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.

BY

ROBERT CASSIDY, BARRISTER-AT-LAW.

VOLUME III.

VICTORIA, B.C.
PRINTED BY THE PROVINCE PUBLISHING COMPANY, 15 BROAD STREET
1896.

JUDGES

OF THE

SUPREME AND COUNTY COURTS OF BRITISH COLUMBIA

AND IN ADMIRALTY

During the period of this Volume.

SUPREME COURT JUDGES.

CHIEF JUSTICES.

THE HON. SIR MATTHEW BAILLIE BEGBIE, KNIGHT.
THE HON. THEODORE DAVIE

PUISNE JUDGES.

THE HON. SIR HENRY PERING PELLEW CREASE, KNIGHT.
THE HON. JOHN FOSTER McCREIGHT.
THE HON. GEORGE ANTHONY WALKEM.
THE HON. MONTAGUE WILLIAM TYRWHITT DRAKE.

LOCAL JUDGES IN ADMIRALTY.

THE HON, SIR MATTHEW BAILLIE BEGBIE, KNIGHT.
THE HON. SIR HENRY PERING PELLEW CREASE, KNIGHT.
THE HON. THEODORE DAVIE.

COUNTY COURT JUDGES.

HIS HON. ELI HARRISON, - - - - - - - - Nanaimo.
HIS HON. WILLIAM NORMAN BOLE, - - - - - - New Westminster.
THE HON. CLEMENT FRANCIS CORNWALL, - - - Cariboo.
HIS HON. WILLIAM WARD SPINKS, - - - - - Yale.

ATTORNEYS-GENERAL.

THE HON. THEODORE DAVIE, Q. C.
THE HON. DAVID MACEWEN EBERTS, Q. C.

NOTE.—The Hon. Theodore Davie, Q.C., Attorney-General, was sworn in as Chief Justice of the Supreme Court of British Columbia on the 11th day of March, 1895, as successor to the Hon. Sir Matthew Baillie Begbie, Knight, who died on the 11th day of June, 1894.

The Hon. Sir Henry Pering Pellew Crease, Knight, retired from the Bench on the 20th January, 1896, having received from Her Majesty the order of knighthood on the 1st day of January, 1896.

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IN THE VICE ADMIRALTY COURT.

BEGBIE, L.J.A.

1893.

Jan. 24.

C.P.N. Co. *v.* THE SARGENT

CANADIAN PACIFIC NAVIGATION CO.

V.

THE C. F. SARGENT.

Maritime Law—Towage Contract—Towage or Salvage.

The ship S. was found by the tug M. in a dangerous position in foul waters. The captain of the tug agreed to tow the ship into the open sea, the amount payable for such services to be left to the respective owners. The owners being unable to agree;

Held, on the evidence, that the ship was in impending danger of loss and injury from her situation and the ignorance of her captain of the locality, and that the service of the tug was therefore a salvage and not a towage service.

ACTION FOR SALVAGE—Motion by the plaintiffs for judgment for them on the evidence, which is fully set out in the judgment. Statement.

E. V. Bodwell, for the plaintiffs.

The Princess Alice, 3 W. Rob. 138, shows that the plaintiffs performed more than mere towage. It is not necessary that the danger should be imminent or inevitable. *The Charlotte*, 3 W. Rob. at p. 71; *Maclachlan on shipping*, p. 531; *The Ellora*, 1 Lush, 550; *The Reward*, 1 W. Rob. 174. As to the effect of the existence of the danger of loss of life on the ship—*The Rialto*, 64 L.T., 540; *The Undaunted*, Lush. 90; *The Silver Bullion*, 2 Ecc. & Ad., p. p. 70-74. Argument.

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D. M. Eberts, *Q.C.* and *W. J. Taylor*, for the defendants cited *The Strathneven*, 1 App. cas. 58 ; *Maclachlan on shipping*, 533. The onus of proving the salvage service is on the alleged salvors. *The Reward*, 1 W. Rob., 174. The evidence shows an agreement limiting the amount payable to $500.00, and the plaintiffs cannot recover more. *The Mulgrave*, 2 Hagg. Ad. R. 77 ; *The True Blue*, 2 W. Rob. 176.

E. V. Bodwell, in reply.

SIR M. B. BEGBIE, L.J.A.:

Judgment.

On the morning of the 4th November last, the steamer Maude, Captain Roberts, with a full cargo and 40 or 50 passengers, was on her regular trip from Victoria to Clayoquot, calling among other places at Mr. Sutton's settlement, in Uculet. She passed Cape Beale about 5 a. m., but, owing to the fog, could not see the light. Owing to the same cause, she abandoned her usual course in clear weather, viz.: through the intricate but smooth inner-water channels of Barclay Sound, and stood across to Cape Flattery. As soon as she heard the Flattery whistle, she made for the western entrance of Barclay Sound. The first thing she made out was Black Rock, at a distance of one-half mile. On closing up to Black Rock, she saw a ship lying at anchor inside, being the C. F. Sargent, Captain Snow, (now libelled) on a voyage from San Francisco to Port Angeles. The ship hoisted a signal, but before paying any attention to it, the Maude, wishing to ascertain her exact position, and not being quite sure of Black Rock or any of the rocks (owing to the fog), endeavored to make Round Island, where there is a beacon, easily identifiable. Finding her first signal unnoticed, the ship began tooting on her horn, but the Maude continued her course till, recognizing the beacon, she knew that she had rightly judged Black Rock, and returned to the ship. After informing the captain, in

answer to his inquiries, that he was off the entrance of Barclay Sound, and refusing (on account of his freight and passengers) to tow him to a port, Captain Roberts undertook to tow him out of his position into the open sea, whence he could give him directions to proceed on his voyage. It was also, after various offers and refusals, agreed that the amount payable for these services was to be left to the respective owners. But, a very few minutes after this had been agreed to by both parties, Captain Snow wished to add a stipulation that in no case was the amount to exceed $500; and he says that Captain Roberts, from the deck of his steamer, gesticulated assent, and shouted "all right"; Captain Roberts insisting that his gesticulations meant dissent, and that he shouted back a refusal to add anything to what was already agreed upon. And this is confirmed by those on board the Maude, who could, much better than Captain Snow, hear what it was that Captain Roberts really said. I am of opinion that the defendants fail to prove any assent to this further stipulation; and so the amount of remuneration was either by agreement left to the respective owners, who now cannot agree; or else, if the last stipulation were considered by Captain Snow to be a necessary term of the agreement, there was no concluded agreement at all.

Judgment.

In either case, the parties now failing to agree upon an amount, it falls upon the Court to say what is a proper remuneration. And the first thing to be determined is, whether such remuneration is to be made as for a salvage service, or simple towage; the plaintiffs claiming as for the first; the defendants alleging that it was nothing but ordinary towage.

Salvage means rescue from threatened loss or injury. If the ship were in no danger, there could be no salvage. If she were in danger, then the rescuers earn a salvage reward, which, on the grounds of public policy, is to be liberal; but

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which varies very much according to the imminence of the danger to the ship on one hand, and the skill and enterprise and danger of the rescuers on the other hand. But the question of the ship's danger is the first thing to be considered. On a service of towing, for instance, the tug may display both skill and enterprise, and expose herself to risk, but if the ship be towed merely for the sake of expedition, and not to take her out of danger, actual or impending, it is towage merely, and not salvage. And the Court is to judge whether the danger really existed, and not the parties themselves.

Judgment.

Now, what was the position of the ship out of which the Maude undertook to tow her? Captain Snow tells us, that having left San Francisco, a few days before, in his ship of nearly 1,700 tons, with crew of twelve men before the mast, bound for Port Angeles, he found on the early morning of the 4th November, that he had completely lost his way—was in utter ignorance whereabouts he had got to. He had been wandering and drifting about with light airs and a fog, which prevented any observations for two or three days previously. He had never been in Barclay Sound before, though he had been to Victoria and Nanaimo; he had no chart except one quite out of date, on a small scale, and almost, if not quite, useless for the purposes of navigation within the intricate channels of Barclay Sound, into which, without knowing it, he had drifted; sailing first north and then south, without knowing where he was or whither he was going. At 6:30 a.m., he was running northeast with a light wind from southeast, when he saw land right ahead. He immediately wore, and proceeded on a southwest course for an hour and a half or two hours, the wind dying out, when, on the fog lifting a little, he saw enough to make him immediately drop both his anchors, running out 75 fathoms on the one and 60 fathoms of chain on the other. What induced him to do this? He could

not have the least notion of the bottom under him; it might have been rock, and 60 fathoms deep; in fact there are 50 or 60 fathoms marked not very far from the place where he was. What was that place?

According to the evidence of the plaintiffs, the ship was lying near a point about equi-distant from Black Rock on the south, and Starlight Reef on the west, having Heddington Reef and Great Bear Rock on the north; and westward of a line drawn from Black Rock to Great Bear. A ship coming down from the northeast with a light, dying air from southeast, as Captain Snow describes, with the westerly current mentioned by some of the witnesses, might easily find herself just about that spot; and the fog rising a little would show an almost uninterrupted semi-circle of broken water, completely embaying the ship, except on the quarter by which both the wind, such as it was, and the current forbade her escape. I am advised that under these circumstances, in order to save the ship from the visible breakers, it was prudent seamanship to cast anchor without wasting any time in examining ground; but that imminent danger is the only apparent ground for such a manœuvre. And if the ship had been in any of the four positions alleged by Captain Snow (to be presently mentioned), inasmuch as there would in that case have been clear open water ahead of him, and none of the rocks above mentioned would even have been sighted, (about half a mile was probably about the sight limit in the fog that morning, at that distance from the shore, though one or two of the Sargent's crew speak of two or three miles), there is no conceivable reason why he should have cast his anchor at all, or why he did not continue on his S.W. course.

Judgment.

The four positions just mentioned arise thus. Captain Snow does not admit that the ship's position is accurately alleged by the plaintiffs. He says that in the course of con-

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versation between himself and the captain of the Maude, while his own ship was getting ready to weigh her anchors, he learned for the first time that he was off the western entrance to Barclay Sound, and obtained the names of the different rocks in the neighborhood—his own chart of Barclay Sound being on too small a scale to contain half their names. From these rocks he took many cross bearings, the result being to place his ship, he says, from a mile to a mile and a half to the eastward of the position described by the plaintiffs. Of course, if the ship had been where her captain alleges, she would have been in little or no danger; and so there could have been no salvage service performed. The only wonder is, why, if so far from the rocks, she should have repeatedly demanded the plaintiff's services, or why she should have cast anchor at all, or wanted a tug at all. She might have wanted to know where she was. But when the assessors plotted out the cross bearings, of which Captain Snow took no less than four, it appears that no two of the points of intersection coincide. There are, therefore, no less than four positions of the ship, as thus shown, some of them three-quarters of a mile apart. This extraordinary discrepancy in a part of the case which was very strongly relied on, and announced with an air of great particularity, throws great doubt over the accuracy of Captain Snow's recollections and observations in other respects. And these alleged and uncorroborated observations by a complete stranger scarcely deserve to be considered or weighed against the direct evidence of the captain and engineer of the Maude and of Mr. Sutton, a settler on Uculet Inlet, who knew Barclay Sound well, having traversed it in steamers, in canoes and in a steam launch, and who happened to be a passenger on board the Maude. Besides which, the fact admitted by both parties that the Maude began to tow S.E. and afterwards edged away to S. and S.W., is entirely consistent with the ship's position as alleged by the plaintiffs, but from the position stated by the defendant there was

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nothing to prevent her steering south at once. There is no doubt that the service of getting the ship out of her difficulties, and placing her in the open sea, with sufficient directions as to her future course, was well and sufficiently performed by the Maude.

It was, indeed, argued for the defendants that the ship, even if in the position assigned by the plaintiffs, was in no danger; for that if a westerly wind should arise (and the wind actually came strong from the westward early next morning near Port Angeles), she could have easily sailed out. In the first place it is to be observed that the argument completely misconceives the meaning of the word "danger." The argument seems to admit that every other wind would have been fatal. And a position which leaves only one chance of escaping destruction, and that chance depending entirely upon one particular change of wind, is in the view of this court, dangerous in the extreme. The force and direction of the wind experienced by the ship 100 miles away, off Port Angeles, is not at all decisive—is scarcely a guide for guessing the nature or direction of the wind at the western entrance of Barclay Sound. Nothing is more common than to stand on Beacon Hill with a fairly strong west wind, and watch the smoke of a forest fire on the opposite side of the Strait, scarcely 20 miles away, rapidly carried towards the Pacific, exactly in a contrary direction to the wind on Vancouver Island, on the north side of the Strait. The evidence of witnesses who were in the neighborhood that night shows that the wind there was either S.E. or S.W. But this is very immaterial. I am not satisfied how the wind was that night at the point from whence the ship had been towed. What is more material is this, that with the most favorable wind I do not think she could have taken advantage of it. There is every ground for believing that Captain Snow used all possible expedition in raising his anchors on the 4th November, yet

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he was four hours getting them aboard, even with the assistance of the Maude towing the ship up to her anchors in order to get the last of them on board. How could the ship have raised them in time to sail out, even if the wind had changed to the west and freshened suddenly, as Captain Snow says it did? She might have slipped them, it is true; but she would have been in a sorry plight without an anchor, and the first vessel from whom she borrowed one might perhaps have claimed as for a salvage service. Nor would her troubles have been nearly over, nor would she have been nearly out of danger, even if she had got free from her immediate entanglement. The assessors are of opinion that with the fairest wind it would have required good seamanship, with a well-found crew and a knowledge of her starting point, to have evaded the dangers, of which she knew absolutely nothing, which lay to the eastward and south-eastward. Assuming that her captain had the requisite seamanship, all the other requisites were absent. To describe such a position as quite safe, because she was not at the moment in instant danger of sinking or drifting, is to misuse language. She might, of course, have ultimately been wafted harmlessly and ignorantly out of that triangle, as she had been, in fact, wafted harmlessly and ignorantly into it. Perhaps the one event was not more unlikely than the other; and of course the second event might have happened, as well as the first. But in the opinion of the assessors, in which I quite coincide, she was on the morning of the 4th November in imminent danger of becoming a total loss. And however Captain Snow may now make light of his position, as men are apt to do of a danger that is past, I am quite clear that he thought at the time he was in a most imminent danger, or he never would let go both his anchors; nor would he otherwise have repeatedly, by ensign and fog horn, called for assistance. And we all think that the *C. F. Sargent* was just in such a position as that a prudent owner or mas-

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ter would willingly have accepted the services of a tug and pilot (for it is to be remembered that the *Maude* rendered both services—the one might have been of little avail but for the other), knowing that he would have to requite such service with a salvor's reward.

The defendants urge that the ship might have lain there in perfect safety till she could summon a tug, and that Captain Snow could have taken a boat to Carmanah or Cape Beale, only twelve or thirteen miles distance, and telegraphed thence to Victoria. The suggestion seems absurd. The captain had not the least idea where he himself was, or where or in what direction either Cape Beale or Carmanah lay. For all he knew, they might have been fifty miles off. How could he have gone on so mad an errand? Then it was suggested that tugs were often in that vicinity. But the contrary is the notorious fact; tugs seeking employment go, it is true, beyond Cape Flattery, but they always expect their customers from the southward. Scarcely once in a year would a chance sailing ship wanting a tug be met coming from the north, and the very perilous position of the ship did not admit of delay. One of defendant's own witnesses, who said he had once approached Barclay Sound, admitted that he had not been nearer than seven or eight miles off and thought that quite near enough. Fortunately for Captain Snow, the same fog which had driven him out of his course, had compelled the *Maude* deliberately to alter hers, and by the merest chance in the world, brought her right down on the ship, so close as to be seen. A quarter of a mile farther off, and neither of them probably would ever have known of the other's vicinity.

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The service then being a salvage, we have to consider the amount of remuneration; there being no concluded agreement between the parties. The defendants have paid $500 into court; and they urge that as $50 per diem would be sufficient charter money for the *Maude*, $500 is fully ample

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for a service which only detained her eight or nine hours. But the mere expense out of pocket of a salvor is never much considered in estimating the value of the service rendered. The most important services may be rendered without the expenditure of a shilling or the loss of a quarter of an hour's time by the salvor; *e.g.*, by giving a course, or information of locality by word of mouth, or by giving a lead by sailing ahead of one or more ships; all of which would be lost, in an intricate channel, but for the lead; that is a salvage service; and it was performed by the *Maude* in addition to the mere physical motive power which she lent to the ship, to enable her to reach the line of safety. The *Maude* was not there seeking such service; she was crowded with freight and passengers, on her fortnightly trip to the West Coast. The Court leans against the large claims sometimes made by professional tugs and pilots; they are generally confined to the tariff scale for their professional services. But the case is different with respect to pure volunteers, who cannot be expected to work for mere tariff allowance. Nor is it at all clear on the evidence produced, that the *Sargent* could have procured a tug from Victoria or Port Townsend, without aid from the *Maude*. Without information from the *Maude*, the captain could not have reached any telegraph station. He neither knew where he was, nor where the telegraph was. The *Maude* could have taken a letter, engaging a tug from Victoria, but that tug could not have reached the ship without information derived from the *Maude*. And if a regular tug charges $700 for going from Cape Flattery to Nanaimo and back (which is what the defendant and his witnesses proved), and $650 from Port Angeles to Nanaimo and back to Cape Flattery, it may well be doubted whether such a tug would have gone from Victoria or Port Angeles to the Black Rock, just opposite Cape Flattery, and back for so small a sum as $500. I look upon the $500 paid into court as barely sufficient for a towage service. The *Maude* was

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of small size, 95 tons ; the ship was 1704 tons gross. The *Maude* consequently had to put on all her power, against the current and wind in the heavy swell, so that though her engines were racing, yet she could not relieve them. Then the delay in the ship in getting her anchor up, also caused risk. If anything had given way, in the *Maude's* engine, she would have been in some risk, as she was not fitted to pass the night at sea if disabled, nor was she rigged so as to enable her to seek shelter under sail. Fortunately her engines stood the strain, and she did reach shelter ; but she did not reach her destination until next day, losing a whole twenty-four hours ; though the actual towage only lasted an hour and a half. The *Maude*, therefore, showed both skill and enterprise, and incurred some appreciable risk, and the ship derived great benefit from her service and did not lose a rope yarn. I do not think that any insurance company would, in the absence of a tug, have underwritten a policy on her for less than 10 per cent. premium ; and there were the lives of all on board at stake. The ship being valued for the purposes of this action at $20,000, I do not think that less than $2,000 would be a sufficient acknowledgment of the advantage to the ship's owners from the local knowledge and steam power furnished by the *Maude*. There will be judgment for that sum with costs. If there is any difficulty about the disposal of the salvage money, application can be made to me in chambers.

Judgment.

I alone am, of course, responsible for this judgment ; but it is founded on the advice, upon nautical matters, of the two gentlemen we have been fortunate enough to have as assessors, with whom, I am happy to say, I have agreed throughout.

Judgment for plaintiff for $2,000 for salvage.

FULL COURT.

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Mar. 13.

VICTORIA LUMBER CO. v. THE QUEEN.

VICTORIA LUMBER COMPANY.

v.

THE QUEEN.

Taxes—Exemption—E. & N. R'y Act—"Sold or alienated"—Appeal—Fresh evidence on—Costs.

By the Stat. B. C. 47 Vic. cap. 14, sec. 22 (E. & N. R'y Act) certain lands acquired by the company for the construction of the railway "shall not be subject to taxation unless and until the same are used by the company for other than railway purposes, or leased, occupied, sold or alienated."

In January, 1889, the E. & N. R'y Co., by agreement, gave to the appellants the right to enter and select 50,000 acres of the said lands, the appellants agreeing to pay $5 per acre in certain instalments, with interest, etc., the lands to be conveyed to the appellants as soon as the purchase money was fully paid, etc. The appellants had entered and surveyed the lands but never occupied the same, nor had they fully paid the purchase money. The Provincial Government assessed the lands for the purpose of taxation and the Court of Revision confirmed the assessment.

Held, by the Full Court on appeal—That the E. & N. R'y Co. had not "leased," "sold" or "alienated" the lands within the meaning of the Act, and that the same were not liable to taxation.

Statement. APPEAL from a decision of the Court of Revision, upholding an appeal from an assessment for the purposes of taxation, of the lands of the appellant company, which they had acquired from the E. & N. R'y Co., under an agreement dated the 14th day of January, 1889. The E. & N. R'y Co. acquired the lands from the Dominion Government for the construction of the railway as a part of their land grant under Stat. B. C. 47 Vic. cap. 14, sec. 22, which provided; "The lands to be acquired by the company from the Dominion Government for the construction of the railway shall not be subject to taxation unless and until the

same are used by the company for other than railway purposes, or leased, occupied, sold or alienated." The material clauses of the agreement under which the appellants took the lands were :

(1) The said company agrees to give the said purchaser or his assigns until the first day of November, 1890, the right to enter upon and select from the lands belonging to the said company.....50,000 acres of timber lands, with the right and option to the said purchaser, to select 50,000 acres additional timber lands from the aforesaid limits.

(9) The said purchaser for himself and his assigns covenants with the said company that he or they will on or before the first day of November, 1890, select and survey as aforesaid from the hereinbefore described lands, timbered lands to the extent of 50,000 acres, and will pay the said company therefor the sum of $5 per acre, as follows : The sum of $25,000 on or before the first day of November, 1889, and the balance in ten equal annual instalments with interest.

Statement.

(11) And the said company agrees with the said purchaser and his assigns that it will grant and convey to the said purchaser or his assigns the full amount of land so selected, more or less, as soon as the same shall have been selected and surveyed as aforesaid, and the whole of the purchase money, with the interest as aforesaid, shall have been paid.

The lands referred to in the agreement had been selected and surveyed, but the terms of payment had not been fulfilled. Appellants read an affidavit of E. J. Palmer, their manager, dated the 11th March instant, shewing that the lands are in a state of nature and have never been occupied or used by the Lumber Company or any other person or

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persons whomsoever on their behalf. No evidence to this effect was given originally or before the Court of Revision.

E. V. Bodwell, for the appellants:

Argument.

There must have been a complete sale, and the property must have passed out of the Railway Company and vested in the purchaser before it could become liable to taxation; the lands were never "leased," "sold" or "alienated"; the conditions of the agreement for sale had not been carried out at the time the lands were taxed; and the title and occupation, if any, continued in the Railway Company. *C. P. R.* v. *Burnett*, 5 Man. L. R. 395; *Cornwallis* v. *C. P. R.*, 19 S. C. R., at p. 702; *Masters* v. *The Madison County Mutual Ins. Co.*, 2 Barbour 628; *Conover* v. *Mutual Ins. Co. of Albany*, 3 Denio 254; *Bouvier Institutes*, Vol. 2, Sec. 1,992; *Hill* v. *Ins. Co.*, *59 Penn. State Rep. 474*; *Trumbull* v. *Portage County Ins. Co.*, 12 Ohio 305; *Burbank* v. *Rockingham*, 24 New Hamp. 550; *4 Kent's Commentaries, 441*; *2 Blackstone's Com. 287*; *Pollard* v. *Somerset M. F. Ins. Co.*, 42 Maine 221; *Allan* v. *Hudson River M. Ins. Co.*, 14 Barbour 445; *Tillon* v. *Mutual Fire Ins. Co.*, 1 Seldon 405.

A. G. Smith, for the Crown, *contra*.

Judgment.

Per Curiam. The appeal must be allowed, but without costs, as there was some evidence before the Court of Revision that the lands had been occupied, which evidence is now displaced by the affidavit of Palmer.

Appeal allowed without costs.

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Mar. 27.

LEHMAN v. WILKINSON.

LEHMAN v. WILKINSON.

Practice—Judge—Jurisdiction of to vary order of another Judge by adding conditions.

A judge has no jurisdiction to add to an order made by another judge for redemption of a mortgage on payment of the debt and costs to date of decree, a further term adding subsequent costs and requiring their payment as a further condition of redemption and charge upon the lands.

Per BEGBIE, C.J., CREASE, WALKEM and DRAKE, J.J.

Statement.

APPEALS from three orders of Bole Co. J., sitting as a local judge of the Supreme Court. The action was to redeem an equitable mortgage for $1,380, constituted by deposit of plaintiff's title deeds with defendant, and for a return of the deeds.

On motion for judgment MCCREIGHT, J., made a decree that if the plaintiff do within two months pay to defendant $1,380, and the costs of this action to be taxed, the defendant do return to the plaintiff his title deeds, but in the event of the plaintiff making default in such payment, then the action to stand dismissed.

The plaintiff within the two months tendered the $1,380 and costs to the defendant, who refused to deliver up the deeds, alleging that he had a lien thereon, beyond his lien as equitable mortgagee, for the costs of another action between the same parties and interest on the judgment therein. The plaintiff refused to recognize this claim and made a motion to BOLE Co. J. as local judge of the Supreme Court for a writ of attachment to compel the defendant to comply with the terms of the decree and return the deeds. This motion was on 27th February, 1893, dismissed with costs on a technical objection to the sufficiency of the

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material on which it was made, and the order of BOLE, L.J. S.C., provided "such costs to be added to the monies secured to the defendant by the equitable mortgage and to be an additional charge on the land." The plaintiff, by leave, then made another motion to same effect which was also dismissed with costs by BOLE, L.J.S.C on another preliminary technical objection and the learned judge made a similar order charging the costs on the lands. From both these orders the plaintiff appealed on the ground that the learned judge had no power to add conditions to the redemption decree, by saddling subsequent costs as a further condition to the right to redeem and to a return of the deeds.

Statement.

Clinton for the plaintiff, the appellant.

Argument.

Irving for the defendant, the respondent, cited *Lippard* v. *Ricketts*, 14 L. R. Eq., 291.

Judgment.

Per Curiam :—The mortgagee is entitled to redeem upon payment of the mortgage debt and all the costs to which he has been put in realizing the security and no more. There was no power to make the orders complained of.

Appeal allowed with costs.

BEGBIE, C.J.
(In Chambers.)

1893.

Apr. 19.

TAI YUNE
v.
BLUM.

TAI YUNE *v.* BLUM *ET AL.*

Practice—Rule 6—Refusing leave to issue ex juris writ where endorsement disclosed no cause of action.

As the leave of the Court or a Judge is (by Rule 6) expressly required to be obtained before the issue of a writ for service outside the jurisdiction the Court must, before sanctioning it, be satisfied that the endorsement discloses a reasonable cause of action.

The promissory note as set out in the special endorsement shewed the name of Wilson, one of defendants, sued as endorser, endorsed under that of the plaintiff the payee of the note.

Held *prima facie* evidence that Wilson was not liable on the note to the plaintiff, and that the plaintiff was not the holder of the note, and motion to issue the *ex juris* writ refused.

Statement.

MOTION by plaintiff under Rule 6 for leave to issue a writ of summons for service out of the jurisdiction upon defendants Blum, the makers, and defendant Wilson as endorser, of a promissory note. The facts fully appear in the head note and judgment.

A. P. Luxton for the application.

Judgment

BEGBIE, C. J. :—

This is an application for leave to issue a writ against three defendants, two of whom are aliens, out of the jurisdiction, on whom notice is desired to be served and for leave also to issue two concurrent writs, for the purpose of such writ.

As the leave of the Court or a Judge is expressly required to be obtained before the issue of the writ, it seems clear that I must before sanctioning the writ, be satisfied that it discloses a reasonable cause of action, and that the proposed course is a reasonable method of proceeding.

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TAI YUNE v. BLUM.

The ground of action is a promissory note dated 10th February, 1893, at ten days' date, for $2,420.00, now in the hands of the applicant. The note is irregular in many respects. It is signed by the two aliens alone as makers, in favour of the applicant, the proposed plaintiff, or order; it runs "I promise," &c., and therefore by section 84, of the Act of 1890 Cap. 33, it binds the makers jointly and severally. It is endorsed in the first place by the applicant, the payee named in the note; below his name, on the back of the note, appears the signature of Wilson. This is of course not conclusive as to the order in time of the signatures and of the consequent liability. But it is *prima facie* evidence on which I or any other tribunal must hold, in the absence of all other evidence, that Wilson is not and cannot be made liable in respect of this note to Tai Yune. For if Wilson, being the owner of the note (and the endorsements being in blank, it will pass by delivery like a bank note), had handed it back to Tai Yune who would be thus restored to his original rights, still Tai Yune being himself a prior endorser could never recover anything from Wilson on the note; sec. 37, Act of 1890. The importance of the true order of the endorsements, and that that should be stated to me on affidavit, was fully pointed out by myself yesterday being then informed, but verbally only, that Wilson had endorsed before Tai Yune. But though Tai Yune makes an additional affidavit read this morning, he abstains from all notice of this point. In fact, however, the order of signature may turn out to be unimportant. According to *Gwinnell* v. *Herbert*, 5 A. & E. 436, Wilson is not liable on this note at all, not as a maker for obvious reasons. You must unread the whole note, pull it all to pieces and replace the words in different order to do that. It would scarcely be doing less violence to the plain meaning of the document to construe Tai Yune as the maker and Blum and Jacklin as the payees. The document may be available as evidence of some contract or other, but you destroy it as a promissory

Judgment.

note if you charge Wilson otherwise than as an endorser, entitled to notice, &c. The technical and true sense of the word "endorsement" is assignment; it can only be executed by a party or a holder. An "endorsement" by a total stranger is a mere nullity, just as much as if a perfect stranger were to sign a deed or will concerning property in which he had no interest. That would not make him an assignor or a testator. By the law merchant, which is part of the law of England and now by statute embodying and declaring the law merchant, any party to or holder of a bill or note can assign it by simply signing his name on the back. A holder might of course assign his debt by deed, with such covenants and stipulations as might be deemed necessary. But no deed or further ceremony is necessary beyond simply writing his name on the back of the note. The holder or payee by such signature not only assigns his whole interest therein, but also binds himself to the terms mentioned in sec. 55 (2). And this principle, that an "endorsement" to be really such must be an assignment, must therefore be by somebody who has a right to assign, and if made by a stranger, is no "endorsement" at all, seems, though not so stated in the Report, to be the principle underlying not only *Gwinnell* v. *Herbert*, but the much later case of *Mander* v. *Evans*, T.L.R. 1888-89, and so also in the opinion of Lord Tenterden in *Abbott on Shipping*, p. 699, 13th ed. I am therefore of opinion that Tai Yune cannot maintain an action against these three defendants upon this promissory note, and that if all three were within the jurisdiction, in which case the plaintiff could issue his writ without any previous leave, yet at the trial the Judge would have to direct a non-suit, if indeed the writ and all proceedings thereon were not previously set aside as disclosing no cause of action. I cannot give leave to commence such an action.

Judgment.

Application refused.

CREASE, J.
(In Chambers.)

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May 16.

VYE
v.
MCNEILL.

VYE *v.* McNEILL.

Execution—Exemption—Homestead Amendment Act, 1890.

A horse, the only exigible personality of defendant, was taken in execution. It was appraised at $1000.00. Defendant, under sec. 2, Homestead Amendment Act, 1890, cap. 20, providing: "2. It shall be the duty of every sheriff or other officer seizing the personal property of any debtor under a writ of *fieri facias* or any process of execution, to allow the debtor to select goods and chattels to the value of $500.00 from the personal property so seized." claimed that he was entitled to select the horse to the extent of $500.00, and to be paid that amount by the sheriff out of the proceeds of its sale.

Held, that the debtor was so entitled.

SUMMONS TO ENFORCE RIGHT OF EXEMPTION.

Statement. THE plaintiff had recovered judgment by default against the defendant for $1,074.80 upon certain promissory notes given for the price of a horse called "Republican" and issued execution thereon. The sheriff had seized thereunder the same horse "Republican," it being the only personal property liable to execution which the defendants had. The horse was appraised at $1,000.00.

C. J. Prior (Eberts & Taylor), obtained for defendant, on 30th April, a summons for an order declaring that the defendant was entitled to an exemption of $500.00 out of the price of the horse, and for payment over by the sheriff to him of that amount out of the sum realized by its sale under the execution.

Argument. *E. E. Wootton, contra*: The Act speaks of the defendant selecting articles by a list out of the goods and chattels seized, evidently contemplating only articles of furniture and the like. A statutory provision of this character should be construed with great strictness, and the exemption should not be extended by intendment beyond the narrowest meaning of its letter.

CREASE, J. (In Chambers.)

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One horse valued at $1,000.00 is not a subject of selection as being either chattels or a chattel, to the value of $500.00. The defendant seeks to select him to the extent of $500.00, by permitting him to be sold under the execution, which can only be done on the basis that he is wholly unexempt or that the defendant abandons his claim to any exemption in regard to him. That the defendant should have $500.00 of the proceeds of sale is an entirely different privilege to that provided in the statute. It is enough that the statute provides no such gratuity or method of reserving it.

Argument.

CREASE, J.:

Judgment.

This is a painful case, and the order I am about to make will certainly work a great injustice; but it is in accordance with the law, duly and expressly enacted by the Local Legislature, which has the exclusive control over the civil rights in the province, and my duty is not to make but to obey the law. Goods and chattels are but another name for personal property. Suppose the only seizable property had been a valuable diamond; the owner could claim his $500.00 exemption out of the proceeds of the sale, and if it were only worth $600.00 the owner could still claim $500.00 out of it. If $700.00 worth of goods had been supplied and delivered to a small trader to start in business on credit and without security, and shortly after the trader failed and a *fi. fa.* was put in, the trader could still in the absence of proof of fraud in the transaction, claim his $500.00 exemption. Indeed, Mr. Wootton intimated there had been such a case under the Act. The benevolent suppliers of the goods got nothing and the trader netted $500.00 by the transaction. This has been clearly pointed out many times by the judges, they can only follow out the law. I therefore order that the defendant's application to be allowed $500.00 exemption out of the proceeds of the sheriff's sale of "Republican" be granted.

Order accordingly.

CREASE, J.

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May 17.

SMITH v. McINTOSH.

SMITH *v.* McINTOSH, CARNE *ET AL.*

Mechanic's Lien—Stat. B.C., 1888, cap. 74, sec. 9—Statements in Affidavit for lien—Residence of Contractors—Particulars of work and materials—"Owing."

The filing of an affidavit fulfilling all the requirements of Stat. B. C. 1888, cap. 74, sec. 9, is a pre-requisite to the validity of a mechanics' lien.

The following defects in such affidavit held fatal :—

(1) Omission to state the residence of the owner of the property.

(2) Omission to sufficiently state the residence of the contractors. Statement of the residence as "Victoria" held insufficient.

(3) Omission to state in detail the particulars and items of the work done and materials furnished in respect of which the lien is sought.

(4) Omission to state that the amount claimed was "due" and when it became due. Statement that it was "owing" held insufficient.

Statement. APPEAL from report of the Registrar upon a reference to him to report upon the amount due upon certain mechanic's liens, the subject of the action.

G. H. Barnard for plaintiff Smith.

D. M. Eberts, Q. C., for plaintiffs Braden and Stamford.

P. Æ. Irving for defendant Carne.

H. D. Helmcken for defendant McIntosh.

The objections to the lien and arguments sufficiently appear from the judgment.

CREASE, J.

Judgment. The points discussed upon this motion come before me on appeal from the Registrar, with the view to alter, vary or send back for revision a certificate made by him on 11th May, 1893, under an order of Court directing him to take an account and enquire what sums were due on certain liens which have been registered in above actions. He

certifies that there were three: William John Smith, $605; Braden & Stamford, $238; W. P. Sayward, $482. The actions were consolidated on the 22nd December, 1891, by order of Court.

The Registrar's certificate states that he has not complied with that portion of the order, which directs him to ascertain and report on what liens are outstanding secured on lot 1,604, Victoria, and their priorities. This having been left undone, the question now is, are the three liens, on the validity of which the Registrar has not reported, to be referred back for his decision thereupon.

To this Mr. Irving, on behalf of the defendant Carne, objects, and advances several grounds based upon defects, which, he submits, invalidate the liens altogether and make it quite unnecessary to send them back to the Registrar.

Judgment.

The objections going to defects in the liens filed, taken also before the Registrar, were as follows as to the liens filed by Braden & Stamford: (1) That the affidavits do not state the residence of owner; (2) Nor name or residence of contractor through whom they claim; (3) Nor particulars of the work done and materials supplied, they stated only what was agreed to be done; (4) The affidavits are in the alternative, "finished *or* discontinued *or* last article of material supplied"; (5) They omit to state when the amount claimed was due; (6) They do not describe interest of owner; this last objection was abandoned. The defects in the liens of Smith and Sayward were sufficiently established and the liens therefore fail. The validity of the lien of Stamford and Braden was supported by Mr. Eberts. It was shewn that the lien of these gentlemen was "on the buildings and premises on Langley street, Victoria, known as the Angel Hotel." The residence of the owners is not there specified. The residence of the contractor is

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not specified, except as of Victoria. More important still, the particulars and items of the work done and material supplied are not specified as they should have been, as required by section 9, sub-sections *a*, *b*, *c*, *d* and *e*, so that a man could say on reading it: "That was not done." "Such and such an item was an overcharge, and I owe only so much," and so on, or: "It only amounts on the whole to so much." The Lien Act of 1888, section 9, is very specific in its requirements. In *Hagarty* v. *Grant*, 2 B.C. p.p. 176, 177, the Chief Justice says: "The affidavit constitutes the lien, and in order to acquire a right of this very unusual nature, the statute must be strictly followed." There an address was omitted. At p. 177 he says: "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." See also *Wallis* v. *Skain*, 21 Ont. 532, and *Macnamara* v. *Kirkland*, 18 Ont. App. 271, and *Maybury* v. *Mudie*, 5 C.B. 283; on these grounds, I think the lien is defective. Mr. Eberts contended that it is quite sufficient if the owner, on reading it, can readily ascertain by further enquiry the special particulars which the Act, in my opinion, requires, and the owner, whose land is to be imperilled, certainly wishes to have in order to know his exact liability. On the point that the lien is defective because the defendant states only that the sum of $238.00 is "owing," but omitted to state when it is due, as provided by sub-section (*e*) of section 9; Mr. Eberts contends that the statement is sufficient. That the word "owing" is synonymous with the word "due," and that a substantial compliance with that sub-section is enough; citing *Hall* v. *Pritchett*, 3 Q.B.D. 205, and *Jones* v. *Thompson*, 27 L.J.Q.B. 234. But a statement that the amount was owing does not meet the intention of the sub-section. There might have been a promissory note given for the $238.00, falling due six weeks or more ahead. If that failed on maturity, the lien would be lost. The acceptance

of the promissory note would be a discharge; *Edmonds* v. *Tiernan*, 219 S.C.R. 406; so the date when "due" is material; and being material, the lack of it destroys the lien. There are other points in which this lien is defective, but I have given already enough. As an instance of the extreme particularity with which lien acts are construed, it only needs the instance of *Harding* v. *Knowlson*, 17 U.C.Q.B. 564. This was a bill of sale case. The Chief Justice in *Hagarty* v. *Grant*, declared: "That lien acts must be followed and construed at least as strictly as the statutes regulating bills of sale." This was an instance. The affidavit made in that case closely followed the direction of the statute in all other respects but this, that the word "creditor" is inserted instead of "creditors" in the place where it is last used in the affidavit. I dare say it was a mere mistake of the person who wrote the affidavit. But such mistakes cannot be allowed to have the effect of frittering away the provisions of an Act of Parliament. "Creditor" and "Creditors" do not mean the same thing. It is our duty at any rate to guard against artful attemps at evasion, but insisting upon such an affidavit being made as the statute requires. Several of the cases cited in the argument are instances of less material deviations from words prescribed by statute, which have been held fatal. On this ground also, I consider the lien of Braden and Stamford as defective, and, consequently, there is nothing to send back to the Registrar. The motion is therefore successful. The question of costs is reserved.

Judgment.

Appeal allowed.

DRAKE, J.

1893.

May 2.

FOLEY *v.* WEBSTER *ET AL.*

Interest on Judgment—Rate.

FOLEY *v.* WEBSTER. The interest carried by a judgment in this province is governed by 1 & 2 Vic., cap. 110, sec. 17 (Imp.) and is therefore 4 per centum per annum.

Statement. REFERENCE by the master to settle the rate of interest payable upon the judgment. The plaintiff having recovered judgment for $5,000.00 and costs, which judgment was sustained by the Full Court upon appeal: The defendants appealed to the Supreme Court of Canada and gave security for the whole amount of the judgment appealed from and also for the costs of the appeal (*ante* p. 251.) The Supreme Court of Canada dismissed the appeal with costs.

L. G. McPhillips, Q.C., for the plaintiff.

E. P. Davis for the defendants.

DRAKE, J.:—

Judgment. By an ordinance passed 6th March, 1867, C.S.B.C. 1888, the Civil and Criminal Laws of England and as they existed on November 19, 1858, became, as far as applicable, in force in British Columbia; therefore the statute 1 & 2 Vic. cap. 110, sec. 17, which gave interest on judgments at the rate of 4 per cent., became and continued to be law down to the passing of the 49 Vic., cap. 44 (Dominion Act), which gave interest on judgments at the rate of 6 per cent.

This Act was repealed by 53 Vic., cap. 34, 1890, and the law now stands "that whenever interest is payable by agreement of parties or by law, and no rate is fixed by law, the rate of interest shall be 6 per cent. Therefore, as the rate of interest is fixed by law in this province at 4 per

cent. on judgments, that is the only amount that can be charged or recovered. (*a*)

The contention that the repeal of secs. 24, 25, 26, and 27 of cap. 127 of the Rev. Stat. of Canada in fact repealed the right to recover interest at all on judgments is not well founded. These sections did not affect the principle of allowing interest on judgments, but only increased the amount of such interest, and by their repeal the law as it existed in this province was not repealed and still is the law here. The legislature never contemplated enacting a new law on the subject of judgments, but only a modification of a part of it, which modification having been subsequently repealed, left the old law as it existed—*Levi* v. *Anderson*, L.R. 4 Q.B. 330 and *Mount* v. *Taylor*, L.R. 3 C.P. 645 are authorities for this proposition. The amount due for interest on this judgment will therefore have to be calculated at 4 per cent. No costs of this application.

Judgment.

Order accordingly.

NOTE.—(a) By Stat. Can. 1894, cap. 22, sec. 2, the rate of interest upon judgments in British Columbia is fixed at 6 per centum per annum, to be calculated (sec. 3) from the time of the rendering of the verdict or the judgment.

DIVISIONAL COURT.

1893.

July 5.

HULL v. SCHNEIDER.

HULL BROS. *v.* SCHNEIDER.

Practice—Rules 6, 35, 44—Ex juris writ—Leave to issue—Affidavit for.

A writ of summons for service outside the jurisdiction is irregular if issued without leave of a Judge under rule 6. An affidavit for an order for substitutional service of such writ must show that the defendant is evading service of it.

Statement. SUMMONS to set aside (1) the writ of summons issued for service outside the jurisdiction ; (2) an order of BOLE, L.J. S.C. for substitutional service thereof within the jurisdiction, and (3) a judgment by default of appearance to the writ so served under the order. The writ had been issued without leave of a judge, as required by Rule 6. The affidavit upon which the order of BOLE, L.J.S.C., had been obtained did not shew that the defendant had absconded for the purpose of evading, or was in any way evading, service of the writ.

Argument. *G. H. Barnard,* in support of the summons upon the objection to the affidavit referred to *Wilding* v. *Bean,* 1891, 1 Q.B. 100 ; *Fry* v. *Moore,* 23 Q.B.D. 395.

J. P. Walls, contra.

SIR MATTHEW B. BEGBIE, C.J. :—

Judgment. This is a summons to set aside a judgment signed in default of appearance, and all proceedings thereunder, and to vacate an order for substitutional service of the writ of summons granted by BOLE, Co. J., sitting as a local judge of the Supreme Court and the service effected thereunder.

The defendant was out of the jurisdiction of the Court at the time of the issue of the writ, but no order was obtained for leave to serve it out of the jurisdiction.

The order of JUDGE BOLE was for substitutional service of the writ within the jurisdiction by posting up a copy in the Registrar's office and mailing a prepaid letter with a copy of the writ to the defendant's supposed address. The affidavit upon which the order was obtained did not shew that the defendant had left the jurisdiction for the purpose of, or was then, evading service of the writ—*Fry* v. *Moore*, 23 Q.B.D. 395, and *Wilding* v. *Bean*, 1891, 1 Q.B. 100, were cited on this point.

It seems obvious that a substituted service can at most only have the effect of actual service. Now actual service at Seattle would have been a nullity, the writ having been issued without leave.

Judgment.

I will therefore make an order staying all proceedings until the 20th instant, or until the further order of this Court. All parties to be at liberty to make such application as they may be advised to the Judge at Vancouver on that day, giving due notice thereof to the other party.

Order accordingly.

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1893.

July 11.

ADAMS v. MCBEATH.

Costs—Taxation—Witness Fees—Travelling Expenses—Subsistence of Non-resident Plaintiff—Whether Allowable.

ADAMS v. MCBEATH.

The plaintiff, resident in England, came to British Columbia to prosecute the action, remained until after the trial, and obtained a verdict.

Held, on taxation of costs, a party to an action coming from abroad to prosecute it is not entitled to tax against the other side, either his travelling expenses or the cost of his subsistence, while awaiting trial.

Statement. APPLICATION by plaintiff to review taxation. The facts sufficiently appear from the judgment.

J. P. Walls for the plaintiff.

H. G. Hall for the defendant.

DRAKE, J.:

Judgment. This is an application to review the taxation of the plaintiff's costs upon verdict and judgment for him, the taxing officer having disallowed the travelling expenses and subsistence of the plaintiff. The plaintiff is resident in England, and came here to enquire into and prosecute his claim against the defendant, and has, since the conclusion of the action, returned home again. No case was produced to me wherein a plaintiff was held entitled to expenses of travelling, in order to prosecute his claim before a foreign Court. If he was so entitled, every plaintiff would be entitled to claim similar expenses whenever he resided at a distance from the place of trial. I think the taxing officer was correct on this point. On the question of subsistence, some authorities were cited, but on examination they do not support the contention set up. Where it is shewn to be absolutely necessary to detain a witness in the country for the purpose of giving evidence, subsistence has in some cases been allowed; but where his presence was required to watch

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the proceedings, then his subsistence was not allowed. The plaintiff may have been a necessary witness, and as such he is entitled to his expenses, which have been allowed; but he is not entitled to subsistence money under any rule that I am aware of.

The application must be refused with costs.

Application refused.

DAVIES *v.* McMILLAN.

DRAKE, J.

(In Chambers.)

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July 24.

DAVIES v. MCMILLAN.

Practice—Staying execution pending Appeal to Privy Council—Terms.

Execution upon a judgment of the Supreme Court of Canada, made an order of this Court, will be stayed pending an appeal to the Privy Council, upon terms.

The terms imposed were to pay the costs of the appeal to the Supreme Court of Canada with an undertaking to refund, if the judgment be reversed; to give security for the amount of the judgment appealed from; money in court to stand for such security *pro tanto*.

SUMMONS to stay execution upon a judgment for the plaintiff for $12,000.00 entered in this Court in accordance with an order of the Supreme Court of Canada, which had been made an order of this court; pending an appeal by the defendant to Her Majesty's Privy Council from the judgment of the Supreme Court of Canada. The goods in question had been sold and the proceeds, $7,000.00, was standing in Court.

Statement.

H. D. Helmcken, for the defendant supported the summons.

A. E. McPhillips, for the plaintiff, contra.

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DRAKE, J. :—

Defendant intends to appeal to the Privy Council from the judgment of the Supreme Court of Canada and asks that execution be stayed in the meanwhile. The amount of the judgment is stated to be $12,000.00—including interest and costs. There is a sum of $7,000.00 in court paid in by defendant under an order obtained by the plaintiff, being the proceeds of the goods which are now decided by the Supreme Court of Canada to have belonged to the plaintiff, and to have been improperly sold by the defendant. The defendant asks that in considering the amount of security this sum should be taken into consideration. If no further proceedings were being taken, the plaintiff would be entitled to have this sum paid out to him in part satisfaction of his judgment. I therefore think, that, if this court has authority to deal with the question of security, the defendant should pay the plaintiff the costs incurred in the Supreme Court of Canada upon an undertaking by the plaintiff's solicitor to refund the same in case the defendant is successful in his appeal.

Judgment.

I therefore order, that the defendant do furnish security satisfactory to the Registrar of this Court, in the sum of $5,000.00—which, with the sum now in Court, will make up the amount of the judgment. The security required for the appeal to the Privy Council will have to be lodged there. Defendant to furnish security in one week and thereupon execution will be stayed, and execution will in the meanwhile be stayed for one week.

Order made accordingly.

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Practice—Writ of Summons—Irregularity—Waiver—Order XVIII, Rule 2—Misjoinder of Actions—Conditional appearance—Order XII. Rule 19.

Notwithstanding Order XII, R. 19 (Rule 70), providing that a defendant may move to set aside service of a writ of summons without entering a conditional appearance, the fact that a defendant has entered a conditional appearance, is not a good preliminary objection to such a motion.

The fact that defendant includes in such application a motion to discharge an *interim* injunction granted before service of the writ, is not a waiver of irregularity in the writ.

A claim endorsed on a writ of summons for a declaration that defendant is trustee of lands for plaintiffs and for a conveyance thereof to them, and for damages for breach of contract, and against one defendant for damages for misrepresentation in regard thereto, and for an injunction, is not a joinder of other causes of action with an action for the recovery of land within the meaning of Order XVIII. R. 2 (Rule 147.)

APPLICATION by summons on behalf of defendants to set aside the writ of summons and all subsequent proceedings, including an injunction restraining the defendants from dealing with the lands in question until a day named, upon the grounds: "That the plaintiffs without the leave of the Court or a Judge had joined with an action for the recovery of land other causes of action contrary to Order XVIII., R. 2, of this Court." The writ of summons was endorsed as follows: "The plaintiffs' claim is as against the defendant Angus McGillivray to have it declared that he is a trustee of Lot 549, Group 1, Kootenay District and Province of British Columbia on behalf of the plaintiffs, and as against the defendant Henry Croft for damages for misrepresentation; and for an order directing the defendants or one of them to convey to the plaintiffs their interest in the said lot; and for damages for breach of contract."

Statement.

The defendants on 7th July had entered the following

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appearance: "Enter an appearance for Angus McGillivray in this action. The defendant enters this appearance conditionally and under protest without prejudice to his right to an intended application to set aside the writ of summons herein on the ground that causes of action are joined contrary to the rules of this Court without leave being first had and obtained to issue said writ."

Statement.

This was done for the purpose of acquiring *status* for the defendant to move to discharge for irregularity the *interim* injunction which had been granted, which motion was returnable on the same day as this summons.

Argument.

H. D. Helmcken, for the plaintiff, shewed cause to the summons, and took the preliminary objection that by appearing the defendant had waived all objection to irregularity in the writ, and that the *addendum* to the appearance by way of condition must be rejected as meaningless since Order XII. R. 19 (Rule 70.) See also *Lenders* v. *Anderson*, 12 Q.B.D. 50; *Call* v. *Oppenheim*, 1 T.L.R. 622; *Fuller* v. *Yerxa*, B. C. (unreported); *Mayer* v. *Claretie*, 7 T.L.R., 40; *Davies* v. *Andre*, 24 Q.B.D. 598; also by moving to discharge the injunction the defendants recognized the writ.

A. E. McPhillips, for defendants, contra:—

The conditional appearance was unnecessary for the purposes of, and has no application to this motion, one way or the other. It was necessary to the motion to discharge the injunction. *Firth* v. *De Las Rivas*, 1893, 1 Q.B. 768; *Ann. Prac.*, 1894, 292; *Chichester* v. *Chichester*, 10 P.D. 186. This is not a motion to dissolve the injunction but to discharge the order for irregularity.

Judgment.

CREASE, J.: As the point is an important one in practice it will be well to decide under the cases that in future an appearance may be entered in the ordinary form; and, if defendant means to reserve the right to object to the jurisdiction a postscript should be added or a written notice

given at the same time stating that the above appearance is entered under protest.

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H. D. Helmcken: The misjoinder of other causes of action with an action for the recovery of land without leave of the Court is not fatal to the writ under Order XVIII. R. 2; they may be separated and directed to be tried separately. This is not an action for the recovery of land. *Glendhill* v. *Hunter*, 14 Ch. D. 492; *Kendrick* v. *Roberts*, W. N., 1882, p. 23; *Read* v. *Wotton*, 1893, 2 Ch. 171.

A. E. McPhillips, contra: The claim endorsed on the writ is that the defendants be declared to hold the lands as trustees for the plaintiffs and for an order that they convey to them. That is clearly an action for the recovery of land within Order XVIII R. 2 and there is included an action for damages for breach of contract, and as against Defendant Croft for damages for misrepresentation. Under Order XVIII R. 1 the leave of a judge is a condition precedent to the right to join such actions and such joinder is prohibited without that leave. The power to separate causes of action provided by Rule 1 of the order only applies to causes of action which may be properly joined without leave.

Argument.

CREASE, J.: I am of opinion, upon an examination of the writ, and upon the cases, that all this writ has reference to is the machinery in connection with which the defendant holds the property, and in connection therewith. It is not an action for the recovery of land, but embraces certain consequences flowing from trusteeship. I think all the claims set forth by the writ are directly connected with the same thing and the same transaction, the same land; and the Procedure Act requires all parts of the same transaction to be tried together. I am clearly of opinion therefore, that the writ is good and subsisting.

Judgment.

Motion dismissed with costs.

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FLETCHER v. McGILLIVRAY.

Practice—Rule 70—Conditional appearance—Ex parte orders after—Waiver.

The Defendant who had entered an appearance expressed to be conditional and for the purpose of moving to set aside the writ for irregularity, upon the dismissal of that motion moved to set aside two *ex parte* orders continuing an *interim* injunction upon the ground that they ought not to have been made *ex parte* after the appearance.

Held, (1) That the conditional appearance was not necessary to the motion to set aside the writ.

(2) That being limited to the purposes of that motion, it did not survive after the disposition of it.

(3) That Defendant's Counsel having appeared on the motion was a sufficient submission to the jurisdiction to permit the motion to be heard.

(4) That the conditional appearance was a nullity, and the orders continuing the injunction were properly made *ex parte*.

Statement.

MOTION by defendant McGillivray to set aside two *ex parte* orders of the learned judge continuing an *interim* injunction obtained by the plaintiffs from the learned judge, by the first from 8th to 22nd July, and by the second from the 22nd of July until the hearing, for irregularity upon the grounds that as the defendant had entered an appearance on the 7th July the orders could not properly have been made *ex parte*.

The plaintiffs on 7th July had served the defendants with a notice of motion returnable on the 10th July to continue the injunction, which notice, owing to a Sunday intervening, was not a good four days' notice under Rule 541. The defendants did not attend upon it and the plaintiffs abandoned it, and took the *ex parte* orders complained of, relying on the defendants' conditional appearance not being a good appearance.

The appearance in question was expressed to be conditional, under protest, and without prejudice to a motion by

the defendant McGillivray to set aside the writ for misjoinder of causes of action without the leave of the Court, which motion was on 12th August dismissed by the learned Judge. See ante p. 37.

H. D. Helmcken, for the plaintiffs, opposed the motion: The defendant McGillivray has never appeared to the action and has no *status* to make this motion, and for the same reason the *ex parte* orders were properly made. The defendant might have moved to set aside the service of the writ without entering a conditional appearance—Rule 70, but at all events his appearance was for the purposes of that application only. A conditional appearance is not a submission to the jurisdiction—*Davies* v. *Andre*, 24 Q.B. D. 598.

Argument.

A. E. McPhillips, for defendant McGillivray, contra: The plaintiffs waived any objection to the appearance as an appearance for all purposes, but adopted it by serving their notice of motion to continue the injunction upon "E. E. Wootton, defendants' solicitor." It is true that notice was not sufficient to secure an order in default of attendance upon it as it did not give the two clear days required by Rule 541, but the service of it recognized the appearance. See *Paxton* v. *Baird*, 67 L.T. 623, where an appearance was entered to a defective writ, which was afterwards ordered to be amended and reserved, and no appearance was entered to the amended writ; it was held that the original appearance stood to the amended writ.

CREASE, J.: I think under the practice here, from the time of the old practice of conditional appearance by leave, down to the present day, a conditional appearance has only been entered to dispute the right to issue the writ of summons or the order for service of such writ. I cannot find any instance of a conditional appearance having been entered to dispute the right to take a subsequent material step in the action where the writ of summons, as here, has upon motion been

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decided to be regular, without a regular appearance in the ordinary form, nor of a conditional appearance having (after the writ of summons which it attacked had been declared good) been deemed to be equivalent to a valid and regular appearance at the time of its entry on the register.

I think however upon Counsel's appearing in Court on a party's behalf, and declaring that he appears for such party which includes a submission to the jurisdiction, will be taken to be an appearance good from the time of Counsel so appearing and declaring, but will not relate backwards. The appearance here was in these words: "7th July, "1893. Enter an appearance for Angus McGillivray in "this action. The defendant enters this appearance "conditionally and under protest without prejudice to an "intended application to set aside the writ of summons "herein, on the ground that causes of action are joined "contrary to the rules of this Court, without leave being "first had and obtained to issue the said writ. E. E. "Wootton Solicitor for the defendant."

Judgment.

Rule 70 S.C. Rules; points indirectly in the same direction. It says: "A defendant before appearing may without "obtaining an order to enter, or entering, a condi-"tional appearance, move on notice to set aside the "service on him of a writ, or of notice of a writ, or to "discharge the order authorizing such service."

Here the order for an interim injunction of 24th June has not been objected to, and that is a substantial step in the action subsequent to the writ of summons. The second and third orders, viz. of 8th July and 22nd July are the first objected to. The form in Seton on Decrees for entering a conditional appearance, on leave, to a defendant irregularly served to illustrate the practice. The motion paper in such a case alleges that defendants have been served with the writ of summons and with an order dated so and so, and are advised that they are entitled to have the said orders discharged, and are desirous of entering an appearance

with the Registrar and of moving the Court to have the same discharged accordingly. And upon reading the said order and the defendants by their Counsel consenting to submit to any process which the Court may direct to be issued against them upon such appearance, this Court doth order that the defendants (A & B) be at liberty to enter a conditional appearance with the Registrar.

The form was as follows: "The above named defendants "A & B. have this day entered their conditional appear- "ance by —— ——, their Solicitors."

The reason of such order was, that when defendant is advised that service upon him is irregular, he will waive the defect if he enters an appearance in the ordinary manner. His proper course, under those circumstances, was to obtain leave on motion, or petition of course, to enter a conditional appearance with the Registrar, and then move to discharge the writ and appearance—*Maclean* v. *Dawson*, 4 D & J. 150.

In *Davies* v. *Andre*, 24 Q.B.D. 598 cited in this case, the Court determined that a defendant sued as a partner who denied being a partner, must either appear or not appear—defendant cannot half appear. He could not make a conditional appearance.

Judgment.

Rule 70, made to meet this Andre case, does not insist on a conditional appearance being entered, but allows a defendant to serve notice of motion to set aside the service upon him of the writ, or notice of the writ, or to discharge the order authorizing such service. In certain cases however the entry of a conditional appearance is still necessary.

On perusing such authorities as are available, I am led to the conclusion that the appearance on the register is a conditional appearance, and not converted by my decision upholding the regularity of the writ of summons into a regular appearance. Grammatically the word "conditional" in the notice governs the whole notice. An appearance, which is a serious step in an action, cannot be condi-

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tional and unconditional at the same time, neither can it be half conditional. "A defendant," says Lord Esther in *Davies* v. *Andre* (and all the Court agreed with him), "cannot half appear."

But as the learned Counsel for the defendant now appears before the Court and states to the Court that he appears in the ordinary way for the defendant, which is a complete submission to the jurisdiction, I feel at liberty to hear him on this motion to discharge the orders of 8th July and 22nd July; and for that purpose I order that the conditional appearance be amended and converted into an ordinary appearance, by striking out the word conditionally and all subsequent words except the signature, the date to be of to-day.

Order accordingly.

The motion to discharge the orders of 8th July and of 22nd July for irregularity was then proceeded with.

Judgment

A. E. McPhillips for the motion:—*Graham* v. *Campbell*, W.N. 1876, p. 12, is an authority that *prima facie* an injunction ought not to be granted *ex parte*. In cases of emergency it may be granted, but rarely. That emergency means where immediate, irreparable damage would probably otherwise ensue. There is no such danger here. An injunction is never issued *ex parte* after service of the writ on the defendant. The Court should have been informed why defendant had not appeared, and that there was an appearance. The Court should have been informed of every material circumstance and of the fact that an insufficient notice of motion to continue the injunction had been served on defendant's Solicitor on the 7th July. As to the order

Argument.

of July 8th, the defendant had not seen it and knew nothing about it. If it was obtained, it was irregularly obtained. Under *Bolton* v. *London School Board*, 7, Ch. D. 766, it is clear that an order of 10th July would have been too late and could not then have been issued, nor without asking the leave of the Court.

H. D. Helmcken, contra: There never was a proper appearance until the order just made, and the *ex parte* orders were right.

CREASE, J.: The points raised in this motion are of considerable importance. As both parties claim an interest in the land, which forms the subject matter of the dispute, and both probably, judging by what little *prima facie* evidence is disclosed in some of the affidavits, with some degree of right, it seemed at first possible that the points apparently at issue ought to he capable of friendly adjustment, but what slight suggestions of that description the Court ventured to make, not having been adopted, it becomes now necessary to decide the points raised according to the legal authorities and evidence now before me. I have given the full prominence which they deserved to the argument so ably brought forward by Mr. McPhillips for the defendant to set aside the injunctions as well as that presented by Mr. Helmcken for the plaintiffs in their complaint that the defendant has taken the law into his own hands without any regard to the alleged claims of the plaintiff upon the same lands. The point he presses is: Shall the defendant be allowed to sacrifice these, before the law has had an opportunity of declaring what is the extent of the rights of the respective parties? The matter more immediately before the Court now for determination is whether the defendant has been rightfully restrained from pre-judging the ultimate determination of a Court of justice by prematurely disposing of and dealing with the land for which both parties are contending as if it were absolutely and beyond contention his own.

Argument.

Judgment.

The facts on which the present *interim* discussion arises are sufficiently set forth in the affidavits upon which the order of the 8th July and that of the 22nd of July were obtained, extending the injunction of 24th June (which is not now under contest) upon terms and with the usual undertaking against damages (if any) by reason of the granting

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of these restraining orders. Those affidavits which were before the Court on the 24th June, the 8th July and the 22nd July, were I find filed on the 26th June, the 8th July and the 22nd July, respectively; the affidavit of Mr. Wootton on the 27th July,

In considering the points of practice which have arisen, the dates are necessarily of importance. The earlier dates have already been referred to in the decision which has been rendered, adversely to the defendant in the motion to set aside the writ; and the preliminary objection as to the extent to which the conditional appearance, to test the writ, was sought to be extended.

The dates immediately before me are those connected with the obtaining of the restraining orders of July 8th and July 22nd.

At the time of the *ex parte* application of plaintiff for the order of 8th July no appearance was entered except the conditional appearance of the defendant on the 7th July against the writ of summons. It is in evidence that the defendant had been served with the writ in Kootenay on the 1st of July, and was on the 6th and 7th July at Victoria, whether there subsequently does not appear. No objection has been raised on defendant's part to the order of injunction of the 24th June, so that does not come at present under consideration. When the matter came before me on 8th July, Mr. Helmcken, for plaintiffs, had received a notice of motion against the writ under the conditional appearance entered for that purpose, upon the ground that an action for recovery of land and an action for damages had been improperly joined in the same writ without leave of the Court. The conditional appearance was the only one that remained in the Appearance Book on the 8th July.

Judgment.

As there was no person who had duly appeared who could properly be served on behalf of the defendant, the application to extend the injunction was necessarily *ex parte*. It

was determined after argument on the preliminary objection of Mr. Helmcken that such conditional appearance did not constitute an appearance to the action and a submission to the jurisdiction—a necessary incident of a regular appearance. The conditional appearance therefore had to be altered by order of the Court into a regular appearance to the action, as of the day of hearing his motion, to enable defendant's Counsel to be heard on the motion now under adjudication. The urgency was so great that the application on the 8th had, in my opinion, from the affidavits before me, to be dealt with at once, or the property claimed might have been sacrificed. The notice of motion for the 10th, which had been given to defendant's solicitors on conditional appearance, was, as the plaintiffs represented the matter, necessarily anticipated by the information then just received of the alleged breach of the injunction of the 24th June by the defendants, and there was no one on the record who could be served or be legally bound by notice, and in fact, I believe no regular appearance was entered on or before the 10th, or even then. And it does not appear by anything which came before me that plaintiffs knew that defendant was in Victoria on the 8th, or possibly they could have served him with notice on the spot. The defendant presumably knew what he was doing; and must naturally be held to be bound by the consequences of his own acts. If the defendant had intended to appear to the action, there was ample time to have done so between the 1st and 7th of July. The defendant, in spite of the injunction, was going on selling and disposing of the property in dispute. Without an injunction it might have all been dissipated beyond recovery; the distance between Victoria and Kootenay was so great. The time between the date when the information reached Victoria of the public advertisement of the intended sale of the property, and the day of the sale, Tuesday, the 11th July, at Kootenay, so short that to prevent irremediable loss the injunction must be

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extended immediately, and even then telegraphed at once to be in time or it could be of no use whatever.

Although the defendant's Solicitors, who had conditionally appeared, had received the notice of motion and knew the injunction of 24th June was in force on that day and the next, they made (if I understand the affidavits aright) no search in the Order Book at the Court House until after the 10th July. It was quite competent for defendants to have made a full appearance to the action even before the 7th of July and moved to dissolve on the merits. The motions made up to this time have been strictly technical, and although the case cannot except by consent be tried on motion for injunction it is a significant fact that not a single affidavit has been as yet laid before the Court, alleging merits.

Judgment.

The affidavits of extreme urgency are unanswered. The necessity for continuing the order for injunction under the same undertaking as that of the 24th June is still the same. The Court cannot relax its hold on the property at stake without danger of total loss. Notwithstanding the allegations of irregularity on which Mr. McPhillips so strongly and with much ability, even urgently insisted throughout, and which possibly were not without some foundation, there is nothing before the Court to shew that the defendant has been prejudiced by such alleged irregularity, and not a word to shew that he has a good defence upon the merits, or that there has been any irregularity (if any) which cannot be amply atoned for with costs, or under the usual undertaking against damages. The case of *Boyce* v. *Gill*, 64 L.T. 824 is directly in point, and is of much authority in the present stage of the proceedings. In the interests of justice, I am therefore of opinion that this application must be dismissed, and the present injunction continued on the same conditions and undertaking against damages until the trial. And I dismiss this motion accordingly, reserv-

ing to the Court the question of costs for further consideration.

Motion dismissed.

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Practice—Appearance under protest—Ex parte orders after—Irregularity—First party in fault.

Defendant, on 7th July, entered an appearance expressed to be conditional, under protest, and without prejudice to an intended application to set aside an *ex parte* injunction for irregularity.

Plaintiff on the same day served the Solicitor so appearing for defendants with a notice of motion to continue the injunction. This notice gave less than the four days required by the rules for such notices. Neither party appeared upon it.

On 8th July plaintiff obtained an *ex parte* order continuing the injunction till 22nd July, and on that day obtained a further *ex parte* order continuing it to the hearing.

A motion by defendant to set aside these *ex parte* orders for irregularity was dismissed by CREASE, J.

On appeal to the Divisional Court:—

Held, per DRAKE and WALKEM, J.J.:—

1. An appearance under protest is a proceeding unknown to the law and irregular.
2. That such irregularity was waived by the plaintiffs by his notice of motion to continue the injunction though itself not a sufficient notice.
3. That the *ex parte* orders obtained thereafter were irregular.
4. That as the first irregularity was committed by the defendant, he had no right to complain of irregularities into which his own error had led the plaintiff, and that the appeal should be dismissed without costs with leave to apply on the merits to dissolve the injunction.

APPEAL by defendants from an order of CREASE, J., dismissing an application by defendants to set aside two orders continuing an *ex parte* injunction, which were made after defendants had entered a conditional appearance. Statement.

The *ex parte* injunction was granted on the 24th day of June, 1893, the date of the issue of the writ, for 14 days from date of order. The defendant McGillivray was served with the writ and notice of the injunction.

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The defendant McGillivray, on the 7th day of July, 1893, entered an appearance expressed to be conditional, under protest, and without prejudice to an intended application to set aside the writ of summons on the ground that causes of action were joined without leave of the Court contrary to the rules of Court.

On the 7th July the plaintiffs' solicitors served a notice of motion to continue the injunction of the 24th of June, returnable on the 10th July, 1893. This notice not being a four days' notice under Rule 541, owing to a Sunday intervening, defendants did not attend thereon, and the plaintiffs abandoned it. The plaintiffs then moved *ex parte*, on the 8th July, 1893, for, and obtained, from CREASE, J., an order continuing the injunction to the 22nd July, and on the 22nd July obtained a further *ex parte* order continuing the injunction to the hearing. The defendant McGillivray, on the 12th of August, 1893, moved before MR. JUSTICE CREASE to discharge the order of the 8th of July (this order had not been entered or issued out of the Registrar's office) and the order of the 22nd of July continuing the injunction until the hearing of the action, which motion was dismissed by the learned judge.

Statement.

The appeal was argued before Walkem and Drake, J. J., on August 29th.

A. E. McPhillips, for the appeal:—

H. D. Helmcken, for the plaintiff, *contra*:—

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DRAKE, J.: This is an appeal by defendants to set aside an order of MR. JUSTICE CREASE continuing an injunction until the hearing, which order is dated 22nd July, 1893. The application is made on the grounds of irregularities in obtaining the order. The writ was issued on 24th June, 1893, and the same day an *ex parte* injunction was obtained for fourteen days, with liberty to apply. On 7th July the defendant, by Mr. Wootton, entered what is called in the proceedings a conditional appearance. This so called appear-

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ance is not a conditional appearance, and would not be so under the old practice, which requires a judge's order before it could be entered. In the Admiralty Court an appearance under protest is recognized ; if this appearance is anything it is by its language an appearance under protest—an unknown proceeding. See *Garesche, Green & Co.* v. *Holliday*, 1 B.C. part 2, p. 83. Rule 57 states the form in which an appearance shall be entered, and if there is substantial variation, the appearance may be set aside or in some cases treated as a nullity. The plaintiff instead of applying to have the appearance taken off the file, treated it as specially limited to the particular application which the defendant indicated he should make to the Court, but plaintiff, on the 7th July, served the defendant's Solicitor with a notice of motion returnable on 10th July, to continue the injunction. This motion was not brought on, but on the 8th July the plaintiff made an *ex parte* motion to further continue the injunction for 14 days and obtained an order. This order the defendant moved to rescind, as well as the order of 22nd July, which was also made *ex parte* and continued the order of the 8th July until the hearing. If the appearance was a nullity the service of the motion would not validate it, but if the appearance was irregular it would act as a waiver of the irregularity, and in my opinion it has had this effect. When this matter was brought to the attention of the learned judge on 11th August on the motion to set aside the service of the writ of summons and all proceedings thereunder for irregularity he directed the appearance to be amended, which appears to be the correct course to adopt.

Judgment.

The main question is : Can a motion be made *ex parte* after appearance, whether such appearance be regular or irregular ? There is no doubt that under special circumstances after a regular appearance, orders have been made *ex parte* for injunctions—*Petley* v. *Eastern Counties Ry. Co.*, 8 Sim. 483 ; *Allard* v. *Jones*, 15 Ves. 605. But the ordinary

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practice is not to grant *ex parte* injunctions after appearance—*Graham* v. *Campbell*, 7 Ch. D. 490. Under Rule 950, the Court has power to disregard irregularities, and to amend proceedings. Unfortunately the merits are not before us, but the grounds indicated by the learned judge's judgment as shewing the necessity of the orders made by him, without any attempt on the defendant's part to controvert them, are such that if it is necessary to uphold the orders I should do so. Both parties are equally irregular in their proceedings, but the first irregularity was committed by the defendant, who is the "*fons et origo mali*," and led the plaintiff into error. Under the circumstances the appeal should be dismissed without costs, and the defendant should have liberty to move to dissolve the injunction on 48 hours notice.

Judgment.

WALKEM J., concurred.

Appeal dismissed without costs.

IN THE COUNTY COURT OF KOOTENAY.

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HENDRYX v. HENNESSEY.

HENDRYX v. HENNESSEY

Judge—Jurisdiction of Supreme Court in County Court Actions—C. C. Amendment Act, 1888—Costs.

The jurisdiction of a Supreme Court judge to perform the duties of a County Court judge, in an action in the County Court, does not attach until the existence of the statutory pre-requisites to the exercise of the jurisdiction are made to appear as a matter of fact.

A Court on dismissing a motion for want of jurisdiction has power to award costs.

MOTION to set aside a *lis pendens*, filed by the plaintiff with the Mining Recorder at New Denver, against certain mineral claims in the Slocan district of West Kootenay, the plaintiff claiming an interest in the claims under a grub stake contract. The action, pending in the County Court of Kootenay, was commenced on the 26th, and the *lis pendens* recorded on the 28th June last. The affidavits filed by defendants showed that the writ had never been served, and alleged that plaintiff had no claim, and that the *lis pendens* was registered for the purpose of embarrassing the defendants in dealing with the claims in question. It was not denied in plaintiff's affidavits that the writ had not been served, but they alleged that they had a *bona fide* claim and that the *lis pendens* was recorded in good faith.

Statement.

Robert Cassidy, for the plaintiffs, showed cause:—We object to the jurisdiction of a Supreme Court judge to entertain the motion. It attaches, if at all, by section 15, C.C. Act, C.S.B.C. 1888, Cap. 25, and only under the special

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circumstances there set out, *i.e.*, that the office of County Court Judge there is vacant, etc.: There is no affidavit that those pre-requisites to the jurisdiction exist. We further object that, even if they did exist, the vicarious jurisdiction of the Supreme Court judge is subject to the limitations affecting the County Court judge, and cannot be exercised outside the territorial limits of the County Court.

Lindley Crease, for the defendants, *contra*:—We rely on section 14 of the County Courts Act, as amended by the County Courts Amendment Act, 1890: "But nothing in this or any other act contained shall affect or abridge the power, authority and jurisdiction now possessed by the several judges of the Supreme Court, and *which power, authority and jurisdiction they and each of them are hereby declared to have*, to preside in any County Court in the Province, and to dispose of the business in any such County Court, as fully and effectually as could be done by any County Court judge"; and Sec. 10 of the Supreme Court Act, C.S.B.C., 1888, giving the Supreme Court cognizance of all pleas whatsoever.

Argument.

Cassidy, in reply:—The words "Jurisdiction now possessed by the several judges of the Supreme Court, which jurisdiction they are hereby declared to have, to preside in any County Court," which "nothing in this Act shall affect," merely saves the jurisdiction existing by virtue of Sec. 15, C.C. Act. *supra*. Sec. 10, of the Supreme Court Act, does not apply, for the action is not in the Supreme Court.

WALKEM, J.: This action is pending in the County Court of Kootenay, and concerns the right of ownership, as between the parties, to certain mineral claims in that district. After entering his plaint, the plaintiff filed and registered a *lis pendens* with the Mining Recorder; but, up to the present, neither of the two defendants has been served with the plaint, nor has the delay been accounted for. Under these circum-

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stances, counsel for the defendant has applied to have the *lis pendens* cancelled on the ground that it is a cloud on their title, and that the proceeding is, in effect, an abuse of the process of the Court. It appears to me that the first question I have to decide, as I suggested when this matter came before me on a former occasion, is: "Have I jurisdiction to deal with it?" That depends upon Sec. 15 of the County Courts Act, 1888: "In all cases where from any cause the office of a County Court judge in any district shall be vacant or not filled up, it shall be lawful for any judge of the Supreme Court to perform the duties of a County Court judge in such district, and he shall have all the powers of a County Court judge for such purpose." As this is an enactment which confers jurisdiction, it must, according to a well known legal principle, be strictly construed; and hence, the condition precedent to that jurisdiction cannot be dispensed with, even by consent. If authorities were needed on the latter point, they will be found in *Endlich's Maxwell on Statutes*, 1888, Edn. p.p. 473, 478. The existence of a judicial vacancy in the Kootenay County Court is the condition precedent to my acting as requested. It has not been shown that such a vacancy exists, and it was incumbent on counsel asserting the jurisdiction to prove that fact, if he could; for Superior Courts and their judges are not bound to judicially notice who is judge of an inferior Court of Record, such as the County Court, or whether there is any such judge—*Van Sandan* v. *Turner*, 6 Q.B. 773, 786. I must therefore decline to assume the jurisdiction. As a matter of fact, I know that there is no vacancy; and although I do not base my decision upon such personal knowledge, still it tends to strengthen my view of the statute that the assumption of jurisdiction on my part would not be warranted by it. The object of the Legislature in enacting the clause quoted is too plain to need exposition. It was contended by the defendant's counsel that, in the event of the present applica-

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tion failing, costs could not be awarded against him; but when a statute imposes upon a court the duty, as the present one necessarily does, of deciding any question, and hence whether it has jurisdiction under the circumstances stated or not, the Court has an inherent power to order payment of costs for its having been wrongly put in motion, although the act is silent as to costs—*Bombay Civil Fund Act*, 40 Ch. D. 288. The application is therefore dismissed with costs.

Judgment.

Summons dismissed with costs.

COUGHLAN & MAYO.

v.

THE CORPORATION OF THE CITY OF VICTORIA, ANTOINE HENDERSON, JAMES MUNRO MILLER AND JAMES BAKER.

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Municipal Act, 1892, Sec. 30 S.S. 10—Disqualification of Alderman for interest in contract—Practice—Injunction or quo Warranto.

An injunction is a competent and appropriate remedy for a complaint that an alderman is, on the facts alleged, disentitled by statute to sit and vote, where the prayer is to restrain him from so doing.

Semble, If the action was to remove him from office, and no other relief asked, quo warranto might be the only mode of procedure.

An Alderman who has contracted to supply to a person who has a contract with his municipality materials to carry it out, has "an interest in a contract with or for the municipality either directly or indirectly" within the meaning of the Municipal Act, 1892, B.C., Sec. 30, S.S. 10.

MOTION, on notice, to continue until the hearing an *interim* injunction, restraining the defendants, Henderson, Miller and Baker from continuing to sit and vote as Aldermen of the city of Victoria.

Statement.

The plaintiffs' claim was to have it declared that a resolution of the Municipal Council of the city of Victoria awarding a certain contract for the construction of a surface drain to certain contractors, H. H. Macdonald & Coy., was invalid and void, because the defendants, Henderson, Miller and Baker, who voted for it, and without whose votes it would not have been carried, were at that time disqualified as Aldermen. Henderson, under Sec. 30, sub-sec. 10 of the Municipal Act, B.C. 1892, set out in the judgment, as being a salaried officer of an incorporated company having a contract to supply horses to the city for street cleaning purposes; Miller, under Sec. 23 (Ibid.), as having lost

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his property qualification since his election to the office; and Baker as having an interest in a contract which certain contractors, Adams, Macdonald & Coy., had with the city for the construction of a drain, in that he had entered into a contract to supply them with brick to put into the contract work. Before the motion came on for argument, defendants Henderson and Miller resigned their seats as Aldermen. The facts are fully set out in the judgment of WALKEM, J.

A. N. Richards, Q.C., and *H. D. Helmcken* took the objection that *quo warranto* was the only method of proceeding open to the plaintiffs.

Argument.

E. V. Bodwell, for the plaintiffs:—By Sec. 32 of the Act, "Any Alderman.....having any interest in any contract .....or having become disqualified as aforesaid, shall be immediately disqualified from continuing to be.....alderman, &c., &c., as the case may be." The office became vacated *ipso facto* by the conduct complained of and injunction, and not *quo warranto*, is the appropriate remedy. See *Chaplin* v. *Public School Board of Woodstock*, 16 O.R. 728 for form of action and motion as here. It was held that *quo warranto* would have been the proper proceeding in that case, as, upon the construction of the Act there in question, the conduct complained of, had not *ipso facto* vacated the seat. The reasoning of that decision appears to shew that where there is no further Act to be taken in order to vacate the office, but the officer continues to assume to perform its duties, injunction is the appropriate remedy. The Judicature Act widened the scope of the remedy by injunction. See *Aslatt* v. *Corporation of Southampton*, 16 Ch. D., 143; see also, *Smith* v. *Petersville*, 28 Gr., 599; *Hardwick* v. *Brown*, L.R. 8 C.P., 406. It is not necessary to quash the resolution now attacked—*Rose* v. *W. Wawanosh*, 19 O.R., 294; *Melliss* v. *Shirley Local Board*, 16 Q.B.D., 446. As to the meaning of indirect interest in a contract, see *Towsey* v. *White*, 5 B. & C., 125. The object of the

statute is to prevent conflict between interest and duty, and it would obviously be the interest of Baker to uphold and stand by Adams, McDonald & Coy., the contractors who were purchasing and using his bricks in the work; see *Nutton* v. *Wilson*, 22 Q.B.D., 744; per LINDLEY, L.J., at p. 748, also *Whiteley* v. *Bailey*, 21 Q.B.D., 154.

A. N. Richards, Q. C., and *H. D. Helmcken*, for the defendant Baker. There is nothing to shew that the defendant knew that the bricks he sold to Adams, McDonald & Coy., were being, or were intended to be used, in their contract with the city. This gets rid of the *mens rea*, and without it there could be no conflict between interest and duty—*Royse* v. *Birley*, L.R. 4 C.P. 296; *Queen ex. rel. Piddington* v. *Riddell*, 4 Ont. P.R., 80. *Le Feuvre* v. *Lankister*, 3 E. & B. 530. The office is not vacated until the facts are passed upon by some competent tribunal and the vacancy declared. *Quo warranto* was the only proceeding open to plaintiff—*Queen ex. rel. Andrews* v. *Collins*, 2 Q.B.D. 30; *Chaplin* v. *Woodstock*, 16 O.R. 728; *Queen* v. *Diplock*, L.R. 4, Q.B. 549.

Argument.

WALKEM, J.: The plaintiffs are contractors of this city, and the defendants are the city corporation and three of its aldermen.

The plaintiff's claim, as endorsed on their writ of summons, is for a declaration that the action of the Council, on the 9th and 14th days of August, instant, in awarding a contract for the construction of a surface drain at Spring Ridge to H. H. McDonald & Co., contractors, was illegal and void, and that the Council be restrained from executing or further carrying out the contract in question. It is further prayed that it be declared that Messrs. Henderson, Miller and Baker were, on the 7th, 9th, 11th and 14th days of August, disqualified to act, sit or vote as aldermen, and that they, therefore, be prohibited from continuing to do so.

Judgment.

Messrs. Henderson and Miller have, through their respective counsel, announced that they had resigned their

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offices within the last few days and had no intention of further contesting these proceedings, but that does not relieve me from the duty of deciding whether they were disqualified or not, as the alleged illegality of their votes is involved in that question and has to be determined.

The present motion is for an injunction, until the hearing, in the terms which I have mentioned. Mr. Richards, while expressing a desire, as Mr. Baker's counsel, for the fullest investigation, objects to the mode of procedure adopted on the plaintiff's behalf, lest it should prove futile, and contends that as the object virtually is to dispossess his client of his office, the proper and only legal method of doing so is by a writ of *quo warranto*. I have to deal with this objection at once, for if it be well founded the plaintiff's motion must fail, independently of the question of merits. None of the authorities cited by counsel on either side are on all fours with the present case, in view of the peculiar cause of action alleged, and, at the same time, of the peculiar relief sought and procedure adopted in aid of it. That relief, as will be seen, is of a twofold nature: First, that certain proceedings of the Council be declared invalid and that further action upon them be stayed; and, secondly, that Mr. Baker be restrained from sitting and voting in the Council by reason of his alleged disqualification.

Judgment.

Admitting, for the sake of argument, that the plaintiffs are entitled to all they ask, would a *quo warranto* information give it to them? If the object were solely to remove the defendant from his office, such a method of procedure would seem to be that which has been followed in the English courts and also in those of Ontario since the judicature system became law. The cases *Queen* v. *Diplock*, L.R. 4 Q.B. 549, and *Queen ex. rel. Andrews* v. *Collins*, 2 Q.B.D. 30, and in late Ontario reports, show this. But there is no case, that I know of, in which it has been held that, where other relief besides a removal from office is sought, the Court would refuse to entertain the questio

of removal simply on the ground that the mere form of procedure as to one branch of the action had been departed from. On the contrary, from passages in the judgment of the late Master of the Rolls, in *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. 143, it would seem to be otherwise, and that a Court should disregard form in favor of substance, and, if justice demanded it, grant the full relief sought, and thus give effect to the declared policy of the Judicature Act that circuity of action and multiplicity of suits should be avoided. An amendment to the plaintiff's claim praying for Mr. Baker's removal might meet this view of the practice and test it. It is not, however, necessary to decide thus far whether a writ of *quo warranto* is the proper and only remedy here, for the object of the plaintiffs, as explained by their claim, and distinctly avowed by their counsel, is, not to remove, but to prohibit Ald. Baker from further voting or sitting in the Council.

Judgment.

Now, before granting an order for an *interim* injunction of any kind a judge has to consider whether the Court would at the trial of the action perpetuate the order on the facts as presented. In the case before me, I venture to think that when the trial takes place, if it ever does, the Court would abstain from applying so drastic a measure as that now asked for. Such a so-called remedy would be worse than the disease. To deprive the defendant of the power of representing his constituents for the remainder of his term of office, and at the same time decline, as the Court would probably do, to declare his seat vacant, as that remedy is not asked for would be a gross injustice to the ratepayers, who would, to all intents and purposes, be disfranchised; for no person could be elected in Mr. Baker's stead, as his office was full, owing to his not having been ousted. He would be placed by the action of the Court in the absurd position of being an alderman, without power to act as such. This is too clear to admit of doubt. The plaintiff's counsel,

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in support of his contention, has cited the observations of the late Master of the Rolls in Aslatt's case, upon that part of the Judicature Act which enacts that "a *mandamus* or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." "Of course," said that eminent judge, "the words 'just or convenient' did not mean that the Court was to grant an injunction simply because the Court thought it convenient; it meant that the Court should grant an injunction for the protection of rights or for the prevention of injury according to legal principles." But this language cuts both ways, for one is entitled to ask—Is it "just or convenient" that I should disfranchise a considerable portion of the community until this action can be tried? And would it be "just or convenient" for the Court hereafter—for I am obliged to consider and am presumed to know what would be done—to continue that disinfranchisement for several months, and until Mr. Baker's term of office should expire? Yet, as I have pointed out, that is precisely the relief, or the effect of the relief on this point now claimed in this action. Whatever wrongs the plaintiffs, or ratepayers, may have already suffered, a great wrong would, in my opinion, be done if I deprived, for weeks to come, a large body of innocent persons of the right which the Legislature has given them to a voice in the government of the city, including, what is all important to them, the proper regulation of matters connected with their own ward and the provident appropriation of their personal contributions to the municipal revenue in the shape of taxes. The injunction in this respect is, therefore, refused.

Judgment.

