUTIONAL LAW—*Continued.*

language of sub-sec. 12 *supra*, except that the words "permanent or licensed place of business" are substituted for "permanent and licensed place of business," the license fee was fixed at $50. *Held*, (1.) The statute, by-law and license tax thereunder are not as contended *ultra vires*, (a) for interference with trade and commerce, or (b) for unlawful discrimination against traders outside the province. (2.) The imposition of the license tax in question is within the powers relegated to provincial control by the B.N.A. Act, Sec. 92, sub-sec. 16. (3) The word "and" in the statute, *supra*, should be construed "or." POOLE v. CITY OF VICTORIA - - - - 271

CONTRACT—*Sale of Land—Warranty.*] An agreement to sell land "according to a plan deposited in the Land Registry Office and numbered 319" does not import a warranty that the plan is deposited in accordance with the provisions of the Land Registry Act. THOMPSON v. COURTNEY 89

2. ——*Illegality—Agreement for sale of pre-emption claim before Crown grant—Land Act, 1888, Sec. 26.*] By Sec. 26 *supra:* "No transfer of any surveyed or unsurveyed land pre-empted under this Act shall be valid until after a Crown grant of the same shall have issued." *Held, per* MCCREIGHT, J., Agreements for such transfer are illegal, and no action can be brought thereon. TURNER & JONES v. CURRAN *et al* - 51

3. ——*Taking over work after part performance—Damages.*] *See* BUILDING CONTRACT - - - - - - - 45

4. ——*Hiring—Municipal Corporation—Corporate Seal.*] A person duly elected at a meeting of the Municipal Council, to municipal office, pursuant to a statute giving the Municipal Corporation power so to appoint its officers, becomes thereby the servant of the corporation without further evidencing or ratification of the contract of hiring, either by writing under the corporate seal or otherwise, and can maintain an action for damages for not being received into the employment. TUCK v. THE CORPORATION OF THE CITY OF VICTORIA - - - 179

5. ——*Uncertainty—Agreement to print a book by specifications "equal to sample" to be produced—No sample produced—Effect of.*] Where the contract provides for the manufacture according to specification of an article "equal in every respect to a sample to be produced" and no sample is produced and agreed upon, the contract is void for uncertainty, and no action can be brought

CONTRACT—*Continued.*

for breach of it by either party. KERR & BEGG v. COTTON - - - - 246

CORPORATE SEAL - - 179
See MASTER AND SERVANT.

COSTS—A C.C. Judge has no power on appeal from summary conviction to award costs against a person not a party to the proceedings before the Justices, though improperly made a party to the appeal. *Re* W. N. BOLE, C.C. JUDGE, &c., IN *re* CONVICTION OF AH TIM AND OTHERS - 208

2. ——*Taxation — Scale — Procedure — Retrospective legislation.*] Upon taxation of costs it appeared that some of the items had reference to proceedings taken before the introduction by statute of a new scale of taxation, and others to proceedings taken since the introduction of the new scale. *Held, per* Bole, Co. J., sitting as local Judge of the Supreme Court, overruling the Registrar, that the introduction of the new scale of costs was legislation in regard to procedure and had a retrospective effect, and that all the items must be taxed upon the new scale. YOUDALL v. DOUGLAS - 342

COUNTY COURT JUDGE—Jurisdiction under the Speedy Trials Act - 53
See CONSTITUTIONAL LAW.

2. ——Jurisdiction as local Judge of the Supreme Court to deal with wages claims under the Execution Act
See JUDGE. [213

COUNTY COURT—*Jurisdiction to make personal order over $1,000 in Mechanic's Lien suit.*] A claim for personal order to pay an amount over $1,000 was entertained in the County Court as auxillary to relief by way of enforcement of a Mechanic's Lien. POST v. JONES - - - - - 250

COUNTY COURT APPEAL—Scope of under C. C. Amendment Act, 1892
See APPEAL. [328

COURTS—Constitution of - - 12
See CONSTITUTIONAL LAW (2).

2. ——Constitution of—B.N.A. Act—Powers of Provincial Legislature - 12
See CONSTITUTIONAL LAW (2).

CRIMINAL LAW—Procedure—No appeal to Divisional Court from order for commission.
See DIVISIONAL COURT.

2——*Writ of Error—Criminal Procedure Act, R.S.C. Cap. 174, Sec. 266—Mis-statement of venue—Whether open on writ of error.*]

CRIMINAL LAW—*Continued.*

(1) An objection to the venue in an indictment is not an objection which could have been reserved at the trial, and is a proper subject of a writ of error under Sec. 266, *supra*, but any error in the statement of venue is cured by Sec. 247 of the Statute, *supra*. (2) An objection that the trial judge did not deliver the whole of his charge to the jury in open court is not a question of record; that it could have been reserved, and that a writ of error did not lie for it. (3) It is too late to allege a diminution of the record after errors assigned. GREER v. THE QUEEN - - - - - 112

3——*Habeas Corpus—Warrant of commitment not showing conviction—Effect of—Form of rule nisi—Dispensing with presence of Prisoner or argument of—See Habeas Corpus—Ex parte Ellamass* - - - 232

4——*Gaming house—Order to enter—Within what time to be executed.*] An order to enter a house reported to be a common gaming house must be executed within a reasonable time. REGINA v. AH SING 167

5——*Alternative charges.*] The fact that a person charged with an offence might upon the facts have been charged with a conspiracy with another is no objection to the individual charge. REGINA v. CLARK - - - - - - - 191

6——*False pretences—Agency—Knowledge of the falsity of the pretence by the agent of the person defrauded—Effect of.*] The knowledge of the agent of the person defrauded of the falsity of the pretence cannot be imputed as the knowledge of the person defrauded so as to affect the criminality of the accused. REGINA v. CLARK - 191

7. ——*Certiorari—Motion to quash conviction—Practice—Rule of Court requiring recognizance with sufficient sureties—Necessity for affidavit of justification—Jurisdiction.*] The Court, or a Judge, has no jurisdiction to entertain a motion to quash a conviction moved up by *certiorari*, unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties to prosecute such *certiorari* with effect and pay such costs as may be awarded against him, etc., as provided by rule of this Court of 27th of April, 1889. (2.) The Court must have an affidavit of justification before it, upon which it can judge of the sufficiency of the sureties. REGINA v. AH GIN - 207

8. ——*Summary conviction—Mens rea—Sanitary By-law—Overcrowding—"Suffering to be occupied"—Proof of knowledge of defendant.*] In order to support a conviction under the clause in the Victoria Consolidated Health By-law, 1886, providing: (17. "No person shall let, occupy, or suffer to be occupied, as a dwelling or lodging, any room (a) which does not contain at least 384 cubic feet of space for each person occupying the same,") it is necessary that there should be some evidence of guilty knowledge, actual or constructive, on the part of the person charged. *Re* WING KEE - - 329

9. ——*Evidence—Proof of absence from Canada to admit deposition of witness taken at preliminary hearing—Per Walkem, J., on a trial under the Speedy Trials Act.*] (1.) Evidence that a captain of a schooner had cleared from a Canadian port a week before the trial and put to sea is insufficient evidence of his being out of Canada to satisfy Sec. 222, Criminal Proc. Act, and his deposition taken on the preliminary examinations refused. REGINA v. MORGAN 329

10. ——*Speedy Trials Act—Adjournment of trial.*] An adjournment of a speedy trial to permit the Crown to obtain better evidence that a witness examined on the preliminary hearing was absent from Canada in order to admit his deposition, refused as contrary to the spirit of the Act. REGINA v. MORGAN - - - 329

DAMAGES—Injury arising from the exercise of a statutory duty or power - - - - 8
See Damnum sine injuria.

DAMNUM SINE INJURIA—*Injury arising from exercise of statutory power or duty.*] There is at common law no remedy for damage caused by the non-negligent exercise of a statutory duty or power. JONES v. THE CITY OF VICTORIA - 8

——*See also* INJUNCTION - - 159

——*And* WATER PRIVILEGES - - 237

DEDICATION—Registering plan showing public street—Who can dedicate—A person who has no power to alienate cannot dedicate - 306
See ESTOPPEL.

DEFAMATION — Poster — Advertising accounts for sale - - 279
See LIBEL.