I have now to consider another branch of the case, and that is the proposed prohibition of the Council from executing the intended contract awarded to McDonald & Co. It stands on a different footing so far as procedure is

concerned. The corporation is made a defendant in this action, and as the Act of 9 Anne, Cap. 25, which relates to proceedings *quo warranto*, regulates those proceedings only as against individuals, holding, for instance, positions as aldermen, and not proceedings as against the corporation itself, as decided by Lord Mansfield in *Rex.* v. *Williams*, 1 Burr, 407, a *quo warranto* information would not be appropriate as against the present corporation. That body was represented by counsel on the present motion. He took no part in the contest between the plaintiffs and the defendant Baker—and very properly so; nor did he object to the proceedings, but submitted to any order that might be made, consistent with the well understood rights and privileges of his client, the Council. If the Council, as a body, has, as alleged, acted illegally, mainly through the instrumentality of the three other defendants, the Council's natural desire is, as I must assume, that matters should be set right, and that as speedily as possible; for as it is now constituted its efficiency in point of numbers is impaired, and consequently its usefulness to the community partially crippled. Was, therefore, its action in awarding the contract to McDonald & Co., illegal, as alleged, and unjust to the plaintiffs, in view of the evidence on both sides, which is before me? That evidence is that, prior to June last, a contract for the construction of drainage works on Cook street was awarded by the Council to one Frederick Adams, and that early in the present month bids were, severally, put in by the plaintiffs, McDonald & Co., and one Wakely, in answer to calls for tenders for the construction of similar works in the vicinity of Spring Ridge. The plaintiff's bid was the lowest; but it was rejected for no ostensible reason (at all events for reasons not given in the affidavits) in favor of McDonald & Co.'s bid on a division vote, which would not have been carried but for the votes, which are now impeached, of the three aldermen who are defendants. The grounds of impeachment are as follows:

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That the defendant Miller was, at the time of the voting, disqualified to hold office by reason of his having lost his property qualification; that Henderson was, at the same time, disqualified owing to the Victoria Transfer Company, of which he was the paid superintendent, having a current contract with the city to supply a team of horses for the purpose of watering the streets; and lastly, that the defendant Baker was, at the same time, disqualified by reason of having contracted to supply Adams, who commenced work about the middle of June, with two kilns of brick to be used in the Cook street works. The bricks were partially, if not wholly, delivered; but in either case this is manifestly immaterial. Again, on the 19th instant, that is ten days after McDonald & Co. had been awarded the contract for the Spring Ridge works, Mr. Baker's firm, as alleged, and it is not denied, delivered a large quantity of bricks at a place convenient to the Spring Ridge works, then in progress or contemplated, to be used in those works by McDonald & Co. Whether these several charges of disqualification are well founded depends upon the interpretation of the Municipality Act of 1892. As I have already stated, Messrs. Miller and Henderson have resigned; but still, their disqualification not having been admitted in Court, I have to determine whether or not it existed.

Judgment.

The enactment which is said to be applicable to Mr. Miller's case is section 23 (b), which is as follows: "The persons qualified to be nominated for and elected as aldermen of the city of Victoria, shall be such persons as are male British subjects of the full age of 21 years, and are not disqualified under any law, and have been for the six months next preceding the day of nomination the registered owners in the Land Registry Office, of land or real property in the city of Victoria of the assessed value, on the last municipal assessment roll, of $500 or more, over and above any registered mortgage or judgment, and who are otherwise duly qualified as municipal voters."

Although the section points to a certain qualification being necessary for *nomination and election*, it would be a violation of its spirit, and of the spirit of the other provisions of the act, which are clearly designed, among other things, to secure to the electorate the services of those who have landed interests within the municipality, to so construe it as to limit its application to the period indicated. The qualification meant is a qualification to sit and vote in the Council, if nominated and elected. To say that less was meant would lead to the absurd possibility that a person who was qualified at his nomination and election would also be qualified after that election, although he had meanwhile become penniless. It has been proved by affidavit, and not disputed, that at the time the McDonald contract was awarded, Miller was not,and that he has not since been, the registered owner of property as prescribed by the above section. I have, therefore, no difficulty in holding, as I do, that he was disqualified from sitting and voting in the Council during the period referred to.

Judgment.

Again, by section 30, sub-section 10, every person is declared to be disqualified by reason of his "having, by himself, or through his partner, or as a director in any incorporated company, or salaried officer in any incorporated company, any contract whatever, or interest in any contract, with or for the municipality, either directly or indirectly."

The defendant Henderson comes within the reach of this provision, having been before, at, and since the time the impeached proceedings in Council took place a salaried officer of the Victoria Transfer Company, which is "an incorporated company," and which had a contract with the Council at the period alleged. His disqualification has, therefore, been established.

Ald. Baker's case is different from both of the cases just considered. His transactions with Adams and McDonald & Co., in respect of the sale by him of the brick to be used

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under their contracts are alleged to be a violation in spirit, if not in letter, of section 32, which is as follows: "32. If the mayor, reeve, or any of the aldermen, councillors, or any person on his or their own behalf, or any person in partnership with him or them, shall enter into or obtain any interest, directly or indirectly, in any contract entered into by or with the corporation, such mayor, reeve, alderman or councillor, having any interest in any contract, or having become disqualified as aforesaid, shall immediately become disqualified from continuing to be mayor, reeve, alderman or councillor, as the case may be."

Admittedly, he has had no direct dealings with the Council. On the other hand, was he indirectly interested in either of the contracts referred to? He was not a silent partner with Adams, or with McDonald & Co.; but he was manifestly interested in a pecuniary way in the success of the two contracts in question. As a member of the Council board, he could assist them in obtaining payments, perhaps under adverse circumstances, and, naturally, he would be tempted to do so, knowing that some of the money would find its way into his hands. There is no statement on his part which shows that any of the brick was paid for, and I must assume that such a statement would have been forthcoming, had it been true, as a point, for what it was worth, in his defence. The several sections which I have cited are of the most stringent character. Take, for instance, Henderson's case; he is declared to be disqualified on the ground of his merely being a paid servant or officer of the Victoria Transfer Co., and not because of his being, in any way, interested in its profits. The provisions I have quoted are designed, not so much to enforce honesty on the part of aldermen, as to prevent temptation being placed in their way. A rigorous interpretation must, especially in view of the section which has condemned Mr. Henderson, be applied to section 30, if the intention of the Legislature is

Judgment.

to be carried out.

Again, supposing that in the future a fair reason arose for taking the contract out of the hands of either Mr. Adams or McDonald & Co. for a breach of its provisions as to time or otherwise, with a view to its being completed by the corporation, directly or under the contract system—what course would Mr. Baker take? Although he might withstand temptation and support a resolution in that direction, even if he saw that it would inflict direct personal loss, still the temptation, and a powerful one at that, to do the reverse would be there. He would be exposed to it, and that is the point.

In *Nutton* v. *Wilson*, 22 Q.B.D. 744, a very wide interpretation was given to a section in the Public Health Act, which provided that a member of any local board, who was "in any way concerned" in any bargain, or contract, entered into by such board, should (except in certain cases, which do not apply here) cease to be such a member, and his office as such should thereupon become vacant. The defendant, while a member of a local board, was employed by persons with whom the board had contracted for the performance of certain works on the premises of the board to do portions of the work so contracted for.

Judgment.

Lord Esher thereupon observed that such provisions were intended to prevent members of any local board, which might have occasion to enter into contracts, "from being exposed to temptation, or even the semblance of temptation"; and it was held that the defendant had been "concerned" in the contract made with the board, and therefore came within the meaning of the Act, and he was consequently disqualified as a member of the board.

I see no difference between the expression "in any manner concerned," as construed in the above case, and the phrase in our statute, "indirectly interested." It is impossible to hold that Mr. Baker was not interested indirectly in the two contracts. The extent of his interest

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in a pecuniary sense, whether large or small, is of no moment. It is the fact of his being interested at all that the Court has to look at. He surely has an almost direct interest in *the result* of both contracts. Holding this opinion—and I think it is one that the Act imperatively demands—I must decide that Mr. Baker's disqualification, as alleged by the plaintiffs, has been proved. It was stated, by the way, on Mr. Baker's behalf, that McDonald & Co. got their brick from him and hauled it away without his knowledge, and that the moment he became aware of the fact he stopped all further delivery of that material. But this was not sufficient. He ought, if he desired to protect himself from these proceedings, which he must inevitably have known something of, have insisted upon the re-delivery of the brick. This was not done, and the contract was, therefore, a subsisting one. Besides, the transaction with Adams would of itself be sufficient to bring him within the scope of section 32.

Judgment.

The last branch of the case remains to be dealt with. Under the circumstances above stated, were the proceedings of the Council in connection with the award made to McDonald & Co. tainted with illegality? It is beyond dispute that those proceedings were successful in consequence of the votes of the three aldermen having been cast in their favor. Their votes, as I have decided, were illegally given, as they were given at a time when the givers were disqualified from taking any part in the business of the board. It follows that the award of the contract to McDonald & Co. was illegal, as it was made by illegal means.

Upon every principle of justice, the Council should be prohibited from in any way furthering what was thus illegally done. Not only the plaintiffs, but the ratepayers at large, are deeply interested in seeing that all contracts, and especially for those for public works, should be entered into on the fairest principles. They are interested also in

having those works done at the lowest cost compatible with good workmanship and good materials. As I have said, the plaintiffs' tender was the lowest. The City Engineer seems to have reported in its favor on that score, and not to have condemned it in any other respect. It is not for me to say that the Council, as a matter of law, were bound to accept it, or should now accept it, as in the invitation for tenders it was specially stipulated that the lowest or any tender should not be binding. But the Council should be prohibited, as prayed by the plaintiffs, from executing, or carrying out, the contract which has been awarded to McDonald & Co. in consequence of the illegality of the award.

An order to that effect, and in accordance with the other points which I have decided, is accordingly authorized.

Owing to the short time allowed me, as the speedy decision of this case was alleged to be pressing, I have not been able to refer, in this judgment, to several authorities which warrant the conclusions I have arrived at.

Judgment.

The question of costs I leave to be decided at the hearing; but if this judgment be hereafter accepted as conclusive between the parties—a course often adopted—I shall settle the costs on motion for that purpose.

Order accordingly.

Immediately after giving the above reasons for judgment, Mr. Eberts, on behalf of the corporation, called my attention to section 321 of the Municipal Act, which is to the effect that when the election of a councillor has been "avoided" by the Court, "no by-law, contract or other proceeding entered into, passed or taken by the Council prior to such avoidance * * * shall, if otherwise within the jurisdiction and powers of such Council, be invalidated or in any manner attacked by reason only of such avoidance."

Now, I have not "avoided" any election, or "invali-

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dated," which means, in a legal sense, quashed, any by-law or resolution of the corporation, or any past contract entered into thereunder, for instance, Adams' Cook Street contract; but what I have done is to anticipate the future by prohibiting the execution of the proposed contract with McDonald & Co. That contract has not, in the statutory sense, yet been entered into. By section 82: "Each Municipal Council shall have a corporate seal, and the Council shall enter into all contracts under the same seal, which shall be fixed on all contracts by virtue of an order of the Council." According to the proper construction of this section, the negotiations with McDonald & Co. do not constitute a contract, for until the corporate seal be attached, and that by special order of the Council, a contract does not exist.

It was also stated that the Council was at first, that is to say on the 9th of August, unanimously in favor of giving the Spring Ridge contract to McDonald & Co., and so resolved, and that the division vote which is complained of occurred on a resolution which was moved on the 14th August, in view of the City Engineer's report which had been meanwhile considered, to rescind what had been done. On reference to the evidence, such appears to be the fact.

Argument.

So far from this explanation changing my views, it tends to strengthen them, for it shows that the propriety of the step first taken by the Council was questioned in the most pointed and emphatic manner, and a determination not to retrace it deliberately arrived at.

The case, therefore, against all the defendants appears to be stronger than I stated it. I have not quashed either of the resolutions referred to; I would have no power to do so. But, if a resolution be illegal or improper, proceedings under it may be prohibited. Such is the case with respect to the by-laws, which, though illegal, have not been quashed by direct proceedings.

Again, in restraining the corporation from executing or

" entering into " the proposed contract, and thereby doing wrong, I am not interfering with its rights and privileges, for to do wrong is not the right or privilege of any man or body of men.

Order accordingly.

NOTE—The terms of the order, made in pursuance of the judgment, were as follows:—

1. That the defendants, the Corporation of the City of Victoria, their officers and agents, be, and they are hereby restrained, until the hearing of this action, or until the further order of this Court, from executing or in any manner proceeding further with the contract for the Spring Ridge surface drainage works in the City of Victoria, which by certain resolutions of the Council of the said Corporation, passed on the 9th and 14th days of August, 1893, was awarded to the firm of H. H. McDonald & Company:

2. And this Court doth further order that the application of the plaintiffs for an order restraining the defendant Baker from acting, sitting or voting as an Alderman of the City of Victoria, be, and the same is hereby refused: Judgment.

3. And this Court doth further order that all questions relating to costs of this motion and the proceedings incidental thereto be reserved, to be disposed of by the Judge at the trial of this action, in case the said action shall come on for trial, but if this action shall not be proceeded with, or if for any reason the trial shall not take place, then this Court doth order that the said question of costs shall be disposed of by a Judge of this Court upon motion for that purpose to be made by any of the parties hereto.

With liberty to all parties to apply to this Court as they may be advised.

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DAVIES v. McMILLAN.

DAVIES
v.
McMILLAN

Court—Jurisdiction—Order effectuating judgment of Court of Appeal—Costs—Refund of on reversal of judgment.

Plaintiff recovered a judgment which on appeal to the Full Court was reversed with costs to defendant. Plaintiff paid these costs. On appeal, the Supreme Court of Canada restored the original judgment with costs, but made no order to refund the costs paid by the plaintiff.

Order made for defendant to refund the costs following *Rodger* v. *Comptoir D'Escompte de Paris*, L.R. 3, P.C. 465.

Statement.

SUMMONS for the defendant to refund costs paid by plaintiff under a judgment of the Full Court which had been reversed by the Supreme Court of Canada.

A. E. McPhillips, for the summons.

H. D. Helmcken, contra.

Sept. 15, 1893.

Judgment.

WALKEM, J.: The plaintiff having obtained a judgment for damages and costs, an appeal was taken to the Full Court, and was allowed with costs. These costs, which amounted to $852.92, were paid by the plaintiff to the defendant. On a subsequent appeal to the Supreme Court of Canada, the judgment of the Full Court was reversed and the original judgment restored, with all costs incurred by the plaintiff in the several stages of the action. No direction, however, was given by the Supreme Court for the refund by the defendant of the $852.92 received by him, as his costs.

An application has now been made on plaintiff's behalf for an order for that refund; and it has been opposed on the ground that as the Supreme Court gave no directions in that respect, and as the plaintiff had abstained from asking for any, he is not entitled to the order applied for, as it would, if granted, be tantamount to an alteration by a judge of this Court of the judgment of the Supreme Court. The fact of the plaintiff having issued execution since the

judgment of the Supreme Court was given is also urged as an objection to the order. The execution has been fruitless; but that would be immaterial, as the *fi fa* could only have been endorsed for the damages and costs awarded on the last appeal.

Rodger v. *Comptoir D'Escompte de Paris*, L.R. 3, P.C. 465, is a decision in an analogous case to the present. There the question was as to the payment of interest on the whole sum of principal and interest which had been paid under a judgment given by the Supreme Court of Hong Kong. On appeal to the Privy Council, the judgment was reversed, with costs. The successful appellant applied to the Court at Hong Kong for an order for payment of interest on the principal and interest directed to be restored to him. The Court held that as the Privy Council's judgment was silent as to such interest, it had no power to allow it. On appeal again to the Privy Council, it was held that the order should have been made, and that, on general principles, it was the duty of all Courts to take care that the act of the Court, whether a "Primary Court" or Court of Appeal, did no injury to suitors, and that persons who had their money improperly taken from them should have it restored to them with interest for the time it had been withheld. Interest, however, on costs should not be allowed. As the plaintiff has had his money improperly taken from him, the order for its repayment by the defendant must be made, but without costs, as he should have taken the present step before he issued execution, and thereby saved the defendant from being obliged to pay the costs of a second writ of execution.

Judgment.

The fact of a writ of *fi fa* having been issued is not a bar to a second writ, in ordinary cases, where further costs than those levied for are ordered to be paid. Execution, for instance, may issue on any number of orders made, during the progress of an action, for the payment of costs, or other moneys, if it be intended that such payment shall be made

independently of the result of the action.

Order for defendant to refund.

WALKEM, J.

MATHESON v. POLLOCK.

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Oct. 10.

Bills of Sale Act—Instrument not stating true consideration—Actual change of possession—Pressure.

MATHESON v. POLLOCK

A bill of sale absolute in form, is invalid as against creditors, where the transaction was in reality one of mortgage, for not setting forth its true consideration and effect.

Held, on the facts, that there was actual delivery and change of possession of the goods, and the Bill of Sale, agreed between the parties to it to operate by way of mortgage, was therefore valid against creditors as a mortgage.

The plaintiff, a brother of the mortgagor, had refused to make him necessary advances unless secured, whereupon the instrument in question was executed.

Held, that there was pressure rebutting preference.

Statement.

INTERPLEADER ISSUE to try the validity of a Bill of Sale given by one D. A. Matheson to the plaintiff, his brother, as against the defendants, execution creditors of D. A. Matheson. The action was tried before WALKEM, J., at Vancouver, on 10th October, 1893. The facts are fully set out in the judgment.

Argument.

Charles Wilson and *A. H. MacNeill* moved for judgment for the plaintiff, citing *Parkes* v. *St. George*, 10 Ont. App., 496; *Stephens* v. *McArthur*, 19 S.C.R., 446 (pressure); *Harvey* v. *McNaughton*, 10 Ont. App., 616; *Lewis* v. *Brown*, 10 Ont. App., 639; *Burns* v. *McKay*, 10 O.R., 167; *Gibbons* v. *McDonald*, 18 Ont. App., 159, 20 S.C.R., 587; *Johnson* v. *Hope*, 17 Ont. App., 10; in *re Johnson*, 20 Ch. D., 389.

L. G. McPhillips, Q.C., contra, cited *McCall* v. *McDonald*, 13 S.C.R., 247; *Gardiner* v. *Klœpfer*, 15 S.C.R., 390.

Charles Wilson, in reply, cited, *ex parte Symmonds, in re*

Jordan, 14 Ch. D., 693 (possession); *Robins* v. *Clark*, 45 U. C.Q.B., 362.

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WALKEM, J.: This is an interpleader issue to determine the right of property in two booms of logs seized whilst in the plaintiff's possession, at the instance of the defendants, as execution creditors of one D. A. Matheson, who is a brother of the plaintiff.

The plaintiff's title to the logs depends upon a Bill of Sale of them from D. A. Matheson, dated the 7th of August, 1893, and upon actual possession of them taken shortly afterwards and retained ever since.

The Bill of Sale was given under the following circumstances: D. A. Matheson carried on a logging business, employing a number of men, at a camp which he had on Hardwicke Island—about 100 miles from Vancouver. During the past two or three years he was obliged to borrow money from the claimant for the purposes of his business, the loans being made without interest. As they were not repaid, the plaintiff, on several occasions, pressed for a settlement, but without avail, until he got the Bill of Sale. The main circumstance that led to its being given was that D. A. Matheson, being about to leave on a visit to Eastern Canada, requested the plaintiff to keep up his camp and furnish it with supplies until his return. The plaintiff refused to do so, except he got security for any outlay on camp account, and also payment of, or security for, D. A. Matheson's then indebtedness to him. Eventually, D. A. Matheson agreed to give the Bill of Sale as security for what was due by him and for the contemplated advances—these advances being the inducement, as testified by him, that led to the giving of it, as the arrangement would tend to prevent his business from collapsing and his men from dispersing. Their mutual accounts were then carefully gone into and adjusted in a solicitor's office; and, as a result, a demand note, payable by D. A. Matheson, was given to

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the plaintiff for an ascertained indebtedness of $1,407.64. The Bill of Sale was then given as security for the payment of the note, and of future advances on camp account. All this took place at the same interview and apparently under the solicitor's advice. The Bill of Sale is absolute in form, and for an expressed consideration of $1,407.64. For that reason, I held at the trial, that, although it had been registered within the proper time, it was invalid, as against the defendants as execution creditors, under the Bills of Sale Act, as the conditions of defeasance, viz., the payment of the demand note and repayment of the contemplated advances, were not stated in it; and I requested counsel for both parties to confine themselves to the question of the legal effect of the plaintiff's possession, and as to whether it had not taken the transaction out of the Statute. This, as I understood, was acceded to, hence the effect of possession has to be decided. Sections 3 and 4 of our Act are taken from sections 1 and 2 of the Imperial Act of 1854 (17 & 18 Vic., c. 36.) It is clear from section 3 that its policy is to compel the registration of Bills of Sale, in cases where the property remains in the possession of the grantor, for the better protection of creditors. Such, in fact, was the object of the corresponding section of the Imperial Act. The preamble to the Imperial Act plainly shows this: "Whereas frauds are frequently committed upon creditors "by secret Bills of Sale of personal chattels, whereby persons "are enabled to keep up the appearance of being in good "circumstances and possessed of property and the grantees "or holders of such Bills of Sale have the power of taking "possession of the property of such persons, to the exclusion "of the rest of their creditors, be it enacted, &c." The Act, therefore, simply makes registration necessary when the property remains in the possession of the maker of the Bill of Sale, and does not affect property of which possession is delivered. The language of Sec. 3 is so clearly to that effect that I should not have thought that authority was necessary

to explain it. (But see Fisher on Mortgages, 1st Ed. p. 20). The logs in the present case having been delivered when the Bill of Sale was given, or shortly afterwards, the transaction is not one that is within the Statute.

The facts with respect to possession are these: After the Bill of Sale was executed, the plaintiff on the same day telegraphed to Victoria for the steamer Hope with a view of getting the logs towed from Hardwicke Island to Coal Harbour. This was on the 7th of August. On the next day, D. A. Matheson left for Eastern Canada. The Hope reached Vancouver on the 19th of August, and left for Hardwicke Island, whence she returned with the logs on the 22nd, and moored or left them in Coal Harbour at a place indicated by the plaintiff, and on his behalf. For this service the plaintiff paid the Hope $227.00. After D. A. Matheson's return, he resumed control of his business, but made no attempt to get possession of the logs. During his absence, the plaintiff kept his part of the agreement by furnishing and paying for supplies for the camp to the value of over $900.00. No part of this sum, or of the monies due on the demand note, and for towage, has been repaid to the plaintiff.

The evidence of the plaintiff was, in my opinion, frankly given, and such discrepancies as occurred in it were only those which ordinarily occur from defective recollection. The same may be said of the evidence of D. A. Matheson.

Acting as a jury, I find that there was no collusion between the two brothers either before or after the execution of the Bill of Sale. The reverse, in my opinion, was the case; and the impression left upon me by the evidence and the manner in which it was given was, that the plaintiff's fraternal kindness was, to say the least of it, but indifferently appreciated by his brother; and that he had more difficulty in getting security, such as it was, for his money than he ought to have had, or than a stranger would have had, had he been the benefactor. I find also that the

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brothers were not partners in the business; and that the Bill of Sale was given under pressure and not by way of preference—a word that imports a voluntary action, a spontaneous act of the debtor. *Stephens* v. *McArthur*, 19 S. C.R. 446.

As a matter of law, therefore, it was not a fraudulent conveyance under 13 Eliz. c. 5, although the contrary was suggested. See *Butcher* v. *Stead*, L.R. 7 H.L. at p. 839.

Under these circumstances, and as the transaction is not within the Bills of Sale Act, the plaintiff is entitled, under his common law right, to the possession of the logs as against the defendants and to hold them as security for what is due to him. According to the evidence, the parties intended when the Bill of Sale was given, that it should have the effect of a mortgage; and such being the case, it is a mortgage with all the incidents of one—due, for instance, on demand being made for payment of what was intended to be secured by it, and defeasible on that indebtedness, whatever it might be, being discharged.

Judgment.

When giving this judgment, I proposed to direct the Sheriff, as I had power to do under our Rule of Court (No. 666) to sell the logs and pay the money into Court, believing that they would fetch more than the plaintiff's claim; and also to refer it to the Registrar to ascertain what was due on the Bill of Sale, as the amount sworn to of "$900.00 or more," as having been paid on camp account was not a sufficiently definite statement of that part of the mortgage debt, and reserve further directions; but counsel for the plaintiff strongly objected to a sale by the Sheriff on the ground that it would lead to a sacrifice of the logs, as they would not, even if sold in any other way and to the best advantage, realize more than $1,400.00 or $1,500.00. I, therefore, abstained from directing a sale, as no offer of indemnity for any loss that might be occasioned by it was made on behalf of the defendants, and as it would be manifestly unjust to the plaintiff to virtually take his security

from him and thereby diminish its value. Upon the plaintiff's counsel afterwards consenting to abandon the claim of $900.00 odd, rather than incur the further expense of a reference to take the account, I settled the sum due on the mortgage, as having been conclusively proved, at $1,634.64—that is, $1,407.64 on the note, and $227.00 paid for towage.

As the plaintiff has succeeded on the interpleader issue, the defendants must pay the costs.

Judgment for plaintiff.

BEER v. COLLISTER.

Practice—Security for costs.

The Court will order a plaintiff to give security for costs who has divested himself of his interest in the action, either before or after suit, and who appears to have no property or means.

SUMMONS for plaintiffs to give defendant security for the costs of the action. The affidavits filed for the defendant shewed that the plaintiffs had served upon him a notice that they had assigned all their interest in the action and its proceeds to one Taylor absolutely, and that plaintiffs were indebted to several persons who were unable to obtain payment of their claims, and that defendant believed plaintiffs were in a state of insolvency and that a judgment against them could not be realized. Statement.

Plaintiffs filed an affidavit denying some of the facts relied on by defendant as evidence of insolvency, but did not file any affidavit of the plaintiffs themselves.

Robert Cassidy for the motion: A nominal insolvent plaintiff must give security for costs. *Holmested & Langton*, Jud. Acts (1890 ed) p. 944: *Boice* v. *O'Loane*, 7 Ont. P.R., 359; *Pendry* v. *O'Neil*, ib. p. 52; *Cowell* v. *Taylor*, 31 Ch. Argument.

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D., 34; *Swain* v. *Follows*, 18 Q.B.D., 585. Where the plaintiff parts with his interest *pendente lite* the rule applies —*Cowell* v. *Taylor*, *supra*, Bowen L.J. at p. 38; *Swan* v. *Adams*, 7 Ont. P.R. 147; *Seear* v. *Lawson*, 16 Ch. D., 121; *Goatley* v. *Emmott*, 15 C.B., 291. It is sufficient to shew in the first place by fair inference that there is no reasonable prospect of recovering costs from the plaintiffs. The *onus* is then on the plaintiffs to satisfy the Court that they have property out of which a judgment could be realized. The plaintiffs have filed no affidavit.

Argument.

Thornton Fell, contra: There is no evidence that the plaintiffs are insolvent or that costs could not be made out of them by execution. That they do not pay all their creditors is not sufficient. The evidence is insufficient to call upon them for a disclosure of their circumstances. Plaintiffs are still carrying on business.

Judgment.

CREASE, J.: The plaintiffs having avowedly assigned all their interest in the action, which appears to be their one available asset, to Taylor (and since they file no affidavit that they have other available assets, the defendant is justified in concluding that they have none) Taylor stands to win, and risks nothing in any event. He is not liable for costs. In case the defendant succeeds, he would most probably lose his costs. In *Swan* v. *Adams*, 7 Ont. P.R., 147 where a plaintiff parted with his interest in the land there in question, proceedings were stayed until security for costs was given. *Cowell* v. *Taylor*, 31 Ch. D. at p. 38 is instructive. Poverty, says *Lord Justice Bowen*, is no bar to a litigant. That, from time immemorial, has been the rule in common law and I believe in equity. There is an exception in the case of appeals, also there is an exception introduced to prevent abuse, that if an insolvent sues as nominal plaintiff (as in this case) for the benefit of somebody else, he must give security. In that case the plaintiff is a mere shadow. The two most familiar cases of this kind are cases where a person has

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divested himself and assigned his cause of action to somebody else that the transferee may sue for him; and cases where a person who has commenced a suit divests himself of his interest during the course of the suit in order that another person may carry it on for his benefit. Those are the common cases; I do not say there may not be others. *Perkins* v. *Adcock*, 14 M. & W., 808; *Elliot* v. *Kendrick*, 12 Ad. & E., 597, and *Goatley* v. *Emmott*, 15 C.B., 291, are the early cases which shew that security is required in the case of an insolvent who is suing as a mere nominal plaintiff for the benefit of a third party. I am of opinion, therefore, that Mr. Cassidy's contention is right, and that the plaintiffs should give security to the defendant; and that proceedings should be stayed until that be done, and I fix the amount of security at $100.

Judgment.

Order made.

POWELL v. LOWENBERG HARRIS & CO.

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Practice—Pleading—Counter claim—Striking out—Rule 204.

One of two defendants sued jointly may counter claim upon a cause of action which he individually has against the plaintiff.

A counter claim should not be entirely independent of the original cause of action, but where the counter claim involved an issue raised as a defence it was held to be sufficiently connected with the claim.

Upon appeal to the Divisional Court:—

Held, per CREASE and WALKEM, J.J.: The fact that a counter claim, if successful, involves the taking of long accounts which will delay the disposition of the action is not a sufficient cause for excluding it if otherwise unobjectionable.

SUMMONS under Rule 204 to strike out a counter claim on the ground that the claim thereby raised ought to be disposed of in an independent action. Plaintiff's claim stated that he paid the defendants $16,500 as his agents,

Statement.

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as being the purchase money of certain lands bought by him through them, but that it was in fact an overpayment of $350.00 as the purchase money was only $16,150, and he claimed to recover the $350.00, as money held by defendants to his use.

The defendants denied the receipt of the $16,500.00 by their firm and denied their agency for the plaintiff, alleging that the money was received by one partner, Harris, only, as vendor of the lands to the plaintiff for that sum.

Statement.

Defendant Harris set up by way of counter claim the facts alleged in the defence, and also, that, at the time of the purchase of the lands from him by the plaintiff for the $16,500.00, it was agreed between the plaintiff and himself that they should be partners in the lands and share any profits upon the re-sale thereof, after deducting the amount which the plaintiff should expend in improvements, and interest at 10 per cent. per annum thereon and on the $16,500.00 advanced by the plaintiff, charging that the plaintiff had re-sold the lands for $40,000.00, and claimed: (1.) An account of the money received. (2.) An account of the moneys expended by the plaintiff in improving the lands. (3.) Payment of the balance, after deducting interest computed as above.

The summons was argued before Drake J., in Chambers, on October 7th.

Argument.

Robert Cassidy, for the plaintiff; The counter claim cannot be conveniently disposed of in this action, and will delay the recovery of judgment upon the plaintiff's claim by the taking of long accounts on the counter claim. The claim is against defendants as partners. A separate counter claim by one partner is an independent matter, though arising out of the same transaction.

A. P. Luxton, contra.

Judgment was reserved, and was delivered on Oct. 14.

DRAKE, J.: I see no reason why the defendant Harris should not set up the counter claim. Before the Judicature Acts a separate debt could not be set off against a joint claim, nor a joint debt against a separate claim, but now such a defence may be raised by counter claim. The counter claim should be connected with the original cause of action: if it is entirely independent of it and unconnected with it, the defendant will be left to a separate action. Here, the defence raised by the counter claim is intimately connected with the cause of action, and, if proved will be a complete answer to it. I think, therefore, this summons should be dismissed, Costs to be costs in the cause to defendant Harris.

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Judgment.

Summons dismissed.

The plaintiff appealed to the divisional Court, and the appeal was argued before CREASE and WALKEM, J.J.

Robert Cassidy, for the appeal: We admit that there is nothing in this counter claim which would prevent the question it raises being tried along with the issue raised on the claim and defence, and do not say that it is not a proper subject of counter claim. The question it raises is, however, independent of the issues raised by the denial of the claim, and is not connected with them except historically. The question of whether the plaintiff and Harris were partners in the land bought by the plaintiff (with its consequences) is irrelevant to the question of whether the defendants or Harris received from the plaintiff more than the real purchase money, which is the whole issue raised by the claim and defence. We do not go the length of saying that an independent matter cannot be set up by counter claim, but there is no foundation in fact for the reasoning that defendant's claim should be disposed of in this action as involving the same issues as those on the plaintiff's claim.

Argument.

Rule 204 was intended to secure speedy and effectual

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justice by permitting to be joined in the same action all cross claims between the parties or any of them of such a nature that they can be disposed of without delay, at the same time, by the same judgment. In all cases in which it has appeared that a counter claim involved the taking of long accounts or introduced other elements of delay so as to retard the plaintiff's judgment till the defendant's claim was ascertained, the counter claim has been excluded as contrary to the spirit of the rule. *Gray* v. *Webb*, 21 Ch. D., 802; *Central Bank* v. *Osborne*, 12 P.R., 160; *Odell* v. *Bennett*, 13 P.R.,10; *Naylor* v. *Farrer*, 26 W.R., 809.

A. P. Luxton, contra: If the circumstances are as defendant Harris sets up in his counter claim, the plaintiff has no claim and all of the questions involved should be disposed of together. One of several joint defendents can counter-claim separately against a plaintiff. *Manchester &c. Railway Co.* v. *Brooks*, 2 Ex. Div. 243. In the following cases counter claims involving questions more disconnected from the subject of the claim than is the case here, were permitted to stand: *Bartholomew* v. *Rawlings*, W.N., 1876, p. 56; *Horrocks* v. *Rigby*, 9 Ch. D., 180; *Hodson* v. *Mochi*, 8 Ch. D., 569.

Argument.

Cur. adv. vult.

CREASE, J.: This appeal against the decision of the Honourable Mr. Justice DRAKE refusing to strike out the counter claim herein was argued at great length and with much force by Mr. Cassidy. The following cases were cited and commented on by him, namely: *Central Bank* v. *Osborne*, 12 Ont. P.R., 160; *Odell* v. *Bennett*, 13 Ont. P.R., 10; *Gray* v. *Webb*, 21 Ch. D., 802; *Hawkins &c* v. *Mybrea*, 3 T.L.R. 91, in supporting his contention, which was to the effect that while there was nothing in the counter claim which would prevent the question it raises from being tried along with the issue raised by the claim and defence and not denying that it was a proper subject for counter claim, that

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nevertheless the question it raises is independent of the issues raised by the denial of the original claim, and is not connected with them, except as he put it "historically." That the issue upon the counter claim depending upon the question whether the plaintiff and Harris were partners in the land bought by the plaintiff is irrelevant to the issue upon the plaintiff's action, which is whether the defendants or Harris received from the plaintiff more than the real purchase money of the land, and, therefore, that the circumstances of the case afforded no solid ground for the contention that defendants' counter claim should be disposed of at the same time as the original claim as involving the same issues. In the case he cited, counter claims were excluded as causing too great delay, or as otherwise opposed to the spirit of S.C. Rule 204. That rule allowed of the addition of counter claims in order to expedite the determination of all causes of dispute between the plaintiff and defendant and the settlement of all cross claims between the parties or any of them, which were capable of being disposed of expeditiously at the same time and by the same judgment, and, therefore, on the authority of the above cases, the learned counsel submitted that whenever it appeared that a counter claim involved the taking of long accounts or introduced other elements of delay so as to retard the plaintiff's judgment till the defendants' claim was ascertained, the counter claim has been excluded as contrary to the spirit of the rule. And that the setting up of a partnership in the land with a single member of the firm sued and claiming accounts would cause the plaintiff endless delay in procuring the repayment of the $350.00 claimed as overpayment.

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The cases cited and relied on by Mr. Luxton for the defendants, the respondents, were: *Atwood* v. *Miller*, W.N. (1876) p. 11, where in an action for rent the Court actually allowed a counter claim for the price of butcher's meat delivered, and damages as tenant of plaintiff, and specific performance

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of an agreement to grant a lease, to be disposed of in one action. He also cited: *Bartholomew* v. *Rawlings*, W.N., 1876, p. 56; *Manchester & Sheffield Ry.* v. *Brooks* and *London & N.W. Ry. Co.* v. *Brooks*, both 2 Ex. Div. 243; *Harroder* v. *Rigby*, 9 Ch. D., 180; *Hodson* v. *Mochi*, 8 Ch. D. 569.

His contention was that the claim of plaintiff was so intimately connected with the counter claim that one could not be tried without the other. That if the circumstances are as Harris sets up in his counter claim, the plaintiff, Powell, has no claim, and all the questions raised could be disposed of together.

Judgment.

After considering all these points, I have come to the conclusion that the connection between the two matters is sufficiently close and the arguments *pro* and *con* are so nicely balanced that, if originally called upon to decide in the question now before us, I might possibly have inclined to adopt Mr. Cassidy's contention in the matter. But a decision has already been judicially given upon it by my brother Drake, and in the exercise of his discretion, which should not be disturbed except for very strong reasons, not advanced here. He has decided not to strike out the counter claim, and I am in favour of not disturbing his decision.

Under these circumstances, it becomes necessary to dismiss the appeal with the usual accompaniment, costs for the respondent.

WALKEM, J., concurred.

Appeal dismissed with costs.

FIRST NATIONAL BANK v. RAYNES.

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FIRST NAT. BANK v. RAYNES

Practice—Oaths Act, 1892—Foreign Affidavit—Notary—Motion for judgment —Order XIV Rule 2—Irregularity.

An affidavit sworn out of the Province of British Columbia before a Notary Public and certified under his hand and official seal is admissible under the B.C. Oaths Act, 1892, Sec. 12.

The copy of the affidavit to accompany a summons for judgment under Order XIV, Rule 2, must be a true copy.

The affidavit was sworn before a Notary Public and the copy had no indication of the Notarial Seal upon the original.

Held fatal and motion dismissed.

SUMMONS for judgment under Order XIV. Statement.

S. Perry Mills, for defendant, shewed cause and took the preliminary objection that the copy of the affidavit for judgment served shewed that it was sworn before a foreign Notary Public, but did not indicate that the Notary had affixed his Notarial Seal upon the original. It appeared that the original affidavit filed upon the motion had the Notarial Seal upon it.

H. E. A. Robertson, contra: The object of the provision is to apprize the mind of the defendant of the contents of the affidavit. The provision is directory and not imperative—there cannot be a copy of a Notarial Seal. It is not necessary to append a formal statement or indication on the copy of the affidavit that the Seal was in fact impressed on the original. If it were, it would not be any part of a copy of the affidavit. The fact that the signature of the officer taking the affidavit appears in the copy as "A. B. Notary Public" indicates that he impressed his seal. *Omnia presummitur rite esse acta.* See *Walker* v. *Niles*, 18 Grant, 210; *Sharp* v. *McHenry*, 38 Ch. D., 427. Argument.

Per Curiam: Objection sustained.

Summons dismissed with costs.

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IN *RE* THE LAND REGISTRY ACT.

BEVILOCKWAY v. SCHNEIDER.

BEVILOCK-WAY *v.* SCHNEIDER

Practice—Appeal to Divisional Court—Notice of appeal—Non-statement of Court appealed to or grounds of appeal—Irregularity—Waiver—Amendment.

The non-statement in a notice of appeal of the Court intended to be appealed to is an irregularity.

The attendance of respondent's counsel in the proper Court upon the notice is a waiver of such irregularity, though he takes preliminary objection to it.

The omission to state the grounds of the appeal, in a notice to the Divisional Court, is fatal to the notice.

Amendment, by inserting the grounds, allowed on terms.

Statement. APPEAL by defendant from an order of Mr. Justice Drake dismissing a summons to cancel a *lis pendens*.

Argument. *P. Æ. Irving*, for the plaintiff, took the preliminary objection that the notice of appeal did not state the Court intended to be appealed to and did not state the grounds of appeal as required by O. LVIII, R. 2. citing: *Pfeiffer* v. *Midland Ry. Coy.*, 18 Q.B.D., 243; *Murfett* v. *Smith*, 12 P. D., 116.

A. E. McPhillips, contra.

Judgment. CREASE, J.: This is an appeal to the Divisional Court from the judgment of the 14th August, 1893, dismissing the summons of the defendant for the cancellation of the *lis pendens* filed herein by the plaintiff against Lot 25, Block 40, sub-division of Lot 541, Group 1, New Westminster District.

At the hearing of the appeal a preliminary objection was taken by the plaintiff to the notice of appeal; that it did not name the Court to which the appeal was taken and did

not set forth the grounds of appeal. After argument, I consider that the objection that no Court was specified in the notice was waived by the plaintiff's appearance here to contest the appeal. And as to the second objection, that the notice of appeal should set forth the grounds of appeal, I think that under the powers of amendment contained in rules (particularly Rule 261) permission should be given to the defendant to amend the notice upon payment of the costs occasioned by the irregularity.

WALKEM, J.: Two preliminary objections have been taken to this appeal; the first one being that the notice of appeal fails to state the Court intended to be appealed to. This is certainly an irregularity in the notice, but it has been waived by counsel for the respondent appearing: *Re McRae*, 25 Ch. D. at p. 19. The second objection is that the grounds of the appeal have not been specified as is required by O. LVIII R. 2, which differs in that respect from the corresponding English rule. As the objection, therefore, could not arise under the English rule we have no authorities to guide except those in which the point has been raised in the analogous case of a notice of motion for a new trial, which must state the grounds for the motion. In *Pfeiffer* v. *Midland Ry. Coy.*, 18 Q.B.D., 243, which was followed in *Murfett* v. *Smith*, 12 P.D., 116, it was held that a notice of motion for a new trial, which in general terms specified "mis-direction," as a ground was bad, inasmuch as it failed to state how and in what manner the jury were mis-directed. In the present case, the appeal is from a refusal of the learned Judge to cancel a *lis pendens*. No grounds of appeal are stated. If the ground is merely the fact of the refusal, the notice would be as vague in its generality as the notices that were condemned in the above two cases. Under O. XXXIX, Rule 4 as well as under O. LVIII, Rule 3, as I pointed out at the hearing, we have power to give leave to amend. This being a discretionary power, as held in the case cited, we may consider the nature

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of the present appeal and be guided accordingly; and as it seems to raise a substantial and not a frivolous question, the appellant ought to be allowed to amend his notice by specifying his grounds, and subject thereto to proceed with the appeal. The costs of the amendment having been caused by the appellant's mistake, the respondent is entitled to them. They will, therefore, be the respondent's costs in the cause in any event. I should mention that although O. LVIII, Rule 2, applies to procedure in the Full Court, the same procedure is made applicable to the Divisional Court by O. LIX, R. 3.

Leave to amend granted.

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Lis Pendens—Land Registry Act.

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Plaintiff claimed in the endorsement on his writ, on behalf of himself and the other creditors of the defendant Marie Schneider, a declaration that a conveyance made by her to her husband (co-defendant) of certain lands, was fraudulent and void as against them, and obtained and registered in the Land Registry Office a *lis pendens* against the land in question.

On motion to set aside the registration of the *lis pendens*:

Held, *per* Drake, J., and affirmed on appeal by the Divisional Court (Crease and Walkem, J.J.): That the statement of claim in the writ shewed an interest in the plaintiff, as a creditor, in the subject matter, sufficient to maintain the action and the registration of the *lis pendens*, though only a declaratory order, and no consequent relief was prayed.

Statement.

MOTION by way of summons to set aside a *lis pendens* registered by the plaintiff against the lands in question upon the grounds *inter alia*: "That the endorsement on the writ of summons does not shew that the plaintiff is entitled to or claims any interest in or lien in or upon the lands in

question." And also to dismiss the action for want of prosecution in not serving the writ.

During the progress of the motion the plaintiff was permitted to amend the endorsement on the writ, and, as amended, it was as follows: "The plaintiffs' claim is to have it declared that the defendant, Fritz Schneider, is a trustee for the defendant, Marie Schneider, of Lot 25, in Block No. 40, according to a map or plan of the sub-division of Lot 541, Group one (1), New Westminster District, and that the conveyance of said lot from the defendant, Marie Schneider, to the defendant, Fritz Schneider, dated April 1st, 1893, may be declared fraudulent and void as against the plaintiff on the ground that the said conveyance was made to said defendant, Fritz Schneider, for the purpose of defrauding, defeating and delaying the plaintiff and other creditors of the said Marie Schneider, who is insolvent. And also that it may be declared that the defendant, Fritz Schneider, is a trustee for the defendant, Marie Schneider, of the lands, for the reason that the said lands are the lands of the defendant, Marie Schneider, and the conveyance thereof was taken by the defendant, Fritz Schneider, for the purpose of defrauding, defeating and delaying the plaintiff and other creditors of the defendant, Marie Schneider, who is insolvent, and that the said two portions of said lands may be declared to be subject to the claims of the plaintiffs."

Statement.

A. E. McPhillips, for the defendants.

P. Æ. Irving, contra.

DRAKE, J.: The endorsement on the writ is to have it declared that a certain deed of Lot 25, Block 40 is void as against the plaintiff on the ground that it was made for the purpose of defrauding, defeating and delaying the plaintiff and other creditors of Marie Schneider, and the plaintiff has filed a *lis pendens*. The defendant asks that the *lis pendens* be cancelled on the

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ground that the endorsement does not shew that the plaintiff is entitled to or claims any interest in or lien upon the lands; that the registration is an abuse of the process of the Court and in the alternative that the action be dismissed. The writ has not been served and has been amended subsequent to the filing of the *lis pendens*. The cases to which I was referred: *Shephard* v. *Kennedy*, 10 Ont. P.R., 242, and *Foster* v. *Moore*, 11 Ont. P.R., 447, were both cases in which the plaintiff had obtained a judgment, and do not apply. In *Jameson* v. *Laing*, 7 Ont. P.R., 404, the learned Vice-Chancellor on a bill filed alleging a fictitious contract of sale and a *lis pendens* filed therein refused to discharge the *lis pendens* or take the bill off the file. No reasons were given, but probably the affidavits disclosed sufficient reasons for the judgment. The present action is brought under the Statute 13 Eliz. to set aside a deed as being fraudulent as against creditors, and in order to proceed in such an action it is not necessary that the plaintiff should have a lien on the property comprised in the impeached conveyance, but if at the trial the Court is satisfied that the deed has been executed for the purpose of delaying or defrauding creditors, it will set it aside, leaving the parties to take some independent proceedings in order to have execution against the property. The action should be brought on behalf of all the creditors: *Reese River Coy.* v. *Atwell*, 7 L.R. Eq., 347. The present action is not, therefore, an illusory action; it is a creditors' action, and one in which a question has to be tried, and is different from the case of *Hull* v. *Schneider*, which was considered in the Divisional Court. I, therefore, dismiss the summons with costs to the plaintiff in the cause, and order the writ to be served forthwith and direct the plaintiff to speed the action.

Judgment.

Application dismissed.

The defendants appealed to the Divisional Court and the appeal was argued before CREASE and WALKEM, J.J., on 6th November, 1893.

A. E. McPhillips, for the appeal: Defendant's motion is under the Land Registry Amendment Act, 1890, Cap. 24, Sec. 1, and Cap. 16 of Stat. B.C. 1891, Sec. 1. The words of the Land Registry Act, Stat. B.C. 1887, Cap. 67, Sec. 29, "who shall have commenced an action in respect of any real estate," are different to the language of the Ontario Statute, R.S.O. 1877, Cap. 40, Sec. 90 "wherein any title is called in question to any land," and *Jameson* v. *Laing*, 7 Ont. P.R., p. 404, and *Sheppard* v. *Kennedy*, 10 Ont. P.R., 242 are distinguishable. There is no sufficient allegation that the plaintiff is a creditor or has any interest in the subject matter: *Collins* v. *Burton*, 4 De G. & J., 612; *Re Reese River Mining Co.*, v. *Atwell*, 7 L.R. Eq., at p. 350.

P. Æ. Irving, contra: The plaintiffs' proceeding is right, Cap. 24 Land Registry Amendment Act, 1890, Sec. 1 *supra*, provides that upon filing an affidavit under the Act, the defendants upon the return of a summons can call upon the plaintiff to shew cause why the *lis pendens* herein should not be cancelled. Under that and subsequent sections, the matter is placed in the discretion of the judge. *Adames* v. *Hallett*, L.R. 6 Eq., 468, does not support defendant's contention. There the parties had come to trial. Caution must be exercised in putting an end to a *lis pendens*. This is not, as alleged, like the *Hull Bros.* v. *Schneider* case. There the plaintiffs proceeded on their own account. Argument.

CREASE, J.: This is an appeal from a judgment of Mr. Justice DRAKE dismissing a summons of the defendant for a cancellation of the *lis pendens* filed herein by the plaintiff against the lands in question. The appeal was heard before the Divisional Court on the 6th November, 1893. The writ on which the present action is based, as amended, is to have it declared that a deed of conveyance of Lot 25, Block 40, from the defendant, Marie Schneider, to the Judgment.

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defendant, Fritz Schneider, is, under the Statute 13 Elizabeth, fraudulent and void as against the plaintiff on the ground that it was made for the purpose of defrauding, defeating and delaying the creditors of the said Marie Schneider, who is insolvent. It is a creditors' action. The declaration is sought under Rule 236. The grounds of the present appeal are; (1.) That the endorsement on the writ of summons herein does not shew that the plaintiff is entitled to register a *lis pendens*. (2.) That the plaintiff does not shew that he is a judgment creditor, or that he has a claim which is in the course of being placed in judgment. (3.) That no claim or interest or lien is made out of the plaintiff in respect of the lands. (4.) That the registration of the said *lis pendens* is an abuse of the process of the Court. (5.) That the plaintiff has not diligently prosecuted this action, and that in the alternative the action should be dismissed. Mr. McPhillips, for the defendant, contended that there was a difference between the B.C. Land Registry Act, Sec. 29, under which a *lis pendens* is registered, and the Ontario Act, Rev. Ont. Stat. Vol. 1, p. 431, Chancery Act, Sec. 90, under which the cases *Jameson* v. *Laing*, 7 P. R., 404, and *Sheppard* v. *Kennedy* referred to in the judgment appealed from occurred.

Judgment.

By Section 29, anyone who "has commenced an action in respect of any real estate" may register a *lis pendens* against the same by means of a charge. Sec. 90 of the Canadian Statute refers to the taking of a "proceeding in which any title or interest in land is brought in question." Arguing therefrom that the endorsement in this writ of summons lacks a material allegation, namely, that the plaintiff is either (1) a judgment creditor, or (2) a simple contract creditor; and that there is no statement on the endorsement except that he is delaying and defrauding him and the other creditors of Marie Schneider, and that it contains no allegation that he is a creditor, which he contended, considering *Collins* v. *Burton*, 4 De G. & J., 612,

was necessary. As to S.C. Rule 236, sanctioning an action for a declaratory judgment (520 annual practice) the learned counsel considered that only applied where the plaintiff was entitled to consequential relief, that the jurisdiction under Rule 236 should be exercised with great caution: *Austen* v. *Collins*, 54 L.T., 903. That under the *Reese River Mining Coy.* case, L.R. 7 Eq. Cas., 350, plaintiff must prove himself a creditor; that in *Jameson* v. *Laing*, 7 P.R., 404, plaintiff had filed a bill to comply with the Ontario Act; that satisfied the Ontario Act, which required that he should shew he was "in course of obtaining a judgment," but that has not been done here. In truth, (the learned counsel concluded) the plaintiff must shew that he is a creditor that that is the essential thing, and the judgment would be proof of that.

After carefully considering the arguments of Counsel and the authorities bearing on the case, I have arrived at the same conclusion as the learned judge, whose judgment is under appeal. This is not an illusory action such, for instance as *Robson* v. *Dodds*, L.R. 8 Eq. 301 where a Bill instituted by a plaintiff having only a nominal interest, on behalf of a body of shareholders, not for the benefit of the plaintiff, but for other and improper purposes, at the instigation of another person, was treated as an imposition on the Court, and the Bill ordered to be taken off the fyle.

Judgment.

The Land Registry Act, Sec. 29, merely requires that any one "who has commenced an action in respect of any real estate" may register a *lis pendens* against the same by means of a "charge." This is an action in respect of real estate, and for a declaration under Rule 236. The fyling of a *lis pendens* is done without any affidavit as to the validity of the plaintiff's claim, or of his having any interest or lien, in or on the real estate affected by the *lis pendens*. The fyling of a *lis pendens* with the Registrar-General in the Land Registry office is not properly a part of the registration titles to land, but is transacted in that office as a matter

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of public convenience for the purpose of giving notice of the pending action to persons seeking to register any title to land on which the *lis pendens* is placed as a charge. It is not, therefore, accompanied under the Act by any affidavit of the right of the party fyling the *lis pendens* to register such a charge. The Courts are very chary (*Strousberg* v. *McGregor*, 6 T.R. 145), of removing a *lis pendens*, as it would at once leave the land open to be conveyed away out of the reach of the plaintiff, and then possibly, should he succeed in his action, he might lose perhaps the only, or most, substantial asset left to meet his claim. In the case of *Jameson* v. *Laing*, 7 P.R. 404, where a Bill was fyled alleging even a fictitious contract of sale and a *lis pendens* fyled therein, the learned Vice-Chancellor refused to discharge the *lis pendens* or take the Bill off the fyle, but ordered, as did the learned Judge in this case, the trial to be expediated. The action here is, so far, in accord with *Reese River Co.* v. *Atwell*, L.R. 7, Eq. 305, that it is brought under the Statute 13th of Elizabeth to set aside a fraudulent deed as against creditors, and it is brought on behalf of the plaintiff and all the other creditors, and so differs from *Hull* v. *Schneider* which was confined to the parties. The present action, therefore, has all the privileges accorded to a creditors' action, and is certainly not illusory, and is one in which a *bona fide* question has to be tried, namely, the validity of a certain deed as against creditors. The learned counsel for the defendants has not laid any ground for his application; the only affidavits he has produced are those of the two Schneiders, which do not touch the point before us for decision and as has been laid down by the learned judge, whose judgment is now under appeal, in an action under the Statute 13 Elizabeth, it is not necessary in order to proceed therein that the plaintiff should have a lien on the property comprised in the conveyance now impeached; but if, at the trial, the Court is satisfied that the deed has been executed for the purpose of delaying or defrauding

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creditors, it will set it aside, leaving the parties to take such independent proceedings as they may be advised, in order to have execution against the land in question.

I am, therefore, of opinion that the judgment under appeal should be confirmed, and the appeal dismissed with costs.

WALKEM, J.:—By the endorsement on his writ the plaintiff seeks, on behalf of himself and other creditors of the defendant, Marie Schneider, a declaration that a conveyance made by her to her husband, the co-defendant of certain land, which is described, was fraudulent and void.

On the day the plaintiff issued the writ, he registered a *lis pendens* against the land, aud the defendant Fritz Schneider thereupon applied to Mr. Justice DRAKE in Chambers, to have the registration vacated. The ground of the application, as stated by his counsel, were substantially as follows: That the endorsement on the writ disclosed no cause of action that would entitle the plaintiff to remedial measures against the land as he claimed no lien upon, or interest in it; that it failed to show that the plaintiff was a judgment-creditor of Marie Schneider or a creditor having a claim in course of being established at law; and that the registration complained of was consequently an abuse of the process of the Court; and in the alternative the dismissal of the action was asked for, as the plaintiff had unduly delayed the service of the writ. The only affidavits read on the application were those of the defendants; and they were put in to prove the issue of the writ, the non-service of it and the registration of the *lis pendens* and inconvenience caused by it. The learned Judge refused to vacate the registration, but directed the plaintiff to serve the writ and speed the cause. From the first part of this order, the defendant Fritz Schneider now appeals. The summons and affidavits upon which the application was made are intituled in this action and "In the matter of the Land Registry Act and Amending Acts;" but the sum-

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mons is not in accordance with those Acts, inasmuch as it fails to comply with the direction given with respect to security. According to Sec. 1 of the Amending Act of 1890, the summons must in form be "to show cause why the *lis pendens* should not be cancelled upon sufficient security being given." This provision is inaccurately expressed; for it is not the *lis pendens* but its registration that is subject to cancellation. The slip is evident; but what is meant is equally evident. By Sec. 3 of the same Act, the registration of the *lis pendens* may be vacated by a Judge in Chambers, upon satisfactory "security being given and upon such other terms (if any) as he may see fit to impose." The imposition of terms is thus discretionary; but not so the requirement of security. The object of the Act of 1890, as explained by its preamble, was to give an owner of land, which might be the subject matter of litigation, the privilege, which he did not before possess, of freeing his title in a summary method from any registration of a *lis pendens* that might have been made; a *lis pendens* when registered being, according to the principal Act, "a charge" upon the land. If, therefore, the defendant decided to take the benefit of the Act, it was his duty to comply with it, if he expected to succeed on the ground that the registration of the *lis pendens* embarrassed him; but, as he has not done so, his application could not have been entertained, and doubtless was not by the learned Judge, as one within the sections referred to. The learned Judge must have dealt solely, and, I think, rightly so, with the objection that the registration of the *lis pendens* was an abuse of the powers of this Court. The action in the first place is not an unknown or fictitious one, as was contended. It is authorized by the 13 Eliz. C. 5; and the objection urged against it, that no consequential relief is sought, is untenable. By Sec. 50 of the Chancery Amendment Act of 1852, (15 and 16 V.C. 86), "No suit.....shall be open to objection on the ground that a merely declaratory decree or order is

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sought thereby, and it shall be lawful for the Court to make binding declarations of right, (without granting consequential relief)." This section is now incorporated in our Rules of Court as Rule 5 of O. XXV. (S. 1,236), but with the following words substituted for those which I have bracketed: "Whether any consequential relief is or could be claimed or not." The change thus made confers a larger jurisdiction on the Court than Sec. 50 gave; yet under Sec. 50, with its more restricted jurisdiction, a declaratory degree, such as that now sought, was made, under circumstances very similar to those of the present case, in the case of the *Reese River Silver Mining Co.* v. *Atwell*, L.R. 7 Eq. 350, although no consequential relief was asked for. That relief was left to be independently enforced; and it was also held that a lien on the defendant's land was not necessary to entitle the plaintiffs to their declaratory degree. That case, it is said by counsel, differs from the present one, inasmuch as it was proved at the hearing that the plaintiffs, the Mining Co., had a claim against Atwell which they were taking steps to establish; but the hearing of the present case has yet to come, and the plaintiff cannot be expected, until it does come, to prove that he has a claim against the defendant, Marie Schneider. The granting is not of the declaratory order asked for, but is a matter of discretion *Austen* v. *Collins* 54 L.T. 903, and manifestly a question to be decided hereafter by the Court. My brother DRAKE was thereupon right in refusing to virtually try the action in Chambers and to practically put an end to it by acceeding to the defendant's application; for such would have been the effect of an order, had it been made, to vacate the registration of the *lis pendens*, as it would have enabled the defendant, Fritz Schneider, to alienate the land, which is the subject matter of the action, and thereby place it beyond the reach of the Court.

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The appeal must therefore be dismissed with costs. With respect to that part of the learned Judge's order which

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awards the costs of the application to the plaintiff, I might observe that had the defendant's counsel applied to us to have it varied, I should have been in favour of it. The rule that "costs shall follow the event" has a distributive meaning, and as the plaintiff only succeeded on the main question involved in the summons, and the defendant succeeded in compelling him to serve the writ and speed the cause, each party was, on principle, entitled to the costs of his success. The costs, being small, might at least have been made costs in the cause. But I should have been in favour of going further and giving all the costs against the plaintiff for having improperly withheld the service of the writ. The practice on the part of a plaintiff, in actions involving questions relating to land, of taking out a writ, immediately registering a *lis pendens* and thus keeping the writ as it were in his pocket for an indefinite period and until the owner of the land finds out by searching his title that it is in existence, is a practice that may be of such evidently mischievous consequences that it should be strongly discouraged.

Judgment.

Appeal dismissed.

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Public Company—Companies' Act, 1862, Imp.—Issuing shares at a discount —Ratification—Laches—Estoppel.

A Company incorporated under the Companies' Act, 1862 (Imperial) assumed power (1.) By its memorandum of association to issue shares at a discount. (2.) By its articles of association, in other respects Table A to the Act, "that these articles may be altered, &c.....at any meeting of the Company by a resolution, &c., passed by a majority," &c.....

Held, Both powers invalid (1) as contrary to law, and (2) as contrary to Sec. 51 of the Act, which requires a special resolution for the alteration of articles.

By a resolution passed at a general meeting of the Company, the whole of the general issue of shares of the Company, which were expressed to be, and were in fact, fully paid up, was cancelled, the capital of the Company was increased from $50,000.00 to $375,000.00, and new shares of the face value of the latter amount, falsely marked on their face, "fully paid up," were issued and divided among the original shareholders in lieu and in sole consideration of their former shares.

Held, ultra vires as the issue of shares at a discount, following *Ooregum Gold Mining Company* v. *Roper*, 66 L.T., 427; and also void as an increase of capital not authorized by special resolution of the Company.

The applicant accepted, under the idea that they were valid, and sold a portion of the new shares issued to him.

Held, not such an acquiescence as estopped the applicant from repudiating the remainder as against the Company.

Remarks on the duties of the Registrar of public Companies.

Order made rectifying the Register by removing the name of the applicant therefrom as a shareholder in regard to the new shares, and restoring it in regard to the original shares.

APPLICATION by John Hill Twigg to rectify the share register of the Company under Sec. 35 of the Companies' Act, 1862 (Imperial), (introduced into British Columbia by the Companies' Act, C.S.B.C., 1888, part 1), by striking off the name of the applicant as the holder of 750 shares of $100.00 each. The Company was in financial difficulties, and notice of an application to wind up under The Companies' Winding Up Act (Can.) was given, though the applicant

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was then unaware of it, on the same day as the service of the notice of this application.

The applicant was originally the holder of 100 shares of $10.00, each, for which he paid in full $1,000.00, and received a certificate that he was the holder of said shares fully paid up.

On 27th February, 1892, during an absence of the applicant from British Columbia, at a general meeting of the Company, a resolution was passed by a majority vote, "that the capital stock of the Company (which was $50,000.00) be increased to $500,000.00, and that $375,000.00 thereof be divided *pro rata* amongst the original shareholders, according to the number of shares held by them respectively, on their surrendering to the Company their original shares fully paid up."

The Memorandum of Association of the Company stated: "The capital of the Company is $50,000.00, divided in 5,000 shares of $10.00, each, with power to increase to such extent as the Company may from time to time determine, and with power to issue any shares in original or in any new capital as fully paid or preference shares or to issue any stock in original or in any new capital, and to receive payments at a discount on the face value thereof."

Statement.

The Articles of Association provided that the regulations contained in Table A of the Companies' Act, 1862, should apply to the Company, with immaterial exceptions, and also provided: "These Articles may be varied, altered, modified, added to or changed at any meeting of the Company by a resolution to that effect passed by a majority of members present, either personally or by proxy." The secretary of the Company wrote to the applicant advising him of the resolution, and further stating: "You are alloted 750 shares, which will be delivered to you on your surrendering to the Company your original certificate fully paid up." The applicant, understanding that he had no option, delivered up his original certificate

for 100 fully paid up $10.00 shares in the Company, and received in lieu, and in sole consideration thereof, a certificate that he was the holder of 750 fully paid up $10 shares in the Company. He subsequently, on 20th September, 1892, sold 100 of said 750 shares to a third party, but the transfer was not registered on the books of the Company. Afterwards the applicant was advised and first became aware that the said new shares would not in law be considered as fully paid up shares for all purposes, but that he might be called upon to pay the difference between the $1,000.00 paid by him to the Company for the original shares and $7,500.00, the face value of the substituted shares, as a contributory to creditors on a winding up. He thereupon notified the Company that he repudiated the substitution and issue to him of said new shares, and, arranging with the person to whom he had sold 100 of them, tendered back the certificate of them, which the Company refused to accept. The applicant had been elected a director of the Company at the meeting of the 19th February, but never acted as such, and had resigned shortly afterwards on the ground that he could not attend to the duties of the position.

Statement.

Robert Cassidy, for the applicant: The resolution of 19th February was wholly void, as being an increase of the capital of the Company by other than a special resolution as provided by Sec. 51 of the Companies' Act, 1862 (Imp.), and Sec. 26 of Table A, and the new shares issued under it never had any legal existence. The transaction was void, not voidable or irregular merely, and was incapable of ratification or confirmation, by acquiescence, laches, or any conduct of the applicant.

Argument.

The resolution was also invalid because it cancelled the original shares. The Act gives no such power. Section 12 of the Act embraces all the powers given to Companies incorporated under it to deal with their share capital. They are: (1) To increase its capital by issue of new

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shares of such amount as it thinks expedient. (2) To consolidate and divide its capital into shares of larger amount than its existing shares, and (3) To convert its paid up shares into stock....." Save as aforesaid, no alteration in the capital of a Company can be made." *Palmer's Company Precedents*, Lib. ed., p. 139; *Re Financial Corporation, ex parte Feiling & Remington*, 36 L.J. Ch., 695 (unauthorized sub-division of shares); *Trevor* v. *Whitworth*, 12 App. Cas., 409; *per* Lord Watson at p. 423 (purchase of its own shares and reduction of capital). The Memorandum of Association does not here assume the power to cancel shares. If it did, it would be inoperative to that extent: *Trevor* v. *Whitworth*, *supra*, *per* Lord Macnaghten at p. 433. See also *Ashbury* v. *Watson*, 28 Ch. D., 56; on appeal, 30 Ch. D., 376; *Ashbury Ry. Carriage & Iron Co.* v. *Rich*, L.R. 7 H. of L., 653; *Guiness* v. *Land Corporation of Ireland*, 22 Ch. D., 349.

Argument.

A Company cannot lawfully issue shares at a discount, and the resolution for and issue of new shares was, therefore, illegal: *Re Addlestone Linoleum Co.*, 37 Ch. D., 191, at p. 204; *Re Almada & Tirito Co.*, 38 Ch. D., 415; *Re Zoedone Co., Higgins' case*, 60 L.T.N.S., 383; *Re Midland Electric Light Co.*, 60 L.T.N.S., 667; *Re Ooregum Gold Mining Co.*, 1892, App. Cas., 125. As far as this objection goes, it is possible that the transaction would have been capable of ratification by acquiescence and that the sale of a part of the new shares would have been a ratification: *In re Railway Time Tables Publishing Co. ex parte Sandys*, 42 Ch. D., 98. If the only contract which a person has made with a company is to take fully paid up shares, he cannot be saddled against his will with unpaid shares: *Ashworth* v. *Bristol, &c., Ry. Co.*, 15 L.T.N.S., 561; *Guest* v. *Worcester, &c., Ry. Co.*, L.R. 4 C.P., 9; *De Ruvigne's Case*, 5 Ch. D., 306, at p. 324; *In re Wedgewood, &c., Co. Anderson's Case*, 7 Ch. D., 75, at p. 95, and we contend that any acquiescence or ratification can only be founded on

such full knowledge of the effect upon the shareholder of the altered position as would make a basis for a new contract: *Phosphate Lime Co.* v. *Green*, L.R. 7 C.P., 43, at p. 57.

W. J. Taylor, for the Company, *contra:* The articles of the Company provide that they may be altered at any meeting by any majority vote. It was competent to the Company by its articles to provide for the increase of capital by other than a special resolution. A resolution of a company assuming to do an act in a manner not authorized by its articles has been treated as *ipso facto* providing for the alteration of its articles so as to warrant the act being done in that particular way: *In re County Palatine Loan & Discount Co.; Teasdale's case*, 43 L.J. Ch., 579. The articles were therefore in effect altered so as to admit of the share capital being increased by other than a special resolution. As to the issue of the new shares at a discount, that was provided for by the Memorandum of Association which is the agreement of the members of the Company as to how they will transact business. It is at all events binding as between the members of the Company, and none of them can repudiate such an issue of shares where authorized by resolution, not at least after they have accepted the shares so issued: *In re Railway Time Tables Pub. Co., ex parte Sandys, supra.* It does not appear that the Memorandum authorized such an issue in the cases cited *contra.* The provisions of Sec. 51 of the Act and of Sec. 26 of table A, as to a special resolution being required, are directory and not imperative. They are provisions for the convenient management of the internal affairs of companies and are for the protection of the shareholders themselves against hasty and ill-considered action and do not affect the public or touch the policy of the Act, and may be waived by the shareholders. The resolution was such a waiver, if not as against all the shareholders then as against all who attended and voted, and against all who accepted the result by taking the new

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shares. See *Brice on ultra vires*, 1893, ed. pp. 602, 603, 631, 632; *Phosphate Lime Co.* v. *Green*, 7 L.R.C.P., at p. 57; *Landowners, &c., Drainage & Enclosure Co.*, v. *Ashford*, 16 Ch. D. 411; *In re Romford Canal Co.*, 24 Ch.D. 85. Section 50 of the Act is not imperative that the Articles can only be altered by special resolution, it is "subject to the provisions of this Act and to the conditions contained in the Memorandum of Association."

The Company is, in effect, in liquidation, the notice of intended application to wind up, being served on the same day as this notice of motion, and though winding up commences in England at the time of the presentation of the petition—*Companies Act Imp.*, 1862, Sec. 84; *Thring on Public Companies*, p. 194—it commences here at the date of the service of the notice: Con. Stat. Can. 1886, Cap. 129, Sec. 7.

The right to repudiate shares and rectify the Register cannot be exercised after the commencement of a winding-

Argument. up: *Palmer's Company Precedents*, Lib. ed. p. 49; *Oakes* v. *Turquand*, L.R. 2 H. of L. 325; *Stone* v. *City and County Bank*, 3 C.P. Div. 282.

The following conduct has been held an affirmation of an otherwise invalid issue of shares. Endeavouring to sell them: *Ex parte Briggs, in re Hop & Malt Co.*, L.R.; 1 Eq. 483. Executing a transfer of them: *Crawley's case*, L.R. 4 Ch. app. 323. Attending and voting at a general meeting as a holder thereof: *Palmer, supra*, p. 51. The motion should be dismissed.

Cassidy, in reply:—The powers of a Company and the mode of their exercise are limited by the enabling Acts under which it is incorporated, which constitute the fundamental charter of its existence beyond or contrary to which it can do nothing; nor can any Company do anything in itself unlawful *quia contra bonos mores*. Companies cannot by their Memoranda of Association assume power to do a wrong thing, contrary to the spirit of their creation—here to issue shares at a discount, deceiving the public by an

imaginary capital. See *Trevor* v. *Whitworth*, 12 App. Cas. 409, *per Lord Watson* p. 423, *per Lord Macnaghten* p. 433. A direct assumption in the Articles of power to increase the capital at an ordinary meeting would have been void as contrary to Sec. 51. The assumption of power to alter the Articles at an ordinary meeting enabling that to be done is void, as contrary to Sec. 50. As to the contention that the resolution increasing the capital was in effect an alteration by implication of the Articles, so as to warrant that being done: Teasdale's case on that point has not been followed. See *in re Patent Invert Sugar Co.*, 31 Ch. D. 166.

Increase of capital is not a matter solely of internal concern, nor is the cancellation of existing shares as both affect creditors.

The provisions of Secs. 50 and 51 are not merely directory. See *Palmer*, *supra*, pp. 50 and 51, where he says, "over internal regulation the members have full power, provided they follow Secs. 50 and 51." As to ratification or acquiescence, see *Baggally*, *L.J.*, in *Asbury* v. *Watson*, 30 Ch. D. 376, at p. 384 where he says, referring to an alteration in a condition in the Memorandum of Association contrary to Sec. 12, "If ratified by every member, or the Company, that would be no evidence to infer that every member had ratified with full knowledge of what had been done and acquiescing in *ultra vires* resolutions, is no evidence of ratification with knowledge."

Argument.

As to notice of winding-up. See *Emerson's Case*, L.R. 2 Eq., 231. There the Master of the Rolls treated the advertisement and not the presentation of the petition as the commencement of the winding-up, in so far as it affected *bona fide* action before notice. The Court has power to rectify the Register as well after as before a winding-up order: *Reese River Silver Mining Co.*, v. *Smith*, L.R. 4, H. of L. 64. The ground of the decision in *Oakes* v. *Turquand*, *supra*, was that the contract to take the shares was voidable and not void, and that a merely voidable contract

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cannot be repudiated after the rights of third parties, the creditors, have intervened. Here the transaction was void.

Cur adv vult.

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DRAKE, J.: This Company was registered under the Companies Act, 1862, (Imperial) on or about the 11th June, 1891. By the Memorandum of Association the capital of the Company is declared to be $50,000.00 in 5,000 shares of $10.00 each, with power to increase to such an extent as the Company may from time to time determine, and with power to issue any shares in original or in any new capital as fully paid up or preference shares, or to issue any stock in original or any new capital, and to receive payment at a discount on the face value thereof.

The object for which the Company is formed is then set out with elusive vagueness and with a scope practically unlimited. Mr. Twigg in the latter part of the year 1891 subscribed for a hundred shares and paid therefor the full amount of $1,000.00. Mr. Twigg left the province in 1891 and returned in August, 1892. During his absence, namely, on 29th February, 1892, a general meeting of shareholders was held, of which meeting he had no notice, (neither is there any evidence of what notice, if any, was given to the other shareholders of the object for which the meeting was called.) At that meeting the following resolution was passed: "Moved by Mr. McGurn, seconded by Mr. Cummings, that the capital stock of the Company be increased to $500,000.00; that $125,000.00 worth of this amount be placed in the Treasury for sale; that the same be first offered to the present shareholders in proportion to the number of shares now held by them, and upon their failure to take up the same within thirty days after being notified of this option, the shares not so taken shall be offered to the general public; the remaining $375,000.00 to be divided *pro rata* amongst present shareholders according to the number of shares held by them respectively on their surrendering to the Company their original shares fully

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paid up.—*Carried.*" And Mr. Twigg is stated by Mr. Bainbridge, the secretary, to have been appointed a director at this meeting, and a few days afterwards the following letter was written by Mr. Bainbridge, as secretary of the Company, addressed to Mr. Twigg: "The capital stock of the Thunder Hill Mining Company, Limited, has been increased to $500,000.00, in 50,000 shares of $10 each; 37,500 of these shares will be divided amongst the original shareholders *pro rata* according to their present holding. You are allotted 750 shares, which will be delivered to you on your surrendering to the Company your original share certificate fully paid up. The remaining 12,500 shares are held for sale as Treasury stock by the Company—of these 6,250 are now offered to the original shareholders *pro rata.* Your proportion now offered to you by the Company is 125 shares on the following terms: 25 per cent. cash on application and allotment, and the balance in monthly installments due on the first Monday in every month, commencing with the month of April, at the rate of 10 per cent. on the value of such shares respectively until the same shall be fully paid. Your prompt reply accepting or refusing the shares offered you for purchase will much oblige."

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The next communication appears to be of 25th April from Mr. Bainbridge addressed to Mr. Twigg, in Dublin. "Dear Sir:—I have just returned from a visit to the mine and find your letter for which I thank you. The capital of the Company is now increased to $500,000.00 and the original shareholders receive in exchange for their original shares $375,000, or 7½ shares for one—therefore your interest will be 750 shares of the new Company," &c.

I conclude these letters were received in due course of post, but none of them refer to his appointment as director.

In August, 1892, Mr. Twigg having returned to this province surrendered his old shares and received new scrip to the amount of 750 shares purporting to be fully paid up.

On 20th September, 1892, Mr. Twigg sold a hundred of

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these shares to McIvor Campbell as fully paid up, but these shares were not delivered to the purchaser nor are they registered in Campbell's name. In September, 1892, Mr. Twigg returned to Ireland and did not again visit this province until September, 1893. He then took proceedings resulting in the present application. On his part Mr. Cassidy contends that this increase in capital in the mode in which it was done was *ultra vires* of the Company, and, therefore, these new shares are in fact void. The articles of association of the Company are "Table A" with some exceptions, not material to the present case, but in addition to the exceptions, Article 4 is to the effect that these articles, i.e., Table A may be altered, varied or modified, added to or changed at any meeting of the Company by a resolution to that effect passed by a majority of the members present, either personally or by proxy. It is contended by Mr. Taylor on behalf of the Company that this clause gives power to any general meeting of the Company, whether called for that specific purpose or for any other purpose to alter the articles of association of the Company, and no such alteration requires any confirmation by any subsequent meeting. Then it is contended that the Company has power by its memorandum to increase its capital. Sec. 50 of the Act enables a company in general meeting by passing a special resolution to alter its regulations. By Sec. 51 a resolution shall be deemed special if it has been passed by a majority of three-fourths present in person or by proxy at a meeting of which notice has been given specifying the intention to propose such resolution, and such resolution has been confirmed at a subsequent general meeting held at an interval of not less than fourteen days or more than one month from the date of the first meeting. Therefore, although it may be in the power of the Company to pass a special resolution by a bare majority, on which point I express no opinion, yet, in such a case, the resolution has to be confirmed at a subsequent meeting. Here the articles

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have never been altered by any meeting, at least no such alteration appears in the documents filed with the Registrar-General, and, therefore, the regulations of Table A stand, and any resolution passed by the Company to increase its capital requires confirmation in accordance with the provisions of the Act, if one resolution increasing the capital was valid it was never confirmed. Such a resolution would in fact be an alteration of the Memorandum of Association, and that can only be done under Sec. 7 of the statute. What the Company proposed to do by this meeting of shareholders was to increase its share capital and to distribute this share capital amongst its original shareholders as if the shares so distributed were fully paid up and the Company rely on the powers which they claim have been taken by it under the Memorandum of Association. The Memorandum of Association first states that the amount of capital is $50,000.00 divided into 5,000 shares of ten dollars each, and it then goes on to say that the capital can be distributed as fully paid up or issued at a discount both which propositions are contrary to the Act, because if the clause means anything it means that it can reduce its actual capital of $50,000.00 to any nominal sum which the Company chooses by issuing the shares as if paid up wholly or partially, it means that the additional capital, if any is raised, can be treated in a similar manner. This conflicts with Rule 279, Table A, which says that additional capital shall be subject to the same provisions as to payment of calls as if it had been the original capital. That no such power exists is pointed out in *Ooregum Gold Mining Co.* v. *Roper*, 66 L.T., 427 at p. 430. Sec. 7 defines what is meant by a company limited by shares. It is a company formed on the principle of having the liability of its members limited to the amount unpaid on its shares. Nothing but payment in full can put an end to this liability and when reference is made to Sec. 38, "liability of member in case of a company limited by shares," it is seen that no contribu-

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tion shall be required from any member exceeding the amount, if any, unpaid on the shares. Therefore, shares can neither be issued at a discount or as fully paid up without an equivalent in cash or money's worth.

The Company further contended that as the Memorandum of Association is their constitution, they can do whatever that constitution authorizes, even though it is in direct conflict with the Act. Such a view amounts to this, that the authority to establish a company of limited liability given by the Act is sufficiently complied with by registering a Memorandum of Association containing the particulars required in Sec. 8, but every other stipulation can be ignored. If the memorandum contains any powers contrary to the statute it is in my opinion inoperative to that extent, and this is the view taken in *Trevor* v. *Whithworth*, 12 App. Cas. at p. 436, when Lord Macnaghten says that if a company has taken power by its Memorandum of Association to purchase its own shares, it would necessarily be void on the ground that it would render the statutory conditions of the memorandum, requiring the capital of the company to be set out in the memorandum an empty form.

Judgment.

For these reasons I am of opinion that the creation of this additional capital, in the mode in which it was done, was *ultra vires*, but I do not think, as regards creditors and others having claims against the Company, it can be considered void as some $60,000.00 of shares have been taken up by the public, and in addition to this there may be such an estoppel by conduct as will prevent other shareholders claiming to be relieved from the liability they have incurred from being relieved.

Having dealt with the question of the attempted issue of new shares the only other question to be considered is whether the applicant is estopped by the delay which has elapsed from August, 1892, when he received the scrip, to the time of taking these proceedings and by his conduct in relation thereto. Mr. Twigg is resident in Ireland and has

only been in this Province on occasional visits, he has not been present at any meeting of the Company and has apparently taken no part in its management. He states that he was informed by Mr. Bainbridge, the Secretary, in reply to his request for information as to the right of the Company to issue fully paid up stock, and as to the liability he incurred in taking this additional stock, that there was no liability, and relying on that he returned to his home without taking any steps in the matter. I accept Mr. Twigg's statement of his interview in preference to Mr. Bainbridge's denial, as the documents in the case support Mr. Twigg's statement. The Company is at present a going concern and although it may be in financial straits it is not winding-up. In the case of *Bank of Hindustan* v. *Alison*, L.R. 6 C.P. 54 at p. 75, affirmed on appeal *ibid* 222, Willis J. says: "The defendant applied for shares without knowledge of the facts, i. e., with such ignorance of the facts as constituted an entire mistake of the subject matter of the contract;" and Kelly C.B. on the appeal says: "A party is only estopped from showing the truth where he has by some act or declaration acquiesced in an assumed state of things and by such acquiescence the situation of the other party has been altered to his prejudice." Here there was no misleading of the Company by Mr. Twigg. Both parties were under a mistake that a legal issue of new shares had taken place, and the Company appear to have acted upon their own view of the law and facts, and not upon any representation or conduct of Twigg. Twigg had no reason for concluding that the increase of capital had not been made in the proper manner, and by the meetings properly called and confirmed, and this he did not discover until immediately preceding his application to this Court. I am, therefore, of opinion that Mr. Twigg is entitled to be relieved of these shares, except as to the one hundred shares which he has sold and are not now his property, and also except as to the one hundred original shares for which

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DRAKE, J.

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Judgment.

they were exchanged, and I direct the register to be amended accordingly.

It is clear that this Company seemed to have considered that as soon as they obtained a certificate of incorporation they might safely ignore all the provisions of the Act. They have made no returns of their share list as required by Sec. 26. Their alleged increase of capital was never registered as required by Sec. 34, for which neglect both the Company and directors are liable to heavy penalties. Their attention has not been called to this serious neglect of their statutory duty by the Registrar of Joint Stock Companies. If the Registrar of Joint Stock Companies is to be merely a scribe to register whatever is laid before him and not to ascertaiin whether or not a company claiming registration has or has not by its Memorandum of Association complied with the stipulations of the Act, I think that his duties should be more clearly defined by statute. The Act is intended to protect the public dealing with limited companies as well as shareholders who invest their moneys, and the utter neglect of all statutory requirements by this Company points to the necessity of some more stringent regulations for compelling obedience to them than at present exist.

With regard to costs I give none.

Order made removing the name of the applicant from the share register of the Company in regard to the 750 new shares and restoring his name to the register in regard to the 100 fully paid up shares for which the former were substituted.

BELROSE v. THE MUNICIPALITY OF CHILLIWHACK

DRAKE, J.

DIVISIONAL COURT.

1893.

Dec. 16.

BELROSE v. CHILLIWHACK

Municipal By-Law—Municipal Act 1892, Sec. 278—By-Law not re-considered and passed within time limited—Validating Section 279—Effect of—Injunction—Whether actions in inferior Court restrained to avoid multiplicity.

By Section 278, Municipal Act, 1892, B.C. "Before any By-Law.....shall be valid or come into effect, the Council shall cause it to be published once in every week for four weeks in etc.....after which the By-Law may be re-considered by the Council; and, if re-considered and finally adopted by the Council within thirty days from the termination of the four weeks of publication aforesaid, it shall come into effect after seven days from its final adoption by the Council, unless the date of its coming into effect is otherwise postponed by such By-Law." By Sec. 279, unless quashed, "the By-Law shall, notwithstanding any want of substance or form, either in the By-Law itself or in the time or manner of passing the same, be a valid By-Law."

The By-Law in question was not re-considered and finally adopted by the Council within the thirty days above limited.

No motion to quash the By-Law within the time limited for that purpose had been made.

The action was for a declaration that the By-Law was invalid, and plaintiffs had obtained an interim injunction restraining actions against them in the County Court, to recover a rate assessed against them thereunder.

Held, per DRAKE J.: Dissolving the injunction, that the By-Law was validated by Sec. 279.

Semble, That the objection was not fatal to the By-Law.

On appeal to the Divisional Court:—

Held, per CREASE and MCCREIGHT J.J.: That the discretion of a superior Court is against assuming to restrain a number of actions in an inferior Court, merely because the question upon which they depend may be finally decided once for all in one Superior Court action.

ACTION, by plaintiffs, on behalf of themselves and all other ratepayers, under drainage By-Law, No. 18, of the Municipal Corporation of Chilliwhack, to have said By-Law declared invalid, and for an injunction forever to restrain all proceedings thereunder, and particularly to restrain certain actions in the County Court of Chilliwhack brought to recover from the several plaintiffs the amount of a rate assessed against them respectively under the By-Law.

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The By-Law was a drainage By-Law, passed under Sec. 276 of the Municipal Act, 1892, B.C., providing "In case the majority in number and value.....of the owners .....on the land to be benefitted.....petition the Council for.....draining or dyking of the land.....the Council may procure an examination to be made by an engineer.....of the locality proposed to be drained..... and if the Council is of opinion that the proposed work or portion thereof would be desirable, the Council may pass By-Laws, for providing for the proposed work, or a portion thereof, being done," etc., etc.....

No motion to quash the By-Law had been made. The rate had been assessed and struck, and, the plaintiffs refusing to pay same, the actions in question had been brought by the Municipal Corporation of Chilliwhack against each of them severally in the County Court of Chilliwhack to recover the respective amounts, which actions were pending and untried, and in them the now plaintiffs pleaded the invalidity of the By-Law.

Statement.

The main grounds of objection to the By-Law were :

1. That one, Tytler, the engineer procured under the section to make the examination of the locality proposed to be benefitted, had reported in effect that the work could only be effectually accomplished by pumping, but that the Municipal Council had referred the report back to him, instructing him to report upon the best method of accomplishing the work without pumping, which he accordingly did, the plaintiffs contending that such action was *ultra vires* of the Council. By sub-section 10 of Sec. 276, "The Council shall have like power and the provisions of this section shall apply in cases where the work can be effectually accomplished only by pumping.....but in such cases the Council shall not proceed, except upon petition of two-thirds of the owners above mentioned in this section."

2. That the By-Law was not re-considered and finally adopted within thirty days from the expiration of its fourth

weekly publication, as provided by Sec. 278 of the Act.

The facts as set out in the affidavits, upon both points, appear in the judgment.

E. A. Jenns, for the defendants, opposed a motion to continue the injunction till the hearing. He read affidavits disputing the conduct charged against the Council in regard to the report of the engineer, and showing that, although the By-Law upon its face was expressed to be passed upon a petition of a majority in number and value of the owners of the lands to be benefitted, more than two-thirds of such owners had in fact signed the petition. He contended that the provisions of Sec. 278 in regard to the time for final consideration and passing of By-Laws after publication, were directory and not imperative. *Endlich (Maxwell) on construction of Statutes*, 1888, ed. p.p. 431, 440, and that, in any event, Sec. 279 validated the By-Law, no motion to quash having been made within the time limited by the Act, and that as the validity of the By-Law was in question in the County Court actions, the discretion of the Court should be exercised by refusing to interfere.

Argument.

Robert Cassidy, for the plaintiffs *contra*: Sec. 279 only validates as against formal defects. It was contended in *Canada Atlantic R'y Co'y* v. *City of Ottawa*, 12 S.C.R. 365 at p. 367, that the provision in the Ontario Act that the By-Law shall not be taken into consideration before the expiration of one month from publication was directory and not imperative. In that case, no motion to quash had been made, and the By-Law had been in existence for nine years, yet this objection was held fatal to its validity, in an action to compel delivery of debentures issued in compliance with its provisions. Sec. 279 cannot be construed to validate a By-Law which never came into existence, and in regard to such a By-Law, no motion to quash is necessary, and the provisions for quashing By-Laws are inapplicable to such a case. The objection can be taken at any time, and Sec. 279 does not apply—See *Harrison's Muni-*

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cipal Manual, 1889, ed., pp. 220-245. The plaintiffs have a right to raise the question, though no motion to quash was made—See *Rose* v. *Tp. of W. Wawanosh*, 19 O.R. 294 ; *Pells* v. *Boswell*, 8 O.R. 680 ; *Sutherland* v. *Nissouri*, 10 U.C.Q.B. 626. There is a dispute as to the conduct of the Council in regard to Tytler's report, which should be allowed to go to trial. This court has jurisdiction to restrain the County Court actions—See *Kerr on injunctions*, 2nd ed. p. 577. The question is one which can only be completely and satisfactorily determined in a Court which has power to declare the By-Law invalid for all purposes, and to restrain all further proceedings of any kind under it, including all present and future actions in the County Courts to recover the rate. Decisions in each of the County Court actions would be necessarily inconclusive. If the decisions in the County Court are adverse to the By-Law, proceedings in this Court must ultimately be taken.

Argument.