DEPOSITION—Proof of absence from Canada to admit under Sec. 222, Crim. Proc. Act, 1869 - 329
See CRIMINAL LAW,

DIVISIONAL COURT—Practice—Divisional Court—time for appealing to —Notice of appeal is bringing of appeal — Jurisdiction — Chamber summons not issued from Registry wherein action brought—Effect of —Sec. 27, Supreme Court Act 235
See PRACTICE. *Re* ELLARD.

2. ——*Jurisdiction—Criminal Procedure—53 Vic. (Can.) Ch. 37, Sec. 23.*] No appeal lies to the Divisional Court from an order appointing commissioners to take evidence under Sec. 23, sub-sec. 2, Criminal Law Amendment Act, 1890, *supra*. REGINA v. JOHNSTON - - - - - - 87

3. ——*Appeal—Jurisdiction—"Interlocutory matter"—Refusal of an ex parte application for leave to issue concurrent writs of summons—Whether appealable.*] There is no appeal to the Divisional Court from the refusal of an *ex parte* application for leave to issue concurrent writs of summons against defendants, who are citizens and residents of the United States, as such application is not an interlocutory matter within Sec. 60, Supreme Court Act. *Semble*, Such application is not a proceeding in an action. TAI YUNE v. BLUM 348

ELECTION — Criminal Law — Prisoner electing to be tried speedily—Whether can be convicted on his speedy trial of any other offence than that for which he elected to be tried - - - 329
See CRIMINAL LAW. REGINA v. MORGAN.

EMPLOYERS' LIABILITY (At Common Law)—Duty to furnish reasonably safe appliances, &c.—*Volenti non fit injuria* - - 137
See MASTER AND SERVANT.

ERROR—Writ of - - 53—112

——*See* CRIMINAL LAW.

ESTOPPEL—*Recital in order of inferior Court—Prohibition.*] A party moving for a writ of prohibition against an order of an inferior Court is not estopped from denying statements of fact necessary to found the jurisdiction of the inferior Court appearing on the face of the order in question on the motion. *Re* W. N. BOLE, O.C. JUDGE, &c., IN *re* CONVICTION OF AH TIM AND OTHERS 208

ESTOPPEL—*Continued.*

2. ——*Default judgment whether — Res judicata—Lunatic—Laches—Judgment — Attacking by separate action after refusal of leave to defend.*] A matter does not become *res judicata* by a default judgment upon which the parties are not heard on the merits. Notwithstanding that the Court has, on the ground of *laches waiver*, &c., refused a motion upon affidavit to set a default judgment aside and admit a defence on the merits, the defendant is not thereby estopped from attacking the judgment and the contract upon which it was founded, upon the ground that he was insane at the time of the contract and at the time of the obtaining of the judgment and of alleged waiver, although his insanity was alleged on the affidavits on the motion. HARPER v. CAMERON - - - - - - 365

3. ——*Default judgment—Whether.*] Fresh action to recover back part of amount of judgment by default on ground that judgment was for too much. *Held*, that the judgment constituted an estoppel and was a bar to the present action, and that the proper course was to apply in the action in which it was obtained to set aside the judgment by default on the merits, which could only be done on the ground of surprise or mistake. GOON GAN v. MOORE - 154

4. ——*Dedication—No power to dedicate where none to alienate—Registering plan showing street and selling lots by it.*] The defendants, a Railway Company, by Dominion Statute acquired the power to "take hold and use" certain foreshore "to such extent as shall be required by the Company for its Railway and other works." The Company were the owners in fee of the lands abutting on the foreshore, and in 1885 filed a certain plan of a portion of such lands in the Land Registry office at Vancouver, which plan showed a public street running at right angles to and opening upon the foreshore, and subsequently sold lots from said plan. The defendants in 1892 ran an embankment for their railway along the foreshore, cutting off access thereto and to the sea by way of the street. *Held*, per McCreight, J., dissolving the injunction and dismissing the action: (1.) That the registration of their townsite plan in November, 1885, operated as a dedication by plaintiffs of a public way over the foreshore from the foot of Gore Avenue, shown as opening upon it, and as an estoppel against their setting up their subsequently acquired rights over the foreshore against such public right of way. (2.) That if plaintiffs in 1886

ESTOPPEL—*Continued.*

acquired any title to the foreshore inconsistent with such public right of way, such title fed the estoppel. (3.) A public right of way is extinguished by Act of Parliament only by express words or where it clearly authorizes the doing of a thing which is physically inconsistent with the continuance of such right, and sec. 18 A, *Supra*, does not do so. (4.) The Crown was a necessary party to the action. Upon appeal to the Full Court. *Held*, per Begbie, C.J., (Walkem and Drake, J.J., concurring), over-ruling McCreight, J., giving judgment for plaintiffs, and reinstating and continuing the injunction: (1.) The plaintiffs' right to occupy the foreshore under sec. 18 A, *supra*, was exclusive. (2.) There was no dedication by plaintiffs by the registration of their map of 1885, as there can be no dedication except by owners of the soil. (3.) There is no power of dedication where there is no power to alienate. (4.) The Crown was not a necessary party. THE CANADIAN PACIFIC RAILWAY COMPANY v. THE CITY OF VANCOUVER - - - 306

EVIDENCE — *Witness — Incompetency by reason of want of religious belief—Examination on voir dire—Duty of Trial Judge.*] It is not the duty of the trial judge to examine a witness on the *voir dire* as to his religious belief, for the purpose of testing his competency as a witness, even if requested to do so by counsel for opposite party, and a party who has not been examined on the *voir dire* at the trial, will not be heard upon affidavit on appeal against the competency of the evidence. GRAY v. MCCALLUM. 104

——Fresh Evidence on appeal—Rule 674 *See* APPEAL - - - [364

——Criminal Law—Proof of absence from Canada of Witness to admit his deposition. - - - 329
See CRIMINAL LAW.

——Affidavit in language not that of deponent. - - - - 343
See AFFIDAVIT.

EXECUTION—*Certificate of judgment—Registration as against lands*—The registration of a certificate of judgment against the lands of a judgment debtor is not an execution within the meaning of a Supreme Court of Canada Act, Sec. 47, Sub.-Sec. (e), and the giving of security to the satisfaction of a judge of the Supreme Court of B.C. for the whole amount of the debt and costs, does not supersede the registration of such certificate. FOLEY v. WEBSTER, - 251

EXECUTION ACT—Terms of redemption of mortgage by purchase of equity of redemption at sale by sheriff under *fi fa* lands—What arrears recoverable—Statute of limitations. - - - 48
See MORTGAGE.

EXECUTOR—*Mixing private funds with estate—Judgment by general legatee for amount of Legacy—Priority of as against prior judgment against executor personally—Merger—Following assets into mixed fund*:—In 1874, one E. H. became entitled to a general legacy of $10,000, bequeathed to him by his brother T., with whom he was in partnership. On J.'s death T. entered into possession of the whole partnership property and paid half the legacy to E. In 1875, E. sued T. and recovered judgment by default for the balance in the usual form of a judgment against an executor admitting assets *de bonis testatoris et si non de bonis propriis*, which judgment was registered February 28, 1889. In the meantime T. had charged the whole property for large sums to various creditors who obtained and registered judgment before January 24, 1889, and a simple contract creditor, C., had also before that date obtained and registered a judgment against him. Receivers having been put in possession of T.'s estate, sold the same under order of the Court, and certain mortgage debts and expenses having been paid off with the sanction of the Court, the balance left was insufficient to pay off the registered charges prior to E.'s judgment. In an action by E. for an enquiry as to what assets of J. came into the hands of T. or the receivers, to have his judgment declared a charge upon such assets prior to the personal judgment creditors, and to restrain the receivers. *Held*, per Begbie, C.J., that the plaintiff, by bringing his action and obtaining judgment against T., became a mere creditor of T., and that his claim was no longer that of a legatee, and also that he had not shown that any of the moneys in the receivers' hands were impressed with a trust in his favour. But *held*, by the Full Court, on appeal, per McCreight and Walkem, J.J., that the action lay as against C., but not *semble* as against the mortgagees, by reason of Secs. 32-36 of the Land Registry Act. HARPER v. HARPER. - - 15

FALSE PRETENCES—Knowledge of agent of the person defrauded to whom the pretence was made of the falsity of the pretence—Effect of —*See* CRIMINAL LAW. [191