DRAKE, J.: An interim injunction was granted on the 29th day of November, restraining the defendants from proceeding with certain actions in the County Court to recover from the plaintiffs the amount claimed to be due from them under By-Law No. 18 being a drainage By-Law. The plaintiff alleged in his affidavit that neither he nor his co-plaintiff ever petitioned for or assented to the By-Law, and there was no sufficient petition ; that the engineer had reported to the Council of the Municipality that the only effectual way of accomplishing the drainage works was by pumping, and that report had been approved ; that the By-Law, although published as required by statute in December, 1891, and January, 1892, was not confirmed within thirty days, as the final passage of the By-Law did not take place until 4th June, 1892. The interim injunction was limited to the 8th day of December, with leave given to the plaintiffs to move on that day to continue it. The plaintiffs accordingly moved on that day to continue

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the injunction, and Mr. Jenns appeared on behalf of the Corporation to oppose. He read an affidavit of Thomas E. Kitchen, who was Reeve during the time the By-Law was passed. He there states that two of the plaintiffs, Alexander Matthewson and H. Ramsay, signed the petition for the By-Law; he also shews that the petition in favour of the By-Law was signed by 39 out of a total of 59 persons whose land would be benefitted by the proposed works. The assessed value of the signers was $88,900, and of the non-signers $26,550. The plaintiffs state that on 9th April, 1892, a petition was presented against the final passage of the By-Law, but Mr. Kitchen says that out of the 24 names attached to that petition, eight signed the petition for the By-Law. Under Section 276, sub-sec. 17, no person can withdraw from a petition presented for a By-Law such as this, unless he does so before the time limited for appealing to the Court of Revision against the proposed assessment, and the Court of Revision has by sub-sec. 12 to be held not earlier than 20 and not later than 30 days from the day on which the By-Law was first published—which was in December, 1891—and no such appeal was made. The plaintiffs never gave any notice to quash the By-Law, under Sec. 278. The plaintiffs further contend that the defendants had suppressed the report of the engineer, which advocated pumping as the only effective way of draining. As regards this charge, it is clear that the engineer reported three alternative schemes, and one of these was adopted; but it was not a pumping scheme. The other and chief contention was that it was necessary to finally adopt the By-Law, within 30 days of its last publication under Sec. 278. I do not consider that the language used in that section renders it absolutely compulsory on the Council to re-consider within 30 days or that the By-Law would be held void if such final passage were delayed beyond that period; but without deciding this point, Sec. 279 comes to the assistance of the Council. It is there enacted that a By-Law shall, not-

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withstanding any want of substance or form, either in the By-Law itself or in the time or manner of passing the same, be a valid By-Law. As I consider that the facts which were stated and which induced me to grant the interim injunction have been fully met and answered, I refuse the motion to continue the injunction, and I abstain to express any opinion on the merits, in order not to prejudice the parties in any future proceedings.

The costs of this motion and of the interim injunction to be the defendants' costs in the cause.

Motion dismissed.

The plaintiff appealed to the Divisional Court, and the appeal was argued before CREASE and MCCREIGHT, J.J., on the 16th day of December, 1893.

Robert Cassidy, for the appeal.

E. A. Jenns, contra.

Per Curiam. The Court should not, unless under very special circumstances, exercise its discretion to interfere by injunction and draw within its jurisdiction matters in issue in an inferior Court. We will not, therefore, consider the question of the invalidity of the By-Laws.

Appeal dismissed with costs.

IN THE VICE-ADMIRALTY COURT.

CREASE, L.J.A.

1894.

Jan. 9.

RE "AINOKA."

RE AINOKA

The Seal Fishery (Behring Sea) Act, 1891—Ship found within prohibited waters with skins on board—Vis major—Lawful excuse.

A sealing schooner, equipped for sealing and with skins on board, was driven into the prohibited waters of the Behring Sea by stress of weather. A current, of which the master was ignorant, had falsified his reckoning, so that he was unaware of his position. The schooner was seized by a Russian war ship for infraction of the Act.

Upon action by the Crown to condemn the schooner:—

Held, That the presence of the schooner at the point in question was sufficiently accounted for to rebut the Statutory presumption that she had infringed the Act.

ACTION for condemnation of the sealing schooner Ainoka, her equipment and everything on board of her under the Imperial British Seal Fishery (North Pacific) Act, 1893, and the order-in-council thereunder of July 4th, 1893, for infraction of the Act.

Statement.

The facts sufficiently appear in the judgment of the Court.

C. E. Pooley, Q.C., for the Crown.

H. D. Helmcken, contra.

CREASE, J.: I find that the ship was driven into the prohibited zone by a succession of gales and a current, of the existence of which the master of the ship was ignorant, setting him on unconsciously for four days previous to his seizure at the Copper Islands. It was proved that on the 17th of July he took observations by sextant, his position then being defined as Lat. 54-90 N., Long. 165-14 E., or about 60 miles from Behring Island and about 90 miles from Copper Island, well outside the limits of the prohibited waters. On the 18th, by dead reckoning, his position was

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stated at 100 miles; on the 19th, at 79 miles; on the 20th, at 76 miles; and, on the 21st, (western time), at 74 miles; all by dead reckoning, when in fact it was proved that he was only 16 miles from Copper Island. Between the 17th and 22nd, the weather was so thick that he could not possibly take any observations, except by dead reckoning, in which he afterwards found he was very much thrown out by a strong current from his position on the 17th to the southeastern end of Copper Island, close to which it ran at a rate of about two miles an hour. The reading of the ship's log showed that by not taking proper count of this current, which was unknown to the master and mate until informed of it by the Russian officers, the schooner was misled in calculating her positions on those five days, and rendered it probable that on the latter part of the 19th, she was then within the prohibited zone, when she thought herself well out of it; and, although she was liable to forfeiture, unless

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her presence there was accounted for, either by the act of God, stress of weather or other circumstances beyond the control of the master, and without his knowledge, yet in this instance, the evidence showed that the vessel was there through stress of weather, influenced by the current referred to, and the captain being unable, owing to the fog, to take observations. This rebuts the statutory presumption of law against the master, arising by reason of his being found within the prohibited belt, "manned, armed and equipped for killing and taking or attempting to kill or take seal." I find that the master acted throughout in good faith, and, though a poor scribe, has not varied in the substantial purport of his statements from first to last. His evidence was confirmed on various points open to question by that of Captain Clarence Cox, Captain Bissett, the mate and others, white members of the crew of the Ainoka. The appearance of the schooner at a point sixteen miles southwest of Copper Island was thus fully explained, and the presumption against the captain of the ship, under the circum-

stances, was discharged. It was shown that only forty-six skins were on board the ship, although the Russian searching officers, who had not even counted them, returned sixty-eight. Every one of those forty-six was taken on the 12th, 13th, 14th, 15th and 16th, a long way out of the limit; they were cleaned, dried and salted, and were evidently old. It was proved beyond a doubt that, owing principally to the badness of the weather, not a single skin had been taken in the prohibited waters. This difference was duly cleared up by Captain Heater to the satisfaction of the Court. It was proved and also confirmed by Captain Bissett, who was in the neighbourhood at the time (some six or eight miles off), that at 3 o'clock on the afternoon of the 21st, the fog lifted a little, and enabled Captain Heater to see the loom of the land—no doubt Copper Island. Thereupon he immediately wore ship, clapped on all sail and headed for the southwest, the direction in which, with the wind about S.S.E., he could get quickest out of the forbidden waters. In this, unfortunately for him, he was delayed by the lightness of the wind and the heavy sea rolling on the island. After seven hours of this, he was overhauled by the Russian gunboat, his papers seized and himself with his ship ordered to Yokohama to report to the British consul there, a certificate being given him to account for the absence of his papers. He proceeded to obey this order, but was compelled by the Indians on board to change his course for Victoria. The protocol showed that there were 15 Indians on the vessel to four white men, and it would therefore be dangerous for the master to attempt to take them against their will to Yokohama. The Court was satisfied by this explanation, that the Captain was fully justified in landing the Indians at Hesquiot, and then coming on to Victoria where there was a Court that had jurisdiction to adjudicate upon the questions. The captain and mate and, indeed, all the men on board the schooner speak in friendly terms of the frank and courteous treatment received from the Russian officers,

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who expressed themselves satisfied with the reasons of their being within the limits, and but for the official log of the schooner not containing her positions on the days mentioned, and possibly some specific orders from her admiralty, would have let the vessel go free. They refused to recognize the mate's log as of any authority, although Captain Heater explained that they were not compelled by British law to make these daily entries in the official log. The question was raised, through the language of the protocol, which stated that the Yakout came upon the schooner when the latter was on a southwest course, with all sail set, trying to get out of the prohibited belt, and carrying no lights. This was corrected by the master and mate, who explained the position and exhibition of the lights in their proper places, which might have been seen by the steamer when she got ahead of the schooner and crossed her bows. All points, therefore, having been fairly and fully explained, and the involuntary presence of the vessel accounted for to the satisfaction of the Court, I therefore pronounce judgment in favour of the schooner, each party to pay his own costs.

Judgment for defendant.

BANK OF MONTREAL v. BAINBRIDGE & CO.

WALKEM, J.

1894.

June 26.

BANK OF MONTREAL v. BAINBRIDGE

Practice—Order XIV—Special Endorsement—Promissory Note—Interest.

The plaintiffs' claim, endorsed on the writ, was upon a promissory note expressed to be payable "with interest at 9 per cent. per annum until paid." It claimed the amount of the note and interest at 7 per cent. from the date of the note to the date of the writ (in view of Sec. 80 of the Bank Act, 1890, Stat. Can. Cap. 31, limiting the interest recoverable by certain banks to 7 per cent.)

Held, upon summons for judgment under Order XIV:—

That the claim for interest at 7 per cent. after the maturity of the note was for unliquidated damages.

SUMMONS for judgment under Order XIV. The plaintiffs' claim as endorsed on the writ of summons was as follows:— Statement.

Statement of Claim: The plaintiffs' claim is against the defendants as makers of a certain unpaid promissory note in favour of the plaintiffs.

Particulars: Promissory note for $1,309, dated at Victoria, B.C., 22nd March, 1894, made by the defendants payable on demand at the Bank of Montreal at Victoria to the order of the plaintiffs, with interest at nine per cent. per annum until paid. The said note was duly presented for payment at said Bank and was dishonoured.

Principal	$1,309 00
Interest from 22nd March, 1894, to date at 7 per cent. per annum	14 31
Amount due to date	$1,323 31

C. J. Prior, (Eberts & Taylor) showed cause to the summons. The claim for interest at 7 per cent. after maturity of the note is an unliquidated demand for damages by way of interest over the rate fixed by law. "Interest at 9 per cent. until paid" means until the time fixed for payment, that is until the maturity of the note *St. John* v. *Rykert*, 10 S.C.R. 278; *Peoples' Loan & Deposit Co.* v. *Grant*, 18 S.C.R. 262; *In re European Central Railway Co.* 4 Ch. D. 33; *Freehold* Argument.

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BANK OF MONTREAL v. BAINBRIDGE

Loan, etc. Co. v. *McLean*, 8 Man. L.R. 116. After maturity, the plaintiff is entitled to recover 6 per cent. interest as a liquidated demand under Sec. 67 of the Bills of Exchange Act Can. Stat. 1890. The additional one per cent. claimed makes the whole an unliquidated demand.

A. Crease, (Bodwell & Irving): *St. John* v. *Rykert* is not precisely in point. The judgment of Strong, J., in the case referred to, as to the note was *obiter dictum*, for the plaintiffs' claim was on the mortgage which had been given as collateral to the note upon which a judgment had been obtained.

Judgment.

WALKEM, J.; I must follow the decision of the Supreme Court of Canada in *St. John* v. *Rykert*, 10 S.C.R. 279 and *Peoples' Loan & Deposit Co.* v, *Grant*, 18 S.C.R. 262. The claim of 7 per cent. interest upon the note after maturity is not a liquidated but an unliquidated demand.

Summons dismissed with costs.

DRAKE, J.

[In Chambers.]

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Jan. 26.

JENSEN v. SHEPPARD

JENSEN v. SHEPPARD.

Arrest—Ca. Sa.—Maintenance money—Discharge of prisoner for non-payment of—Rules 976 and 977.

The language of Rule 977 is imperative, and if the maintenance money of a judgment debtor imprisoned on a *ca. sa.* is not paid by the judgment creditor as therein provided, he is entitled to his discharge as of right.

APPLICATION by summons under Rule 977 for the release of the defendant from custody under a writ of *ca. sa.*. The affidavit of James Eliphalet McMillan was read in support of the summons. It set out: (1) That the deponent is sheriff for the county of Victoria, and that the defendant was arrested by his deputy on the 2nd day of January, 1894, on a writ of *ca. re.* and, on the 4th day of January, on a writ of *ca. sa.*, and (2) On the 3rd day of January, the

plaintiff's solicitor paid him $3.50; and, on the 10th day of January, a further sum of $3.50 for the defendant's maintenance; (3) That since the 10th day of January (the affidavit was sworn on the 22nd day of January), he had not received any further sums for the defendant's maintenance, and that there was still due since the 17th day of January the sum of $3.50; (4) That the defendant was still in custody in the Provincial gaol in and for the county of Victoria, under the said writ of *ca. sa.*

J. S. Yates, for the defendant, moved the summons absolute: The language of Rule 977 is imperative; and as it has not been complied with, the defendant should be discharged. In *Fisher* v. *Bull*, 5 T. R., 36, it was held that an insolvent debtor has a right to his discharge, if his groats be not paid before ten at night of the day on which they were payable: and that this right was not waived by the turnkey on the felon's side accepting them after that time.

J. A. Aikman, for the plaintiff, shewed cause: I submit that as the maintenance up to the 31st January was paid on the 23rd of January the defect is cured, and there is nothing now due and owing.

Judgment.

DRAKE, J. In this case the plaintiff is held in custody under a writ of *ca. sa.* The plaintiff paid the weekly allowance to the Sheriff up to the 17th day of January; the next weekly allowance was due on the 17th; this was not paid until the 23rd. The defendant applied to be discharged on the ground of nonpayment of the weekly allowance due on the 17th day of January. The summons was dismissed, as it had not been served on the plaintiff, as required by the Rules. On the day of the dismissal of this summons, the plaintiff paid to the Sheriff the allowance up to the 31st January. On the 25th, the defendant again applied for his discharge, on the ground of the omission to pay on the 17th, claiming that no subsequent payment could cure the omission of payment in accordance with the terms of Rule

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976. The language of Rule 977 is precise :—"In case the maintenance money is not paid as aforesaid, the defendant shall be entitled to be discharged." The money, by the previous Rule, is required to be paid in advance, $3.50 a week. Not being so paid, I think the defendant is entitled to his discharge.

Defendant discharged.

CREASE,
L.J.A.
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DUNSMUIR
v.
HAROLD

IN THE VICE-ADMIRALTY COURT.

DUNSMUIR v. THE OWNERS OF THE SHIP "HAROLD."

Maritime law—Towage contract—Concealment of circumstances affecting—Extraordinary towage or salvage.

The concealment by the owners of a ship, through the officer in charge, of the fact that the ship is in a leaky and dangerous condition, avoids a contract to tow her to port for a specified sum, made with him by the captain of a tug, in ignorance of her true condition.

Where towage services cannot, on the facts, be said to have saved the ship from being lost, but were of extraordinary service, owing to her condition, and involved more than ordinary trouble and risk, they should be allowed for, not as salvage but as extraordinary towage services.

Statement.

ACTION by the owners of the tug "Lorne" against the owners of the ship "Harold," for $5,000, for salvage services rendered by the tug Lorne, in towing the ship from the vicinity of Race Rocks, a dangerous reef in the Straits of Fuca, about five miles from Esquimalt, into Esquimalt Harbour.

The facts, as they appeared from the evidence, shortly, were :—On the morning of the 16th November, 1894, the steel ship Harold ran ashore at Race Rocks, sustaining injuries which caused the leakage of a considerable amount of water. She got afloat after some hours without assist-

ance, and shortly afterwards the tug came alongside. The captain of the tug hailed the ship and asked if she had been ashore, to which the answer was "Yes;" and to a further question, whether there was any damage, the answer was, "Do not know." He looked around the decks and saw no water from the pumps. The hatches were all on as far as he could see, and he consequently thought the ship was all right. It appeared in evidence that there was at that time eighteen inches of water in the hold amidships, and six inches over the ceiling in the fore hatch, of which the first mate, with whom the contract was made, was fully aware. The captain of the tug in a conversation, which is set out in the Judgment, then agreed to tow the ship into Esquimalt Harbour for $50 and a promise of inside towage. On arriving at Esquimalt Harbour the captain of the tug went on board the ship and found that she had made a great deal of water and had a list of 32 degrees, and it became nccessary to put her in dry-dock at once. She had 3 feet 6 inches in the forehold and 22 inches in the main pump. The survey of a Lloyd's surveyor made after she was docked, as to the extent of the injuries received by the ship, showed that a number of her plates had been injured, and that one plate in particular on the starboard side about abreast of the forepart of the main hatch had a punctured hole in it and was split for a distance of seven or eight inches.

Statement.

C. E. Pooley, Q. C., and *A. P. Luxton*, for the plaintiffs.
E. V. Bodwell and *P. Æ. Irving* for the defendants.

The learned Judge, after an exhaustive review of the evidence, which was conflicting, and having in the result found the above facts as proved to his satisfaction, proceeded:

CREASE, J.: Having thus reviewed, as far as the space of a judgment will allow, the leading evidence in the case, the whole of which I have gone over with the greatest care and used in forming my opinion, there only remains to draw

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from it the deductions which the law, as fairly though not completely laid down by the learned counsel for the ship, directs, and to ascertain the conclusions of the Court on the following points :—

1. Was the $50 contract a complete one and binding one on the Tug as an ordinary towage contract ?

2. Was the service rendered by the Tug purely salvage service, or not ?

3. Was the ship in danger of loss if left to her own resources ?

4. If not, what was the service rendered, and was it beyond an ordinary towage service ; and if so, what was it's value ?

In the first point, I do not think there can be any reasonable doubt, for I find that it was made by the first mate, who represented himself as the captain at the time, and allowed himself to be called and treated in all respects as the captain of the ship, and in all respects conducted himself as the captain until when so addressed in Esquimalt Harbour he was obliged to undeceive Captain Locke, the master of the tug, who was not until then aware who the captain of the ship really was. The mate did not declare the authority which he says he had from the real captain, or the fact of his existence, and he purposely concealed a most material fact from the master of the tug, that he had in the main hold at that very time eighteen inches of water in the well, and six inches over the ceiling forward. As a jury, I have no doubt that the statement of the master of the Lorne on that point was substantially correct, and I have little doubt that had Captain Locke known that fact he would never have agreed to tow the ship to Esquimalt for $50. That was the suppression of an important fact, that of the imminently dangerous condition of the ship, which, I think, according to *Akerblom* v. *Price*, 7 Q.B.D., 129, materially affected the contract entered into with the tug. Now Dr. Lushington, in his judgment in

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the *Kingalock case*, 1 Spinks, Ecc. & Ad. p. 263, lays down a rule which may be well applied here. He says :— "An agreement to bind two parties must be made with a full knowledge of all the facts necessary to be known by both parties ; and if any fact, which, if known, could have any operation on the agreement, is kept back or not disclosed to either of the contracting parties, that would vitiate the agreement itself. It is not necessary, in order to vitiate an agreement, that there should be moral fraud ; it is not necessary, in order to make it not binding, that one of the parties should keep back any fact or circumstance of importance. If there should be misapprehension, accidentally or by carelessness, we all know that there may be what, in the eye of the law, is termed equitable fraud."

I am, therefore, clearly of opinion, and find, that the contract was not a binding one, and it must be treated as null and void.

The second question, whether the service rendered to the "Harold" was a purely salvage one, must, I find, be answered in the negative. In the first place, the "Lorne" ran no risk or danger in assisting the ship, and he can base no claim for salvage or extra reward on that score.

Judgment.

Now, I will suppose, for it is necessary to do so, that the ship had not taken the tug but had trusted only to her own sails and seamanship. If it had been found that there was any probability of the ship being again placed in a position of danger by the ebb tide, she could have anchored anywhere, although the chart shews forty fathoms thereabouts, and the tide runs strong. It is proved beyond a peradventure, that all her tackle, cables, anchor, and every other part of her equipment were in perfect order, and the crew well in hand and presumably willing. She was, when taken in tow, in a position of safety, with a prospect of fine weather, and a hope of a breeze The crew, when the alarm and confusion occasioned by getting on the rock was over, was well under the command of the first and second mates.

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Under these circumstances, no one in charge of the "Harold" would have been justified in employing a tug at a purely salvage rate of payment.

On the 3rd point—Was the ship then in danger of loss, (that is, of being lost) if left to her own resources by the tug? Of course, at sea, as most unexpectedly befel the "Harold" in this very case, it is frequently the unexpected which does happen. But in answering this question I am obliged to answer it according to the reasonable probabilities, as they appeared from the evidence to exist at the time. I do not think that the services of the "Lorne" saved the "Harold" from loss. From the nature and position of the leak, it could have been to some extent choked, after ascertaining its position, with a sail or mat, in case she was making water too quickly for their pumps, if there had been no tug to assist her.

And this brings me to the last point: What was the service rendered, and what should be its remuneration? I need not say how deeply I am indebted to the valuable assistance of the assessors, who have throughout furnished me with the results of their nautical experience; and the practical suggestions they have so cheerfully afforded throughout, in a somewhat difficult case on nautical points, whenever the occasion required. In estimating the services actually rendered by the tug, and in weighing the varying evidence taken on the point, it is impossible to forget the position of the ship, and the injury and damage which actual experience proved she had received. These remained the same whether she was towed in by the tug or came on under sail. All the observations I have made in considering previous special points, have assumed, as it was a calm day, every reasonable condition which could be thought in favour of the ship, and I have the advantage of being fairly able to do so after the event. But at the time of taking her in tow, which I have adopted exclusively in a salvage case as the proper legal point of departure for my consider-

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ation, it is impossible, in dealing with so unstable an element as the sea, and particularly at this stormy season of the year, not to be conscious that great and pressing danger to the ship might at any moment have arisen, when the men would either have been obliged to neglect the sails to work the pumps, or neglect the pumps, as they did when they slipped off the rock, to work the yards. As I have already stated, the ship at the time of taking the tug was not in actual danger; and, although she did subsequently appear in danger, it was not immediate, nor was it such that the crew, provided they had their hands free to do so, could not have somewhat reduced, even if they could not keep it under. The ship, however, was not in a seaworthy state, after having been on the rocks, from the damage to her bottom, although this was not apparent at the time.

It is true that under the circumstances of wind, weather, tide and the like, under which the services of the "Lorne" were rendered, she could not be said to have saved the "Harold" from being lost, yet the fact still remains that the services of the "Lorne," rendered when they were, removed any possibility or probability of loss, and from the fact that a calm was apparently setting in, were of considerable value to the "Harold," in bringing her at once to a place absolutely safe, whatever might occur, and which she could not have gained in a reasonable time without risk, on her own resources. This, in my opinion as a jury constituted a service of more than ordinary towage. The decision of the Court of Appeal in *Akerblom* v. *Price*, 7 Q.B.D., 129, at p. 132, is a good guide in arriving at a correct conclusion here, for that applies to a case where those who represented the ship in making the towage contract, did not disclose to the other party material facts affecting the danger of the ship, or the danger or difficulty of the required service, in view of which it would be, in the language of the same judgment, "manifestly unreason-

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able and unjust" to expect the performance of the service to be undertaken for remuneration at a mere towage rate.

And that is certainly the case here. I have found that the towage contract in this case was void from misrepresentation, and the concealment of a material fact affecting the danger of the ship, the concealment of the true quantity of water then in the ship, and consequently of the extent of the injury and damage so far as then known which the ship must necessarily have sustained, and there being no contract for that towage, I am of opinion that a fair and moderate remuneration for an extraordinary towage, adapted to the facts of the case, as proved in evidence, should be paid to the tug for the service rendered. The circumstances of no two of the various cases reported, which I have examined, exactly agree. It is therefore the duty of the Court, acting upon the principles laid down, most nearly suited to the circumstances, and the benefit rendered in the particular case, to apportion the sum allowed to the particular ship as, in justice and good conscience, is just and equitable.

Judgment.

After much and careful consideration, and having regard to the rates in common use, and the unusual circumstances of the case before me for decision, I have fixed upon the sum of $250 as the amount of the remuneration to be paid to the "Lorne" for the whole of her services to the "Harold" (inclusive of all towage) on the present occasion, and as the difficulty and consequent expenses arose entirely by the default of one of the officers of the "Harold," the ship should also pay the costs of the action.

I pronounce, therefore, and adjudge that the "Harold" do pay to the plaintiffs $250 and costs to be taxed.

It is a satisfaction to be able to add that the nautical assessors who have sat with me and given so much attention to the case, concur in the judgment now rendered.

Judgment for plaintiffs for $250, for extraordinary towage, and costs.

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Master and servant—Wrongful dismissal—Contract of hiring—Construction of—Corporation—Evidence—Trial—Divisional Court—Jurisdiction.

A contract by defendants to employ plaintiff as brewmaster in its lager beer brewery in Victoria for three years, and during that period pay him as such brewmaster a salary of $250.00 a month, at the end of each month, is broken by the Company incapacitating itself from continuing the plaintiff in that employment, and is not satisfied by a readiness to pay the salary at the end of each month.

Statements made by the officers of the Company to the plaintiff, indicating to him that he was dismissed from the service, are admissible in evidence upon the issue raised by a denial of the dismissal, without proof that the Company authorized same, or by resolution authorized a dismissal of the plaintiff.

Observations by BEGBIE, C.J., on the propriety of obtaining a finding as to damages before entry of non-suit to avoid a new trial should the non-suit be reversed on appeal.

Observations of MCCREIGHT, J. on the relevancy of evidence.

MOTION to set aside non-suit and for a new trial. The action was for wrongful dismissal and breach by the defendant Company of a contract in writing under its corporate seal as follows: "The said Phœnix Brewery Company agrees to employ said Gustave Varrelmann as brewmaster in its lager beer brewery at Victoria for a period of three years, beginning on the 1st day of March, 1892, and during said period to pay said Gustave Varrelmann, as such brewmaster, a salary of $250.00 a month at the end of each month." The defence denied the dismissal.

Statement.

The case was tried before WALKEM, J. and a special jury. The plaintiff proved at the trial that the president of the Company wrote him a letter informing him that the Company had amalgamated with another Brewing Company in Victoria, and that the secretary of the defendant Company and the president of the other Company had been appointed joint managers of the amalgamated concern, and

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asking the plaintiff to attend a meeting next day in regard to the matter, which the plaintiff attended accordingly. The learned judge refused to admit evidence of what the president and secretary of the Company said to the plaintiff at the meeting, on the ground that it was necessary to prove express authorization from the Company to them to say and do what they did in order to make it evidence against the Company, and that if it were sought to use what they said and did as evidence of a dismissal of the plaintiff that authority from the Company to them to dismiss the plaintiff ought to have been proved. Part of the evidence was afterwards admitted, subject to the objection. It was proved that the president and secretary demanded from the plaintiff the keys which he held as brewmaster; that he gave up the keys under protest, the president stating that a proper settlement would be made with him; that the brewery was dismantled and abandoned and the stock removed to the other brewery, where the amalgamated business was carried on under its brewmaster. One of the directors of the defendant Company endeavoured to obtain other employment for the plaintiff. The secretary of the Company, being first thereto authorized at an informal meeting of the directors, on its behalf made an unconditional offer of $1,000.00 to the plaintiff in settlement of his claim for wrongful dismissal.

Statement.

The learned judge held that there was no evidence of dismissal of the plaintiff by the defendants to go to the jury, and non-suited the plaintiff, refusing to leave the question of the amount of damages to the jury so as to avoid a new trial on that question should the non-suit be set aside on appeal.

The plaintiff moved the Divisional Court to set aside the non-suit and for a new trial, and the motion was argued on January 29th, 1894, before BEGBIE, C.J., and MCCREIGHT and DRAKE, J.J.

Argument.

E. V. Bodwell, for the defendants, took the preliminary

objection that a Divisional Court has no jurisdiction to entertain a motion to set aside a non-suit as that is an appeal from a final judgment.

Per curiam : The Divisional Court has jurisdiction to entertain motions for new trials besides its jurisdiction upon appeals from interlocutory orders.

Objection over-ruled.

Robert Cassidy, for the motion : The contract expressly provides without qualification for the continuance of the plaintiff in the employment stated. The fact that the defendants by their own act put an end to their ability to carry out their contract was conclusive evidence of breach : *Hochester* v. *De La Tour,* 2 E. & B., 678. A voluntary parting with the business is a breach of a contract to continue a servant in the employment : *Stirling* v. *Maitland,* 5 B. & S., 840 ; *Cook* v. *Sherwood,* 3 F. & F.. 729 ; *McIntyre* v. *Belcher,* 14 C.B.N.S., 654 ; *Marshall* v. *McRae,* 16 O.R., 495 ; 17 O.A.R., 139. The question as to whether the business is continued or not is a question of fact for the jury : *Collett* v. *Smith,* 143 Mass., 473 ; *Thompson on Trials,* 1112. The unconditional offer of $1,000, in settlement, was in itself evidence of breach which could not be withdrawn from the jury : *Wallace* v. *Small,* M. & M., 446 ; *Nicholson* v. *Smith,* 3 Stark, 128. The evidence objected to was admissible : *Lash* v. *Meriden Britannia Co.,* 8 O. A. R., 680. In that case the language of the officer of the Company relied on, and sustained, as a dismissal was much more equivocal, and it was not contended at any stage that it was not admissible. If there was no evidence of authorization by the Company, there was abundant evidence of ratification of what was done by its officers.

Argument.

E. V. Bodwell, contra : The obligation of the Company under the contract, was nothing more than to pay the stipulated wages at all events. There was no breach in not

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furnishing the work for which the payment was the expressed consideration or continuing the servant in the capacity referred to in the agreement, so long as they did not refuse to pay the wages—see cases collected in *Smith's Master and Servant*, 4th ed., p. 98. There is no implied obligation on the part of the master to find work so as to enable the servant to earn wages. To raise the presumption there must be express language in the contract. *Per* LUSH, J.: *Churchward* v. *The Queen*, L.R., 1 Q.B. at pp. 195, 211. *Per* KINDERSLEY, V.C., *Midland Ry. Co.* v. *L. & N.W. Ry. Co.*, 35 L. J. Ch. 831; see also *Aspden* v. *Austin*, 5 Q.B., 671; *Dunn* v. *Sayles*, 5 Q.B., 685. In no case does the obligation to keep retained and employed necessarily import an obligation on the part of the master to supply work. *Per* CROMPON, J. in *Emmons* v. *Elderton*, 4 H. of L. cas., at p. 643. It is not now contended that the evidence in question should have been rejected.

Argument.

BEGBIE, C.J.: This is an action in which the plaintiff claims $6,000, for breach of a contract, in writing, made between himself and the defendants, in which, by clause 1, it is agreed: "The said Phœnix Brewery Company agrees to employ the said Gustave Varrelman as brewmaster in its lager beer brewery at Victoria, for a period of three years beginning on the first day of March, 1892, and, during said period, to pay said Gustave Varrelman, as such brewmaster, a salary of two hnndred and fifty dollars a month, at the end of each month." Mr. *Bodwell's* contention is, that this clause should be construed as if the agreement to employ the plaintiff as brewmaster in the defendant's lager beer brewery at Victoria, and the agreement to pay him a salary of two hundred and fifty dollars a month, were alternative provisions; in other words, that the word "and" should be read "or." In addition to the word "and" being used, the words "as such brewmaster," qualifying the provision for payment of the salary, contradict the contention. I put it to Mr. *Bodwell*, and I fail to

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see what language could have been used more completely to express a contract on the part of defendants to keep the plaintiff in that specific employment for the period mentioned.

What took place was this: After the end of the first year, the Company amalgamated with the Victoria Brewery Company, an arrangement I dare say very convenient to the interests of both companies. The joint business could manifestly be carried on more cheaply than the two separately. One brewmaster was sufficient, and it was decided that the one to go was Mr. Varrelmann, to whom it is accordingly intimated, constructively if not in terms, that his services are not required any longer. The keys which he holds as brewmaster are demanded from him. The brewery stock is carried away; the plant in the brewery is pulled to pieces; and yet we are told that there is no evidence of his dismissal. It is difficult to imagine what evidence could be stronger, but at all events it is quite clear that there was evidence to go to the jury.

The defendants object, that because there was an agreement to pay him $250 a month at the end of each month, that he should at the end of each month have gone and asked for his wages, and since he did not do so he cannot recover anything. That is a fallacy, and a wrong view of the case. A servant who has been discharged has no right to go, month by month, and ask for his wages, for such a demand could only be made on the basis that he was not discharged. I cannot understand such a defence as that. I think that it was very unfortunate that the learned Judge at the trial did not adopt the suggestion of the learned Attorney-General and leave it to the jury to find the amount of damages, as such a course, in the view which we take, would have avoided the necessity of a new trial. The motion for a new trial must be granted. If the parties can arrive at an agreement on the question of damages, or to leave the question of damages to the Court, a new trial will

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be unnecessary. In order to give counsel opportunity to meet on this suggestion, the order for a new trial will not be drawn up for forty-eight hours. The question of costs of the motion can be discussed when the matter is again spoken to.

McCREIGHT, J.: I have little to add to what has fallen from the learned Chief Justice. There are two distinct covenants: first, to employ the plaintiff as brewmaster in the defendants' lager beer brewery at Victoria for a period of three years; and secondly, during such period, to pay the plaintiff, as such brewmaster, a salary of $250 a month, at the end of each month. It was observed by Mr. Justice MAULE, in an old case, that a man might, by apt words, covenant with another that it would rain on such a day. If it did not rain, whereby the other suffered loss, it would be no defence to an action for the covenantor to say that he was the victim of circumstances and could not make it rain. The defendants here could not be compelled to carry on their brewery merely for the sake of continuing the plaintiff as their brewmaster. The effect of the covenant is, that they will either do so or pay him damages for the loss which he has suffered by their not doing so.

Judgment.

On the trial of an action, every piece of evidence which is offered should not be viewed as if it were necessary that it should be complete in itself, if it is, as a fact, in itself in direct relation to the issues. Sir James Stephen, in his work on evidence, has an observation in substance to the effect, that, on the question of relevancy, any fact or piece of evidence more consistent with the truth of the allegation of the party advancing it, on the issues, than that of the other, is evidence. At least, he says the word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one or the other, taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other,

then such evidence seems to be relevant and admissible, subject of course to the technical rules requiring the best evidence to be procured or to be given, etc. Even in regard to hearsay evidence, the rule is applied in modern times with more discrimination than formerly. "The important point to remember about them (*i. e.*, words spoken) is, that bare assertion is not generally regarded as relevant to the truth of the matter asserted"—*Stephen's Evidence*, 4th ed., pp. 153, 154.

The objection that authority from the Company to Sayward and Gowen, the president and secretary, to do and say as they did, was not proved, seem to me to be unsustainable. They were Directors. There is a remark in *Clerk & Lindsell on Torts*, pp. 81, 84, which I may quote as pertinent to the subject: "The trial of an action is a long, inductive process. The ultimate premises are the various statements made by the witnesses. From these statements it is inferred that a certain condition of things existed, that certain things were said and done on the one side or the other, and so the case advances through a series of converging inferences until the final inference is drawn, that there shall be a verdict for the defendant or the plaintiff, as the case might be." Of course the statements of the witnesses must be relevant, according to the tests put by *Stephen*. It has been well said that two persons and some solemnities are required to make a contract, but a contract can be broken by one without any solemnities whatever.

There was some suggestion that a corporation could not be fixed with a breach of contract, unless it was the result of some act of the corporation in solemn form, as by resolution of the Company or its directors, and that the best, and indeed only evidence, was the proof of such a resolution. There is no foundation for such a contention. Furthermore, there are the great principles of ratification on the one hand or repudiation on the other, in regard to acts done by

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ostensible agents, where the contention of the party sought to be charged is that the acts were unauthorized by him. This Company were certainly aware of the effect of what had taken place and of the view of it taken by the plaintiff. If they did not wish to adopt what had occurred, as a dismissal of the plaintiff, why did they not repudiate such a construction. They might have told him that there was no intention on their part to dismiss him, and asked him to come back to resume his duties. In this case, of course, they were not in a position to make such an offer. Their conduct throughout was a ratification and adoption of what Sayward had done. Then there is the offer of $1,000.00 to the plaintiff, not as wages but as compensation. There must be a new trial.

Judgment.

DRAKE, J., concurred.

New trial granted. Costs of this motion to be plaintiff's costs in any event. Costs of the former and of the new trial to abide the event of the new trial.

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Practice—Divisional Court—Extending time for appeal—Ex parte order—Irregularity.

An order extending the time for appealing to the Divisional Court is irregular if made *ex parte*.

The Divisional Court has jurisdiction, and, in a proper case, ought to cure irregularities or want of time in the bringing of an appeal, by making an order at the hearing of the appeal extending the time for appealing and thereupon proceeding to hear same—following *re Manchester Economic Building Society*, 24 Ch. D. 488.

APPEAL by defendants from an *ex parte* order made by WALKEM, J., on 3rd August extending the time for the plaintiff to move the Divisional Court for a new trial, until the 10th October, upon the ground that there was no jurisdiction to make the extending order *ex parte*. Statement.

The action was tried on 31st July, 1893, when the plaintiff was non-suited. Vacation commenced August 1st and ended September 30th. On 8th August, defendants served notice of appeal to the Divisional Court from the *ex parte* order. The plaintiff thereupon, on the same day, gave notice of and set down his motion to the Divisional Court for a new trial for argument at the next sitting thereof. This appeal and the plaintiff's motion for a new trial having both stood adjourned from the first sitting of the Divisional Court after vacation (saving exceptions) now came on for argument, this appeal first.

E. V. Bodwell, for the appeal: The order extending the time ought not to have been made *ex parte*. To permit the order to stand would be to establish a precedent contrary to the accepted practice and decisions of this Court that both parties must be heard upon such a motion. It is submitted that there was no jurisdiction to make the order *ex parte*. Argument.

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Robert Cassidy, contra: There was jurisdiction to make the order *ex parte*. The unreported decisions in this Court referred to were under Rule 375 of 1880 providing that every application authorized by those rules must be made in a summary way by summons. That Rule is omitted in the Rules of 1890, and Rule 572 provides for the making of applications in Chambers *ex parte*. A motion to extend the time over vacation was a motion of course in the Chancery practice, and, as such, an *ex parte* motion. See *Dan. Ch. prac.*, 6th ed. 1,546–47; In *re Lawrence*, 4 Ch. Div. 139, it was held that after the time for appealing has expired, leave extending the time will not be granted *ex parte*, implying that, before it has expired, it may be so granted. An order extending time to advertise a winding up order may be made *ex parte—Re Universal Discount Co.*, 32 Solrs. Journal 721. The proper course was to move Mr. Justice WALKEM to rescind the order and not to appeal, and the appeal does not lie. The plaintiffs' motion for a new trial was set down within eight days after the trial under Rule 434 and the *ex parte* order in effect abandoned. The day of trial should be excluded. At all events, the Court has now power to make an order extending the time for and thereupon to proceed to hear the motion for a new trial—*Re Manchester Economic Building Society*, 24 Ch. Div. at p. 496. There is nothing involved in this appeal but the costs of it, and the Court should not hear such an appeal.

Argument.

BEGBIE, C.J.: The order extending the time ought not to have been made *ex parte*, and the appeal must be allowed with costs. The Court has, however, power now to and will extend the time so as to admit of the appeal being heard.

Judgment.

Order accordingly and appeal allowed with costs.

BEER BROS. v. COLLISTER.

DRAKE, J.
[In Chambers.]
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Practice—Pleading—Amendment—Counterclaim—Adding after case in paper for trial.

Order made adding a counterclaim after the case was in the paper for trial.

SUMMONS to amend pleadings by adding a counterclaim. The action was set down for trial on February 3rd. Statement.

Robert Cassidy for the motion.

Thornton Fell, contra.—The order should not be made at this stage: *Ware v. Gwynne*, W. N. 1875, p. 240. Argument.

DRAKE, J.: It is a matter of discretion to grant or refuse the order dependent on the convenience of the parties, and as it is not shewn that any inconvenience will result to the plaintiff or that he is taken by surprise, I will make the order. Costs of the application and costs occasioned to the plaintiff by the amendment to be costs of the cause to him in any event. Judgment.

Order made.

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FOOT v. MASON.

Practice—Ex parte order extending time for appeal—Irregularity—Rule 674—Divisional Court—Right of to make any order which may appear just.

FOOT *v.* MASON

An *ex parte* order varying the terms of an order made upon summons is irregular but is not a nullity.

By an order made upon summons, the action was dismissed for want of prosecution, unless the plaintiffs gave security for costs within a week.

On the last day of the week limited, an *ex parte* order was made extending the time for two days.

Upon appeal to the Divisional Court from that order, it appeared that the plaintiffs had not up to then given the security ordered.

Held,—

(1.) That the *ex parte* order was irregular.

(2.) Objection that the action was out of Court over-ruled.

(3.) The Divisional Court under Rule 674 had jurisdiction to make any order which might appear just. Order made that plaintiff be at liberty to proceed with the action upon terms of giving the security within 48 hours and payment of costs.

Statement.

APPEAL from an *ex parte* order of Mr. Justice CREASE, dated 22nd January, extending for two days the time (seven days) limited by an order of Mr. Justice DRAKE, made upon summons on the 15th January, the terms of which were as follows: "I do order that this action be, for want of prosecution, dismissed, with costs, to be paid by the plaintiffs to the defendants, unless the said plaintiffs do within one week from the date of this order give security to the satisfaction of the Registrar for the costs of each of the defendants to the extent of $75." The defendants had moved in Chambers to rescind the *ex parte* order of CREASE, J., but that motion had been refused.

The grounds of appeal were:—

(1.) That there is no jurisdiction to vary by an *ex parte* order the terms of an order made by summons after hearing the parties.

(2.) That the order of CREASE, J., made no provision for

dismissing the action in default of the security being given within the extended time.

The appeal was argued before BEGBIE, C. J., MCCREIGHT and DRAKE, J.J., on January 31st, 1894.

W. J. Taylor, for the defendant, Appellant.

J. P. Walls, for the plaintiffs, Respondents.

The Court expressed an opinion that the *ex parte* was irregular, and that the plaintiffs were out of time.

J. P. Walls, for the respondents, I submit that the Court has now jurisdiction to grant the extension of time. *Re Manchester Economic Building Society*, 24 Ch., Div. 488. The reason the security was not given within the extended time was owing to the question being raised as to the validity of the *ex parte* order, as, if it was inoperative, the giving of the security would have been too late to prevent the dismissal of the action ; but the plaintiffs are now prepared to submit to terms, and give the security if the Court in the exercise of its discretion extends the time. Argument.

W. J. Taylor, contra : By the terms of the order of Mr. Justice DRAKE, the action was out of Court upon the lapse of the time for giving the security ; and if the extending order of Mr. Justice CREASE is inoperative, the whole matter is now *coram non judice* and the Court has no jurisdiction to extend the time or make any order. Further, the security was not given within the extended time.

BEGBIE, C.J. : The Court has jurisdiction by Rule 674 to give any judgment and make any order which may be just and which the case may require. We do not think that it would be just to dismiss the action and put the parties to the costs of another action, when the plaintiff is now ready to give the security. The order will therefore be that upon payment by the plaintiffs of the costs of this appeal and of the defendant's motion to review the *ex parte* order in Chambers, and upon giving the security under the order of Mr. Justice DRAKE within forty-eight hours, the plaintiff be at liberty to proceed, otherwise the action to Judgment.

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stand dismissed with costs.

Per DRAKE, J.: Our judgment is not to be taken as an expression upholding the granting of *ex parte* orders on such motions, or irregularities such as have occurred here. The next case of the kind that comes before the Court may be dealt with in a different manner.

MCCREIGHT, J., concurred.

Order accordingly.

MARGARET JACKSON v. ALEXANDER JACKSON AND CELIA MYLIUS.

FULL COURT.

1894.

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JACKSON v. MYLIUS

Pleading—Rules 167, 173—Evasive denial—Admission—Contract of married woman—Separate estate.

The action was tried and evidence given *pro* and *con* upon the question whether defendant, Celia Mylius, a married woman, was liable to the plaintiff as being the partner of the defendant Jackson.

The plaintiff's claim alleged; "2. The defendants entered into partnership as watchmakers and jewellers on, etc. 3. That while defendants were carrying on such business, the plaintiff advanced to them the following (claimed) sums."

The statement of defence of Celia Mylius alleged: "1. The defendant denies that on, etc., or at any other time she entered into partnership with the defendant, Jackson as alleged in paragraph 2 of the statement of claim. 2. Neither at the times therein alleged or at any other times did plaintiff advance to defendants the sums alleged or any of them, and if.....advanced, they were advanced to defendant Jackson alone."

CREASE, J., who tried the action, entered judgment for the plaintiff, on the ground that the partnership was proved.

There was no evidence that the defendant, Celia Mylius, had any separate property at the time of the alleged contract.

On appeal to the Full Court :—

Held, per BEGBIE, C.J., and DRAKE, J.: That the partnership was admitted on the pleadings, and that such objection was then open to the plaintiff.

Per MCCREIGHT, J., dissenting: That the partnership was not admitted, but denied in the defence. That, if otherwise, all proper amendments should be made to meet the case as presented at the trial.

That, in any case, the objection that the defendant, Celia Mylius, had no separate property at the time the alleged liability arose, was fatal to the judgment.

Statement.

APPEAL by defendant, Celia Mylius, from the judgment of Mr. Justice CREASE at the trial in favour of the plaintiff. The action was to recover amount of moneys alleged by plaintiff to have been advanced by him to a partnership of which the defendant, Celia Mylius, was a member. Plaintiff obtained judgment by default against the defendant, Alexander Jackson, and the question disputed at the trial

FULL COURT. and to which the evidence *pro* and *con* was directed was
1894. whether there was a partnership or not.
Feb. 7. The learned trial Judge delivered a written judgment, in
JACKSON which he stated "The defence denied the partnership, the
v. loan of the money as alleged; but that if any such loans
MYLIUS were made, they were made to and for the defendant, Jackson, only," and he found that the partnership was proved.

Statement. The grounds of the appeal (*inter alia*), as stated in the notice of motion were:

That the partnership was not proved; "3 That the defendant, Celia Mylius, being a married woman, could not form a mercantile partnership; 4 That it was not proved at the trial, that at the time of the alleged advances, the defendant, Celia Mylius, had any separate property."

The form of the pleadings appear in the head note and in the judgments.

F. B. Gregory, for the appeal.

H. D. Helmcken, contra.

BEGBIE, C.J.: This is a claim by a widow for $12,048.25, the unsatisfied residue of a larger sum, in respect of an advance to the plaintiff's son and a married woman, with whom he is alleged to have been in partnership.

At the trial, the only witness called was the son. Mrs. Jackson, the plaintiff, was not called. But as it was not
Judgment. pretended by her that she had ever been in communication, or had any correspondence, verbal or otherwise, with the defendant, Celia Mylius, directly, or through any other channel than the verbal communications with her son the defendant Alexander Jackson, (who was examined and cross-examined at great length) her absence from the witness box was not, I think, very important. It was a much more serious matter that neither Mrs. Mylius nor her husband were called for the defence, to deny the partnership, which was alleged to have been entered into by deed—executed by Celia, by her

husband acting for her—under an alleged power of attorney. This instrument was not produced at the trial, nor had it been called for by the plaintiff under a *subpœna duces tecum* or otherwise. The husband was in Court during the trial. Celia, the alleged partner, had gone to Nova Scotia, some time before the trial, and remained there. The absence of the plaintiff from the Province and the abstention of the husband from tendering himself, seem to me very suspicious circumstances. On the other hand, the defendant, Jackson, the son, was a very unsatisfactory witness; but no other witness having been called, his statements were quite uncontradicted, except to some extent by himself; but he was evidently quite confused, and may not have been wilfully untruthful. All the money advanced by the plaintiff was admittedly paid by her by instalments at different times into the hands of the son, as alleged, for the use of the partnership; but it seems clear that not all of it reached the partnership. On the evidence and the books, I think, only a net sum of $5,270.00 appears to be properly chargeable against her. The Judge, who had not the assistance of a jury, found for the plaintiff for the whole amount claimed, $12,043.25, with costs. On the whole, had it not been for the state of the pleadings, we should probably have set aside the judgment and directed a new trial, at which Mrs. Mylius might have had an opportunity of presenting her case before a jury on oath. But when we look at the pleadings, it is clear that the case ought never to have gone to trial at all, but that plaintiff should have moved for judgment on admissions. The first paragraph of the statement of claim alleges that the defendants (the only two defendants are Alexander Jackson, plaintiff's son, and Celia, Mrs. Mylius) reside in Victoria, "and carry on the business of watchmakers and jewellers." That is wholly uncontradicted in the statement of defence; but it seems to me that it amounts to an admission of a partnership. Two persons can hardly carry on one business, except as partners.

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The second paragraph in the statement of claim alleges that this partnership was entered into "on the 22nd April, 1891, for a period of 5 years." The defendant merely denies that on the second day of April or at any other time she entered into partnership *as alleged* in paragraph 2 of the statement of claim. That is not a sufficient denial. It merely denies the term of intended duration of the partnership, and looking to the absence of any denial that they did carry on business together, really amounts to another admission of a partnership only denying that it was for five years. The effect of the words "as alleged," when superadded to a denial of a complex fact, is pointed out and the authorities referred to in *Bullen & Leake* p. 26. But this is not all. Paragraph 4 of the statement of claim alleges that when the said advances were made, it was agreed between the plaintiff and the defendants (plural—*i. e.* Alexander and Celia) that the defendants (Alexander and Celia) should pay interest on "the various instalments at the various rates in the said paragraph 4 mentioned; and paragraph 5 of the statement of claim alleges that the defendants "(plural)" have paid to the plaintiff interest on the sums so advanced at the respective rates aforesaid, amounting to $976.75, but have not repaid any of the principal." In the statement of defence, these paragraphs are thus dealt with: "This defendant has no knowledge of the matters alleged in paragraphs 4, 5 and 6, *except as therein alleged.*" I rather think that this amounts to an admission by the defendant that she knows the facts to be as alleged in the statement of claim, viz.: She knows that she and Alexander did covenant to pay interest, and did in fact pay it. But it is at least quite clear that the statement of defence neither denies nor refuses to admit these allegations, and therefore admits them to be true.

Judgment.

This state of the pleadings does not appear to have been at all considered until attention was called to it by this Court on the opening of the appeal. It has to-day, how-

ever, been discussed and argued at considerable length. If before trial application had been made to a Judge at Chambers for judgment on admissions in the pleadings, he would probably have granted to the defendant leave to amend upon terms as to costs. Even at the trial, the Judge might have given leave to amend, so as to enable the real matter at issue between the parties to be raised, viz.: partnership or no partnership. The trial would of course have had to be adjourned. It is very late to apply for fresh leave now. But we think we have power to grant it, if applied for. And the lowest terms to which we think the plaintiff entitled are, that all her costs, both here and below, shall be hers, in any event of the action, *i. e*, whether the ultimate judgment award the costs in the cause to her or to the defendant, all these costs are to be paid or allowed to her. Upon these terms, we give leave to Mrs. Mylius to amend her statement of defence, and allow her eight days for that purpose. If she do not amend within eight days, the appeal must be dismissed ; that is, the judgment for the plaintiff must stand, and with costs ; but the amount of damages will be reduced to $5,270.00. We think that out of the $12,043.25 claimed, only $5,270.00 appears to have come into the hands of the firm, as distinguished from the hands of Alexander alone. And the first instalment of $3,000.00 appears to have been made on 10th May, before Celia actually joined the firm. And although the evidence is that when she did join, she agreed that the partnership should date back and commence as on the 22nd April, that would only bind her as to ordinary trade transactions, viz: buying and selling watches and jewellery, etc., and therefore would not bind her as to this advance, unless specially brought to her notice and ratified by her, which is not proved to have been the case. As the defendant's appeal has been partially successful, each party will bear their own costs of this appeal.

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After the mid-day adjournment, Mr. Gregory announced

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that he respectfully declined to amend his pleadings; but claimed that his appeal ought to be allowed on another ground, viz.: because the defendant, Celia, being a married woman, and only capable of contracting in respect of her separate estate, the plaintiff ought to have shown, but had not shown, that the defendant at the time of entering into the contract had some separate estate.

Our judgment has already been given; it was not necessary for Mr. Gregory to come here at all to announce his option to us; he might have intimated it to the Registrar or even to the opposing counsel or simply abstained from amending. I don't think he should be allowed to come here and open an entirely new argument not taken either in the Court below or here in appeal, after having been heard at great length and judgment given against him. A Court of Appeal will not in general allow entirely new questions to be argued here which have not been taken below. But, apart from these considerations, it would seem that the very foundation of the action which we have held to be, on these pleadings, admitted, necessarily imparts the possession of separate estate at the time or times of the several contracts on which we have given judgment. Each advance was made to the firm in which she was a partner, apart from her husband. A partner in a business must have some estate; and in the case of a married woman trading apart from her husband, it must be her separate estate. There is therefore nothing probably in the objection; but we do not decide this point; we decline to allow it to be brought forward.

Judgment.

DRAKE, J.: This is an appeal from the order of Mr. Justice CREASE giving judgment in favour of the plaintiff, against the defendant, Celia Mylius, for $12,043.25.

The defendant, Jackson, suffered judgment by default.

The statement of claim alleges that the defendants entered into a partnership as watchmakers and jewellers on 22nd April, 1891, for a period of five years.

That the plaintiff advanced at various times of the defendants $11,500, at various rates of interest, as specified in par. 4, and that $976.75 had been paid on account of interest.

Celia Mylius, by her statement of defence denies that on the 2nd (possibly an error for 22nd) April, 1891, or at any other time she entered into partnership with Alexander James Jackson as alleged in par. 2 of the claim.

This is an evasive denial under Rule 173; the object of that rule is to compel parties to raise distinctly in their pleadings the points on which they take issue; by Rule 167, every allegation of fact, if not denied specifically, shall be taken to be admitted. Now what does the defendant deny. She denies that on the 22nd of April, 1891, or at any other time she entered into partnership with the defendant as alleged, that is she denies a partnership as watchmakers and jewellers for a period of five years; but she does not deny that she entered into a partnership of some sort for some other period.

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The rule says that if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances; and this is exactly what the defendant has done.

These rules were carefully considered by the Master of the Rolls in *Thorp* v. *Holdsworth* 3 Ch. D. 637 and also in *Tildesley* v. *Harper* in 7 Ch. D. 403 a strict compliance was insisted on.

On further reference to the defence, in par. 3, the defendant, by the same course of construction, admits the rate of interest and payment of interest as stated in the claim.

The plaintiff could have moved for judgment on admissions in the pleadings, but is not compelled to do so; and, at the trial, it is apparent he only came to prove the indebtedness for which purpose the defendant, Jackson, was called. He swears to a partnership with Celia, and neither

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Celia nor Peter, her husband, are called to dispute it; the cross-examination was directed to the fact whether or not the partnership had been properly constituted; and the defendant took objection to the production of the partnership deed, as the power of attorney, under which it purported to be executed, was not produced, and, accordingly, it was ruled out. Having so far succeeded in excluding written evidence of partnership, the defendant could have applied to amend her defence by denying any and every partnership, but she did not do so, but preferred to rest on the pleadings and evidence. If such an amendment had been asked for it would have been made, almost of course, but upon terms. Jackson's evidence, which is uncontradicted, except by himself, and that more apparently from his want of business capacity than from want of veracity, states that his original partnership was with Peter Mylius, and after it had been in operation a few weeks and he, Jackson, had obtained an advance from the plaintiff of

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$3,000, Peter informed him that he was afraid of his old creditors, and suggested the partnership should be put in his wife's name. Jackson suggested another course, but was overpersuaded, and a fresh deed was entered into with Celia, dated back to 22nd April, the date of the old partnership. It was apparently understood that Celia's name was only used as a protection for her husband, and this accounts for the non-discussion of business matters with Celia afterwards. It is true that the evidence of partnership, beyond the fact that it is sworn to by Jackson, is not of the strongest, but it is quite possible if it had been put in issue that ample evidence would have been forthcoming, in fact the learned Judge who tried this case refers to an order of the Court made on 22nd May, 1893, on application of Celia Mylius, exempting $500 worth of the partnership property from execution, under the Homestead Act, section 10. This could only have been made on the sworn testimony that she was owner of the property seized by the Sheriff. The

Appeal Book does not show the evidence of this fact, probably an omission, but certainly it has an important bearing on the contention which the defendant now raises, through her counsel, that she was not a partner.

The learned Judge gave judgment for the whole amount of the plaintiff's claim, but on a review of the evidence I think it clear that the judgment against this defendant should be reduced to $5,270, as of the $11,500 advanced by the plaintiff $3,000 was advanced before the defendant entered into the partnership, and $3,230 was used by the defendant Jackson for his own purposes.

On this appeal the defendant was offered leave to amend, so as to raise the question of partnership, and the Court would grant a new trial. This offer was declined. The appeal should therefore be dismissed, but without costs, as the judgment has been largely reduced.

The counsel for the defendant raised a further point, alleging it was necessary before the plaintiff could obtain a judgment against a married woman it was necessary to allege she had separate estate. Without discussing this point, it is only necessary to remark, that it is not raised on the pleadings, and was not raised in the Court below: *The Connecticut Fire Ins. Co.* v. *Kavanagh*, 1892, App. cas., 473, decides that a point not taken in the Court below and not appearing on the pleadings, cannot be used on Appeal.

Judgment.

Vary Mr. Justice CREASE's order, by entering judgment for $5,270 against the separate estate of the defendant, in lieu of the judgment for $12,043.25.

MCCREIGHT, J.: Paragraph 2 of the Statement of Claim alleges as follows:—

"The defendants entered into partnership as watchmakers and jewellers, on the 22nd April, A.D. 1891, for a period of five years."

Paragraph 1 of the Statement of Defence of the defendant Celia Mylius is as follows:—

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"The defendant denies that on the 22nd day of April, A.D. 1891, or at any other time, she entered into partnership with the defendant, Alexander Jackson, as alleged in paragraph 2 of the statement of claim."

Mr. Helmcken contended for the plaintiff that this traverse was evasive within the meaning of the Judicature Rules 173; but I think the traverse is quite correct, and is in entire conformity with the forms given in appendix D to the Rules—see Section V. p.p. XLII. and XLIII; see *Bullen and Leakes' forms* pp. 92, 93, 96, 97, 98, 104, 109, 146, 156 177, 198, 217, 218, 227, 241, 245, and rules of Hilary Term 1853 (Title, Actions on Contract). Moreover, a perusal of Rule 173 shows it contemplated cases where the plaintiff really might be embarrassed—if amendment of the pleading is necessary (I cannot see how it can be so), then no doubt it should be made as of course and without costs, as no expense could have possibly been incurred through the supposed error in (if any) in pleading. Compare what was done by Lord Justice LUSH in *Clough* v. *L. & N. W. R'y Co.*, L.R. 7 Ex. see at p. 30—where an amendment was held both proper and necessary. As there was not sufficient evidence of partnership between the defendant Jackson, and Celia Mylius, the other defendant, I think the judgment against her must be set aside, as I hold the traverse perfectly good. Another, as it seems to me, manifest reason for setting aside the judgment against her, argued by counsel for the defence, and taken in the notice of appeal, is that, as she was a married woman, the onus was on the plaintiff to shew that she the defendant had separate property at the time she made the alleged contract, if any. No such evidence appears to have been given. He referred to *Palliser* v. *Gurney*, 19 Q.B.D. 519 (C.A.), and *Whitaker* v.

Judgment.

NOTE.—The judgment of the majority of the Court was reversed, and that of MCCREIGHT, J., sustained, by the Supreme Court of Canada—*Mylius* v. *Jackson*, 23 S.C.R., 485.

Vandermessen, 4 Times, L.R. p. 707 ; *Leak* v. *Driffield*, 24 Q.B.D. 98, and *Stogdon* v. *Lee*, 1891, I.Q.B., at pp. 661, 666 (C.A.), which seems to me fully to sustain his contention. I think the judgment given by the Trial Judge should be set aside.

Order reducing Judgment, without costs.

WALKEM,

DIVISIONAL COURT.

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GABRIEL v. MESHER.

GABRIEL v. MESHER.

Res judicata—Divisional Court—Judge in Chambers—Jurisdiction.

An order once pronounced will be given effect to and followed by every Judge and Court of inferior or co-ordinate jurisdiction, and no order will be made inconsistent therewith.

SUMMONS to fix a day for trial. The action was under the Employers' Liability Act, for damages to a servant, occasioned by the negligence of his master. The defendant moved the Divisional Court (Begbie, C. J., Walkem, and Drake, J.J.) for a new trial, which was granted on the ground of misdirection, and it was provided in the order that the defendant's costs of the motion were to be paid by the plaintiff as a condition precedent to his going down to a new trial. The plaintiff, after the order was drawn up, moved the Divisional Court to re-consider the order as to costs, which was refused. The defendant, on taxation, was allowed the costs of a printed appeal book used on the motion, the printer's charges for which were $312.20, the whole costs being taxed at $486.00. The plaintiff reviewed the taxation before DRAKE, J., who affirmed the Registrar. The plaintiff had not paid the costs, and wished to go to trial without paying them.

Statement.

Theodore Davie, *A.-G.*, and *G. H. Barnard*, moved the summons absolute.

Argument.

E. V. Bodwell, contra.

WALKEM, J. : A Judge in Chambers has no jurisdiction to re-consider an order of the Court, particularly of a Court

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of Appeal, and effect must be given to it. The plaintiff cannot go to trial without paying the costs.

Summons dismissed with costs.

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GABRIEL v. MESHER

The plaintiff appealed to the Divisional Court, and the appeal was heard before CREASE and MCCREIGHT, JJ., on 1st February.

A. E. McPhillips, for the appeal.

E. V. Bodwell, contra.

The judgment of the Court was delivered by—

Judgment.

CREASE, J.: After considering the arguments and authorities dwelt on by the counsel on both sides, we must hold that the Divisional Court cannot alter the judgment of another Divisional Court given on the 21st February, 1893, however much disposed we should be to do so. Mr. *A. E. McPhillips* cited cases in support of his contention that Mr. Justice WALKEM should have fixed the day for the holding of the new trial, though the payment of the costs of the motion for a new trial, as required, had not been made. We think he could not have done this without in substance reversing the order of the Divisional Court, and that his refusal was quite right. There is another way by which we think the plaintiff can and ought to have relief. It seems that Mr. Justice DRAKE made an order by which the costs the plaintiff was to pay as a condition precedent to his obtaining a new trial included the costs of the shorthand writer's notes. We do not think that the rules warrant this. Shorthand writers' notes cannot be considered *ejusdem generis* with the expenses for maps, plans, etc. We think, therefore, and order that there should be allowed, and we do allow, the plaintiff ten days to appeal from Mr. Justice DRAKE's order as to the costs of motion for a new trial herein, and further that the costs of this appeal be in the discretion of the Divisional Court which shall hear the appeal from the order of Mr. Justice DRAKE.

MCCREIGHT, J., concurred.

Order accordingly.

IN THE VICE ADMIRALTY COURT.

THE "MINNIE."

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Seal Fishery (North Pacific) Act, 1893, Secs. 2 and 5—Onus of proof—Rebutting—Evidence—Statement of officer of warship—Admissibility.

The Court will take judicial cognizance, without further proof, of an Imperial Order-in-Council, upon production of a copy purporting to have been printed by the Queen's Printer in London.

The statement of the captain or officer in command of a warship making seizure under Sub-sec. 5 of Sec. 1 of the Act purporting to be signed by such officer is admissible in evidence upon proceedings for condemnation without proof of signature.

The Minnie was arrested 22 miles within the 30-mile prohibited zone, fully manned and equipped for taking seals and with one seal skin on board.

Held, That the evidence for the defence set out in the judgment was insufficient to satisfy the *onus* cast on the ship by Sec. 1 Sub-sec. 5 (A) to show that she was not used or employed in contravention of the Act.

THIS was an action for condemnation under the Imperial British "Seal Fishery (North Pacific) Act, 1893," and the Order in Council thereunder, of July 4, 1893, of the schooner Minnie (Victor Jacobson, owner, and Julius Mohrhouse, master), seized by the Imperial Russian transport Yakout within the forbidden 30-mile zone around Kormandorski Islands, manned and armed, and having shooting implements and sealskins on board, and otherwise fully equipped for hunting, or attempting to hunt or take seals within the prohibited waters aforesaid, in contravention of the above mentioned enactments. The seizure took place in latitude 51 deg. 21 min. north, and longitude 169 deg. 38 min. east, about 22 miles from the southern extremity of Copper Island. The statement of claim sets forth the above facts, and charged that Victor Jacobson and Julius Mohrhouse

Statement.

NOTE.—(5A.) "If a British ship be found within the prohibited limits having on board fishing or shooting implements, or seal skins.....the *onus* shall be on the owner or master to shew that the ship was not used in contravention of the Act."

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had due notice not to enter the prohibited waters of the North Pacific nor to proceed within a zone of thirty miles round the Kormandorski Islands; that Copper Island is one of the Kormandorski Islands, and that at the time of the seizure the Minnie was fully manned and equipped for the purpose of hunting, killing and taking seals, and had on board thereof shooting implements and sealskins; that after the seizure and examination of the said ship and her papers by the official commission of the said Yakout, it was decided to seize the said papers, and the said Julius Mohrhouse was directed to proceed with the Minnie to appear before Her Majesty's consul at Yokohama and a provisional certificate was given to the said Julius Mohrhouse; but that he did not proceed to the port of Yokohama and report to H. B. M.'s Consul there, but sailed for the port of Victoria, where he arrived on the 24th August, 1893. Whereupon Captain Hughes-Hallett, R.N., captain of H.M.S. Garnet, claimed her condemnation and that of her equipment and everything on board for such contravention as laid on the said Seal Fishery Act and Order-in-Council.

Statement.

In the statement of defence, the defendant denied that the ship was seized in lat. 54 deg. 21 min. N., and long. 169 deg. 38 min., as claimed, or at any other point within the prohibited zone; that either he, or the captain, Mohrhouse, had any notice whatever not to enter the prohibited waters of the North Pacific Ocean, or to proceed within the prohibited 30-mile zone; also while admitting (par. 8) that the Minnie at the time of the seizure was fully manned and equipped for the purposes mentioned in the statement of claim, that she had but one sealskin on board when seized. He also denied that the master of the Minnie was directed to proceed with her to Yokohama, by the captain of the Yakout, but said that that officer merely "proposed to him that he should leave the said waters and proceed to Yokohama." In the alternative, defendant alleged, that if it was proved that the Minnie was within the 30-mile zone when seized (which he

denied), the schooner was not used or employed or intended to be used or employed therein, in killing, hunting, or attempting to kill, hunt or take seals therein, in contravention of the said Seal Fishery Act, 1893, or otherwise, but that the position of the ship when seized was due wholly to stress of weather. The trial took place before CREASE, D. L.J.A., on the 20th and 22nd of January, 1894.

C. E. Pooley, Q.C., for the Crown:

A. L. Belyea, for the defendant:

In the course of the trial, *Pooley, Q.C.*, put in a copy of the Imperial Order-in-Council passed 4th July, 1893, under the Act, prohibiting the taking of seals during the period in question, purporting to have been printed by the Queen's Printers in London, and the learned Judge held that he would take judicial cognizance of it without further proof. (*a*)

Argument.

The facts fully appear from the above statement of the case with which the judgment of the learned judge was prefaced, and which proceeded as follows:—

CREASE, J.: The translation into English of the Russian protocol, sent by the captain of the Yakout under the Act for the purposes of the trial, was proved by Mr. Clive Phillipps Wolley, a gentleman certified to have passed in the Russian language by the Director-General of Military Education, in the College from the Civil Service Commissioners, in the Military Education Division. *Mr. Belyea* objected on behalf of the ship to the admission of the protocol as evidence on the ground:—That it does not purport to be signed by the proper officer; that there is nothing in it to show it has been signed by the captain of the Yakout—nothing in the document itself to show who the captain of the Yakout is, and therefore the signature of the captain is no proper evidence that it is

Judgment.

(*a*) NOTE.—The Order-in-Council had not at this time been published along with the Dominion Statutes; but was afterwards with Can. Stat., 1894. See *Re Stanbro*, 2 Man. 4; *Re McCartney*, 8 Man. 367.

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signed by the captain of that particular vessel, the Yakout. True (he argued) the inference may be that it is, but the fact is not proved, and the act being highly penal, must be construed strictly. The learned counsel moved for a non-suit on these grounds.....I noted and overruled the objection, and refused to order a non-suit on the following grounds: The power of seizing, etc., under Sub-sec. 5 of Sec. 1 of the British Seal Fishery (North Pacific) Act, 1893, and Sec. 2, of the Order-in-Council of 1893, which says: "The captain or any officer in command of any warship may board, search and seize," etc., and "a statement purporting to be signed by such officer," as to the circumstances, etc., "shall be admissible," etc.....The copy of the register of the ship was proved by Mr. Alexander R. Milne, the Collector of Customs at Victoria (the original was subsequently produced in Court), who has been both judicious and active in carrying out his portion of the duty in sealing cases.....

Judgment.

The chief dependence of the master of the Minnie in the defence, which was admirably conducted in every respect by his counsel, *Mr. Belyea*, was on his ship's log, hereinafter called the log, to distinguish it from the official log, which contained no entry beyond his appointment at Sand Point, on the 27th June, 1893, as master, in the place of Victor Jacobson, the owner, who had been previously acting as master, and the Russian-English memo. of the ship's papers detained, and the seizure by the Russians. A little examination into the mode of making up this log, shows that very little dependence can be placed upon it. .....On the 15th July she was in lat. 53 26 N., according to this log, and long. 168 15 E.; Sunday, the 16th, in lat. 53 30 N., long. 168 33 E.; Monday, the 17th, in lat. 53 40 N., long. 168 45 E. The seizure was on the evening of the 17th at 9 o'clock. The position of the Minnie was not marked in the log by the captain on Tuesday at noon, but she was supposed by him to be in the same position as the

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day before, as he thought she had not made any headway. In the evening of Tuesday, at 9 p.m., he put her position at lat. 53 deg. 49 min. N., long. 168 deg. 41 min. E. On reference to the chart in use on the ship, which consisted of three parts, Captain Mohrhouse says: "I marked the position each day with a dot; most are marked, some are rubbed out. (And some marks rubbed out, I would add, present the appearance of being entirely new, and being in a different place from some of the dots rubbed out, destroys its authority as a guide to positions marked on the chart at the time.) The seizure was at 9 p. m., he says, on Monday, the 17th. He was detained until 1 o'clock a. m. on Tuesday, and then set free. The weather during all that time that I have been speaking of, viz.: From 11th July to the seizure, had been cloudy, overcast and foggy, with occasional strong winds from S. and W., so that no observation could be taken, and no land had been seen since sighting Aggattu Island, and taking her departure thence. Little, indeed no allowance was recorded in the calculation in this log, whatever the deduction he may have made in sailing, for the current known to the captain by two years' previous experience, which there in strong S.W. winds goes very strongly to the Northeast, with proportionate drifting in that direction—an element in fixing the Minnie's position which deserves a special notice. Moreover, Captain Mohrhouse, who claims that he used nautical (or sea) time in compiling his log, diverges all through the log occasionally into civil time.....

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The inference is irresistible, that no reliance is to be placed on Captain Mohrhouse's account that when seized he was without the 30-mile zone, nor does Captain Anderson's clear and manly acoount of the mode in which he found himself in the schooner, the Viva, a few miles within the zone, and the speed with which he got out of it, and there sighting each other and subsequent meeting, in the least strengthen Captain Mohrhouse's contention that he

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was outside when seized. And the inference is reasonable though not certain, as he lowered his jib, that when he (Captain Anderson) saw the Russian steamer, they also saw him, and if they did, considered him outside the zone, and so not seizable. The protocol distinctly states the Minnie was 22 miles within the zone, in the latitude and longitude I have set out. The Yakout was only three hours out of port, and being worked by steam, was independent of wind and tide, and its officers, presumably, intimately acquainted with the current there, and the inference is that they could not be mistaken in their position, and the hasty memorandum of 8 o'clock given by the Russian captain to Mohrhouse, on a tiny slip of paper, was, I think, clearly a mistake for 9 o'clock, and I therefore find that beyond a doubt the Minnie was taken at that particular spot, 22 miles South of Copper Island, within the zone. And what was she doing there? Captain Jacobson, the owner, whose evidence was delivered in an eminently untruthful manner, which, I think, must have surprised the learned counsel who so steadily and earnestly advanced every possible argument for the defence—as it certainly did the Court—knew perfectly well of the 30-mile zone, and, even though very roughly, pencilled out a zone of his own on the ship's chart, though not a 30-mile zone, as a 30-mile zone. Moreover, he had been on board the Triumph, the well-known master of which, Captain Clarence Cox, had been furnished by Captain Hughes-Hallett with one or more copies of Mr. William Smith's and his own public warning to sealers for distribution, and had engaged to communicate the warning to all the sealers he encountered, and presumably must have done so to him, and, as it is a matter of common knowledge and has been before this Court, that in several known cases and on several occasions during 1893, he had honourably discharged his obligation, and on several occasions, it is in the highest degree unlikely that he would have omitted either Captain Jacobson or Captain Mohr-

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house when either came aboard his ship from this friendly service.

Moreover, Captain Mohrhouse, in his evidence, confesses to knowing the danger of sealing within the 30-mile zone until he could get an observation, a practical admission which speaks for itself. Yet on the very day of seizure, he puts down all his boats, each with two expert persons in it, for Indian women are as good, if not better, canoeists than the men, under the pretence of washing decks, which, to his shame be it said, he avowed as a reason, had been dirty for some three weeks; and we have only his word for it that they did not take guns with them, and not a single witness of the 23 or 24 who were there, was brought forward to corroborate him. It is sworn that Mohrhouse was picked out by the owner to redeem his previous ill-luck in sealing, Captain Jacobson well knowing that he (Captain Mohrhouse) had already brought other sealers into trouble in a similar manner.

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It is well known, and is so stated in the negotiations which preceded the passage of the Act, that recent events in Behring Sea had sent a cloud of fleet and daring schoners, some of them making even 11 and 12 knots an hour, admirably manned and commanded, hovering like hawks, and covered with a cloud of canvas, all around the 30-mile zone about the Kormandorski Islands. And it was necessary to guard against any of them to whom the risk itself would be an attraction, slipping inside the 30 miles of feeding ground set aside for the seals which might chance to frequent the Kormandorski Islands, and running the risk of capture, in order to secure a rich but forbidden harvest of sealskins. The statement of claim alleges that, in this instance, the Minnie, at the time and place of seizure, was fully manned and equipped, for the purpose of hunting, killing and taking seals, and it has been proved that after due notice she was found so manned and equipped for that purpose within the 30-mile zone. And Sec. 6 of the Seal

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Fishery Act of 1893, above cited, enacts that "if during the period" (that is between the 4th July, 1893, and 31st December, 1893; here it was the 17th July, 1893) "and within the sea specified by the Order-in-Council, viz: The 30-mile zone, a British ship is found, having on board thereof fishing or shooting implements or sealskins, or bodies of seals, it shall lie on the master or owner of such ship to show that the ship was not used or employed in contravention of this Act," and that has certainly not been shown to me as a jury by the evidence adduced by the defence. If Captain Mohrhouse had been sincere in his desire to keep outside of the forbidden waters, his vessel's head would have been put the other way, away from and not towards the island, until he had ascertained his position by observation. If such flimsy excuses as his, supported by such equivocal testimony, were to be allowed to prevail, sealers would only have in that foggy climate, especially so on the South-west side of Copper Island, to allege stress of weather to make the Act framed to repel their intrusion within the zone a dead letter, and thus render nugatory an honourable understanding between England and a friendly nation, whose officers, so far as we have seen, in carrying out the provision of this particular Act (and I am guided solely in my consideration and decision by this Act) have treated British subjects with every courtesy and consideration.

As a jury, I find that the presumption which the portion of the Act I have cited raises, of the liability of the defendant, has not been displaced. The lesson which this law teaches has yet to be learned, and the present is a case wherein, from the total absence of *bona fides* in the defendant from first to last, it has become the duty of the Court to enforce the provisions of the law. I do not take into consideration, in forming the present judgment, the question of what may be considered the disobedience of what I consider the order or direction of the captain of the Yak-

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out, that the master of the Minnie should report himself to H. B. M.'s Consul at Yokohama, where there is a good and competent Court to deal with the case, as no penalty therefore is sought to be enforced.

I pronounce, therefore, in favour of the Crown, and decree the condemnation of the ship Minnie and her equipment and everything on board of her, or the proceeds thereof, on the ground that the said ship was at the time of the seizure thereof within the prohibited waters of Behring Sea or North Pacific Ocean, that is to say, within a zone of thirty marine miles around the Kormandorski Islands, as defined by Order-in-Council dated the 4th day of July, 1893, made by Her Majesty the Queen in pursuance of the Seal Fishery (North Pacific) Act, 1893,—fully manned and equipped for killing, taking and hunting seals, and had on board shooting implements and one sealskin, and that the said ship was used and employed in taking, killing or hunting, or attempting to kill or take seals within the prohibited waters aforesaid. The proportion in which the proceeds are to be distributed, I reserve for further consideration. No costs on either side.

Judgment.

Judgment for the Crown.

NOTE.—This decision was affirmed by the Supreme Court of Canada—23 S.C.R., 478.

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B.C. IRON WORKS v. BUSE

BRITISH COLUMBIA IRON WORKS CO. v. BUSE *ET AL.*

Practice—C.S.B.C. Cap. 31, Secs. 61-67—Rule 743—Extending time for appeal to Divisional Court after lapse of the eight days.

Rule 743, providing that a Judge may extend the time for doing any act although the application is not made until after the time appointed, is not inconsistent with C.S.B.C., Cap. 31, Sec. 61, providing that every appeal to the Divisional Court shall be brought within eight days, unless the time shall be extended by a Judge, and the Court has power to extend the time for moving for a new trial after the lapse of the eight days provided by the Statute.

Statement.

APPEAL from an order of DRAKE, J., made on 15th of February, 1894, at Vancouver, extending the time for giving notice of motion for a new trial until the 6th day of March. The trial was concluded and verdict entered for the plaintiff on 23rd January. CREASE, J., upon application made to him within eight days from the verdict, had made an order extending the time for giving the notice until 13th February, and a notice of motion for a new trial was given on the 12th February, returnable eight days thereafter, but the motion was not set down nor the appeal books entered.

Argument.

A. E. McPhillips, for the appeal: The extension of time for moving for a new trial under Sec. 61 of C.S.B.C., Cap. 31, must be made before the time has expired. If the Rule in effect extends the right of appeal, it is inoperative. The order is wrong in form. The notice of motion for a new trial had been given and the order should have been to extend the time for bringing on the appeal, but the order allowed a fresh notice to begiven.

E. V. Bodwell, contra.

BEGBIE, C.J.: The order appealed from was authorized

by Rule 743, which is not inconsistent with C.S.B.C., Cap. 31, Sec. 61. An order might have been made extending the time for setting down the application for a new trial upon the notice of motion already given.

WALKEM, J.: concurred.

Appeal dismissed; costs to be costs in the cause to the defendant in any event.

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HARRIS v. BRUNETTE SAW MILL CO.

Corporation—Trespass—Master and servant—Respondeat superior—Agency—New trial—Misdirection—Rule 446.

A servant of the defendant corporation employed to cut timber on its lands, knowingly trespassed and cut timber off plaintiff's land which adjoined, and the defendants' manager, general foreman and other servants, knowingly took and included it in defendants' boom and hauled it away. It was afterwards cut up and sold along with defendants' lumber.

Evidence was given for plaintiff and denied by defendants that the trespass was committed by instructions of the manager. The jury found a verdict for the plaintiff.

Held, per DRAKE, J., on motion for judgment:

If a servant of a company commits a tort in the course of his employment and for the benefit of his employer whether by his direct orders or not, the employer is liable, even if the Act was unknown to or actually forbidden by him.

On appeal and motion for a new trial:—

Held, per CREASE, J., following *Clark* v. *Molyneux*, 3 Q.B.D. 237: The whole of a summing up must be considered in order to determine whether it afforded a fair guide to the jury and too much weight must not be allowed to isolated and detached expressions.

Held, per WALKEM, J.: That it was misdirection by the trial Judge to tell the Jury that they had only to consider the question of damages as the question of agency of the servant for the master by ratification or otherwise had to be left to them.

That the defendants were liable for the tortious acts of their manager and foreman on the ground that they had the entire control of their business.

That under Rule 446, the Court on appeal, notwithstanding an apparent misdirection of the jury, can draw such inferences of fact as are not inconsistent with the verdict.

Statement.

ACTION for trespass against the defendant company (which was incorporated for the purpose of, and was carrying on a lumbering and saw milling business) in coming upon the plaintiff's land and cutting, carrying away and converting his timber to its own use. The plaintiff's land in question adjoined that of the defendants; they had upon it a lum-

bering camp, where they had a manager, foreman and gang of men employed to cut timber for them. One of the men, Mitchell, was instructed by the defendants' general foreman, Macdonald, to log on the defendants' land, and was by him shewn the division line. Mitchell trespassed upon plaintiff's land, cut his timber and constructed skid-ways on his lands by which it was removed. Macdonald, and one Wilson, defendants' foreman, were aware of what Mitchell had done. It was given in evidence by plaintiff and denied by defendants, that Macdonald and Wilson had instructed Mitchell to do as he did.

The action was tried before DRAKE, J., and a special jury. The learned Judge after summing up the facts to them, which more fully appear in the judgment, charged the jury that in his opinion the only question was one of damages, but the whole charge left the issues to the jury on the evidence. The jury found a verdict for the plaintiff for $1,000.00 damages.

Statement.

A. N. Richards, Q.C., moved for judgment on the verdict.

Charles Wilson, for defendants, moved for a non-suit on leave reserved.

Argument.

DRAKE, J.: The facts shewn in evidence on behalf of the plaintiff are: That the plaintiff is registered owner of E. ½ of Section 3, Township 8, New Westminster. That the defendant Company were incorporated for the purpose of purchasing and selling timber and manufacturing lumber. That John Wilson was the Manager of the defendant Company. That Macdonald was the general foreman and had control of the defendants' logging camps and engaged and discharged the men employed. That one Mitchell was employed by Macdonald to log on land adjoining the plaintiff's land and was shown by him the section post and general line of division. The above facts are not disputed, it was further alleged and denied that both Wilson and Macdonald instructed Mitchell to cut some timber on the plaintiff's land. Mitchell cut out

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some skid roads on the plaintiff's land and used them for transporting logs cut on the defendants' land and also used them for transporting logs cut on plaintiff's land.

Mr. Wilson, for the defendants, contended that on this evidence that even if Mitchell acted under the direct orders of Wilson and Macdonald the defendants cannot be held liable, the trespass being one which the defendants themselves could not lawfully do, and therefore they could not authorize their servants to do it. A company is not formed for illegal purposes and can seldom be said to have authorized the wrongful acts of their servants, but it is clear the ordinary principles of agency apply in such cases. If the servants of a company commit a tort in the course of their employment and for the benefit of their employer, whether by direct orders of the company itself or by its manager, the company are liable. See *Mackay* v. *Bank of New Brunswick*, 5 L.R.P.C. 394.

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If an illegal act is committed by a servant in furtherance of his own private ends the employer is not responsible, so also if a servant does an act which is clearly *ulta vires* of the powers vested in the company, and the reason is that such an act cannot be considered as done within the scope of his employment, but if the illegal act is in furtherance of his employer's orders, or in the course of his employment, the employer is responsible and in the latter case, even if the act was unknown or actually forbidden by the employer.

The trespass here complained of consisted of making skid roads, felling trees for that purpose and cutting and removing trees for saw logs, the making of the skid roads was shown to be in furtherance of Mitchell's employment and these roads were cut out, for the purpose of removing logs from land belonging to the plaintiff, the cutting of the saw logs on defendants' land was part of the trespass complained of and these logs were removed to the defendants' mill and converted by them into lumber. Under the old

style of pleading the defendants would be liable to an action of trover and conversion.

The law as laid down in *Huzzey* v. *Field*, 2 C .M & R. 432 and *Story on Agency*, 7th Ed.; Sec 452, is that a master is responsible for the wrongful act of his servant even if it is wilful or malicious provided the act is done by the servant within the scope of his employment and in furtherence of his master's business and for his benefit—the facts of this case clearly distinguish it from *Bolingbroke* v. *Swindon. Local Board*, 9 L.R.C.P. 575; in that case the defendants employed a person to manage a farm and he trespassed on an adjoining farm by cutting a ditch and removing trees and Mr. Justice GROVE in giving judgment says there is no ground for supposing that Brichan thought what he was doing was within the scope of his authority or that he did not know he was committing a trespass, nor could it be said that the act was one which in any reasonable sense was within the authority given to him for ameliorating the farm; the judgment is addressed to the special facts of that case and does not lay down any new rule of law while the facts in this case show, even if the authority given by Mitchell's superior is excluded, that the trespass as to the skid roads was committed with Macdonald's knowledge and that the defendants accepted the benefits derived from the trespass, for the logs from the plaintiff's land were counted distinct from the other logs of the defendants.

Judgment.

The distinction between a tortious act and an unauthorized mode of doing an authorized act is often only a question of degree and if the unauthorized mode leads to a trespass the principal is liable. See *Limpus* v. *London General Omnibus Co.*, I. H. & C., BLACKBURN, J., at p. 542.

I am therefore of opinion that the plaintiff is entitled to hold his verdict and give judgment accordingly with costs.

Judgment for plaintiff.

The defendants moved the Divisional Court to set aside

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the verdict and judgment for the plaintiff entered thereon and for a new trial on the ground of misdirection, and also appealed to the Full Court to set aside the verdict and judgment, and to enter a non-suit or judgment for the defendants upon the ground that the evidence disclosed no cause of action against the defendants. By consent of counsel the motion to the Divisional Court and the appeal to the Full Court were set down and argued together before the Court, constituted as a Full Court at its regular sitting (*coram* BEGBIE, C.J., CREASE and WALKEM, J.J.), but sitting both as a Full Court and a Divisional Court so as to dispose of both motions at once.

Argument.

Charles Wilson, for the defendants: There must at least be a new trial for the misdirection, as it in effect withdrew the whole case from the jury. Rule 446 does not apply. The contention is that there is no "finding of the jury," by reason of the misdirection. The defendants are not liable for the, by them, unauthorized trespass of their servant. The question is, what was the scope and limit of Mitchell's employment by, and therefore of his agency for, the defendant corporation. He was employed and was their agent to cut timber on their own land. If, while so engaged, he had acted wrongfully, so as to injure another, the defendants would have been liable for that. If a servant in the course of doing something, which he is employed and authorized by his master to do, acts wrongfully in such a way as to injure another, *i.e.*, if he does improperly something which he was employed to do, and could have done in a proper way, the master is liable, but if he goes outside the field or path of his employment without authorization from his master and there proceeds to a course of conduct wrong in itself, he is not, in that matter, the agent of his master, but is a trespasser on his own account.

The wrong must be brought home to the Corporation and they must be shewn to be principals to it.

To shew that the defendants' managers and foremen in

the woods, having themselves only a limited implied authority, ordered Mitchell to take the plaintiff's timber, does not advance the case a step against the defendants. In *Seymour* v. *Greenwood*, 6 H. & N., 359, cited in the judgment, the servant was employed to drive defendants' omnibus upon a certain route, *i.e.*, to drive it carefully, so as not to risk injuring others. He pulled it across the road in front of another rival omnibus, contrary to express instructions, upsetting it, and defendants were held liable, for there the servant was acting within the field of his employment, though in a negligent and disobedient manner, whereby the plaintiffs were injured. If the servant, in that case, had gone out of his proper route on to another, unauthorized by the defendants, and had there injured another, the defendants would not have been liable. This is a much stronger case of deviation from the field of unauthorized service—*Seymour* v. *Greenwood*, and *Limpus* v. *Gen. Omnibus Co.*, 1 H. & C., 526, may be cited for the proposition that it makes a difference that the servant supposed himself to be acting in his master's interest; but see the subsequent case of *Allen* v. *L. & S. W. Ry. Co.*, L.R., 6 Q.B., 65, and cases collected in *Roberts & Wallace, Employers' Liability*, 3rd ed., at p. 88, in support of the text: "It makes no difference that the servant supposed himself to be acting in furtherance of his master's interests." The servant, in this case, committed a crime, which rebuts the idea that it was impliedly authorized by the terms of his employment, and raises a violent presumption against its express authorization by any person not shewn to have done so. As to ratification, the conduct of the foreman and other fellow-servants cannot be relied on as such. Ratification is equivalent to an original command and must be brought home to the parties charged. Full knowledge of the wrong, and acquiescence by the Corporation, as such, must be shewn; see *Nicholl* v. *Glennie*, 1 M. & S., 588; *Morawetz on Private Corporations*, 2nd ed., pp. 579, 580, 582.

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A. N. Richards, Q.C., and *A. P. Luxton*, for the plaintiff. As to the question of misdirection: If the whole charge is looked at, it appears that the issues involved were fairly left to the jury, and the language complained of was a mere expression of opinion as to the effect of the evidence—See *Clark* v. *Molyneux*, 3 Q.B.D., 237.

As to the appeal: The principle to be deduced from the authorities is, that when the servant is acting within the scope of his employment, and in so doing does something negligent or wrongful, the employer is liable, even though the act done may be the very reverse of that which the servant was actually directed to do—*Bayley* v. *Manchester, &c., Ry. Co.*, L.R. 8 C.P. 148, at p. 152, and see, per MELLOR, J., in *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex., at p. 265, as follows: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted on in running down cases, and it has been applied to direct trespass to goods. In all these cases it may be said that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in," quoted with approval in *Mackay* v. *Commercial Bank of New Brunswick*, L.R., 5 P.C. 394–412. A Corporation is liable for intentional acts of malfeasance by its servants, provided the acts are connected with the scope and objects of its incorporation—*Green* v. *Gen. Omnibus Co-*, 1 H. & C., 526; 29 L.J.C.P., 13; *Limpus* v. *Gen. Omnibus Co,*, 32 L.J., Ex. 34; *Maund* v. *Monmouthshire Canal Co.*, 4 M. & G., 452. Even if there was no antecedent command, or agency express or implied, to do the act, there was ratification. The trespass was adopted by the defend-

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ants, by the taking and cutting up of the timber knowingly, by the persons authorized by the defendants to take or reject—see *Smith* v. *Birmingham & Staffordshire Gas Light Co.*, 1 A. & E. 526, holding that a jury might infer the agency of a person professing to make a distress on behalf of a corporation, though not authorized under seal, from an adoption of the act by reception by the corporation, through its servants, of the proceeds of the seizure.

BEGBIE, C.J. : This is an action for damages, for that the Company have trespassed on the plaintiff's lands, made a "skidway" across part of it, for hauling logs, and felled and carried away the plaintiff's trees growing there, converted them into lumber, without any consent, knowledge or agreement by the plaintiff, and pocketed the proceeds. The defendants do not deny that all of these things have been done ; but they deny their liability in this action, placing their excuse on this very ground, that the whole of these acts were utterly wrongful. They allege that being a Joint Stock Company they had no knowledge of these things in their corporate capacity ; that they necessarily act through agents, and that Mitchell, the foreman of the gang, who felled the trees and made the skidway, the men who towed the logs to the mill, received them there, sawed them up into lumber, sold them and received the price, were all merely agents of the Company. That according to the universal law of principal and agent, the principal is only liable for his agent's acts, so far as these are within the authority delegated to the agent ; but when the person, even though usually the Company's agent, is acting beyond that authority, he is not, *ad hoc*, their agent at all, and therefore they are not liable for his misdeeds or mistakes. They then allege that they never did authorize Mitchell to commit any of the trespasses complained of, and never could, for no instructions or orders could authorize him to do that which they themselves had no right to do, *i. e.*, commit a trespass. A principal, it was urged, can only

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appoint or authorize an agent to do what the principal might do if personally present. The defendants, therefore, deny their liability for the foreman's trespasses, relying on *Poulton* v. *L. & S. W. Ry. Co.*, L. R., 2 Q.B. 534; *Edwards* v. *L. & N. W. Ry. Co.*, 18 W. R. 1032; *Walker* v. *S. E. Ry.* *ibid*; *Bolingbroke* v. *Swindon Local Board of Health*, L.R. 9 C. P. 575; *Bank of New South Wales* v. *Owston*, 4 App. Cas. 270; and they suggest that the plaintiff's only remedy is against the foreman, who actually set the axemen to work.

It would be, of course, impossible for us to resist these decisions if they governed the present case. They seem to introduce an exception upon the old established rule, *qui facit per alium facit per se*, an exception which must be carefully watched in its application. And it still sounds plausible, that if I hire a man to break my neighbour's windows, my neighbour can recover damages against me, although it was impossible for me to clothe anybody with legal authority to do anything of the sort. The principal cannot, of course, strictly speaking, authorize any trespass or any other tortious act; but he may have authorized his agent to transact some business or do something or other, in the course of which the wrongful act is committed, and then he may be liable. Again, the principal may derive some profit from the wrongful act; in which case he will generally not be permitted to take advantage of his agent's wrong.

Perhaps it is clearer and more authoritative to cite the words of WILLIS, J., in delivering the judgment of the Exchequer Chamber, in *Barwick* v. *English Joint Stock Company*, L.R., 2 Ex. 265, which has been cited with strong approval, both in the House of Lords and the Privy Council: "The principal has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the principal to place him in." And again, in

Swift v. *Winterbotham*, L.R. 8 Q.B. 244, COLERIDGE, C.J., says: "When the agent of a Company, in conducting its business, does something of which the Company takes advantage, and by which they profit, or may profit, and it turns out that the act is fraudulent or wrongful, they cannot afterwards repudiate the agency and say that the act which has been done by the agent is not one for which they are liable." This principle was strictly followed in *Mackay* v. *Bank of New Brunswick*, 5 L.R.P.C., App. 394, where these words were cited with approval; and on examining the cases relied on by the defendants, I think it will be found either that the principal derived, and could have derived, no benefit from the wrongful act of the agent, or else that the damage to the plaintiff arose from some act of the agent, not only beyond the power of the principal to authorize, but really not necessary for the execution of the principal's business, nor for the protection of his interests, nor within the reasonable scope of the agent's employment, but undertaken by him for his own convenience and satisfaction in performing the works. Thus, in *Bolingbroke* v. *Swindon*, *supra*, the defendant's agent might have effected the Swindon drainage without trespassing on the plaintiff's land at all, but went there merely as being the readiest way and to save himself trouble; or where the wrong is done, not for the promotion of the principal's interests, but to gratify the agent's irritation, as in *Walker* v. *S. E. Ry. Co.*, L.R., 5 C. P. 640.

The doctrine contended for by the defendants requires especial care in its application in the case of a corporation or joint stock company. These bodies are quite incapable of any wrongful intention or *mens rea*, *e. g.* of malice in a prosecution. They are, besides, quite incapable of doing by themselves anything in the world, except passing or rejecting resolutions in a general meeting. Unless by some agent, they cannot even enter into any contract, or sue or be sued. The Company has no hands to affix their seal, or

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take out a writ, or enter an appearance. If, therefore, the doctrine be as laid down by the defendants in this case, that where the act is not one which the principal can do himself, he cannot authorize his agent to do it, and therefore is not liable, no joint stock company could ever be made responsible for the consequences of any act of any agent whatsoever. Nor could the Company subsequently sanction or adopt any wrongful act by an agent, except by a resolution in a general meeting. Any sanction by an officer however high in the scale, a director, or president, would only be a sanction by another agent, under circumstances equally *extra vires* of the Company.

There have been several cases in England recently against principals for the acts of their agents (for false imprisonment, etc.), in which *Poulton's case*, *Edwards' case*, and the others have been cited for the defendants. Perhaps the latest of these is *Ashton* v. *Spiers & Pond*, 9 T.L.R., 606. The Court does not appear at all to notice, either to disapprove or to distinguish, the cases relied on by the defendants here; but they seem to disregard them, and hold the principal liable.

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But, in fact, the liability of the defendants here may be placed on quite a different ground. Suppose the defendants, instead of being a lumber company, had been trading as butchers and had employed their foreman to "round up" and drive into a corral some cattle of theirs, roaming in the unenclosed wild land of the Crown, and that the foreman had ignorantly or of set purpose driven into the corral along with the defendant's own cattle some animals belonging to the plaintiffs which were roaming in adjacent unenclosed wild land of his. Suppose the plaintiff follows hot foot and finds his cattle there. Has the act of the foreman so divested the right of property in the cattle from the plaintiff and vested it in the defendants, as that the plaintiff is precluded in bringing his action against them for the

animals, or their value? Surely not. He might certainly replevy. Suppose the plaintiff comes an hour too late and finds the animals slaughtered; perhaps the carcases mixed, and he might be unable to proceed in replevin. Can he make no claim against the defendants in respect of the beef? Or is the right of property by that further tortious act taken out of him as against the defendants? Suppose the plaintiff comes yet a few hours later—the animals have not only been slaughtered, but the beef has been sold and been carried away. Can he get no compensation from the defendants who have the price of his steers in their pockets? And is he to be told that his only remedy is against the original wrongdoer, the penniless servant of the defendants? Now this is very nearly the present case. While the plaintiff's trees were growing on his land, they were part of his real estate; when they were felled they became the plaintiff's chattels, which the defendants' agent laid hold of and brought to their mill. Assume that no action would lie against the defendants for the tortious act of their servant in committing a trespass and felling the trees. At the mill these logs belonging to the plaintiff have been converted into lumber, and the defendants have sold that lumber and have the price in their pocket. Admitting everything that is said about Mitchell being wholly unauthorized, incapable of being authorized, and so forth, to commit the original trespass, or to haul away the trunks, yet the felled timber did not cease to belong to the plaintiff because it was hauled away to the defendants' mill. The defendants have by other agents equally unauthorized, as they may contend, converted the logs into lumber and the lumber into money. They are liable in an action for this series of acts and the wrongdoings of their agents.—*Per* WILLIS, J., in *Barwick's case*, *supra*.

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The action, therefore, will, in my opinion, lie against the defendants, and that disposes of the appeal. But there is the application to us as a Divisional Court for a new trial,

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on two grounds:—(1st) For that the verdict was against the weight of evidence; and 2nd, because the damages are excessive. Both these questions are conspicuously for the jury, and no Court will set their verdict aside, unless it be clearly such as no reasonable men could coolly arrive at. Now, as to the weight of evidence: It is true the direct evidence of Mitchell exactly contradicts Macdonald. Mitchell swears he was ordered to go in and fell these trees. Macdonald says he was expressly told not to touch them. The jury prefer to believe Mitchell. That may be unpleasing to Macdonald, but the jury saw the two men under examination, and cross-examination, and were expressly summoned to decide (among other things) which spoke the truth. They probably considered (among other things) that if Mitchell spoke falsely it must be perjury, whereas Macdonald's denial might possibly be due to loss of memory. But there was much circumstantial evidence besides, (and circumstances are said to vary from living witnesses, in this, that they cannot lie) all of which are inconsistent with Macdonald's story. There was no indignation at the theft at its discovery; no immediate discharge of Mitchell for the theft, or for the breach of his express orders; no anxiety to make amends for the unintended wrong; no care even to ascertain the extent of the wrong; no tender of an apology; no effort even to ascertain the true owner. The defendant's excuse is, that they thought one Stone was the true owner, and therefore never mentioned the matter to Harris. But they never mentioned the matter to Stone; they utilized the logs and kept the secret for a year. The jury might well believe that it was a true secret.

As to the amount of damages: This is also almost entirely for the jury. It has become, perhaps, through the wrongful acts of the Company's servants in mixing up the stolen logs and lumber with their own, rather a difficult matter to discover with perfect certainty the value of the plaintiff's trees. The Company cannot derive benefit from

that. Macdonald seems almost to consider himself an injured party, at all events entitled to sympathy and impunity, because he has sold the stolen lumber at such a price as to leave the Company little or no profit. This is not the view which a jury is likely to take. It is no wonder, as C. J. ROBINSON remarks, in *Flint* v. *Bird*, U.C.Q.B. 444, "If juries wax indignant at these high-handed proceedings and give exemplary damages;" and he intimated that he would not feel disposed to set aside a verdict on such grounds, if by any means it could be supported by the evidence. And here, besides the stolen lumber, the jury doubtless took into their consideration the skid road, which the defendants admitted to have been an extremely convenient access to their own lawful fellings and so of considerable value. Way-leaves are sometimes of great value. The banks of the river Tyne have long since been completely emptied of their underlying minerals, but owing to the way-leaves, for giving the further collieries access to the staiths, these exhausted banks are more valuable now than before the underlying coal began to be worked. So far from thinking $1,100 excessive, I think the evidence would have supported a larger amount. I think the defendant's appeal fails on all points and should be dismissed, with costs.

Judgment.

CREASE, J.: This was a motion by defendants that the verdict rendered herein on the 9th May, 1893, be set aside and a new trial had herein for misdirection on eleven separate grounds set forth in the notice of motion and that the verdict was against the weight of evidence. There was also a notice of motion by the defendants to set aside the judgment rendered herein and to enter judgment for the defendants with costs upon five several grounds therein stated. The two motions were practically though consecutively argued together. The facts disclosed by the evidence for the plaintiff were that the plaintiff was and is the registered owner of the eastern half of Section 3, Township 8, in New Westminster District. The defendants were

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incorporated as a Company for the purpose of purchasing and selling timber and manufacturing lumber. John Wilson was manager of the Company, while Hugh Macdonald was general foreman and superintendant of and had the control of the logging camp for the Company and hired and discharged the men employed. It was also proved that a man named John Mitchell was employed by Macdonald to cut logs on the land adjoining plaintiff's land, and he pointed out to Mitchell the section post and by compass the dividing lines between plaintiff's land and the two sections adjoining where they were logging. So much was not denied. It was in evidence, though defendants denied it, that Wilson, the manager, and Macdonald, the general foreman and superintendant, had directed Mitchell to cut some of the timber on plaintiff's land ; and it was proved beyond a peradventure that Mitchell cut out skid roads across and into the plaintiff's land and hauled logs out over them which he had cut on the plaintiff's land, and all the timber cut on the plaintiff's section was hauled out along the skid roads so cut there, down to the Nickomekl River, mixed (unmarked) in the boom with the other timber, which the Company had the permission to log, out of the section adjoining that of the plaintiff "run down with the rest of the timber and carried to the mill" says one witness, and their identity so destroyed. Thus they were in fact appropriated by the Company, altogether, without distinction, beyond the possibility of identification, to the use and benifit of the defendant Company, and dealt with in every way as their own property. As well might a rancher, rounding up his cattle, and finding a number of other men's cattle unbranded amongst them in the corral, count them in with his own, and apply them without enquiry to his own use as his property. No attempt was made to ascertain the ownership of the land, no search for that purpose made in the Land Registry Office, where it was registered in plaintiff's name. No acknowledgment of the trespass or tender

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of amends, made to him or any one else. The Company and its agents (for its officers according to their degree and relative duties were still, under the circumstances which the evidence discloses, its agents) contented themselves, or rather the clerk whose duty it was to check the logs and record them in his book according to the places where they were cut, contented himself with entering such logs as he chose out of those gathered in the boom into the name of one Stone. "He had" (he said) "to give them to some person." He did not send the account to Stone or advertize for Stone, although he adds Stone was living on the land, (p. 75) and Macdonald who gives this evidence was equally indifferent to the ownership of the logs they were appropriating. There could not be a more marked case of what I must deem, because of the palpable benefit derived from it, intentional negligence, or a more complete adoption and consequent ratification of the trespass, by their subordinate officers, on the plaintiff's land. It matters little whether Wilson and Macdonald did or did not direct Mitchell and his men to cut there. It is beyond a doubt from the evidence that they knew what was going on there; and now they are brought to book, affect to have ordered Mitchell not to go on the land. Yet they saw the skid roads driven into it along part of which much of their own logs were being daily hauled and saw Mitchell with his gang of the Company's men in the course of his employment, and within the scope of it, doing this work day by day, while one of them, Macdonald, was actually in camp there, and yet did not stop Mitchell or discharge him, and it could not be by accident, did not go the few yards necessary to survey his work. Macdonald says, in much evasive evidence, that he did not "see" the trees cut, but there is no blindness so great as that of those who will not see! However, it is certain, for Macdonald admits it, that he saw them after they were cut, and was cognizant of their being hauled and carried off in the booms with all the other logs

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down the Nickomekl to be cut up at the defendant Company's mill and affected to be entered in some of the Company's books. How, and in what number entered, or what their full value, it is needless now for us to enquire. That research has already been entirely superseded by the verdict of a competent jury, who have made that enquiry, and, as far as I am able to judge from the evidence, and without seeing the witnesses' manner in delivering it on which so much depends with a jury (judges of fact) seems a fair, just and moderate amount, not a vindictive one, but one to which any reasonable and impartial man might be fairly expected to arrive. With regard to the numerous isolated points of law raised in the case, dealing with it in sections rather than as a whole, they have been succinctly but comprehensively and as I conceive satisfactorily, dealt with and disposed of by the trial Judge in his judgment. I have gone over all the evidence and points in the Judge's charge to the jury, and the reservation of points of law beyond their ken for the argument on the non-suit. Viewing the Judge's charge as a whole, I am of opinion that all the points necessary for the jury to come to a lawful and proper decision were laid by him before them. It is true that in one matter the difference between Paris' and Knight's estimate of the timber cut was not to the extent of 17,000 feet as the Judge in the reception of the evidence until explained to him supposed. But that can scarcely have affected the verdict to any appreciable extent, and if it had, it is a point to which, if defendants' counsel thought it of sufficient importance, he should have challenged the Judge's attention during the trial markedly to it, and if overruled, had the objection noted for subsequent use. The same remark applies to counsel's comment on Mr. Wood's evidence, that is referred to a valuation of timber 10 years ago and that fact was not explained to the jury. Besides according to the well known case of *Clark* v. *Molyneux*, 3 Q.B.D. 237, BLACKBURN, J., at p. 243: "A summing up is not

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to be rigorously criticized. The whole of the summing up must be considered in order to determine whether it afforded a fair guide to the jury; and too much weight must not be allowed to isolated and detached expressions." And here although the learned Judge commences by calling the attention of the jury to their special duty of finding as to damages, he immediately branches out into a long and elaborate dissertation on the facts and the law which is to be applied to them; in short, explained all the evidence, and its bearing on the law to the jury. The jury necessarily came to their decision after weighing all the evidence in the light of the Judge's exposition of the law upon it. They believe so much of it as they thought fit. Their conclusion, as far as I am able to judge, must presumably have been based on a general consideration of the number, lengths and value of the timber cut and the locality, and circumstances of the trespass; the effect upon the land and the appropriation of the proceeds of the Company of all which they had ample evidence on both sides before them. And those conclusions I cannot but consider, exactly met the justice of the case. Now, as to the liability of the Company. Mitchell, even if "he acted carelessly, wantonly and improperly" in trespassing on the plaintiff's land and cutting and hauling the timber to the boom, did so, "in the course of his service and employment and was doing that which he believed to be for the interest of the defendants" then the defendants are responsible for the act of their servant. True, "not every act which a servant may deem in the interest of the employer is done in the course of his employment" (such as a footman taking upon himself to act as a coachman and meeting with an accident); but it has to be seen "whether the particular act was done in the course of the employment" and here, the course and scope (or object in view) of Mitchell's employment was to cut logs for the Company, and that, and that alone is what he did. "If that were so," says BLACKBURN, J., in the case

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I am referring to, *Limpus* v. *London General Omnibus Company*, 1 H. & C. 542; and see also as to ratification, *Poulton* v. *London and S. W. Railway*, L.R. 2, Q.B. 534; *Barwick* v. *English Joint Stock Bank*, L.R. 2 Exch. 259, *et vide McKay* v. *Commercial Bank*, L. R., 5 P. C. 394, "it was utterly immaterial if he did it contrary to instructions given by the master." It is not denied that Mitchell was acting throughout with the intention of benefitting his employers and there is no suspicion even that he was acting with the idea of benefitting or gratifying himself in any way. The employer, the master, is in such a case responsible, although Mitchell's actions were in one sense wilful on his part, and although (as Mr. Justice BYLES in the same *Limpus Case*, goes so far as to say) it were an illegal act. So looking at what is a reasonable direction in the common understanding of the law, as well as what has been held before, I think the learned Judge's direction on this head was perfectly correct. And now setting aside all considerations as to whether the defendant Company could, or did, or did not intend to give authority to its officers or servants to commit a trespass, and cut and carry away other people's timber, the evidence and the return of the verdict by the jury brings us face to face with the fact that the Company found themselves in possession and use of what they knew was the property of another person. By their action, they destroyed all means of identification, let us assume even that it was done by accident; they make no inquiry as to whose it was. The expenditure of fifty cents in the Land Registry Office, in the town where their place of business was, would have told them exactly the real owner. They go on using it as their own, they make no enquiry and offer no amends, and when at last the real owner calls for a refund and compensation they resist by a technical defence. But the law is intended to prevent and remedy, not to conceal or favour injustice. And here there is more than injustice; the evidence of the Company's appropriation

and adoption of the results of the trespass to their own use, is too clear, the facts evolved in the course of the trial too overwhelming, to leave any doubt on a reasonable mind of the righteousness of the verdict, and coupled with the law applicable to such a state of facts, or the justness and correctness of the judgment thereon delivered. I think, therefore, on all considerations, that the judgment of the learned Judge must be sustained, and the applications of the defendant dismissed with costs, both of this Court and the Court below.

WALKEM, J.: The plaintiff is the owner of a tract of land in the district of New Westminster, a portion of the land being timber land. The defendants are a company incorporated for the purpose of buying, selling and manufacturing lumber, with incidental powers of acquiring timber limits or privileges and removing the timber therefrom. The defendants having certain timber privileges lying immediately to the westward of plaintiff's land, their workmen felled the timber and, in order to haul it out, entered the plaintiff's land and cut down some of his trees for skids, and constructed skid roads across its southwestern corner. By way of explanation, the defendants' foreman states that this was done as the construction of a skid road round, instead of across the plaintiff's land, would have been too expensive. The defendants are also charged with a further act of trespass, inasmuch as their workmen felled a considerable quantity of timber growing on the same land, and forwarded the greater portion of it to a mill, where it was converted into lumber and then sold or otherwise disposed of on the defendants' account. For the removal of this timber, skids were cut and roads constructed, as in the above instance, on the plaintiff's land. On behalf of the defendants, it is contended here, as it was at the trial, that they are not liable for these acts, as they were unauthorized and beyond the scope of their workmen's employment; and, on that ground, they are now appealing from a judgment

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which was directed to be entered against them for $1,000, in pursuance of a verdict for that amount, and also moving, in the alternative, for a new trial, because of alleged misdirection and the verdict being against the weight of evidence. In *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, the defendants' driver pulled across the road in front of a rival omnibus owned by the plaintiff, and thereby upset it; and, although, in doing so, he was acting contrary to specific orders, his employers were held responsible for his act; "for," as was observed by WILLIS, J., "he was employed not only to drive the omnibus, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did is not inconsistent with his employment, when explained by his desire to get before the other omnibus." Supposing that, instead of what thus occurred, the driver had found the road blocked by excavations, or an unusual amount of traffic, and that in order to get beyond the obstruction and deliver his passengers at their destination he had left the road and driven through private property alongside of it, can there be any doubt that, under such circumstances, his employers would have been held liable for his tortious act, on the ground that he was acting at the time in their service and what he believed to be their interest? Analagously, the defendants here are liable, in respect of the first trespass, for the workmen, in order to get their employers' timber out of the forest, or at least to do so by the cheapest method, cut across and made use of the plaintiff's land in the manner I have described; and, in doing so, there was nothing inconsistent with their employment, when explained by the object which they had in view. The principle deducible from the decision in the case above cited is, as stated in *Pollock on torts*, p. 84, that, "The question is not what was the nature of the act itself, but whether the servant intended to act in the master's interest."

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The second act of tresspass is of a much more serious character, and, on the principle mentioned, the defendants might be held liable for it, as the act was done in what the workmen believed to be their masters' interest. But admitting, for the purpose of discussion, that the principle is of doubtful application, the defendants would be liable on the ground that they elected to take the benefit of what the workmen had done, "a consideration," as remarked by KEATING, J., in *Bolingbroke* v. *Swindon Local Board*, L.R. 9 C.P. at p. 578, "which is important." According to the evidence. the plaintiff's timber was cut and removed in January, 1892, to the knowledge of one Macdonald, who was superintendent of the defendants' logging camp. It was entered with other timber cut about the same time on four or five different timber limits adjoining the plaintiff's land, in the defendants' log book, and the log book sent to their manager in September following. The plaintiff's timber was described in the entry as timber taken from Stone's land, under the mistaken impression that Stone, and not the plaintiff, was the owner of the land. Stone was living somewhere on the land, and, as Macdonald states, could easily have been communicated with ; but, notwithstanding this fact, he was never informed of what had occurred, and it was not until after the plaintiff had discovered the injury done to his property and claimed compensation, namely, in December, 1892, that the defendants' manager—for the defendants, as a company, seem to have taken no notice of the matter nor said anything about it. In the meantime, at what precise date does not appear, the timber was manufactured at the defendants' mill, and sold and otherwise dealt with as their property. This was a ratification, in a most unequivocal manner, of the tortious acts of their workmen. Ratification, it is true, depends upon intention ; but the intention may, in view of the facts of the case, be inferred. For instance, the explanation given on the defendants behalf for their neglect or failure to communicat

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with Stone is that they left the whole control of their business in the hands of their manager and, therefore, were ignorant of what had occurred. The manager, in turn, states that he was also ignorant of what had been done, as he had not examined the log book, inasmuch as he considered it unnecessary to do so before the end of the year, at which time the defendants' books were usually made up and balanced. This is certainly an extraordinary explaination; for it means that the management of the defendants' business was such that they, as well as their manager, were uninformed, for fully eleven months, of the ownership, quantity and price of timber cut, as in this case, during that period on four or five different timber limits, and reported and delivered at the mill. The report in the log book was sent to the defendants' office, in September, and as they and the manager chose to abstain from examining it, their ignorance of its contents was palpably wilful. The manager at least, must be taken to have known all that occurred, and by accepting the benefits of the acts of the workmen, on behalf of the defendants, to have ratified those acts. According to his evidence, he has authority "to buy and sell and give general directions in the business," and he seems to have carried on the negotiations respecting the plaintiff's claim for compensation without referring that claim to the defendants or their board of directors. Mitchell, it is to be observed, who was foreman of the men who cut the timber, states that it was done by the manager's directions. This is denied; but the jury, as may be inferred from their verdict, seem to have believed Mitchell. The case, in view of all these circumstances, comes, in my opinion, within the decisions given in *Barwick* v. *English Joint Stock Bank* L.R. 2 Ex. 259 and *MacKay* v. *Commercial Bank of New Brunswick* L.R. 5 P.C. 394, where the defendants were held to be liable for the tortious acts of their managers as such, on the ground that the latter had the entire control of their business. Upon any one or all of the

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grounds I have stated, the judgment of the Court below may be sustained; hence the appeal must be dismissed with costs. As to the application for a new trial, the principle of alleged misdirections are, in substance, objections to the judgment now affirmed, and hence are disposed of. Of the other objections, one only calls for observation, namely, the direction to the jury that they had "only to consider the question of damages." I must differ from the learned Judge in that respect; the main and, indeed, only issue—an issue upon which the question of damages or no damages depended—was whether the workmen, in doing what they did, were acting within the scope of their employment, for if they were not, it is obvious that the action would be untenable, except, perhaps, on the ground that their acts had been ratified and the defendants had accepted the benefit of them. Be this as it may, we have authority, under Rule 446 of our Rules of Court, to draw such inferences of fact as are not inconsistent with the verdict. Accordingly the inference that I draw from the evidence is, that the workmen were, on the occasions referred to, acting in the service and what they believed in the interest of their employers, and, certainly, were not acting in their own interests or for their own ends. As to the verdict being against the weight of evidence, it has been well settled by the House of Lords that where, as here, there is evidence on both sides, the verdict should not be disturbed, if reasonable men could have arrived at it. There was considerable difference between the witnesses produced by both parties in their estimate of the damage done to the land. The highest estimate was $2,500. The highest value of the timber that was cut was placed at $1,600. The verdict of $1,000 was, therefore, evidently well considered and apparently included no exemplary damages; aud if I were called upon to express an opinion about it, I should say, that it was a reasonable verdict. Besides, as was said, in a somewhat similar case, by ROBINSON, C.J., we should not be

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expected to "go into nice calculations of the value of timber thus plundered," *Flint* v. *Bird*, 11 U.C. Q.B. 444. The motion for a new trial is therefore dismissed with costs.

Appeal and motion for a new trial dismissed.

CREASE, J.

[In Chambers.]

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LEISER v. CAVALSKY

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Practice—Chamber Summons—Filing affidavit before issue of—Rules 421 and 572.

Rule 572 requiring every summons in Chambers to give notice of the affidavits to be read in support of it is imperative.

SUMMONS on behalf of the plaintiff to amend his statement of claim.

Jay, for the defendant, Cavalsky, took the preliminary objection, under Rules 421 and 572, that the affidavit in support could not be read, as the summons contained no notice of reading it, and it was not filed until after the summons was issued.

Argument.

Lawson (Bodwell & Irving) for the application, *contra*.

Judgment.

CREASE, J.: The objection is fatal.

Summons dismissed.

WOLLEY v. LOWENBERG, HARRIS & CO.

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WOLLEY
v.
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Practice—Pleading—Amendment of—Postponing trial.

After an order fixing the day for trial, amendments in the pleadings, making a new case, will only be allowed upon terms of postponing the trial, if the party against whom the amendments are made is not ready for trial on the new questions introduced.

E. V. BODWELL, for the plaintiff, applied for leave to amend the statement of claim so as to make the plaintiff's case agree with the facts brought out on plaintiff's examination for discovery before the Registrar. On the 9th inst., Mr. Justice WALKEM made an order fixing the day of trial for the 19th February. Statement.

Theodore Davie, A.-G., for the defendants, did not oppose the amendment, but asked that the trial be postponed, as the proposed amendment materially changed the case made on the statement of claim, necessitating amendment of the statement of defence, and the defendants were not ready for trial on the new questions introduced.

E. V. Bodwell, in reply: The facts have all been known to the defendants since the examination of the plaintiff and defendants are not taken by surprise. Argument.

CREASE, J.: As the proposed amendments make a new case, they can only be admitted at this stage on terms of postponing the trial for one month, as defendants' counsel states that his client is not ready for trial on the new matter introduced. Judgment.

Order accordingly.

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[In Chambers.]
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COOLEY v. FITZSTUBBS.

Practice—Examination of parties—Rules 703 and 705—Order to amend Pleadings—Effect of—Right to examine.

After an order for amendment of a statement of claim, the amended claim must be delivered before an order for examination of defendant can be made.

POTTS (Belyea & Gregory) for the plaintiff, moved absolute a summons for the examination of defendant for discovery under Rule 703.

Statement.

The defendant, in his defence, had objected to the sufficiency in law of the statement of claim, and it had been held insufficient; but the plaintiff, by an order made on the 15th February, 1894, was given leave to amend his claim. The amended statement of claim had not been delivered.

Theodore Davie, A.-G., objected that the claim and defence, by reason of the order for amendment, were not delivered so as to permit the order to be made.

Judgment.

WALKEM, J.: The objection is fatal.

Summons dismissed with costs.

ADAMS v. THE NATIONAL ELECTRIC TRAMWAY AND LIGHTING CO.

DRAKE, J.

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ADAMS v. NAT. ELEC. T. & L. Co.

Master and Servant—Respondeat Superior—Corporation—Ultra Vires—Agency—Ratification—Pleading—Admissions—Point of Law not raised on Pleading—Evidence.

A Corporation is liable for a trespass committed by its servant while conducting its business, although committed in the doing of an act *ultra vires* of the Corporation itself.

Where the servant of a Corporation forms an erroneous judgment, and, in the supposed scope and discharge of the duty delegated to him, commits a trespass, the Corporation is liable for it.

The objection that, upon the evidence, the act complained of was not done by the servant in the course or within the scope of his employment by defendants, and was unauthorized by them, is not open to defendants upon motion for a non-suit unless they pleaded it as a defence.

A judge in charging a jury may read to them parts of an examination for discovery additional to the parts put in evidence by counsel.

CROSS-MOTIONS for judgment, *i.e.*, by defendants, pursuant to leave reserved at the trial, to enter a non-suit or judgment for them, and by plaintiff to enter judgment for him for the amount of damages assessed by the jury, $13.25, with Supreme Court costs, and for a certificate for costs of the special jury. Statement.

The action was for damages for an assault committed by a conductor of defendants, in ejecting the plaintiff from a tram-car.

The statement of defence admitted the ejection of the plaintiff by the conductor, and stated that it was done because he refused to pay his fare or produce a ticket or transfer ticket.

It appeared in evidence that the plaintiff told the conductor that he had already paid his fare for the whole journey in a connecting car, but that the conductor in that car had refused to give him a transfer ticket (which it was, at the trial, conceded the plaintiff was entitled to), saying

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that it would be "all right on the second car." The conductor then forcibly ejected the plaintiff, who had given his name and address.

The only power the company had to deal with passengers not paying their fare was contained in their private Act, which provided that any such passenger might be summoned before a police magistrate and fined $20 and costs, on proof of the offence. The managing director of the company was examined for discovery, and parts of his examination were put in evidence by plaintiff's counsel as admissions. In a part not put in evidence he said that he approved of and sustained the conductor in his conduct in the matter. This, though objected to, was read to the jury by Mr. Justice DRAKE as a part of his charge as evidence of ratification by defendants.

The cross-motions came on for argument before DRAKE, J., on Oct. 8, 1893.

H. D. Helmcken, for the plaintiff.

Robert Cassidy, for the defendants.

DRAKE, J.: The plaintiff was a traveller on the defendants' tram car, and paid his fare to the conductor of the car he first entered, and, having to change cars at the power house, the conductor of the first car told him that no transfer was necessary; he accordingly entered the second car to continue his journey, and was ejected by the conductor therefrom, because he did not pay his fare or produce a transfer, and the defendants, by their defence, justify the act of the conductor. On the trial, the jury found a verdict for the plaintiff for $13.25, leave being reserved to the defendants to enter a non-suit or verdict for them. The plaintiff also gave notice of motion to enter judgment for the plaintiff with costs.

Judgment.

Mr. Cassidy, on behalf of the defendants, contended that the act complained of, being one which the company, by their charter, were not authorized to do, they could not

authorize their servant to do an illegal act, and there was no ratification of the act of the conductor by the defendants, and even if there had been, the defendants would not be liable. The carriage of a passenger by the tram car is a matter of contract, and if a passenger neglects or refuses to pay his fare, the remedy of the company is by civil action. They have no power to eject for such a cause, and no such power will be implied, in the absence of legal authority to do so. Mr. Higgins, in his evidence, admits he was managing director of the company, and that he approved and sustained the act of the conductor.

The point now raised by *Mr. Cassidy* is not raised on the pleadings, for the form of such a defence—see *Bullen & Leake's precedents*, Vol. 2, p. 425. By Order XIX, the parties are to raise all their grounds of action or defence on their pleadings. This ground of *ultra vires* and want of authority in the conductor was not raised, and I cannot entertain it now. But, apart from this consideration, in my opinion, where a corporation justify or authorize an illegal act of their servant, they thereby make themselves liable for the consequences of such act.

Judgment.

The cases cited, *Poulton* v. *L. & S.W. R'y Company*, L.R. 2, Q.B., 534, and *Goff* v. *The Great Northern Railway Co.*, 30, L.J., Q.B., 148. *Roe* v. *Birkenhead R'y*, 21 L.J., Ex. 9., and other cases in the same line, all lay down that there is no implied authority for the servant of a company to do an act which the company itself could not do. A company must act through or by its servants; they cannot be present in person; and, if a servant mistakes orders or exceeds them, while acting within the supposed scope of his duties, the company are liable. See *Seymour* v. *Greenwood*, 6 H. & N. 359. In that case, the conductor of an omnibus ejected a passenger, and the company were held liable on the ground that having *delegated a duty to* their servant, they became responsible, if the servant formed an erroneous judgment. And in *Butler* v. *Manchester Railway Co.*, 21 Q.B.D., 207, on

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facts very similar to this, the defendants were held liable.

The defendants' argument amounts to this, that no corporation can be held responsible for illegal acts committed by persons in their employ, even when the corporation sanction the acts. In other words, a corporation can employ their servants to commit assaults without any responsibility attaching—a contention entirely without foundation.

I am of opinion that the verdict should be sustained, and with costs.

Judgment for plaintiff.

The defendants appealed to the Full Court, and the appeal was heard before BEGBIE, C.J., CREASE and WALKEM, J.J., on 26th July, 1893.

Argument.

Robert Cassidy, for the appeal: There should have been a non-suit. The company are not liable for this act of their conductor, which, we admit, was a trespass on his part. At Common Law, a person having a right to enter a public conveyance, does not become a trespasser *ab initio*, so that he can be forcibly removed, because of his mere non-feasance in refusing payment of fare. *Six Carpenters' Case*, *1 Smith's Ldg. Cas.* p. 144. The corporation was not given by statute any such power of summary ejection. On the contrary, a different statutory remedy was provided: "A corporation are liable for such wrongful acts of their servants as are done in the execution of the powers vested in the corporation. A corporation is not liable for the misconduct of their servant, in doing such acts as the corporation is not itself authorized to do." *Roberts and Wallace on Employers' Liability*, 3rd Ed. p. 56; *Poulton* v. *L. & S. W. R'y Co.*, 36 L.J.Q.B. 294; *Roe* v. *Birkenhead, etc., R'y*, 21 L.J., Ex. 9; *Edwards* v. *L. & N. W. R'y*, L.R. 5 C.P. 445; *Emerson* v. *Niagara Navigation Co.*, 2 O.R. 528. It makes no difference that the servant supposed himself to be acting in furtherance of his masters' interests. *Roberts and Wallace*

on Employers' Liability, supra, p. 88; *Allen* v. *L. & S. W. R'y Co.*, L.R. 6, Q.B. 65. On this point the earlier cases of *Seymour* v. *Greenwood*, 6 H. & N. 359, and *Limpus* v. *Gen. Omnibus Co.*, 1 H. & C. 526, have not been followed. To do an act beyond the powers of the corporation itself is not within the scope of the servant's agency for the master, as implied by law. *Morawetz on Private Corporations*, 2nd Ed., 579-580-582-607 citing; *Bayland* v. *Mayor of N. Y., 1 Lanaf, N. Y.* 27. No express authority to the conductor to act as he did was proved, There was no evidence of ratification; and, indeed, the act was incapable of ratification by the company. With respect to ratification by a corporation of its servants' acts, such a body (that is the shareholders) cannot be bound by the commission of acts by its servants which are outside of its corporate powers, and, therefore, the command to do those acts being wholly void *qua* the corporation, any supposed ratification, which is no more than equivalent to such command, must, in like manner, be wholly void, *ibid* p. 92 and per Lord Ellenborough, *Nicholl* v. *Glennie*, 1 M. & S. 588; *Morawetz supra* p. 581; *March* v. *Fulton*, 10 Wall 675, per FIELD, J. It might be contended that an approval by resolution under seal of the company would have been, in law, no ratification. *Asbury* v. *Riche*, 44 L.J. Ex. 185. In any case, subsequent expressions of approval by the managing director are clearly not sufficient.

Argument.

As to that part of the judgment appealed from, which holds that an objection in point of law to the sufficiency of the case made by a plaintiff on the evidence, in order to be open to a defendant upon a motion for a non-suit, must have been raised by him on the pleadings. This ruling, we submit, is wrong. Rule 169, providing that the defendant must raise by pleading all matters which show the action not to be maintainable, refers to matters of fact, not to objections in point of law. *Odger on Pleadings*, p. 90. A set of facts, which are not a cause of action, do not become

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so because the defendant has omitted to draw attention to or argue their insuffiency before, or even at, the trial. "Error is *caput lupinam*, and, up to the last moment, it may be objected to"—per Lord Bramwell, *Smith* v. *Baker*, 1891, App. Cas. 347. For the purposes of a motion for a non-suit, the plaintiff must, in the first place, have alleged and proved matters sufficient to show that his action is maintainable. Rule 169 has no application to this motion, but prohibits a defendant from surprising a plaintiff, who has made out a *prima facie* case, by setting up facts not pleaded. The effect of the rule is that a defendant is debarred from giving evidence of anything, particularly in confession and avoidance, except what he pleads. The plaintiff here has proved no right of action; he has alleged none. The onus was on plaintiff, both to allege and prove facts (here the statutory power in the corporation to eject for non-payment of fare) which could alone make the conductor its agent, by implication from his employment, in doing the act complained of. To allege that he was its conductor and did the act is not enough, for, as such, he was *prima facie* not their servant or agent *quoad hoc*. See *Farwell* v. *G. T. R'y*, 15 U.C.C.P. 427. The old form of pleading would have been to allege the conclusion: "That the defendants did the act by their servant or agent." Now, the onus is on the plaintiff to allege facts from which the Court can deduce the agency. The defendants were not bound to deny a fact material to the plaintiff's case, which he omitted to allege. "A plaintiff who objects to the defence may be called upon to defend the sufficiency of his statement of claim, and, if unsuccessful, judgment will be given for defendant." *Odger on Pleading*, p. 79. Nor were defendants bound to set up on their pleading the objection in point of law. "No one is bound to take an objection in point of law; he must raise it on his pleading, if he desires to have the point of law set down for hearing and disposed of before the trial; but at the trial, he may urge any point of law he likes, whether

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raised on the pleadings or not." *Odger on Pleading*, p. 72. "The Judges are bound to know the law, and they can apply it to the facts themselves, without it being stated in the pleading." *Ibid*, 8. "It is quite unnecessary for the defendant to excuse himself from matters of which he is not yet accused, or to plead to causes of action which do not appear in the statement of claim." *Ibid* p. 20. "Neither should he traverse matter not alleged; he should be content to answer the case that is actually laid against him—not that which he thinks his opponent ought to have raised." *Ibid* 75. "Unless the defect is seriously embarrassing, it is often better policy to leave it unamended. You only strengthen your opponent's position by reforming his pleading; but be careful, in drawing your defence, not to aid the defect in any way, leaving the plaintiff's counsel to explain it to the Judge at the trial, if he can." *Ibid* 96.

Argument.

In *Butler* v. *Manchester &c., R'y Co.* 21 Q.B.D. 207, the facts appear very similar to those of the present case; but the point taken here was not taken or argued by counsel there, or referred to in the judgment; and the inference is that the company, in that case, had the power to eject for non-payment of fare.

The expressions in the examination of the managing director, of his approval of the act of the conductor, and opinion that it was his duty to do as he did, are not evidence of ratification by defendants, but show only that the managing director was under the same mistake as the conductor. If that part of the examination had been admitted as part of plaintiff's evidence, the defendants would have proved that they never instructed or approved such a course as the act complained of, and the objection is that it is not proper in a charge to introduce to a jury matter which constitutes a new element in the case, not pleaded, or put in evidence here that of ratification, which might have been answered if put in evidence at the proper time.

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H. Dallas Helmcken, for the plaintiff, *contra*: The con-

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ductor was acting in and about his masters' business; and, if he made a mistake in the powers conferred on the company, or on himself as their conductor, and injured the plaintiff thereby, the company is liable. *Seymour* v. *Greenwood*, 6 H. & N. 359; *S. E. Ry Co.* v. *Broom*, 6 Ex. 314; *Moore* v. *Met. Dist. R'y Co.*, 8 L.R.Q.B. 36; *Butler* v. *Manchester, Lincolnshire & Sheffield R'y Co.*, 21 Q.B.D. 207. The act of the conductor was ratified by the managing director, in giving it his approval; he being, in that, the agent of the company.

BEGBIE, C.J.: The plaintiff in this case, which is an action of tort, brings action against the defendant company for having been forcibly ejected from one of their cars by the conductor. The case was tried before Mr. Justice DRAKE and a special jury. At the close of the plaintiff's case, *Mr. Cassidy* asked for a non-suit; but the case was allowed to go to the jury, with the view especially of ascertaining the damages in case they should find for the plaintiff. Eventually, they did find for him, and gave

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$13.50 damages. In pursuance of leave reserved at the trial, *Mr. Cassidy* moved for a non-suit, and *Mr. Helmcken* moved for judgment according to the verdict. Ultimately, Mr. Justice DRAKE gave judgment for the plaintiff for $13.25, with costs on the Supreme Court scale. The defendants now ask us as a Full Court to set aside that judgment, and enter up judgment for the defendants on the authority of a long chain of cases from *Nicholl* v. *Glennie*, 1 M. & S. 591 down to *Edwards* v. *L. & N. W. R'y Co.*, 5 L.R.C.P. 445; *Bolingbroke* v. *Swindon Board of Health*, 9 L.R.C.P. 575 and *Poulton* v. *L. & S. W. R'y Co.*, 36 L.J.Q.B. 294; and, in the alternative, they ask us to exercise our statutory powers as a Divisional Court and to order a new trial, on the ground of misdirection and non-direction by the Trial Judge, and that the verdict was against the weight of evidence.

The plaintiff, Adams, had entered the defendants' tram

car at Yates Street, purposing to travel on it as far as the West end of Rock Bay bridge. The fare was five cents for this distance; but it was necessary, as the plaintiff knew, to change cars at the power house. Shortly after entering the car, he paid his five cents to the conductor, and asked for a transfer ticket; but the conductor declined, saying that "it was all right," with which assurance the plaintiff was satisfied. On arriving at the power house, the second car being ready waiting, the plaintiff stepped off the Yates Street car on to the second car, which presently moved on. The conductor on the second car immediately began to collect the fares from the passengers; but when the plaintiff was applied to, he informed the conductor that he had paid on the first car. The conductor then asked for his transfer ticket, but the plaintiff informed him that the former conductor had refused to give him one. Plaintiff was then informed that in default of a transfer ticket, he must pay five cents or leave the car, and, declining to pay over again, he was, notwithstanding his giving his name and address, and in spite of his resistance, dragged off the car by the conductor, with more or less difficulty, before arriving at his lawful destination. I cannot find any grounds for directing a new trial. The alleged misdirection consists in this, that the learned Judge did not direct the jury to find for the defendants on the authority of the cases above cited. As to this, I have had occasion very lately, in the case of *Harris* v. *Brunette Saw Mill Co.*, to review those decisions in the light of more recent cases, and it seems unnecessary to repeat the observations then made. This alleged misdirection, in truth, is the same ground upon which the nonsuit is moved for. It seems clear that the result of applying the doctrine of the above cited cases to joint stock companies without great care may lead to great hardship and ensure them complete immunity for the greatest oppression. For, as a company can do nothing except pass or reject resolutions in general meeting, and can never, for instance,

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commit an assault upon anybody, but must do everything, lawful or unlawful, by some agent, if they are not to be made responsible for any act of an agent, except such as they might do themselves, they can never be made responsible for any act of any agent, lawful or unlawful. Nor can any agent, even a president, ratify an unlawful act of a conductor; that is no part of his presidential duty. Whether from such considerations or otherwise, it seems noticeable that of late years the authority of *Edward's case, etc.*, seems somewhat disregarded. In particular Mr. Justice WILLES, in *Barwick* v. *Joint Stock Bank* (L.R. 2, Ex. 259) in the Exchequer Chamber, uses the words (cited afterwards with approval in the Privy Council and the House of Lords) "The general rule is, the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved" (with many illustrations). "In all of these cases, it may be said, as it was said here, that the master had not authorized the act; but he has placed the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the master to place him in."

Judgment.

And Lord COLERIDGE, in *Swift* v. *Winterbotham* (L.R. 8 Q.B. 244), says: "When the agent of a company in conducting its business does something of which the company takes advantage or by which they may profit, and it turns out that the act so done by their agent is a wrongful act, they cannot afterwards repudiate the agency and say that the act which has been done by their agent is not an act for which they are liable." And so it is in the very recent cases in England of *Lowe* v. *Great Northern R'y Co.*, 62 L. J.Q.B 524, just before the last long vacation, and *Ashton* v. *Spiers & Pond*, 9 T.L.R., 606, just after vacation, where all the arguments and cases cited by *Mr. Cassidy* were urged, the Court upheld the verdict of the jury,

making the Company liable for the tortious act of their servant. *Lowe* v. *Great Northern R'y Co.* is very near indeed to the present case, and the Judges (MATTHEW and WRIGHT, J.J.) both say "The porter (who was the aggressor in that case) must have the power to remove a person improperly travelling in the company's carriage; here he has made a mistake as to the impropriety, and the company is liable."

The present is a very gross case of a series of blunders on the part of the defendants. It is not only the conductor who has mistaken his power; he had a very good reason for thinking he was right; the administrators of the company have committed still graver errors. It seems quite clear that the plaintiff was abundantly in his right, in endeavouring to retain his seat; being there by a contract with the company, for which he had already given full consideration. He had complied both with the company's private Act, which says, Sec. 12, "The fare shall be due and payable by every passenger, on entering the company's car;" and with the rule suspended in the car, which says that the passenger, if he purposes a trip which will involve a change of car, must ask the conductor for a transfer ticket when he pays his fare. He could not compel the conductor to give him this ticket: and the conductor declined to give him one, intimating that it was unnecessary. And then there was some very extraordinary evidence. It seems that the company had, in the meantime, issued a new rule, directing that in such case the fare should not be payable in the first car, nor accepted by the conductor there, nor was any transfer ticket to be given, but that the fare was to be due and payable to the conductor in the second car. This rule, of course, is quite illegal and void, being inconsistent with the company's Act of Parliament; and the company seems to have committed the extraordinary blunder of keeping it secret from the passengers (for it was not displayed in the car, but, on the contrary, the original rule, which this new

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rule professed to repeal, was still kept displayed for the guidance of the passengers) and of communicating it to some only of their conductors. It would seem impossible to pursue any course more certain to lead to entanglement.

As to the suggestion that there is no evidence, or not sufficient evidence, that the plaintiff was in the first car at all, it seems quite absurd. There is no evidence the other way. There is the plaintiff's own evidence that he entered at Yates Street and paid his fare to the conductor, and he was not cross-examined as to these statements, nor, indeed, at all, on his first examination in chief. There is the evidence of Mr. Oliver, who saw him get off the first car at the power house, also not cross-examined as to that. What the defendants style "evidence" against the plaintiff is, first, Mr. Meyers, who was in the first car, but does not recollect having seen the plaintiff there. Mr. Meyers does not say that he recollects anybody who was there—probably he paid no attention. And, next, there is Mr. Holmes, who says that at the power house he saw the plaintiff coming from the direction of Pembroke street; that is, not in Pembroke street, but standing or moving between the witness and Pembroke street. But that was also in the direction of coming from the car. The witness might have stated with equal truth and equal relevancy that he saw the plaintiff coming from the direction of the cathedral a mile away, and was also in the line of coming from the off side of the car. The evidence of two witnesses who thought they were in or near the car, did not see, or did not notice, the plaintiff upon the car, are really not to be balanced at all against the evidence of other two witnesses who did see him on the car. There is a very equitable rule in granting new trials and disturbing a verdict, that we are not to do so unless some substantial injustice has been done. In my opinion, this entitles us to look at the answers of Mr. Higgins, the president of the company, on his examination, even at such as were not read to the jury. And it is quite

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clear that he, so far as lay in his power, on behalf of the company, amply ratifies and adopts the act of the conductor now complained of. And, in every point of view, it seems that it would be most unjust, if the plaintiff were to be left without redress; and that the circumstances would even have quite justified the jury in awarding exemplary damages. They have given a most temperate amount. Then, as to the last part of the appeal against the allowance of Supreme Court costs. It cannot be denied that the Judge had power to certify that this was a proper case to be brought in this Court, in which case the plaintiff would get his costs; and the Supreme Court scale is the only scale on which these costs can be taxed, for he is to get these costs or nothing. Now, in substance, that is just what the learned Judge has done; and where a Judge has jurisdiction and a discretion as to costs, there is no appeal from his directions, even if the Court above should differ in their views of their propriety. But this seems an eminently proper order.

Judgment.

Both the appeals to the Full and also to the Divisional Court will therefore be dismissed with costs; but there will only be one set of costs.

CREASE, J.: This was a motion by the defendant Company to set aside the verdict obtained for the plaintiff for $13.25 and for a new trial, on the grounds of improper admission of evidence, misdirection, non-direction of the jury by the learned Judge at the trial, or, for entry of judgment for the defendants with costs on the ground of no evidence to support the verdict and that the Court has all necessary materials whereby to form a final judgment.

The pleadings in the case, succinctly stated, are, that Adams brings his action against the defendant Tramway Company for an assault which he alleges has been made upon him by one of the conductors, a servant of the company.

The defendants do not deny and therefore by the rules

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admit the assault, so as far as that goes, the case is undefended, and the defendants beyond a question admit their responsibility. They go on and for defence plead that plaintiff was properly turned out in that he had no right to be in the car at all for that he did not pay his fare or produce a transfer ticket, to entitle him to passage on the car. The facts of the case, however, as detailed in the evidence and adopted by the jury in their verdict, are short and plain.

On the 13th June, 1893, the plaintiff entered a car of the defendant Tramway Company at the corner of Yates and Government streets to go to his place of business between Rock Bay Bridge and Point Ellice Bridge, the regular fare for which journey is five cents. On the payment of that fare the contract between him and the Tramway Company, viz., to convey him from the place where he took the car to Point Ellice Bridge in consideration of the payment of five cents, was clear and complete. He paid the full fare of five cents for the carriage contracted for, as required by the wording of the Act "upon entering the car," and following the directions prescribed by the regulations posted up by company in the car, at the same time asked for a transfer ticket to frank him in Car No. 7 (which for the convenience and under the managing powers of the defendant company) was appointed to connect and carry on the first car passengers to their several stipulated destinations.

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The conductor of this first car, who by the by, was not produced by the company as a witness, refused to give plaintiff a transfer (as it is called) but said it was all right, he did not require it; whereupon he got on to the second or connecting Car No. 7 without one. Shortly after this second car started to cross Rock Bay Bridge and when partly across, the conductor of it (Wilson) asked plaintiff for his fare, or a transfer ticket. Adams explained that he had paid his fare in the first car to the conductor who had told him in reply to his request for a ticket that the trans-

fer ticket was not required. He refused to pay the same fare a second time for the same ride. Thereupon, and for such default, the conductor threatened to put him forcibly off the car. Warm words, as might be expected, on both sides ensued. Adams gave his name and address as a reference to meet any proceedings which might be instituted against him. But notwithstanding this the conductor, using violence, forcibly ejected him from the car which is the tort complained of.

The case was tried on the 28th February, 1893, before a Supreme Court Judge and a special jury, who returned a verdict of $13.25 damages in favour of the plaintiff. The learned Judge having reserved to counsel for the defendant the right to apply for a non-suit when the plaintiff should move for judgment. On the 8th February, 1894, the learned Judge, after hearing the argument for a non-suit, delivered judgment and sustained the verdict of the jury with costs.

Judgment.

From this the defendants now appeal: First, to set aside the verdict and for a new trial on the following grounds:—

For improper admission of evidence, viz., of part of the examination of David W. Higgins before the Registrar. But this was in my opinion admissiable under Rule 725, and as Mr. Higgins was not produced in Court by the defendant at the trial it became necessary for the information of the jury to supply them with the evidence, and having been introduced, it became the duty of the learned Judge at the trial, whether counsel in introducing them knew his exact position or not, in charging the jury, to lay before them the purport of those portions of the evidence of Higgins which were so closely connected together as to form one subject. Mr. Higgins proved he was managing director of the company, and as such, he fully confirmed and approved of the conductor's action in the matter, under the instructions to conductors laid down by the company. There was full knowledge and intention, full capacity to

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act, as a company can only act by its officers, of whom he was chief, so the adoption by the company, so far as they could, of the servants' act—the putting the passenger off the car by force, which is in law an assault—was complete. In fact by their pleadings they have acknowledged their responsibility, and all this effort to prove they could not be liable is not of any avail in the face of the pleadings which admit their responsibility for the company's act.

The second ground—misdirection and non-direction of the learned Judge—in that he read to the jury a part of the evidence of D. W. Higgins which plaintiff's counsel had not formally put in. The reply to this is partially involved in my answer to the first. Though plaintiff's counsel only put in part of the examination the Judge could see and examine the whole, and if the interests of justice, and the proper and complete understanding by the jury of the portions put in called for it, use and repeat to the jury such portions connected with them as he found necessary. It would be impossible for a Judge to stop a trial by excluding such portion of the evidence before him as formed a necessary sequence to the portion specially put in, merely because of some misapprehension or mistake of counsel as to his position.

Judgment.

(*a.*) The next is, that the learned Judge improperly read to the jury the portion of the evidence of D. W. Higgins, that the duty of "the conductor under our instructions was to do exactly as he did" as an evidence of an adoption by the company. On this I have already commented. The company have acknowledged their responsibility and I observe here that the learned counsel for the defendants considers "that this evidence even if properly before the jury, would not have affected the defendants as charged by the learned Judge." This implies and involves a separate point of law, that the act of the conductor was *ultra vires* of the company and there was a want of authority in the conductor. But this is a difficulty which the learned counsel

for the defendant has been struggling with all through the appeal, and seeking to interweave into the case, without laying the only proper foundation for it. The conclusive answer is that the point is not raised in the pleadings, and the rules (Order xix.) are imperative that the parties are to raise all their grounds of action or defence in their pleadings, or be concluded by their neglect. This the defence have omitted to do in respect of *ultra vires* of the company, and the want of the authority in the conductor and this mission by itself is fatal to them now besides and they have admitted the assault which is the tort complaned of and their responsibility for it.

(*b.*) The next grounds that the learned Judge at the trial told the jury that there was no cross-examination of the plaintiff, therefore all his testimony was to be accepted as undisputed. Whereas Holmes and another had given evidence varying somewhat from Adams, as to what took place at the second car. But that is a very imperfect rendering of the words of the learned Judge in his charge, which under *Clark* v. *Molyneux*, 3 Q.B.D., 243, should be looked at as a whole, not in detached fragments. As I read it, it clearly meant that those portions of the evidence on which he had not been cross-examined were to be taken as admitted and undisputed. Any other construction would have been inconsistent with the learned Judge's charge to them to weigh carefully all the evidence on both sides; and a charge, especially in a long case, must be read like a statute, so that, if possible, effect should be given to every part of it, "*ut res magis valeat.*"

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(*c.*) The next ground is: That instead of charging the jury to decide whether the plaintiff had paid his fare or not, as if it were material and implying that he had done so, the learned Judge should have charged, since the conductor had no power to eject for nonpayment of fare (supposing defendant liable for his act) that such question was imma-

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terial, except upon the point of damages. If that were so, if it were immaterial, that would not act injuriously upon such of their findings as are material, and these are amply sufficient to sustain the verdict.

(*d.*) The next ground is : That the learned Judge should not have told the jury that there was no "custom" established, as to the particular mode and car for the payment of fares. As to that, I see that the *Tramway Act*, Sec. 12, Cap. 39, 1889, enacts that "the fare shall be due and payable on entering the car," (under a penalty by action not expulsion), and in that Adams complied with the working and intent of the Act.

I cannot but conceive that the charge of the learned Judge on the point of custom was perfectly correct.

There could be no custom under the evidence laid before the jury, nor any positive or settled rule was proved. There was no time for a custom to have established itself, and no certain regular practice was proved; without which, even if there had been time, no custom could have arisen of which the law could take cognizance.

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(*e.*) The next ground raises again, but more directly, the question of *ultra vires* in the company and want of authority in the conductor. This has already been dealt with, and needs no further comment.

Now as to the liability of the company, I have already stated that as the question of *ultra vires* and no authority in the servant, is not raised in the pleadings, this case does not turn on that point, and the citation of cases bearing on that is of no practical use in this case. The learned counsel for the defence cited the *Poulton case*, 2 L.R.Q.B. 534, *Roe* v. *Birkenhead Ry.*, 21 L.J. Ex. 9, *Goff* v. *The Great Northern*, 30 L.J.Q.B. 148, and others in the same direction, that the servant of a company is not impliedly authorized to commit or do any act which the company itself cannot do. In the position which the company under their pleadings have taken up, these cases are inapplicable here. It is scarcely

consistent to bring forward a string of cases to shew that in law the company cannot be responsible, when by their pleadings they practically are so. They admit the assault and practically they are responsible for it, as they go on to shew that the assault was justifiable. But as the question of the liability of companies for the act of their servants has been mooted in dealing with this case, it is a matter of great public importance to know how far under the modern authorities the public are protected by law while travelling in public conveyances.

There are cases which shew that where an incorporated company, such as the defendant Tramway Company, does authorize or justify an illegal act of a servant, in the supposed discharge of his duty in the course of his employment, the company becomes liable for the consequences. A corporation can only speak by resolution, or by seal, or by-law. As it cannot act in person, it must act through its officers and servants; and when a servant, in the course of his employment and in supposed discharge of and scope of his duty delegated to him, forms an erroneous judgment, the company has been held liable, as in the case of *Seymour* v. *Greenwood*, 6 H. & N. 359. A master may be liable even for wilful and deliberate wrongs committed by a servant, provided they be done on the master's account and for his purposes, and this no less than in other cases, although the servant's conduct is of a kind forbidden by the master. Of course he is not liable for the acts of the servant which are "committed exclusively for the servant's private ends," or "for private spite"—see BLACKBURN, J., in *Limpus* v. *Gen. Omnibus Co.*, 1 H. & C. at p. 526. of which there is no suggestion in the present case. The question is not, what was the nature of the act in itself, but whether the servant intended to act in the master's interest.

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Then we have *Butler's case* against *Manchester Railway Co.*, 21 Q.B.D. 207, the circumstances of which are nearly analagous to those in the present case. There the plaintiff, who

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was a passenger by defendant's railway, had admittedly paid for a ticket but had lost it, admittedly accidentally. At a certain stage of the journey he was asked to produce his ticket, and, not being able so do so, was told he must pay the ordinary third-class fare from M. to S. He refused to do so, and thereupon defendants' servants (as in the case now before us) assumed the power of putting the plaintiff forcibly out of the railway carriage in which he was travelling. The plaintiff brought an action of assault against the defendants; they pleaded they were justified in removing the plaintiff from their carriage by a reasonable amount of force, as he was unlawfully on the carriage (as the tramway company do here), and it was admitted that the allegation that he was so, was material to their defence. The question, therefore, was, whether it was true that he was unlawfully on their premises. It was the same here. The jury in their case decided it in the negative. The Court of Appeal, Lord ESSHER speaking, determined that

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"no one has a legal right to lay hands forcibly on a man in the absence of some legal authority to do so, or some agreement to that effect." And that requires (says LINDLEY, J., in the same appeal) some by-law authorizing the company to remove from their carriage a passenger who failed to produce his ticket. "That consideration (he adds) seems to be the key to the whole case." How can the company justify laying hands on the plaintiff? The passenger had taken his ticket and the effect was that there was a contract by the company to carry him to M. and back. And there was no provision for his being turned out on breach of any part of the contract. The remedy would have been to take proceedings for the breach of contract on his part.

And the same here.

The plaintiff had admittedly taken his ticket for the journey from M. to S. and back, and had paid his full fare for the journey, and admittedly he had lost his ticket accidentally.

"The effect is to my mind (says LOPES, C.J.) that he was lawfully in the defendants' carriage. It seems to me sufficient to state so much to shew that the defendants were not justified in assaulting him as they did." The case of the present plaintiff is much stronger than of the plaintiff in Butler's case. For here there is no by-law, no custom, to restrict him. He was acting in literal obedience to the company's regulations posted up in the car, and to the wording of the Act, and was sent on to car No. 7 (by the conductor of the first car, a servant of the company's), with the parting words, "Its all right, you don't require a ticket." The defendant company's case has broken down on their own shewing. It is to be observed that the class of cases in which the relations of companies and passengers come up arises principally in railways, omnibus companies, tramway companies, and the like, carried on as incorporated companies, who must act by officers and servants, in all of which the public are intimately concerned; and therefore have to look to the law for protection.

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The tendency of modern authorities to extend this protection, and the remedies against corporations, is strongly shewn in another set of cases, where fraud in their agents or servants is exhibited, and the corporations, although incapable themselves of fraud, are made responsible for this in the same manner as for wrongs.

The liability of the master (the company) for the frauds of the servant, is imposed by the policy of the law, without regard to personal default (it would be very difficult for a corporation to make a personal default) on the master's part; so that his express command or privity need not be shewn; which places fraud on the same footing as any other wrong. And the plain reason, exactly as in the case now under appeal, is that a corporation can never be invested with either rights or duties except through natural persons, who are its agents. *The British Mutual Banking Co., Ltd.* v. *The Charnwood Ry. Co.*, 18 Q.B.D. 714. If the

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contention of the learned counsel for the defence in this case could be carried into practice, and only the conductor be held responsible, there would practically be no remedy for any wrong he might commit, either in excess or mistake of his instructions in the ostensible discharge of his duties. There could be no remedy by action, for he has nothing, nor by criminal proceedings, for he acted with an honest intention, under an honest mistake. The result would be, that the travelling public would be unprotected, and no passengers in these tram cars would be safe.

For all the foregoing reasons and considerations I am of opinion that the judgment of the learned Judge must be sustained and the appeal dismissed with costs. As to the motion for the reversal of the judgment in favour of the defendants, it will be seen from what I have said that there is not sufficient ground advanced for it and the appeal must be dismissed. And as to the appeal against the imposition of Supreme Court costs there is this to say: Costs are as a general rule in the discretion of the trial Judge, who in this case has exercised it, after a separate motion and argument in Court and has decided that the law points involved in the case are of sufficient importance to be tried in the Supreme Court in preference to an inferior tribunal, and I confess I am of the same opinion and confirm his decision as to the higher scale of costs which he gives to the plaintiff.

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Appeal dismissed with costs.

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Employers' Liability—Stat. B. C., 1891, Cap. 10, Secs. 3-6—"Ways"—"Defect"—Contributory negligence—Volenti non fit injuria—Verdict.

Plaintiff, in the course of his duties as defendants' employee, in their mill, walked upon a roller way constructed for the purpose of carrying lumber from the saws out of the mill, consisting of a platform through which rollers, moved by connecting uncovered cog wheels at the sides, slightly projected. The jury found that there were other passage ways for the plaintiff, but none of them sufficient. That the non-covering of the cogs was a defect. That the plaintiff was cognizant of the danger of using the roller platform but was not unduly negligent, and found damages.

Held, per DRAKE, J.—Upon motion for judgment, dismissing the action, that if the defendants had covered the cogs the accident would not have happened, and that, upon the findings of the jury, the negligence of defendants was primarily the cause of the accident, but that the plaintiff was guilty of contributory negligence in using the roller way as a passage way, and was *volens* in regard to the risk of injury.

Held, by the Full Court (BEGBIE, C.J., CREASE and WALKEM, JJ.), allowing an appeal and entering judgment for the plaintiff—That, to support the defence of contributory negligence, it was necessary that there should be a direct and positive finding that the plaintiff voluntarily incurred the risk, and that there was no such finding.

Quære, Whether that defence was not barred by Section 6 of the Act. *Per* WALKEM, J., that it was.

That the finding, by the jury, of damages must be considered as equivalent to a general verdict for the plaintiff, supplementing the special findings and importing such as were necessary to a general verdict.

That upon the evidence and findings of the jury the plaintiff's case was made out, and that the Court having all the necessary materials before it should enter judgment for the plaintiff upon the evidence, instead of granting a new trial.

APPEAL to the Full Court from a judgment for defendants granted by Mr. Justice DRAKE, before whom the case was tried, with a special jury, by his judgment, upon cross motions to him for judgment after the trial, *i. e.*, by the plaintiff, for judgment for the amount of damages assessed by the jury, and by the defendants, for a non-suit, or judgment for them. Statement.

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Statement.

The action was under the *Employers' Liability Act, 1891, B.C.*, Cap. 10, Sec. 3, to recover damages for personal injuries alleged to have been caused to the plaintiff by reason of defects in the condition and arrangement of the ways, works, machinery, etc., of the defendants' saw-mill, in which the plaintiff was employed as a tallyman. His duty required him to mark down, or tally, at three different places on one side of the mill all the lumber cut during its passage from the circular saw until its exit from the mill along two roller ways, A and B, one a continuation of the other, constructed for that purpose, and in the course of such employment to go from one part of the mill to another. The construction and arrangements of the mill were such, that the most ready and convenient method for the workmen of traversing the mill, was to use the roller ways as passage ways, and it was the admitted custom of the employees so to use them. A workman was usually employed to control a lever governing the rollers upon which the cogs in question were fixed, but, upon the occasion in question he was absent, and the foreman had not appointed any other person to attend to his duties during his absence. The plaintiff, while walking upon the roller-way B, which consisted of a wooden platform, through which, at the distance of a step from each other, the rollers slightly projected, slipped upon one of the moving rollers and caught his foot between the cog-wheels at the side of the rollers, which connected them with the driving power and with each other, and which resulted in the injury complained of. The plaintiff claimed that the roller-way, though originally intended for the passage of lumber only, had been adopted by common consent as a passage-way for workmen, and that shields or covers for the cogs should have been supplied, in order to render it safe as a passage-way, and that their absence was a "defect" within the the meaning of the Act. Such shields were furnished on roller-way A. The plaintiff also claimed that there was neg-

ligence in the foreman, for which the defendants were liable under Sec. 3, in not having a man to control the rollers, whereby the accident might have been averted. The defence set up was that the roller-way in question was not provided or held out (as was roller-way A) as a passage-way for workmen and was not a "way" within the meaning of the Act, and that other and sufficient ways were provided, which the plaintiff ought to have used on the occasion in question. The plaintiff disputed that there was any other proper or sufficient way provided. At the close of the plaintiff's case, the defendant's counsel moved for a non-suit, on the grounds above indicated. The learned Judge refused the motion, but reserved leave to move for a non-suit upon any grounds. At the close of the whole case he left it to the jury upon questions to which they returned answers as follows :—

1. Was there one or more sufficient passage-ways for the plaintiff to fulfil his duties without passing along the roller platform ?

A. There were more ways than one, but, in our opinion, none of them were sufficient, though the roller-way was more expeditious.

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2. Was the non-covering of the cogs on roller-bed a "defect" in "ways, works, or machinery ?"

A. Yes.

3. Were defendants guilty of negligence, in not having a man stationed at the lever ?

A. No.

4. Was the plaintiff guilty of contributory negligence in using the roller platform when it was in operation ?

A. The plaintiff must have been cognizant of the danger of using the roller platform, yet he was not unduly negligent.

5. Amount of damages ?

A. $2,500.

The plaintiff moved for judgment for the amount of

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damages assessed by the jury, and the defendants made a cross motion asking for a non-suit, or judgment for them.

L. G. McPhillips, Q.C., and *C. R. Hamilton*, for the plaintiff, now moved for judgment.

Charles Wilson and *Buell*, for the defendants, *contra*.

DRAKE, J.: This action was tried before me on the 21st and 22nd days of March, with a special jury. The plaintiff's statement of claim alleges that he was a tallyman for the defendants, and that in the exercise of his duty he had frequently to pass from one end of the mill to the othe,r and that in fact the only way for him to go was by the roller platform, and that owing to the defective condition of certain cog wheels which set the rollers in the platform in motion he was injured. The defendants deny liability and allege contributory negligence and a voluntary undertaking by the plaintiff of the employment, knowing its danger. At the close of the plaintiff's case the defendants' counsel moved for a non-suit, on the ground of contributory negligence, and that the plaintiff had undertaken the employment with a full knowledge of the risk. I considered that there was evidence to go to the jury, and refused the application, but reserved to *Mr. Wilson* leave to move on any grounds. At the close of the case, the following questions were submitted to the jury. (The learned Judge then sets forth the questions to and answers of the jury—*supra*, p. 223.)

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On these findings the plaintiff moves for judgment, and the defendants on leave reserved move for a non-suit. The Act under which this action is brought (Employers' Liability Act, 1891) enacts that where personal injury is caused to a workman by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises, he is entitled to recover, unless the defect arose from or had not been discovered or remedied owing to the negligence of the employer; and further, that in case the workman knew of the defect and failed to give

notice to his employer, he cannot recover compensation, unless he was aware that the employer knew of the defects or negligence. The jury have, in fact, found that the ways were not sufficient, but they do not find that the roller-bed way was a way; they say it was more expeditious, it does not follow that it was a way of necessity, the use of which was compulsory to the plaintiff; they also find that the defendants were negligent in not covering the cogs. The evidence was sufficiently distinct to shew that the foreman and managers were aware of the state of the cogs, because they admit that they did not have them covered, as no workman ought to be on the side of the platform when they were exposed. And they further say, that all the cogs which were a source of danger were carefully protected. The negligence of the defendants in not covering the cogs, is not sufficient to make the defendants responsible, if the plaintiff knew of the risk he was incurring, or voluntarily incurred it. The jury find that he knew the risk and was not unduly negligent. In cases of this sort, the conduct of the plaintiff must be judged by the facts as they appeared at the time of the accident, and not as they afterwards turned out. The plaintiff knew that the platform was dangerous and that the cogs were uncovered, yet for more than twelve months he ran the risk. The Rule laid down in the House of Lords in *Radley* v. *London and Southwestern Ry Co.*, 1 App. cas. 754, at p. 759, is, that though the plaintiff may have been guilty of negligence, which may in fact have contributed to the accident, yet if the defendants could, by ordinary care and diligence, have avoided the mischief, the plaintiff's negligence will not excuse them. If the case had rested here, and there had been no other way open to the plaintiff to fulfil his duties, the defendants would be liable. The jury say the plaintiff was not unduly negligent; this may either mean he was not unduly or excessively negligent. In either meaning it imports negligence, and if the plaintiff's negligence was the sole cause of

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the accident, he cannot recover. Here, if the defendants had covered the cogs, which was easily done, this accident would not have happened; therefore, on these findings, the negligence of the defendants was primarily the cause of the accident. But whatever may be the result of these findings, the defendants contend that the plaintiff undertook the work knowing the danger, and that the maxim *volenti non fit injuria* applies, and the case of *Membery* v. *Great Western Ry. Co.*, 14 App. cas. 179, was cited. In that case the plaintiff had been engaged to shunt trucks, a dangerous operation, and in the performance of his duties he was injured. It was held that as he had voluntarily undertaken the risk, he could not recover. Lord BRAMWELL says: "Where a man is not physically constrained, when he can at his option do a thing or not, the maxim applies." The analogy between that case and the present is this: Here, the duty was not dangerous, but was made so by the plaintiff's own act. He might have avoided the danger at his own option, and have taken a slower and safer mode of passage; and in *Thomas* v. *Quartermaine*, 18 Q.B.D., 685, LINDLEY, L.J., says; "The question in each case must be not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff. If a workman voluntarily agrees to incur a particular danger, or voluntarily exposes himself to it, and is thereby injured, he cannot hold his master liable." And in *Yarmouth* v. *France*, 19 Q.B.D. 647, the Master of the Rolls, discussing the judgment in *Thomas* v. *Quartermaine*, says, the mere knowledge of danger will not do, there must be assent on the part of the workman to accept the risk with a full appreciation of its extent, to bring the workman within the maxim *volenti non fit injuria*. In the present case we have knowledge on the workman's part; he was also *volens* for more than twelve months; he had used the roller platform knowing its dangers, without com-

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plaint. This continued user is assent in the strongest form. In *Woodley* v. *Metropolitan Dist. Ry, Co.*, 2 Ex. D. 384, where a workman was injured after a fortnight's employment in a dangerous job, he was held not entitled to recover, as he had continued in the employment with a full knowledge of the danger. If every workman was entitled to recover damages for injuries sustained in doing work which he knew was risky, a large number of mills would have to close. No man is compelled to work at a dangerous task. and wherever there is machinery there is more or less risk. The plaintiff here, in my opinion, voluntarily incurred the risk, as he was not using the roller platform in pursuance of any order which he was bound to obey at the risk of losing his employment, but he used it to expedite his work,

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I am, therefore, of opinion that he is not entitled to recover, and I dismiss the action with costs.

Action dismissed with costs.

The plaintiff appealed from this judgment to the Full Court, and the appeal was argued on the 12th day of July, 1893, before SIR MATTHEW B. BEGBIE, C.J., CREASE and WALKEM, J.J.

L. G. McPhillips, Q.C., and *C. R. Hamilton* for the appeal: The findings of the jury do not support the judgment. The first and second findings determine that the roller-way was a "way," in the sense of a passage for the workmen, and that the non-covering of the cogs was a "defect" in relation to its user for that purpose, causing the injury complained of. As to the meaning of the word "way," see *Roberts & Wallace on Employers' Liability*, 3rd ed., p. 247; *McGiffin* v. *Palmer Shipbuilding Co.*, 10 Q.B.D. 5. The fourth finding, that the plaintiff must have been cognizant of the danger of using the roller-ways, is not a finding that the plaintiff was *volens* as to the risk of injury—see *Employers' Liability Act*, 54 Vic. B.C. (1891), Cap. 10, Sec. 6, which is merely

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declaratory of the law as laid down in *Smith* v. *Baker*, 1891, App. cas. 325 ; see also *Osborne* v. *L. & N. W. Ry. Co.*, 21 Q.B. D., 220, at p. 224 ; *Yarmouth* v. *France*, 19 Q.B.D. 647. In order to defeat the plaintiff's claim upon this ground or that of contributory negligence, there would have to be a finding that the plaintiff, both knowingly and voluntarily, assumed the risk, or that he was negligent in his mode of using the way, and that his negligence was the proximate cause of the injury. The words "not unduly negligent" mean reasonably careful ; at all events, they do not constitute a finding—still less an unequivocal finding—of contributory negligence. And the *onus* was on the defendants to obtain that in order to succeed in face of the other findings. *Smith on Negligence*, p. 155 ; *Dublin, Wicklow and Wexford R'y Co.* v. *Slattery*, L.R. 3 App. Cas. 1,155 at p. 1,180. The judgment appealed from says that if the defendants had covered the cogs, which was easily done, the accident would not have happened, and that the negligence of the defendants was primarily the cause of the accident, and decides against the plaintiff, on the basis of the application of the maxim *volenti non fit injuria*, which, we submit, does not apply.

Argument.

Charles Wilson and *Buell*, for the defendants : Apart from the question of the application of the maxim *volenti non fit injuria*—there is no finding that the defect found was the *causa causans* of the plaintiff's injury, or that the defect was due to the negligence of the defendants, which is a necessary finding. There is no more liability under the Act, for defects not the result of negligence than at common law. *Roberts & Wallace*, *supra*, p. 249, and cases cited ; *Walsh* v. *Whiteley*, 21 Q.B.D. 371. The fourth finding, in answer to the question whether the plaintiff was guilty of contributory negligence, that he was not unduly negligent, is a sufficient finding of contributory negligence, for, after the finding of negligence, the qualification must be discarded. The fact that the plaintiff and other workmen, to

the knowledge of defendants, used the roller-way as a passage way, did not make it a "way." It was not constructed for or held out as such. The roller-way was admittedly not defective in any respect for the purpose for which it was constructed, and the plaintiff and other workmen, by using it for a passage-way with full knowledge that it was not constructed for that purpose, could not complain of the lack of shields on the rollers or cogs. The supplying of them was not a reasonable precaution required of the defendants, and their absence not a defect, and the finding to that effect is contrary to law and the evidence. If the non-suit is not maintained, there must be a new trial, as the findings, if not fatal to the plaintiff, are inconclusive.

L. G. McPhillips, Q.C., in reply: The Court should enter a verdict in accordance with what is deemed to be the true construction of the findings, coupled with other facts taken as admitted, or so clearly proved that no controversy could arise about them—*per* SIR R. COLLIER in *Connecticut Mutual Ins. Co.* v. *Moore*, 6 App. Cas. 644. The evident intention of the jury was to find for the plaintiff, to whom they assessed damages, and the findings should be looked at in this light.

Argument.

BEGBIE, C. J.: The plaintiff a tallyman in the defendants' saw-mill sues for damages for an accident which occurred in the execution of his employment.

The duty of a tallyman is to receive at one end of a long bench, about forty feet long, the lumber as it is prepared and passed up to him from the saws. If free from defects he then has to pass it along such bench to the other end, where it is delivered to another workman for shipment. In order that the lumber may travel along the bench, which is about two feet wide, rollers are arranged at intervals of about twenty inches along its whole length, which are kept in rapid motion by machinery by means of a belt. These rollers, about three or four inches in diameter, are arranged horizontally at the same level and moved by

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means of a cogged wheel at the near end of each roller, the cogs on the wheels, being set at an angle of 45 degrees, are acted upon by another corresponding set of cogs, on wheels fixed on a spindle parallel with and close to the bench: the cogs on these last mentioned wheels are also at an angle of 45 degrees, fitting to the cog-wheels already mentioned at the end of each roller.

In order to prevent the end of the planks or lumber from striking against these rollers while being passed along them, the intervening spaces are fitted with solid slabs firmly fixed to the bench, but so as not to touch the rollers or interfere with their motion, so that the whole bench presents the appearance of a series of firm stepping stones of about eighteen inches or two feet square, separated by a series of rollers kept in rapid motion by machinery, which are in the works known as "live rollers." Obviously the tallyman may some time make a mistake in his judgment of some particular plank and may send along this bench towards the delivery end a plank which he may almost immediately perceive ought to be discarded as unfit for shipment. In order to correct his error and recall such a defective plank, means are provided by which on pressing a lever, the motion of rotation of the rollers is reversed and the plank is brought back again. The tallyman has to leave his post from time to time, advance to the middle of the bench and record on a board there the quantities and descriptions of the lumber which he has passed on to the delivery end, and for this purpose he was proceeding along the bench above described, stepping on these boards just likened to stepping stones, when he unfortunately stumbled and fell with the terribble consequence of the loss his leg at the hip joint. Perhaps no verbal description without the aid of plans or models can quite convey a full notion of the Bench, considered as a way, and the danger connected with it. To any man accustomed to a mill full of whirling machinery, it would seem not at all more peril-

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ous or risky than the way provided for railway employees along the top of a train in motion or even the passage way from one passenger car to another.

There seems to be a preponderance of evidence to show that the plaintiff and all the workmen in the mill, and even the foreman, when they had to move from one end of the mill to the other, generally, some of them perhaps invariably, used this as a way for a whole year, while the plaintiff was employed there; and this was the first accident which occurred. This might be thought to shew that this bench was a perfectly, or at least a reasonably safe "way." There are of course two sorts of danger; one from the risk of an accident happening at all; the other, the risk of the consequences being more or less serious. The risk of falling from a trapeze, is just the same whether a net is or is not stretched below the performer, but the risk of hurting himself is very different. Now, here, there was, with ordinary care, very little danger of falling at all; even if the plaintiff had fallen, under ordinary circumstances, *i.e.* if the rollers had been running as usual towards the delivery end, the consequences would only have been such as might follow from a tumble from an ordinary table, for the upper circumference of the cog-wheels in that case would have been turning away from each other, and the plaintiff's leg could not have been caught and crushed between them. It was only in the unusual case of the motion of the rollers, and therefore of the cog-wheels, being reversed, and the plaintiff's leg or his clothes being seized and dragged inwards—which was actually the case when the plaintiff stumbled—that any serious mischief could have happened, and that was a risk so small, as depending on the concurrence of two improbable contingencies, that it might be well questioned whether this bench was not a reasonably safe way for the passage of the employees to and fro. No way can anywhere be absolutely safe; horses and men stumble from time to time without any apparent cause and

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with very serious results, on open smooth roads; and in a workshop like a saw-mill, full, perhaps unusually full, of machinery and moving belts and rollers in many directions, nothing more can be required from the employer than that he should provide a reasonably safe passage. This, however, he is as a matter of duty bound to provide, otherwise he is guilty of negligence, and, of course, he will be liable for the consequences.

If, therefore, the question had been left to the jury to say whether the way along the bench was a reasonably safe way for a reasonably careful man, and they had found that it was, I do not know that I would have quarrelled with that finding. Perhaps if I had been a juryman I might have considered it a reasonably safe way. In point of fact, the jury have found that it was not safe. Are the defendants entitled to have that question referred again to another jury? I think not. In the first place, whatever the inclination of my own mind might have been, it was a question for the jury, and it is impossible to say that no reasonable man could pronounce it unsafe. On the contrary, there is abundant evidence to support their findings, and in such case a Court of Appeal rarely refuses to give effect to the verdict. But beyond that, I do not think that it is open to the defendants to take this point at all, or rely on the safety of the ways along the bench or "roller way," as it is called, they have themselves distinctly condemned it. They strongly contended at the trial that this was a dangerous way, so dangerous that it never was intended by them as a passage way for workmen, and that for that purpose another way had been provided for them, a little longer, it was true, but quite safe; and that the plaintiff only used this bench as a way in order to save himself trouble, and then the doctrine "*volenti non fit injuria*" was invoked. It may be much doubted whether that doctrine applies, unless the damaged party not only has before hand a tolerably clear view of the chances and of the possible results of

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failure, but also deliberately selects a course which he had no right, or at least was not bound to follow. The plaintiff denies all this contention as to there being a choice of ways, alleging that he thought the bench or roller-way to be the regularly appointed way for himself, and, indeed, for all the workmen. There was certainly ample evidence to justify the jury in coming to the conclusion that the plaintiff was not forbidden, but was rather encouraged to use this bench as a way, both by the example of others and his own unchecked practice. There is also in the balance abundance of evidence to warrant the finding that the way alleged by the defendants to have been provided and intended for the plaintiff, was inadequate and unsafe so that it really appears that—this bench or roller-way being interdicted—the defendants have provided no suitable way at all for the performance of the plaintiff's duties. Indeed it is not clear how the plaintiff could have recorded the quantities of lumber on the board already mentioned, which was part of his duties, or how he could have reached that board at all by means of the way or ways suggested by the defendants or in any other manner than by getting up on the interdicted bench way; and the plaintiff at the trial insisted that he could not. Now it was admittedly part of his duties to make this record on this board. The defendants, therefore, have failed in their duty to their servant, and the action will lie, no contributory negligence being shewn and indeed being expressly negatived by the jury. In this position of affairs, it only remains to consider the damages, and although the amount awarded is considerable, it does not seem disporportioned to the injury suffered. On the whole, I think the appeal should be allowed and judgment entered for the plaintiff for the amount found by the jury with costs here and below.

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CREASE, J.: This was an appeal from a judgment of the Supreme Court, in which after a full trial before a special jury the learned Judge presiding, non-suited the plaintiff

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with costs.

The action itself was under the Employers' Liability Act, B. C. Statutes 1891, Cap. 10, Sec. 3, which entitles a workman to compensation for a personal injury caused to him: (1) By reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for, or used in the business of the employer.....The plaintiff was a workman at monthly wages as a tallyman, whose duty it was to mark down or tally all the lumber of the mill while it was being cut, in three different places along the length of one side of defendants' mill during its passage from the circular saw to its exit from the mill on to the wharf where the ships were waiting to receive it as cargo. The injury, which maimed him entirely of one leg for life, occurred by slipping his foot and being drawn in between two cog-wheels working rollers along a platform used by him as a passage way while pursuing his duty as a tallyman in defendants' mill. The danger was not so much from the moving rollers, the axes of which were stationary, with firm thick boards between them, as from the uncovered cog-wheels which caused the rollers to rotate, to convey the lumber over them along the platform from the saws towards the wharf. These were occasionally reversed and turned to work inward against each other; it was during one such reversal of the rollers and cogs that the injury occurred. Between the rollers, the tops of which were a little above the platform, were solid boards on which the plaintiff and other workmen used frequently to walk in their progress from one end of the mill to the other in the process of making the tally.