FRAUDULENT PREFERENCE—*Pressure—Bill of sale Act—Conditional Sale—In-*

FRAUDULENT PREFERENCE—*Continued.*

solvency. To constitute pressure which will authorize an assignment by way of security, there must be a legitimate and *bona fide* attempt by the creditor to get payment of his debt, or security therefor. A bill of sale given subject to a condition not appearing therein is void as against creditors. The evidence showed that the mortgagor was started in buiness by the mortgagees in May, 1889, and was to their knowledge insolvent from the day he commenced business. The mortgage was made in April, 1890, upon demand of the mortgagees, who threatened to sue, but almost all the property of the debtor was exempt from execution and the mortgage covered all his property. *Held*, Not *bona fide* pressure. DOLL v. HART. - - - - 32

2. ——*Pressure—Innocent purchaser—C. S.B.C. 1888, Cap. 51.*] M. & Co., being then insolvent, upon demand of one of their creditors, O. Bros., and in fear of legal proceedings, executed a Bill of Sale to them of their stock in trade and effects. Before the commencement of this action by the other creditors to have the Bill of Sale declared void, as being made with intent to give O. Bros. a preference, the latter had sold the goods to a *bona fide* purchaser for value and received the purchase money. *Held*, (1.) The Bill of Sale was not made voluntarily, or with intent to give a preference, but was made under pressure sufficient to take the transaction out of the Statutes. (2.) O. Bros. could not in any event be called upon to account for the purchase money to the other creditors. CASCADEN v. MCINTOSH - - 268

FRAUDULENT CONVEYANCE—Innocent purchaser—Following trust funds - - - - - 268
See INNOCENT PURCHASER.

GARNISHEE - - - - - 171
See ATTACHMENT OF DEBTS.

HABEAS CORPUS—A person imprisoned may make fresh application for a writ of *habeas corpus* to every Judge or Court (Superior) in turn, who are each bound to consider the question independently. *Re* GEORGE BOWACK - - - - - 216

2. ——*Criminal Law—Habeas Corpus—Warrant of commitment not showing conviction—Effect of—Form of rule nisi—Dispensing with presence of prisoner on argument of.*] A warrant of commitment by an Indian Agent recited that E. had been charged with having an intoxicant in his possession

HABEAS CORPUS—*Continued.*

contrary to the Indian Act, "and thereupon, having considered the matter of the said complaint, I adjudged the said Ettamass should be imprisoned in the common gaol .....for..... three calendar months." *Held*, (1.) Warrant defective for not showing any conviction. (2.) The prisoner could be discharged without the writ of *habeas corpus* actually issuing, and without the prisoner being personally brought before the Court. *Ex parte* ETTAMASS 232

3. ——*Custody of infant—Person asking writ must make out right in himself.*] The Court will not interfere by *habeas corpus* to take an infant out of the custody of a person not lawfully entitled thereto, for the purpose of enabling a person equally unentitled to obtain possession of it. *Re* AH GWAY *ex parte* CHIN SU - - - - - 343

HEALTH REGULATIONS—*Municipal By-law providing—Provincial Statute authorizing—Constitutional Law—Interference with Trade and Commerce—"Power to stop, detain and examine every person coming from place infected with pestilential disease, in order to prevent introduction of same into city"—Construction of words.*] A municipal by-law providing, "The Medical Health Officer shall have power to stop, detain and examine every person or persons, freight, cargoes, boats.....coming from a place infected with a pestilential or infectious disease, in order to prevent the introduction of the same into the city," does not authorize the Medical Health Officer or other municipal authorities to detain a steamship and its passengers and crew coming from an infected place, or to prevent them from landing within the municipal limits without reference to a proper examination for the purpose indicated and its results, as showing danger of their introducing the disease. (2.) That the stopping of all the passengers without examination was not an exercise of the powers reposed in the Corporation by the by-law, but was an interference with trade and commerce and was *ultra vires*. (3.) That the by-law and the statute authorizing it were *intra vires*. CANADIAN PACIFIC NAVIGATION CO. v. THE CITY OF VANCOUVER - - 193

2. ——*Constitutional Law—Public Health Act, 1888—Delegation of Legislative power—Power of Lieutenant-Governor-in-Council to dismiss Municipal Health Officer appointed by by-law.*] *Held, per* Begbie, C.J., (1.) A Provincial Statute having given to the Lieutenant-Governor-in-Council power to make and alter such regulations as he might

HEALTH REGULATIONS—*Continued.*

deem expedient in regard to certain matters affecting the public health, the same to have the force of law, such regulations when passed superseded all provincial and municipal enactments inconsistent with themselves. (2.) It is competent to the Lieutenant-Governor-in-Council by regulations under the provisions of the Health Act, 1888, to dismiss a Health Officer appointed by Municipal By-law. THE ATTORNEY-GENERAL OF BRITISH COLUMBIA v. MILNE - - - - - - 196

3. ——*Habeas Corpus—Municipal Health By-law authorizing confinement and isolation of travellers "exposed to" certain diseases—"Exposed to" defined—Right to apply for writ of habeas corpus seriatim to different Judges after refusal by one Judge.*] A Municipal By-law of the City of Vancouver, authorized by Provincial Statute provided: "In case any traveller coming from without the city.....is infected with or exposed to any of the diseases mentioned in this By-law (of which small-pox was one), the Medical Health Officer of the Board of Health may make effective provision in the manner which to them shall seem meet and best for the public safety, by removing such persons to a separate house, or by otherwise isolating them, if it can be done without danger to life, and by providing nurses and other assistance necessary for them at his own cost and charges," etc. B., having been for 36 hours in Victoria, a city of 20,000 inhabitants, in which there were 55 cases of small pox, came directly thence to Vancouver where he landed. He was thereupon by direction of the Medical Health Officer of Vancouver under colour of above By-law, arrested and confined in quarantine as a traveller, etc., "exposed to" the disease. Upon motion for a writ of *habeas corpus*. *Held*, *Per* McCreight, J., That B. was a person "exposed to the disease," and that the detention was lawful. Writ refused. Subsequently, upon similar motion to Walkem, J. *Held*, *per* Walkem, J.: (1.) A person imprisoned may make fresh application for *habeas corpus* to every Judge or Court in turn, who are each bound to consider the question independently. (2.) The detention was unlawful and not within the scope of the By-law. The authority to detain, isolate and nurse, could only apply to persons suffering from the disease. (3.) B. could not be said to be a person "exposed" to the disease merely because he came from and had been 36 hours in a city infected with it to the extent proved. Writ granted. *Re* GEORGE BOWACK. - - - - - - - 216

INFANTS—Right to custody of - 343
See Habeas Corpus.

2. ——*Investment by trustees of funds of—Duties of.*] *Re* BROWN *ex parte* BROWN. 110

INJUNCTION—*Discretion to grant interlocutory injunctions in actions of libel.*] *Held*, *per* Begbie, C.J., On a motion to dissolve an injunction restraining until the hearing the further publication of matter charged to be libellous, that the Court will interfere by interlocutory injunction restraining until the trial the publication of what clearly appears to be a libel. On appeal to the Divisional Court: *Held*, *per* Crease, J., That though in England the courts have not of late restrained publication before the question of libel had been submitted to a jury, there is undoubted power to do so under C.S.B.C. Cap. 31 Sec. 14, and the appeal should be dismissed. *Per* Drake, J., that as the jurisdiction is one never admitted before the judicature act and the exercise of it may prejudice the trial of the action as being a conclusive opinion that the matter complained of is defamatory, it should be very sparingly used and in practice confined to trade libels, and the appeal should be allowed. WOLFENDEN v. GILES - - - - - - - 279

2. ——*What notice of sufficient—Disobedience of—Practice—Committal—Attachment in lieu of.* A mandatory injunction required "the defendants, their officers, agents, etc., to permit all passengers upon the plaintiffs' steamers to land at the port of Vancouver, subject only to such detention, examination and inspection as may be reasonably necessary in order to ascertain the existence among them of the disease of small-pox, by reason of their or any of them having been actually exposed to contagion thereof," etc, Notice of the effect of the injunction was telegraphed to the defendants' solicitor by his agent in Victoria, upon whom the amended order had been served. Defendants afterwards by their agents, met plaintiffs' steamships at the wharf at Vancouver and, without any inspection or examination of them informed the passengers that they could not land, but if they did so they would be subject to be quarantined for 14 days, under the City Health By-law, and thereby prevented them from landing. *Held*, (1.) That the defendants had sufficient notice of the terms of the injunction as above. (2.) That the conduct of the defendants was a breach of the injunction, and attachment ordered to bring before the Court those proved to have been actively concerned in the breach. THE CANADIAN PACIFIC NAVIGATION CO. (LTD.) v. THE CITY OF VANCOUVER - 298