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The appeal was argued before the Full Court on the 12th July, 1893.

After a careful consideration of the evidence the arguments of counsel and the authorities adduced, I find myself unable to concur in the conclusions of the learned Judge

who tried the case and for the following reasons: In considering the question whether the non-suit can be supported or not, the learned Judge who tried the case has supplied a test which will aid in determining the point, when in his judgment (page 14 in Appeal Book), after commenting on the questions and answers of the jury and citing *Radley* v. *L. & S. W. Railway Co.*, 1 App. Cases 75, he says: "Though the plaintiff may have been guilty of negligence which may in fact have contributed to the accident, yet if the defendants could by ordinary care and diligence" (such, I suggest as covering the cogs) "have avoided the mischief the plaintiff's negligence will not excuse the defendants." "If the case" (he adds) "had rested here, and there had been no other way open to plaintiff to fulfil his duties, the defendants would be liable." If therefore there was no other way (meaning of course a way which the law deems sufficient), and this will shortly appear to have been the case, the judgment declares the defendants would be liable, and, if liable, of course that judgment should go against them. The Judge then proceeds to state, as the reason for granting the non-suit, that the plaintiff was guilty of contributory negligence; that he knew that the way was defective and dangerous, yet used it, and so voluntarily incurred the risk, and consequently was *volens* and "*volenti non fit injuria.*"

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These words therefore supply the test, that before a non-suit can be lawfully declared, it is absolutely necessary there should be a distinct and positive finding that the plaintiff is *volens* and that, being a finding of fact, is the exclusive province of a jury; and further, if upon an examination it should appear, that no such finding has been obtained, then a non-suit becomes inapplicable and would have to be set aside. Thereupon arises the further question, whether there is not already before the Court sufficient evidence and finding of defendants negligence and proof of such other facts in the case as not only to make a new trial unnecessary, but to render it the duty of the Court, having

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all the evidence before it necessary for a just determination of the whole case, to decide in favour of the plaintiff.

Now in entering on a discussion of the question of contributory negligence it must be borne in mind how far the conclusions of the Court are aided in forming an opinion, by Statutory Law on the subject. Turning to the Employers' Liability Act, on which the action is based, we find in Section 6, these words:

"In an action against an employer under this Act a workman *shall not*, by reason only by his continuing in the employment of the employer with knowledge of the defect, negligence, act or omission which caused his injury, *be deemed to have voluntarily incurred the risk of the injury.*" I do not dwell on the qualifications of the above section, in Section 7, Sub-sections 1, 2 and 3, of the Act, because there is such ample proof and admission in the evidence at the trial, that plaintiff was aware that "the employer or some person superior to himself in the service of the employer already knew of the defect or negligence" in the said section more particularly mentioned, applicable in the case, as to make any further reference to these restrictions superfluous. In *Yarmouth* v. *France*, 19 Q.B.D. 647, discussing the question of contributory negligence, Lord Esher says: "Does the maxim *volenti non fit injuria* go this length, that the mere fact of the workman knowing that a thing is dangerous yet using it is conclusive to show that he voluntarily incurs the risk?" His Lordship then (p. 654) lays down as a rule: "Whether or not a workman has voluntarily agreed to run the risk of defective machinery is a question of fact. That would have made the decision in *Thomas* v. *Quartermain* wrong, for the majority of the Judges there took upon themselves to decide the question of fact, whereas in my opinion, they had no right to decide it. The utmost they could properly do was to send it back to the County Court from which it was sent up. I have always protested that it is not for a Judge to say whether or not a

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plaintiff has been guilty of contributory negligence; he (the Judge) has no right to hold that the evidence of it is conclusive. It should be left to the decision of the jury."

The questions submitted to the jury and their answers, in this case sufficiently establish that the jury did not find the plaintiff guilty of contributory negligence. Question 1. "Was there one or more sufficient passage ways for the plaintiff to fulfil his duties without passing along the roller platform?" Answer. "There were more ways than one, but in our opinion *none of them* were sufficient," (meaning for the plaintiff to fulfil his duties without passing along the roller platform—adding) "although the roller-way was *more expeditious*." Evidently, as I read it, regarding the roller "way" as one of the "passage ways" whereby to fulfil his duties, to which the question referred. Question 2, and answer, establish that the non covering of the cogs on roll "way" A (the roller way) was a defect in the ways, works and machinery of the mill. In question 4, the Judge asked the direct question: "Was the plaintiff guilty of contributory negligence" which doubtless he defined "in using the roller platform when it was in operation?" to which he received answer. "The plaintiff must have been cognizant of the danger of using the roller 'way,' *yet* he was not *unduly* negligent."

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This is assumedly not a finding of contributory negligence. Indeed it was an answer unfavorable to the defendants, and according to Lord Esher in *Yarmouth* v. *France*, (p. 654) it was not competent for the learned Judge to hold, as he appears to have done, that the evidence of contributory negligence was conclusive. That rested with the jury and they said he was *not* unduly negligent which according to the common acceptation of the words means not *improperly* negligent. So as to create liability which the judgment under appeal quoted above declares them to have incurred by their negligence in not protecting the machinery where they knew it was defective.

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There was no reason why they should not, and every reason why they should have prevented the danger (in a passage way which they knew from their own experience and example had been in frequent use as a passage way for years) by the speedy and inexpensive covering of the cogs. The learned Judge having left the question of contributory negligence to the jury, could not well after they had answered, take it again from them, and decide it for himself conclusively on his own view of the evidence. That, of itself, affects the validity of the non-suit, neither is it according to the authorities competent for a Judge where there is a jury to decide conclusively on his own view of the evidence that the plaintiff was *volens* and that therefore "*volenti non fit injuria*" applied to him.

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"A mere knowledge" (says Lord Esher in the case last quoted) "of the danger will not do. There may be an assent on the part of the workman to accept the risk with a full appreciation of its extent to bring the workman within the maxim, "*volenti non fit injuria.*" If so, that is a question for the jury and should be specially found. LINDLEY, L.J., in *Yarmouth* v. *France*, lays down that "it is for the jury to find that the plaintiff was not only *sciens* but *volens*." The answer of the jury was in effect that the plaintiff was *sciens* only, he was cognizant of the danger of using the roller platform but was not unduly negligent. That shews that the opinion of the jury on the question of contributory negligence was substantially unfavorable to the defendants and as both *sciens* and *volens* were included in the question; their finding substantially was that plaintiff was also not *volens*. The jury go much further than that, for after weighing all the evidence and the Judge's comment, and considering all the questions put to them, which (under *Clark* v. *Molyneux*) should not be criticized too narrowly, questions which included all that in law formed the constituent parts of contributory negligence returned a verdict for the plaintiff for the full amount allowed by law, $2,500.

Thereby they negatived the idea that plaintiff knew and had a full appreciation of the nature and extent of the risk he was running without which he could not be *volens*. The authorities already quoted shew that it did not follow because plaintiff worked for over twelve months when he knew the cogs were uncovered, and the roller-way consequently dangerous, that therefore he was, for this reason only, guilty of contributory negligence, which the non-suit assumed. When the mill was working in the usual way, as it was at the time of the accident, it was from the evidence next to impossible that Scott could have satisfactorily discharged his duties as tallyman, when the narrow passages which the manager called "ways" were blocked or impeded, as they necessarily were oftentimes, by men throwing slabs backwards over their heads across the narrow passage, endangering any person passing that way, and rolling lumber rapidly from place to place, everything being done at great speed, in the course of cutting lumber for the ship there waiting at the wharf to stow away their lumber as it comes down along the platform from the mill. Every (so called) passage-way in the mill, when it was running, was more or less dangerous; and there was nothing to shew which was the more or less dangerous. The men generally, even when Scott first came, appear to have been constantly in the habit, when duty called them in that direction, of using the roller platform, and the only way one can account for their not having had a similar accident before is that the men became so familiar with its use as to be skilled in avoiding the danger which attended it, particularly Scott, who, it is in evidence had used it more or less frequently for fourteen months presumably without an accident; if there had been one we should certainly have heard of it. It did not come out in evidence that any of the men who had been using the roller-way had met with an accident and this goes to prove that the experience of the roller-way was to make it appear less dangerous than it

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really was to a careful and active man with steady nerves like Scott, and to prevent the danger from acting as an effective caution against its use. Nor could the defendants have thought so themselves, or they would never have set the example by using it themselves as a way, and by their conduct holding it out as a passage-way and abstaining, as the evidence shows they did, from warning their employees against its use as their duty in such case required. Had the cogs been covered as some were after the accident, and thereby rendered perfectly innocuous "practically safe" the accident in question could never have occurred (*vide* Scott's evidence page 33, Appeal Book, questions 382 to 386), and *vide* evidence of J. W. McFarland, Wm. Hickey, machinists; and of Mearns, the foreman of the mill, in support of this. The jury specially found that the noncovering of the cogs on the roller-way, *i.e.*, (the live rollers) was a defect in the ways and machinery; a neglect for which defendants were responsible and the fact of the defendants covering a number of the cogs, as they did after the accident, with complete success, attested the soundness of that finding and sheets home the defect from which the man suffered as the negligence and consequent liability of of the defendants. The judgment itself of the learned Judge decides that if the matter stopped there and in the absence of a finding of contributory negligence which I think I have shewn was not found, the judgment should be for the plaintiff. That the jury was not biassed or in any way influenced by undue sympathy with the plaintiff is proved by their finding that the defendants were not guilty of negligence by reason only of not keeping a man continually at the lever on which the plaintiff had strongly relied. This impartiality makes their finding of negligence for defect in the ways and machinery against the defendants all the more emphatic. The defendants' counsel argue all along as if the plaintiff had a choice of "ways" and voluntarily selected the dangerous one and so was guilty of con-

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tributory negligence. But nothing could be further from the fact. If there had been such ways, surely the assistant manager (Beecher) should have known of them. In passing upon the evidence to ascertain if the verdict of the jury is properly supported it must be remembered that the mill at the time of the accident was twice as full of machinery as its original construction warranted. It was intended and built for one set of sawing machinery, and to make the most of it, Hendry, the constructor of the mill inserted a second or duplicate set of machinery exactly like the first on the opposite side of the mill so that what might have been a fair number of available and safe passage-ways before were so narrowed down as to be no longer safe. So that Hendry's reluctant confession that the mill was "a little cramped" must be taken to have meant "*not* a little cramped" seen in the light of the fact proved of the necessity a tallyman was under of using the live rollers if he wished to get through his work in time. Time being as several witnesses said of great importance in checking lumber always on the move. In testing the accuracy of the jury's finding as to the passage ways we have to examine the evidence before the Court. In doing this it is singular to observe, how little thought even the chief men of the Company gave to the consideration of ensuring the safety and sufficiency of the passages, and to note that though knowing the danger and defect and how quickly and cheaply it could be remedied, they never removed it or gave a single caution or warning of it to the men, as they ought to have done or pointed out by what way they should go. But by their own frequent example sanctioned the use made of the Roller-way (A) by Scott and other men, and by their conduct accentuated their negligence by lulling their servants into a false security.

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Another thing to be borne in mind, and which is not stated to have struck the jury when they viewed the mill during the trial, is that the mill must necessarily have

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have been prepared for their visit, and it is a fair presumption that the proprietors put the best face on their works, and that the narrow passages or alleys down which alone, it was argued, Scott ought to have gone were kept carefully free for the time from the obstruction of men and lumber usually found there at ordinary working time and which "oftentimes" prevented and blocked Scott from the free and quick passage which he required for effective tally. They could not therefore have had the advantage of seeing to the full how the so-called passage-ways were occupied and impeded when in ordinary full work the state which was existing at the time in regard to which the witnesses were giving their evidence.

Moreover, important points in the mill had been altered before the view and after the accident, but before the trial. For instance, a whole set of cogs had been covered since then and a guard rail put up, concealing several of the dangers, described in the evidence, which Scott had to encounter. As to the passage-ways: Mearns, the foreman, a witness for the defence, who had full control of the mill and the men gave evidence at first of three passage ways, had seen Scott using the level rollers but never forbade him and every other tallyman used them and he never forbade them; had seen Mr. Lunn use them even after the accident and never forbade him. In his examination he said there were three ways in which a man might go from one end to the other of the mill and could not say which he should use; never told the tallyman which way or particular ways he should go and confessed that all these passages are "oftentimes" more or less obstructed and left it to the judgment of the men which to chose. Mearns in his examination had mentioned one of these three ways, which none of the witnesses had discovered yet, namely: a passage-way overhead going upstairs (and down) by a stairway to a place on top of the mill where there was no floor but two planks of not over 20 inches by 3 inches, which ran all the length of

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the mill over the rafters with no hand-rail for the protection of those going that way. When cross-examined on that, he was obliged to confess that it could not be considered a passage. This shews how indefinite an idea of where any sufficient passage was existed in the mind of even the foreman of the mill. Scott when examined on that point testified, "I never saw any one go up over the mill to get from one end to the other. I never heard of such a thing." Mr. Beecher, a witness for the defence, assistant general manager of the Company, was familiar with the working of the mill in order to correct the foreman, and others who might be under him, who also made it a practice of going through the mill, certainly twice a day, and as much oftener as he could, to see how things were going on. In his direct examination he makes this remarkable confession: "I might say right here, that I take pleasure in correcting the statement I made in my preliminary examination" (under oath be it remembered) "as to which way a man ought to go; he ought to go overhead. I had used that way myself and it was the best." In cross-examination he excuses himself thus: "I then said that in my judgment he should go upstairs; I had no intention to say, it was the only way." Question. "You said further, in your opinion, that any other way would be at the party's risk?" (In other words that this would be the only safe one.) Answer. "In my judgment, I said so." Then this gentleman, assistant general manager, familiar with the working of the mill, who went through it not less than twice a day to see how things were going on, to correct the foreman and others, gives an equally singular instance of his power of perception and observation when he stated he had not seen nor even heard of Scott's use of the rollerway, *i.e.*, during 14 consecutive months to which so many witnesses, one after the other, bore testimony of his using them until the day previous to that of the trial. So here we have the assistant general manager and the foreman who did not know what passage-

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ways there were, and where they were for the tallyman to use to transact day by day the necessary business of the mill. The real reason was the mill was too cramped for space to allow of proper and sufficient passage-ways and tallymen were obliged to have recourse to the roller-way. Is it any wonder that Scott, without direction, should take the most direct and expeditious one or that the jury should find: "There were more ways than one but in their opinion none of them was sufficient though the roller-way was most expeditious." On this head the evidence of Whittier, a tallyman in Moodyville Mill, who, for two years before Scott came, had been tallyman in Hastings Mill is important—and his evidence was substantially corroborated with just such differences as add weight to their evidence by all the other tallymen who had occupied that position. Whittier says when asked, how did you get from one end of the mill to the other, answered: "Over the live rollers." Q. "Why did you use that?" A. "Because it was the best way I know of." Q. "Did anybody tell you to use it?" A. "No, sir." Q. "Why did you commence to use it?" A. "It was about the only way to use." Q. "Do you know of any other?" A. "Well, there are other ways, when there is not lumber in the way." Of the passage by the rollers at the other end suggested to him as an alternative passage-way, he said: "There is no room to go through there, men working there." Q. "You don't mean to tell me there is no room." A. "There is room." Q. "But you think it is a great deal easier to go down over the rollers?" A. "I will tell you why. There is a trimmer saw right here and a man working may stop to notice the passage way and is likely to get caught with the saw." Q. "But you could tell him to stop?" A. "It is not customary to stop the mill at all." Q. "Don't you think it would be better to go the other way (indicating the other narrow passage-way)?" A. "I don't know as it would. There is more room to go this way something between one and two feet. Men working

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here are in the way, and got to climb up and get over." In another place on being asked. Q. "You have tried other routes other than walking over the live rollers hav'nt you?" A. "I don't think when I was working I ever went any other way, except when the big carriage was stopped." Hendry, a witness for the defence, who constructed the mill, and of course had an eye to defending his own work, testifies that he doubled the original machinery without enlarging the mill itself, and so proportionately contracted the passage-ways, was studiously non-committal, and indefinite in his evidence, except as to the ordinary details of the working which he explained at some length. He was a reluctant witness; he would not own to having seen Scott using the road way. He might have admitted having seen Mearns and Alexander using this roller-way, never saw a tallyman walking on those rollers; admitted they were dangerous. Asked, "Suppose a man were walking on those rollers would you notice it?" Answer. "No." To a juryman said he did not often visit the mill and had been away that year for months together. As to the roller-ways stated, "They were never intended when the mill was constructed to have a man walk along them, but unfortunately they have been using them for that purpose." Hendry admits that to get through what he calls the passage, "the tallyman has to wait his chance," and to speak to the edgerman that he wants to get through (and of course wait till he has finished his work at that moment). "He can always get a man to give him a chance if he wants it." In other words can only get through what he calls a passage way on sufferance. This is not a sufficient passage way for the proper performance of the tallyman's duty. *Fokey*, a workman, stated, "as a rule in cases like to-day, when only one side is running I would walk on the live roller tables. At other times they let me pass." Macfarland a machinist, a witness for the defence, was aware the mill was cramped. The covered cogs were practically safe. The others would

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be just as safe if covered. Scott, the plaintiff, who looked at passages from a tallyman's point of view, also stated "I say it is the only way in that mill to use the frame work." (the roller-way A.) and also, "I do say there is no passage-way in that mill at all; these narrow ways are not "passages," only 19 inches wide, two men cannot pass each other." Q. "Do you say that is the only way? A. "I might go down below, go around and come up on the top of the mill. I would have to cross these cogs. I say there is no passage-way." Q. "Was any other way than the roller-way pointed out to you?" A. "No, sir." Q. "Was there any of the passages that anybody else was in the habit of using?" A. "Not any other. The tallyman and every man who has to go back and forward would go up here." Q. "What were the particular reasons you could not use the passage-ways defendants' counsel asked you about?" A. Well, there were three men there, and there would only be a space of 18 inches about, may be more, and two men cannot pass without one man being squeezed up against his side of the frame work, or go in between the rollers." Q. "What time have you to get from your desk to score these off and get back?" A. "Just as quickly as I possibly could, I had no time to waste. Immediately I left my desk, the lumber goes out and there is none to tally it." Q. "Any reason why you should hurry?" A. "I suppose if I did not hurry up they would soon get another man who would." Q. "What about the reason of using this passage-way?" A. "The lumber is coming through here all the time. Now, when, if I was to get up here, or crawl underneath, or over the top, or wait until these men pull the slab out of reach, the lumber would be going out of the mill without being tallied. It would leave the live rollers. There is not space enough, no one can walk without going sideways. The end of the shaft comes right there and the rollers are here, there is no more than six inches on each side; the lumber, which comes generally

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from the circular saw, is going through the mill all the time.

As to the extent of plaintiff's appreciation of the dangers of walking over the roller-way, A. Scott gives the following evidence: Q. "Did you ever draw the attention of Mr. Mearns or anybody else to the danger?" A. "I never supposed there was any danger, or drew anyone's attention to it. I suppose it was the foreman's place to draw the workman's attention to it if there was any danger." Q. "Did you ever draw any attention to it? A. "I never did." Q. "And you never supposed there was any danger?" A. "I never supposed there was any, because I saw Mr. Mearns and other responsible people using that place, and if there was danger they should know it." Q. "As they were, did you think they were safe?" A. "Certainly I did. I don't think I ever used any other place but these rollers in going backwards and forwards in that mill." If we are to judge of a man's mind by his conduct, Scott's constant use of the roller-way, although he must have felt there was some danger, shews he could not have fully appreciated it, or he would never have run such a risk. Munn, for the plaintiff, now in independent employ and a tallyman belonging to the Moodyville Saw Mill Company, who took Scott's place after his injury, when asked: "What way did you use in going from one end of the mill to the other?" answered: "I walked those live rollers, generally, sometimes, if I had time, I could go around the other way; but I did not go once a week, of course because the lumber would be in the road. Mr. Mearns never mentioned how to go from one end of the mill to the other." Q. "You used the same way that Scott did?" A. "I used the same way; I thought it was dangerous, but was very careful." Q. "Why didn't you use the other way?" A. "Couldn't find any." Q. "Did anybody else use this passage?" A. "Yes, I have seen all the managers and the foremen using it." As to the cogs, Scott said: "Some of the cogs

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which were uncovered when I was hurt, are covered now. There is also a guard-rail put up since the accident, in Section A. of the roller-way; it would be to stop the men using these gangs, and the slabs would have to be hauled the width of the roller framework, and these skids are right on a level. Marters also, another tallyman, witness for plaintiff, says: "In general, in going from one end of the mill to the other, I used to go over the live rollers. No other way was provided. I sometimes would go to where the men were trimming slabs, catch the carriage, jump up and go that way. I used to fall down occasionally, of course it was at my own risk." On close examination, he says: The roller-way was the most convenient; I never thought of any danger at all; it was the custom, all the time I was there, to go that way." John Cosgrove, a mill labourer for the plaintiff, confirms this evidence as to the live rollers. Had seen Mearns, Hendry and Alexander using that way, and Mearns quite often." Q. "Was there any passage-way?" A. "There is a small alley, when the mill was running; could not call it a passage-way. It was blocked by men working there.....throwing lumber over their heads at times, and would not turn around but threw it behind them, of course to the danger of persons passing that way." Q. "Did you use the live rollers for a passage-way." A. "When I was going out of the mill, I ran over them going out, often ran over them; yes, sir, when the mill was going." Q. "You would not take the trouble to go around the other passage-way?" A. "Which passage-way?" Q. "In between the sides of the rail?" A. "There is just as much danger as by going over the rollers when the mill was running, because there was lumber on the rollers, and if I was caught I would be jammed to pieces; would have to cross over the track where the cars run. Squire Randall, for the defence, a machinist at Moodyville Saw Mill, did not examine Hastings Mill fully, says: "I don't think this roller-way would be a fit place

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for everybody to walk on. In our mill the tallyman travels through the alley-ways. Our mill is differently constructed, has openings from one end of the mill to another. It is less obstructed on account of the room we have; that is a better way to have it. It would be much less danger. The live rollers away from the big saw, were not so well constructed to my idea as the ones next the big saw. If built so to traffic over them I should say the gear was rather exposed in that case." Q. "You mean there would be danger of getting into that gear?" A. "Yes, I should think so, the machinery is more cramped than in our mill." Q. "You did not see any open passage-way?" A. No, sir, the passage is not so clear as at our mill." Q. "It would be difficult to find an open passage through there other than on the rollers?" A. "Well, at times I guess it would be; you would have to climb over something, if you didn't the rollers." From what has been said, I think certain facts have been established. That the roller-way was used with the knowledge and implied sanction of the defendants as a passage-way, and by all the tallymen.

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Assuming that Scott knew there was some danger, which the frequency of the use seems to negative the onus of proving that Scott was *volens*, *i. e.* not only knew but had a full appreciation of the extent of the danger, was on the defendants, under *Osborne* v. *L. & N. W. Ry. Co.*, 21 Q.B.D. 220, to get this finding from the jury, in order to prove contributory negligence and make the maxim "*volenti non fit injuria*" apply. This they have failed to shew and their defence is not made out. In *Yarmouth* v. *France*, 19 Q.B.D., at p. 660, LINDLEY, L. J., says, quoting Lord Justice BOWEN'S distinction, that the maxim is not "*scienti non fit injuri*," but "*volenti non fit injuria*," with approval adds: "The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff. In *Smith* v.

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Baker, 1891, App. Cas. 325, at p. 353, Lord WATSON says: "It does not appear to me to admit of dispute that at common law a master who employs a servant in work of a dangerous character, is bound to take all reasonable precautions for the workman's safety. The question which has most frequently to be considered is, not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that if injury befel him the risk was to be his and not his master's." But assuming that he knew of its existence and appreciated or had the means of appreciating the danger, his Lordship goes on to say: "I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will, in every case, necessarily imply his acceptance." Lord HERSCHELL, p. 362, speaking of the case before him, said, as may be said of the present case: "It was a mere question of risk which might never eventuate in disaster. The plaintiff evidently did not contemplate injury as inevitable, not even I should judge, as probable. When then a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service with knowledge of the risk preclude the employed if he suffer from such negligence from recovering in respect of his employer's breach of duty? I cannot assent to that proposition that the maxim "*volenti not fit injuria*" applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong." (And this conclusion of the learned Judge applies in this case.) Lord HERSCHELL then adds: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations so as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be

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numbered the risks of the employer's negligence, and the creation or enhancement of danger thereby engendered. If then the employer thus fails in his duty to the employed, I do not think that, because he does not straightway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim "*volenti not fit injuria*" becomes applicable." Though, of course, there is a different set of circumstances to be considered in each case, yet the analogy here is sufficiently close to make the above reasoning applicable in the present case. The occupation of the plaintiff was attended with danger, owing chiefly to the wilful negligence of the defendant and defect of his machinery. Of this danger the plaintiff was only, at the most, partially aware, and certainly had no full appreciation of its extent, and was therefore not "*volens*." The course he adopted in using the roller-ways had had the concurrence and consent of the defendants, strengthened by their own example. There is a finding by the jury that the plaintiff was "*sciens*," but no finding that he was "*volens*," so that defendants have failed to prove contributory negligence on his part. The non-suit was therefore wrong, and must be set aside. There is ample evidence to support the finding of the jury, and I think the verdict ought to be restored; there is no reason to suppose that any injustice has been done to the defendants by reason of it, or that the result of a new trial would be different. I think, therefore, the judgment in the Court below ought to be reversed, and judgment entered for the plaintiff for the full amount given by the verdict, with costs in this Court and the Court below.

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WALKEM, J.: This action was brought under "The Employers' Liability Act, 1891," and was tried by Mr.

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Justice DRAKE and a special jury. In the statement of claim, the plaintiff attributes his injury to the action of certain cog-wheels, which were on the line, or "way," that his duty as tallyman required him to take; and alleges that the accident could not have happened had the wheels been covered, as they ought to have been, or had the lever, which controlled them, not been negligently left unmanned by the defendants' foreman, on the day of the accident.

The defence, in effect, is that the plaintiff should not have used the roller platform, to which the cogs were attached, as a "way," there being ways provided for him which he might, and ought to, have taken; that the lever was, on the day of the accident, used as ordinarily, and that, if not manned, was the fault of the plaintiff, as he had authority to call upon any workman near him to attend to it, if necessary; and that, under the circumstances stated, he was guilty of contributory negligence.

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At the close of the plaintiff's case, a non-suit, as the learned Judge states in his judgment, was moved for and refused, but with leave reserved to "move on any grounds." There must be some mistake about this; for a non-suit could not, at the same time, have been refused and reserved. From the reporter's notes of the trial, it would appear that what the learned Judge, probably, intended to say was that he refused to stop the case, as he considered there was evidence to go to the jury, but reserved leave to move, etc. This would seem to be correct, for the motion for non-suit was renewed without objection, and heard, after verdict, concurrently with a motion by the plaintiff for judgment, as the jury had awarded him damages. The verdict was a special verdict; but, in view of the maxim *volenti non fit injuria*, judgment was given for the defendants, upon a finding that the plaintiff knew of the risk he incurred in using the platform, and upon the inference drawn by the learned Judge that he was *volens*, as he had thus knowingly used it for over twelve months without complaint. The

question of non-suit was left undecided; hence, as the plaintiff is now appealing from the judgment against him, the defendants' counsel moves, by way of cross appeal, that the non-suit be allowed. The grounds for the non-suit, as stated by the learned Judge, were the acceptance by the plaintiff of the employment, with full knowledge of its risk, and contributory negligence. We have, therefore, to consider the case as made out by the plaintiff at the time the non-suit was first applied for. According to the evidence on his behalf, he had used the platform as a way from the time he had entered on his duties, down to the time of the accident—a period of fourteen months. He had never been told that there was any other way; nor had he been instructed by the foreman, or any other person, not to use the platform as a way. It was the only way known to him that was available for the proper discharge of his duty; and it had been habitually used as a way during the period mentioned by some of the principal officers of the company, and by all the workmen who required to pass to and fro in that part of the mill. The plaintiff also stated—and there was no evidence to the contrary—that he knew of no risk in his so using it. How, then, could he be said to have impliedly agreed to incur any? The *maxim volenti non fit injuria* would, therefore, be inapplicable. As to contributory negligence, there was no proof of it. Again, there was ample evidence to support the allegation in the statement of claim that the plaintiff's injury was due to the lever being negligently left unmanned, and that evidence could not have been disregarded by the Court or withdrawn from the jury. From every point of view, the motion was groundless, and must now be refused.

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We have next to consider the plaintiff's appeal from the judgment; and, as there has been some misconception as to the grounds on which the judgment was based, I shall give them as they are stated by the learned Judge: "The jury find that the plaintiff knew the risk, and was not unduly

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negligent, * * * therefore, we have knowledge on the workman's part. He was also *volens*, for, for more than twelve months, he had used the roller platform, knowing its danger, without complaint. This continued use is assent in the strongest form. *Woodley* v. *Metropolitan R'y Co.*, 2 Ex. D. 384." But Sec. 6 of our Act prohibits such an inference, for it enacts that in an action against his employer, a workman shall not by reason only of his continuing in the employment with knowledge of the defect, negligence, act or omission which caused his injury, be deemed to have voluntarily incurred the risk of the injury. There was no corresponding provision in the English Act, when *Woodley* v. *Metropolitan R'y Co.* was decided, and consequently that decision does not apply. Besides, the decision in that case has been materially modified by *Smith* v. *Baker* (1891) App. Cas. 325. At all events, the judgment, in so far as it is in contravention of Sec. 6, cannot stand ; and, as I shall endeavour to show presently, there is no finding in the verdict which will support it.

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Whether the judgment shall be reversed, or a new trial directed, depends upon the construction to be put upon the first, second and fourth findings of the jury, which are not as clearly expressed as they might have been. Owing to the view taken of the case by the learned Judge, it became unnecessary for him to consider all the findings. Hence it is incumbent on us to do so, and to review the evidence which bears upon them, as we have to give such judgment as, in our opinion, ought to have been given, provided we come to the conclusion that a second trial is unnecessary.

The evident intention of the jury was to give the plaintiff a verdict, as they awarded him damages. We must, therefore, be guided by that intention, in arriviug at the meaning of any ambiguous expressions in the findings, as well as by the evidence produced at the trial. Having "all the materials necessary for finally determining" the issue in the action before us, we have authority by the combined effect

of Rules 446 and 674 of our Rules of Court, to "draw all inferences of fact, not inconsistent with the findings of the jury," and "give judgment accordingly." It is unnecessary to cite any English authority on these rules, as they have been acted upon here on several occasions, and lately, for instance, in the case of *Kerr* v. *Cotton*, 2 B.C. at p. 246. The questions left to the jury and the answers given were as follows:

1. Q. "Was there one or more sufficient passage ways for the plaintiff to fulfil his duties without pasaing along the roller platform?" A. "There were more ways than one; but, in our opinion, none of them were sufficient, though the roller-way was more expeditious."

2. Q. "Was the non-covering of the cogs on roller bed a 'defect' in 'ways, works or machinery'?" A. "Yes."

3. Q. "Were the defendants guilty of negligence in not having a man stationed at the lever?" A. "No."

4. Q. "Was the plaintiff guilty of contributory negligence, in using the roller platform when it was in operation?" A. "The plaintiff must have been cognizant of the danger of using the roller platform, yet he was not unduly negligent."

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5. Q. "Amount of damages?" A. "$2,500."

With respect to the first finding, the learned Judge observes in his judgment: "The jury do not find the roller bed to be a way; they say it was more expeditious. It does not follow that it was a way of necessity, the use of which was compulsory on the plaintiff." I am unable to concur in the views thus expressed. In the first place, the jury were not required to bring in a specific finding as to whether the platform was a way or not; hence it was not incumbent upon them to do so. Again, the award of damages to the plaintiff for the injury received by him while using the platform embodies, by implication, a finding that the platform was a way, and a way, too, that was necessary for the performance of his duties. Had the

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verdict, for instance, been a general one for damages, the mere award of damages would, impliedly, have determined all other questions of fact in the action. Besides, the finding itself suggests that the jury considered that the platform was a way, for, in what possible respect could it have been "more expeditious," if not as a way? Being a way, then, they find, as a matter of comparison, that it was "more expeditious" than the "more ways than one," which they say existed independently of the passage over the platform. Metes and bounds, or defined passages, are not necessary to constitute a way within the meaning of the Act; and, as a question both of law and fact, the platform was as clearly a way as the passage over the well or catchpit mentioned in *Willets* v. *Watt* (1892), 2 Q.B. 92. We have no report of the learned Judge's charge; and, as no exception has been taken to it, we must assume that it was unobjectionable.

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He must, therefore, have explained to the jury the meaning of the term "way," as used in the Act, and have drawn their attention to the fact that the plaintiff's evidence that the platform had been habitually used as such, was not disputed; but, on the contrary, was confirmed by the defendants' witnesses. Take, for instance, the foreman's evidence on his examination in chief (p. 106): "Has this roller-way in tier marked 'A,' been commonly used as a means for the men travelling to and fro?" A. "They go through there, off and on, backwards and forwards." And, in a preceding answer, he says: "If I were going down from the big saw on one side of the mill, I, very likely, would come down the roller-way. If I stop at the edge, on my way down the passage, coming from the passage, I might go around the slab-way. I may go over the rollers. In fact, I have gone every way in the mill. I have gone through the mill, both going and returning, without getting on any rollers; and I have gone through, very likely, to the big saw, on top of all the rollers, but it would be a rare thing for me to do that." Now, "all the rollers" mean the

rollers in tiers "A" and "B;" but, with those in tier "B," we are not concerned. It is also well to explain, with a view to a clear understanding of the evidence, that the platform is variously referred to by the witnesses as the "roller-platform," the "roller-way," or "bed," the "live rollers," and the "rollers in tier A," or "table A." Again, referring to the foreman's cross-examination: "You say, in your examination before the trial, you used the live rollers?" A. "Yes, sir." Q. "You say, also, I don't think I have ever forbidden plaintiff using the live rollers?" A. "Yes." Q. "You have told Mr. Wilson you have seen him use them?" A. "Yes." Q. "You say every other tallyman used them?" A. "Yes." Q. "You say Mr. Lynn used them afterwards?" (*i.e.*, after the accident). A. "Yes, sir." Q. "And yet you never forbade him using these rollers?" A. "No." Q. "Are there any written rules in your building?" A. "No." Q. "Any verbal rules?" A. "None." Q. "You pointed out, in your examination, three ways in which a man might go from one end of the mill to the other, and said 'I cannot say which he should use?" A. "Yes, sir." Q. "That is a fact?" A. "Yes." Q. "There is no way laid down on that mill floor which a tallyman, who was going from one end of the mill to the other, should use?" A. "There's passages there for them." Q. "There is no one way, no two ways, no particular ways?" A. "I cannot say I have ever told him he should go by that passage, or any particular passage in the mill. I don't think I ever told the men; I left it to their native intelligence." Q. "Left him to pick out the way?" A. "There is a passage open; if he sees fit to take the most dangerous, I can't help it." Q. "All those passages are more or less obstructed?" Well, oftentimes." Q. "Which one he would use would be a good deal a question of judgment?" A. "Yes; left it to the judgment of the men."

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There is further evidence to the effect that the foreman used the platform as a way, at least three-fourths of the

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time, and that it had been similarly used, as I have already stated, by the general manager and assistant general manager of the company, and, habitually so, by the workmen for over a year. With respect to the other alleged ways, for instance, those marked "Open Passage, No. 2" and "Open Passage, No. 3," on the plan produced at the trial, and a way overhead, consisting of two unguarded planks placed on the open rafters, the evidence of the plaintiff and his witnesses was that the overhead one was unknown to them, and that the so-called "Passages" were not ways, but were spaces that were occupied by two or three workmen engaged in throwing lumber backwards over their heads, as explained by the witness Cosgrove who was working in the mill at the time of the accident. Q. "Was there any other passage way" (than the platform)? A. "There is a small alley. When the mill was running, could not call it a passage way, because it was blocked by men working there; and would be in danger of being knocked over by a stick of lumber, if you went through there, because there were men throwing lumber over their heads at times, and would not turn round—throw it behind them" And this is confirmed by one of the principal witnesses for the defendants, Mr. Beecher, who was their assistant general manager, and the foreman's immediate superior. He states that the passages might have been used as ways by the plaintiff, had he chosen to do so; but he also says later when referring to them, and the men occuping them, "They (the men) stand in between them," *(i.e.*, the rollers in front of them, and the platform or table behind them, marked "A" on the plan) "and throw the edgings over their heads on to the table (A). They do it without looking behind them, because it is not supposed that anybody is going to be there." He then proceeds to say that the tallyman "ought to go overhead" on the rafters, because, to quote his language, "I had used that myself, and it was the best." But then the foreman,

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when asked about this passage overhead, said that it was not a way. For instance, Q. "Even then, this is not considered a passage?" A. "No sir." The evidence of Randall, another witness for the defence, also tends to show that the so-called passages were unsuitable, and could not have been used, as ways. Randall was the millwright of the Moodyville Saw Mill Company, and had often been in the defendants' mill for the purpose of observing its system of operation. Q. "In your mill, how does the marker, or tallyman, go from one end of the mill to the other?" A. "He travels through the alley ways." Q. "What kind of alleys have you?" A. "Our mill is differently constructed. Has openings from one end of the mill to the other. It is less obstructed, on account of the room we have." Q. "That is a better way to have it?" A. "Certainly; we have—it would be much less danger. I always try to do that in all cases when it can be done." Q. "The machinery is more cramped than in your mill?" A. "Yes." Q. "You did not see any open passage ways?" A. "No, sir; the passage is not as clear as at our mill." Q. "It would be difficult to find an open passage way through there other than the rollers?" A. "Well, at times, I guess it would be. You would have to climb over something, if you didn't, the rollers." We have thus a clear corroboration by the defendants' witnesses of the evidence given by the plaintiff and his witnesses, that the mill had not been provided with any special way for the use of the plaintiff, or his fellow workmen. This omission is accounted for by the general manager, who stated that the building was an old one, and that, to make it profitable, the old machinery had to be replaced with modern machinery, which, being of greater bulk, had to be compressed, or, as the witness expressed it, "cramped," to get it into the space now occupied by it. The foreman gave evidence to the same effect. It is a significant fact that no instance was given, on behalf of the defendants, or any one of the many

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tallymen, or other workmen, who had been employed during, and prior to, the plaintiff's fourteen months' engagement, having used any one of the three passages as a way, or having used any other way than that along the platform. What may have been done since the accident, and the practical warning it conveyed, is obviously irrelevant. A defined passage, even if the alley were one, is not necessarily a way within the meaning of the Act, for, as pointed out by Lord Justice FRY, in *Willet* v. *Watt*, it may be so obstructed, as was the case here, as to be unfit for the purpose. The plaintiff, evidently, had no choice of ways, but was compelled to follow the practice of the other workmen, and use the platform. As he stated on cross-examination, he had other duties to perform besides those of tallyman, and "had no time to waste," in attempting to push his way through the alleged passages or alleys, but had either to use the platform or submit to dismissal.

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The jury, in view of the evidence, apparently believed him. They, moreover, condemned the three alleged ways as being "insufficient," or unfit for his purpose, and they must have concluded that his user of the platform was a matter of necessity, otherwise they would not have given him damages, as they have done, for the injury he sustained while passing over it. If, however, the finding does not bear the interpretation I have put upon it, there is ample evidence, as I have shown, to justify us in drawing the inference that the platform was a way, and a way, too, that the plaintiff was obliged to take.

We come now to the second finding: Q. "Was the non-covering of the cogs on roller-bed "A" a defect in ways, works or machinery?" A. "Yes." The answer of the jury, is of course, open to criticism; but what they meant is quite intelligible in view of the evidence. In addition to that given on behalf of the plaintiff, it was proved by the defendants' witnesses, Randall and Hickey—both machinists—that the platform was dangerous as a way, owing to

the cogs, or "gear," as Randall termed them, being too exposed, and that had the cogs been covered, as was the case with those in the adjoining platform (B), the danger would have been lessened. Randall's evidence for instance, is as follows :

Q. "When *Mr. Wilson* asked you about the cogs being safely constructed, you said 'some of them are,' explain what you meant?" A. "I mean that I seen two sets of rollers there that was differently constructed." Q. "Which ones do you mean were properly constructed ?" A. "The ones next the big saw. (Platform 'B') Q. "Would you say the ones away from that were not properly constructed?" A. "No, sir ; I would not, but not so well constructed to my idea as the one next the big saw." Q. "What do you say was wrong with them ?" A. "If built so to traffic over, I should say the gear was rather exposed in that case." Q. "You mean there would be danger of getting into that gear ?" A. "Yes, I should think so." Q. "I think you told *Mr. Wilson* you did not examine it very closely." A. "No, sir ; not to-day. I was over that mill several times, and being a millwright I look at these things pretty often. I notice things particularly." Q. "The machinery is more cramped than in your mill?" A. "Yes." Hickey's evidence is to the same effect. Q. "If you were manager of a mill, and knew these cogs were not covered, and were being used, you would naturally cover them, would you not?" A. "I suppose it would be better; it would lessen the danger." Consequently, the jury could not have done otherwise than find, as in my opinion they have done, that the condition of the platform as a way was defective. The condition of the works and machinery are likewise defective, in the sense, which is also applicable to the ways, that it was defective in reference to danger, and that to the knowledge of the defendants, as admitted in their particulars, and in the testimony given by five at least of their witnesses, viz.: the general manager, the assistant

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manager, the foreman and Messrs. Randall and Hickey. In *Walsh* v. *Whiteley*, 21, Q. B. D. 371, it was laid down as a principle, as was observed by LORD COLERIDGE in the later case of *Morgan* v. *Hutchings*, 6 T.L.R. 219, that danger arising in the use of a machine, might be a "defect" in a machine within the meaning of the Act; and hence that the condition of a machine might be said to be defective in reference to danger. *Morgan* v. *Hutchings* was a similar case to the present. A boy received an injury from a set of cogs on a machine which he was using. Although the cogs were not in themselves defective, the jury found for the plaintiff on the ground that the machinery was defective, and to the defendants' knowledge, inasmuch as the cogs were not covered. On appeal, the verdict was upheld, in view of the principle above stated. That a grammatical error, such as that made by the jury in this case, and an error, too, that is capable of being explained by the evidence, should invalidate a finding or verdict, and thereby possibly defeat the object of the act, would be most unreasonable. In any event, we may draw the inference from the evidence, and decide, as the jury no doubt intended, that the condition of the platform was a defect in the ways and machinery, owing to the cogs being uncovered. The defendants, as I have pointed out, knew of the defect, and its consequent danger, and failing to remove it, were guilty of negligence. As proved by Randall and other witnesses, the cogs in the adjoining platform (B) have been covered so as to ensure the safety of the workmen, and why those in question were left unprotected was not, as the jury must have thought, satisfactorily explained, for the only reason given for the omission was that it was not intended that the plaintiff or others should have occasion to be near the cogs, or, in other words, be upon the platform, to which they were attached. But the fact remains that he and others habitually used the platform, and that to the knowledge of the defendants.

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The further finding with respect to contributory negligence, that the plaintiff must have known of the danger, but was not unduly negligent, palpably means, in view of the award of damages, that he was not inexcusably negligent. Bearing in mind that the onus of establishing contributory negligence lay upon the defendants, any finding, which, like the present one, falls short of that effect, must be a finding in favor of the plaintiff; for according to the well-known case of *Davies* v. *Mann*, 10 M. & W., 545, the plaintiff's negligence does not excuse the defendants, as they could, by the exercise of ordinary care have prevented the injury which happened. See also *Radley* v. *L. & N. W. Ry. Co.*, 1 App. Cas., 754, and *Wakelin* v. *London & S. W. Ry. Co.*, 12 App. Cas. 41. As to the plaintiff's knowledge of his danger, such knowledge is of itself insufficient, according to the decision in *Smith* v. *Baker*, (1891) App. Cas. 325, to deprive him of his right to recover. Section 6 of our Act is but an enunciation of the principle there laid down, namely, that the mere circumstance of a workman continuing in his employment, after knowledge on his part of the defect from which he ultimately suffers, cannot defeat his claim. In the present case, the defect was known to the employers for a considerable period, and nothing was done to remedy it. The following observation of LINDLEY, L.J., in *Yarmouth* v. *France*, 19, Q. B. D., 647, made under similar circumstances, is consequently to the point: "The Act cannot, I think, be properly construed in such a way as to protect a master who knowingly provides defective plant for his workmen, and who seeks to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations, or submit to use what is known to be unfit for use." This view of the Act is approvingly referred to by LORD HERSCHELL, in *Smith* v. *Baker*, *ibid.*, at page 365. Whether a workman, like the plaintiff, takes upon himself such a risk or not is a question of fact, and not of law; and as contributory negligence was

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not found in the present case, it would require a special finding by the jury "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it," to entitle the defendants to succeed on the ground that the maxim *volenti non fit injuria* was applicable. *Per* WILLS, J., in *Osborne* v. *London & N. Western Ry. Co.*, 21, Q. B. D., at p. 224.) There is no such finding here; nor is there any evidence from which such a finding might be inferred. The amount of the damages awarded to the plaintiff is within the limit prescribed by the Act, and cannot therefore be interfered with.

Judgment.

There is no occasion for a new trial; and as the verdict, as a whole, is in the plaintiff's favor, the appeal, must, for the reasons I have given, be allowed, and the judgment in question reversed, and judgment entered for the plaintiff for the $2,500.00 awarded as damages, together with the costs of this Court, and of the Court below.

Appeal allowed and judgment entered for the Plaintiff with costs.

BRACKMAN *ET AL.* v. McLAUCHLIN.

DRAKE, J.

1894.

March 13.

BRACKMAN ET AL *v.* McLAUGHLIN.

Bills of Sale Act, Sec. 2, sub-sec. (c)—Statute—Construction of—"Apparent possession"—"Premises occupied by" person giving Bill of Sale.

The grantee under a Bill of Sale (treated as unregistered by reason of a defect in the affidavit) on 3rd January, 1894, took possession of the goods covered thereby, consisting of a bakery stock, and employed a person to take charge and instructed him to let no one else in the place. The grantor had absconded from British Columbia. The plaintiff gave no written notice of change of ownership, but informed some of the creditors that he was in possession. The plaintiff carried on baking and delivered the product in his own name. The debtor's name, however, was not removed from the door of the premises. The defendant seized under *fi. fa.* on 5th January, 1894.

Held, 1. That the goods were not in the "apparent possession" of the debtor.

2. That the premises were not "occupied by" him, within the meaning of the Act.

INTERPLEADER between claimant in possession under a Bill of Sale and an execution creditor. The facts fully appear from the judgment. Statement.

E. V. Bodwell, for plaintiff.

A. L. Belyea, for defendant.

DRAKE, J.: The plaintiffs' claim against the defendant, Wm. B. McLaughlin, certain goods and chattels seized by the Sheriff, under a writ of execution issued on a judgment obtained by the defendant against Jordan, a baker. Jordan gave to the plaintiff a Bill of Sale by way of mortgage, which was registered on 27th February following. The affidavit required by the Bills of Sale Act and attached to the bill of sale, was never signed by the deponent, though it purports to be both subscribed and sworn. On the 3rd of January, 1894, Mr. Ker, vice-president of the plaintiff company, went to Jordan's place of business Judgment.

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and, as he alleges, took possession of the goods mentioned in the bill of sale and engaged McKenzie, a person previously employed by Jordan to work for him at a monthly salary and board, and at the same time sent R. O. Campbell, a person in his employ, to assist in taking charge. On the 5th January, 1894, the defendant commenced an action against Jordan, and obtained judgment on 16th January for $445.00 and costs, and issued a *fi. fa.*, under which the Sheriff seized. Having received notice of the plaintiffs' claim, the Sheriff interpleaded, and on the 29th January an interpleader issue was served in pursuance of an order of this Court, and which is now the subject of this trial. The bill of sale is not properly registered, owing to the defect in the affidavit, and whatever rights the plaintiffs have must be considered irrespective of the registration. Jordan, on the 3rd January, was absent from the province and has not since returned, and is alleged to be an absconding debtor. The debtor carried on his business as baker in a building separate and distinct from his residence, in Victoria West, and the goods purporting to be assigned, with the exception of a delivery cart and two horses, are all in this building. The only point in the case is, whether or not there was a sufficient taking of possession to give the plaintiffs a priority over the judgment-creditor, and, as the authorities appear conflicting, I have to consider the cases cited in connection with the evidence. Mr. Ker says he engaged McKenzie at $40 a month, and agreed with Mrs. Jordan to board him for $3.00 a week; his instructions were to keep possession and to allow no one else in the place. Mr. Ker gave no written notice of change of ownership at the time, but informed some of Jordan's creditors that he was in possession. The baking of soft bread was discontinued and the business confined to baking crackers and biscuits, and the plaintiffs furnished flour for the purpose, and the manufactured article was delivered in plaintiffs' name. McKenzie had the key of the bakery until the

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Sheriff obtained possession of it. Campbell was sent by the plaintiff to assist, and had been there about ten days, and was in the bakery on the Sheriff's arrival. On these facts the defendant's contention is, that this possession was merely a formal possession, and that by Section 3 of the Bills of Sale Act, any bill of sale which does not comply with the requirements of the Act is absolutely void as against execution creditors in respect of goods in the possession or apparent possession of the person making the bill of sale ; and it is contended that these goods were in the apparent possession of Jordan. Sub-section (c) of Section 2, says: "Personal chattels shall be deemed in the apparent possession of the person giving the bills of sale, if they remain on the premises *occupied* by him, notwithstanding formal possession may have been taken by or given to any person."

I have first to consider whether these goods were on the premises occupied by Jordan ; occupation may be of varying degrees. If a man pays rent and taxes for a building, he may be said to occupy it although he is never present. If a man is an absconding debtor can he be said to occupy the premises he has departed from ? I think the meaning to be attributed to the term as used in this Act is limited to that occupation which is a personal possession either by the debtor or his agent, and the general scope of the authorities have dealt with the term 'occupation' in this light. Whenever the debtor has had free access to and use of the chattels assigned, then they have been held to be in the apparent possession of the assignor. The next question is, what is meant by formal possession ? If the plaintiffs had taken possession and allowed Jordan to carry on the business or exercise any control over it, that would be merely formal possession. I think formal possession means nominal possession and nothing more. In the case of *Seal* v. *Claridge*, 7 Q. B. Div. 516, the grantor went in and out of the place where the goods were at his pleasure, and although

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a man had been put in, nothing more was done than telling the clerk not to remove the goods; this was held to be merely formal possession. In the case of *Ex parte Hooman*, L.R. 6 Chy. App. 63, a man was put in possession of furniture, but the assignor continued to live in the house and use the furniture as before; here it was held that the possession or apparent possession was in the grantor. And in *Ex parte Lewis*, L. R. 6 Ch. App. 626, it was held that putting in a broker's man, who did not interfere with the use of the furniture or remove it, was merely formal possession. It is clear that the bill of sale, which was good *inter partes*, did not authorize the plaintiffs to carry on the business. They could have taken possession and removed the chattels, or proceeded to a sale, but the fact that they did that which they were not authorized to do, will not exclude them from the benefit of their possession if in other respects it was good. Here the business was changed to this extent, that the goods sent out were sent out in the plaintiffs' name; Jordan was excluded from the premises; he was absent and did not interfere with or make use of the goods assigned. The men in possession were appointed and paid by the plaintiffs, and there is no evidence that Jordan, after such possession, had any control of the goods.

Judgment.

As I have to decide on the facts as a jury, I find that *bona fide* possession was taken by the plaintiffs on 3rd January, and that at the time the Sheriff entered the goods were in the possession of the plaintiffs.

In the case of *Ex parte Saffery*, 16 Ch. D. at p. 671, the Master of the Rolls says: "apparent possession cannot be put higher than actual possession;" the fact that the debtor's name was on the door is not enough. The question is, if anyone went there would he conclude that the debtor was in sole possession? And in *Robinson* v. *Briggs*, 6 L.R. Ex. 1, the Court held that occupation, in the Act, meant actual *de facto* occupation; the fact of the debtor being tenant of the

premises in which the goods were was insufficient if he had ceased to be the actual occupier.

I therefore give judgment for the plaintiffs, with costs, and direct the defendant to pay the Sheriff costs of execution and possession. The Interpleader bond is to be given up to be cancelled.

Judgment for Plaintiffs.

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LANTZ *ET AL* v. BAKER.

DRAKE, J.
[In Chambers.]
1894.
March 30.
LANTZ ET AL *v.* BAKER.

Practice—Damages fixed by contract—Liquidated or unliquidated demand—Order XIV—Summons asking stay of proceedings—When stay operates.

A claim for $1,000.00. "Amount due upon an agreement whereby the defendant agreed to pay the plaintiffs the sum of $1,000, in the event of certain work in which the plaintiffs were engaged being wholly stopped by the defendant, and which has been wholly stopped by him," is a liquidated demand and proper subject of special endorsement.

A summons calling for a stay of proceedings only operates as a stay from and after its return, and judgment by default of appearance signed after service of the summons, but before it was returned, is regular.

SUMMONS to set aside judgment signed by the plaintiff as in default of a defence by the defendants to a writ of summons specially endorsed as follows:—

STATEMENT OF CLAIM.—The plaintiffs' claim is for the amount due under a proviso in an agreement dated the 4th day of November, 1893, and made between the defendant and the plaintiffs, whereby the defendant agreed to pay the plaintiffs the sum of $1,000, in the event of certain work mentioned in the said agreement, and in which the plaintiffs were engaged being wholly stopped by the defendant, and which work has been wholly stopped by him. Amount due, $1,000.

Judgment.

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The writ of summons was served on defendants on 5th March. Some negotiations took place, which were abandoned; and, on 22nd March, the defendants obtained a summons signed by the registrar for Mr. Justice WALKEM, "upon an application on the part of defendant (returnable in Chambers on 30th March, at 10:30 a.m.) for an order that the plaintiffs do, within a time to be limited, deliver a statement of claim or further and better particulars of their claim endorsed on the writ of summons, and that in the meantime all proceedings be stayed," and served same on plaintiffs' solicitor on the same day. On the 24th March, the plaintiffs signed judgment, as in default of appearance against defendant. The grounds stated in defendant's summons to set the judgment aside were for irregularity, on the ground that the writ was not specially endorsed, and no statement of claim had been delivered, and that the defence was not yet due, and that proceedings were stayed by service of the summons of 22nd March.

Statement.

P. S. Lampman, for plaintiffs, shewed cause to the summons: Where a stay of proceedings is asked for in a summons, the stay operates only from the time of the return of the summons—not from the time of its service. *Arch. Prac, at Judge's Chrs.* p. 10; *Arch. Q.B. Prac.* 12th ed. p. 1,602; *Morris* v. *Hunt*, 2 B. & Ald. 355; *Rex* v. *Sheriff of Middlesex*, 5 B. & Ald. 746; *Glover* v. *Watmore*, 5 B. & C. 769; *Anthill* v. *Metcalfe*, 2 N.R. 169; *Redford* v. *Eadie*, 6 Taunt 240. A summons served after judgment signed never operates as a stay of proceedings, *Phillips* v. *Birch*, 2 Dow. N.S. 101. The plaintiffs' claim is for liquidated damages, and not a penalty, *Law* v. *The Local Board of Redditch* 1892, 1 Q.B. 127; *per* Lord ESHER at p. 131; LOPES, L.J., at p. 132; KAY, L.J., at p. 134; *Astley* v. *Weldon*, 2 B. & P. 346; *Lord Elphinstone* v. *Monkland Iron and Coal Co.*, 11 App. Cas. 332.

Argument.

A claim for liquidated damages is a liquidated demand within the meaning of Order III. R. 6. *Von Lederer* v.

Burton, 87 Law Times Jo. 316; *Bickers* v. *Speight*, 22 Q.B.D. 7; *Smith* v. *Wilson*, 4 C.P.D. 392; *Satchwell* v. *Clarke*, 66 L.T.N.S. 641. A condition precedent need not be averred on a special endorsement. *Bradley* v. *Chamberlayne*, 1893, 1 Q.B. 439.

A. P. Luxton, contra: The summons operated as a stay of proceedings from the time of its service, "as a rule a summons does not operate as a stay of proceedings, unless it be a part of the application why, in the meantime, all further proceedings should not be stayed." *Arch. Q.B. Prac.* 12 ed. p. 1,601. Argument.

A claim for liquidated damages is not a liquidated demand within Order III. R. 6, and cannot be specially endorsed. See *Cavanagh on Special Endorsements*, p. 41.

DRAKE, J.: This is an application to set aside a default judgment. Defendant alleges this is not a specially endorsed writ, and, therefore, judgment could not be signed, as no statement of claim had been delivered. If the writ is a specially endorsed writ, under Rule 15, no other statement of claim shall be delivered. The endorsement alleges, the plaintiffs' claim is for the amount due under a proviso in an agreement dated 4th November, 1893, whereby the defendant agreed to pay the plaintiffs $1,000, in the event of certain work mentioned in the agreement being wholly stopped by the defendant, and which work has been wholly stopped by him. A proviso is generally a limitation of a covenant; but there are cases in which it may be treated as a covenant itself. The claim may be a liquidated demand, or it may be a penalty; the allegation, I think, claims the $1,000 as a liquidated demand, and, as such, may be the subject of a specially endorsed writ. The endorsement should give reasonably specific particulars, to enable the defendant to see if he has a defence or not. I think the defendant must know from this claim what he has to meet. On the 22nd, a summons was taken out, returnable after Judgment.

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Easter vacation, with a stay in the meanwhile. The stay does not operate until the return day and hour when the summons is to be heard; the plaintiffs signed judgment after the issue of the summons and before hearing. I think the judgment should be set aside, upon the defendant giving security on Tuesday next for the claim, the costs of the judgment and order to be the plaintiffs' costs in cause. The plaintiffs to furnish particulars of claim within two days after security given, and the defendant to have one week after particulars to put in defence. In case security not given, judgment to stand.

Summons dismissed with costs.

BRITISH COLUMBIA CORPORATION, (LD.)

v.

COUGHLAN & MASON AND GEORGE STELLY.

DIVISIONAL COURT.

1894.

April 7.

B.C. CORPORATION v. COUGHLAN ET AL.

Practice—Judgment under Order XIV.—Bills of Exchange Act, (Can.) 1890, Sec. 57—Interest (unexpressed) after maturity of note—Liquidated or unliquidated demand—Sufficiency of special endorsement.

Plaintiff obtained an order for judgment under Order XIV., upon a specially endorsed writ against Coughlan & Mason as makers and Stelly as endorser for the amount of a promissory note and interest as claimed from the date of its maturity at 6 per cent., no interest being provided for in the note. The endorsement stated that the note had been duly presented for payment and been dishonoured and that "notice of dishonour had been waived."

Upon appeal to the Divisional Court.

Held, Per CREASE and DRAKE, J.J., affirming WALKEM, J., and dismissing the appeal: That interest was payable on the note after maturity at 6 per cent., and was a liquidated demand under the Bills of Exchange Act, (Can.) 1890, Sec. 57, and that the special endorsement was sufficient. (McCREIGHT, J., concurred on that point.)

Held, Per McCREIGHT, J., dissenting from the order of the Court, that the endorsement was insufficient. That the allegation of waiver of the notice of dishonour should have stated the name of the defendant so waiving, and set out the facts relied on as a waiver and that the note should have been stated to be still unpaid.

APPEAL from an order of WALKEM, J., granting an application of the plaintiff for judgment under Order XIV., upon an affidavit verifying the special endorsement under the writ, which was as follows: "The plaintiff's claim is against the defendants John Couglan and Mary Ann Mason as the makers, and against the defendant George Stelly as endorser of a promisory note with interest from maturity at 6 per cent:

Statement.

1894, Jan. 3rd, Promissory note of this date made by defendants Couglan & Mason in favour of George Stelly and endorsed by him and now held by plaintifis for $8,031.70

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payable 30 days after date at the office of Green, Worlock & Co., Victoria; which note was duly presented for payment but dishonoured and notice thereof was waived.

Principal	$8,031 70
Interest	13 39
	$8,045 80

The affidavit verified the statements in the endorsement. The defendants appealed to the Divisional Court and the appeal was argued before McCREIGHT, WALKEM and DRAKE, J. J.

P. Æ. Irving, for the appeal: Sections 1 and 2 of the Interest Act (Con. Stat. Can. 1886, Cap. 127) did not apply to British Columbia at the time of their becoming law, Secs. 24 to 27, inclusive of the same Act regulating the law as to interest in B.C. The repeal of the latter sections did not bring into force in B. C., Secs. 1 and 2.

Argument.

A. P. Luxton, for the plaintiffs, *contra*: That the claim for the interest after maturity of the note at 6 per cent., by Section 57 of the Bills of Exchange Act, (Can.) 1890, is a liquidated demand, is clear; see *Lawrence* v. *Willcocks*, 1892, 1 Q.B. 696, upon the similar section of the English Act. The statement of claim in the special endorsement is certain to every reasonable intendment and is sufficient. *May* v. *Chidley*, 1894, 1 Q.B, 451. The statement as to waiver of notice of dishonour could only refer to the defendant Stelly. The statement that the note is still unpaid must be inferred from the plaintiffs' claiming the amount as on an overdue note. It is not necessary to make every allegation with the particularity of a pleading.

Judgment.

CREASE, J.: This was an appeal against an order of MR. JUSTICE WALKEM of the 2nd April, 1894, granting to plaintiffs final judgment against the defendants for the full amount claimed, interest and costs, under Order XIV. The action is brought by Coughlan & Mason as the makers and George Stelly as the endorser of a dishonoured promis-

sory note for $8,031.70. The note did not on its face bear any interest; but the writ was endorsed "with interest from maturity" at 6 per cent., without saying whether it is payable under statute or by contract. The endorsement also stated that notice of dishonour was waived. The real point on which the appeal was based was the contention that in British Columbia interest after maturity, not expressed in the note, is not a liquidated demand so as to be within the scope of Order XIV., to enable final judgment to be obtained thereunder, or more shortly stated, that the writ is not a specially endorsed writ. True, the note gives no interest, but the writ which is a pleading, does not say whether it is charged by contract or by statute. *Lawrence* v. *Willcocks*, 1893, 1 Q.B., 696; *The Gold Ores Reduction Co.* v. *Parr*, 1892, 2 Q.B., 14; shew that in order to constitute a good special endorsement within the meaning of Order XIV., the writ should shew that the interest claimed is payable under a contract or as in the case of a bill of exchange, is an amount fixed by statute. It is most important that a defendant should know from the writ what the exact claim against him is. The writ, however, in this case does not shew whether the charge for interest is by contract or by statute. The matter therefore has to be dealt with as a question of interest on a contract in which no rate of interest is specified. To arrive at a sound conclusion on this head, it is necessary to ascertain what the law has enacted on the subject. By Cap. 127, Sec. 2 of the Dominion Revised Statutes it is enacted that: "Whenever interest is payable by the agreement of parties, or by law, and no rate is fixed by such agreement or by law the rate of interest shall be fixed at 6 per cent. per annum." In the same Act, the provisions of 49 Vic., Cap. 44, applicable to interest in British Columbia were consolidated together with the various separate provisions as to interest in Ontario, Quebec, Nova Scotia and New Brunswick and embodied with the British Columbia provisions

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in one Act occupying Secs 9 to 30 inclusive. In 1887 the Dominion Statutes came into force and repealed the 49 Vic. Cap. 44, but consolidated the same clauses in Cap. 127, Secs. 24, 25, 26 and 27. In 1890, these sections were repealed, and no special sections referring to interest in British Columbia were left. For the defendants it was contended that as the sections left unrepealed were a re-enactment of the consolidated statutes which, at the time they were enacted, referred only to Ontario, Quebec and Nova Scotia, the repeal of the British Columbia sections left that province without any enactment at all as to interest, and as no rate was mentioned in the promissory note, none could be exacted or was allowable by law; consequently that the writ called for interest as an unliquidated demand and was not a specially endorsed writ. But that would be giving much too narrow a construction to the intention of the legislature and the general winding up of the clauses which remain. That intention, it appears to me, according to the rules governing the construction of statutes, could only have been to do away with all special clauses for particular provinces, and enact one general law to govern the rate of interest through the whole Dominion. It seems to me clear that, under the Interpretation Act. Secs. 1 to 8 of Cap. 127 Rev. Stat. Can. apply to British Columbia, and, therefore, in the case now before us, Sec. 2. The Bills of Exchange Act, 1890, Sec. 57 does the rest, and Cap. 127 Sec. 2 having already ascertained the rate at 6 per cent., provides that interest shall be payable on a promissory note from the maturity of the note.

Judgment.

The judgment of Mr. Justice WALKEM must therefore be sustained, and the appeal dismissed with costs.

McCREIGHT, J.: In this appeal from the judgment of Mr. Justice WALKEM, the contention has principally been that the special endorsement was insufficient, because it did not shew that the interest was due by statute or by contract. This objection does not apply to bills or notes—see the

Judgment.

judgment of SMITH, L.J., in *Lawrence* v. *Willcocks*, 1892, 1 Q.B. 694–5, because, as he there points out, the plaintiff has no longer to resort to 3 and 4 Wm. 4 Cap. 42 Sec. 28 in order to make a claim for interest, by way of damages; but the claim is, by statute, made a liquidated demand in England, and exactly the same expression is used in the Canada Bills of Exchange Act 1890, Sec. 57. By that Act, as well as by the Interest Act 1890, in the absence of a special agreement, six per cent. seems to be the proper rate of interest. No objection on that ground to the endorsement can therefore be sustained; but there are other objections which I shall briefly deal with. As regards the defendant Stelly, who is an endorser, Section 86 of the Act requires presentment for payment at the place named in the note, *i.e.*, at the office of Green, Worlock & Co., and sub-sec. 2 says, that presentment for payment is necessary in order to render the endorsers of a note liable. The endorsement on the writ says that the note was duly presented for payment and dishonoured, and it may be so drawn. That is sufficient—*Bullen & Leake's precedents*, p. 81 ed. 1863 and p. 93 of ed. 1882. But that part of the endorsement which says that notice of dishonour was waived is manifestly insufficient, in omitting to say by what, if any, defendant it was waived; of course, Stelly is the only person, properly speaking, who could have waived this notice as well as the only person concerned with it. If the endorsement stated that the waiver had been by Stelly, the facts constituting such waiver, I think, should have been set out—see forms and notes, *Bullen & Leake*, p. 94–95, ed. 1882 and 1886, and see p. 81–82 *ibid.* ed. 1863 and Sec. 50 of the Canadian Act. *May* v. *Chidley*, 1894, 1 Q.B. 451–3 was cited; but that case merely deals with the sufficiency of the affidavit, which I shall deal with presently.

Judgment.

Under Order XIV., there must be a sufficient endorsement, as well as an affidavit; and I think the endorsement, for the above reasons, is insufficient; as well as on the

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additional grounds that it does not state that the note is still unpaid—see *Bullen & Leake*, p.p. 92 and 95 ed. 1882 and pp. 80–84, Ed. 1863, as the affidavit may be a general averment of the truth of the endorsement, and omissions are more serious in the endorsement than in the statement of claim.

But if the endorsement is seriously defective, the affidavit filed for the purpose of proving the endorsement is even more so. It does not say that the three defendants are indebted; and, *non constat*, but that only the defendants, *i.e.*, some two out of that three, are indebted, and it rather looks as if the deponent were reluctant so to swear that Stelly was indebted, owing to an uncertainty as to whether notice of dishonour was either given or waived. Let a draughtsman try to assign perjury on this affidavit; he will realize the difficulty, I think, owing to defective allegations and proof. Stelly is not liable to have summary judgment given against him, nor yet Mason, nor Coughlan, by reason of the endorsement not alleging that the note is unpaid, and of the uncertainty of the affidavit. *May* v. *Chidley*, 1894, 1 Q.B. 451 was cited for the plaintiffs; but that case only shews that the verification of the cause of action in the affidavit may be made in general terms, and we know this to be the practice in the case of proving petitions. Here the affidavit does not necessarily refer to Stelly, at all events, or even to any particular defendant. The case referred to has no application to defective allegations in the endorsement, but merely as to the mode of proof; and I observe that Mr. Justice WILLS refers to "statement of claim" or "special endorsement" as practically equivalent expressions. I am of the opinion that the judgment should be set aside.

Judgment.

DRAKE, J.: This appeal is from an order of Mr. Justice WALKEM allowing judgment to be signed under Order XIV.; the claim endorsed on the writ is in respect of a promissory note made by Coughlan & Mason in favour of George Stelly

and endorsed by him to the plaintiffs, which note was duly presented for payment but dishonoured and notice thereof waived and the plaintiffs claimed interest.

The affidavit in support of the application alleged that the note was duly presented for payment and dishonoured, but did not allege that the notice of dishonour was waived.

The defendants took two objections to the order for judgment:

1. That there was in fact no statute under which interest at six per cent. could be claimed, and the endorsement on the writ did not state whether it was claimed by statute or contract.

2. That the affidavit was insufficient, as it did not allege that notice of dishonour had been waived.

On the first point as to interest: In 1867, an interest ordinance was passed in this province dealing with interest on claims which were the subject of litigation; but this ordinance did not affect interest due on judgments under 1 & 2 Vic. Cap. 110 Sec. 17 which was the law in existence in this province at that time and still is, as far as applicable. The Interest Act of 1867 remained the law of this province under Sec. 129 of the B.N.A. Act, until repealed by Can. Stat. 49 Vic. Cap. 44 Sec. 3. That Act was consolidated in the Revised Statutes relating to interest, but was eventually repealed by Cap. 34 of 53 Vic., as far as regards the special clauses relating to this province, but the rest of the Act remains as the Statute governing interest, and Sec. 2 enacts that whenever interest is payable by agreement of parties or by law and no rate of interest is fixed, the rate shall be six per cent. The contention before us was that the first and second clauses of this Act were the law of the upper and lower provinces of Canada only, and the insertion of these clauses in the Dominion Act did not operate to make the clauses binding on the other provinces.

Judgment.

The interpretation of Statutes Act Cap 1 of the Revised Statutes of Canada 1886 answers this contention; Sec. 7

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says: "In every Act of Parliament of Canada, unless the context otherwise requires, the enactments shall apply to the whole of Canada." The law is considered as always speaking; and by Sec. 57 of the Bills of Exchange Act 1890, Can., if a note is not paid when due, interest is recoverable as damages from due date; but, as no date is mentioned, clause 2 then steps in and gives the rate of interest at 6 per cent.; and in the case of *Lawrence* v. *Willcocks*, 1892, 1 Q.B. 696 it is decided that interest can be recovered as a liquidated demand, under Order XIV., on a bill or note as it is recoverable by the above mentioned Bills of Exchange Act. The effect, therefore, is that, so far as the question of interest is concerned, the order appealed from is right in allowing interest at six per cent. from the due date of the note.

On the second point, it was decided in *May* v. *Chidley*, 1894, 1 Q.B. 452 that if the statement of claim in the writ shewed that the bill or note had been duly presented and notice of dishonour given, the mere fact that the affidavit did not mention the non-giving of the notice was not such an omission as rendered the affidavit in support of judgment under Order XIV. bad. The defendant Stelly, by the endorsement, was aware of the fact that the notice of dishonour had been waived, and he did not dispute it, and, therefore, in my opinion, the endorsement on the writ is sufficient and so is the affidavit in support. If the allegation of dishonour had been omitted, the affidavit could cure the defect; the endorsement contains all that is necessary for a statement of claim, and the debt is sworn to as well as the dishonour. This is sufficient; and I think the appeal should be dismissed with costs.

Judgment.

Appeal dismissed with costs.

WOOD v. GOLD.

DRAKE, J.

DIVISIONAL COURT.

1894.

April 5.

WOOD v. GOLD

Arbitration—Misconduct of Arbitrator—Order setting aside award—Whether final or interlocutory—Divisional Court—Jurisdiction—Arbitrator functus officio on making award.

An arbitrator nominated by one of the parties permitted a witness to make statements to him with reference to the matter in dispute, in the absence of the parties and of the other abitrators.

Held, per DRAKE, J.: Award invalid for such misconduct.

Upon Appeal to the Divisional Court, *Held*, per CREASE, MCCREIGHT and WALKEM, J.J., over-ruling an objection to the jurisdiction of the Divisional Court to entertain the appeal, that the order setting aside the award, which gave the parties liberty to apply for further directions, was not a final but an interlocutory order.

Held also, award invalid, and judgment of DRAKE, J., affirmed.

Upon motion to refer back the award and to appoint a fresh arbitrator in the place of the arbitrator found guilty of misconduct;

Held, per DRAKE, J.: That there was no power to make such an appointment.

MOTION to set aside an award for misconduct of one of the arbitrators. The facts sufficiently appear from the judgment.

Statement.

E. P. Davis, for the motion.

Godfrey, *contra*.

DRAKE, J.: The agreement for arbitration is dated the 16th day of November, 1893; and, by it, W. H. Gallagher is appointed arbitrator for Wood, and Edward Odlum for Gold, and James T. Hall was nominated umpire by the arbitrators. The object for which the arbitrators were appointed was to ascertain the price to be paid by Gold to Wood for the Albion Hotel building, license, bar and bar fixtures and lease of the land whereon the said hotel is erected. On the 10th day of January, 1894, an award was made and published by Hall and Gallagher awarding $1,900 to the plaintiff in respect of the matters submitted. The defendant objects that the award is bad on its face, because it purports to decide a matter not submitted, namely, "Fees

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paid for renewal of license." Secondly, That the arbitrator, Gallagher, acted throughout the arbitration as agent for Wood, and not as an independent arbitrator. Thirdly, That Gallagher took evidence not in the presence of the other arbitrators.

There were several other objections contained in the notice of motion, but no argument or evidence was adduced in respect of and no reliance was placed upon them. I therefore shall not consider them, but confine my judgment to the three points contended.

With regard to the first point: The value of the license is one of the matters referred to arbitration. The value, of course, depends upon its existence at the time the award was made. Pending the arbitration, the license would have expired, if it had not been kept on foot by payment of the necessary fees for renewal, and it was a matter of great importance to both parties that the license should not lapse. If the defendant, Gold, is to take the hotel, the license is an essential factor of value ; if Wood is to keep it, she cannot carry on the hotel without the license, and I think that the award in this respect is correct.

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With regard to the second objection, there is uncontradictory evidence to shew that Gallagher, after the award was decided upon and after all the evidence was in, stated that he wished to consult the counsel for Wood before he assented to the proposed amount, and, in fact, he desired to relieve himself of the responsibility of deciding without the assent of the person for whom he was acting ; this, no doubt, was a very improper view to take of his duties as an arbitrator, but it is not necessarily such conduct as will induce the Court to set aside an award. It may be that he desired to satisfy himself with the assent of his nominator with the amount which the other arbitrator had suggested, and it might have been possibly more beneficial to have a final decision, even although such a decision was not for a sum, which he thought sufficient as compensation, than to leave

the matter open indefinitely. Whatever his expressed opinion was to the other arbitrators, the evidence I think clearly indicates that neither Mr. Russell nor Mr. Godfrey gave him any assistance in that direction. It was strongly urged that this expression that he would have to see Mr. Russell to see if he agreed to the amount, shewed clearly that he had not brought an independent mind to bear on the evidence, and that such being the case, the award should be set aside, and the following cases were cited as bearing out this contention: *Conmee* v. *C.P.R.* 16 O.R. at p. 648; *Harvey* v. *Shelton*, 7 Beav. 455; *Re Lawson and Hutchinson*, 19 Grant 84.

On examining these cases, the principle that underlies them is clearly this, that an arbitrator must not have an interest adverse to one or other of the parties; if he has, he is not fitted to exercise an independent opinion. A man holding strong views on one side or the other is not thereby disqualified; he may be thoroughly conscientious in the exercise of his duties, and it by no means follows that he will not be governed by the evidence and modify his opinions when substantial ground is shewn him. Mr. Hall's affidavit of the 9th February clearly indicates that in his opinion both the other arbitrators took extreme views; but he goes on to say that, in his opinion, they were both conscientious, and acted throughout with the best intentions; and he did not attribute to either of them any bias or undue influence. I cannot therefore consider that there has been any improper conduct or partiality as will render the award invalid. Arbitration, as experience teaches, is generally founded on compromises.

Judgment.

The third objection is a far more serious one. If one of several arbitrators examines witnesses or obtains evidence in the absence of the parties on the other side, the award will be set aside; I have therefore to examine the evidence on which this charge rests.

Charles Wills, in his affidavit of 6th February, says that

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Gallagher, on two or three occasions, came to the Albion Hotel and was shewn about the premises by B. L. Wood, the husband of the plaintiff, and some conversation took place with reference to the value of the bar counter, which was one of the subjects of decision. He does not fix any date; but I understand him to mean that it was pending the arbitration.

George Jefferson Carey, in his affidavit sworn 6th February, says that he made an estimate of the value of the buildings, at the request of the husband of the plaintiff, and, before being called as a witness, he read a detailed statement of his estimate to Gallagher, and he also speaks of a further conversation between Gallagher and B. L. Wood with reference to the value of some matters arbitrated on. Mr. Gallagher, in his affidavit of 13th February, does not deny the statements of the two above mentioned deponents, but says that no visit subsequent to the one which he made with Odlum prior to the appointment of Hall as third arbitrator affected his judgment and, further, he says that the information Carey gave him he did not take into consideration, and he denies that B. L. Wood ever spoke to him about his evidence or attempted to influence his judgment. R. S. Whatmough, in his affidavit of 6th February, speaks to Gallagher being twice at the hotel during the arbitration and being shewn over the building by B. L. Wood. B. L. Wood, in his affidavit, denies ever speaking about the award or the matters in dispute to Gallagher. There is other evidence adduced charging Gold, the defendant's son, with attempting to suborn witnesses, which is strongly denied. On this evidence, which is very contradictory, I have to try to find on which side the truth is. The conclusion I have arrived at with regret (for I think the award is a reasonable one) is that Mr. Gallagher did not exercise that discretion which as an arbitrator he was bound to exercise; he did undoubtedly during the pendency of the arbitration have discussions relative to the matter with

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persons who were witnesses or were interested in the result. He says they did not influence his judgment; but, of that, neither I or any one else can form an opinion. An arbitrator should not under any circumstances discuss any matters relating to the arbitration with any except his fellow arbitrators, unless in the presence not only of his co-arbitrators, but also of that of the other parties. I have no doubt this was done inadvertently, but the effect is that the award must be set aside and with costs. With relation to the costs, there has been a great mass of evidence taken not bearing on this the main issue, but on points which have been abandoned by the defendant or decided against her, and I think the costs of this evidence, in respect of issues in which the defendant has failed, should be borne by the defendant and set off against the general costs.

Judgment.

With regard to the course to be adopted thereafter, I shall leave the parties to apply.

Award set aside.

Frances Wood appealed to the Divisional Court from this judgment, and the appeal came on for argument on April 5th, before CREASE, MCCREIGHT and WALKEM, J.J.:—

E. P. Davis, for the respondent: We take the preliminary objection that the order appealed from is a final and not an interlocutory order, and that this Court has no jurisdiction to entertain the appeal.

Argument.

Godfrey, contra, on that point, cited *Standard Discount Co.* v. *La Grange*, 3 C.P.D. 67; *Russell on awards*, 7th ed., pp. 691–2; *Delagoa Bay* v. *Tancred* 61 L.T.N.S., 343.

Per Curiam: By the Arbitration Act, 1893, the Court has power, after setting aside an award, to refer the matter back to the arbitrators. The order of DRAKE, J., gives general leave to apply. His judgment is not therefore a final judgment.

Judgment.

Objection over-ruled.

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The appeal was then argued. *Walker* v. *Frobisher* 6 Ves., 71 and *Harvey* v. *Shelton* 7 Beav., 455 being cited for the respondent.

The Court affirmed the judgment of DRAKE, J.

Appeal dismissed with costs.

13th April.

Godfrey, for Frances Wood, now applied for the appointment of an arbitrator, in the place of Gallagher.

E. P. Davis, contra.

DRAKE, J.: *Mr. Godfrey* moves for the appointment of H. Herschberger as an arbitrator, in place of Gallagher, through whose improper conduct the award made was set aside, and for an extension of time to make the award. An award is equivalent to a judgment, in law and equity; if a judgment is set aside, the parties are remitted to their original position; an award being set aside, the same result follows. The plaintiff contends that I have power to remit the award back to the same arbitrators, or, if such a course is inexpedient, that I have power to remit it back to the arbitrator and umpire plus a fresh arbitrator; a little consideration will shew that this cannot be done. The agreement for arbitration is an agreement *inter partes.* The parties define their arbitrators, the subject to be awarded on and the time in which the award is to be made. If the award is not made in time, the arbitrators are *functi officio,* unless the time is extended under the Act. In *re Joseph Bros. and Miller* 1 B.C. pt. 2. 38. By Sec. 11 of the Act, certain powers are given to the Court or a Judge to remove an arbitrator or set aside an award; but the removal of an arbitrator must be pending the making of the award, and the parties can appoint a new arbitrator and the time will be extended. Sec. 9, although general in its terms, has, in my opinion, application to cases where arbitrators have neglected to enlarge the time and where circumstances have

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arisen which would prevent the award being completed within the agreed limit. I think the parties will have to arbitrate afresh and appoint an umpire. If they cannot come to terms, the plaintiff must take such course as she may be advised. I cannot make the order asked for.

Motion dismissed.

GORDON v. COTTON.

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April 16.

GORDON v. COTTON

Privy Council—Appeal from Divisional Court B. C.—Imperial Order in Council—Rules.

The Divisional Court will not in its discretion allow an appeal to be brought from that Court to the Privy Council except in a matter of general public interest.

MOTION by the defendant Cotton for leave to appeal to the Imperial Privy Council from an order of the Divisional Court directing him to answer a certain question concerning the disposition he had made of certain stock, part of his assets, which question he had refused to answer upon his examination as a judgment debtor, upon the ground that to do so would be to disclose the private business of other persons. The defendant had refused to answer the question on the examination in the first instance, and upon motion, CREASE, J., ordered him to attend and answer on pain of committal. He refused to attend and, on motion, an order was made for the plaintiffs to be at liberty to issue a writ of attachment against him. From that order he appealed to the Divisional Court, which allowed the appeal

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on technical grounds but afterwards made the substantive order now proposed to be appealed to England.

Argument.

A. E. McPhillips, for the motion, referred to the Imperial Order-in-Council, dated at Windsor Castle, 12th July, 1887: "2. It shall be lawful for the Supreme Court (of British Columbia) at its discretion on the motion or petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order or sentence of the said Supreme Court to grant permission to such party to appeal against the same to Her Majesty, her heirs and successors in her or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final decrees, orders and sentences."

E. V. Bodwell, *contra*, was not called on.

Judgment.

Per curiam—WALKEM and DRAKE, J.J.: The Rule affecting appeals from the Supreme Court of Canada to the Privy Council is, that the question involved should be one of public interest as affecting some general right, and the Court will exercise the discretion here given upon the same considerations.

Motion dismissed with costs.

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BAKER v. DALBY, BALLENTYNE & CLAXTON.

Practice—Judgment under Order XIV.—Contract—Construction of—Covenant to indemnify—Liquidated or unliquidated demand—Variation between endorsement and affidavit verifying.

Plaintiff's writ was specially endorsed to recover "$1,000 for principal money due under a covenant to pay the sum of $1,000 on 20th Feb., 1892." The covenant as set out in the affidavit was to assume, pay and discharge all moneys due and to become due from the said assignor (plaintiff) to one Parker, under a certain agreement between them, and "to indemnify and save harmless him the said assignor from the payment of the same," etc. It did not appear that Parker had demanded payment from the plaintiff.

Held, per DRAKE, J., dismissing the motion:

That the covenant was one of indemnity, and that it was a pre-requisite to the plaintiff's claim that he had paid, or been called upon to pay, the $1,000.

That the cause of action proved was not that stated in the endorsement on the writ.

Upon appeal to the Divisional Court, *Held*, per CREASE and WALKEM, J.J., dismissing the appeal:

1. The contract proved was one of indemnity.
2. A claim for breach of such a contract is not a liquidated but an unliquidated demand.
3. That the variance between the special endorsement and the affidavit was fatal.

Per CREASE, J.: A demand upon the plaintiff to pay the $1,000 was a pre-requisite to his cause of action.

MOTION for judgment under Order XIV.

The endorsement on the plaintiff's writ of summons was as follows:—

"The plaintiff's claim is for principal money due under a covenant to pay the sum of $1,000 on the 20th February, 1892, contained in an agreement under seal, dated the 26th February, 1891, entered into between plaintiff and defendants. "Particulars: Principal, $1,000." Statement.

The affidavit of the plaintiff, filed in support of the motion,

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stated: "5. That by articles of agreement dated, etc., I agreed with one John Parker to purchase from him the following property, namely.....and agreed to pay him therefor $1,000, on the 20th day of February, 1892."

"6. That by indenture, dated 26th February, 1891, made between me and the defendants, I, in consideration of $1,150, assigned to the defendants all my interest in said agreement with said Parker on the 20th day of February, 1892."

This agreement was set out, and the clause in question was as follows:

"The said assignees (defendants) hereby covenant and agree with the said assignor (plaintiff) that they will assume, pay and discharge all moneys due and to become due under said (original) articles of agreement (between plaintiff and Parker), and will indemnify and save harm-

Statement.

less him the said assignor against and from the payment of the same or any part thereof, and will observe, keep and perform all the terms, covenants and conditions in said articles contained, and by the said assignor therein agreed to be observed, kept and performed."

G. H. Barnard, for the motion.

F. B. Gregory, contra.

DRAKE, J.: The plaintiff's cause of action is for principal money due under a covenant to pay $1,000 on 20th February, 1892, contained in an agreement under seal, dated 26th February, 1891, entered into between plaintiff and defendants. The plaintiff applies for judgment under

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Order XIV. The defendants contend that the alleged covenant is one merely of indemnity, and that no demand having been made for the payment no summary judgment will be given. On reference to the deed of 26th February, 1891, the defendants "covenant and agree with the plaintiff that they will assume, pay and discharge all moneys due and to become due under the recited articles of agreement,"

(which were to pay $1,000 on 20th February, 1892, with interest at seven per cent.) "and will indemnify and save harmless the said plaintiff against and from the payment of the same or any part thereof." This is a covenant of indemnity only, and the writ does not claim that the plaintiff has paid or even been called upon to pay the sum of $1,000, due under the agreement of 20th February, 1892. In some cases a trustee is entitled to be indemnified against liability as well as loss incurred in behalf of his *cestui que trust*, but in other cases some loss or damage must usually have accrued. The cause of action stated in the affidavit and exhibits is not the same cause of action as that stated in the writ. I think this is not a writ so endorsed as to entitle the plaintiff to judgment under Order XIV.

Judgment of DRAKE, J.

Application dismissed. Costs in the cause.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was heard before CREASE and WALKEM, J.J., on 16th April.

The grounds of appeal, *inter alia*, as stated in the notice were :

1. That the writ was specially endorsed within Order III., Rule 6, and that the affidavit verified same.

Statement.

2. That it was unnecessary for the plaintiff to show that John Parker demanded payment from him in order to found the present action.

3. That default having been made by the defendants under their covenant, the plaintiff's cause of action accrued.

A. E. McPhillips, for the appeal: An action can be brought upon a special agreement to indemnify, though no money has been paid under it. It differs in this from a suretyship contract. *English & Scottish Trust Co.* v. *Flatau*, 36 W. R., 238 ; *Randall* v. *Raper*, 6 W. R., 445 ; *Mason* v. *Barker*, 1 C. & K., at p. 111 ; *Loosemore* v. *Radford*, 9 M. & W.,

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657; *Carr* v. *Roberts*, 5 B. & Ad., at p. 84; *Mayne on Damages*, p. 305. Where the defendant's promise is an absolute one to do a particular thing, as to discharge or acquit the plaintiff from such a bond, an action may be brought the moment he has failed to perform his contract and a plea of *non-damnificatus* would be bad. *Wms. Saunders*, 117; *Vide Spark* v. *Heslop*, 1 El. & E., at p. 569: "The real meaning of this agreement is not, I will pay you whatever you have paid, but, I will be answerable to you that the amount shall be paid by me. It is not a contract of indemnity in the ordinary sense. It is a contract not merely to repay but also to take care that the plaintiff shall not be called upon to pay." The covenant here is not a mere covenant to indemnify but a covenant to pay and also to save harmless and keep indemnified. See *Hodgson* v. *Wood*, 2 H. & C., 649; POLLOCK, C. B., at p. 657; also *Wigsell* v. *School for Indigent Blind*, 8 Q.B.D., 357; *Ashdown* v. *Ingamells*,

Argument.