INNOCENT PURCHASER—*Con. Stat. B.C., 1888, Cap. 51.*] The purchasers of goods from an insolvent, under a Bill of sale alleged to have been fraudulent against his creditors, before action to set aside the sale, sold and delivered the goods to an innocent purchaser for value and received the purchase money, which was not ear marked in an way. *Held*, (1.) No remedy is provided by the Act after the property reaches *bona fide* purchasers. (2.) The purchase money paid by the latter not being ear marked in any way could not be followed by the Court and no order could be made. Plaintiff non-suited. CASCADEN v. MCINTOSH - - - - - - 268

INSANITY—*Inquisition.*] A finding by inquisition of the insanity of a person is not a necessary preliminary to an action by his next friend to set aside his contract on the ground of his insanity. Insanity once established is presumed to continue. HARPER v. CAMERON - - - - - 264

INSOLVENCY—Assignee for creditors—Removal of whose interests conflicts with his duty - - 262
See TRUSTEE.
See FRAUDULENT PREFERENCE.

INTEREST—*Promissory note—Laches.*] It is discretionary with the tribunal on the trial of an action upon a promissory note not providing for interest, to allow interest after maturity by way of damages, or not. *Held*, That a plaintiff by laches in not pressing for or sueing to recover on the note for a period of over three years, had disentitled himself to interest. SMITH v. HANSEN - - - - - - 153

2. —*Liquidated or unliquidated demand—Practice—Order III, Rule 6—Judgment by default.*] *Held*, per Begbie, C.J., Crease and Drake, J.J., A claim specially endorsed on writ for amount of an account rendered, and "for interest thereon at six per cent. until judgment" is not a liquidated demand under Order III, Rule 6, and an order setting aside judgment thereon as in default of appearance, sustained. MCCLARY MANUFACTURING CO. v. CORBETT - - 212

JOINDER OF ACTIONS—*Joint action by several offenders to recover fines paid after conviction quashed.*] Where several persons are fined by one summary conviction which has been quashed, they may not sue jointly to recover the fines paid, but must bring separate actions. FIVE CHINAMEN v. NEW WESTMINSTER - - - - - 168

JUDGMENT BY DEFAULT - 174
See ESTOPPEL.

JUDGMENT UNDER ORDER XIV—*Practice—Writ of Summons—Sufficiency of special endorsement — Obtaining judgment under Order XIV after amendment of—Time.*] In an action to recover the amount of a promissory note, presentment for payment, dishonour, and notice thereof to the endorser must be stated in the special endorsement of the writ to warrant an order for judgment against the endorser, under Order XIV, but need not be alleged to warrant judgment against the maker. When an order amending the special endorsement upon a Writ of Summons is made, the writ with the new special endorsement must be reserved upon every defendant affected by the amendment. If such defendant has already appeared, such appearance stands as an appearance to the amended writ (following Paxton v. Baird, 1891, 1, Q.B. 139), and the plaintiff can apply for judgment under Order XIV, but judgment cannot be directed to be entered against him before the lapse of eight days from the service of the amended writ. *See* PRACTICE - - - - - - 302

2. ——*Special endorsement—Sufficiency of* *See* BILL OF EXCHANGE ACT. [333

3. ——*Rules of 1880—Admitting to defend —Discretion.*] Upon a motion for leave to sign a final judgment under Order XIV, S. C. Rules of 1880, if a Judge thinks that a good defence is *bona fide* intended to be set up, or if he is doubtful, he must give leave to defend, but he has a discretion as to the terms of the leave, and in exercising the discretion regard should be had to the chances of the defence being successful. HOTZ v. MCALLISTER - - - 77

JURISDICTION—Of County Court to make a personal order for payment of an amount over $1,000 as auxiliary to judgment in a Mechanic's Lien suit - 250
See COUNTY COURT.

2. ——*Making Order in Court below after allowance of Appeal to Supreme Court of Canada.*] The Supreme Court of British Columbia has no power to make an order controlling proceedings under its judgment, after the perfecting of an appeal from such judgment to the Supreme Court of Canada. FOLEY v. WEBSTER - - - 251

JURY—Charging with additional facts out of open Court - - 112
See CRIMINAL LAW. GREER v. REGINAM.

JUSTICE OF THE PEACE—*Incapacit by reason of interest.*] The receipt by

JUSTICE OF THE PEACE—*Continued.*

Police Magistrate of a salary paid out of the Consolidated Fund, into which fines imposed by him are paid, does not incapacitate him from hearing a prosecution by reason of interest in the result. REGINA v. HART [264

LAND REGISTRY ACT—*Right of non-registered foreign company to be registered as owner of lands in B.C.*] The Land Registrar is justified in refusing to register a non-registered foreign company as the owner of land. *Ex parte*, NEW VANCOUVER COAL MINING AND LAND CO. - - - - 8

2. ——*Priority of registered charge.* *See* EXECUTOR.

3. ——*Registration of judgment against lands—Duty of Registrar.*] BYRNES v. McMILLAN - - - - - - 163

4. ——*Cancellation of ordinary certificate of title under Sec. 61, upon issue of certificate of indefeasible title under Sec. 17.*] The Registrar-General has power to cancel the ordinary certificate of title upon issue of a certificate of indefeasible title. *Re* J. H. TURNER - - - - - - 244

LEGACY—Judgment by general legatee—Priority of as against personal judgment against executor - 15 *See* EXECUTOR. HARPER v. HARPER.

LIBEL — *Defamation — Poster advertising accounts for sale.*] Defendant, a debt collector, printed a poster, containing the names of persons from whom he was employed to make collections, showing the amounts and the nature of the accounts set opposite the respective names under the heading in large letters: "Accounts for sale, Victoria, B.C. The British Columbia Commercial Agency offers the following accounts for sale at their office," &c. This poster, which showed the name of the plaintiff as a debtor for a drug bill of $9.67, defendant sent to him, and to each of the persons on the list, together with a circular stating: "You may still have your name lifted by paying the amount on or before the 27th inst., after which date the posters will positively be issued." An interim injunction having been granted to restrain further publication. *Held*, per Begbie, C.J., on motion to continue the injunction till the hearing, That the poster was libellous and the inuendo implied was not merely that the plaintiff was justly indebted in the sum mentioned, but that he was dishonest and insolvent. And *held*, per Crease, J., on appeal, that the poster was in fact in the

LIBEL—*Continued.*

eyes of the public a black list implying that all ordinary efforts to obtain payment had failed, and that the debtor was either dishonest or insolvent. WOLFENDEN v. GILES [279

LICENSE—*Of water privileges for mining purposes.*] The licensee has no right so to use the water as to foul the stream and prevent riparian proprietors lower down from using the water for milling purposes. THE COLUMBIA RIVER LUMBER CO. v. YOUILL [237

LIQUOR LICENSE LAW—The Liquor License Regulation Act, B.C. 1891, Sec. 4, providing for the closing of saloons on Sunday is *intra vires* of the Provincial Legislature - 93 *See* CONSTITUTIONAL LAW. SAUER v. WALKER.