5 Ex. Div., 280, at p. 286. The special endorsement is taken from p. xxix of the Appendix to the Rules of Court, as that proper for a claim on a covenant. The action being on an indemnity covenant sounds, it is true, in damages, but the damages are liquidated and as such constitute a "liquidated demand" within Order III., Rule 6—*Von Lederer* v. *Benton*, 87 L.T.Jo., 316; *Leader* v. *Tod-Heatley*, W. N. (1891), 38.

F. B. Gregory, contra: It is necessary not only that the plaintiff should have a sufficient special endorsement, but that he should prove it as laid, in order to obtain judgment under Order XIV. The endorsement here is that provided in the schedule for a claim to recover a sum covenanted to be paid by covenantor to covenantee direct, and the proof is breach of an indemnity contract. A claim for damages on such a contract cannot be specially endorsed—*Cavanagh on Special Endorsements*, p. 41. The test of whether a claim is a proper subject of special endorsement is whether it would formerly have been recoverable in the old Common

Law Action of Debt—*Ann. Prac.*, 1894, 225.

The amount must have been demanded by Parker from plaintiff before he can sue defendant—*Mayne on Damages*, 4th Ed., p. 306.

Cur. adv. vult.

26th April, 1894.

CREASE, J.: This was an appeal from the refusal of Mr. Justice DRAKE to grant the plaintiff final judgment under Order XIV.

To enable final judgment to be given under this Order, without a trial in the ordinary way, two things are absolutely necessary. One is, that the demand in the writ setting forth the plaintiff's claim must be for a sum certain, or, as it is termed, liquidated—Order III., Rule 6. The other is, that it shall be set forth in a writ specially indorsed with the full particulars of the plaintiff's claim, so that the person served with it, the defendant, shall know from it for certain and completely the exact demand he is required to meet, and the claim must be exactly supported by the affidavit in support of the motion to entitle to summary or final judgment under Order XIV.

Judgment.

The plaintiff's claim here is for principal money due under a covenant to pay the sum of $1,000 on 20th February, 1892, contained in an agreement under seal, dated the 26th February, 1891, entered into between the plaintiff and defendants. The particulars were, "Principal, $1,000." Plaintiff, in his affidavit in support of the motion, says: "By articles of agreement dated, etc., I agreed with one John Parker to purchase from him the following property, namely (describing it), and I agreed to pay him therefor $1,000."

"By indenture, dated 20th February, 1892, between me and the defendants, I, in consideration of $1,150, assigned to the defendants all my interest in the said agreement

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with the said Parker."

This agreement was set out, and the clause in question was as follows :

"The said assignees (defendants) hereby covenant and agree with the said assignor (plaintiff) that they will assume, pay and discharge all moneys due and to become due under the said (original) articles of agreement (between plaintiff and Parker) and will indemnify and save harmless him the said assignor against and from payment of the same, or any part thereof, and will observe, keep and perform all the terms, covenants and conditions in said articles contained, and by the said assignor therein agreed to be observed, kept and performed."

From the foregoing it will be seen that the plaintiff proceeds entirely upon the covenant to pay. He does not mention indemnity, although it is a covenant of indemnity. He intentionally avoids proceeding on that, and sues for the money to pay off the original vendors for the purchase of the land, proceeding on the words "will pay all moneys due under the said agreement."

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To make his claim more precise the plaintiff abandons the interest he alleges he was entitled to, in order to avoid the objection which, if a claim for interest were inserted, would have tainted with uncertainty the special indorsement on his writ—*Freehold Loan Co.* v. *McLean*, 8 Man., p.p. 116 and 334 ; *Grant* v. *People's Loan Co.*, 18 S. C. R., 262. With this in view he calls the amount so ascertained a liquidated sum, and then treats it as a proper subject for special endorsement, and applies for final judgment under Order XIV.—*Wooldridge* v. *Norris*, 6 L. R. Eq., 410.

A vein of misapprehension runs through all the plaintiff's application, and the cases adduced in support. This is, that although on proper cause he can sue the defendant, *quia timet*, in the ordinary course, even before the money has been demanded from him, he has not thought it necessary to show that he is also in a position to take advantage

of the exceptional statutory privilege of Order III., Rule 6, and Order XIV. The learned counsel for the plaintiff stated that no case had been cited before the learned Judge in the application in the Court below, shewing that a demand ought to have been made on the plaintiff before action brought. But *Mayne on Damages*, 4th Ed., p. 306, which was cited, states that although the law allowed an action for damages where defendant's promise is to do a particular thing, as to take up a note—*Loosemore* v. *Radford*, 9 M. & W., 657—an action might be brought and damages to the extent of the note obtained, though no actual injury had been sustained. But he adds, "Where the covenant is to indemnify or save harmless (which is the case here), no action can be brought until some loss has arisen. And in this case also it is to be observed the covenant to pay, which the plaintiff's counsel considers absolute, is only to pay when it will be due, and there is nothing to shew it was 'due,' *i. e.*, at the time of commencing the action."—*Wolmerhausen* v. *Gullick*, 9 T.L.R., 437, cited on behalf of the plaintiff, was an action for contribution by one co-surety against another before the former had paid his own proportion of the joint liability. But there the obligation to pay was absolute. Similarly, in *English and Scottish Trust Co.* v. *Flatau*, 36 W.R., 238, so soon as the obligation to pay is absolute, an action can be commenced, but here there has been no demand and the obligation is not yet absolute so as to come under Order XIV. In other words, it is not a liquidated demand and therefore not capable of being made a special endorsement under Order XIV.

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Counsel for the plaintiff seems to lose sight of the fact that this is a case of a special indorsement with a view of obtaining a final judgment by what is practically a summary trial and not a cause proceeding by the regular ordinary steps to trial. *Spark* v. *Heslop*, 1 El. & E. 569, cited for plaintiff is not an authority applicable to the case before us. This is not a case of a contract to indemnify in

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the ordinary sense and consequently does not apply here. *Loosemore* v. *Radford*, 9 M. & W., 657, was a covenant to pay a sum of money on a day named. That was not a covenant to indemnify as in the present case. *Smith & Howell*, 6 Ex. 730, also quoted on plaintiff's side, was a case where a demand had been made, for there judgment had been recovered against a plaintiff and that is the highest kind of demand, though there had been no payment under it. (*Vide* Mayne on damages, 4th Ed., 306–7.) The case cited *(English & Scottish Trust Co.* v. *Flatau)* can be distinguished. There money was actually paid into Court under a 3rd party notice and the money was paid into Court before the plaintiff made the claim. Again, it must be kept constantly in mind that this is on a liquidated claim under Order XIV. *Wooldridge* v. *Norris*, 6 L. R. Eq. 410 was also cited by plaintiff and considered by his counsel as his strongest case. There the exact state of circumstances was different from those in the present one, and it was not brought on a covenant to indemnify. Another test is, has the learned counsel endorsed his writ in accordance with his affidavit? The endorsement is for one thing the affidavit proves another, which is inconsistent. Plaintiff's only right is to endorse under Order 3, Rule 6, but he justifies his claim by referring to the form in No. 8, appendix p. xxix., but the marginal note there shews that form is applicable to a covenant to pay money certain. If the covenant had been to pay B $1000, there would have been nothing to be said against it. But the defendants are not indebted in this manner. "Then due" in form No. 8 means what it says, but in the present case there was no money which could be said to have been then due at the time the action was commenced. The second recital shews an agreement to assume the payment.

Judgment. of CREASE, J.

The covenant in the last page is a clear covenant to indemnify or save harmless. The plaintiff is not entitled to final judgment in that short way. He can sue in the usual

regular way but he cannot take advantage of Order III., Rule 6, to take a short cut to final judgment. There are many authorities for that, *Mayne on Damages*, 4th Ed., 306; *Sedgwick on Damages*, Vol. 8, Ed. 2nd, Sec. 791, concur in this, that if the engagement be indirect, whether only implied in law, or whether it be an undertaking to indemnify or save harmless against the consequences of the default, there damages to be recovered must be proved. While on the one hand a covenant for the payment of a definite sum of money is, so far as such covenant goes, within Order III., Rule 6.

On the other hand a covenant which is not of itself for payment of money is not within this Rule; although the measure of damages for breach thereof may, in the event become a definite sum. Hence in an action to recover the amount of rent of a leasehold, which the assignor has been compelled to pay to the lessee through default of the assignee, the claim cannot be specially endorsed. The claim by the assignor to recover against the assignee of the lease, is founded on breach of express covenant by the defendant to indemnify the plaintiff and is necessarily of an unliquidated character as sounding purely in damages. *Knight* v. *Abbott*, 10, Q. B. D., 11, (1882).

Judgment of CREASE, J.

For the foregoing reasons I think the present is not a case where Order III., Rule 6 applies. Mr. Justice DRAKE's order consequently must be supported and the present appeal dismissed with costs.

WALKEM, J.: This is an appeal from a refusal by Mr. Justice DRAKE to allow the plaintiff to enter Judgment XIV.

The endorsement on the plaintiff's writ is as follows: "The plaintiff's claim is for principal due under a covenant to pay the sum of $1,000 on the 20th of February, 1892, contained in an agreement under seal, dated the 26th February, 1891, entered into between plaintiff and defendants."

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The covenant referred to is not a covenant to pay $1,000, or any other specific sum of money, but is one to "indemnify and save harmless him," the plaintiff, from the payment of certain moneys due by him to one Parker, which indebtedness the defendants agreed to personally assume and discharge. Damages for the breach of such a covenant would obviously be unliquidated damages; and the mere circumstance that they are capable of being fixed at a definite sum cannot change their legal character, or, in other words, constitute them liquidated damages when they are not so. Now a judgment under Order XIV. can only be given where the plaintiff's writ of summons is specially endorsed, according to Order III., Rule 6, for "a debt or liquidated demand." The present claim, being neither one nor the other, is therefore, not within the Rule, and hence cannot be the subject of special endorsement. The endorsement in question is inaccurate, inasmuch as it mis-states the cause of action, and in that respect differs from the plaintiff's affidavit, which correctly sets forth his claim as being one for indemnity. The decision of the learned Judge, though given upon other grounds than the above, must be upheld, and this appeal disallowed with costs.

Judgment of WALKEM, J.

Appeal dismissed with costs.

ASPLAND v. HAMPSON & CO.

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ASPLAND v. HAMPSON

Execution—C. S. B. C. 1888, Cap. 42, Sec. 21—Receiver—Appointment of is not an execution—Order XLII., Rule 8.

The appointment of a Receiver of the estate of a judgment debtor at the instance of his judgment creditor by way of recovering upon the judgment is not an "execution" within the meaning of the Execution Act, Sec. 21, and clerks and servants of the execution debtor have no right to an order for payment of their wages out of the amount realized by the Receiver in priority to the claim of the judgment creditor.

APPLICATION under C.S.B.C., 1888, Cap. 42, Sec. 21, on behalf of certain clerks and servants of the execution debtor to be paid their wages in preference to the claim of the judgment creditor out of the moneys realized by a receiver of the estate of the judgment debtor appointed at the instance of the judgment creditor. Statement.

Aikman, (Drake, Jackson & Helmcken) for the applicants.

White, (Eberts & Taylor) *contra.*

WALKEM, J.: This application is made under the provisions of Section 21 of the "Execution Act," (Chap. 42, Con. Stat. 1888) on behalf of several clerks and servants lately employed by the defendant, for an order directing the receiver appointed in this action to pay them certain amounts due to them respectively for wages. The ground of the application is that the appointment of a receiver was equivalent to legal execution. The section referred to is as follows: "In case of any writ of *fieri facias*, or execution against goods or lands, any clerk, servant, labourer or workman, to whom the execution debtor or person against whom the process issues is indebted for salary or wages, may apply by summons in Chambers to a Judge of the Court out of which the process issues, and it shall be lawful for such Judge, upon such application, and upon proof of the claim Judgment.

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of such clerk, servant, labourer or workman, to order so much as shall be due to him from the execution debtor, for salary or wages, not exceeding three months' arrears, to be paid to the applicant, out of the proceeds, if any, of the execution, in preference to the claim of the execution creditor," etc.

This section was subsequently amended by postponing the preference thus given to claims for wages, to the payment of the execution creditor's costs of action, but nothing turns upon this. The appointment of a receiver is not execution. By Order XLII., Rule 8, the term "writ of execution" shall include "writ of *fieri facias*, *capias*, sequestration and attachment, and all subsequent writs that may issue for giving effect thereto," and the term "issuing execution" against any parties, shall mean "the issuing of any such process against his person or property as under the preceding Rule of this Order shall be applicable to the case."

Judgment.

The process referred to means the writs of procession, delivery, attachment, and sequestration, that are mentioned in Rules 4, 5, 6, and 7, of the Order. As observed by COTTON, L. J., in *re* Shephard 43, Ch. D., at p. 135, "what a person gets by the appointment of the receiver, is not execution, but equitable relief which is granted on the ground that there is no remedy by execution at law."

Since writing the above, I find that the present question has been very recently before the Queen's Bench Division in England, and that the opinion I have expressed upon it is correct. (See *Norburn* v. *Norburn*, 1894, 1 Q. B. 448). The application must be dismissed with costs.

Application dismissed with costs.

MELLOR v. CARTER.

WALKEM, J.
[In Chambers.]
1894.
May 5.

MELLOR
v.
CARTER

Practice—Ex juris Writ of Summons—Rule 44—Order for substitutional service—Evasion of Service—Necessity to shew—Affidavit—Supplemental Refused.

To support an order for substitutional service of a Writ of Summons allowed to be issued for service out of the jurisdiction it must appear upon the affidavit upon which the order is obtained that the defendant is evading service of the writ.

Supplemental affidavit that such was the fact not admitted in answer to a motion to set aside the order.

SUMMONS to set aside an *ex parte* order giving the plaintiff leave to effect substitutional service within the jurisdiction of the writ of summons issued by leave of a Judge for service outside the jurisdiction of the Court, for irregularity, in that the affidavit upon which the order was made did not shew that the defendant had absconded or was keeping away to evade service of the writ. Statement.

Aikman, for the motion cited *Wilding* v. *Bean*, 1891, 1 Q. B., 100 ; *Fry* v. *Moore*, 23 Q. B. D., 395. Argument.

Hall, contra, desired now to fyle a supplemental affidavit showing that the defendant had absconded to evade service.

WALKEM, J.: The order is irregular ; I cannot now allow a supplemental affidavit to be fyled. Judgment.

Order set aside.

DRAKE, J.

1894.

June 9.

TODD & SON (Judgment Creditors)

v.

PHŒNIX (Judgment Debtor), THE UNITED FIRE INSURANCE CO. (Garnishees) AND LOWENBERG, HARRIS & CO. (Claimants).

TODD v. PHŒNIX & UNITED FIRE INS. CO.

Chose in action—Validity of Oral equitable assignment of.

An oral equitable assignment of a chose in action is valid, and takes priority of a subsequent attaching order of the debt so assigned.

SPECIAL case stated for the opinion of the Court as follows:

1. It is admitted that the plaintiffs, on the 25th day of March, 1893, commenced the above actions in this Court against the defendant Phœnix, in which they recovered judgment against the said defendant as follows:

On the 13th April, 1893, judgment for $526 debt and costs, and, on the same day, judgment for the further sum of $907.38 debt and costs.

Statement. Which are still subsisting and unpaid.

2. Garnishee summons purporting to attach all moneys in the hands of the United Fire Insurance Company, Limited, due or to become due to the defendant Phœnix, were issued in the said suits on the 25th March, 1893, and were on the same day served on William Monteith, the agent of the company, at the city of Victoria.

3. The said Monteith was the agent of the said company at the city of Victoria.

4. On the 24th day of March, 1893, the said Phœnix borrowed from Lowenberg, Harris & Co. the sum of $2,000 (which money was then paid by the latter to the former) for which he gave his promissory note dated 24th March,

1893, a copy of which is hereto annexed and marked "A."

5. As security for the payment of the said promissory note, the said Phœnix, on the said 24th March, 1893, by parol, assigned to Lowenberg, Harris & Co. all moneys due or to be paid to him under and by virtue of a certain policy of insurance with the said fire insurance company, and at the same time, he executed a power of attorney to N. P. Snowden, of the firm of Lowenberg, Harris & Co., to enable the said Lowenberg, Harris & Co. to collect the moneys so assigned. The policy of insurance was also, at the said date, delivered by said Phœnix to the said Lowenberg, Harris & Co. The moneys payable under said policy were the only moneys coming to Phœnix from the said fire insurance company.

6. On the 28th day of March, 1893, a letter was written by the said Lowenberg, Harris & Co. to the said William Monteith, giving to them notice of the assignment, which letter was received by the said Monteith on the 29th day of March, 1893. On the 21st April, 1893, a letter was written by the said Lowenberg, Harris & Co. to Messrs. Hudsons & Lane, of Montreal, the chief agents of the said insurance company in Canada, giving to them a similar notice, which letter was duly posted, but no reply thereto received.

Statement.

7. Prior to the 24th day of March, 1893, a total loss occurred under the said policy. The moneys payable under the insurance, $2,000, were remitted to the said William Monteith by the said company some time after May 29th 1893.

8. At all the said dates and for some time prior thereto, the said fire insurance company was a company duly licensed under the provisions of the Dominion Insurance Act to carry on business in the province of British Columbia, and were actually so engaged; but the said insurance company had no office in this province.

9 On the 7th day of August, 1893, the said garnishee

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summons came on for hearing in this Court. The said United Fire Insurance Company, Limited, appeared by counsel, and thereupon an order was made.

10. The said Harvey Combe, mentioned in the said order, was appointed receiver, under and by virtue of the terms of an order dated 14th April, 1893.

The question for the Court is: To whom, under the circumstances above stated, the money in Court should be paid?

The policy contained a proviso against assignment, without the consent of the insurance company.

Argument.

A. P. Luxton, for the claimants: An equitable assignment of a debt may be by parole. *Heath* v. *Hall* 4 Taunt, 326; *Tibbits* v. *George* 5 A. & E. 107 at pp. 115, 116; *Gurnell* v. *Gardner* 9 L.T.N.S., 367. There may be a valid assignment of money to be subsequently acquired. *Rodick* v. *Gandell* 19 L.J. Ch. 113. The equitable assignment of the policy after the loss was not a breach of the condition against assigning without the consent of the insurance company. *Garden* v. *Ingran* 23 L.J. Ch. 478; *Waydell* v. *Provincial Ins. Co.* 21 U.C.Q.B., 612, at p. 620; *Randall* v. *Lithgow*, 12 Q.B.D. 525. A pledge of a fire policy is not an assignment within the condition. *Riccard* v. *Prichard* 1 K. & J. 277.

E. V. Bodwell, contra.

Judgment.

DRAKE, J.: On 24th March, 1893, Phœnix borrowed from the claimants $2,000, for which he gave his note, payable on demand, and deposited a policy against fire effected with the garnishees, which policy had, in fact, matured, as a fire had taken place and a total loss incurred. Notice of the deposit was given to Wm. Monteith, local agent of the company, on 28th March, 1893, and to the managers in Canada on 21st April. On 25th March, a garnishee summons was taken out under the amended County Court Act, and, on the 13th April, judgment was rendered for the

judgment creditors against the judgment debtor. On 7th August, the garnishee summons came on for hearing, and a day was fixed for the argument. The question to be decided is whether or not the equitable assignment by parole of the policy moneys on the 24th March is valid as against the judgment creditors. An equitable assignment need not be in writing—*Tibbits* v. *George* 5 A. & E. 107—and here there is no dispute as to the advance of the money, $2,000, on the strength of the parole assignment. The judgment creditors did not issue their summons until after the day the assignment was made. A garnishee summons only binds such funds of the debtor as he was entitled to deal with. Here he had no funds with which he could deal. In *Russell* v. *Russell, White & Tudor*, Vol. 1 p. 773 and the notes thereto, it was held that the pledge of a lease was good against the assignees of a bankrupt, and Lord LOUGHBOROUGH says: "This is a case of delivery of the title to the plaintiff for valuable consideration. The Court has nothing to do but supply the legal formalities, the contract being executed." The plaintiffs' counsel contends that the Choses in action Act, C.S.B.C. 1888, Cap. 19, implies that an assignment must be in writing. I do not think the Act goes so far; it does not affect equitable assignments of choses in action, but merely authorizes the assignee to sue in his own name when the assignment is in writing, which he could not do before this Act. The order therefore will be that the money paid into Court be paid out to Messrs. Lowenberg, Harris & Co., subject to the order of 7th Aug., 1893, as to costs, and that the costs of this application and order be paid by the plaintiffs, J. H. Todd & Son.

Judgment.

Judgment for claimants.

DRAKE, J.
[In Chambers.]

WHEATON v. ALLICE & AULT.

1894.
Sept. 6.

Practice—Order XIV., R. 2—Jurisdiction of Judge to relieve against provision in Rules of Court.

WHEATON
v.
ALLICE ET AL

A Judge has no power to shorten the four days' notice of a motion for judgment required by Order XIV. Rule 2.

SUMMONS for judgment under Order XIV. The summons was issued and served on 5th and made returnable on 6th by special leave of a Judge.

Argument. *Morphy*, took the preliminary objection that there was no jurisdiction to shorten the four days' notice required by Rule 84.

Judgment. *Higgins, contra.*

DRAKE, J.: I must sustain the objection.

Summons dismissed with costs.

McLEAN v. THE INLAND CONSTRUCTION AND DEVELOPMENT CO., LTD.

DRAKE, J.
[In Chambers.]

1894.

Sept. 6.

McLEAN
v.
INLAND CONSTRUCTION ETC. CO.

Practice—Security for costs.

Plaintiff residing outside the jurisdiction voluntarily deposited $100 as security for costs. Upon motion by defendant after appearance, to increase the amount to $150.

Held, (1.) The amount in which security is to be given is in the discretion of the Court.

(2.) An order increasing security for costs, will only be made after the amount furnished has been exhausted.

Statement.

THE plaintiff, resident outside the jurisdiction, had deposited $100, without order, as security for defendants' costs of the action. The defendants had appeared, but no further proceedings had been taken.

Argument.

G. H. Barnard, moved absolute a summons to increase the amount of the security to $150, on an affidavit, that $100 would be insufficient to cover the probable costs of the defence. He also contended that by the practice $150 was the recognized amount to order.

P. Æ. Irving, contra.

Judgment.

DRAKE, J.: There is no fixed rule as to the amount of security to be ordered. It is in the discretion of the Court. The plaintiff having given security to the not unreasonable amount of $100, without order, which amount stands unexhausted, the motion to increase is premature.

Summons dismissed with costs.

DRAKE, J.

1894.

Oct. 16.

QUEEN v. SAUER

REGINA v. SAUER.

Liquor License Regulation Act, 1891—Construction of word "meal."

By the Liquor License Regulation Act, 54 Vic., B.C., Cap. 21, Sec. 4, the sale of liquor in licensed premises is prohibited between the hours of eleven o'clock on Saturday night and one o'clock on Monday morning, and by Sub-sec. 2 of Section 4 "the provisions of this section shall not apply to the furnishing of liquor to *bona fide* travellers nor to the case of hotel or restaurant keepers supplying liquor to their guests with meals."

The defendant was the holder of a saloon and restaurant license. A customer called for liquor during the prohibited hours, which was refused unless he ordered a "meal," whereupon he ordered crackers and cheese for which no charge extra to that for the liquor was made.

Held, sustaining a conviction of the defendant that the word "meal" applied to food eaten to satisfy the requirements of hunger, and, on the facts, that the supply of food by defendant was a mere excuse to enable defendant to supply liquor.

Statement. APPEAL, under the Summary Convictions Act, Stat. B. C., 52 Vic., Cap. 26, Sec. 70, from a conviction of the defendant under the Liquor License Regulation Act, 1891, 54 Vic. B.C., Cap. 21, Sec. 4, for selling liquor within prohibited hours on Sunday on his premises licensed as a saloon and restaurant. The facts fully appear from the judgment.

S. Perry Mills, for the appeal.

W. J. Taylor, *contra*.

DRAKE, J.: The appellant is owner of the Bank Exchange Saloon and Restaurant, and pays a saloon as well as a restaurant license. The saloon is at one end of the building,

Judgment divided from the restaurant by a room used by guests to play cards and eat lunch. The appellant supplies on week days what is called a free lunch—that is, customers pay for the liquor they consume and have a lunch given them.

The evidence shows that on ordinary days the appellant charges ten cents for a glass of beer; on Sundays he

charges 15 cents, and makes the waiter offer the customers a plate of crackers and cheese. The plate of crackers and cheese is a general plate offered to every one who calls for liquor. If a customer should ask for crackers and cheese he would charge 15 cents, but if he has a glass of beer with it he is charged no more.

It is a fact admitted that Charles Freedman came in during prohibited hours and called for beer. The barkeeper refused to serve him unless he ordered what is called a meal, and he was supplied with crackers and cheese, for which he paid the regular Sunday price of 15 cents, which included his beer.

The appellant's contention is that this is a service of liquor to a guest by a restaurant keeper with his meals. That a meal is an unknown quantity and varies with the appetite of the customer, and therefore any food put down by a person holding a restaurant license beside a person drinking, complies with the Act. The Act has to be read as "*loquitur ad vulgus*," giving to the words their ordinary meaning. Now picking a crumb of biscuit as an excuse for drinking is not eating a meal. I consider the term "meal" in the Act as applying to food that is eaten to satisfy the requirements of hunger, and in the present case it is quite clear that the biscuits were merely used as an excuse to enable the appellant to supply liquor. If the contention of the appellant is good, any fragment of food would enable a saloon-keeper to evade the Act, if offered to a customer, and whether consumed or not. The liquor here was not supplied by the ordinary restaurant waiters, nor was it supplied in the restaurant, but it was supplied from the saloon bar, and this Sunday plate of biscuits duly put in an appearance.

Judgment.

Section 4 of the Act states that "no sale or disposal of liquor shall take place on the premises where in ordinary circumstances liquor may be sold, nor shall liquor be drunk in such places during the prohibited hours." The room in

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which the liquor was consumed is part of the licensed premises, and the appellant calls this room a restaurant for 15 cent meals, chiefly consisting during the prohibited hours, of biscuits. In my opinion the appellant has not brought himself within the exception, and I therefore confirm the conviction with costs.

I think in cases where a saloon is carried on as well as a restaurant in the same building that the license should clearly define the limits of each business, and that the bar-rooms should not have open communication with the restaurant.

Judgment.

The Municipal Council have power to pass by-laws prescribing the form and conditions of the licenses to be granted by the Commissioners and to regulate the same, but at present this Council has not thought fit to exercise this power. In my opinion there is no subject of greater importance for the Council to deal with than this subject of licenses.

Conviction affirmed.

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Oct. 10.

WARD AND PEMBERTON v. YOSEMITE

IN THE EXCHEQUER COURT OF CANADA.

(The British Columbia Admiralty District.)

BETWEEN

WILLIAM CURTIS WARD AND FREDERICK BERNARD PEMBERTON, EXECUTORS OF THE LATE JOSEPH DESPARD PEMBERTON,

AGAINST

THE SHIP "YOSEMITE."

Admiralty Law—Collision—One ship under way and other at anchor—Onus of proof—Mortgagee in possession—Right of to bring action for damage—Both parties in fault—Division of loss—Costs.

It appeared from the preliminary Acts that the defendant ship was under weigh and the plaintiffs' ship at anchor at the time of the collision.

Held, Upon proof of the interest and right to sue of the plaintiffs, that the *onus* was on the defendant ship to show that the collision was not caused by her negligence.

(2) That mortgagees of a ship, in possession, have a right of action for damage done to her.

(3) That where both parties are to blame for a collision, though in different degrees, the loss and costs will be divided equally between them.

ACTION for damages caused by collision. The facts fully appear in the judgment. Statement.

A. L. Belyea, for the plaintiffs.

P. Æ. Irving, for the "Yosemite."

CREASE, J.: This was an action for damages by collision of the steamer Yosemite with the tugboat Vancouver a little after two o'clock in the morning of the 15th May, 1893, in Miner's Bay, Mayne Island, Plumpers (or Active) Pass. Judgment.

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The Vancouver was lying at anchor having a scow laden with iron lashed to her about a hundred yards from shore and I am disposed to think some three hundred yards from the wharf.

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The Yosemite, a very long, fast, paddle-wheel steamer, when she ran into the Vancouver was swinging round East by North to South for the purpose of making a landing at the wharf, a very dangerous thing to do in a narrow pass, full of tide rips and varying currents, at the best of times, and especially at night with a captain who was not familiar with either the passage or his steamer. The night was clear overhead but dark below, owing to the reflection of the trees along the shore, especially under the high ground inshore; in the shadow of which both the ships were at the time of the accident. The tide was about three-quarters flood, and the evidence on both sides show that the Yosemite struck the Vancouver on the port quarter, a few feet from the stern, nearly immediately over the propellor; cut through her guard and considerably damaged her. The defence was that the Vancouver was anchored in "the fair way," carried a dim light, not a proper shipping light, at her masthead, and kept no lookout either on the steamer or on the schooner Bonanza which was fastened to her.

Judgment.

On the opening of the case a contention arose, to determine upon which of the parties the *onus* of commencing should fall. It was decided by me that from the facts disclosed in the preliminary acts, (assuming the plaintiffs' right to sue) the burden of proof would be on the defendant to show that the fault was not his. *Marsden on Collisions*, 3rd Ed., 31 lays it down that the plaintiff must make out a *prima facie* case. The burden of proof lies upon him; but as soon as the plaintiff has made out a *prima facie* case of negligence on the part of the defendant, the burden of proof is shifted; and the defendant will be liable, unless he proves that his negligence in no way contributed to the loss.

It is notably the case in collision accidents, where certain

inferences of fact have been established by numerous cases, they become to a very great extent very nearly of the same authority as if they were propositions of law. In support of this view the following authorities were cited: In "*The Batavier*," 2 Wm. Rob. 407, Dr. Lushington in his judgment declared it to be a proposition of law that the *onus* was on the vessel under way to show that the collision occurred through no negligence of hers. A vessel at anchor cannot get out of the way. The *onus* is on the vessel doing the damage, whether the injured vessel is well or ill anchored. The same in "*The Victoria*," 3 Wm. Rob. 52, although the vessel was lying in a track frequented by the ships. In all cases the *onus probandi* is on the vessel which comes into contact with another vessel which is stationary and helpless. Lord Herchell in the "*Annie Lyall*," 11 Prob. Div. 114, (1886) Lord ESHER and FRY, L.J., placed the *onus* on the vessel in motion.

Mr. Irving for the defendant contended on the authority of "*The Telegraph*," 1 Spinks, 428, 1 Pritchards Adm. Prac. p. 290, that as the collision occurred at night, and the Vancouver was not well lighted and anchored, the vessel anchored must prove that she was properly lighted and anchored. She ought not to have been moored at the entrance of a port, except of necessity; and considering their long delay in bringing the action on a collision which occurred fourteen months previously, the *onus* ought to be on the Vancouver. It was the complainants delay *vide* "*The John Brotherick*," 8 Jurist, 276, and he should therefore have the *onus* thrust on him.

Judgment.

I therefore ruled that the plaintiff should first prove property, that is prove their right to sue, and then the *onus* would be shifted on the Yosemite, to discharge the presumption that her negligence was the cause of the injury. To prove property and the right to sue, one of the plaintiffs, Fred. Pemberton, testified that he and William Curtis Ward, his co-plaintiff, are the executors of the will

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of Joseph Despard Pemberton, deceased; of which probate was granted to them on the 27th December, 1893. The Vancouver was registered at New Westminster in the name of Robert Couth as owner. The register of course is not an evidence of title.

On the 10th September, 1889, the Vancouver was mortgaged by the owner to the late Joseph Despard Pemberton, before the present action was brought. It was intended that the action should have been brought before, but on the 11th November, 1893, the said mortgagee suddenly died, and probate was not granted until the 27th December, 1893; the provisions of the new act respecting succession duties requiring time for fulfilment.

The mortgage was produced; and from it was shown that money was still due to the mortgagee at that period. The mortgagees took possession of the Vancouver on the 1st July, 1892, and she has been in their possession ever since. The mortgagees had agreed to insure the vessel for $2,600, but had originally insured her for more. They had a Bill of Sale for her from Henderson to Cook. The certificate of registration from the Custom House, New Westminster, was produced. On it was an endorsement of Greenleaf as master dated 18th March, 1893, made by Peter Grant, the then acting registrar. This endorsement was afterwards cancelled, as Greenleaf turned out to be an American citizen. But that took place after the collision. That change consequently has no bearing on the present case. The appointment of Greenleaf as master was made through the instrumentality of the mortgagees. The plaintiffs do not sue as registered owners. The registered owner Couth cannot be found. They sue as mortgagees in possession under an unsatisfied mortgage. The plaintiff Pemberton, besides being an executor was a partner with his father, the late Joseph Despard Pemberton, at the time that this business and mortgage were transacted, and it was all done as part of the firm business. The authorities fully support the

Judgment.

proposition that the mortgagee in possession has the right of action in case of collision and damage: *See Dickinson* v. *Kitchen* 8 El. & B. 789, and the later case of *Keith* v. *Burrows* 2 App. Cas. 646 where the mortgagor remains until the mortgagee takes possession. Then, in right of that, the latter becomes the owner, *vide* Lord Cairns' judgment in *Mears* v. *London & S.W. Ry. Co.*, 11 C.B., N.S., 849 where a barge let out to hire was damaged, the owner was held to have the right to sustain an action for permanent damages. *European & Australian Royal Mail Co.*, v. *R.M. S. Packet Co.*, 30 L.J.C.P. 247 is also at point. This was a very full case and established that mortgagees in possession are equivalent to owners.

P. Æ. Irving for the defendants cited Sec. 70 of the Imperial Shipping Act, 1854, the corresponding section to which in the Canadian statute is Sec. 36, Cap. 72, Can. as expressly declaring that the mortgagee shall not by reason of his mortgage, be deemed to be the owner of the ship and *Simpson* v. *Thompson*, L.R., 3 App. Cas. 279. There the underwriters contended that they had a right to maintain an action for damages, in their own name in respect of the goods insured in the ship. But then in that case there was no possession, before she was lost, no possessory right. The cases are not parallel; and the difference as to possession makes a wide distinction. He cited also "*The Ilos*," Swa. Ad. 100, a case of collision. There George Turner up to a late period of the case appeared as registered owner. The ship was condemned, and reference for the amount of damages after decree was ordered. The real owner, one Redway, afterwards turned up. Dr. Lushington however refused to substitute the beneficial owner as he had already decreed in favour of the registered owner; but directed the amount to be paid into the registry and threw upon the party claiming it the *onus* of establishing his ownership. To this argument, rather implied than direct, of defendant's counsel, the plaintiff gave a complete reply

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drawn from *Dickinson* v. *Kitchen, supra*, followed in the Feronia 2, L.R. Adm. 65. There the limited construction and the meaning to be placed upon Sec. 70 of the Imperial Merchant's Shipping Act, 1854, repeated in our statute Sec. 36, Cap. 72, was clearly brought out. The latter case was a suit by a master who was a part owner, against a ship and freight for wages and disbursements. The master's maritime lien on these was deemed to be in priority to the mortgagee's in possession; and not affected by his being part owner. And the reason why the master's maritime lien was preferred to the mortgage was that the maritime lien does not require possession to make it good. The rights of the mortgage must be made good or better by possession. Those two cases establish that clearly, and the endorsement on the mortgage is not on the certificate of registry, for the simple reason that when a mortgagee has taken possession, registration becomes immaterial, *Keith* v. *Burrows*, 1 C.P.D. 722, establishes the point that an unregistered mortgage passes the ownership on the mortgagee taking possession; subject of course to the equity. *Non constat* but that there may be another registered mortgagee in existence. The register itself has not been produced; but that consideration does not affect the plaintiff's right to sue, as they are first mortgagees and in possession. The proof of the registration of their mortgage is certified on the mortgage itself; and it is in evidence, that it was registered on the 19th September, 1889, as vouched by the signature of George C. Clute, the registrar of shipping.

Judgment.

Influenced by these considerations, I determined that the plaintiffs had clearly established their right to sue for the damage occasioned to the Vancouver; and that the *onus* was thereby cast on the Yosemite, to satisfy the Court, that she was not at fault in the collision which took place between them. Thereupon numerous witnesses were examined on both sides, and as usual in all collisions and running down cases, there was a considerable conflict of testi-

mony. [The learned Judge after exhaustive discussion of the evidence proceeded.] These considerations may be condensed into the following conclusions: I consider the Yosemite is principally to blame for the collision and damage which occurred; but I also find that the Vancouver is also to blame in a smaller but yet distinct proportion for the collision and loss. But the law in such a case where both vessels are in fault, as in this instance is quite settled and undisputed; and the rule of the Admiralty is, that if there is blame on both sides causing loss, they are to divide the loss equally, although the negligence of the one contributed to the accident in a greater degree than that of the other.

I pronounce therefore the collision to have been caused by both ships and pronounce and decree that the damages from such collision to the Vancouver, together with the costs of suit on both sides be equally borne by both parties; and that the amount of such damages be referred to the Registrar to ascertain the same for the above purpose.

Judgment.

Order accordingly.

CREASE, J.

1894.

Oct. 22.

WONG HOY WOON v. DUNCAN.

Health regulations—Victoria Health By-Law, 1893, Secs. 32, 35—"Infected locality"—Proof of—"Exposed to infection."

WONG HOY WOON *v.* DUNCAN

Action of trespass against the Medical Health Officer of the City of Victoria for causing the plaintiff, one of a number of Chinamen, who landed at Victoria in a steamer last from Hong Kong in China, to be removed to the "Suspect Station" and there detained and subjected to cleansing process under colour of Sec. 35 of the Municipal Health By-Law, 1893, giving him, as Medical Health Officer, power "To stop, detain and examine every person or persons, freight, cargoes, railway and tramway cars coming from a place infected with a malignant or infectious disease," in order to prevent the introduction of such into Victoria.

The plaintiff had been passed by the Dominion Government Quarantine Officer as entitled to land at Victoria.

The white passengers from Hong Kong on the same steamer were not interfered with. The only evidence of Hong Kong being a place infected, etc., was that of a medical man resident in Victoria, who said "That in China small pox was endemic, because there inoculation was the universal practice. That there was danger of infection from white passengers, but not the same danger as from Chinamen."

There was no direct evidence of the existence of small pox to a dangerous extent in Hong Kong at the time of the departure thence of the steamer, or that it was "a place infected," etc., or that the plaintiff had been "exposed to infection."

Held, That the facts were insufficient to justify the action of the Health Officer under the by-law.

Remarks on the duties of Health Officers.

Statement

ACTION, claiming damages, for trespass. The facts fully appear from the head note and from the judgment.

H. Dallas Helmcken, for the plaintiff.

W. J. Taylor, for the defendant.

Judgment.

CREASE, J.: This was a test action to try whether Chinamen have the same rights as other foreigners in landing here on their advent from China.

The occasion was the arrival of the Empress of China at

the Outer Wharf, which is within the city limits of Victoria, on the 1st day of May, 1894, from China and Hongkong.

The action is one nominally rather than really, for damages against Dr. George Duncan, the Health Officer of the City of Victoria, on account of an alleged excess of duty in despatching *en masse*, without examination or enquiry, a number of Chinamen out to the suspect station at Ross Bay, there to be disinfected and scrubbed. No white passenger from the same port (Hongkong, the last port touched at) having been treated in a similar manner or apparently even questioned or detained. The Chinamen had already been examined on board the ship by the Dominion Quarantine Officers and Provincial officers and passed. Hoy Woon had also paid the $50 required by the Government as his entry fee into British Columbia, and was in possession of the proper receipt.

Dr. Duncan then appears on the scene, and finds these men already passed and landed clear of ship, Dominion customs and entrance.

Judgment.

Disregarding the white men, who had come at the same time from the same place and in the same ship and presumably subject to some of the same unsanitary influences, though not to the same extent as the Chinese, without any reason for special suspicion, without inspecting or attempting to inspect a single man, (that had already been done individually by the Dominion Quarantine Officers) he orders them into the custody of his constables to be taken out to the suspect station at Ross Bay, there to be washed and disinfected and scrubbed. They, with their goods and chattels, were bundled into a common truck like so many cattle.

The plaintiff and other Chinamen similarly situated obtained a writ of *Habeas Corpus*, upon which they were discharged from this custody.

Thereupon the present action was brought to test if and how far Chinamen are to be treated, when they land on our shores, differently from other foreigners.

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The grounds alleged by the Health Officer for this arbitrary treatment is "that China is an infected locality," and all persons coming from China and especially in this instance Hongkong, and especially also the natives of China, come from an infected locality, and that he has that authority under the Health By-Law, 1893, which was passed at the time of the small pox panic in Victoria, and, in all he did, was simply doing his duty.

Section 32 of that by-law (published in the *B.C. Gazette* of April 20, 1893) directs a strict examination to be made of any vessel and persons coming from "an infected locality," before any person, luggage or freight or other thing is allowed to be landed from it.

Section 35 of the Health By-Law of 1893 gives the Medical Health Officer power to stop, detain and examine every person or persons, freight, cargoes, railway and tramway cars coming from a place "infected with a malignant pestilential or infectious disease," in order to prevent the introduction of the same into Victoria.

Judgment.

The case was tried before a jury upon the issue whether Hongkong, the last port the steamer left in China, was or not "an infected locality." To prove that Hongkong was such, Dr. Davie was placed in the witness box as an expert. He considered "China the home of small pox," and that it was "an infected place"; that, in China, small pox was "endemic," *i.e.*, always there; because there "inoculation" was the universal practice and was a constant source of danger; that in England and Europe and America, generally, vaccination, of late years, has been the rule. That was a preventative, and persons from such places were naturally not so much the object of suspicion or inspection to a health officer. He thought that too close a scrutiny could not be made of Chinese passengers. That small pox must have been in China on the 19th April last, the date when the Empress left Hongkong, as it was always there. He had no opinion to express as to the British possession

of Hongkong; but it was a portion of China, where small pox was always, in a sense, "endemic." There was danger of infection from white passengers, but not the same danger as from Chinamen. It was his opinion that every one should be examined who comes from China or from any "infected port."

They should be examined on the ship. When asked the question, "Would you allow Chinamen to land and go into the city?" the Doctor replied, "The whole of the baggage should be disinfected, on the steamer if possible—if not, on the Outer Wharf. If I could not do anything else I would take them out to the suspect station. I would, if I could," he continued, "examine every passenger from there at the Outer Wharf. To do this it requires certain facilities which are wanting at the Outer Wharf." The duty of the Health Officer, as Dr. Davie understood it, was to interview the ship's officers and ascertain the sanitary state of the ship during the voyage; to inspect the whole of the men, inspect every individual, before he left the vessel. He was of opinion that the whole of those landed should be disinfected. The Chinese are chiefly dressed in woollen materials and these harbour infection for weeks and months. The period of incubation of small pox was from twelve to fifteen days. Cases of small pox were found in all large seaport towns, as for instance Liverpool; but these were not "endemic."

If the vessel left Honkong, it was quite possible some cases might develop during the passage. If they were not examined on the steamer there were no facilities for doing so on the wharf. There were several other diseases to be guarded against from China, *e.g.*, cholera, leprosy, etc. (Here I observe that from first to last no mention was made of the black plague, which has carried off so many thousands of Chinese in Hongkong; and it appeared that during the passage from China to Victoria, which presumably lasted over the ordinary period of inoculation, no case of small pox appeared on board the Empress, and that she showed

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a clean bill of health.)

Upon the question whether or not Hongkong, at the time the steamer left on April 19, 1894, was or not "an infected port," in the sense of Sec. 35, a place "infected by a malignant, pestilential or infectious disease," and they were so charged. The jury returned the following verdict:—"According to the evidence we find that on 1st May, 1894, Hongkong was an infected port. We speak according to the evidence of Dr. Davie, that the port of Hongkong was and is an infected port." Now this assumes, as Dr. Davie assumed, that Hongkong, although a British port and subject to quarantine regulations, was (which includes the time of the steamer's departure) and is a cradle of small pox, and that every ship coming thence to Victoria, especially with Chinese on board, should be subject to the most searching examination, and the drastic treatment I have described. He does not include Japanese in the same category as Chinese. It was apparent throughout the Doctor's evidence that he regarded the whole subject exclusively from a medical point of view, which is by no means identical with the legal construction which must prevail. The law, while it imposes on the Medical Health Officer the duty and arms him with abundant authority to deal imperatively almost in every case, at the same time insists that he shall discharge that duty with judgment and discretion, and not overrun the mark.

Judgment.

In this case, to say the least, he has not discharged his duty discreetly, but, on the contrary, has exceeded it. The whole gist of the by-law is to guard the case of persons "infected or exposed to infection," words which have a definite legal meaning, which applies to persons who have been brought into actual contact with or within the baleful influence of an infectious or contagious disease, as travelling in the same carriage or boat with anyone affected by the disease, and not securely isolated from accidental or other contact, or has recently come from a locality where from an

accumulation of cases or other reason the disease has got into the air and become epidemic.

This construction applies to Sections 12, 13, 15, 16 and 29 of the by-law by the wording of which this meaning is distinctly brought out.

His duty was, if he considered the Empress of China came from "an infected locality," at once to go on board the suspected vessel and make his examination and inspection on board the vessel (as Section 32 says), "before any luggage, freight or other thing is landed or allowed to be landed."

It goes further and shews that the only person to be "dealt with in such manner as the Medical Health City Officer shall direct" is "any infected or exposed person from on board," under none of which categories do the plaintiff or other Chinamen, seized and carted off on this occasion, happen to come.

Judgment.

There was not an atom of actual proof before the jury of the actual existence of a single case of small pox in Hongkong in April or May or since, beyond a medical opinion that there might be.

Now a medical opinion, however valuable as an opinion, is not the legal proof of a fact. It would be a painful surprise to the people of Hongkong and its business men, living under British rule, to learn that, on the strength only of the opinion of a learned expert, their place is given out to the world as an infected place, which the by-law interprets to mean a place "infected with a malignant, pestilential or infectious disease," without any actual proof of the fact. In this case the plaintiff had been already duly and personally examined by Dr. McNaughton Jones, the able and experienced Health Officer, on his arrival, and passed. He had also been examined and passed by the Customs House officers as a man who had paid all his customs dues and had a certificate to shew the fact, which left him free to come and go as he pleased. It is not shewn that Dr.

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Duncan went on board, or that he conferred with the Dominion Health Officers as to whether any further examination of the plaintiff was necessary, or, in the public interest, advisable. It is shewn that he did not personally examine a single Chinaman or inquire if he was "an infected or exposed person." In a matter affecting the public health, it is quite natural, and everyone would expect that officers who are armed with extensive sanitary powers, should confer together and assist one another in carrying out the law, and work well together for the public good and safety. Where that is not done the public are quick to note and comment on the fact.

The by-law is very properly arbitrary in its provisions and the powers it confers in cases of emergency, or even actual suspicion, on the Health Officer and his subordinates and these should be supported wherever practicable and the occasion warrants their employment.

Judgment.

But it should be understood that these exceptional powers are a great trust placed in the hands of the Health Officer to meet such cases as I have described, and at all times to be administered with firmness, judgment and discretion—not under any fear of infection unwarranted by the facts of the case which may enter into the mind of the Health Officer, or to be carried out by carting off *en masse* to the suspect station all who hail from China or Hongkong without examination or enquiry. The evidence shews there was nothing like emergency in the present case or anything to warrant the treatment they received.

On a review of the facts I am of opinion that the defendant exceeded his authority and caused the plaintiff great unnecessary loss and annoyance. I therefore give judgment for plaintiff against the defendant, but, as it is a test case, with only $5 damages and costs to be taxed.

Judgment for plaintiff.

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REGINA v. PEARSON.

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Municipal License law—"Wholesale Trader" Definition of—Manufacturer selling in large quantities to merchants.

By Stat. B.C. 55 Vic. Cap. 33, Sec. 204 ss. (10) "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 (10) from any person carrying on the business of a wholesale or of a wholesale and retail merchant or trader not exceeding $50 for every six months."

Held, That a person who imported materials, and manufactured articles of clothing therefrom, and sold same in quantities to wholesale and retail dealers, was a person carrying on a wholesale business within the meaning of the Act.

A trader, wholesale or retail, is one who sells to gain his living by such buying or selling, not to gain a profit on one isolated transaction.

If a manufacturer sells the product of his labour and skill in wholesale quantities, he is a wholesale trader.

CASE stated by Farquahar Macrae, Esq., Police Magistrate of Victoria, for the opinion of the Supreme Court upon a conviction of the defendant for carrying on a wholesale business without the license required by law. Statement.

A. L. Belyea, for the defendant.

D. M. Eberts, A.G., contra.

DRAKE, J.: Appeal by defendant on a case stated by the Magistrate from a conviction by him dated January 7th, 1893, of the defendant, for carrying on a wholesale business without having taken out a wholesale license. Judgment.

The case was settled and signed on August 6th, 1894, and is now brought on for argument.

The case finds that the defendant carried on business in Victoria under the description "T. B. Pearson, wholesale woollen importer and manufacturer;" that he had no license as a wholesale trader; that he imported material, and out of those imported materials he manufactured

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certain articles of clothing and sold such articles in quantities to be sold again by wholesale and retail; that he also on one occasion sold unmanufactured goods to the trade in Victoria to be made up into goods. The whole question therefore is whether or not on these facts the defendant is a wholesale dealer and liable to pay a license fee as such.

Mr. Belyea, for the defendant, contended that the defendant being a manufacturer of the articles sold was not liable. I agree with him, that the defendant is not liable to this tax, as a manufacturer. There is no tax imposed on this class of the community, and none can be inferred, as a tax must be imposed in clear and unmistakeable language. I also agree with his contention that one transaction of buying or selling does not make a trader. A trader, whether wholesale or retail, is one who sells to gain his living by such buying and selling, not to gain a profit on one isolated transaction.

Judgment.

The main question is, if a manufacturer sells the product of his labour and skill in wholesale quantities, does he become liable under 55 Vic. Cap. 33, Sec. 204, which says every person carrying on the business of a wholesale or of a wholesale and retail merchant or trader is liable to pay a license. Neither the Act nor by-law defines what is included by the term wholesale; and I have therefore to apply the ordinary meaning, which is that wholesale merchants deal with the trade who buy to sell again, while the retail trader deals direct with the consumer. The appellant sold his manufactured goods wholesale to the trade, and therefore he is a wholesale merchant. I see nothing in the Act or by-law to limit the term wholesale business or wholesale merchant to an importer of goods who sells them out in bulk to the trade.

In my opinion, the term is equally applicable to any person who sells in large quantities to the trade goods which he has manufactured and converted from the original article into something else. A cotton spinner converts the

raw material into cloth and sells such cloth to the trade. He is a wholesale dealer.

There is no difference in principle between a cotton spinner and a slop manufacturer, if both sell to the trade to be subsequently distributed to the consumer.

I think the judgment appealed from should be confirmed with costs.

Conviction affirmed.

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WILSON v. MARVIN.

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C.S.B.C. Cap 68, Sec. 4—Insolvency—Administration—Priority of creditor obtaining judgment against executors of insolvent estate before administration decree—Right of such creditor to payment out of assets before final distribution of estate—Practice—Appeal to Divisional Court—Time—Extending.

The plaintiff obtained judgment against the defendant as an executor of the deceased, an insolvent. Afterwards an administration decree was made. The plaintiff applied for payment to him of the amount of his judgment out of funds in court, being proceeds of the estate.

Held per DRAKE J., making the order, that C.S.B.C. Cap. 68, Sec. 4, does not take away the priority of a creditor under a judgment obtained prior to the making of the administration decree.

Held on appeal, by the Divisional Court (CREASE and MCCREIGHT, J.J.) it appearing that there might not be sufficient funds to satisfy an undecided right retainer by the executor, and other judgments, that payment out of court to plaintiff should be postponed till final distribution of the estate under the decree in the administration suit.

Preliminary objection being taken that the appeal was out of time, the court, without deciding the point, directed the argument on the merits to proceed so that their discretion might be informed with a view of extending the time in order to cure the objection if justice required.

Statement.

SUMMONS by the plaintiff for payment to him out of funds in Court, proceeds of sale of the estate of the deceased,

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an insolvent, under an administration decree, to answer judgment obtained by him against the defendant as executor of the estate, prior to the date of the administration decree. It appeared in the affidavit that the executor claimed a right of retainer as paramount to all other creditors, and there were several judgment creditors prior to the plaintiff.

J. A. Aikman, for the plaintiff.

A. Crease (Bodwell & Irving), for the defendant and the administrator.

DRAKE, J.:—The plaintiff, a simple contract creditor, obtained a judgment against the defendant as executor of Edward Marvin on 31st August, 1892, and issued execution but recovered nothing.

Judgment.

On 14th February, 1893, an administration decree was made and a sum of money deposited in the bank as representing the assets of the deceased.

It now appears that the testator died insolvent, the assets being insufficient to meet the debts proved against his estate.

The executor claimed a right of retainer in respect of money owing by the testator to him at his death, but the funds in hand are more than sufficient to meet this claim and the plaintiff's judgment. The plaintiff also, on 15th February, 1893, obtained a receiving order *nisi* which was not made absolute.

The plaintiff now asks for an order for payment out to him of the amount of his judgment interest and costs. The defendant sets up Section 4, Chapter 68, C. S. B. C., 1888. This section is a counterpart of the English Act, 32 & 33 Vic., C. 46. That section was considered in *re* Williams' estate, 15 Eq., 271, and the Vice-Chancellor held that the act did not take away the existing right of a judgment creditor to be paid who had obtained his judgment before the administration decree, and, as I am governed by that decision, the order will be for the trustees, C. E. Pooley

and Messrs. Bodwell and Irving, to pay to the plaintiff the amount of his judgment and interest at 4 per cent. and costs of this application.

Costs of the other parties to be paid out of the estate.

Order accordingly.

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The defendant, without objecting to the declaration of plaintiff's priority over the ordinary creditors, appealed to the Divisional Court from that part of the order which directed payment out of court to him, on the ground that it was in fact doubtful on the affidavits whether, if all the claims prior to the plaintiff's were allowed, there would be funds in the estate to meet his judgment in full.

Statement.

The appeal was argued before CREASE and MCCREIGHT, J.J., on December 11th, 1894.

J. A. Aikman, for the respondent, took the preliminary objection that the appeal had not been "brought on" within the eight days required by Rule 673. (The order appealed from was made on 5th, and the appeal set down on 14th November), citing *Steedman* v. *Hakim*, 22 Q.B.D. 16.

Argument.

E. V. Bodwell, contra. The appeal is "brought" when the notice of appeal is served. *Christopher* v. *Croll*, 16 Q.B.D. 66. The words "brought on" cannot be strictly construed, as they would then mean brought on for argument, and it might be impossible to obtain an argument within eight days. At all events the court can now extend the time and hear the appeal. *Re* Manchester Economic Building Society, 24 Ch. D. 488.

Per Curiam. We have a discretion at the hearing, in a proper case, to extend the time for appealing, and will hear the merits for the purpose of informing our discretion.

The appeal was then argued and the court being satisfied on the affidavits that there was doubt whether there would be funds to pay the plaintiff's judgment in full after satisfying prior claims, extended the time and allowed the appeal without costs.

Judgment.

Appeal allowed without costs.

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H. B. Co. v. KEARNS & ROWLING

THE HUDSON'S BAY CO. v. KEARNS & ROWLING.

Land Registry Act—Priorities between equitable mortgage and subsequent registered conveyance—Fraud—Constructive notice—Onus of proof—Pleading—Statute of Frauds—New trial.

Action to foreclose an equitable mortgage by deposit of title deeds, brought by the plaintiffs against the mortgagor K and a person R, who appeared on the title as the grantee of the lands under a deed made to him by K, subsequent to, and, as the plaintiffs' claim alleged, in fraud of the mortgage, which deed he had registered not as a fee, but as a charge against the lands.

K had suffered judgment by default.

Neither notice of the mortgage, nor want of valuable consideration for the deed were charged against R in the statement of claim, or negatived by him in his defence, in which he claimed that, under Sec. 31 of the Land Registry Act, his registered charge was entitled to prevail over the plaintiffs' unregistered charge, and also set up the Statute of Frauds.

At the trial, R called no evidence, and maintained that the *onus probandi* to displace his *prima facie* statutory priority was on the plaintiffs, and that he was entitled to judgment.

Held, *per* WALKEM, J., on motion for judgment, dismissing the action as against R, That his registered charge had a *prima facie* validity and priority, under Sec. 31, and that the *onus* of proof of want of consideration, fraud, or notice to him of the mortgage, was on plaintiffs.

The Statute of Frauds is not a defense to an equitable mortgage.

Held, by the Full Court on appeal :—

Per CREASE, J.: That in the state of the pleadings and evidence, fraud on R's part could not be assumed by the Court, but that there should be a new trial to determine the question of the *bona fides* of the deed.

Per MCCREIGHT, J.: That before the Statute the burden of proof would have been upon R to show that he made enquiries for the title deeds and gave valuable consideration for his deed from K, as being facts peculiarly within his knowledge and not of the plaintiffs, and not having done so he was, by their absence, affected with constructive notice of the mortgage. That by Sec. 35 he was only relieved from the effect of such notice by proving himself a purchaser for value, and that the *onus* of doing so was therefore on him, and that as to the effect of notice, Sec. 31 must be read as subject to Sec. 35, which alone deals with that question.

Quære. Whether the non-compliance with Secs. 13, 19, 54 and 55 of the

Act as to production of title deeds vitiated the registration.

Per DRAKE, J.: That, on the facts, the presumption was that R had actual or there was constructive notice to him of the equitable mortgage, and the *onus* was on him to allege and prove valuable consideration for his deed.

That the deed in fee was improperly registered as a charge, and that the plaintiffs should not be prejudiced by the mistake of the Registrar.

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APPEAL to the Full Court by the plaintiffs from the following judgment of Mr. Justice WALKEM given at the trial, dismissing the action as against the defendant Rowling.

WALKEM, J.: This is an action for the foreclosure of an equitable mortgage given by the defendant Miss Kearns to the plaintiffs.

Miss Kearns being indebted to the plaintiffs in the sum of $1,400, or thereabouts, verbally agreed in August, 1891, to secure them by a mortgage on certain town lots which she owned in Vancouver, and for the purpose of having the mortgage prepared, the title deeds were delivered by her to the plaintiffs, and by them to their solicitors. Her indebtedness was subsequently reduced by payments made from time to time to $830.34, the amount now sued for. The mortgage, apparently from inadvertence, was never drawn up, but the title deeds remained in the plaintiffs' possession. About fourteen months after they had been first deposited, namely, on the 22nd October, 1892, Miss Kearns made, a conveyance in fee of the same lots to the defendant Rowling; and, on the 29th October, Rowling registered the conveyance in the Vancouver Land Registry, as a charge. On the 29th April, 1893, he applied to be registered as the owner of the "Absolute Fee"; but his application was refused, in consequence of the title deeds having been deposited with the plaintiffs as above stated.

Judgment.

Miss Kearns has allowed judgment to go by default.

The defence set up by Rowling is that the Statute of Frauds has not been complied with, inasmuch as the agreement between the plaintiffs and Miss Kearns was not

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reduced to writing, and that his charge as a registered charge is paramount to the plaintiffs' unregistered charge. An agreement, as in the present instance, to give a mortgage accompanied by the delivery of the title deeds for the purpose of having that mortgage prepared constitutes an equitable mortgage; and such an agreement is not affected by the Statute of Frauds; for the deposit of the deeds is in itself "evidence of an executed agreement for a mortgage." *Keys* v. *Williams*, 3 Y. & C. 55; *ex parte Wright*, 19 Ves. 258; 1 *Coote Mortg's*, 5th ed. 340. The question therefore becomes the narrower one of a conflict, under the Land Registry Act, between a registered and an unregistered charge. At the trial, the facts I have stated were established on the plaintiff's behalf as part of their case. Counsel for Rowling called no witnesses, but relied upon the Act. His opponent thereupon contended that as there was no evidence that Rowling was a purchaser for "valuable consideration," the absence of the title deeds when he bought was constructive notice of the plaintiffs' mortgage; and he was therefore not protected by Section 35 of the Act, as it only applied to purchasers for valuable consideration. That section reads, "No purchaser for valuable consideration of any registered real estate, or registered interest in real estate, shall be affected by any notice expressed, implied or constructive, of any unregistered title interest or disposition affecting such real estate, other than a leasehold interest in possession for a term not exceeding three years, any rule of law or equity notwithstanding." But the objection cannot prevail; for the execution of Rowling's conveyance and its registration in the charge book as a conveyance in fee having been proved, the Act of Registration, by the terms of Section 31, gave him a *prima facie* title in fee. The language of the section is clear, in that respect: "The registered owner of a charge shall be deemed to be *prima facie* entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as

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appear existing thereon, and to the rights of the Crown."

Again, by Sec. 33, "when two or more charges appear entered on the register, affecting the same land, the charges shall, as between themselves, have priority according to the dates at which the applications respectively were made and not to the dates of the creation of the estates or interests."

A fortiori, a registered charge would prevail over an unregistered one, for, as a matter of fact, no question of priority could arise between them. The plaintiffs' case can stand on no higher ground than if they had obtained a legal as distinguished from an equitable mortgage, and had not registered it.

The action as against Rowling must therefore be dismissed with costs, as the registration of Rowling's conveyance as a charge cannot be disregarded, and a foreclosure directed in the face of it.

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During the trial, the objection was taken that the Registrar should not have registered the conveyance as he did, without requiring Rowling to produce or account for the absence of the title deeds; but I think that the fact of his not having required the production of the title deeds or an explanation as to why they were not produced ought not now to prejudice Rowling's rights; for supposing that the Registrar had complied with Sections 54 and 55 of the Land Registry Act and been informed that the plaintiffs held the title deeds as an equitable mortgage, he could not have refused to register Rowling's conveyance as a "charge" for whatever it was worth. I think that the Registrar was right in subsequently refusing to register Rowling as the owner of the "Absolute Fee." Rowling accepted a bad title; but that circumstance does not assist the plaintiffs, as they must rely on the strength of their own title.

Action dismissed as against defendant Rowling.

Statement.

From this judgment the plaintiffs appealed to the Full Court, and the appeal was argued on the 7th and 8th days

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of August, 1894, before CREASE, MCCREIGHT and DRAKE, J.J. The grounds of appeal are set out in the judgment of CREASE, J.

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C. E. Pooley, Q.C., for the appeal: The allegation in the statement of claim that the title deeds were in the hands of the plaintiffs amounted to a charge that Rowling had constructive notice of the equitable mortgage, whereupon, even if the deed to him, from the fact of its being registered as a charge, had, in the first place, under Sec. 31, a *prima facie* priority over the plaintiffs' unregistered charge, the *onus* was, by reason of that notice, thrown upon him to prove valuable consideration and *bona fides*. Section 35 (a) alone deals with the effect of "notice express, implied or constructive of any registered title, interest or disposition" upon "any registered real estate or registered interest in real estate," and therefore, when the question of the effect, upon any registered title, of notice of any unregistered title, is involved, that section governs to the exclusion of Sec. 31 (b), which only gives a *prima facie* validity to a registered over an unregistered charge independently of the question of notice. Apart from the Act, the *onus* was on Rowling to allege and prove that he gave valuable consideration for his deed, and had no notice of the mortgage, and was no party to the fraud—*Barber* v. *McKay*, 19 Ont. 40, *re* Burke's estate, L.R. 9 Eq.; *Phillips* v.

Argument.

NOTE (a).—C.S.B.C. Cap. 67. "31. The registered owner of a charge shall be deemed to be *prima facie* entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as appear existing thereon, and to the rights of the Crown. R.L. No. 143, S. 37."

(b) "35. No purchaser for valuable consideration of any registered real estate, or registered interest in real estate, shall be affected by any notice expressed, implied, or constructive of any unregistered title, interest or disposition affecting such real estate other than a leasehold interest, in possession for a term not exceeding three years, any rule of law or equity notwithstanding. R.L. No. 143, S. 40."

Phillips, 4 DeG. F. & J. 205. Rowling having, on the facts as alleged and proved, constructive notice of the mortgage, was not relieved from the *onus* of proving valuable consideration, whether he registered his deed as a charge under Sec. 19 or as a fee, as it purported to be, under Sec. 13; though it is apparent that he registered it as a charge on the idea that the joint effect of Secs. 31 and 35 was to enable him to evade the effect of his notice of the mortgage. In any case, the affected registration as a charge is invalid, as it is submitted that the Registrar has no power to register a deed in fee as a charge, there being different methods provided by the Act, and different preliminaries for the registration of fees and charges. To constitute a valid registration, the statutory prerequisites must be complied with. *Farmers & Traders Loan Co.* v. *Conklin*, 1 Man. 181, TAYLOR, C.J., at p. 188; *Read* v. *Whitehead*, 10 Grant 448; *Robson* v. *Waddell*, 24 U.C.Q.B. 574. Judgment should be entered for the plaintiffs. If this Court thinks proper to grant a new trial to admit Rowling to prove additional facts concerning his instrument, it should be on payment of costs.

Argument.

A. E. McPhillips, contra: The question is primarily one of pleading. The plaintiffs alleged nothing, affecting Rowling, against the deed. Notice to him of the mortgage, at least, should have been alleged. If that had been done, he would have been obliged to plead and prove that he gave value. The allegation and proof that the plaintiffs had the title deeds is not enough, for it is consistent with that fact that Rowling enquired for the deeds and that Miss Kearns plausibly accounted for their absence, and perpetrated a fraud upon him as well as on the plaintiffs. As to the registration of the deeds as a charge, it may, in reality, have represented a mortgage transaction, as is often the case. It is not the intention of the Act that registration should be refused to such an instrument in its true character. In that view, the fact that Rowling afterwards attempted to register the deed as a fee would indicate

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merely that his mortgage money was unpaid and that he desired to foreclose. It cannot be said that, on the state of the record, Rowling ought to have assumed the *onus* of proving valuable consideration, and given evidence. It is unnecessary for a defendant to excuse himself from matter of which he is not yet accused or to plead to causes of action which do not appear in the statement of claim. He should be content to answer the case that is actually laid against him, not that which he thinks his opponent ought to have raised. *Odger on Pleadings*, 1892 Ed. pp. 8, 20. The section of the Act which governs here is Sec. 81, and not Sec. 35. In the first place, a registered charge is by Sec. 31 given *prima facie* priority over an unregistered charge, and all that is alleged against or brought home to Rowling is that the plaintiff has an unregistered charge which he desires to foreclose, and that Rowling has a subsequent registered charge which stands in the way of the foreclosure. The charges of fraud against Kearns do not affect Rowling. In all cases, fraud, to be taken advantage of against a party, must be distinctly alleged and proved against him. *Leigh* v. *Lloyd*, 35 Beav. 455; *Wallingford* v. *Mutual Ins. Co.*, 5 App. Cas. 685, at p. 701; *Lawrance* v. *Norreys*, 15 App. Cas. 210; *Davy* v. *Garrett*, 7 Ch. D., at p. 489. If the notice of the mortgage had been alleged, it is admitted that Sec. 35 would have governed.

Argument.

The judgment appealed from, on the record and evidence as they stand, should be affirmed. If there is a new trial, it is a favour to the plaintiffs, who will have to amend their claim, and should be granted only on payment of all costs by them. It is submitted that the proper course would be nonsuit the plaintiffs with leave to bring a fresh action.

Cur. Adv. Vult.

Judgment.

CREASE, J.: This was an appeal by the plaintiffs to set aside a judgment of nonsuit given by a Judge of the

Supreme Court on the 14th March, 1894, for the defendant Rowling and also to enter judgment for the plaintiffs. The grounds of the application are: 1. That Rowling not being proved a purchaser for valuable consideration is not protected by Sec. 35 of the Land Registry Act. 2. That the District Registrar registered the Kearns conveyance as a charge in error, without giving notice under Sec. 55. 3. That an application for registration, non-production of title deeds was not satisfactorily explained by affidavit as required by Sec. 54. 4. That the conveyance is improperly registered as a charge and ought to be removed. 5. That Rowling was guilty of negligence in not inquiring for the prior title deeds at the time of purchase, and cannot avail himself of the Registrar's mistake. 6. That said error cannot prejudice the appellants' charge. 7. That Rowling merely purchased an equitable interest and was put upon enquiry for the title deeds. 8. And that appellants are protected by Sec. 25.

Judgment. of CREASE, J.

In form, the action is one for the payment of $830.37 due the plaintiffs by the defendant Kearns for an equitable mortgage of the lots in question by Miss Kearns to the plaintiffs and reconveyance of the lots to the plaintiffs or for sale thereof and payment of the debt out of the proceeds of such sale. In effect, it comprises an action of ejectment.

It arose under the following circumstances: Miss Kearns had several business transactions with the plaintiffs, and in August, 1891, upon a balance of accounts, found herself an acknowledged debtor to them in the sum of $1,440; to secure which she had already given a bill of sale of certain chattels. They demanded additional security; whereupon she verbally agreed to secure them by a mortgage on the two Vancouver town lots mentioned in the statement of claim. And for the purpose of having a legal mortgage drawn up, delivered the deeds of the lots over to the plaintiffs. At that time, the lots were registered as a fee simple absolute in her name.

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The mortgage was never drawn; the title deeds still remained in the plaintiffs' possession.

Matters rested in this position until the 22nd October, 1892—more than a year after Miss Kearns had handed over the title deeds to the plaintiffs. There is no explanation of this extraordinary delay.

On the 22nd October, 1892, Miss Kearns made a conveyance in fee of the same property to Rowling.

On the 29th October, 1892, Rowling, there being no charge registered against the property, registered the conveyance as a charge in the Land Registry Office, Vancouver.

On the 20th April, 1893, he applied to be registered as the owner of the absolute fee. This was refused, because it came out in the usual sifting of the title required by the Act for the registration of an absolute fee, that the title deeds had been deposited, as I have before mentioned, with the plaintiffs.

Judgment. of CREASE, J.

Thereupon the present action was commenced. A judgment by default was entered against Miss Kearns, and a *lis pendens* was filed against the property to preserve matters *in statu quo* until the determination of the present case. There is no doubt that the delivery of the deeds in consideration of the proved debt $830.37, for the purpose of making a legal mortgage to further secure it, constituted an equitable mortgage in favour of the plaintiffs. The defendant Rowling called no evidence in support of his case, and for some reason or other, he was not examined before the Registrar under the rules, previous to the trial by the plaintiffs, so we are entirely in the dark as to what consideration, if any, was given for the purchase or whether he took with or without notice of the equitable mortgage. The Land Registry Act was never intended to be used as an instrument to assist, but to prevent fraud. In this case as presented to us, fraud is not charged or necessarily implied. Indeed the pleadings look the other way, and admit the deed and the charge, and say nothing whatever about fraud.

If the pleadings had intended to charge fraud, they should have alleged it. But they allege nothing of the sort, and we have no right to pre-suppose it. In view of the evident suggestions to be drawn from it, the evidence before us is so meagre and incomplete as to constitute reason sufficient to call for a new trial.

It is to be borne in mind that the principle and provisions of the Act have greatly modified the law previously existing as regards notice. The reasoning which governed the application of the law as regards notice before the passing of the Act does not apply to the same extent that it previously did. The only notice now required is that called for by the Act.

In proof of which I need only refer to Sections 33 to 35. The wording of the statute as regards notice and priority is clear and emphatic.

Fraud will of course, if properly proved against a person registering, generally invalidate his registration.

Judgment of CREASE, J.

Bnt here some of the main facts have been placed sufficiently before us to enable us to decide upon them. When we are called to consider the particulars of a case of registration of title, one principle stands out in marked relief, which is that under *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 26 Ch. D. 432, and the numerous interesting cases there discussed—from *LeNeve* v. *LeNeve* downwards, it is clear that for the complete effectiveness of all registrations, there must be *bona fides* in the party seeking to register.

There is no proof of consideration, if any, for the deed. In fact the original conveyance itself is not before us, having been given back to the applicant. We have not even the form of the applications of Rowling for registration of the deed as a charge. If it should turn out to have been in the form set in the Act, he would have had to sign a declaration under form D. (Section 19) as "a person claiming another and lesser estate than a fee simple, and

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have to set out the value of the interest sought to be registered as a charge and to declare accordingly." His application for registration as an absolute fee should have been before us, and information how this estate became enlarged to that extent. A year's registration as a charge would not of itself elevate a less estate into a full fee. As the case at present stands, I can only come to the following conclusions: That, under the circumstances as laid before us, there should be a new trial within three calendar months from this time; the costs of both trials to abide the event —no costs of this appeal, neither party having succeeded: and that in default of such trial being had within such three calendar months, the present judgment shall stand.

Judgment of CREASE, J.

McCREIGHT, J.: It appears that about September, 1892, the defendant Kearns being indebted to the Hudson's Bay Co., deposited with that Company certain title deeds for the purpose of making a mortgage to the Company, and the deeds were left by them in Mr. Hammersley's office for him to draw up this mortgage, but he did not prepare that document.

About the 22nd day of October, 1892, the defendant Miss Kearns made a conveyance in fee of the same lots to the defendant Rowling and on the 29th October, 1892, Rowling registered the conveyance in the Vancouver Land Registry Office as a charge.

Judgment.

On the 29th April, 1893, Rowling applied to be registered as the owner of the absolute fee, but his application was refused in consequence of the title deeds having been deposited with the plaintiffs as above stated.

Miss Kearns, one of the defendants, allowed judgment to go by default.

This statement of the facts I have taken to a great extent from the judgment appealed from and I do not understand that there is any dispute about them. I agree also with the

judgment where it states that an agreement to give a mortgage accompanied by the delivery of the title deeds for the purpose of having that mortgage prepared, constitutes an equitable mortgage, and refer to the cases cited at the end of the judgment especially *James* v. *Rice*, 5 DeG. M. and G. 461, but I cannot agree with his view as to the conflict between the registered charge of Rowling, and the unregistered charge of the Company, and the conclusion which he draws in favour of the former; although if Rowling had been called to prove and had proved the giving of valuable consideration and *bona fides*, the judgment I dare say would have been free from the objections dealt with later. In considering the case as it appears on the pleadings and evidence, it may be well to determine what would have been the rights of the plaintiff Company and Rowling respectively before the Land Registry Act was passed, and then to consider what, if any, different rights Rowling enjoys under the circumstances, and by virtue of the Act. Undoubtedly before the Land Registry Act was passed, Rowling would have had to prove that he had made inquiries of Kearns for the title deeds (See *Worthington* v. *Morgan*, 16 Sim. 547; *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 26 Ch. D. 482 C.A.; *Le Neve* v. *Le Neve*, 3 Atk. 648) and would likewise have had to give proof of consideration; moreover the burden of proof would have been cast on him on both points as the facts lay peculiarly within his knowledge and this rule would apply even though there might be a presumption of law in his favour (See *Best*, 367, 377, 6th Ed.; *Taylor*, 353 and 354, Blackstone Ed.; *Dickson* v. *Evans* 6 T.R. 57; *Reg.* v. *Turner*, 5 M. and S. 211. I may observe this as well as the judgment in *Hobson* v. *Middleton*, 6 B. and C. 295 at. p. 302 per BAILEY, J., show that paragraph 4 of the statement of claim is correctly framed in omitting any averment as to the absence of consideration.

When we turn to the Land Registry Act we find nothing

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to warrant the course pursued in the registration of this conveyance from Kearns to Rowling on the 29th October, 1892. Sections 13, 19, 54 and 55 seem to require that the Registrar should demand production and the applicant should produce or give satisfactory reasons for the non-production of the deeds on affidavit. The Act fully recognizes the old law that whilst the title to chattels, as was observed by Lord ELDON is evidenced by possession, the title to land is evidenced by written instruments per Vice-Chancellor SHADWELL in *Worthington* v. *Morgan*, 16 Sim. at p. 551.

The Act appears to require that the Registrar should discharge nearly the same duties in demanding production of the deeds as were formerly cast on the intending purchaser of the fee simple or a mortgagee, etc., (see Sections 13, 14, 54 and 55) and if these are neglected, frauds may take place as startling as those we too frequently read of in places where they have no system of registration (see note to *Le Neve* v. *Le Neve*, 2 White & Tudor's Law Cas. Eq. 6th Ed. p. 38, and the celebrated judgment of FRY, L. J., in *Northern Counties Fire Insurance Co.* v. *Whipp*, 26 Ch. D. 486 C.A.) It is premature to suggest fraud so far as Rowling is concerned but this case would probably not have arisen if Sections 19, 54 and 55 had been attended to. Whether these omissions vitiate the registration by Rowling I do not feel obliged to decide in the view I take of this case. In truth we do not know what he has or has not done, but I merely observe that applicants for registration are supposed to know the law as found in the above clauses as well as in Section 13, and that as Section 74 prevents an action being brought against the Registrar, and as it is supposed there is no wrong without a remedy, plausible reasons may be assigned in support of such contention. There is at least neglect on the part of the applicant for registration if he made no enquiry, and omission to enquire about the deeds would have been fatal under the

Judgment of CREASE, J.

old law. Unfortunately Rowling was not examined and this seems to me one reason why there should be a new trial in this case. I cannot agree with the view which the learned judge has taken as to the *prima facie* title referred to in Section 31. A *prima facie* title can only mean a good title till there is evidence to displace it, and according to the well known rule, Section 31 must be read in connection with the following sections dealing with the same subject, *e.g.* Section 35. Indeed in case of conflict Section 35 must prevail as the latest of the two sections and according also to another well known canon of construction, more attention should be paid to the Section dealing especially with a particular subject matter here that of the effect of notice of an unregistered title than a more general Section.

Rowling cannot invoke Section 35 without proving that he is a purchaser for valuable consideration, inasmuch as he and he alone knows and can prove that he paid (supposing that he did so) such consideration. At all events it is unlikely that the plaintiff should be able to prove the negative. The authorities I have already referred to as to the necessities of parties proving facts specially within their knowledge are ample on this point, and Rowlings as matters stand, falls exactly within the old law and the above case of *Worthington* v. *Morgan*, 16 Sim. 547 as to the necessity of enquiring for the deeds. That discussion is approved in the judgment of the Lord Justice delivered by FRY, L.J., in *Northern Counties Insurance Co.* v. *Whipp* before referred to. There is no proof of enquiry as to the deeds or of valuable consideration and there should be a new trial to determine one or both of these questions. I may mention as another reason why Rowling should give evidence of valuable consideration, that Section 35 cannot have been intended to qualify the statute of Elizabeth as to fraudulent conveyances where the purchaser in order to succeed had to prove valuable consideration as well as *bona fides*. There is a remark towards the conclusion of the

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judgment now in question to the effect that if the Registrar had been informed of the equitable mortgage, he could not have refused to register Rowling's charge, but if Rowling both advanced money and sought to register to the detriment of the plaintiff, it seems to me he would have been committing a fraud on the plaintiffs, and his conduct very like that which gave rise to the case of *Hopkinson* v. *Rolt*, 9 H.L. Cas. 514, where a first mortgagee with a proviso for making further advances, such having been made with notice of a second mortgage and to the detriment of the second mortgagee. In *Jervis* v. *Berridge*, L.R. 8 Ch. App. 360, Lord SELBOURNE says giving the judgment of the Court that the Statute of Frauds was not meant as a weapon of offence, but of defence. I think the same must be said of the Land Registry Act as was remarked during the argument. At all events it cannot be suggested that it was passed for the purpose of facilitating anything that will lead to fraud, but on the contrary for the purpose of preventing frauds.

Judgment of McCREIGHT, J.

As to *Norris* v. *Wilkinson*, 12 Ves. 192 (see notes to *Russell* v. *Russell*, 1 White & Tudor's Ldg. Cas. Eq. 6th Ed. p. 782, and *James* v. *Rice*, 5 DeG.M. & G. 461 where it is overruled. I think *Lee* v. *Clutton*, 45 L.J. Ch. 43 has no bearing on the main question as to the meaning of the Land Registry Act Sec. 35, nor has *Leigh* v. *Lloyd*, 35 Beav. 457, nor the other cases cited for the defence. I think the plaintiff is entitled to a new trial. Should he omit to go down to such trial within say three months, the present judgment should stand. As to costs of appeal, Rowling is not entitled, as he has not succeeded in holding the judgment, nor are the plaintiffs, as they have not succeeded in obtaining judgment, and a new trial may produce the same result or the plaintiffs may not choose to resort to it. If they do so successfully, they will get the costs of both trials.

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DRAKE, J.: The plaintiff's action is for payment of debt and foreclosure or sale. Kearns pledged her title deeds with the plaintiffs as an equitable mortgage. This is not registerable.

Kearns was a registered owner and after the deposit and while a considerable sum of money was due to the plaintiffs she conveyed the land to Rowling. Whether the conveyance was made subject to the debt of the plaintiffs is not shewn but the presumption is, it was not.

Rowling having obtained the conveyance applied to register it not as a conveyance in fee simple which it evidently was, but as a charge, and the Registrar improperly acceded to his request, placed it in the register as a charge. The Act says (Sec. 2) a charge shall mean "any less estate than an absolute fee or any equitable interest whatever in real estate." In other words it is some legal or equitable incumberance on the fee. In my opinion this registration of the absolute fee as a charge was improper. The Registrar has to examine the deeds produced for registration and if the deed, in the words of Section 2, comprises the legal ownership of an estate in fee simple, it has to be registered under Section 13; and under Section 17 the Registrar is to issue a certificate of title to the person effecting registration; under Section 24 the Registrar shall require production of the title deeds or the non-production must be explained by affidavit and if the title deeds are in anybody else's hands then not less than one week's notice or more than three months' must be given of the intention to register. The object of this notice is to enable the holder of the deeds to protect himself if necessary. The Registrar, even when a charge is intended to be registered, must satisfy himself, after examination of the title deeds produced, of a *prima facie* title. If there are no deeds produced, the Registrar has to satisfy himself of the reasons of the non-production.

Judgment of DRAKE, J.

What did Rowling do? Instead of applying for registration of an absolute fee which it is presumed is what he

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was in possession of, because he subsequently applied to register that which had been put in the register as a charge, as an absolute fee, he applied to register only a charge in order to get the protection of Sections 31 and 35. And then set this charge up as a shield to protect himself against prior unregistered titles of which he had actual or constructive notice.

The presumption is he knew of the plaintiff's claim and in order to avoid it he adopted this ingenious method to cut out the plaintiff.

The Act is intended as a defence to *bona fide* purchasers for valuable consideration and not as a means for perpetrating a fraud. The Act being a radical departure from the principles which governed notice express or implied or constructive of other titles or interests, swept them all away. It has to be construed strictly and should not be extended. Before a person can obtain the benefits of the Registration Act so as to exclude notice of an unregistered title, he has to show he is a purchaser for valuable consideration (see Sec. 35.) If he does not, he is not entitled to the protection of that Section. Here the defendant Kearns in fraud of the plaintiff's rights conveyed this property to Rowling knowing that the plaintiff had a prior equitable right.

Judgment of DRAKE, J.

It is necessary then for the defendant Rowling to show that he gave valuable consideration for the deed. He neglected to do this, but relied on the fact that he had it in the register as an incumbrance, and whether he did that properly or not he claims he is protected from proving consideration. I do not think he possibly could have shown that he was innocent of all collusion with Kearns, but he did not do so. I therefore think the appeal should be allowed, but I am not prepared to say on the evidence that the facts are sufficiently before us to give effect to the prayer of the plaintiff's claim. The appeal is allowed with costs and a new trial should be had and if necessary the

plaintiffs should have liberty to amend their claim, the costs of the first trial to abide the result of the new trial.

I do not think the plaintiff's should be prejudiced by the error of the Registrar in improperly placing Rowling on the register as an incumbrance.

New trial granted. Costs to abide the event.

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DECOSMOS v. THE VICTORIA AND ESQUIMALT TELEPHONE CO., (L'TD).

Injunction—Disobedience of—Writ of sequestration—Whether lies against person not named in the injunction.

Persons not named in an injunction are not liable to be committed for breach of it, unless, with knowledge of the injunction, they interfere and commit the act enjoined, in which case they are liable for contempt of Court.

APPLICATION by the plaintiff for a writ of sequestration against the defendants, and also against the Corporation of the City of Victoria, for disobeying certain orders of this Court enjoining the defendants.

The facts fully appear from the judgment.

A. N. Richards, Q.C., and *C. E. Pooley, Q.C.*, for the plaintiff.

D. M. Eberts, Q.C., for the defendants.

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DRAKE, J.: This is an application for a writ of sequestration against the defendants and also against the Corporation of the City of Victoria for disobeying certain orders of this Court of the 20th March, 1893. The first of these

Statement.

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orders restrained the defendants from disturbing the soil in front of the plaintiff's lots 533 and 534, Victoria City, for the purposes of erecting telephone poles, and by order of 21st April the injunction was continued until the hearing.

The plaintiff now alleges that the defendants, as well as the Corporation of Victoria, have been guilty of a breach of the order, inasmuch as poles similar to those which the defendants originally attempted to set up have been put up opposite his lots, and that if done by the Corporation, the defendants have connived at it.

From the evidence, it is clear that poles have been put up, and it is equally clear that poles of this size and character are a nuisance to the plaintiff, inasmuch as they are detrimental to the proper enjoyment of his property. The Corporation, it appears, have erected these poles, as they allege, for public lighting purposes, and are making some use of them with this object. The Corporation was not included in this order, and they have, by the Municipal Act, power to pass by-laws to "regulate," which term includes public lighting in the city. If they have erected these poles without lawful authority, they may be responsible in a properly framed case, to parties who are prejudicially affected by their actions, but they cannot be made responsible in the present proceedings. Persons not named in the restraining order are not liable to be committed for breach of it. *Iveson* v. *Harris*, 7 Ves. 256. But if a person not named in the order chooses to step into the place of a person who is named, and, with knowledge of the order, does the act which the others were restrained from doing, he will be held guilty of a contempt of Court. *Avory* v. *Andrews*, 30 W.R. 564. It is claimed that some members of the Corporation were aware of this order, but it is not shown that the act which is complained of was done for the defendants; it was done for another purpose and under other and different statutory authority. Such being the case, I must dismiss the motion as against the Corporation

Judgment.

with costs.

The evidence on the motion against the defendants shews that they did not distinctly repudiate the act complained of when application was made to them before further steps were taken, but they now show by affidavit that they are not directly or indirectly concerned with the acts of the Corporation. They sold two posts to the Corporation, which have been used for public lighting purposes, and have not made any contract or agreement with the Corporation for a further use of their posts for telephone purposes. Such being the case, the motion for sequestration as against them must be dismissed, but without costs, as the proceedings would have been unnecessary if they had explained their position when requested to do so.

Judgment.

Application dismissed.

DRAKE, J.

1894.

Nov. 12.

Re GEORGE BAILLIE

IN THE MATTER OF THE TRUSTEES OF THE WILL OF GEORGE BAILLIE, DECEASED, AND THE TRUSTEES AND EXECUTORS' ACT.

The following language in a will: "I give, devise and bequeath to such of my wife's children as are alive at the time of my death all money or moneys deposited in my name in any bank or banks in the province of British Columbia, said money to be divided between each of said children share and share alike when they shall attain the age of 21 years. Until such time the said money and interest as aforesaid is to remain untouched except as hereinafter provided," created a vested interest in the children payable on their respectively attaining 21 years of age.

Statement.

APPLICATION by the trustees of a will under C.S.B.C. Cap. 115 for the opinion of the Court upon the construction of the above clause in the will of the testator.