2. ——*Cancellation of License obtained clandestinely—"Court House"—Meaning of —Duties of Magistrates on hearing of petition for license.*] A retail liquor license obtained clandestinely and without due regard to preliminary statutory requirements was cancelled. A school house which had been used on occasions as a place of meeting by a Licensing Court, is not a "Court House" within the meaning of Sec. 11 of the Licensing Act, Cap. 73, C.S.B.C. 1888. *In re* CLOSE & BERRY - - 131

LIQUOR LICENSE REGULATION ACT, 1891—*Selling Intoxicating liquors on Sunday—Detectives visiting saloons to see if law obeyed—Whether bona fide travellers.*] A constable who, by order, visits saloons on Sundays to see whether or not the law with respect to the sale of liquor is being obeyed, is a *bona fide* traveller, within the meaning of the Liquor License Act, 1891. REGINA v. HARRIS - - - - - 177

LIQUOR LICENSE LAW—*Municipal Act, 1892, Sec. 204, sub-sec. 3—Selling liquor without a license.*] *Held*, That Sec. 208 of the Statute, *supra*, providing: "No person shall sell spirituous.....liquors.....by .....retail, and no person shall use, practice, carry on or exercise in the municipality.....any trade.....or business described or named in Section 204 and the sub-sections thereof, without having taken out and had granted to him a license in that behalf, under a penalty not exceeding $250 .....together with the amount which he should have paid for such license, which .....penalty shall for the purposes of recovery.....be held to be one penalty," made it an offence to sell liquor by retail,

LIQUOR LICENSE LAW—*Continued.*

without a license in that behalf, independently of whether a by-law providing for the issue of such licenses and fixing the amount of fees thereon had been passed or not, and that the appeal could proceed as a hearing *de novo* for such statutory offence. And it appearing upon such evidence that the liquor sold was intoxicating, but no evidence being given as to its having been produced by distillation (2) that the evidence was insufficient to sustain a charge of selling spirituous liquor. *Re* KWONG WO - 336

LUNATIC—*Contract—Fraud.*] Action to cancel promissory notes as being obtainable by defendant, without consideration from plaintiff, while he was to defendant's knowledge of unsound mind and incapable of transacting business; and to set aside a judgment by default of appearance obtained Dec. 10, 1888, in an action by defendant against the plaintiff upon the notes. The jury found that the plaintiff at the time of the contract represented by the notes in question was of unsound mind; (2) that the transaction was not fair and *bona fide*; (3) that there was no consideration; (4) that the transaction was without deliberation; (5) without independent advice; (6) that the defendant at the time of making the notes was aware that the plaintiff was of unsound mind. The jury also stated that they were all for a verdict for the plaintiff. Upon motion for judgment, *held*, (1.) That the plaintiff was not estopped by the default judgment in Cameron v. Harper. (2.) That the issues were not *res judicata* by a decision in Chambers in Cameron v. Harper, affirmed by the Divisional Court, refusing to set aside the default judgment and admit plaintiff to defend and set up in that action the plaintiff's case herein. (3.) That the answers and general verdict of the jury included a finding that the plaintiff was in fact *non compos mentis* at the time of and ever since the transaction impeached, and he was consequently not estopped by conduct. (4.) A finding by inquisition of the insanity of the plaintiff was not a necessary preliminary to this action. Upon motion for new trial and appeal: *Per* Begbie, C. J., Walkem and Drake, J.J. (sitting both as a Full Court and Divisional Court), judgment of Crease J. affirmed. (2.) The verdict of a jury should not be disturbed as being against evidence, unless it is one which the jury on the evidence could not reasonably have formed. (3.) An action lies to set aside a judgment in another action. (4.) Where documentary evidence is rejected at the trial, and the propriety of the rejection is not made a ground of appeal, the Court will not allow that evidence to be read on appeal as fresh evidence under Rule 874. (5.) *Per* Walkem J., Insanity once established is presumed to continue. (6.) *Per* Drake, J., Where a contract is attacked the defence of ratification must be pleaded to admit evidence of ratification. HARPER v. CAMERON - - - - 365

MARITIME LAW—*Collision—Party to blame—Salvage.*] Salvage consequent on a collision may be awarded to the party to blame. ZAMBESI v. FANNY DUTARD - 91

2. ——*Collision—Navigation Act—Articles 16 and 20—Party to blame.*] The steamships J. and C. cleared from the same wharf at Nanaimo harbour at about the same time, the J. first. Each backed from the wharf in a different direction from the other, and each executed a manœuvre in the harbour for the purpose of making exit to the sea by a narrow channel between an island situated at the mouth of the harbour and a shoal, and approached its entrance and each other in directions convergent and almost at right angles, the J. being on the starboard side of the C. The relative courses and speed of the vessels were such that unless altered by one or the other a collision was imminent. Both vessels kept their courses, but a few seconds before the collision took place the C. stopped and reversed her engines, notwithstanding which she struck the J., which was then crossing her bow, forward of amidships, almost at right angles. *Held*, (1.) That the J. was not an overtaking ship, within the meaning of Article 20, or bound to keep out of the C.'s way. (2.) That the C. had the J. on her starboard side, within the meaning of Article 16, and was bound to keep out of her way. (3.) That the C. was solely responsible for the collision. THE CUTCH - - - - - - 357

MASTER AND SERVANT—*Negligence Duty of Master to take reasonable care of servant's safety.—Volenti non fit injuria.*) At common law an employee of mill hands is bound to take reasonable care that the mill is properly and safely constructed, and fitted with machinery so as to insure a reasonable degree of security to a careful workman, and to provide reasonably skilful and proper supervision. A workman may be *sciens* of the actual situation without being *volens* of the risk of injury or fully appreciating it. FOLEY v. WEBSTER - 137

2. ——*Contract of hiring by election to office—Corporate Seal—Municipal Act, 1891 (B.C.) Sec. 93—54 Vic. Cap. 29.*] "At the

MASTER AND SERVANT—*Continued.*

first meeting of the Council in every year, or as soon as possible thereafter, the Council may elect a clerk, water commissioner, surveyor, or such other officers as may be deemed necessary, who shall hold office during the pleasure of the Council, and may receive such remuneration as the Council shall by by-law appoint." The plaintiff was thereunder duly elected to the office of city engineer of the city of Victoria, the salary of which was fixed by by-law. *Held*, That he became thereby the servant of the city without further evidencing of the contract of hiring under the corporate seal or otherwise. TUCK v. THE CORPORATION OF THE CITY OF VICTORIA - - 179

MECHANIC'S LIEN ACT OF 1891—*Jurisdiction of Supreme Court to enforce lien.*] The Supreme Court has no original jurisdiction to enforce a Mechanic's Lien under the Mechanic's Lien Act, 1889, providing Sec. 16: "That whatever the amount of the lien, proceedings may be taken before a Judge of the County Court of the District in which the land charged is situate," &c. MARTIN v. RUSSELL - - - 98

MECHANIC'S LIEN—*Waiver.*] Taking and negotiating a promissory note for its amount discharges a Mechanic's Lien, and although the note falls due before the expiration of the time limited for filing the lien, the lien does not revive upon the note being dishonoured. (Affirmed by the Supreme Court of Canada.) EDMONDS v. TIERNAN - - - - - - 82

2. ——*Lien for materials—Whether saved by repealing Section 30 of the Mechanic's Lien Act, 1891—Affidavits—What they should show—Non-suit.*] In an action to enforce a Mechanic's Lien the owner is entitled to defend on any ground available to the contractor even where judgment has gone against the latter by default. *Quære*, Whether if credit has originally been given the contractor for a longer period than the time within which proceedings must be taken to enforce the lien, an action would be maintainable. The lien for materials given by the Mechanic's Lien Acts, 1888-90, together with the procedure for the enforcement thereof have not been abolished by the repealing section (30) of the Act of 1891. The Court is not disposed to grant a non-suit with leave to bring fresh action where the action is brought to enforce a purely statutory right and fails. HAGGARTY v. GRANT (defendant) AND DUCK (owner) 173

MEDICAL ACT (Con. Stat. B.C. 1888, Cap. 81, Sec. 29)—*Medical Practitioner—*

MEDICAL ACT (Con. Stat. B.C. 1888, Cap. 81, Sec. 29.)—*Continued.*

Refusal to register in British Columbia an English registered practitioner—Mandamus.] A medical practitioner registered in England prior to June 1st, 1887, under the Imperial Medical Acts, is entitled to be registered and admitted to practice in British Columbia pursuant to Imp. Stat. 31 Vic., Cap. 29, Sec. 3, subject to such laws as the Provincial Legislature may have made, for the purpose of enforcing the registration within its jurisdiction of persons registered under the Imperial Medical Acts. (2.) General provisions in the B.C. Medical Act (Con. Stat. B.C. 1888, Cap. 81), relating to examination of candidates, payment of fees and registration of medical practitioners, do not affect the right to be registered in the Colony acquired under the Imperial Statute by English registered practitioners. (3.) The B.C. Medical Act (Con. Stat. B.C. 1888, Cap. 81, Sec. 31) authorizes the making by the B.C. Medical Council of rules pursuant to Imp. Stat. 31 Vic., Cap. 29, Sec. 3, for admitting English registered practitioners upon the provincial register. (4.) The B. C. Medical Council having made no such rules plaintiff was entitled to be admitted upon the B.C. register upon such proof of his English registration as would be admitted in a Court of law. METHERELL v. THE MEDICAL COUNCIL OF B.C. - - 186

MEDICAL PRACTITIONER—Registration in B.C. of English registered —Supremacy of Imperial over Provincial Statute - - 186
See MEDICAL ACT, B.C. METHERELL v. THE MEDICAL COUNCIL OF B.C.

MENS REA - - - - 321
See CRIMINAL LAW.

MERGER—Claim of general legatee recovering judgment against executor—Position as regards assets of estate - - - - 15
See EXECUTOR. HARPER v. HARPER.

MINERAL ACT, 1891—The order of a Judge extending the 30 days provided by the Mineral Act (1891), Amendment Act, 1892, within which to commence proceedings in a Court of competent jurisdiction to enforce an adverse claim is appealable to the Divisional Court under Sec. 77 Supreme Court Act, although not made in any pending cause. *Re* THE MAPLE LEAF AND LANARK MINERAL CLAIMS - - 323

MINING COURTS—
See CONSTITUTIONAL LAW (2).

MISCHIEVOUS ANIMALS ACT—*Scienter.*] In an action for damages for injuries caused by the bite of a dog, Sec. 30 of the Mischievous Animals Act (C.S.B.C. 1888, C. 4) does not preclude the defendant from showing the peaceful character of the dog, or his ignorance of its vicious disposition, but only raises a rebuttable presumption against him. NEVILLE v. LAING - 100

MIS-DIRECTION—It is not mis-direction sufficient to require a new trial that the Judge has used inaccurate language in the course of a long summing up, if the charge as a whole afforded a fair guide to the jury. GRAY v. MCCALLUM - 104

MISJOINDER - - - 241
See PLEADING.

MORTGAGE—*Terms of redemption by purchaser of equity of redemption—Statute of limitations—Execution Act (C.S.B.C. 1888, Cap. 42, Secs. 37-44.*] Under Section 44 of the Execution Act, *supra*, providing any purchaser may remove or satisfy any mortgage in like manner as the execution debtor might have done, an execution purchaser of an equity of redemption is entitled to redeem only upon payment of the whole arrears of principal and interest legally recoverable from the mortgagor, and 20 years arrears are recoverable under the usual covenant to pay. KEARY v. MASON - - 48

MUNICIPAL BY-LAW—*Non-compliance with statutory pre-requisites — Debenture holders not protected.*] It is no answer to a motion to quash a by-law for non-compliance with statutory pre-requisites that debentures have been issued and taken up upon the faith of the by-law. WILTSHIRE v. TOWNSHIP OF SURREY - - 79

MUNICIPAL CORPORATION—Contract of hiring by election to office
See MASTER AND SERVANT. [179

2. ——*Duty of to maintain its electric wires in a safe condition—Negligence—Res ipsa loquitur.*] A fire alarm wire belonging to a municipality broke and fell upon an electric wire belonging to a private corporation, and thereby sent a fatal current into the plaintiff's horse. *Held*, That the municipality was liable. EARLE v. THE CITY OF VICTORIA - - - 156
See NEGLIGENCE.

3. ——*Appointment of officers by resolution —Whether By-law necessary.*] A Provincial Statute authorized an appointment to Municipal office to be made by a Municipal Corporation subject to the consent of the Lieutenant-Governor-in-Council. *Held*, (1.) Such appointment was well made by resolution under the Corporate Seal and a By-law was unnecessary. (2.) It is immaterial whether the assent of the Lieutenant-Governo-in-Council is obtained before or after the resolution. TUCK v. VICTORIA - - - - - - 179

MUNICIPAL LICENSE LAW—Power of Municipality to pass By-laws imposing a special tax on non-resident traders—Power of Provincial Legislature to authorize - 271
See CONSTITUTIONAL LAW.

2. ——*Sale—Wholesale or retail.*] A sale to a person in British Columbia by an agent of a firm doing business outside the Province of 1,100 business cards to be supplied by them, is a sale by wholesale, and not a sale by retail within the Municipal Act, 1891, 54 Vic. Cap. 29, B.C., Sec. 166, and a conviction for making such sale without the license required by the Statute for making such sale by retail.—Quashed. HEATH v. THE CITY OF VICTORIA - 276

NAVIGATION ACT—Articles 16 to 20—Collision—Overtaking ship—Party to blame - - - 357
See MARITIME LAW.

NEGLIGENCE—*Proximate cause—Municipal Corporation — Duty of to maintain electric wires in safe condition—Res ipsa loquitur.*] A fire-alarm wire belonging to a Municipality broke and fell upon an electric wire belonging to a private corporation, and obtained therefrom and sent a fatal current into the plaintiff's horse. *Held*, That the Municipality was liable. EARLE v. THE CITY OF VICTORIA - - - 156

NEW TRIAL—*Weight of evidence—Reasonableness of verdict.*] The Court will not set aside the verdict of a jury unless it is wholly unsupported by evidence, or is contrary to such a body of evidence or rests on such slight foundation as to make it obvious that the jury were perverse or invincibly prejudiced. GRAY v. MCCALLUM
See MISDIRECTION. [104

2. ——*Appeal.*] It is not competent to an appellant, *ano flatu*, to move alternatively for a reversal of the judgment as entered on the findings of a jury or for a new trial. O. XXXIX and O. XL., R. 4, of the S.C. Rules of 1880 explained; Davies v. Felix, 4 Ex. D. 35 followed. [ED. NOTE—This head note seems too broad for the decision of the Court, which was only that the two

NEW TRIAL—*Continued.*

alternative motions cannot be entertained unless both are properly founded on the necessary proceedings to bring them before the Court.] FOLEY v. WEBSTER - 137

3. ——*Divisional Court—Referring back motion for fresh evidence.*] The Divisional Court, upon a motion for a new trial, being of opinion that there was no evidence upon which the damages assessed could be calculated, directed a further enquiry as to such damages, and adjourned the motion in the meantime. PARKS v. BLACKWOOD [346

NON-SUIT—The Court is not disposed to grant a non-suit with leave to bring a fresh action where the action is brought to enforce a pure statutory remedy contrary to common right, and fails for want of statutory pre-requisites - - 173
See MECHANIC'S LIEN.

NOTICE—*Practice — Injunction — What notice of injunction sufficient.*] Telegraphic notice to solicitors who have appeared for defendants of the effect of an injunction is sufficient notice to defendants to warrant their committal or attachment for disobedience of it - - - - - 298
See INJUNCTION.

NOVATION—To bring about a complete novation there must be three things: (1.) The new debtor must assume the complete liability. (2.) The creditor must accept the new debtor as a principal debtor, and (3.) The creditor must accept the new contract in full satisfaction of and substitution for the old contract, so that the original debtor is discharged. POLSON v. WULFFSOHN - - - - - 39

ORDER—
See SUMMONSES AND ORDERS.

ORDER XIV—
See JUDGMENT UNDER ORDER XIV.

PHARMACY ACT, 1891—"*Exercising Profession*"—*Meaning of.*] One who resided in the Province until the coming into force of the Pharmacy Act, 1891, and was a partner of a druggist practising within the Province, is not entitled to be registered under Sec. 12 of the Act, as having practised as a druggist. *Ex parte* HENDERSON IN *re* THE PHARMACY ACT, 1891 - - 103

PLEADING — *Amendment.*] The Court may allow pleadings to be amended at any time at or after the trial to meet the facts proved, and in accordance with the lines upon which the trial has proceeded, following Clough v. L. & N.W. Ry. Co., L.R. 7, Ex. 30. FOLEY v. WEBSTER - - 137

PLEADING—*Continued.*

2. ——*Amendment.*] An action was brought for wrongful dismissal, when, on the facts, it should have been for a refusal to receive into the employment. An amendment was allowed at the trial. TUCK v. THE CORPORATION OF THE CITY OF VICTORIA - - - - - - 179

PRACTICE—*Altering decree before drawn up.*] A Judge has power to alter his decree in matters of detail before it is drawn up, but not to reverse it. ZAMBESI v. FANNY DUTARD - - - - - - 91

2. ——*Claim and counter claim—Treated as separate actions up to execution.*] A claim and counterclaim are treated as distinct actions up to execution, which will go for the difference or the sum of the two judgments as the case may be. SMITH v. HANSEN - - - - - - 153

3. ——*Recognizance with sufficient sureties required on motion to quash conviction* - 207
See CRIMINAL LAW.