D. M. Eberts, Q.C., for the trustees.

F. B. Gregory for the widow.

Judgment.

DRAKE, J.: The question submitted to me by the trustees of this will is whether or not under the terms of the will the children take a vested interest or whether or not such interest should be paid to them on their respectively attaining the age of 21.

In my opinion the legacy vested on the death of the testator but became payable at 21—words directing a division between objects at a future time when engrafted on a gift would postpone vesting. See *May* v. *Wood*, 3 Bro. C. Ch., 471. I am further of opinion that each child is entitled to his or her share on attaining 21, of the amount of the fund then existing.

Order declaring accordingly.

RE THUNDER HILL MINING CO.

Companies Winding-Up (Can.) Act—Sale by mortgagee of assets of company —Power of Court to confirm—Right of liquidator to take over security at a valuation.

The Court has no power to confirm a sale by a mortgagee from the company until the security has been valued and offered to the liquidator at that value.

Statement.

MOTION to confirm sale by the mortgagees of assets of the Company which was being wound up.

W. J. Taylor, for the purchaser and the liquidator of the Company.

Judgment.

DRAKE, J.: Messrs. *Eberts & Taylor* apply to confirm an option of purchase to Mr. Child of the property now in mortgage to Mr. Renouf consisting it is alleged of the mine and machinery.

Mr. Renouf is stated to be a trustee for certain gentlemen who have advanced large sums to the company. He and all the *cestuis que trustent* but one are willing to give this option to Mr. Child for 12 months to see if he can find a purchaser for the property for $50,000, a sum sufficient to pay all the debts of the company, and I am asked to confirm such consent so as to bind the objecting *cestuis que trustent.*

At present the Court has no control over the mortgage. Under the Winding-up Act a creditor holding security over the property of the company must put in his claim to the liquidator specifying the nature and amount of his security and shall upon oath put a specified value on it. This he has not done; as soon as it is done, the liquidator can decide whether or not he will take the security at the value to be paid out of the property when realized or whether he will allow the creditor to retain it; in either case the liqui-

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Jan. 8.

Re THUNDER HILL MIN'G. CO.

dator has to have his action confirmed by the Court.

Therefore until this is done, the Court has no power to make any order.

Application refused.

WALKEM, J.
[In Chambers.]

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Jan. 4.

HORSFALL *v.* PHILLIPS

HORSFALL v. PHILLIPS.

Practice—Security for costs.

Security for costs, on the ground that the plaintiff is resident outside the jurisdiction, will not be granted to a defendant against whom the plaintiff holds an unsatisfied judgment for an amount sufficient to cover the costs of the action.

Statement

APPLICATION by defendant for security for costs on the ground that the plaintiff is resident outside the jurisdiction.

Higgins (*F. B. Gregory*) for the summons.

Thornton Fell, contra, read an affidavit that the plaintiff held an unsatisfied judgment in this Court for an amount sufficient to cover the costs of the action.

Judgment.

WALKEM, J.: The application is not made *bona fide*, and I must exercise my discretion by refusing it.

Summons dismissed with costs.

HERMANN v. LAWSON.

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[In Chambers.]

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HERMANN
v.
LAWSON

Practice—Commission to examine witness abroad—Affidavit.

An affidavit for an order for a commissioner to examine witnesses abroad must state the names of the witnesses proposed to be examined.

APPLICATION by plaintiff for a commission to examine witnesses abroad.

Drake for the motion.

Jay for the defendants objected that the affidavit did not state the name of any of the witnesses proposed to be examined.

Judgment.

WALKEM, J.: The affidavit is insufficient.

Application refused with leave to move on further affidavit.

COWAN v. PATTERSON.

WALKEM, J.

1895.
Jan. 7.

CREASE, J.

Feb. 20.

COWAN
v.
PATERSON

Practice—Nominal plaintiff—Security for costs.

The Court will order a nominal insolvent plaintiff to give security for costs of the action.

Where a party is ordered to give security for costs within a limited time, and makes default, he will be compelled to pay the costs of a motion to dismiss the action for the non-compliance as a condition precedent to his right to furnish the security and proceed.

SUMMONS by defendant for the plaintiff to give security for costs of the action upon the ground that the plaintiff had before action divested himself of the cause of action by

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assignment and was a nominal plaintiff suing for the benefit of his assignees and was insolvent.

G. H. Barnard for the applicant.

Aikman, contra.

The facts fully appear in the judgment.

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WALKEM, J.: The defendant has applied for an order for security for costs on the ground that the plaintiff is insolvent and is virtually suing on behalf of Messrs. Drake, Jackson & Helmcken.

On the 1st of May, 1894, the plaintiff gave the above firm the following document bearing that date:

"T. W. PATERSON, ESQ.

"I do hereby order, authorize and request you to pay to Messrs. Drake, Jackson & Helmcken, solicitors, the sum of $2,000, the moneys due or to become due from you to me, and their receipt shall be a good discharge for same."

(Signed) "M. H. COWAN."

Judgment.

This document is, in effect, an assignment by the plaintiff to Messrs. Drake, Jackson & Helmcken of an alleged debt due to him by the defendant (See *Johnson* v. *Braden*, 1 B.C. Reports, part 2, p. 265 and cases there cited) and *Beer* v. *Collister ante* p. 79. He has therefore parted with his claim against Mr. Paterson, and hence can only be a nominal plaintiff, especially as no affidavit to the contrary has been made on his behalf. The affidavit filed by the defendant shows that there are executions out against the plaintiff and that he has no property in the Province to satisfy them. He is therefore an insolvent—a term which, according to the authorities, is not a technical one, but means simply a person "who is incapable of paying his debts" (per WOOD, V.C., *re Muggeridge*, 29 L.J. Chy. 288.) As a plaintiff, he is, therefore, a mere shadow, and comes within the class of exceptions to poverty being no bar to a suitor commencing and prosecuting an action in any of our Courts. The cases cited by *Mr. Barnard* apply to the

present one; hence I have no hesitation in granting the usual order for such security for costs, to the extent of $150.00 as shall be approved of by the Registrar (See *Cowell* v. *Taylor*, 31 C.D. at page 38; BLACKBURN J.'s observations in *Malcolm* v. *Hodgkinson*, L.R. 8 Q.B. 209; *Perkins* v. *Adcock*, 14 M. & W. 808.)

Order made.

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Statement.

Defendant now moved in Chambers before CREASE, J., to dismiss the action unless the security was furnished within one week, and also asked that the plaintiff should as a condition precedent to the giving up of such security, pay to the defendant the costs of this application.

G. H. Barnard for the motion cited *Ex parte Isaacs* in *re Baum*, 10 Ch. D. 1.

B. H. T. Drake, contra.

Order made.

DIVISIONAL COURT.

1895.

Jan. 14.

ROBERT WARD & CO. v. JOHN CLARK, JOHN CLARK, JR., AND HENNIGER.

Injunction—Maintaining status quo—Discretion—Estoppel.

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Upon motion to dissolve an injunction retaining property in dispute in *statu quo*, *pedente lite*, it is not necessary in order to maintain the injunction for the Court to enquire further into the rights of the parties, if it appears upon the affidavits that the plaintiff has made, upon his own showing, a good case for the interference of the Court, and that there is, upon all the facts before the Court, a reasonable prospect of his succeeding at the trial.

APPEAL by defendant John Clark, Jr., to the Divisional Court from an order of CREASE, J., refusing to dissolve an injunction.

The action was brought by the plaintiffs, subsequent judgment creditors, to set aside two judgments obtained in default of appearance against the defendant John Clark, one by his son John Clark, Jr., and the other by the defendant Henniger, or to postpone same to the plaintiff's judgment, upon the ground that the said judgments were fraudulent and collusive as against the plaintiffs, and that the plaintiffs therein were estopped from maintaining them against the plaintiff herein and to set aside the *fi. fas.* and all proceedings under the said judgments and for an injunction to restrain the defendant John Clark, Jr., from removing or dealing with the schooner Enterprise sold by the sheriff under the execution issued upon his judgment and bought in by himself.

Statement.

It appeared from the affidavits filed for the plaintiffs that the defendant John Clark, who was indebted to the plaintiffs, had gone to them with John Clark, Jr., on Dec. 3rd, and, in his presence, had stated to the plaintiffs that he was not indebted to any other person than the plaintiffs, and requested them to make him further advances. This the

plaintiffs, who had demanded payment, refused to do. They did not commence action till 10th December, in consequence of the statements referred to, and then delayed placing the writ in the sheriff's hands for service until the 12th. John Clark, Jr., sued on the 12th, and Henniger on the 13th Dec. The plaintiffs being unable to effect a personal service of their writ, were obliged to obtain an order for substitutional service, and did not recover their judgment against the defendant John Clark until 28th Dec. The other defendants recovered judgment against him on 20th and 21st Dec. respectively.

The sale of the schooner to John Clark, Jr., took place on the 28th Dec. On 29th Dec., this action was commenced, and an *ex parte* injunction was moved for and granted by CREASE, J., against his dealing with the schooner until the hearing or further order, and on 9th Jan., 1895, the defendant moved before the same Judge upon affidavits (in which both the defendants Clark denied the material allegations in plaintiffs' affidavits) to dissolve the injunction and set up other facts fully appearing in the judgment. This motion was refused with costs.

Statement.

From this refusal, the defendants appealed to the Divisional Court, and the appeal was heard on the 14th January, 1895, before MCCREIGHT and DRAKE, J.J.

A. L. Belyea, for the defendants: There is no evidence of fraud and collusion in the obtaining of the judgments complained of. It is not asserted that the defendants John Clark, Jr., and Henniger, are not *bona fide* creditors of the defendant John Clark. It is not asserted that there was any frand or collusion between either of them and John Clark in obtaining their judgments, and no facts from which it can be inferred. The mere fact that the plaintiffs were unable to serve their writ is of no consequence. If John Clark had entered an appearance in plaintiffs' action allowing the other actions to go by default, it would not then have been impeachable as a preference or fraud. The

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assertion of John Clark to plaintiffs, in presence of John Clark, Jr., on 3rd Dec., that he had no other creditors than plaintiffs might operate as an estoppel to the defendants maintaining the contrary, if any further advances had been made on the faith of such statements, in an action involving such advances. It is too much to say that the plaintiffs were induced to delay action from 3rd and to keep the writ in hand from 10th to 12th December because of such statements. It does not appear that plaintiffs could have served John Clark with the writ if they had sued earlier or not kept it in hand, and they had it in the sheriff's hands on the same day as the first of defendants' suits was commenced. Their real complaint is that John Clark evaded service of their writ, and that is insufficient, and the other defendants are not shown to have been accessory to any such conduct.

Argument.

E. V. Bodwell contra: The statements relied on as an estoppel were made for the purpose of inducing the plaintiffs to rely upon it that they were the only creditors of John Clark, and, as one of the consequences of such being the case, that they had no need to use dispatch in obtaining judgment, while, in fact, the position and priority of John Clark, Jr., here, stands upon the basis that he had then a subsisting claim against his father, and has beaten the plaintiffs in a race for judgment upon it ;and he is here, by reason of such statements estopped from asserting such a position against the plaintiffs. He stood by while his father made the statement. He therefore adopted and is estopped by it. *Cornish* v. *Abington*, 28 L.J. Ex. 262.

(DRAKE, J., referred to *Shanly* v. *FitzRandolph*, Cassels' Digest of S.C. Cases p. 279.)

The fact that the plaintiffs' affidavit is contradicted by the defendants Clark is immaterial. The Court will not try the question of fact now. All that is necessary is that a plaintiff should, upon his own showing, make a proper case for the interference of the Court to preserve the property pending the dispute, and that, upon all the materials before

the Court, the plaintiff has a reasonable chance of succeeding at the trial. *G.W.R. Co.* v. *Birmingham & Oxford R'y Co.*, 17 L.J. Ch. Cottenham L.C. at p. 245; *Curtis* v. *Buckingham*, 3 Ves. & B. 168; *London County Banking Co.* v. *Lewis*, 21 Ch. D. 490.

DRAKE, J.: The injunction in the first instance was obtained *ex parte*, and, in such a case, if the allegations which constitute the equity of the plaintiffs' case are, in the opinion of the Court, not denied merely, but clearly shown to be false, the injunction will be dissolved, on the application to dissolve.

The defendant John Clark, Jr., fyled an affidavit denying that John Clark ever stated that he owed any debts beyond that of the plaintiffs, and then proceeded to allege how his claim arose. The affidavit is more marked by its omissions than by its assertions. The allegation that wages are due for three years past as seaman and hunter on the schooner is quite consistent with his being paid out of the net proceeds only of the sealing catch. He does not show that he signed the articles as a seaman or that there was any contract for his other services, if he performed any. In fact, the defendant, while he admits certain facts sworn to by the plaintiff, denies the statement on which the plaintiffs' equity rests, but such denial is not, under the circumstances, such a disproof of the plaintiffs' case as will cause this Court to interfere. It is unlikely, looking at all the facts, that his denial is strictly accurate. An injunction is a discretionary act of this Court to protect the property pending the trial, and if the defendant John Clark, Jr., sustains any loss, he can be compensated in damages for which the plaintiff had given ample security as the defandant admits. It is also admitted that the defendant has no property in the jurisdiction, except the schooner in question, and, if on the trial the plaintiff succeeds in establishing his claim, then the defendant's right to the schooner will be open to question. The appellant has not succeeded in satisfying me that the

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injunction should be dissolved. The appeal is therefore dismissed with costs.

McCREIGHT, J., concurred.

Appeal dismissed with costs.

DIVISIONAL COURT.

1894.

July 9.

McCOLL v. LEAMY ET AL.

McCOLL v. LEAMY *ET AL.*

Practice—Order taken out by neither party—Whether appealable.

In order to maintain an appeal from an order, it must have been drawn up and issued.

If the party upon whose summons the order is made refuses to draw it up, the other party may obtain a similar order upon summons on his own account.

If the order made is not within the terms of the summons, then the party in whose favour it is made may draw it up.

APPEAL to the Divisional Court by plaintiff from an order for security for costs made by McCREIGHT, J., upon a summons taken out by the defendants. Certain terms were imposed by the learned Judge upon the defendants as a condition of granting the security to which the defendants objected, and the order had not been taken out by either party.

Statement.

The appeal was heard on the 18th June, 1894, before CREASE and DRAKE, J.J.

Eckstein, for the appellant.

McColl, Q.C., contra.

DRAKE, J.: On 7th June, a summons was taken out by the solicitor for the defendants to settle the amount of

security to be given by the defendants Scoullar and Drysdale on an appeal by them to the Full Court.

Mr. Justice McCreight fixed the amount at $500, and added some further directions as to payment of costs of the action and security for the amount of the judgment.

To these latter directions, *Mr. Eckstein*, on behalf of the defendants, objected and declined to take out the order which he was justified by the practice in doing.

The practice is as follows: If the order made in Chambers is made on the summons and the party obtaining the order refuses to draw it up, the other side may obtain a similar order upon a summons on their own account.

If the order made is not within the summons, then the party in whose favour it is made can draw it up.

Judgment.

The question here is, no order having been drawn up on either side, whether there is any right of appeal. In my opinion, there is nothing to appeal against.

The appellant cites Rule 684, which says that the period of eight days is to be calculated (in case of an appeal from an order in Chambers) from the time such order was pronounced. This rule does not alter the right of a person obtaining an order which he does not like, of abstaining from drawing it up, and if he declines to draw it up, it is not an appealable order. If the order pronounced had been made in an application of the other side, then notice under this rule has to be issued within eight days from the pronouncement of the order, and the party appealing should draw up the order so that the Divisional Court may have before them the exact terms of the order appealed from. This is necessary, because, until the order is drawn up, the Judge may reconsider and amend it.

Appeal dismissed with costs.

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BEAVEN v. FELL.

BEAVEN v. FELL.

Practice—Divisional Court—Remitting motion to Chambers for reargument and to procure written reasons.

On an appeal to the Divisional Court from an order of WALKEM, J., in Chambers refusing an application for discovery, counsel could not agree as to what had taken place in Chambers or upon what were the reasons for the dismissal of the motion.

The Court referred the motion back to WALKEM, J., for report and reargument before him if necessary.

Statement.

APPEAL to the Divisional Court from an order of WALKEM, J. The hearing of the appeal came on before MCCREIGHT and DRAKE, J.J.

E. V. Bodwell for the appeal.

Theodore Davie, A.-G., and *Hunter, contra.*

Counsel were unable to agree as to what had taken place before WALKEM, J., in Chambers and he had not given a written judgment.

Judgment.

MCCREIGHT, J., referred to *Saunders* v. *McConnell*, 29 Ch. D. 76.

Per curiam: Order referring motion back to WALKEM, J., *for report and re-argument if considered advisable.*

THE CITY OF VICTORIA v. THE UNION CLUB.

CREASE, J.

1894.

Oct. 23.

VICTORIA v. UNION CLUB

Municipal Act 1889 Sec. 173—"Sale" of liquor—Club selling to its members, whether.

By the Municipal Act B.C. 1889 Sec. 173 "every club in a municipality shall pay to the corporation of the municipality an annual tax of one hundred dollars on the 31st day of December in every year." "A 'club' for the purposes of this Act shall mean and include an association of persons consisting of not less than forty in number whose objects of association are mutual recreation or improvement, and the keeping for the members a place of resor wherein intoxicating, spirituous or malt liquors are consumed by members either at a tariff fixed by the rules of the association or pursuant to any agreement or understanding between the members of the association."

The defendants admitted that they were such an association.

Held, that the club was not liable to pay the license because it did not sell liquor.

APPEAL to the County Court from FARQUAHAR MACRAE, Police Magistrate. The facts appear from the judgment.

C. E. Pooley, Q.C., for the appeal.

D. M. Eberts, Q.C., contra.

CREASE, J.: This was an appeal by the defendant from the order of the local magistrate upon the hearing of a summons against Hayes, the late secretary of the club, for non-payment of $100 assessed against the club under Section 173 of the Municipal Act, 1889.

Judgment.

Mr. Pooley, Q.C., for the defendant, admitted that the Union Club is an association of not less than 40 persons, whose objects are mutual recreation and improvement and the keeping for the members a place of resort wherein intoxicating liquors are consumed by members either at a tariff fixed by the rules of the association or pursuant to an arrangement or understanding between the members of the association within the wording of Section 173 of the said Municipal Act.

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It has 150 members, governed by rules and by-laws produced in Court and passed by the club in 1887 as its constitution, vesting all its property and effects in trustees, to ensure the payment of outstanding debentures secured on the property of the club and carry on its affairs, but so as not to render any member personally liable; to promote the other objects of the association—social intercourse, mutual improvement, benefit and enjoyment.

A committee of management has been appointed for the conduct of all the general business and affairs of the association. Members can obtain food and refreshment in the club, and wine, beer and spirits on payment. There is no license to sell liquor. The liquors are consumed on the premises, and only given and paid for among themselves. The money therefrom goes to the general funds for the support of the club. The assessment appealed against, though called a tax, is under the heading of "Trades Licenses." The heading of that division of the Act clearly classes Section 173 among "Trades Licenses," and this intention is accentuated by the decision in *Sewell* v. *B.C. Towing Company*, 9 S.C.R. 551, and *Lang* v. *Ker*, 3 App. Cas. 529; *Bryan* v. *Child*, 5 Ex. 368, and *Hammersmith Railway Company* v. *Brand*, L.R. 4 H.L. 171, that the heading under which a section of an Act occurs must be read as part of that particular section to which it is applicable.

Judgment.

The dealing with liquor in the club is not a sale under ordinary mercantile sense of the word, and *Graff* v. *Evans*, 8 Q.B.D., 373, although not serving as a precedent in the present case—inasmuch as it did not, as in the present instance, arise under a statute—is yet a clear authority that the conduct of an association on the lines of this club is not carrying on a trade—and does not make sales for a trade profit, but is in fact a private establishment, and so also does not come within the authority of the police magistrate. The true construction of the rules—according to the interpretation given to them by Mr. Justice FIELD and

Baron HUDDLESTON, in the above case and cases there cited —which form the constitution of the club is that the members selected by a strict ballot among themselves and paying a fee on entrance are joint owners of the general property in all the goods of the club that the trustees were their agents with respect to the general property in the goods, though they could have other agents with respect to special properties in some of the goods. Any member is entitled to obtain the goods on payment of the price. That does not constitute a sale. A sale involves the elements of a bargain. With the prices fixed there is no bargain. By his subscription to the funds of the club, a member or owner, becomes entitled to have his goods sold to him at a certain price. If there are 150 members he owns 1.150th share in the goods he obtains. The transaction becomes a transfer of a special property in the goods to such member, which is not a sale in the ordinary acceptation of the term. The association is not a partnership. It is not an association formed for the purpose of realizing joint profits, although as we have seen, the members are joint owners. It is not, therefore, under the Act, the language of which has to be construed strictly to see whether the person on whom a tax is sought to be imposed comes within the description of a person who is engaged in the conduct of a trading concern and lawfully the subject of a trade license.

Judgment.

For the reason given I am of opinion that the defendant does not come within that description, and, being of that opinion, it becomes unnecessary to consider the other points raised by the defence, and I have therefore to allow the appeal with costs.

Appeal allowed.

DRAKE, J.
[In Chambers.]

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Jan. 18.

IN THE COUNTY COURT OF VICTORIA.

WILKERSON v. CITY OF VICTORIA.

WILKERSON v. VICTORIA

County Court Practice—County Courts Act, Secs. 95, 97—Summons in Chambers—Authority for.

There is jurisdiction under the County Court Act and Rules, and it is the proper course, to entertain questions of practice arising in that Court upon summons in Chambers in the same manner as in Superior Court actions.

Statement. SUMMONS by the defendants for better particulars of the acts of negligence complained of in the statement of claim.

C. J. Prior (Eberts & Taylor) for the summons.

Archer Martin, contra : There is no provision in the
Argument. County Courts Act or rules for dealing with interlocutory matters arising in a County Court action, upon summons in Chambers, and therefore no jurisdiction to entertain the motion.

DRAKE, J.: *Mr. Martin* objects to the summons for further and better particulars on the ground that there is no provision under the Act for such a proceeding.

By Section 95, "The Judge of the County Court may at all times amend defects and errors in any proceeding, and all amendments necessary for determining the real controversy shall be made if duly applied for."

Judgment. How then are such applications to be made? Apparently under Section 97 they may be made *ex parte*, as the Judge has the same power to make or direct as a Judge in the Supreme Court Chambers has.

I think that it is far more convenient practice, that, instead of applying *ex parte* in many of the cases in which *ex parte* applications are allowed, that such applications

should only be made on notice or summons.

Summons in Chambers is a recognized proceeding, and it has always been the practice of this Court to require a summons to be served on the other side where the application is one in which the other side is interested.

Objection over-ruled.

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WILKERSON v. THE CITY OF VICTORIA.

Practice—Rules 128, 133—Third party notice—Parties—Substituting for defendants parties liable to indemnify them—Terms—Security for costs.

Persons brought in on third party notice as liable to indemnify the defendants against the action ought to be made co-defendants.

At their own request, the third parties were substituted as defendants, upon giving security to the plaintiff for such amount as he might recover and costs.

SUMMONS under Rule 133 by the defendants for directions as to mode of trial.

The action was brought against the defendants for negligence in not properly protecting certain sewer excavations against danger to pedestrians whereby the plaintiff fell into same and was injured. Harrison & Walkley, the contractors with the defendants for the construction of the sewer, were brought in under a third party notice as being liable to indemnify the defendants. Statement.

P. S. Lampman, for the contractors, admitted their Argument.

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liability to indemnify the defendants.

Archer Martin, for the plaintiff: In that case, the contractors should be made co-defendants. *Coles* v. *Civil Service Supply Association*, 26 Ch. D. 529; *Edison, etc., Electric Light Co.* v. *Holland*, 41 Ch. D. 28; *Blore* v. *Ashby*, 42 Ch. D. 682.

DRAKE, J.: The contractors should be added as defendants. Terms of order to be spoken to.

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P. S. Lampman, for the contractors, now asked that they should be substituted as defendants.

Prior (Eberts & Taylor), for the defendants, consented.

Archer Martin, for the plaintiff: We should not be
Argument. required to accept the sole liability of the contractors, who may not be financially satisfactory, without security for the amount for which we may recover. *Carshore* v. *N.E. R'y Co.*, 29 Ch. D. 344.

DRAKE, J.: Under the circumstances, the order will be for the contractors to be substituted as defendants, upon giving to the plaintiff security to the satisfaction of the Registrar for the amount of the plaintiff's claim and costs, and fyling a dispute note. Costs of this application to be
Judgment. costs in the cause to the plaintiffs in any event. Costs as between the contractors and the defendants reserved till after the trial.

Order accordingly.

STEWART v. WILSON.

DRAKE, J.

1894.

Nov. 28.

STEWART v. WILSON

Bill of Sale—Fraudulent preference—C.S.B.C., 1888, Cap. 51—Pressure.

Wilson Bros., creditors of P. & Y., a firm of general storekeepers, demanded security for their overdue account, and agreed to supply further goods and not register the instrument, if it was given. Plaintiffs objected that it would be unfair to other creditors to accede, but finally did so on the terms proposed, and gave the security by bill of sale on part of their stock of goods.

The debtors were at the time in insolvent circumstances, but it was not proved that Wilson Bros. were aware of it.

Held, The bill of sale was not made with intent to give Wilson Bros. a preference over the other creditors of plaintiffs, but was made under pressure sufficient to take the transaction out of the statute.

MOTION for judgment. The action was brought by the plaintiffs on behalf of themselves and all other creditors, except the defendants Wilson Bros., of Messrs. Pilling & York, a firm of general storekeepers, who were insolvent and had made a general assignment for the benefit of their creditors, to have it declared that a Bill of Sale made two days before the date of the assignment, securing the defendants Wilson Bros., a firm of wholesale merchants, to whom they were indebted for the amount of their account, was made with intent to give Wilson Bros. a preference over their other creditors, and to set same aside and transfer the property covered thereby into the hands of the assignee. Statement.

The facts sufficiently appear from the judgment and head note.

E. P. Davis, for the defendants Wilson Bros.: There should be a non-suit. The instrument was not void at common law or under 13 Eliz. Cap. 5 ; *Wood* v. *Dixie*, 7 Q. B. 892; *Alton* v. *Harrison*, L.R. 4 Ch. 625. There was *bona fide* pressure. *Johnstone* v. *Hope*, 17 O.A.R. 10 ; *Embury* v. *West*, 15 O.A.R., 357 ; *Gibbons* v. *McDonald*, 20 S.C.R., 587 ; Argument.

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Molsons Bank v. *Halter*, 18 S.C.R., 88 ; *Stephens* v. *McArthur*, 19 S.C.R., 486 ; *Davies* v. *Gillard*, 21 Ont., 431, 19 O.A.R., 432; *McLean* v. *Garland*, 13 S.C.R., 366. It is immaterial whether Wilson Brothers knew that the debtors were insolvent. *Stephens* v. *McArthur*, *supra*.

A. J. McColl, Q.C., contra : The condition upon which the Bill of Sale was given that Wilson Bros. would make further advances of goods was a condition which ought to have been expressed on the face of the instrument, and it is void for not expressing it. *Edwards* v. *Marcus*, 1894, 1 Q.B. 587.

DRAKE, J.: The plaintiffs, on behalf of the creditors of Pilling & York, sue Wilson Bros. and Pilling & York, and ask that a certain chattel mortgage made by Pilling & York to Wilson Bros. be declared fraudulent and void, and that the assets included in such Bill of Sale be handed over to the assignees for the benefit of creditors.

The defendants Pilling & York put in no defence.

Judgment.

The other defendants deny all knowledge of the insolvent circumstances of Pilling & York, and allege *bona fides*.

The facts disclosed in evidence shew that Wilson Bros. had dealt with Pilling & York for a considerable period, apparently taking notes at sixty days for their indebtedness.

On 23rd July last, the debtors owed the Wilsons $1,887 on overdue notes and on general account, which is not however alleged to be due, over $5,000. The debtors carried on a general store at Mission City, and supplied certain boarding houses and camps along the line of the C.P.R.

The defendants were under the impression that if they could get a little time and further goods for the camps that they could pull through.

When Wilsons' agent saw them about the unpaid notes, they explained their position, that they had a surplus of some $7,000 or $8,000, and thought that the camps, if kept running, would enable them to continue and get out of

their financial difficulties. Wilson Bros. pressed for security for their debt, and agreed, if security was furnished, they would supply goods for the camps.

At this interview, which took place 21st July, Pilling states he told Wilson Bros.' agent he thought that giving security would be unfair to the other creditors, but eventually agreed to give security over the camps and book debts, if the defendants would continue to supply goods for the camps and not register the mortgage. On the 23rd of July, a further interview took place, when the mortgage was signed and the book debts also assigned and possession taken on the 24th. Two days afterwards, the debtors made a general assignment for the benefit of creditors.

The property which was not included in Wilsons' security consisted of the stock in trade at Mission City, valued between $5,000 and $6,000, and certain cattle, pigs and sheep valued at $1,400.

Owing to this assignment, Wilson Bros. did not nor were they asked to furnish any further supplies for the camps, and they registered their mortgage in August, as it no longer was of the slightest importance to the debtors as affecting their credit that the security should not be registered.

Judgment.

Some evidence was offered that the Wilsons knew the debtors were insolvent because Pilling says they could have seen the correspondence and bills on the table, but he at the same time admits that he informed the Wilsons' agent that he had a surplus of $6,000 to $7,000 and I cannot find from the evidence that the Wilsons knew the debtors were insolvent, in fact rather the other way, that it was a temporary difficulty which the continuation of the camps would enable them to extricate themselves from in a short time.

The evidence shews that a *bona fide* claim was made for security, and although Pilling says he was not threatened with an action in so many words yet he understood immediate proceedings would be taken if security was not given, and he so informed Mrs. York, his partner, and if

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proceedings were taken the business would be smashed up. Both the defendants were very reluctant to give the security asked and it was not apparently without considerable discussion that the Bill of Sale and assignment were eventually executed.

An assignment to be void must be voluntary. As Lord CAIRNS says in *Butcher* v. *Stead*, 7 H. of L. 839, "the word preference imputes a voluntary preference, that is to say, the spontaneous act of the debtor," and such an act under statute must be made with an intention in the mind of the debtor to prefer a particular creditor, by a debtor who is insolvent or unable to pay his debts in full.

Our statute is very nearly identical with the Ontario Act, which has frequently been before the Courts, and the authorities governing this Court will be found in *Molsons Bank* v. *Halter*, 18 S.C.R. 95, followed by *Stephens* v. *McArthur*, 19 S.C.R. 446, and *Gibbons* v. *McDonald*, 20 S.C.R. 577, and it must now be treated as settled law that a mortgage given by a debtor who is unable to pay his debts in full is not void as a preference, if given as the result of pressure and for a *bona fide* debt, if the mortgagee is not aware of the debtor being in insolvent circumstances.

Judgment.

The question what are insolvent circumstances must depend on the particular facts. The fact that a debtor has a bill overdue and unpaid cannot be treated as being in insolvent circumstances, because if that were so the fact that the creditor demanded security in such a case might impute a knowledge of the insolvency.

On the facts I grant the non-suit as asked, with costs.

Plaintiff non-suited.

COWAN v. CUTHBERT.

DRAKE, J.
[In Chambers.]
1895.
Jan. 5.
COWAN v. CUTHBERT

County Court practice—Order IV, Rules 2 and 3—Security for costs—Married woman—residence of.

The statement in the plaint of the residence of the plaintiff (temporarily resident in California), as "the wife of Maynard Havelock Cowan, of Victoria," &c.: *Held*, sufficient.

Statement of the residence of defendants as "of Broad street, Victoria, Auctioneers:" *Held* sufficient.

The residence of a wife, not living apart from her husband, is at the place of residence of her husband, and defendant held not entitled to security for costs from the plaintiff, on the ground that she was then living in California, her husband being resident in Victoria.

MOTION to set aside the summons and plaint in the County Court for irregularity in not stating the residence either of the plaintiff or of the defendant's as provided for by C.C. Order IV, Rules 2 and 3.

It appeared that the plaintiff, a married woman, was living in California, on a visit; her husband was resident and living in Victoria. The plaintiff was described in the plaint as "the wife of Maynard Havelock Cowan, of Victoria" &c. The defendants were described as "of Broad Street, Victoria, Auctioneers." **Statement.**

A. S. Potts (A. L. Belyea) for the motion: We rely on the C.C. rules, *supra*, and the *W. A. Sholten*, 13 P.D. 8. If the plaintiff's residence had been stated, she would have been obliged to give security for costs to the satisfaction of the clerk of the Court, as a condition precedent to the issue of the summons. **Argument.**

George Powell, contra.

DRAKE, J.: The residence of the plaintiff is that of her husband, and is sufficiently stated. The defendants' residence is also I think sufficiently stated. The defendants are not entitled to security for costs. **Judgment.**

Summons dismissed with costs.

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JACOBSEN ET AL v. ARCHER

IN THE EXCHEQUER COURT OF CANADA.

(British Columbia Admiralty District.)

JACOBSEN *ET AL.* v. SHIP "ARCHER."

Maritime law—Salvage—Expenses of conveying derelict to hands of Receiver of Wrecks—Whether recoverable.

Plaintiffs, having salved the ship, incurred expenses in navigating her along a dangerous coast at a rough season of the year.

Held, on the facts, that besides a salvage reward of one-half of the proceeds of the sale of the ship, the plaintiffs were entitled to expenses to be estimated at a lump sum.

Statement.

ACTION for salvage and expenses for bringing the ship into the hands of the Receiver of Wrecks.

The facts and authorities cited by counsel fully appear in the judgment, which, after setting out the facts under which the salvage services were performed, proceeds as below.

E. V. Bodwell for the plaintiffs.

J. A. Aikman for the defendant ship.

Judgment.

CREASE, Dep. L.J.A.: That all the plaintiffs were salvors in an undoubted salvage case, is clear. And also that they were entitled to half the auction value of the ship.

Were they, however, upon the authorities, entitled in addition under the above circumstances, to the expenses necessarily incurred by them in bringing her along a rough coast at a rough season to the hands of the receiver. That is the point of the case. This addition is not usually given.

The plaintiffs ask not only for $2,567, the half of what she fetched at auction, but for $1,468, expenses thus made up: Services of the Pioneer, $600; Jacobsen and party,

$750; allowance to Irving, pilot, 6 days at $15 per day $90; paid men's passage from Clayoquot, $28. Total, $1,468.

It is a matter of discretion which the Judge in Admiralty has to exercise, according to those principles of equity which have been evolved from the consideration of a succession of cases, and these more or less dependent on the facts produced in evidence.

Authorities were cited on both sides in support of their opposite contentions. For the allowance, by *E. V. Bodwell*, the case of the *Rasche*, L.R. 4, A. & E. 127, that and a number of similar cases, *e.g. The Armstrong ibid*, 380, 385, were instances where the amount of the loss and expenses were added to the salvor's reward and deducted from the other moiety.

J. A. Aikman, against the allowance, not disputing the right to a salvage reward, contended on the authority of *The Reliance*, 2 W. Rob. 122, that the salvors are bound to deliver the wreck to the Receiver, and that the cost of that should come out of the salvors' reward. Now here there was no special loss or injury to their boats or vessels. There was danger of life, and, but for timely succour, a certainty of injury from the Indians who came to steal. But for the salvors *The Archer* would certainly have gone to pieces on the rocks. They also incurred personal risk the greater part of the time.

Judgment.

Then again steamers were employed by the salvors, of these Dr. LUSHINGTON in *The Kingalock*, 1 Spks. 267, says:

"The principle I have always endeavoured to follow, is this. That when steamers render salvage services, they are entitled to a greater reward than any other class of salvors." And the reasons he gives are found. They can act with "greater celerity than other vessels, greater safety to the vessel in danger, and frequently under circumstances in which no other assistance could by possibility prevail."

Taking everything into consideration I think this case is one of that class which invites me to decide upon a gross

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sum generally to recover remuneration and any loss or expense that may have been incurred, as was done in the more recent cases of *The Silesia*, 5 P.D. 177, and *The Lancaster*, 8 P.D. 65, 9 P.D. 14. I consider the selling value of the ship at the auction was greatly enhanced by the previous expenditure in repairs of $844.08, and the salvors moiety proportionately increased.

I therefore pronounce in favor of the Canadian Pacific Navigation Company, the plaintiffs herein, who, I understand, represent all the plaintiffs in this case.

I award to the plaintiffs out of the proceeds of the ship, the gross sum of $2,967 to cover the salvage reward, and any loss or expense the salvors have incurred—and no costs.

Judgment.

Judgment accordingly.

FOOT AND CARTER v. MASON AND NICHOLLES.

DRAKE, J.

1894.

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FOOT ET AL v. MASON ET AL

Vendor and purchaser—Specific performance—Title to lands.

An agreement for the sale of land provided for the payment of the purchase money by instalments, and that on payment of the purchase money by the vendees the vendor would convey by a good and sufficient deed in fee simple free from encumbrances.

Held, That the vendors were not entitled to call for a title until after payment by them of the purchase money.

Semble, It is not necessary in an action for specific performance of a contract for the sale of lands that the vendor should be the holder of the title if he can obtain a grant in fee from the holder to the purchasers.

ACTION by the vendors for specific performance of an agreement for the sale of lands. The material parts of the agreement were as follows: "Now it is hereby agreed between the parties aforesaid in manner following, that is to say: The said party of the second part (defendant Mason) for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the parties of the first part (plaintiffs and another) their heirs, executors, administrators and assigns, that he or they shall and will well and truly pay or cause to be paid to the said parties of the first part, their heirs, executors, administrators and assigns, the said sum of money together with interest thereon at the rate and on the days and times and manner above mentioned. And also shall and will pay and discharge all taxes, rates and assessments wherewith the said land may be rated or charged from and after this date. In consideration whereof, and on payment of the said sum of money with interest as aforesaid, the said parties of the first part do, for themselves, their heirs, executors, administrators and assigns, covenant, promise and agree to and with the said party of the second part, his heirs, executors,

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administrators or assigns, to convey or assure or cause to be conveyed or assured to the said party of the second part, his heirs or assigns, or such other person as he or they may direct, by a good and sufficient deed in fee simple, with the usual covenants for title, the said piece or parcel of land, with the appurtenances, freed and discharged from all encumbrances, but subject to the conditions and reservations expressed in the original grant from the Crown. And it is expressly understood that time is to be the essence of the contract, and unless the payments are punctually made, the said parties of the first part shall be at liberty to re-sell the same premises, and any deficiency in price and the expense attending such sale shall be borne by the party of the second part and recoverable as damages, such conveyance shall be prepared at the expense of the said party of the second part."

Statement.

J. P. Walls, for the plaintiffs.

E. V. Bodwell, for defendant Mason.

W. J. Taylor, for defendant Nicholles.

The facts and authorities cited fully appear from the judgment.

DRAKE, J.: The plaintiffs sue the defendant Mason for $4,000, amount due under a covenant dated 31st October, 1891, alleging that the defendant was acting therein on his own behalf as well as on behalf of the defendant Nicholles.

The facts show that the plaintiffs and one Alexander Vye leased from Fleming Hewitt Sec. 17, Renfrew District, containing 169 acres, from the 4th August, 1891, to the 4th August, 1896, at the annual rent of $60, payable quarterly in advance, with the privilege to the lessees of purchasing the demised premises at the price of $2,000 on or before the 4th August, 1893, or thereafter at a price to be agreed upon, and in default of the payment of the said rents for a period of three months, liberty to the lessor to re-enter.

Judgment.

On 29th September, 1891, the plaintiffs agreed to bond to

the defendant Nicholles the said land for $4,500, the offer to hold good for thirty days only, which was subsequently extended for five days further by a memorandum of the same date. On 30th October, the defendant Nicholles assigned his interest in the aforesaid option to the defendant Mason. On the 31st October, 1891, the plaintiffs and Vye entered into an agreement under seal with Mason for sale and purchase of the said lands for $500 cash and $4,000 to be paid on 29th March, 1892, with interest, and the plaintiffs covenanted that they would convey and assure or cause to be conveyed or assured to Mason, his heirs and assigns the said land by a good and sufficient deed in fee simple with the usual covenants for title free from encumbrances, and it was expressly understood that time was to be the essence of the contract, and unless the payments were punctually made, the plaintiffs should be at liberty to re-sell the premises, and any deficiency should be borne by the defendant Mason who should prepare the conveyance at his own expense.

Vye subsequently transferred all his interest to the plaintiffs. Judgment.

The $500 was paid. On the 1st of March, the plaintiffs' solicitor wrote to the defendant Mason stating that the $4,000 would become due on the 29th inst., and that his clients would then be prepared to execute the necessary conveyance and asking for a draft conveyance for approval.

No reply was given to this; but there is some evidence that Mason called on Mr. Dumbleton on the 29th of March, and asked for the conveyance, and by a letter of that date Mr. Dumbleton stated that owing to Mason's neglect to reply Mr. Hewitt had returned home to Sooke, and asking what Mason intended to do.

Mason never tendered any deed of conveyance nor the purchase money, both of which he was by the agreement bound to do before he could question the title (see *Guthrie* v. *Clarke*, 3 Man. 320).

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The title was satisfactory to Nicholles, and so stated by him prior to the original agreement being signed, and also to Mason, it was not therefore necessary to furnish any abstract.

Mason, on 1st of April, wrote in reply to letter of 30th March alleging he was merely agent for clients, and acted on their behalf, and alleging that the $500 was paid for an option only, and that it rested with his clients whether the purchase should be completed or not and that his clients did not intend to exercise their right.

It is clear that Mason did not understand the deed he executed. There is no option in the matter. It is an absolute agreement for sale and purchase, and Mason, in order to take advantage of any delay, was bound to tender a conveyance and the purchase money.

Then comes an intimation that proceedings will be taken; and, on the 11th of April, this action was commenced.

Judgment.

The plaintiffs sue both defendants; the one as principal and the other as agent, and Mason has obtained a third party order for indemnity against Nicholles, in case he should be held liable on the agreement, and the question of indemnity will be decided after this case.

The defendants called no witnesses.

Mr. Bodwell, on behalf of Mason, asked for a non-suit, on the ground:

1st. That the plaintiff was not prepared with a title, and had not paid Hewitt the $2,000 and therefore had no title to sell.

2. That the rent was in arrear at the time, and therefore the lease was voidable and under the authority of *Brewer* v. *Broadwood*, 22 C.D. 105, the Court would not under these circumstances give effect to the agreement.

Mr. Taylor, for Nicholles, asked for non-suit on the first point. *Mr. Fry*, in his work on specific performance, 3rd Ed. p. 403, says: If a vendor sues for specific performance, the defendant is entitled to have the action dismissed, if it

appear that the plaintiff cannot make out a good title; provided the defect in title is prominently put forward in the pleadings, and the Court can decide the question.

If the defect is prominently put forward in the pleadings, the defendant is entitled to have an enquiry as to title. Here the defendant Mason pleads that the plaintiffs are not and never were the owners of the lands referred to, and they cannot and could not at any time give a title thereto.

In this case, the defendant knew that the plaintiffs were not the owners of the land, but it does not follow that they could not then and cannot now give a good title, in fact they swear they can. The language in the contract for purchase shows that the parties contemplated that the plaintiffs might have to obtain an assurance from some one else, and unless it is shown that they could not make out a title to the defendant at all, they are entitled to give a conveyance from the owner in fee with a surrender of their term. I am not aware that it is necessary to an action for specific performance that the vendors should be the holders in fee, if they can obtain a grant in fee to the purchaser free from incumbrances.

Judgment.

In *Dart on Vendors*, p. 1,178, it is stated that specific performance has been decreed, where the vendors contracted under the *bona fide* belief that they could make a good title and discovering that they had no title legal or equitable procured the concurrence of the necessary parties and also when the vendors having only a life estate contracted to sell the fee, relying on their being able to procure the concurrence of the parties in remainder.

See also *Murrell* v. *Goodyear*, 1 D.F. & J. 432, and *Dart* further says that it is by no means clear that in the extreme case of A contracting to sell the estate of B, A would not be entitled to specific performance if by procuring a conveyance from B he was able to make a good title on the reference. The present case does not require this extreme illustration. The owner in fee was bound to convey to the

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present vendors at any time prior to 4th August 1893, on receipt of $2,000.00, and it can easily be ascertained by a reference whether the plaintiffs were able to fulfill their covenant as to title and if under such a reference they can show a title before the certificate is issued they will be entitled to judgment. *Vancouver* v. *Bliss*, 11 Ves. 458; *Wynn* v. *Morgan*, 7 Ves. 202.

The second objection is based on evidence of exhibit L which purports to be a receipt for $75.00 for rent due Hewitt also for taxes; this is dated April 14th, 1893, and the deduction the defendant draws is that at the date of 30th March there was twelve months rent due and at the time the contract was made the lease was voidable for non-payment of rent; it is only a deduction and no other evidence was adduced; the rent was payable in advance on the 4th August, 4th November, 4th February, and 4th May, and no right of re-entry until the expiration of three months after any default. This receipt may be for rent in advance or for rent partly past due and partly in advance or for rent altogether past due. There is no explanation given of it and as rent was payable in advance I do not see why I should treat this as irrefutable evidence that it was for past due rent and that the lease was therefore voidable.

Judgment.

In *Brewer* v. *Broadwood*, 22 C.D. 105, the facts were very different from mere delay in payment of rent. In that case there was a building lease voidable at the date of the agreement because the conditions in which it was to be granted were in default. There it was asked, was the plaintiff in a better position on the day the defendant repudiated the contract? It was shown in evidence that at the date of repudiation there existed only a conditional waiver of the right to avoid the term and it was held that the purchaser had a right to avoid the contract and the case of *Forrer* v. *Nash*, 35 Beav. 171 was followed where the Master of the Rolls said that where a person sells property which he is neither able to convey himself nor has power to compel a

conveyance of from any other person, the purchaser as soon as he finds this out may repudiate.

The plaintiff at the date of this contract down to the time fixed for completion had power to compel the owner of the freehold to convey. The defendant is a solicitor and prepared the agreement of purchase; he knew what he was buying and what the plaintiffs were selling and he knew the title and expressed himself satisfied with it. If it hadn't been for the depreciation from which all landed property is suffering we should not have heard of this case.

Judgment.

With reference to the allegation that Mason was agent for Nicholles it is clear from the evidence of Nicholles himself that Mason was acting for him in the matter, but it is not clear that he, Mason, personally had no interest in the transaction. As the contract is drawn Mason is liable. In his defence he asserts he was agent for Nicholles but the agreement is not so framed and Mason cannot escape from the liability he has incurred.

As regards Nicholles he admits that Mason was a trustee for him. I therefore am of opinion that the plaintiffs are entitled to judgment for specific performance of the agreement as against Mason, subject to a reference as to title. And I reserve further directions and all costs and interest until the third party action is disposed of.

Judgment accordingly.

CREASE, J.

FULL COURT.

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Jan. 21.

CROASDAILE v. HALL.

CROASDAILE v. HALL.

Contract—Illusory promise—Agreement to pay for services such sum as W. H. shall consider right—Release—Misdirection—Motion for new trial—Setting out grounds.

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Plaintiff had performed services for a mining company for over three years when the following resolution was passed: "Resolved and carried unanimously that Mr. H. E. Croasdaile be requested to accompany Messrs. Hall and McDonald to England and assist them in negotiating the sale of the mines, and that he be paid for his expenses $70 by each of the aforesaid 13 interests, and such further sum as Mr. Winslow Hall shall consider right, upon the sale of the mines, in consideration of his general services to the partnership." The plaintiff proceeded to England accordingly, and in the result a sale of the mines was effected. W. H. declined to allow plaintiff anything, and the defendants refused to pay him anything for his services either before or consequent on the resolution. At the trial the jury found a verdict, and judgment was entered for the plaintiff for $1,350.00 for the former and $4,350.00 for the latter services.

On appeal to the Full Court, MCCREIGHT, WALKEM and DRAKE, J.J.:

Held (1.) That the resolution affected subsequent services only, and that it contained no contract upon which the plaintiff could recover anything.

(2.) Its acceptance constituted an agreement by the plaintiff to abide by the decision of W. H. to the exclusion of any right of action for the subsequent services upon a *quantum meruit*, and that the judgment as to the $4,350.00 should be set aside.

(3.) A vested right of action can only be discharged by payment, release under seal, or accord and satisfaction, and, as plaintiff had at the date of the resolution such a right in respect of his prior services, the resolution could not be construed as affecting it, and that the judgment for $1,300.00 should stand.

Per DRAKE and WALKEM, J.J.: On motion for a new trial for misdirection, the objections must be specified.

Statement.

APPEAL by the defendants to the Full Court from a judgment for the plaintiff entered by Mr. Justice CREASE at the trial, and motion by them in the Divisional Court for a new trial on the ground of misdirection.

Both motions were argued before MCCREIGHT, WALKEM

and DRAKE, J.J., sitting both as a Full Court and Divisional Court, on 13th December, 1894. The facts fully appear from the judgment.

The misdirection complained of was that the learned trial Judge told the jury that: "It was the duty of Winslow Hall to name an amount, and not having done so the plaintiff has left it to you to say what is reasonable."

Charles Wilson, Q.C., for defendants, referred to *DeCosmos* v. *The Queen*, 1 B.C. Pt. 1, 26; *Roberts* v. *Smith*, 4 H. & N. 315; *Taylor* v. *Brewer*, 1 M. & S. 290; *The Queen* v. *Doutre*, 6 S.C.R. STRONG, J., at p. 394.

Theodore Davie, A.G., for the plaintiff: This is not a contract to accept such sum as the defendants should think right, and is not governed by the authorities cited *contra*.

The resolution was not intended and cannot be construed as in any way a substitute for the plaintiff's right of action upon *quantum meruit* for his anterior services, as it is not an accord and satisfaction, and there is no release, but the fact that it provides that the plaintiff is to get "such further sum as Mr. Winslow Hall shall think right" * * * "in consideration of his general services to the partnership," shows that the promise was not intended to rest entirely on the subsequent consideration, and that it was intended as a substantial and enforceable agreement. The question whether the plaintiff is to be paid or not is not left to the defendants. Where the whole question of payment is left by the contract in the hands of one of the parties to it, the other is necessarily at his mercy. and must rely on his honour and generosity, as it is, *ex necessitate rei*, impossible for the Court to contemplate, or deal with, one of the parties to a contract as an arbitrator or referee. Here a third party is nominated who is to accompany the plaintiff, survey his work, consider the matter, and say, in view of its character and result, how much he "considers right" that the plaintiff should receive. All this presupposes the

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honesty and fairness of Winslow Hall. No questions of honour and generosity in defendants are left open, as the matter is not left to them.

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That Winslow Hall was a member of the Company is immaterial. His position is not distinguishable in principle from that of a surveyor named in the contract who is to give a certificate of value of work done. Where the right to receive payment is made dependent upon the approval of another, and that approval is fraudulently withheld, the Court will give relief: *Addison on Contracts*, 9th Ed. p. 804; *Scott* v. *Liverpool Corporation*, 25 L.J. Ch. 230; *Morgan* v. *Birnie*, 9 Bing 672; *Mayor, &c., of Salford* v. *Ackers*, 16 L.J. Ex. 6; *Moffat* v. *Dickson*, 13 C.B. 543; *Milene* v. *Field*, 5 Ex. 829.

Argument.
The question is whether the payment of the plaintiff for the subsequent services was or was not to be optional. There is an absolute contract that he is to be paid for them, the sum only being left open to be considered. The words in the contract: "That he be paid" equally govern the words "for his expenses $70.00" and the following words: "And such further sum as Mr. W. H. shall consider right." There is no dispute, but that the meaning is that the expenses were to be paid, and yet the only difference between the two cases is that the sum to be paid is arrived at in one case and not in the other. Suppose eliminating the words fixing the $70.00 a share for expenses, that the contract read: "That he be paid his expenses and such further sum," &c., could it be said that it was an illusory contract as to either branch?

Judgment of McCREIGHT, J.
McCREIGHT, J.: The liability of the defendants to the plaintiff was treated at the trial, and I think correctly so, as divisible into two parts, *viz.*: (1) That which preceded the Colville resolution of June 2, 1892. (2) The subsequent part involved in the going to England and sale of the mine. With respect to the former, it must be remembered

that the plaintiff, according to the jury's finding, had a right of action against the defendants for $1,350.00 for services rendered. This vested right of action could only be met by pleadings and defences which the facts of this case would not warrant, that is, payment, release or accord and satisfaction.

It was hardly suggested that there was payment. In truth the defence was a denial of agency on the part of the plaintiff for the defendants, and there was merely an agency for Day and Atkins.

This the jury, by their verdict of $1,350.00, have distinctly found in favour of the plaintiff.

Another contention of the defendants was that these antecedent services were included in the resolution of June 2, 1892, and the evidence seems to show that they were, but it seems to have been forgotten that if this defence amounted to a bar, it must be as a defence of accord and satisfaction. Now it is clear from the evidence that Croasdaile did not accept a bare resolution leaving him at the mercy of W. Hall, a resolution which might be difficult to sue on, in satisfaction of a claim which he estimated at $2,000.00 for past services and the jury at $1,350.00, and his evidence on this point was not in the least displaced. He says: "It is by no means on that resolution alone that I bring my action. Had there been no resolution, I should have brought the action all the same." Again he is asked: "Were you perfectly satisfied at that time, *i.e.*, at the time of the Colville resolution of June, 1892, to leave Mr. Hall to fix whatever sum he considered right for your services?" Ans. "I was satisfied on the understanding that he was obliged to pay me a fair remuneration." Of course Mr. Croasdaile was to be satisfied as to whether there was a fair remuneration or not. He appears in truth to have had before his mind with more distinctness than one would expect in a man not a lawyer the distinction between cases in which the plaintiff has agreed to accept the promise of

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the defendant in satisfaction, and those in which he has agreed to accept the performance of such promise in satisfaction, the rule being in the latter case, there shall be no satisfaction without performance, whilst in the former, if the promise be not performed, the plaintiff's only remedy is by action for the breach thereof, and he has no right to recur to the original demand. I have taken this passage from *Chitty on Contracts*, 12th Edit. p. 758, and I may add by way of illustration that if W. Hall had offered the plaintiff a sum, say of $1,000.00, for the services up to June, 1892, the plaintiff might have accepted it in satisfaction of such claim, or he might, as the plaintiff did in *Day* v. *McLea*, 22 Q.B.D. 610 (C.A.), receive the said sum and send a receipt on account demanding a further sum, and in conformity with that case it might be held that the mere keeping of the $1,000.00 was not conclusive in law that it was taken in accord and satisfaction, and that the plaintiff was not bound to keep it on the terms on which it was sent, or to return it, but that the keeping of the cheque was only evidence of accord and satisfaction, and that it was a question of fact to be determined according to the circumstances whether or not it was taken in satisfaction. See *Chitty on Contracts*, 12th Edit. 757–8; *Hall* v. *Flockton*, 16 Q.B. 1039, where it was held it must always appear that the accord was accepted in satisfaction.

Judgment of McCREIGHT, J.

With respect to so much of the plaintiff's claim as relates to the going to England by the plaintiff and the procuring the sale, I cannot, having regard to paragraph 3 of the resolution, see that he is entitled to anything more than what W. Hall considered right. He never had any vested right of action in respect of such services except under and subject to the resolution by which it seems to me that he agrees to leave W. Hall to be the sole arbitrator to fix the value of those services, and that by that agreement he must stand. What were the reasons which induced him to rely on such a precarious arrangement is a matter with which

we have but little concern.

The defendants advanced him nearly $1,000.00, though I gather they could not well afford it, and his assistance might have proved of little value, or as I gather was actually the case, might be the main cause of their success in effecting a sale, but having perused the cases referred to of *Taylor* v. *Brewer*, 1 M. & S. 290, *Bryant* v. *Flight*, 5 M. & W. 114, *Roberts* v. *Smith*, 4 H. & N. 315, referred to by counsel, and endeavouring to act in conformity with the principles deducible therefrom, I think the plaintiff must abide by the award of W. Hall.

It must be remembered that Hall and McDonald held the power of attorney to sell, and that the plaintiff was to "assist in negotiating the sale" and to receive such further sum as W. Hall should consider right upon the sale of the mines, in consideration of his general services to the partnership. The plaintiff himself framed the resolution, and he is fortunate in being able to retain the $1,350.00 for services rendered before the Colville resolution. I regret, so far as it is right to express regret, that the Court can give him no more, for I gather his services were valuable, and the defendants seem to have behaved, to say the least, without any fine scruples. But the disposition of the Courts since the decision of the cases above referred to has been to confine people to their agreements even more strictly than formerly. I think there is no ground for a new trial, but that the judgment must be reduced to the sum of $1,350.00 with costs in the Court below; no costs here, as appellant partly succeeds and partly fails. The respondent must pay the costs of the second argument. As the motion for a new trial was argued along with the appeal, any costs thereby incurred are to be paid to the plaintiff.

Judgment of McCREIGHT, J.

WALKEM, J.: This action was brought by the plaintiff in his character of an agent to recover $15,000 for general

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services to the defendants as part owners of a group of mines known as the "Silver King." The services may be classified as services rendered in this Province and the adjoining State of Washington during a period of three years and a half, ending in June, 1892, and as services in England during twelve months, ending in July, 1893. At the trial these distinctive periods were kept in view and a separate award was made by the jury in respect of the first period of $1,350, in lieu of the plaintiff's claim of $2,000, and in respect of the second period of $4,350 in lieu of his claim of $13,000.

The present litigation has arisen in consequence of the different interpretations placed by the plaintiff on the one hand and the defendants on the other upon the following resolution, which was passed at a meeting of the defendants at which the plaintiff was present in July, 1892:

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"(3rd.) Resolved and carried unanimously, that Mr. H. E. Croasdaile be requested to accompany Messrs. Hall and McDonald to England and assist them in negotiating the sale of the mines, and that he be paid for his expenses $70.00 by each of the aforesaid thirteen interests, and such further sum as Mr. Winslow Hall shall consider right, upon the sale of the mines, in consideration of his general services to the partnership."

Acting upon the resolution, the plaintiff accepted and received the $70.00 per interest provided for his expenses and proceeded to England, where he assisted Hall and McDonald as agreed upon. At the time of the passing of the resolution all parties seem to have been of opinion that he would not be detained there more than two months, whereas, as it turned out, he was detained twelve. It was also stated to us by his counsel, and not denied, that according to evidence given at the trial, which does not appear in the appeal book, namely, that of two witnesses, Sir Joseph Trutch and Mr. Day, the sale of the mine was almost wholly due to the plaintiff's influence and business ability, and to

the active part that he took in the negotiations that led to it. After the sale, Winslow Hall refused to pay the plaintiff for any of his services, hence the present action. It is not denied that the term "general services" includes services performed before and after the passing of the resolution; and there is no reason why those services should not be separately dealt with, as was done at the trial when considering the question of remuneration.

Judgment having been given for the whole amount of the verdict, the defendants now appeal on the ground that the question of the plaintiff's remuneration having, by the terms of the resolution, been left by the parties to the decision of Winslow Hall, the action is not maintainable. A motion for a new trial for alleged misdirection has also been made; but as the rule requiring the instances of misdirection to be stated in the notice of motion has not been complied with, the motion must be refused with costs. Apart from this, as pointed out by the Court at the hearing, the motion could not be allowed for want of merits.

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With respect to the first branch of the case, *viz.*, the plaintiff's claim for services performed between January, 1889, and July, 1892, that is, for the period preceding the resolution, I agree with my brother McCREIGHT for the reasons he has just given, that as the plaintiff had acquired a vested right to be paid, nothing short of payment or a valid release would discharge the defendant. Hence, the resolution in itself, although assented to by him, could not, fortunately for him, have the effect of divesting him of that right. The finding of the jury for $1,350.00 must therefore stand.

As to the second finding of $4,350.00, for services performed in England, it is obvious that the same reasons for supporting it do not exist; for when the resolution was passed it interfered with no vested right, for none had been acquired as no reward had been earned. It was quite competent, therefore, for the parties to agree that the question

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of remuneration for prospective or contemplated services should be left, as was done, to Hall; and such an agreement implies that it was intended to be left to him and not, for instance, to a jury. The plaintiff, it is true, states that he so agreed on the understanding that he would be entitled to a fair remuneration and that he did not rely on the resolution alone as the foundation of his claim. But the fact remains that both he and the defendants acted upon the resolution, and must, therefore be taken to have adopted it. In support of the finding, the plaintiff's counsel cited: *Bryant* v. *Flight*, 5 M. & W. 114; but that case would appear to have been overruled twenty years later by *Roberts* v. *Smith*, 4 H. & N. 315; and such is the opinion expressed by Mr. Justice STRONG, now Chief Justice of Canada, in his judgment in *Doutre* v. *Regina*, 6 S.C.R. at p. 397. *Roberts* v. *Smith* was a case where, for instance, A and B agreed that B should perform certain services, and that in one event A should pay B a certain salary, but that in another event A should pay B whatever A might think reasonable. That other event not having happened, the Court held that there was no contract which B could enforce. In commenting on the case, SIR FREDERICK POLLOCK observes at p. 43 of his work on contracts, 3rd Ed.: "Services, indeed, had been rendered by B, and of the sort for which people usually are paid and expect to be paid; so that in the absence of express agreement there would have been a good cause of action for reasonable reward." It follows from this that if the resolution had not contained the stipulation that the remuneration was to be such as Hall should "consider right" the plaintiff might have been successful in upholding the finding for $4,350.00. In *Taylor* v. *Brewer*, 1 M. & S. 290, a person did certain work for a committee under a resolution "that any services to be rendered by him should be taken into consideration and such remuneration should be made as should be deemed right," and it was held that he could not recover for such work as the resolution imported that

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the "committee were to judge whether any remuneration had been earned." See also *Chitty on Contracts*. The promise there relied upon, like the promise in *Roberts* v. *Smith*, and for that matter like the promise in the present case, was an illusory promise, and hence a promise incapable of enforcement. Effect, therefore, cannot be given to the finding for $4,350.00, and accordingly the judgment given for the plaintiff must be reduced by that amount.

It was contended on behalf of the plaintiff that, as the resolution left the question of remuneration for his general services, or, in other words, for all his services, to the decision of Hall, the services for the two periods stood on the same footing, and that the second finding should, like the first, be upheld, especially as the plaintiff understood that he was to be fairly remunerated; but such an argument cuts both ways, for it might be urged, as indeed was done, that the first finding should share the same fate as the second. With respect to the services antecedent to the resolution, no express agreement as to remuneration was made at the outset, but there was in law an implied agreement that they should be paid for, and that agreement was the foundation of the plaintiff's vested right to a reasonable reward, which Hall having refused to name, the jury settled at $1,350.00. On the other hand, with respect to the services to be performed and that were performed subsequent to the resolution, an express agreement as to remuneration was by the terms of that resolution made at the outset, namely, that Hall (and not a jury) should determine what, if anything, the plaintiff was entitled to. Effect could be given to such an agreement because, as I have said, no vested right had been acquired, for no reward or compensation had been earned.

There has been a growing inclination on the part of the Courts in England to keep people to the strict letter of their agreements, even though hardship should be the result. *Jones* v. *St. John's College*, L.R. 6 Q.B. 115 is a notable

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example of this.

In view of the evidence in the present case, it would appear that the plaintiff has been harshly treated by the defendants. Their line of defence throughout has been of a highly technical character and one that a scrupulous man would, under similar circumstances, hesitate to take advantage of, and especially so after a jury had expressed the opinion which the present jury have expressed, of the value of the plaintiff's services.

Judgment of WALKEM, J.

As the appeal has only been partially successful, there will be no order as to costs. The plaintiff's costs consequent on the dismissal of the motion for a new trial may be taken as balancing the costs occasioned to the defendants by the further hearing of the appeal, which was granted at the instance of the plaintiff's counsel.

DRAKE, J.: The appeal in this case is against the judgment rendered in pursuance of a verdict of the jury, and there is also a motion for a new trial.

On the first hearing, for the case was twice argued, the only ground discussed was that the agreement tried on, was an illusory contract, and such being the case the plaintiff was not entitled to recover.

Judgment of DRAKE, J.

The plaintiff, it appeared, had acted for the defendants in various transactions protecting their interests prior to the date of the resolution of 19th June, 1892, and in respect of these prior services the jury have found a verdict of $1,350.00, and in respect of services connected with the sale of the mines, $4,350.00.

The resolution on which this action is based in the first place appointed Winslow Hall and John McDonald attorneys to negotiate a sale of the mines known as Silver King and others, and it further specified the amount which should be paid to McDonald on the sale of the mine for his services.

The resolution proceeds as follows: That the plaintiff

be requested to accompany Messrs. Hall and McDonald to England and assist them in negotiating the sale of the mines and that he be paid for his expenses $70 by each of the 13 interests, and such further sum as Mr. Winslow Hall shall consider right, upon the sale of the mines, in consideration of his general services to the partnership.

This resolution is open to more than one construction. One view is that he is only to be paid for his past services, if the mine is sold, and then only such a sum as Mr. W. Hall shall name.

The other is that any service he renders the partnership whether before or after the date of the resolution, are to be valued by Mr. W. Hall and paid if the mine is sold. Both parties contend that the resolution refers to both past and future services, but the defendant says that whether it does or not the contract is illusory and dependent on the will of Winslow Hall; and as Winslow Hall refused to make any further allowance the plaintiff can recover nothing.

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The plaintiff says that the very fact that past services are included brings the case within *Bryant* v. *Flight*, 5 M. & W., 114, which was an action brought on an agreement worded as follows: "I hereby agree to enter your service as a weekly manager commencing next Monday, and the amount of payment I am to receive I leave entirely for you to determine." The majority of the Court held that a contract to pay something was deducible from the paper itself, but Baron PARKE held it a merely honorary obligation undistinguishable from *Taylor* v. *Brewer*, 1 M. & S. 290. In the subsequent case of *Roberts* v. *Smith*, 4 H. & N. 315, it was decided that where future remuneration was left to the defendant to decide there was no contract upon which the plaintiff could recover, and MARTIN, B. says that in his opinion if called upon to decide between *Taylor* and *Brewer*, and *Bryant* and *Flight*, he should say that *Taylor* and *Brewer* was rightly decided, and I cannot, therefore, say that as regards future services the plaintiff has succeeded

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in showing that he is entitled to hold his verdict. He has accepted Mr. W. Hall as the person to decide his remuneration, and Mr. Hall refuses to give anything. This may be a liability in honor, but it is not a liability by contract. With regard to past services the plaintiff had a claim and unless this resolution can be treated as accord and satisfaction, I do not think he is ousted from maintaining his right to some payment. He did not sign the resolution. A substituted agreement may be accepted as accord and satisfaction of an existing cause of action, the new promise only and not the performance being taken in satisfaction. See *Flockton* v. *Hall*, 14 Q.B. 380. But to make the new promise a discharge of the original debt it must be a promise binding on both and the original debt must be discharged.

I do not think in this case that there is any accord and satisfaction of the original debt, and I therefore am of opinion that the plaintiff is entitled to retain his verdict for $1,350 for past services.

Judgment of DRAKE, J.

With respect to the motion for a new trial I think it should be refused. The motion does not state the grounds on which it is asked. It states for misdirection, without in any way specifying the misdirection relied on. See *Rule* 433 and *Murfett* v. *Smith*, 12 P.D. 116, and *Pfeiffer* v. *Midland Railway Co.*—18 Q.B.D., 243.

The other grounds are error in refusing to put questions to the jury submitted by defendant's counsel. On reference to the appeal book I think the jury were practically directed as requested, and the refusal to leave to the jury the construction of the resolution was right and proper. Having gone carefully through the evidence in support of the plaintiff's case I cannot help feeling that the defendants succeeded in obtaining the plaintiff's services for practically nothing.

I think the costs of the second argument should be a complete set-off against the costs of the motion for new trial,

and, therefore, as costs on either side of appeal or application for new trial. Plaintiff is entitled to his costs in the Court below.

Appeal allowed in part, and judgment reduced to $1,350.00.

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ALEXANDER GILMOUR v. ELLEN GILMOUR.
JOHN A. GILMOUR, (Claimant.)

DRAKE, J.
[In Chambers.]
1894.
Sept. 6.
GILMOUR
v.
GILMOUR

Execution Act—Claim of priority for wages.

Plaintiff having obtained judgment and execution against defendant as administratrix of the estate of John Gilmour, deceased, John A. Gilmour claimed under C.S.B.C. Cap. 42, Sec. 21, to be paid the amount of wages due to him by the administratrix as manager of her farm, part of the estate of the intestate, in priority to the execution creditor.

Held, that the act only applies to claims for wages against the execution debtor and that the administratrix, and not the estate, was responsible for the wages.

SUMMONS under C.S.B.C. 1888, Cap. 42, Sec. 21, for the sheriff to pay to John A. Gilmour, the claimant, $350 due to him for wages, in priority to the claim of the execution creditor. The plaintiff's judgment was against the defendant as the administratrix of the estate of John Gilmour, in respect of a debt due by him. The claimants affidavit stated that the wages claimed by him were due under a contract of hiring of himself by the administratrix as manager of a farm, the property of the estate. Statement.

J. A. Aikman for the summons.

S. Perry Mills, contra.

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DRAKE, J.: The claim for wages and the judgment are not against the defendant in the same right. The execution is satisfiable *de bonis testatoris*. The wages constitute a personal debt of the testatrix.

Summons dismissed with costs.

DIVISIONAL COURT.
1894.
May 11.

HARVEY
v.
NEW WEST-
MINSTER

HARVEY v. CITY OF NEW WESTMINSTER.

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

The adjournment at the trial of a hearing, by consent of counsel, is equivalent to a countermand of the notice of trial, and if the plaintiff does not proceed in due course, the defendant may thereafter either himself give notice of trial, or apply to dismiss for want of prosecution.

Statement.

APPEAL to the Divisional Court from an order of BOLE Co. J., sitting as a local Judge of the Supreme Court, that the action be dismissed unless the plaintiff proceed. The appeal was heard on the 17th day of April, 1894.

A. P. Luxton for the appellant.

J. W. McColl for the respondents.

The judgment of the Court, CREASE and DRAKE, J.J., from which the facts appear, was delivered by DRAKE, J., on May 11th, 1894.

Judgment.

DRAKE, J.: The plaintiff appeals from an order of Judge BOLE dated the 10th April, 1894, directing that unless the plaintiff proceed to trial within one month from the 10th April, the action be dismissed with costs. The plaintiff gave notice of trial and set the action down for hearing on the 31st January, 1893, and did nothing further. The defendants on the 2nd April, 1894, took out a summons to

dismiss for want of prosecution and on that summons the order appealed against was made. The Court required evidence of what took place on the day fixed for the trial. Mr. Jenns says that it was agreed between Mr. Wilson and himself that the trial should be adjourned pending a decision in a similar case. This is equivalent to a countermand of the notice of trial by consent. After countermand the position of the cause is the same as if no notice of trial had been given and then under Rule 340 the defendant may either give notice of trial or apply to dismiss for want of prosecution. The plaintiff contends that after notice of trial given, and the action set down, the defendant is barred from taking any proceedings to get rid of the action. Such a contention will require strong authority to support it. The postponment of a trial *sine die* puts an end to the notice of trial and in order to bring on the action for trial, a fresh notice must be given and cause set down. The appeal is dismissed with costs. The same course to be taken with the appeal of Suter and the same defendants.

CREASE, J., concurred.

Appeal dismissed with costs.

DRAKE, J.

COUNTY COURT

1894.

Dec. 6.

LINDELL v. CORPORATION OF THE CITY OF VICTORIA.

Negligence—Municipal Corporation—Nonfeasance—Liability for non-repair of highway—Knowledge of defect—Municipal Act, 1892, Sec. 104, Sub-sec. 90.

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Corporations undertaking to manage highways are not insurers against latent defects, they are only bound to take reasonable care.

No action could be maintained at common law for an injury arising from the non-repair of a highway, but a duty may be cast by statute upon a corporation to repair, and if that is clearly done it will be answerable in an action of negligence.

The Municipal Act, 1892, B.C. Sec. 104, Sub-sec. 90, gave the defendant corporation power to raise money by way of road tax, and to pass by-laws dealing with roads, streets and bridges.

Held, that no duty to keep the streets in repair was thereby cast on defendants.

ACTION by plaintiff, a labourer, against the Corporation of the City of Victoria for $500 damages for personal injuries caused by a defective sidewalk in the City of Victoria, which said sidewalk, the plaintiff alleged, the defendant corporation negligently omitted to keep in repair. The

Statement. plaintiff, a labourer, stepped from the road on to the sidewalk, and trod on a loose board which struck him in the face, causing the injuries complained of, whereby he was incapacitated from work for a space of three weeks. The plaintiff swore that he did not know the plank was loose, and produced two witnesses who swore that they had noticed the planks were loose for 3 or 4 weeks. The defendant corporation proved that the sidewalk inspector had been over the place 4 days before the accident to fix any loose planks, and his deputy 10 days before, that the planks had been forcibly pried up, and that they had received no notice that the planks were loose.

Argument. *A. L. Belyea* for the plaintiff. There is no express statutory obligation on the corporation to repair, but as the legislature

has clothed it with authority to do so, and provided the means of raising the funds for so doing, an obligation is cast upon it to keep the streets in repair, and it is liable in an action for negligence for injuries arising out of the omission to do so.

C. J. Prior (Eberts & Taylor), for the corporation: There being no statutory obligation on city to repair streets it is not liable at the suit of a private individual, for acts of nonfeasance. *Municipality of Pictou* v. *Geldert*, The Reports Vol. 1, 1893, 447. There was no negligence as there was no knowledge nor means of knowledge. The mere existence on a highway of an obstruction is not enough to establish negligence on the part of the city. *Castor* v. *Corporation of Uxbridge*, 39 U.C.Q.B. 126; *Boyle* v. *Corporation of Dundas*, 25 U.C.C.P. 428. Argument.

Where the obstruction is the work of a wrong doer, notice of it should be brought home to corporation, or the defect be so notorious as to make it reasonable to fix the corporation with notice of it.

DRAKE, J.: The case of the plaintiff is that he stepped on to a sidewalk from the street, and the board being loose it sprung up and struck him a violent blow in the face and incapacitated him from work for three weeks. On his behalf other witnesses were called who said that planks in this particular sidewalk had been loose for several weeks before the day of the accident, but whether these were the same loose planks that caused the injury is uncertain, no notice was given to the corporation of the want of repair until after the accident, when the necessary repairs were made. Judgment.

The Corporation's employees engaged on sidewalks stated that four days before the accident all loose planks were nailed and that a general supervision was held over the sidewalks every two or three weeks, and from examination of the loose planks, it was apparent that they had been pried

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off and not become loose from ordinary wear and tear.

The conclusion I arrived at from the evidence was that the Corporation had not been negligent in their supervision and repair. It is impossible for the Corporation to ascertain every little defect as soon as it arises, if they neglect after knowledge to repair them they may become liable as for mis-feasance, but in my opinion the question of responsibility rests on a broader question.

Is the Municipality liable to be sued by a private individual for damages, for injury arising from mere non-feasance?

By the common law public bodies charged with the duty of keeping public roads in repair are liable by indictment for breach of duty but not liable at the suit of an individual.

Judgment.

I fail to find in our Municipal Act any language indicating an intention of the Legislature to vary the Common Law and without express language imposing on the Corporation a liability for non-repair of streets I do not think any action at the suit of a private person can be maintained.

Corporations are bound by acts of mis-feasance as distinguished from acts of non-feasance. See the *Bathurst case*, 4 Appeal cases, 256, distinguished in the case of the *Municipality of Pictou* v. *Geldert*, 1893 Appeal cases 524, where the law is clearly laid down.

I therefore give judgment for the defendants with costs.

Judgment for defendants.

REGINA v. MEE WAH.

BEGBIE, C.J.

COUNTY COURT

1886.

Feb. 3.

REGINA
v.
MEE WAH

Constitutional law—B.N.A. Act, Sec. 92, s.s. 9—Taxation—Municipal license fees—Direct or indirect tax—Construction of statute—Words ejusdem generis.

The Municipal Act, 1885, Sec. 10, extended the powers of municipalities so as to include "licensing and regulating wash-houses and laundries," and Sec. 11 enacts that Municipalities may "hereafter levy and collect from every person who keeps or carries on a public wash-house or laundry, such sum as shall be fixed on by by-law, not exceeding $75.00 for every 6 months."

On appeal from a conviction for carrying on a public laundry without a license.

Held, (1) Taxation by means of license fees, and the tax in question, is indirect and not direct taxation.

(2) All indirect taxation, except that authorized by Sec. 92, s.s. 9. B.N.A. Act, providing "in each province the legislature may exclusively make laws in relation to (9) shop, tavern, saloon, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes" is *ultra vires* of the Provincial Legislature.

(3) The words "and other licenses" only included industries *ejusdem generis* with those specified, and do not include a wash-house.

(4) The most reasonable rule to adopt to ascertain whether a certain matter or thing is within the meaning of a statute as being *ejusdem generis* with things specified therein "and others," is to look to the object or mischief aimed at by the statute. All similar things that come within that object, though not in the abstract *ejusdem generis* are so for the purposes of the statute.

(5) If it appears that a tax is not *bona fide* within the purpose provided for, but is imposed with the real purpose of discriminating against a class, it is not within the justification of the enabling statute, and, on the facts, the tax in question was intended not for the purpose of raising a revenue, but as a restriction on the Chinese.

Statement.

APPEAL from a conviction for carrying on a public laundry without a license and payment of the license fee under a by-law of the Corporation of the City of Victoria based on Sec. 11 of Municipal Amendment Act, 1885.

The facts and arguments of counsel fully appear from the judgment.

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COUNTY COURT

1886.

Feb. 4.

REGINA v. MEE WAH

A. N. Richards, Q.C., for the appeal.

J. S. Yates, contra.

BEGBIE, C.J.: This is an appeal from a conviction for carrying on a public laundry without a license and payment of the license fee under a recent by-law. It was not denied by the appellant that the by-law is authorized by the recent Provincial Act, the only question is whether that Provincial Act, viz.: clause 11 of the Municipal Amendment Act, 1885, is constitutional within the meaning of the British North America Act. Section 10 of the Provincial Act extends the powers of the Corporation so as expressly to include "licensing and regulating wash-houses and laundries," and Section 11, referring to the existing expressed powers of Corporations to issue other licenses and collect fees or taxes in respect thereof, expressly adds this, that they may hereafter levy and collect "from every person who keeps or carries on a public wash-house or laundry such sum as shall be fixed by by-law not exceeding $75.00 for every 6 months." This is the clause impugned.

Judgment.

The clause in the B.N.A. Act upon which alone this Section of the Provincial Act is based is Section 92. "In each province the Legislature may exclusively make laws in relation to * * * (sub-section 9) shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for Provincial, local or Municipal purposes. Sub-section 16. "Generally all matters of a merely local or private nature in the Province" does not, I think, apply to taxation.

The only other sub-section which confers on the Provincial Legislature any power to tax is sub-section 2 which deals with direct taxation within the Province in order "to the raising of a revenue for Provincial purposes." But neither can this sub-section have any application here. 1st. It deals only with direct taxes and this taxation by means of license fee is indirect, not direct taxation. *Severn's case*, 2 S.C. Can. R. pp. 70, 90, 92, 113, 123, 137. 2nd. It deals only

with taxation within, *i.e.* generally, throughout the Province, and these laundry license fees are only to be levied within Municipalities, and may vary in different parts of the Province. 3rd. It only authorizes taxes for Provincial revenue and these license fees are to fall into the Municipal revenue. The consideration of sub-section 2, therefore, merely emphasizes the proposition (according to the *Attorney-General of Quebec* v. *The Queen Assurance Company*, 3 L.R. App. Cas. 1090) that all indirect taxation for Municipal purposes except what is authorized by sub-section 9 is illegal.

The first objection taken by Mr. *Richards* (viz.) that the clause is unconstitutional merely and broadly because it imposes an indirect tax seems to be too general. Such taxation will be valid enough, if the enactment comes fairly within the meaning of sub-section 9, nor can the next objection be fatal (viz.) the objection merely and broadly that it is in restraint of trade. Whether washing be a trade or a mere industry will presently be considered. Unquestionably all taxation on buying and selling, all interference with labour, may and perhaps must to some extent restrain trade, yet some instances of taxation of trades, and some regulations of labour, are undoubtedly within the power of the Provincial Legislature. Besides, this enactment, and consequent by-law, do not absolutely restrain, *i.e.* forbid this industry. The laundryman may remove beyond the city limits and quite evade the tax.

Judgment.

Setting aside therefore these broad objections to the tax, as too general, the questions are two, (viz.)

1st. Does this license come within the words "shop, saloon, tavern, auctioneer and other license?" and,

2nd. Is the tax imposed in order to raise a Municipal revenue, or is it imposed for any other purpose? *e.g.* for restriction or suppression, total or partial.

The answer to the first question depends on the force of the words "other licenses." Whether that means other

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licenses on matters of the same kind as the four enumerated, according to the general rule of construction, or whether it means licenses for the doing or permitting any other thing whatever. It is said by a learned text writer, *Sir P. Maxwell on Statutes*, p. 303, that the rule restraining the generality of the word "other" to matters *ejusdem generis* only applies where the things actually named are themselves all of the same nature; but that where the things named are of different natures then the phrase "other things or articles" will extend to all objects, though quite different from those named. Citing for this among other cases *Regina* v. *Payne* 1 C.C.R. 27. There a statute made it penal to convey to a prisoner, in order to facilitate his escape, "any mask, disguise, letter or other article or thing;" and it was held that a crowbar was within the Act. So in *Young* v. *Grattridge*, 4 L.R.Q.B. 166, a Health Act empowered a medical officer to enter and inspect "any slaughter-house, shop, building, market or other place" and it was held that a butcher's yard which contained slaughtered cattle was within the Statute, *Regina* v. *Edmundson*, 2 E. & E. 77, is to a similar effect. But these decisions do not for their support apparently require the principle enunciated by Maxwell, nor was any such principle alluded to in any of them. And though his statement deserves great respect being cited approvingly by a very learned Judge in *Severn's case*, yet it was not followed by the other four Judges, nor does it appear to be founded on any other judicial dictum. And indeed it is submitted that such a construction of the doctrine of *ejusdem generis* is in some sense self-destructive.

Judgment.

If the two or more things actually named are identical as "air, atmosphere, or other gas;" "dagger, poniard or other weapon," then the word "other" is to be confined to other gases strictly of the same nature, it does not extend the phrase at all and if the two things named are not identical as "oil, vinegar or other fluids," the word "other" would extend to all other fluids whatever. The doctrine of

ejusdem generis which has occupied many Courts and many judgments and which therefore does really exist, would run the risk of being annihilated. A more reasonable rule would seem to be to look at the object or the mischief aimed at by the Statute or other instrument; all matters that come within that are *ejusdem generis* so far as the Statute is concerned. Thus in *Gayne's case*, a crow bar and a letter and a mask are no doubt extremely different in texture, weight and appearance. No painter or chemist would call them *ejusdem generis*; but they are all strictly *ejusdem generis* so far as that they are instruments calculated to facilitate a prisoner's escape. So in *Young's case*, a butcher's yard is strictly *ejusdem generis* with his shop and his slaughter house so far as regards the mischief of preparing unwholesome food. But a watchmaker's or a tailor's shop would not be *ejusdem generis* with a butcher's shop, though all are called shops; and meat in a tailor's shop would probably not have been liable to be seized under Statute in that instance.

Judgment.

If there were no matters or occupations having any analogy or attribute (except taxability) common to these four named instances in sub-section 9, the inference would be very strong that "other licenses" extended to every possible matter. But as was pointed out by Mr. Justice WILSON in *Regina* v. *Taylor*, 36 U.C.Q.B. 183, cited and approved in *Severn* v. *Reginam*, there are many analogous matters.

Restaurants and lodging houses bear no distant resemblance to taverns; coffee shops to saloons (though these again are utterly distinct from a teetotaler's point of view) and there are coupled together in the Insolvency Act, Canada, 1875, Sec. 1, brokers and commission agents to auctioneers, etc.

There are two classes of Statutes in which words are always strictly construed in favour of the party charged, even at the suit of the Crown; Statutes which create offences and Statutes which impose taxation.

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The present Municipal Amendment Act, 1885, partakes of both natures, and the ordinary rule must I think be observed, viz., the subjects of the "other licenses" mentioned in sub-section 9 must have at least somewhat besides taxability (from which quality no Act or thing is exempt) in common with "shops, taverns, saloons or auctioneers."

Again suppose some other licenses, well known elsewhere, taxes as in England on man-servants, on hair powder, on armourial bearings—would these be authorized by sub-section 9? I think not. Indeed if no restriction whatever be placed on the word "other" in that section; if the Provincial Legislature can insist upon imposing licenses upon everything and upon every act of life, and tax each licensee at any moment they please, there would be a very simple way of excluding every Chinaman from the Province, by imposing a universal tax, not limited to any nationality, of one or two thousand dollars per annum for a license to wear long hair on the back of the head: or to exclude Russians by a license to wear a beard, or Jews by a license to eat unleavened bread. No Chinaman will shave the back of his head; no true moujik will shave his chin. There might be a tax on a license to register lands above a certain value; and we might have a graduated property tax. The opinion, therefore, of the majority of the Judges in *Severn's case*, seems more probable. There must I think be some limitation placed on the licensing power by the word "other."

Judgment.

Mr. *Yates* argued from even that point of view these laundries were taxable, for that the laundry men though they were very certainly not keeping shops, were very analogus to auctioneers. I rather think that the auctioneers would repudiate this alleged similarity of their occupation to that of a Chinese washerman. I cannot perceive it. An auctioneer has very extensive authority and important duties; he prepares advertisements and surveys, disposes property in lots, advises as to prices, and generally is the agent of

both parties to the contract of sale. There is nothing of all this in a laundry; and I feel strongly inclined to think that laundries are not taxable under this sub-section at all, bearing no analogy to either "shops, saloons, taverns or auctioneers."

But without deciding on this ground there is a still more serious obstacle against supporting this clause 11 of the Provincial Act of 1885, as being within Section 92, subseetion 9. The taxation by way of license authorized by that sub-section 9 is to be "in order to the raising a revenue for Provincial, local or Municipal purposes." Now, licences may have for their object the raising of a revenue, or the regulation of a trade or occupation, or they may be imposed for the purpose of repression or suppression. And whatever power the Provincial Legislature may possess for regulation or repression; taxation for these two latter purposes is not authorized by the B.N.A. Act, but only taxation for the purpose of revenue. And it is roundly alleged by the appellant that this tax is imposed, not with the object of raising a revenue for the City, but with the object of harassing Chinamen, supposed to be the only persons carrying on this industry.

Judgment.

In considering this objection, we must distinguish between the real objects and the actual results of legislation. It is true the real object is very often, perhaps in most cases, shown by the result. But an Act which has *bona fide* only one object, may indirectly work out an entirely collateral result. An Act intended purely for a revenue, or regulation may greatly harass some particular individuals or classes of individuals; *e.g.* the Excise Acts. But the harassing of brewers is not the object of the Excise Acts. So on the other hand an Act intended purely for harassing of some one or more individuals may incidentally bring money into the City treasury. That incidental result will not validate the Statute, if the real object be unlawful. The objection to apply at all, must depend on the object, de-

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cleared or dissembled, and not merely on the result or one of the results of the provisions of the Act.