4. ——*Judgment by default — Special endorsement—Order III, Rule 6—Interest—Liquidated or unliquidated demand* - 212
See INTEREST.

5. ——*Ex parte order in favour of wages claimant as against execution creditor.*] Such an order is irregular if made, *ex parte* McKAY v. CLARKE - - - 213

6. ——*Affidavit—Intituling—Irregularity.*] The affidavits in support of a motion for an order for payment into Court of moneys realized under an execution to answer claims of third persons against the execution debtor for wages were not intituled in the cause, but "in the matter of the Execution Act and of A. E. Clarke, judgment debtor." *Held* irregular. McKAY v. CLARKE - - - - - - 213

7. ——*Judgment by default — Special endorsement including a claim for interest—Liquidated or unliquidated demand.*] *Held*, per Begbie, C.J., Crease and Drake, J.J., A claim specially endorsed on the writ for amount of account rendered and "for interest thereon at 6 per cent. until judgment" is not a liquidated demand under Order III, Rule 6, and an order setting aside judgment thereon is in default of appear-

PRACTICE—*Continued.*

ance, sustained. McCLARY MANUFACTURING CO. v. CORBETT - - - - 212

8. ——*Divisional Court, time for appealing to—Notice of appeal is bringing of appeal—Jurisdiction—Chamber Summons not issued from Registry wherein action brought—Effect of—Sec. 27, Supreme Court Act.*] The giving of notice of intention to appeal is the bringing of the appeal, within Sec. 61, Sup. Court B. C. Act, and when such notice is given within eight days from the perfecting of the order appealed from, it is no objection that the appeal is not either set down or argued within that time. A Judge in Chambers has jurisdiction to entertain a motion made upon summons issued out of a Registry, other than that out of which the writ of summons issued, notwithstanding Sec. 27 *supra*. *Re* ELLARD - 235

9. ——*Injunction.*] Exercise of discretion to grant restraining further publication of matter charged to be libellous, until the hearing - - - - - - 279
See INJUNCTION.

10. *Amending writ—Re-service — Appearance—Whether that to original stands to amended writ — Judgment after — Time.*] When an order, amending the special endorsement upon a writ of summons is made, the writ with the new special endorsement must be reserved upon every defendant affected by the amendment. If such defendant has already appeared, such appearance stands as an appearance to the amended writ (following Paxton v. Baird 1893, 1 Q.B. 139), and the plaintiff can apply for judgment under Order XIV, but judgment cannot be directed to be entered against him before the lapse of eight days from the service of the amended writ. MOORE *et al* v. PATERSON *et al* - 302

11. ——*Motion to discretion of Court—Non-disclosure of material fact—Effect of—Whether objection available on appeal.*] It appeared that a writ endorsed to prosecute an adverse claim under the Mineral Act, 1891, in the Supreme Court, had been issued before an application for an order extending the time for bringing action in the County Court was made; but that fact was not disclosed to the Judge upon the application. *Held*, allowing an appeal, that the fact of the issue of the Supreme Court writ was material to the original application and should have been disclosed. Such a circumstance can be taken advantage of upon an appeal from, as well upon a motion to rescind, the order. *Re* THE MAPLE LEAF AND LANARK MINERAL CLAIMS - 323

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12. ——*Judgment under Order XIV—Special endorsement—Sufficiency of—Bills of Exchange Act, 53 Vic. (Can.) Cap. 33, Sec. 86—Promissory Note made payable at particular place—Necessity for allegation of presentment against the maker* - - 333
See BILLS OF EXCHANGE ACT.

PLEADING—*Misjoinder.*] Misjoinder by a plaintiff of unconnected causes of action against different defendants is not objectionable on demurrer by any of the separate defendants, but is a proper subject of a motion to strike out as embarrassing, &c. McKENZIE & McGOWAN (Assignees, &c.) v. BELL-IRVING PATERSON & Co. *et al* - 241

PRE-EMPTION—Sale of before Crown grant is illegal - - 51
See CONTRACT.

PREFERENCE—Pressure - 32-268
See FRAUDULENT PREFERENCE.

PRESSURE - - - 32-268
See FRAUDULENT PREFERENCE.

PRISONER—Dispensing with presence of on motion for *habeas corpus*.
See HABEAS CORPUS.

PROHIBITION—The only ground of prohibition to an inferior Court is that of exceeding its jurisdiction. FIVE CHINAMEN v. NEW WESTMINSTER - - - 168

2. ——*Statement of fact in order of inferior Court—Contradicting—Estoppel.*] On motion for prohibition statements of fact necessary to found jurisdiction of the inferior Court, appearing in the order of the inferior Court in question on the motion may be contradicted. *Re* W. N. BOLE, JUDGE OF THE COUNTY COURT, &c., IN *re* CONVICTION OF AH TIM AND OTHERS - - - 208

PROMISSORY NOTE — *Presentation — Bills of Exchange Act, 53 Vic. (Can.) Cap. 33, Sec. 86.*] Where a Bill of Exchange or Promissory Note is made payable at a particular place, presentation at that place must be proved to make a cause of action against the maker. CROFT v. HAMLIN 333

PUBLIC WAY—Foreshore—Public right of access. CANADIAN PACIFIC RAILWAY CO. v. THE CITY OF VANCOUVER [306

QUIETING TITLES ACT — *Title by possession.*] A person producing evidence of twenty years' continuous and undisturbed possession of lands is entitled to a

QUIETING TITLES ACT—*Continued.*

declaration from the Court that he is entitled thereto in fee. IN *re* LOEWEN AND ERB - - - - - - - 135

RES IPSA LOQUITUR - - 156
See NEGLIGENCE.

SANITARY BY-LAW—Summary Conviction—Overcrowding—"Suffering to be occupied"—Proof of knowledge of defendant—*Mens Rea* 321
See CRIMINAL LAW.

SECURITY FOR COSTS—Recognizance with sufficient sureties required on motion to quash conviction - 207
See CRIMINAL LAW.

2. ——A motion to the Divisional Court is an appeal within the meaning of Order LVIII, Rule 15, and the Court has power to order the applicant to give security for costs - - - - - - 350
See APPEAL. WILSON v. PERRIN.

SHERIFF—*Execution Act—Responsibility for error in notice of sale caused by error in Land Registry office—Duty of Registrar—Mode of registering judgments.*] A Sheriff discharges his duty under Sec. 37 of the Execution Act if he publishes a correct copy of the information as furnished him by the Land Registry Office, and is not responsible for loss arising out of errors committed therein. It is the duty of the Registrar either to comply with applications for registration or to give a written refusal forthwith. Remarks on the faulty mode of registering judgments. BYRNES v. MCMILLAN - - - - - - 163

SPEEDY TRIALS ACT—*Election of prisoner to be tried speedily for a certain offence—Failure of Crown to prove—Whether prisoner can be convicted on a different offence disclosed by the evidence.*] A prisoner having decided to be tried speedily upon the charge of forgery, for which he was committed to trial, and being charged and tried for that offence accordingly, there was not sufficient evidence to convict, but there was evidence upon which he might be convicted of obtaining money by false pretences. *Held*, That the Crown could not then substitute a charge for the latter offence for the charge of forgery upon which the prisoner had elected to be tried. REGINA v. MORGAN [329

2. ——*Jurisdiction of County Court Judge under* - - - - - - - 53

STATUTE OF LIMITATIONS—
See MORTGAGE.

STATUTE — Construction of — "and" construed "or" - - 271
See CONSTITUTIONAL LAW.

2. ——*Construction of—Provision relating to procedure—Directory or imperative.*] The provision in Sec. 27 of the Supreme Court Act, that all proceedings in an action shall be taken and recorded in the Registry Office in which the action is commenced is directory and not imperative, and a Judge in Chambers has jurisdiction to entertain a motion made upon summons issued out of a Registry other than that out of which the writ of summons issued. *Re* ELLARD 235

3. ——*Construction of—Legislation relating to procedure—Retrospective effect—Costs.*] A Statute introducing a new scale of costs is legislation in regard to procedure, and has a retrospective effect, and in a bill of costs taxed after the Statute comes into force, items for work done before the passage of the Act must be taxed upon the scale provided for in it. YOUDALL v. DOUGLAS [342

SUMMARY CONVICTION—Motion to quash—Recognizance required on
See CRIMINAL LAW. [207

2. ——*Appeal to County Court — Prerequisite to hearing of — Conviction not returned—Security not given.*] The following preliminary objections to the jurisdiction of the County Court to hear an appeal from a summary conviction were over-ruled. (a) That the conviction was not returned to or before the Court on the appeal. (b) That no security for the appeal had been returned. The appeal having been heard, an objection that the By-law upon which the conviction professed to be made had not been proved was over-ruled on the ground that a Statute of the Province made the conduct complained of a substantive offence. *Semble*, That the absence on the depositions returned of proof of the By-law would have been fatal upon *certiorari* and motion to quash the conviction. It was *held*, that an appeal from a conviction is a proceeding *de novo*, as if the information were then first brought to be tried. *Per* SIR M. B. BEGBIE, C.J. *re* QUONG WO - - - 336

SUMMONSES AND ORDERS—Practice —Sec. 27 Supreme Court Act—Chamber Summons not issued from Registry Office of District wherein action brought - - 235
See PRACTICE.

SUPREME COURT — Jurisdiction in Mechanic's Lien cases. MARTIN v. RUSSELL - - - - - 98

TAXATION—Provincial law taxing municipality for educational purposes
See CONSTITUTIONAL LAW.

2. ——*Practice.*] Costs must be taxed on the scale in force by Statute at the time of the taxation, though the items are for work done before it came into force - 342
See COSTS. YOUDALL v. DOUGLAS.

TITLE TO LANDS—Land Registry Act, 1888 — Cancellation of ordinary certificate upon issue of certificate of indefeasible title - - 244
See LAND REGISTRY ACT, 1888.

TRUSTEES—Duties of—Investing Infants' moneys—Covenant against incidence of Mechanic's Lien. *Re* BROWN *ex parte* BROWN - 110

TRUSTEE—*Removal of whose interest conflicts with his trust.*] There is an inherent jurisdiction in Courts of Equity to remove trustees and appoint new ones in proper cases. A trustee for creditors who is also employed as solicitor to manage an insolvent estate is a person whose interest conflicts with his duty to the creditors as trustee. *Re* DICKENSON - - - - 262

VERDICT—*Jury finding answers to questions and also returning general verdict—Effect of.*] Where a jury, besides returning answers to the questions put to them, of their own accord, stated that they were all for a verdict for the plaintiff. *Held*, That a general verdict in addition to special findings imports a finding in favour of the party for whom it is given of every fact in issue necessary to sustain it besides the facts specially found. The verdict of a jury should not be disturbed as being against evidence unless it is one which the jury on the evidence could not reasonably have formed. HARPER v. CAMERON - 365

2. ——*Reasonableness.*] - - 104
See NEW TRIAL, GRAY v. MCCALLUM.

WAGES—*Claim for as against execution*] The plaintiff, having recovered judgment and execution in this action in the Supreme Court, the Sheriff levied the amount thereof from the goods of the defendant. Five persons to whom the execution debtor was indebted for wages, obtained an *ex parte* order from a County Court Judge (professing to sit as a Judge of the Supreme Court, under Stat. B.C. 1891, Cap. 8, and Rules of Court printed in *B.C. Gaze te*, 4th November, 1891) for the Sheriff to pay into Court out of the moneys levied the amount claimed by them in order that they might be at liberty to establish their claims thereto in preference to the execution creditor under C.S.B.C. 1888, Cap. 42, Sec. 21. Neither the order nor the affidavits in support of it were styled in any cause, but "In the matter of the Execution Act and of A. E. Clarke, judgment debtor." *Held*, (1.) The order and affidavits were irregular as not being styled in any pending cause. (2.) The order ought not to have been made *ex parte*. (3.) Section 21 *supra* only authorizes the order therein provided for to be made by "a Judge of the Court out of which the process issues," and "upon proof of the claim" and the County Court Judge had no jurisdiction. (4.) An order for payment into Court of the moneys levied is unauthorized. MCKAY v. CLARKE - 213

WAIVER—Of Mechanic's Lien by taking promissory note - - 82
See MECHANIC'S LIEN.

WARRANTY - - - - - 89
See CONTRACT.

WARRANT OF COMMITMENT—No conviction shown—Held bad 232
See Habeas Corpus.

WATER PRIVILEGES — *Provincial Statutory grant of use of water—Limitations of—Riparian proprietor—Right to injunction against statutory licensee of use of water so using it as to foul stream—Injunction—43 Vic. B.C., Cap. 11—Placer Mining Act, B. C., 1891.*] Plaintiffs were entitled as riparian proprietors to the use of the natural flow of the water of a stream, Quartz Creek, running through timber lands leased by them from the Dominion Government. The lands so leased were part of the lands in the railway belt granted to the Dominion by the Province of British Columbia by 43 Vic. B.C., Cap. 11, in aid of the construction of the C.P.R. Defendants as free miners licensed by the Provincial Government obtained from it a grant of the right to use for mining purposes the water of a stream running into Quartz Creek above the plaintiffs' saw mill, by record under the Placer Mining (B.C.) Act, 1891, Secs. 56 and 57. Defendants so used this water as to foul Quartz Creek and stop the plaintiff's mill. *Held*, (1.) No person, unless by grant or prescription, is entitled to deprive another of the beneficial use of water which would naturally descend to him. (2.) A right granted by a Statute which does not in express terms derogate from the rights of others cannot be held to have done so by implication. (3.) A grant

WATER PRIVILEGES—*Continued.*

of water privileges under the Provincial Mining Acts does not sanction the user of the water to the detriment of the rights of others, however acquired, to the same water at another part of the stream. (4.) The Dominion Government, under 43 Vic. B.C., Cap, 11, were in possession of the lands as trustees to administer same, and it was competent to them to grant a lease to the plaintiffs, carrying the ordinary rights to the water of a riparian proprietor. THE COLUMBIA RIVER LUMBER CO. v. YUILL AND others - - - - - - 237

WIDE TIRE ACT, 1889 - - 36
See CONSTITUTIONAL LAW.

WITNESS—Incompetency by reason of lack of religious belief - 104

WORDS AND PHRASES—"Exposed to" - - - - - 216
See HEALTH REGULATIONS.

2. ——"*Exercising profession*" - 103
See PHARMACY ACT, 1891. *Ex parte* HENDERSON.

3 ——"*Court House.*"] *Re* CLOSE AND BERRY - - - - - - 131

4. ——"*Bona fide traveller.*"] REGINA v. HARRIS - - - - - - 177

5. ——"*Appeal shall be brought*" - 235
See APPEAL.

6. ——"*Equal to sample*" - 246
See CONTRACT.

7. ——"*And*" *construed* "*or*" - 271
See CONSTITUTIONAL LAW.

WORDS AND PHRASES—*Continued.*

8. ——"*Sale by retail*"—"*Wholesale*"
See MUNICIPAL LICENSE LAW. [276

9. ——"*Take, hold and use*" - 306
See ESTOPPEL.

10. ——"*Suffering to be occupied*" - 321
See CRIMINAL LAW.

11. ——"*Spirituous liquor*" — *Means liquor produced by distillation.*] It appearing upon the hearing of an appeal from a conviction for selling spirituous liquor without a license contrary to the Municipal Act of 1892, Sec. 204, sub-sec. 3, that the liquor sold was intoxicating, but no evidence being given as to its having been produced by distillation, it was *held* that the evidence was insufficient to sustain the conviction. *Re* QUONG WO - - - - - 336

12. ——"*Appeal.*"] A motion to the Divisional Court for a new trial is an appeal within the meaning of Order LVIII, Rule 15 - - - - - - 350
See APPEAL. WILSON v. PERRIN.

13. ——"*Overtaking ship*" - - 357
See MARITIME LAW.

14. ——"*Interlocutory matter.*"] TAI YUNE v. BLUM - - - - - 348

15. ——"*Execution.*"] FOLEY v. WEBSTER - - - - - - - 251

16. ——"*Stop, detain and examine.*"] CANADIAN PACIFIC NAVIGATION CO. v. CITY OF VANCOUVER - - - - - 193