If the object of the Provincial Statute be as alleged, viz., to subject Chinamen to exceptional disadvantages it is clearly unconstitutional. That point has been so held in this Court by Mr. Justice GRAY in *Tai Lung's case*, reported appx. G. to the report of the recent Chinese Commission, p. 379, and by Mr. Justice CREASE in *Wing Chong's case*, 1 B.C.R. Pt. II, 150, both these learned Judges fortifying their opinions by numerous decisions and arguments of Judges in the United States' Courts. Those decisions are not binding on us here; and indeed are partly founded on the Constitution of the United States and its relation to the several States, which in many respects differ from the Constitution and the relation between the Dominion and the Provinces. But the Judges in those foreign Courts have had a much longer and more varied experience on these topics than ourselves; their institutions are closely analogous in many respects, though, it is true, contrasted in others to our own. And their opinions and reasonings being also founded on international law, and, I take the liberty of saying, on natural equity and common sense, they are entitled to great weight beyond the limits of their own jurisdiction. I shall only mention *Lee Sing* v. *Washburn*, 20 Cal. Rep. 354; *Baker* v. *Portland*, 5 Law 750; *Teburcio Parrott's case, coram* SAWYER and HOFFMAN, J.J., 1880, and the *Quene ordinance case, coram* FIELD and SAWYER, J.J., 1879; the two latter cases published in a separate pamphlet form, in which the opinions of Mr. Justices FIELD, HOFFMAN, SAWYER and DEADY and other Judges whom they cite, all confirm this, that a State, or Provincial law imposing special disabilities or unequal burdens on Chinamen is unconstitutional and void. In British Columbia such a law if it impose a tax labours under the additional infirmity that a licence tax for any other purpose with any other object, than merely raising a revenue, is beyond the power of the Provincial Legis-

Judgment.

lature to impose.

Mr. *Yates*, for the Corporation, urged that this Statute is very different from the Statutes condemned by Mr. Justice CREASE in *Wing Chong's case* and by Mr. GRAY in *Tai Lung's case*; those Statutes were by their title and preamble expressly aimed at Chinamen by name; that this distinction also renders inapplicable all the United States' cases cited; that this enactment is quite general extending to all laundries without exception and we must not look beyond the words of the enactment to enquire what its object was; that there is in fact one laundry in Victoria not conducted by Chinamen on which the tax will fall with equal force so that it is impossible to say that Chinamen are hereby exclusively selected for taxation; the circumstance that they are chiefly affected being a mere coincidence; that the by-law only imposes $100.00 per annum, keeping far within the limit of $150.00 permitted by the Statute; that the tax clearly is calculated to procuring additional Municipal revenue and that no other object is hinted at.

Now it is true that this Statute does not, like those dealt with by Mr. Justice GRAY and Mr. Justice CREASE by its very title bind illegality upon its forehead; nor is there here any preamble like that in *Wing Chong's case* which Mr. Justice CREASE treats as "without example," but which may well deserve the stern reproof uttered by Mr. Justice FIELD upon a somewhat similar enactment in California. "It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible." *Quene ordinance case*, p. 9.

Judgment.

The recent statute has nothing of that sort. But it is very justly insisted upon by every Judge that the object of a statute is after all to be determined by the effect of its operative part. The title and preamble may be very objectionable, but if the operative sections are within the power of the Legislature they shall stand. On the other hand, the

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preamble may breathe the spirit of the purest and most universal philanthropy, and the most submissive legality ; but that will not save any clauses which are otherwise unconstitutional. And in determining the quality of any clauses, the same Mr. Justice FIELD remarks : " When we take our seats on the Bench, we are not struck with blindness and forbidden to know as Judges what we see as men ; and when an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly." Now can anybody in the Province, on or off the Bench, conscientiously say that this ordinance does not come within the principle thus enunciated ? I, for my part, cannot arrive at any other conclusion than that it is specially directed against Chinamen because they are Chinamen and for no other reason ; to compel them to remove certain industries from the city or themselves from the Province. But the authorities already cited show that this effect cannot be attained directly, and what cannot be done directly will not be permitted to be done by a side wind. *Tiburcio Parrott's Case*, pp. 1634 ; *Cummings* v. *Missouri*, 4 Wall 325. " If we hold otherwise," said the learned Judge, in that case "no kind of oppression can be named against which the framers of (the B.N.A. Act) intended to guard which may not be effected."

Judgment.

The appellants' contention that the clause is merely intended to hamper or expel Chinamen is much strengthened by considering the amount of the tax sanctioned, which is $150.00 per annum, whereas the limit sanctioned by the Legislature in the case of any retail shop, however extensive or lucrative its business, is only $10.00 per annum. In other words, this menial and poorly paid occupation may be taxed fifteen times the annual amount which the statute permits to be imposed on the most extensive grocery or

dry goods store. It is impossible for me to believe that the sole object or the main object of such an imposition is to aid the revenue of the Corporation.

The test is whether on the whole statute the Legislature can fairly be held to have said: "Let us impose a tax in order to raise a revenue, though perhaps it may fall on Chinamen," or "let us impose this tax in order to fall on Chinamen, though perhaps it will raise no revenue." When we find (1st) no other description of labour taxed at all; (2nd) this description of labour practically quite abandoned to Chinamen alone; (3rd) this description of labour taxed at fifteen times the rate permitted to be levied on any retail shop; (4th) that a preliminary Provincial Act has declared Chinamen incapable of the franchise which they formerly exercised. I cannot doubt but that the tax is directed against Chinamen, as such.

But the enormously disproportioned rate of taxation has another consequence. It shows that revenue was not the sole object of the tax; probably not the object at all. If the promoters of this clause had been really casting about for additional revenue, they must have seen that shops are a great deal more numerous than laundries and generally more remunerative.

Judgment.

It requires very little financial ability to perceive that a a small addition of $5.00 or $10.00 on shops would enrich the city far more than $150.00 per annum on every laundry, even if this last amount could be collected. But here the magnitude of the tax would entirely defeat the professed object and support the view that the concealed object was the true one. The occupation of a washerman is very poorly paid; probably at a lower rate than any other trade or occupation, since in former years men of all nationalities busied themselves with this, which they have wholly abandoned, presumably for more lucrative employment; whereas the number of shops, &c., has very much increased. It must have been apparent on the commonest reflection that

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this, the most poorly paid occupation, cannot endure fifteen times the tax imposed on the most lucrative; that such a tax would probably extinguish every laundry in Victoria; and so that no additional revenue would be produced at all. I cannot imagine that any person reading the clause would be blind to this; and I am compelled to think that restriction and not revenue was the very object of the tax. But it is clear that the Provincial Legistature has under the B.N.A. Act no power to impose or authorize a tax for the purpose of driving any industry out of the city or the Province.

Clanse 11 in the Act of 1883 seems, therefore, quite *ultra vires* and unconstitutional; and the by-law, which I have taken to be admitted as otherwise accurate, stands upon that clause alone and must fall with it. In fact, if the by-law only imposes a moderate and reasonable amount, say $5.00 or $10.00 per annum, it would probably be equally a nullity. Even a reasonable and useful by-law cannot stand if authorized only by an unconstitutional statute.

Judgment.

The general conclusions arrived at are these: (1.) It seems probable that laundries are not taxable within Subsection 9 of Section 92 B.N.A. Act. (2.) Any clause in a Provincial Statute or Municipal By-Law, which, though general in its terms, operates, or is intended to operate only upon one sect, race or class, is liable to be declared unconstitutional and void. (3.) The object of a statute is to be ascertained not only from its title or preamble, but mainly from its enactments. (4.) That a by-law, even if founded upon a valid statute must be reasonable, *i.e.*, not necessarily equal but proportionate, and not such as to defeat the object of the law. This is all in conformity with the previous decisions of Mr. Justice CREASE in *Wing Chong's Case* and Mr. Justice GRAY in *Tai Lung's Case*, which are approved and followed.

In this case I am moreover of opinion (5th) that the Provincial Legislature has no power to impose or authorize any

license tax except for the *bona fide* object of raising revenue by the produce of the tax; and that this Clause 11 was not enacted *bona fide* for that sole purpose or even mainly for that purpose, and is therefore unconstitutional and void.

The conviction will, therefore, be set aside with costs.

Appeal allowed.

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WOLLEY v. LOWENBERG, HARRIS & CO.

Brokers for mortgagee—Duty to obtain accurate valuation—Agency—Negligence — Misrepresentation — Deceit—New trial — Measure of damages—Misdirection—Lord Tenterden's Act.

The action was for misrepresentation by defendants, financial brokers, concerning the value of the security and character of the borrower, made by S., a member of their firm, in recommending to plaintiff an investment on real estate mortgage security of $5,500.00. Defendants were in fact employed by the borrower, H. and they obtained a written valuation of the lands from two persons who certified that they knew the lands personally and that they were worth $9,700.00 or $7,000.00 at a forced sale. The mortgage becoming overdue the lands proved unsaleable and not worth the amount of the loan; and H. had abandoned the property. At the trial the case was put in the alternative as an action for negligence on the part of defendants as plaintiff's agents in not obtaining an accurate valuation.

The jury, besides finding that S. had misrepresented to plaintiff the value of the security and the character of H., found that S. led the plaintiff to rely upon the belief that the defendants were acting for him, and that they were his agents in the matter; that S. did not show the valuation to the plaintiff, who acted solely on his advice; that the defendants adopted the valuation without further enquiry, and in doing so were guilty of negligence.

Upon these findings, WALKEM, J., ordered judgment to be entered for the plaintiff for the full amount of the loan and interest, as damages, upon plaintiff executing an assignment to defendants of the security.

Upon appeal to the Full Court, and motion to the Divisional Court for a new trial,

Held, per CREASE, MCCREIGHT and DRAKE, J.J.: That there was sufficient evidence and findings of agency and negligence.

Per CREASE and DRAKE, J.J.: affirming WALKEM, J.:

That the measure of damages was the whole loss on the loan.

That the fact that the case was put to the jury, as also involving actionable misrepresentation or deceit, and that findings were taken thereon, and that the learned Judge charged the jury that the representations, if made, amounted to a guarantee by the defendants of the loan, were insufficient grounds of misdirection to call for a new trial.

Per MCCREIGHT, J.: There was nothing amounting to a guarantee of the loan, and the damages should be reduced by the actual cash value of the security at the time of the loan, and a new trial had to ascertain such value.

Statement. APPEAL to the Full Court from a judgment of WALKEM, J., entered at the trial upon the findings of the jury, order-

ing the defendants to pay to the plaintiff the full amount of principal and interest due by one Hodge to the plaintiff upon a certain real estate mortgage, as damages for negligence on the part of the defendants as plaintiff's agents, in recommending the investment to him, and in not taking due care to obtain an accurate valuation of the lands, which turned out, after default by the mortgagor, to be unsaleable and not worth the amount of the loan.

The defendants also moved the Divisional Court for a new trial on several grounds of misdirection, principally on the question of the character of the liability of the defendants, and measure of damages, and that the learned trial Judge in effect told the jury that by making representations to him that the lands were first-class security for the loan the defendants guaranteed the loan to the plaintiff, and also in leaving to them, as an element to be considered, certain charges of deceit made in the statement of claim, it not appearing from the evidence that the defendants had made the alleged misrepresentations fraudulently or dishonestly.

Statement

The plaintiff's case as set out in the statement of claim was "that one Snowden a member of the defendant firm was on terms of intimate friendly relations with the plaintiff who reposed the fullest confidence in his judgment and truthfulness. That he approached the plaintiff and represented to him that he could obtain for him a first-class investment on mortgage of the property of one Hodge. The said Snowden then represented to the plaintiff that the said investment was of such an excellent character that he wished the plaintiff as an intimate friend of his to obtain the advantage of it. That he, Snowden, had a personal knowledge of the value of the property and that it was at that time of the value of over $12,000.00, that he personally knew the proposed borrower Hodge and that he was a thoroughly competent and industrious farmer, who would be sure to meet his interest money promptly as it fell due. The plaintiff relied on the

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statement of the said defendant Snowden and made no independent enquiries, believing, as the fact was, that the defendants were acting as agents for the plaintiff in the matter, and that the statements of the said Snowden were made to him in that capacity, and consequently relying on the skill, knowledge and integrity of the said Snowden advanced $5,500.00 to the said Hodge on the 28th October, 1893, who executed a mortgage in favour of the plaintiff for said amount payable in three years with interest at 8 per cent. That plaintiff paid the defendants no cash commission for procuring the loan, but in lieu thereof it was arranged that the defendants should collect the interest on the mortgage receiving a commission on the collections. That the said representations made by the said defendant Snowden were untrue in fact as he well knew, and were made with the purpose of inducing the plaintiff to lend the said money on security of the said property. The said property was not at the said date, and has never been since worth more than $4,000.00. That the defendant Snowden at the time of the said transaction had no personal knowledge of the property. That the said Hodge was a stranger to the defendant Snowden, and was a thoroughly worthless and incompetent farmer, he has never paid any interest on the said loan, and has since completely abandoned the property."

The statement of defence alleged that the defendants were financial brokers and that they were employed by Hodge to obtain for him the money on the security of the lands and were paid by him the usual broker's commission of one per cent. That they had no personal knowledge either of the lands or of Hodge. That before introducing the investment to the market they had obtained a written valuation from two competent valuators. It denied all misrepresentations, and, as to those concerning the character and credit of Hodge, pleaded Lord Tenterden's Act.

It appeared that the valuation was upon a form in use by

defendants containing a series of questions concerning the property, the answers to which were drawn up in the handwriting of one of the valuators and were signed at the foot by Hodge, and stated that the land was black loam with clay sub-soil, flat, all fenced, no swamp, all 80 acres cleared, no stumps, well cultivated in wheat and oats, fenced, with house and barn of the estimated value of $1,700.00, and assessed value of $2,000.00, occupied by the owner. That the place would rent for $500.00 a year increasing every year. Was in a well settled country, the farms around well cultivated and of a general value of $75.00 to $100.00 an acre, that similar property in the neighbourhood had been selling by private contract for $130.00 an acre, that there had been no auction sales. To the questions "Is the applicant to the best of your knowledge and belief of sober and industrious habits?" and "Is the applicant married?" the answers were "Yes." That taxes were paid and Hodge had given no bonds to the Crown. These statements were endorsed and signed by the valuators in the following certificate: "I certify that I have examined the property specified in the foregoing proposal and that the above is a correct description thereof. That the value of the land is $75.00 to $100.00 an acre, viz., 80 acres of cleared land at $100.00 per acre is $8,000.00. That the present value of the buildings is viz., dwelling houses $1,000.00, barns $700.00, $1,700.00, total $9,700.00, and in my opinion the whole of the above described property is worth in cash the sum of $9,700.00." There was no dispute at the trial that Snowden was on terms of intimate friendly relations with the plaintiff, and that he had recommended the investment to him, and that the plaintiff had acted upon that recommendation. It appeared that the defendants were not the regular agents of the plaintiff but that they had on two previous occasions been given by plaintiff the collection for him of the interest on mortgage loans which had been introduced to him by them when acting as agents for the bor-

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rowers. Plaintiff's evidence was that Snowden had represented the investment to him as "a first-class gilt-edged investment, one which I keep for a special pal," and "that the land was worth from $100.00 to $125.00 an acre and that Hodge was a hardworking industrious farmer who would be sure to pay his interest money as it fell due."

Snowden swore that he showed the valuation to plaintiff on introducing the loan, which plaintiff denied. Also that he introduced to the plaintiff the borrower Hodge who took part in the negotiations, which was admitted.

The facts relied on by the plaintiff to establish the agency of defendant for him in the matter, were his personal intimacy with and confidence in Snowden and that Snowden during the negotiations asked him, and he agreed, to allow defendant firm to collect the interest at the usual commission for that service and that he thought Snowden was acting as his agent.

Statement.

The jury found the following answers to questions put to them by WALKEM, J.:

1. Q. Did Mr. Snowden as a member of the defendants' firm, give the plaintiff reason to believe and to rely on the belief that the defendants were acting as agents for him (the plaintiff) in the negotiations that led to the loan mentioned in the pleadings being made? A. Yes.

2. Q. Did Mr. Snowden, as such member of the firm, before, or at the time the loan was completed or the money paid over, show the plaintiff or inform him of the valuation of the land in question which had been made by Messrs. Shotbolt and Baker? A. No.

3. Q. Did the plaintiff, if he saw or knew of the valuation, accept that valuation and make the loan in consequence of it? A. No.

4. Q. Did the defendants adopt that valuation as the correct valuation without further inquiry? A. Yes.

5. Q. If they did so, did they in doing so use due skill and diligence as valuators in arriving at the value of the

land in question as security for the loan? A. No.

6. Q. Did Mr. Snowden state to the plaintiff that the land was first-class security for the contemplated loan; and bearing in mind that the loan was for three years, was the statement true? A. Mr. Snowden did so state, and such statement was not true.

7. Q. Did Mr. Snowden state to the plaintiff that Mr. Hodge, the intending borrower, was a thrifty, hard-working man, and if so was the statement true, and had Mr. Snowden good reason for making it? A. To the first part of the question, yes; to the second and third parts, no.

8. Q. Were the statements made by Mr. Snowden as to the value of the security and the character of the intending borrower based upon personal knowledge? A. No.

9. Q. Were such statements made recklessly? A. Yes.

10. Q. Did Mr. Snowden, on behalf of his firm as agents for the plaintiff advise him to accept the investment, and did the plaintiff act solely on his advice? A. Yes.

11. Q. Has the plaintiff been paid anything on account of the principal and interest on his mortgage? A. One year's interest.

Statement.

12. Q. Has he endeavoured to sell the mortgaged premises, and if so has he been able to realize any sum therefor? A. To the first part, yes; to the second part, no.

13. Q. In any event, if it be decided that the mortgage shall be transferred to the defendants, what damages is the plaintiff entitled to? A To the amount of principal, $5,500.00, with interest due and unpaid thereon.

Upon these answers the learned trial Judge ordered "judgment to be entered for the plaintiff for the sum of $5,500.00 being the amount of the principal of the said mortgage, and interest thereon at the rate of 8 per centum per annum from the 28th day of October, 1891, and that upon payment of the said sum and interest and costs, the plaintiff do execute an assignment to the defendants or to whom they shall appoint of his mortgage security referred

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to in the pleadings herein."

The defendants having moved the Divisional Court for a new trial for misdirection, within the time limited by the Rules, and afterwards set down an appeal from the judgment to the Full Court, the Divisional Court motion was adjourned to be argued at the same time as the appeal, and both motions were argued together on the 2nd, 3rd, 4th, 6th, and 7th days of August, 1894, before CREASE, MCCREIGHT and DRAKE, J.J.: sitting both as Full Court and as a Divisional Court.

The matters of misdirection principally complained of were, that the learned Judge in charging the jury told them, "here is a mortgage for three years and when Mr. Snowden tells the plaintiff that that is an excellent security for the money, and that it has a cash value of $7,000.00 at a forced sale—that is explained by the witness to mean a forced sale—he means to say surely, if he means anything, that at any time during the pendency of that mortgage that property is worth that; if he did not mean that he ought to have said so, he ought to have said, it is worth that to-day, it may not be worth that to-morrow, and I wont guarantee that it will be worth that three years hence, but your security is good. What is the meaning of that phrase? It is good from this onward, it is quite safe. That is the meaning of that or it means nothing. When there is a difficulty of realizing on these things then comes the forced sale, and then what is the result? Zero! Nothing! Pocketless as to $5,500.00 and there is your gilt-edged security. A thing merchantable, saleable in the market, it ought to be saleable in the market like a good bill of exchange or promissory note or even a bank note by a solvent bank. The recommendation in this case and the assurance in this case was equivalent to this, that whether you have a good year or a bad year there is your gold on a forced sale. That is the meaning and no other meaning can you attach to that security." And also that the learned Judge left the

Statement.

case to the jury as involving actionable misrepresentation or deceit, and charged them in effect that negligent misrepresentation, without actual fraud, dishonesty, or an evil mind, was actionable.

The language objected to was, "Now if Mr. Snowden made such a representation (that Hodge was an industrious, thrifty farmer &c.) that representation, I think you will come to the conclusion is untrue, and if it was untrue, that is a reckless statement, and a statement a gentleman should not have made, because when a gentleman pledges his word, you may say that he pledges his honour, and when any man gives his word it should be as good as gold. A reckless statement may be made without any *mens rea*, he ought to be responsible for it." "I do not think it was made with an evil mind, but still it was very reckless if he made it not knowing it to be true." Statement

At the close of the charge to the jury, on the two points the following took place:

"*Mr. McColl, Q.C.:* I object that there was misdirection in telling the jury that if the security is not a first-class security to-day the case is indefensible.

The Court: I put it then, gentlemen, if it is not a security that would realize the $7,000.00—I put that instead—on a forced sale, as stated by defendants' own witnesses, then it is not a good security, and it is not a gilt-edged security.

Mr. McColl: I ask your Lordship to explain the law of this suit to the jury, and to tell them that this is the law upon it. In *Derry* v. *Peek*, that in an action of deceit the plaintiff must prove actual fraud, and that he may do so by showing that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false, and that to the extent to make the man an evil mind—as it is put here. Argument.

The Court: The law was if the man made a misrepresentation without knowing it to be such, he is not liable, but

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this was overturned in this suit, and the law defined to be that if a man makes a representation not knowing it to be true, making it recklessly. (After some discussion.) I suppose I ought to give my idea of this. If the statement that Hodge was a thrifty man of good character was made to get Mr. Wolley to invest and was made recklessly, without caring whether it be true or false is a *sine qua non*, for it is in this that lies the *mens rea*, a reckless statement may be made without *mens rea*—he ought to be responsible for it."

Argument.

Theodore Davie, A.G., and *Robert Cassidy*, for the defendants: That the jury was not properly directed upon the law is plain. It cannot be said that any representation however strong, made by an agent, to his principal, in recommending to him a security, with reference to its quality or value, amounts to a guarantee of the principal against loss. The obligation of the defendants as it was put by the learned trial Judge would be an unqualified promise by them to answer to the plaintiff for the default or miscarriage of Hodge, within the Statute of Frauds. That this is the nature of the error is apparent from the form of the judgment, which directs the defendants to pay off the loan in the place of Hodge, upon being handed the security, which is the proper judgment in the case of a guarantor. Secondarily the question is one of measure of damages, which in the case of actionable misrepresentation, is, at the most, the difference between the actual value of the property, at the time, and that which it was represented to be, and if the liability be for negligence, the difference between the then and now actual value of the land to be ascertained by a finding or reference. It is clear from the facts, and the language of the trial Judge, that there was no fraud or dishonesty in the representations of Snowden, and therefore no cause of action for deceit: *Derry* v. *Peek*, 14 App. Cas. 337; *Angus* v. *Clifford*, 1891, 2 Ch. 463; *Knox* v. *Hayman*, 67 L.T., N.S. 140; and the learned Judge should, since that was the only case made by the plaintiff on the pleadings,

have taken a special care to withdraw it from the minds of the jury, and, after proper amendments, to direct their attention to the question of agency and negligence as only the one involved. Instead of which the facts were put as warranting and inviting a finding of deceit in language highly prejudicial to defendants' position, followed by questions directed to the issue of misrepresentation. Even assuming that it could be said that there is to be found in the case, evidence, and directions by the Judge, and findings by the jury, which, if they stood alone, would sustain a judgment against the defendants for negligence as plaintiff's agent, it cannot be said that the case has been properly tried, or the minds of the jury properly directed to the real questions involved, and fairly instructed on them. We admit that isolated expressions in a charge are not to be too closely scrutinized, if, upon the whole, the charge is a fair guide to the jury. On the other hand a charge that is not a fair guide and introduces as factors, irrelevant and disturbing elements, should not be passed over even if no absolute misstatement of law should occur in it. If the undoubted effect of a strong charge is misleading, the fact that in the course of subsequent discussion with counsel some of the statements of law contained in it may have been remodelled, will be insufficient, unless it is fairly clear that the wrong impression was as far as possible obliterated, and the right one clearly substituted. *White* v. *Crawford*, 2 U.C.C.P. 352; *Lucas* v. *Moore*, 3 O.A.R. 602.

Argument.

There was no evidence of either negligence or agency to go to the jury and those questions were not properly put to them. Snowden was avowedly acting for Hodge. A certain latitude of commendation was permitted to him. He approached his friend the plaintiff and recommended the investment to him. There is no evidence that he asked the plaintiff to employ him in the matter or that the plaintiff asked him to accept such employment, or that any *consensus* between them to the relationship took place. The

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mere fact of highly coloured recommendations by Snowden cannot be treated as evidence of such employment. They were, if anything, evidently inconsistent with it, and only consistent with a desire to put off Hodge's commodity on plaintiff, and not to protect the plaintiff against Hodge. There must be a consensus, see JAMES, L.J., in *Markwick* v. *Hardingham*, 43 L.T.N.S. 650; ROMER, J., in *Scholes* v. *Brook*, 63 L.T.J.N.S. at p. 837, an agreement to make an agency. The question of agency by estoppel can never arise between the two parties to the relationship. As between them the relationship is created by mutual agreement only, and the consensus must be proved, as in any other contract. As against third persons if the alleged principal allows or leads a third person to believe and to rely on that belief that another is his agent, and the third person acts on that assumption the agency is deemed to exist in favour of the third party, though, as between the assumed principal and agent, it has no real existence. The first question to the jury, whether Snowden led the plaintiff to believe, &c., that he was acting as his agent, on which the supposed finding of agency rests, was in reality irrelevant and improper, and the tenth question assumes an affirmative on the basis of the first. The question whether there was an agency was therefore never properly put or found. Had there been agency there was no negligence. The occupation and employment in the matter of the defendants, was as brokers, and a broker's fee of one per cent. for negotiating the loan, from the borrower, was all they received. Assuming their employment by the plaintiff, the scope of their duty was to take that reasonable amount of care which a careful broker would take to obtain an accurate valuation, and a sufficient security. That degree of care they took. The enquiry which they made was an independent enquiry, and on the evidence they had every reason to rely on it. We submit that the plaintiff should have been non-suited at the trial and that judgment should now be for the defendants.

Argument.

E. V. Bodwell, contra: There was evidence of agency to go to the jury and the jury have found the question in favour of the plaintiff. That there must be an agreement or employment is admitted, but it can be inferred by the jury from the conduct of the parties, without express words. It is enough that plaintiff understood that Snowden was offering his services and accepted them, which is the meaning of the finding of the first question. Although misrepresentations are not actionable unless there is actual fraud and dishonesty in making them in cases where there is no duty imposed to tell the truth; they are actionable, though they are made without fraud, as a breach of duty, where a duty to find out and tell the truth is imposed by the contract or relationship between the parties. Here it was the duty of the defendants to take care to find out the truth concerning the security and accurately to report to plaintiff. The elements of misrepresentation and negligence are necessarily associated together in the case. The whole pleadings at the trial went upon the correct theory that there were before the Court two issues, (1) an action for damages for deceit, (2) an action for damages on the ground of negligence if the jury should find that the misrepresentations were not made wilfully with intent to deceive. There was no amendment but the evidence on both sides was directed to those two issues. The Judge charged the jury with reference to both and the parties must now abide by the result of that state of affairs, and cannot allege that any of these questions were not properly pleaded or dealt with. *Gough* v. *Bench*, 6 Ont. Rep. 706; *Burns* v. *Burns*, 21, Grant 14; *Swim* v. *Sheriff*, RITCHIE, C.J. Cassels Sup. Ct. Dig. at p. 78. Pleadings are now no longer technical in the sense that they must show the precise legal form which the plaintiff's demand must take, they now shew the facts and it lies with the Court to decide upon the legal result of these facts, per BRETT, L.J. in *Hanmer* v. *Flight*, 35 L.T.N.S. 129. An action of deceit rests upon the state of the defendant's

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mind; "an action of negligence has no necessary relation to his mind, it simply regards his breach of duty. The same facts, including even a false misrepresentation, may support either an action for deceit or one for misrepresentation, but the former is based on the knowledge or intention of the plaintiff, the latter is independent of knowledge and goes solely on the breach of duty." *Moncreiff on Fraud* p. 150. The relationship of principal and agent having been created between the parties to the transaction, a contract on the part of the agent to use due skill and diligence is implied as a matter of law. The occupation being one that required the exercise of skill and diligence, they were bound to use such skill and diligence, even if they were acting gratuituously. *Harmer* v. *Cornelius*, 5 C.B.N.S. 245; *Shiells* v. *Blackburn*, 1 Hy. Blackstone's Reports, 158; *Dartnall* v. *Howard*, 4 B. & C. 345; *Whitehead* v. *Greetham*, 2 Bingham, 464; *Wilson* v. *Brett*, 11 M. & W. 111; *Jenkins* v. *Beetham*, 15 C.B. at pp. 187 and 188 per Chancellor Spragge; *Hamilton Provident Loan Society* v. *Bell*, 29 Grant at p. 206.

Argument.

But the evidence shows that there was a sufficient consideration in the stipulation to allow defendants to collect the interest and the possibility of gaining control of plaintiff's business. It was the duty of the defendants to take other opinions than those of the valuators. *O'Sullivan* v. *Lake*, 15 Ont. 544, the learned Judge there charged the jury: "But a valuator is a person who holds himself out to value property, assumes to have skill and knowledge in that matter, and is bound to use that skill and knowledge reasonably in the interest of his client. If he does anything rash without obtaining the necessary information to enable him to make a just valuation, and the person who employed him is injured by it, that gives him a cause of action. In that view of it, I think there is evidence for your consideration as against the defendant Lake." And later on the learned Judge says: "If it was not fair value for $8,000.00, did Mr. Lake discharge his

duty fairly as a valuator by merely taking the valuation of Mr. Balfour, who was acting on behalf of Mr. Murphy the borrower, and then going to the land and looking over it and making no enquiry from anybody as to the value of that land, what it would sell for. He says in the course of his examination, which was read here, that he made no enquiry of any person as to the value of land in that neighborhood, that he took Mr. Balfour's valuation, and taking that and looking at the land himself, he made a valuation of $13,500.00." This direction to the jury was held to be correct by the Court of Appeal, 15 Ont. App. Rep. 711. There being evidence and findings to support the judgment, the verdict should not be set aside for misdirection unless in the opinion of the Court some substantial injury or miscarriage has been thereby occasioned. Rules S.C.B.C. 436.

Argument.

Cassidy, in reply: The statement of law of Mr. Moncreiff is not in accordance with the authorities. See BRAMWELL, B., in *Dickson* v. *Reuters Co.* 3, C.P.D. 5. When speaking of a similar contention he says: "The consequence would be that the general rule which has been admitted to exist, would be inaccurate, and it ought to be laid down in these terms, that no action will lie against a man for misrepresentation of facts whereby damage had been occasioned to another person, *unless* that misrepresentation is fraudulent or *careless*, but it is never laid down that the exemption from liability is taken away by carelessness." "Negligent misrepresentation certainly does not constitute a cause of action," per BOWEN, L.J.: in *Le Lievre* v. *Gould*, 68 L.T.N.S. at p. 626; *Scholes* v. *Brook*, 63 L.T.N.S. 837, 64 L. T.N.S. 674.

Judgment of CREASE, J.

CREASE, J.: This was an appeal to the Full Court to set aside the judgment of the learned Judge at the trial, as entered on the verdict of the jury, for the plaintiff, and to enter judgment thereon for the defendants.

It was also an application to the Court sitting as a Divisional Court for a new trial upon the grounds taken on the

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application for a non-suit that the evidence and findings on the issues joined disclosed no cause of action and no objection taken to the Judge's charge for misdirection, non-direction and improper reception and rejection of evidence. The appeal and application for a new trial were heard together.

The questions on which the appeal must turn are those of agency, negligence and loss. The most important of these is agency, as on that the solution of all the other points of the case more or less directly depends. Agency is of several kinds. In this case, Snowden, according to the findings of the jury in answer to question No. 1 put to them by the Judge at the trial "as a member of defendant's firm gave the plaintiff Wolley to believe, and to rely on that belief that the defendants were acting as agents for him (Wolley) in the negotiations which led to the loan the subject matter of the present action." As such agent he applied to plaintiff for the loan upon a security; the valuation of which was far below what he stated it to be. Plaintiff did not see the valuation Snowden had procured of it until after the action had commenced, but relied entirely on the statements of Snowden and without any inquiry trusted to his representation that it was first-class security, a statement which the jury found to be untrue. In this answer to query 10 the jury found that Snowden on behalf of his firm, as agents for the plaintiff, advised him to accept the investment and that plaintiff acted solely on that advice. It is well settled that when an intending lender does not himself make independent inquiries in a case like the present, but trusts entirely to the broker who is negotiating the loan, any misrepresentation or misstatement made to him by the broker gives the lender a right of action against the latter.

Judgment of CREASE, J.

The evidence showed plaintiff had several agents investing for him, but it also showed as clearly that Snowden on behalf of the defendants was his sole agent in this particular transaction. Ample evidence went to the jury on the

question of agency. The jury answered all the three questions as to the agency of Snowden in the affirmative, and their finding to that effect was confirmed by the evidence and cross-examination of Wolley and Snowden themselves, so that I do not think their finding on that head can be disturbed. The question of negligence, like that of agency, was fairly raised by the pleadings and borne out by the evidence, and, under a satisfactory direction from the Judge, found by the jury in answer to the questions submitted to them (to question 4) that defendants adopted an incorrect valuation of the property without further inquiry (to question 5) without using due skill and diligence, as valuators, in arriving at the value of the land in question as security for the loan and (to question 6) Snowden so acting stated the land was first-rate security, and such statement was not true. So that taking the text laid down in *Metropolitan Railway Co.* v. *Wright*, 2 App. Cas. 153, I cannot say that the jury's findings as to agency and negligence were not such as "a jury viewing the whole of the evidence reasonably could not properly find." The jury were quite within their right when they refused to attach weight to the defendants' contention that as the valuation they got was made by respectable men they were right in adopting it, and that, if it was wrong, no liability for that should attach to them. An examination of the evidence as to the formation of the valuation entirely destroys its weight. It was made, of an inflated value, by the intending borrower Hodge, signed by him, and endorsed by two persons who were reckless enough to accept Hodge's statements without testing their truth, and with which they expressed themselves as personally cognizant although quite at variance with the fact.

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Snowden adopted all this valuation trusting to Hodge's word, but, by using this excessive valuation to aid in effecting the loan, made it his own and himself personally, as such agent, responsible for it. He was then in the position

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of the man in *Brownlee* v. *Campbell*, 5 App. Cas. 936 who had taken upon himself the responsibility of a positive statement (which the jury found was partly untrue) upon the faith of which he knew the plaintiff was going to deal for valuable consideration. The duty was on him to disclose the truth as to the real value of the security, and he neglected, or omitted, to do so, but placed on it a value, which, after fairly weighing the evidence on the point on both sides, the jury declared was incorrect, at the same time they gave credence to the evidence of the plaintiff when he averred that he trusted implicitly and solely to the statements of Snowden.

As to the motion for a new trial on the grounds stated in the notice, it is to be observed that many of these, especially as to misdirection and non-direction, were taken as objections to the learned Judge's charge before the jury, and in their presence and hearing, and their attention specially directed to them, and the exceptions to his rulings were favourably laid by him before the jury in the manner defendants' counsel wished and he corrected certain of his rulings objected to in the manner desired by counsel; the whole taking place during the summing up of which these suggestions and corrections then became an integral part. They were there and then completely dealt with and cannot now be reproduced before the Divisional Court.

Judgment of CREASE, J.

The rejection of the evidence as to the value of other land in the same neighbourhood as the land subject to the mortgage was, I think, right, although it was substantially fully introduced into the evidence laid before the jury, and doubtless entered into their calculations of value of which the defendant had the full advantage. As to the rejection of the evidence as to Hodge's thrifty, hard-working character, it is only necessary to observe that the evidence shows that the money was advanced solely on the security of the land and on no other ground.

Its value was stated by Snowden at $7,000.00, its value at

forced sale, and necessarily, therefore, as its value during the three years' term for which the money was loaned. The evidence showed its value at the date of the loan was far below $7,000.00, but the money was lent on Snowden's assertion that $7,000.00 at a forced sale, which means at any time during the term, was its value, and equity in such a case insists "that the statements made, if false in fact, by persons even who believed them to be true, if in the due discharge of their duty they ought to have known the facts which negative the representation made" the person making the representation should be restrained from falsifying it thereafter, but if necessary he should be compelled to make good the truth of that which he asserted; and in this connection, and in support of this view, *Hammersly* v. *De Biel*, 2 Cl. & F. 45; *Pulsford* v. *Richards*, 17 Beav. 87; *Burrows* v. *Lock*, 10 Ves. 470; *Cleland* v. *Leach*, 5 Ir. Ch. 478, and the numerous cases therein cited, all in the same direction, may be usefully consulted. Plaintiff offered to deal with the mortgage as defendants might direct, and, therefore, I consider he should have judgment for the amount of principal and interest which has been found due, and the security handed back to the defendants.

Judgment of CREASE, J.

It is not a question of payment of any difference between the amount so found due and the value of the land, as the plaintiff could not sell the land—so that he is entitled to receive the whole amount due and therefore deliver over the security he holds to the defendants. *Derry* v. *Peek*, 14 App. Cas. 337, was advanced for the defendants as applicable here, but it has been settled that *Derry* v. *Peek* does not apply if there is a legal obligation (as there was in this case) on the part of the defendants to give correct information. If such an obligation exists, an action will lie for its non-performance even in the absence of fraud. *Burrows* v. *Lock*, 10 Ves. 470, is in principle applicable to the present case. There a trustee, whose duty it was to have known, made an erroneous statement which was acted on as to an

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encumbrance existing on a share which was sold. It was decreed that he should pay the full value of the shares on the ground that he was estopped from denying the encumbrance. So here, on this principle, the plaintiff would be entitled to a decree that the defendants should pay to the plaintiff the amounts of principal and interest due and costs, by reason of the estoppel.

From all these considerations I decide that the judgment of the Court below is sustained, and the motion for a new trial dismissed with costs.

Judgment of McCREIGHT, J.

McCREIGHT, J.: It appears from the evidence in this case that Mr. N. P. Snowden, representing the defendants, Lowenberg, Harris & Company, Real Estate Agents, and he being one of their firm, recommended the plaintiff Wolley to take a certain instrument or mortgage for $5,500.00 on certain land in the Delta of the Fraser which has since proved to have been very inadequate security. His own evidence far from contradicting that of Wolley which was distinct in support of the affirmative, substantially agrees with it, and of course his agency with respect to Wolley may well have existed along with a contemporaneous agency for the borrower of the money, though, in the event which has actually happened of the security proving to be inadequate, such double agency must be looked upon as at least an unfortunate circumstance.

The three main questions in this case seem to be, first, was Snowden agent for Wolley in making the loan; next supposing he was agent, did he act negligently, and thirdly, did loss ensue, and to what extent. As to the first question, I may premise that I see no misdirection on the part of the Judge; for I think that questions 1 and 10 explicitly raise the question of "agency," *i.e.*, that Snowden offered to act as agent in the transaction for Wolley and that Wolley accepted such offer and dealt with him accordingly as agent. The jury answered all three questions in the affirmative and having regard to the evidence and that of Snow-

den himself, see especially his cross-examination and the re-examination, I think their finding on that question of agency cannot be challenged successfully. As to the next question of negligence, I think questions 4, 5, 6, 7, 8 and 9 explicitly raise the question of negligence, and, subject to remarks which I shall make presently as to question 6, the direction is correct and the answers satisfactory and I cannot say that they were based on insufficient evidence of which, as might be expected, there was some on both sides, and I must say that if the property was a good security in October, 1890, for $5,500.00 it ought now to be worth $20 per acre. (See p. 42, line 12, of Wolley's evidence.) At all events I cannot say that the verdict as to the "agency" and "negligence" was one which a jury, viewing the whole of the evidence reasonably "could not properly find.". (See *Metropolitan R. Coy.* v. *Wright*, 11 App. Cas. 153 and see *Commissioners for Railways* v. *Brown*, 13 App. Cas. 133 P. C.) How can it be said that there was such preponderance of evidence for the defence as to make it "unreasonable and almost perverse," to use Lord SELBORNE'S expression in the case, that the jury should return such a verdict. Therefore there should be no new trial I think on these two points. But on the third question, *i.e.*, as to the amount of loss through the negligence (for it can hardly be denied that there was some loss) I think there has been some miscarriage and that the direction of the learned Judge has caused the jury to give a greater sum as damages than was correct. I don't forget the offer of the plaintiff in paragraph 10 of the Statement of Claim to place the mortgage security at the disposal of the defendants upon their paying principal and interest, but that does not get over the difficulty. The charge (at p. 171 hereof) gave the jury to understand that the value of the land in October, 1890, the date of the mortgage must be taken to be the "tillage value," but I think this was not correct and in this case was misleading. Section 24 Cap. 111 of the Consolidated Statutes B.C. 1888

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indicates that land is to be estimated at its cash value for assessment purposes, and why not for others, as it should be appraised "in a payment of a just debt from a solvent debtor," which, at the date of the mortgage was no doubt considerably more than the mere "tillage value;" nor are we concerned with the circumstance that this land is situate away from any town and never likely to have much intrinsic value except for tillage purposes for it is notorious that during a "boom" such lands will fetch a higher price than during the reaction. Again at pp. 29 and 30 the jury were, it seems, directed that Snowden may be understood as having guaranteed the continuance of the value during the pendency of the mortgage, or for three years, but I know nothing in the evidence to warrant this suggestion. Supposing the contract of agency had been put in writing I doubt whether Wolley would have asked for such a provision or Snowden assented to it; I could understand a Court of Equity implying this kind of guarantee or insurance if Wolley had been an infant *cestui que* trust (of tender years) and Snowden his trustee—the remark of TURNER, L. J., in *Jennings* v. *Broughton*, 5 DeG. M. & G. 126 seems to have a bearing that the Court must be careful, &c., &c., "that it does not enable persons who have joined with others in speculation to convert their speculations into certainties at the expense of those with whom they joined." He is there dealing with a case of alleged fraud. But *mutatis mutandis*, it seems to me that the damages should be reduced by the amount which the land would have fetched in October, 1890, adopting not the "tillage value" but rather that adopted in Section 23 Cap. 111 of the Provincial Revenue Tax Act." Of course the plaintiff's offer to assign the mortgage security to the defendants upon payment of principal and interest, cannot derogate from this principle of assessing the damages, and to make him take it at its present reduced value would be unjust, and I think the defendant is entitled to a new trial on the question of

Judgment of McCREIGHT, J.

damages. As to the costs of this appeal the defendants are not entitled, for the point as to damages was not taken in the Court below. (See *Games* v. *Bonner*, 33 W.R. 64, and see *Hussey* v. *Horne Payne*, 8 Ch. D. at pp. 677, 679 and An. prac., 1894, p. 1,021.) And again they may not choose to take the issue as to damages down to the trial, which I think they should do, if at all, within a period say of three months, or they may not succeed in such issue. The plaintiff has succeeded on the issues of agency and negligence and may succeed on that of damages or the defendants may not take the issue down to trial, and in either of which events the plaintiff should have the cost of the appeal, but I think not otherwise.

DRAKE, J.: This case comes before us on two notices of motion, the first is by way of appeal to this Court from the verdict of the jury and judgment thereon. The second is a motion for a new trial to the Divisional Court on the ground of misdirection and non-direction for the improper reception and improper rejection of evidence. The motions were heard together.

Judgment of DRAKE, J.

The case depends on the fact of agency of the defendant Snowden. If Snowden was not the plaintiff's agent, then there was no duty cast upon him to be accurate in his statements. The mere fact of exaggerating the value of the security proposed and asserting a personal knowledge of the locality, which was untrue, in order to obtain an advance for the owner was undoubtedly wrong and, under the circumstances, extremely reprehensible dealing as Snowden was with a friend; but it will not make him liable for the loss which the plaintiff has sustained.

A man may have many agents each one engaged in a single transaction. The plaintiff undoubtedly had other agents employed to obtain investments but this fact is no answer to the allegations that Snowden was *ad hoc* the plaintiff's agent. As a rule which would be more honored in the

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breach, than in the observance, land agents act for both parties. A man wants a loan and the land agent applies to one who has money to invest, and unless he leaves the lender to decide on the value of the security, unbiassed by any report of his own, he becomes the broker between the parties and the agent of both and his statements then become of importance. If the proposed lender does not exercise any independent judgment in the matter, but relies solely on the broker; any misstatements or misrepresentation by the broker will give a cause of action to the lender against him. In this case the question of agency was distinctly raised on the pleadings entered, and there was ample evidence to go to the jury on the question of agency, and the jury, having found that the plaintiff had reason to believe and rely on that belief that the defendants were acting as agents for him in the negotiations that led to the loan, have found that defendant Snowden was reckless in the statements he made, that his statements were untrue in part, and that the plaintiff relied on those statements.

Judgment of DRAKE, J.

On looking through the evidence I cannot say that the findings of the jury are not amply justified—and the finding of a jury on facts will not lightly be displaced if the verdict is one which as reasonable men they could reasonably have arrived at. They have not arrived at their conclusions without evidence, and the contention of the defendants that they having obtained a valuation from respectable persons and were entitled to rely on it, and if it was erroneous they are not responsible, cannot be supported.

The valuation was obtained by the proposed borrower Hodge, signed by him, and Thos. Shotbolt and James Baker endorsed his views without having taken the trouble to test the accuracy of any one of his assertions. They were reckless in their confirmation of his report pledging themselves to a personal knowledge of the statements he gave them which they in fact had not. They relied on his word and by so doing doubtless misled Snowden but that does not

free the defendants from responsibility.

The law is clear that a man cannot escape from the effect of positive representations of matters of fact upon the ground that he relied on the representations of some one else employed by him for the purpose. If he had placed that report before the plaintiff and left it to him to decide as to the course he should adopt, then the defendants would be free from responsibility but that course was not taken, and the plaintiff swears that he relied solely on the assertions made by Snowden and the jury believed him.

In my opinion the judgment was rightfully entered for the plaintiff and the appeal should be dismissed.

On the other motion, for a new trial, a very large number of objections for misdirection and non-direction were taken, but it must be borne in mind that a summing up is not to be critically analyzed if the bearing and effect of the evidence on the whole is fairly laid before the jury. In the present case many of the objections which are now taken were first taken as exceptions to the charge in the presence and hearing of the jury, and the points objected to were placed before the jury in the light which the defendants desired. If an incorrect ruling was given and an exception taken and the ruling is corrected in the mode and manner desired, it becomes part of the summing up and is not open to have the same objection taken again before this Court. The objection taken for improper reception of evidence of the character of Hodge is apparently based on Lord Tenterden's Act, but that Act applies to representations affecting the financial standing and credit of a person and not to such statements as were made here that Hodge was a thrifty, hardworking man. Those statements may be absolutely true without affecting his pecuniary position. The loan was not advanced on his thrift but on the value of the security offered.

As to the rejection of evidence of valuation of other land in the neighbourhood, this was in my opinion rightfully

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rejected, but in fact this value was put in to the jury though the document itself was excluded. So whatever benefit was supposed to be derived from the valuation, the defendants had the result. The loan was for three years, the alleged value of the mortgaged property was $7,000.00 at a forced sale; this value must be treated as existing for the whole period of three years. It was not shown as a then speculative value, but the evidence showed that not even at the date of the loan was the security worth anything like $7,000.00 nor in fact worth the money loaned. The principle derived from the authorities is that when a representation is made by one man to induce another to enter into a contract and the person making the representation is no party to the contract, the Court will compel the latter to make good his assertions as far as possible. *Pulsford* v. *Richards*, 17 Beav. 94; *Hammersley* v. *De Biel*, 2 Cl. & F. 45. "In this case in an elaborate judgment Lord ROMILLY laid down the principal that equity compels a careful adherence to the truth in all dealings with mankind and is applicable not only to those cases where statements are made known to be false by person making them, but also to statements false in fact made by persons who believe them to be true, if in the true discharge of their duty they ought to have known the fact which negatived the representations made, citing *Burrows* v. *Lock*, 10 Ves. 470, and he sums up the application of the rule thus laid down that the person making the representation should be restrained from falsifying it thereafter, but if necessary he should be compelled to make good the truth of that which he asserted. And in *Cleland* v. *Leach*, 5 Ir. Ch. 478, all the cases are reviewed and the principle upheld that a person making a false representation must make good his assertion. Here the plaintiff by his statement of claim undertakes to deal with the mortgage in any manner the defendants may direct. He therefore is entitled to have judgment for the amount found due, and upon payment thereof, the defendants are entitled

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to a return of the security.

If the plaintiff had been successful in selling the mortgaged property his loss would be the difference between the amount realized and the amount due for principal, interest and costs, but as he was unable to obtain an offer for the land, the result is that he is entitled to recover the whole amount due and thereupon he must hand over the securities to the defendants. The defendants contend that *Derry* v. *Peek*, 14 App. Cas. 337, applies. There is no doubt that before that decision in equity if a person carelessly although honestly made a false representation to another, liability followed. That as a general proposition is inconsistent with *Derry* v. *Peek*, but *Derry* v. *Peek* does not apply if there is a legal obligation on the part of the defendants to give correct information. If such an obligation exists an action will lie for its non-performance even in the absence of fraud see *Barley* v. *Walford*, 9 Q.B. 197. The case of *Burrows* v. *Lock*, 10 Ves. 470, is, in principle, applicable to the present case. There the action was brought by the assignee of a residuary legatee. The trustee informed the assignee that the share was encumbered whereas it was not. The decree was that the trustee should pay the full cost of the share to the plaintiff on the ground that he was estopped from denying the encumbrance. So here the plaintiff is not entitled so much to damages for misrepresentation as to a decree that the defendants pay the amount advanced by the plaintiff with interest and costs on the ground of estoppel.

Lord Justice KAY in *Low* v. *Bouverie*, (1891) 3 Ch. Div. 111, sums up the result of the authorities, and the third rule he deduces is that relief will be given at law and in equity, even though the representation was innocently made without fraud, and thus in all cases the suit will be effective, if the defendant is estopped from denying truth of his representations. To render the doctrine of estoppel effective, the statement by which the defendant is bound must be clear and unambiguous and of a present existing

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fact and not a matter of opinion and it is essential that the statement should be of such a nature that it would mislead any reasonable man, and that the plaintiff was in fact mislead by it.

The motion for a new trial therefore fails and the judgment appealed is sustained with costs.

Appeal and motion for new trial dismissed with costs.

NOTE.—This judgment was appealed from to the Supreme Court of Canada, which granted a re-assessment of damages following the judgment of McCreight, J.

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1893.

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CLARK v. EHOLT & CARSON

CLARK *ET AL* v. EHOLT & CARSON.

Practice—Delay—Amendment.

The proper mode for a defendant to take advantage of delays on the part of a plaintiff is by motion to dismiss the action.

Plaintiff having, after long delays, obtained an order to amend his statement of claim. *Held*, on appeal to the Divisional Court (CREASE and DRAKE, J. J.), that the intervening delay was no ground for setting it aside.

APPEAL by defendant Carson from an order made by the Chief Justice, Sir M. B. BEGBIE, in Chambers, giving the plaintiffs leave to amend their statement of claim as they might be advised.

Statement.

H. D. Helmcken, for the appellant.

Theodore Davie, *A.-G.*, for the respondents.

Judgment.

CREASE, J.: This is an appeal by the defendant Carson

against an order of the Chief Justice giving leave to the plaintiffs to amend their statement of claim as they might be advised. There have been great delays on both sides, probably greatest on that of the defendants. The writ of summons was issued on July 30th, 1889, but owing to explainable circumstances, was not served until October 29, 1890. Then came the order of Mr. Justice WALKEM amending the statement of claim; appealed to the Divisional Court and by them confirmed, with permission to amend in fourteen days. This order was not taken out, and no amended statement of claim delivered. On October 18, 1892, plaintiff, under Rule 749, served the usual one month's notice (as more than a year and a day had expired since the last proceeding) of his intention to proceed. Then followed the present notice of motion for judgment in default of delivery of the amended pleading ordered, on which the learned Chief Justice made the order appealed against; refusing to give the judgment asked, but allowing three days for delivery of amended statement of claim and payment of costs, otherwise statement of claim to be taken off the file. Against this decision of the Chief Justice the defendant now appeals. His chief complaint is of the plaintiff's laches, in not complying with the order of the Court, confirmed as it was by the Divisional Court, to deliver an amended statement of claim, and that he is placed at a great disadvantage thereby. But he has shown considerable laches himself; for it is clear that when the month's notice to proceed was given he could then have made application to set that notice aside. Indeed, he could have applied at any time to dismiss the case. The service of the notice to proceed was a direct challenge to the defendant to seek, if he required it, the assistance to the Court to dismiss. But that course was not adopted. Moreover, if the present motion were granted it would not be useful, for the action would still survive. Success in this application would not get rid of the action. If defendant had succeeded now, nothing definite could

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have come of it; nor would it have prevented any other step being taken in the action. I consider, therefore, that the learned Chief Justice's decision is the proper one to have been made under the circumstances, and should be supported; and that this appeal should be dismissed, with costs to the plaintiff in any event.

DRAKE, J.: This appeal, if successful, will result in nothing; it will not prevent another application to amend or to add defendants or any other steps that may be necessary in an action. The defendant relies on the great and unexpected delays that have taken place; if he had made use of these delays to apply to dismiss he might probably have succeeded, but as long as an action is on the files of the Court, the Court has cognizance of it, and applications are made continually relating to some steps or other which may be thought necessary to be taken. It is contended, further, that by giving leave to amend, the defendant may be prejudiced in his defence of the statute of limitations. The issue of a writ is sufficient to prevent the statute running, but it is said here the writ does not disclose the time of the alleged trespasses and could not be used to sustain a cause of action which would be barred before the delivery of the claim. I don't think this is correct; the writ is sufficient to sustain a cause of action which is commenced within the statutable period. The statement of claim defines more particularly the years in which the damage occurred, but no statement of claim having been delivered until 1893, the argument is that the Statute begins to run from the date of delivery of the claim, which would have the effect of eliminating three years of alleged damages. It is not necessary to decide this point on the present appeal. The Chief Justice has allowed the plaintiff's application on terms. I see no reason to set aside his order. There has been unwarranted delay on the plaintiff's part, but our

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rules provide a remedy to the party prejudiced. I think the appeal should be dismissed, with costs to the plaintiff in any event.

Appeal dismissed with costs.

IN THE EXCHEQUER COURT OF CANADA.

(B.C. Admiralty District.)

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Feb. 14.

RITHET v. BOSCOWITZ

RITHET v. SHIP "BARBARA BOSCOWITZ," AND PORTER. (Third Party.)

Exchequer Court—Admiralty jurisdiction—Claims for damages for breach of contract by owner of ship—Owner within jurisdiction—24 Vic. Cap. 10, Sec. 6.

The Admiralty Court has no jurisdiction over claims by owner, or consignee of goods, for damages done thereto by negligence or breach of duty by the owner, master, or crew of the ship, if it is shewn that, at the time of the institution of the cause, that any such owner or part owner is resident within the Province.

Held, That entry of an appearance is not a waiver of the objection to the jurisdiction.

ARGUMENT of a question of law, raised on the pleadings, as to the jurisdiction of the Court. The action was brought by the plaintiff as consignee of a cargo of furs shipped by the defendant steamship to Victoria, B.C., for damages for short delivery. It was admitted that the furs were shipped by the defendant ship, and that they were delivered immedi-

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ately on the arrival of the vessel to one Porter, a warehouseman, at the city of Victoria. The warehouse was broken into the following night and the furs were stolen. The warehouseman, Arthur Porter, had been added as a third party by defendant who claimed over against him. In the defendant's statement of defence it was submitted, that, as a matter of law, the Court had no jurisdiction in the matter, on the ground that the owners are resident within the jurisdiction. The question was argued before Mr. Justice CREASE, Deputy Local Judge in Admiralty, on February 14th, 1894.

Argument.

A. L. Belyea, for the defendants: By 24 Vic. Cap. 10, Section 6: "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee, or assignee of any bill of lading, of any goods carried into any port in England or Wales, in any ship for damage done to the goods or any part thereof, by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales." By the Admiralty Act, 1891, (Can.) the Colonial Courts of Admiralty Act, 1890, was brought into force in Canada. This also similarly limits the jurisdiction of the Exchequer Court of Canada, and it having been admitted that the owners of the defendant ship are resident within the Province, the jurisdiction of the Court is ousted and the action must therefore be dismissed with costs.

H. D. Helmcken, for the plaintiff: This objection should have been raised by the defendant before appearing, before a third party was joined, and before pleadings were delivered. The defendant must now be taken to have waived his right to object, appearance being a waiver of objection, and submission to the jurisdiction.

A. L. Belyea, in reply: Nothing that the defendant may

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or may not have done, can add to or take away from the jurisdiction of the Court. It was the plaintiff's business to see that the action was properly brought.

C. E. Pooley, Q.C., for Porter (third party) was not called upon.

CREASE, Dep. L.J.A.: This Court has no jurisdiction over the subject matter. The entry of the appearance does not waive such an objection.

Action dismissed with costs.

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April 22.

FERGUSON v. THAIN

FERGUSON v. THAIN.

Practice—Rule 33—Right to Jury—Waiver.

An action by an engineer for making an examination and report upon a mineral claim, in which the defence denied the contract and set up that the report made was unsatisfactory and of no value, is within Rule 333, and either party is entitled to trial by a jury.

The action had been brought down to trial without a jury, and been postponed, and the evidence of a witness subsequently taken, *de bene esse*.

Held, That the facts did not amount to a waiver of the right to a jury, or constitute an agreement to try without a jury.

APPEAL to the Divisional Court from an order of DRAKE, J., refusing an application by the defendants for a jury.

The action was brought by the plaintiff, a civil engineer, for the costs of making an examination and report upon a certain mineral claim. The defendants denied the agreement and also set up that the report furnished by the plaintiff was unsatisfactory and of no value. The plaintiff had brought the action down to trial without a jury, and it was

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postponed by consent. Subsequently the plaintiff obtained an order to take the evidence of certain witnesses who were leaving the jurisdiction *de bene esse*, and the evidence was so taken, and the witnesses left the jurisdiction, after which the defendant made the application for the jury, which was dismissed by the learned Judge.

Godfrey, for the defendants, the appellants. This is a common law action, involving a distinct issue of fact, and is governed by Rule 333. It is not "any question or issue of fact or partly of fact and partly of law arising in any cause or matter which, previously to the passing of the Judicature Act, could, without any consent of parties, have been tried without a jury," as mentioned in Rule 331, nor is it "an issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation," as mentioned in Rule 332, and the defendants have the right to a jury. If the plaintiff had been misled in any way, it is a question of costs or postponement of the trial.

Argument.

W. J. Taylor, contra: It was held in *Brooke* v. *Wigg*, 8 Ch. D. at p. 510, that where parties had taken evidence on affidavit for the purpose of its being used at a hearing, that such a course was equivalent to an agreement on both sides to try the case without a jury. The defendant not having asked for a jury before the trial, was misled into supposing that it was intended to try the action without a jury, and he therefore took the evidence of the witnesses in question *de bene esse*. He would not be content to have the evidence in that form submitted to a jury.

DAVIE, C.J.: This is an action in which, before the Judicature Act, either party would be entitled to require a jury by notice, and previous to 1876, could only have been tried by jury, if brought in the Supreme Court. Under Rule 333 the right to a jury in such case is retained. The order appealed from can be sustained only by a decision that what took place between the parties amounted to an absolute agreement on the part of the defendant to waive

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his right to a jury. I do not think that construction can be placed upon what took place. *Brooke* v. *Wigg*, 8 Ch. D. 510, was an Equity suit, this is a common law action. It is every day practice in jury trials at *nisi prius*, to read evidence taken *de bene esse*. The appeal must be allowed and the original summons made absolute for trial by a common jury, with leave to the plaintiff on four days' notice to have a special jury if so advised, upon the usual terms as to paying the increased expense.

McCREIGHT, J., concurred.

Appeal allowed with costs.

SMITH *ET AL* v. MITCHELL.

WALKEM, J.

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SMITH ET AL *v.* MITCHELL

Contract—Privity—Principal and agent—Sale of lands—Statute of frauds—Pleading—Admissions—Point not raised at trial—Specific Performance—Damages in lieu of—Whether rescission together with—Parties—Trustees—Rule 98.

In an action in their own names by the vendors, who were trustees, for specific performance by defendants of an agreement to purchase lands, or damages in lieu thereof, or rescission of the contract and ejectment; it appeared that the negotiations for purchase were carried on between the vendees and one B. by means of a written correspondence, B's. letters containing the terms of sale offered, which were accepted by the defendants. These letters were written on printed letter forms headed "Canadian Pacific Railway Company Land Department," and under B's signature was the word "Commissioner." The defendants pleaded the Statute of Frauds and maintained that the only written contract was, on its face, between the C. P. R. Co. and the defendants, and that evidence that the plaintiffs were the undisclosed principles of B. was not admissible.

Judgment was entered at the trial by WALKEM, J. for the plaintiff for a rescission of the contract, possession of the land, and damages in lieu of specific performance.

On appeal to the Full Court, CREASE, MCCREIGHT and DRAKE, J.J.:

Held, The form of the writing did not import that B. was contracting as agent for the C.P.R. Co.

(2) That the contract was by B. in his own name.

(3) That evidence was admissible to show that the contract was made by B. on behalf of unnamed principals.

(4) That such principals, being trustees, were (under Rule 98) entitled to sue on the contract in their own names without joining their *cestuis que trustent* as parties.

(5) That a party to a contract cannot be decreed, *uno flatu*, both specific performance and rescission, and where he obtains rescission he cannot have damages, which are given as in lieu of specific performance.

Statement.

APPEAL from a judgment of Mr. Justice WALKEM, at the trial granting the plaintiffs rescission of a contract for sale by them to the defendants of certain lands, and an order

for possession thereof, and $7,500.00 damages in lieu of specific performance by the defendants.

The facts appear from the head note and judgments.

The material parts of the letter of Browning to the defendants were:

"Canadian Pacific Railway Company Land Department,
"VANCOUVER, B.C., 9th APRIL, 1892.

"*Messrs. S. Z. Mitchell and John S. Anderson, care Edison Co'y., Vancouver:*

"DEAR SIRS:—Adverting to our interview this forenoon regarding your desire to purchase lots Nos. 1 and 2 in Block 34 in sub-division 541 I agree to sell you the said lots upon the following conditions (then follows the terms and conditions). Kindly let me have a letter stating whether you accept the lots upon the conditions mentioned.

"Yours truly,
(Signed) "J. M. BROWNING,
"Commissioner."

Statement.

To which the following reply was sent:

"Edison General Electric Company,
"VANCOUVER, B.C., 11th APRIL.

"*J. M. Browning, Esq., Land Commissioner Canadian Pacific Railway Co., City:*

"DEAR SIR:—I beg to acknowledge receipt of yours of the 9th inst., referring to the two lots, &c., and I hereby accept your terms of sale for same. Mr. Anderson is away in Victoria, but I have his authority for accepting your proposition in his behalf as well as my own.

"Yours, very truly,
(Signed) "S. Z. MITCHELL."

Defendants' appeal was argued in the Full Court, before CREASE, MCCREIGHT and DRAKE, J.J., on 14th March, 1894.

Argument.

L. G. McPhillips, Q.C., and *A. E. McPhillips* for the appeal: From the documents it appears that the C. P. R. Co. is the vendor, and evidence that the plaintiffs are the vendors, contradicts the written contract.

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The whole of the letter with its headings must be read and its natural meaning adopted. *Gadd* v. *Haughton* L.R. 1 Ex. Div. 357, 360. It is not sensible to construe the body of the letter without the heading and signature. *Pike* v. *Ongley et al* 18 Q.B.D. 710.

If the document shows that it was made by an agent for a named principal evidence cannot be given to introduce a different principal. *Saunderson* v. *Griffiths*, 5 B. & C. 909; *Humble* v. *Hunter*, 17 L.J.Q.B. 350; *Evans on Principal and Agent*, 362; *Young* v. *Schuler*, 11 Q.B.D. 651; *Wilson* v. *Tumman*, 6 M. & Gr. 236; *Vere* v. *Ashby*, 10 B. & C. 294. There is nothing to show that Mitchell knew the title was in Smith and Angus. *Schneider* v. *Norris*, 2 M. & S., 286; *Alexander* v. *Sizer*, L.R. 4 Ex. 102; *Allen* v. *Bennett*. 3 Taunt, 169; *Egerton* v. *Mathews*, 6 East. 307.

Argument.

A memorandum to satisfy the Statute should leave no doubt of the parties to the contract so as to have no fair or reasonable dispute as to who is buying and who is selling, *Potter* v. *Duffield*, L.R. 18 Eq., JESSEL, M.R. at p. 7.

The evidence discloses that plaintiffs are not the owners or vendors. Rule 98 dispenses with the necessity of trustees joining their *cestuis que trustent*. Plaintiffs are not trustees in the sense intended. They acquired no right to represent the C. P.R. or sue to enforce their contracts merely because they hold a bare deed of the lands.

An act of part performance to take the contract out of the Statute of Frauds must be an unequivocal act, *Maddison* v. *Alderson*, 8 App. Cas. Lord O'HAGAN at p. 485; *Charlewood* v. *Duke of Bedford*, 1 Atk. 497; *Frame* v. *Dawson*, 9 Rev. Rep. 304, 306; *Wills* v. *Stradling* 4 Rev. Rep. 27, 28; *Campbell* v *McKerricher*, 6 O. R. 85.

The judgment is wrong in awarding both a rescission of the contract and damages. Damages are grantable under Lord Cairns' Act in lieu of specific performance, and, as there cannot be an order for both rescission and specific performance, neither can there be an order for rescission

and damages which are only an alternative for specific performance. *Ferguson* v. *Wilson*, L. R. 2. Ch. App. 77; *Henty* v. *Schroder*, 12 Ch. D. 666; *Hutchings* v. *Humphries*, 54 L. J., Ch. 650. The damages are assessed on the basis of the cost of putting the lots in their original condition but the actual alteration in value is the proper measure. *Ferguson* v. *Wilson*,, 2 Ch. App. 77; *Hall* v. *L. & N. W. Ry. Co.* 35 L.T.N.S. 848.

E. P. Davis, *Q. C.*, and *B. H. T. Drake*, *contra*: On the question of the judgment giving both rescission and damages cited: *Henty* v. *Schroder*, 12 Ch. D. 666; *Fry on Specific Performance*, Ed. 1881, p. 352; *Hutchings* v. *Humphrey*, 33 W. R. 563; *Proctor* v. *Bayley*, 42 Ch. D. 390; *Saunderson* v. *Griffiths*, 5 B. & C. 909: *Newbigging* v. *Adam*, 34 Ch. D. 582; Alternative prayer not necessary, Rule 186.

Argument.

CREASE, J.: This is an appeal against a judgment of Mr. Justice WALKEM, dated the 23rd January, 1894, in favour of the plaintiffs for $7,500.00 damages, and declaring that plaintiffs were also entitled to the land which formed the subject in dispute.

The action was brought to compel specific performance of an agreement for the purchase of lots 1 and 2, block 34, subdivision of district lot 541, group 1, in the City of Vancouver, or damages in lieu thereof, or in the alternative for rescission of the contract or a declaration that defendant had no longer any interest in the property and for the recovery thereof.

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The defence was no agreement or if there was one that it was not sufficient, under the 4th Section of the Statute of Frauds, to support the action.

The agreement was the outcome of a series of letters during April, 1892, between the plaintiffs as registered owners in fee of the said lots and the defendant and one John Anderson, to purchase the lots from the plaintiffs for $9,000,00 on conditions.

These were—to erect over the whole property a three-story stone and brick building in accordance with plans to

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be submitted and approved by J. M. Browning, the Land Commissioner and agent for the plaintiffs.

The purchase price was to be paid on the due completion of the building. If completed within a time limited by the agreement a rebate of 20 per cent. of the purchase price was to be allowed. But no money was paid on account to bind the bargain. This omission had a distinct bearing upon the construction of the agreement when the question of part performance came up in the course of the argument.

These letters containing the terms offered by the plaintiffs and accepted by the defendant were written on printed letter forms headed in printed letters "Canadian Pacific Railway Company Land Department" and signed "J. M. Browning, Commissioner."

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The printed words and the letters accepting the offer counsel for the defence contended were addressed to "J. M. Browning, Commissioner, Canadian Pacific Railway Co." These addresses, defendant argued, so incorporated this description into the letters as to make it an integral part of the contract. The names of Smith and Angus who it was shown are the trustees of the Canadian Pacific Railway Co., have not appeared openly anywhere in the contract; and defendant's counsel relied in his defence upon these facts, as conclusive in law, that there was no contract thereby created between the defendant and Smith and Angus, so as to satisfy the 4th Section of the Statute of Frauds.

He laid much stress on the case of *Gadd* v. *Houghton*, 1 Exch. D. pp. 357-360, where a broker making a sold note "on account of" a foreign principal, but in his own name, was held not liable upon the contract, which was to be interpreted according to its plain and natural meaning.

He cited also *Pike* v. *Ongley*, 18 Q.B.D. 710, to the same effect, and Mr. Justice PATTERSON'S judgment in *Humble* v. *Hunter*, 17 L.J.Q.B. 350 arguing therefrom that where A. is called a principal it is not allowable to prove B. a principal

—and if it be, that there is nothing to show that the C.P.R. are the vendors, then he argues it is clear that Browning being an agent is not the vendor--and applying *White* v. *Tomalin*, 19 Ont. 513, that as it requires parol evidence to construe these letters, they do not make a contract sufficient to satisfy the statute.

But upon all the authorities, I think the letters between Browning and defendant do form a clear contract between them for the purchase of the lots.

These letters do not state that Browning is, or is not, agent for the C.P.R. Co. The mere employment of the printed form of heading and description after the signature, presumably in daily use for indifferent as well as important subjects, may well be construed as mere descriptions of person and place. There is nothing in the body of the letters either directly or impliedly to convey the conclusion that Browning contracted with Mitchell, as agent and on behalf of the C.P.R. Co. alone.

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The plaintiffs' pleading is quite consistent with the fact of Smith and Angus being trustees for the C.P.R. Co. acting with one common interest, as if they were one and the same together, through Browning. For by our Rules, S.C.R. 98, trustees may sue and be sued, on behalf of or representing the property of which they are trustees, without joining any of the persons beneficially interested, and shall be considered as representing such persons, though the Court or a Judge can at any stage order the beneficiaries to be made parties. But here there is no necessity ; although joining the C.P.R. as parties, though superfluous, would have prevented any question arising on that point. We have an authority under which Browning's principal could be sued or also sue on the agreement as well as himself, *Fry on Specific performance*, Ed. 1892, p. 116, par. 258 says, where agents appear on the face of the contract as principals, the principle by which those cases are regulated, is laid down with great clearness by Lord WENSLEYDALE in *Higgins* v. *Senior*, 8 M. & W. 834.

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who says: "There is no doubt that where such an agreement is made it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand, and charge with liability on the other, the unnamed principals—and this whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence by no means contradicts the written agreement. It does not deny that it is binding on those whom on the face of it it purports to bind; but shows that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is in law the act of the principal. But on the other hand to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done.

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And it is observable that the Statute of Frauds (*Fry on Specific Performance*, Ed. 1892, part 3, Cap. 11) does not require that the authority of the agent should be in writing, where the contract is required to be so.

I am of opinion that either Smith and Angus, or Browning alone or together with the C.P.R. Co., could sue on this contract.

One of the tests of a contract is mutuality. During the argument the case was put, could Mitchell sue under the contract formed out of the letters as I have described. I think under *Laythoarp* v. *Bryant*, 2 Bing, N. Ca. p. 735 that he could. The letters show all the requisites for the purpose. They show a contract between Browning on the one part and Mitchell on the other, and a consideration of $9,000.00 for the purchase of the two lots now in dispute—under certain definite conditions within a definite time. So, from whichever side it may be regarded, the contract thus established is amply sufficient to satisfy the Statute of Frauds, and the

plaintiff has rightly sued.

Another point argued by plaintiff's counsel was, that there had been part performance, sufficient to take the contract out of the Statute, and to aid him in his claim for damages; but there was no evidence adduced in support of it. An act of part performance must be an unequivocal act, *Maddison* v. *Alderson*, 8 App. Cas. 478 to 480, and with a sole view to the agreement in question. There was no evidence, or very slight, of the excavation of the lots by defendant, although the fact of such an excavation was itself suggestive of a contract. Indeed as I take it it is not material to plaintiff's case to prove part performance, in order to sustain his claim for damages. For as counsel argued, if the contract was not good under the Statute, the plaintiffs would have had previous to Lord Cairns' Act to bring his action in a Court of Law, and as his agreement was not good under the Statute, he could not have succeeded; and according to *Lavery* v. *Pursell*, 39 Ch. D. 508, he would have fared no better under the Judicature Act; as that made no difference in that respect.

Besides, as counsel informed me during the argument, there was no money paid on account of the purchase.

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The only remaining question was that of damages.

These were granted by the Court at $7,500.00 together with a rescission of the contract, and a declaration that plaintiffs should also have the land.

Now there are several points to be considered here.

Mr. *McPhillips* argued very strongly (1) that the damages were excessive; (2) that the plaintiff could not have all these remedies together.

In *Ferguson* v. *Wilson*, L.R. 2, Ch. App. 77, where relief by way of specific performance was not possible, and damages as a statutory alternative for it were sought, it was held that the plaintiffs' claim for damages under Lord Cairns' Act failed also.

Then again, as to the double application for specific per-

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formance or damages or rescission of the contract. *Henty* v. *Schroder*, 12 Ch. D. 666, determined that the plaintiff may have either remedy; but not both together. It does not seem reasonable to ask to rescind a contract, and at the same time ask that it may be specifically performed. In the *Henty* v. *Schroder* case the Master of the Rolls allowed the contract to be rescinded; but declared it impossible at the same time to give damages for the breach of it.

In *Hutchings* v. *Humphrey*, 54 L.J. Ch. 650, also 38 Weekly Reporter, 563, the same thing is stated. This was commented on in *Dart on Vendors and Purchasers* Ed. 1888, 1254; and it was stated that V. C. STUART was the single Judge who thought that these two opposing remedies might be obtained together, but that it now "appears to be settled that an order cannot be obtained at the same time for rescission of the contract, and for damages for its breach."

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In this respect therefore the judgment of the Court below for rescission of the contract, and $7,500.00 for non-performance of it, seems to be wrong.

Then I think the damages were excessive. The plaintiffs based their demand for $9,000.00 on the lots being in a good business portion of the town suitable for large substantial buildings, such as they insisted on requiring as a condition of the contract. If so the excavation to the depth required instead of being a disadvantage, was a great advantage; and should count much in mitigation of the damages sought.

At present we are told the prices of lots there, are down in the market. But situated as the city is, the depression can only be temporary, and immediately the tide turns, and demand for such revives, it is quite reasonable to expect that the vendors will not forget to ask a satisfactory sum for such beneficial work already done to hand.

The judgment for both damages and rescission together cannot be sustained. If the plaintiffs desire to keep their judgment, they can do so by abandoning their damages. If

they adhere to the damages, they must abandon the rescission of the contract and submit to a smaller amount of damages, $3,000.00, or in the alternative take a new trial.

As neither party has more than partially succeeded there will be no costs.

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McCREIGHT, J.: Smith and Angus sue Mitchell for specific performance or damages in lieu thereof and in the alternative for rescission of an agreement by Mitchell for the purchase of some land in Vancouver from Smith and Angus. No part of the purchase money was paid but the defendant took possession under the agreement, and with a view to erect buildings as agreed upon, made excavations in the ground which, as the defendant has refused to proceed any further, have damaged the ground to an extent, as the learned Judge found on the evidence, of $7,500.00, who gave judgment for that amount, as also for a declaration that the plaintiffs are entitled to the property or in other words for rescission of the agreement, and this is an appeal to the Full Court from that decision.

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It was argued for the defendant that there was no contract in writing sufficient to satisfy the 4th Section of the Statute of Frauds, but I am of opinion that there was, and I think that the letters of the 9th and 11th of April between Browning and Mitchell constitute a distinct contract between them for the land. I do not collect from them that he, Browning, contracted merely as an agent or even that he was only an agent. The headings of the letters and the expression "Commissioner" may be only descriptive or *designatio personæ*. If the letters expressly or by implication had alleged that Browning contracted as agent and for the C.P.R. Co. alone the objection might be serious. See the judgment of *Higgins* v. *Senior*, 8 M. & W. 834, but I do not think that is by any means the true construction. It might well be that Smith and Angus and the C.P.R. Co. stood to each other in the relation of trustee and *cestui que trust*, or

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if I may say so were substantially identical, in which case the pleader was right in attending to Rule 98 of the Jud. Rules as to actions brought by trustees. If the case goes down to another trial it might be proper perhaps to join the C.P.R. Co. as co-plaintiffs but I don't think it would be necessary to do so. I think to take the case which would be the converse of the present namely of Mitchell suing Browning on these letters that he could recover against Browning. The letters show the names of the contracting parties, the consideration and the land which is the subject of the contract and this is all that the Statute requires. See *Laythoarp* v. *Bryant*, 2 Bing N.C. 735, and *Williams* v. *Lake*, 29 L. J. Q.B. p. 1.

The case of *Higgins* v. *Senior*, 8 M. & W. 834, shows that Browning's principal might also be sued or also sue on the agreement. See the remarks on this case in *Fry on Specific Performance* 1892 edition, p. 116, s. 258. I think it plain that either Browning or Smith and Angus with or without the C.P.R. Co. or at all events with them could sue on this agreement. It was argued by the plaintiff's counsel also that the case for damages could likewise be supported on the ground of part performance. In the view I take of the previous question I think that which arises from alleged part performance is immaterial, but as it was argued at length I may say that supposing the letters not to satisfy the Statute, part performance would not help the plaintiffs. For before Lord Cairns' Act which was passed I believe in 1858 the plaintiff who wanted to get damages would have been obliged to go to a Court of Law, and if the Statute was not satisfied he would of course have failed as part performance would have been of no use to him there and the Judicature Act has not changed this. See *Lavery* v *Pursell*, 39 Ch. D. p. 508, see especially p. 518, per CHITTY, J.: and *Fry on Specific Performance* p. 268, s. 578 and p. 270, s. 594; *Salt* v. *Cooper*, 16 Ch. D. 544; *Joseph* v. *Lyons*, 15 Q.B.D. (C.A.) 280 and *Hallas* v. *Robinson*, 15 Q.B.D. (C.A.) 288, as

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well as *Steeds* v. *Steeds*, 22 Q.B.D., 541, since the Judicature Act and Rules illustrate the same doctrine or line of thought.

But a third question arises in this case upon which I must give my opinion in favour of the defendant; the judgment gives damages $7,500.00 coupled with rescission of the contract, and in this respect seems on the authorities to be wrong. Before referring to them I may say that considering that the damages are a substitute for specific performance the same difficulty arises as if rescission of the contract and specific performance of it were both granted, which would of course be a manifest contradiction in the decree, see *Ferguson* v. *Wilson*, L.R. 2 Ch. App. 77. The plaintiff may take one or the other, but he cannot have both. The cases on this point are *Henty* v. *Schroder*, 12 Ch. D. p. 666, where Sir G. JESSEL held that the plaintiffs were only entitled to have the agreement rescinded, and could not at the same time claim damages for its breach. This case was followed in 1885 by NORTH, J., in *Hutchings* v. *Humphrey*, 54 L.J. Ch. p. 650 reported also in 33 W. R. 593; *Sweet* v. *Meredith*, 4 Giff. 207. It is there pointed out that V. C. STUART was the only Judge who thought that both damages and rescission could be granted and his decision appears to have led to a wrong form being used in *Seton on Decrees*, 4th Ed. p. 1320. As to *Henty* v. *Schroder*, 12 Ch. D. 666, see last edition *Fry on Specific Performance*, p. 532 s. 1174, and *Mayne on Damages*, 4th Ed. p. 193 also may be referred to, but the text writer who is most explicit on the subject is *Dart on Vendors and Purchasers*, Edn., 1888, a book praised by Judges; at p. 1254, it was stated as follows: "Although in one case STUART, V.C. excepted from the stay of proceedings any application which the vendor might make to assess damages for breach of the contract, yet it appears to be now settled that an order cannot be obtained at the same time for rescission of the contract and for damages for its breach."

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I think the judgment wrong in giving both damages and

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rescission, and that it must be set aside and the plaintiff take the case down to a new trial and elect whether he will have the damages or rescission. It is unfortunate for the plaintiffs that a deposit was not insisted on before the defendant took possession, for the Court would not under the circumstances have ordered its return. If the parties can make some arrangement whereby the expense of a new trial can be saved, I think they will be acting wisely considering the injury to the land that the defendants have caused. I doubt whether the successful appellant should have costs, or rather they should be set off against the damage. See what is said by FRY, L.J. in his treatise p. 532 last edition, as to the doctrine of *Henty* v. *Schroder* preventing the plaintiff getting full redress. Further the defendants have partly failed and partly succeeded on the appeal, and this is an additional reason why costs should not be given.

Judgment of DRAKE, J.

DRAKE, J.: The plaintiffs allege a contract of sale and purchase based on letters written by Mr. Browning and accepted by the defendant. To this the defendant pleads the Statute of Frauds. In my opinion all the ingredients for a contract for sale of lands are present. Browning offers to sell at a price certain specified lots, payment to be made in one of two ways, the offer is accepted and one of the alternative modes of payment adopted. The contention strongly urged before us is that as Browning wrote on paper headed "Canadian Pacific Railway Land Department," and signed his name followed by the word "commissioner," that in fact it was the contract of the Canadian Pacific Railway and the wrong parties have sued. But Browning does not sign as commissioner or as agent. This is a valid contract and could be enforced by the purchaser as against Browning, but Browning says he contracted on behalf of Smith and Angus, the freeholders and under the authority of *Higgins* v. *Senior*, 8 M. & W. 834, an agent can contract on behalf of an undisclosed principal whether the agreement be or be

not required to be in writing under the Statute of Frauds, As this part does not contradict the written document it does not deny that the person contracting is bound but it shews that some one else is also bound.

But the Statute of Frauds cannot be pleaded in this case as a bar to the action because the plaintiffs allege that the defendant went into possession and made a large excavation in the land digging the whole surface out to the depth of fifteen feet and the defendant merely pleads a general denial of the whole statement of claim. As a matter of pleading this is an admission under the Rules 13, 17 and 19 and *Rutter* v. *Tregent*, 12 Ch. D. 758, and *Burdett* v. *Humphage*, 92 L.T.Jo. 294, are direct authorities on this point. The defendant did not apply to amend but preferred to rest his case on the pleadings as they stand. The object of the seven Rules of Pleading is that the parties may know what case they have to meet and not be put to the expense of bringing witnesses to prove that which is not denied.

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The learned Judge decided that this was not a case for specific performance as the time for building the house and payment of the purchase money had gone by and treated it as a case for damages under Lord Cairns' Act.

The plaintiff produced evidence to show that the damage to the property was of a serious nature. that it would cost $5,500.00 to fill up the excavation made by the defendant and when that was done it would not render it as fit for building purposes as it was before. To put the property in a fit condition for building would necessitate the construction of retaining walls and the cost was estimated at $7,500.00. These witnesses were not cross-examined and no counter evidence adduced, but the defendant contends before us that the principle adopted in estimating the injury was wrong and therefore it was not necessary to show what was the right principle to be applied. I cannot agree with this contention. The defendant is bound to disclose his defence, it was open to him to show that the excavation

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was an improvement and enhanced the value of the property. The defendant now contends that the proper estimate of damages is the difference between the value of the property at the time of sale and the value at the time this action was brought. The evidence of Browning and Tatlow was in fact directed to this point and passed undenied. If owing to a misconception on the part of the defendant he believes he is prejudiced I see no reason why the appellant should not be allowed to raise a point which he did not raise in the Court below. See *ex parte Firth*, 19 C. D. 419 and *Connecticut Fire Insurance Co.* v. *Kavanagh*, (1892) App. Cas. 473.

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I cannot help thinking that the amount of damages is excessive, but as we have before us all the evidence and to send the matter down for a new trial on this head alone would be a useless expense. I think the damages should be reduced to $3,000.00. The excavation may be of value to the plaintiffs in obtaining an advanced price for the lots. On the other hand I think the judgment in so far as it gives a rescission of the contract as well as damages is wrong under the authority of *Henty* v. *Schroder*, 12 C.D. 666 which overrules the previous authorities to the contrary.

The plaintiffs cannot have rescission and damages.

If they wish to keep the judgment as to rescission, they can do so by abandoning the damages. If they wish to retain the damages, then so much of the decree as awards rescission must be set aside and the damages reduced to $3,000.00.

In either case there will be no costs of this appeal.

Judgment accordingly.

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Bills of exchange—Choses in Action Act, C.S.B.C. 1888, c. 19—Supreme or County Court action—Costs—C.S.B.C. 1888, c. 31, s. 84.

An order to pay money in which the drawee is mentioned is a Bill of Exchange, and by Sec. 7. C.S.B.C. 1888, c. 19 (Assignment of Choses in Action Act), is excepted from the operation of that Act, and does not operate as an assignment.

When the drawee is not mentioned, the order is not a Bill of Exchange and is an assignment within the Act.

Johnson v. Braden, 1 B.C.R. Pt. II, 269, followed.

The action being within the jurisdiction of the County Court, County Court costs only allowed.

ACTION for balance due on two orders drawn by one McLellan on the defendants in favour of the plaintiff.

Statement.

W. J. Bowser, for the plaintiff.

E. M. Yarwood, for the defendants.

The facts and arguments fully appear from the judgment.

DRAKE, J.: This action is for balance due on two orders drawn by McLellan on the defendants in favour of the plaintiff. The plaintiff was a sub-contractor under Angus McLellan for the erection of a wharf for the defendant at Nanaimo. He was paid by two orders.

"$312.15 NANAIMO, Feb. 22nd, 1894.

"Please pay to William McPherson the sum of $312.15 and charge the same to my account.

"ANGUS McLELLAN.

"Witness—F. M. Young."

"NANAIMO, March 19th, 1894.

Judgment.

"Please pay to the order of Mr. McPherson the sum of $75.00 and charge to account of

"ANGUS McLENNAN.

"*To Messrs. A. R. Johnson & Co.*"

"On the first order $234.10 was paid, leaving $78.05, and

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there is due on the second order $18.75. The first order is not a bill of exchange, as there is no drawee named or indicated.

The second order is a bill of exchange payable on demand, as no time for payment is expressed, addressed to Messrs. A. R. Johnston & Co., but not accepted. A verbal acceptance is insufficient, and so is part payment. The plaintiff relies on the Statute, Ch. 19, Consolidated Statutes, 1888, relating to choses in action, and claims that both these documents are a sufficient assignment in writing to bind all moneys in defendant's hands payable to McLellan at their respective dates. Section 7 of that Statute excludes bills of exchange or promissory notes from the operation of the Act. As I am of the opinion the second order contains all the requisites of a bill of exchange as defined by the Code of 1890, and does not purport to be drawn on any particular fund, the plaintiff cannot invoke the Chose in Action Act in support of this portion of his claim. With respect to the first order it was proved that it was presented to the defendants by the plaintiff, and although refused acceptance a portion of it was subsequently paid. An order such as this is subject to any defence or set-off which existed at the time of the assignment or before notice thereof to the defendants. The defendants have not set up any such defence. They simply deny they are indebted to the plaintiff on the orders or on any account, and further deny that they accepted the orders. They do not set up that at the time they had notice of the order there was no money due to the drawer or that they had a set-off. Some evidence was adduced that the contractor failed to fulfill the contract at a date subsequent to the payments on account, but that evidence had no bearing on the issues raised by the pleadings and no amendment was asked for. The Choses in Action Act was considered in the case of *Johnson* v. *Braden*, 1 B.C. R. part II, page 269. I agree with the judgment in that case. I am of the opinion that the first order was a

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sufficient assignment of a chose in action under the Act, and further that there was money in defendants' hands belonging to McLellan, because they subsequently paid the plaintiff $56.25 on the second order.

The plaintiff contends that he is in his right to bring this action in the Supreme Court because the plaintiff and defendants are living in different County Court districts. The County Court Amendment Act, 1894, Section 3, enacts that plaints may be entered in the district where defendant carries on business, at the time suit is brought, or in the County Court where the action wholly or in part arose. The defendants here live at Nanaimo, and the cause of action wholly arose there. This clause merely obviated the necessity of applying to a Judge for leave to issue a plaint in the cases mentioned in that Section and gave the plaintiff power to issue his plaint wherever the cause of action in whole or part arose, and in my opinion the word "may" in this Section is not directory merely, but if the plaintiff sues in the County Court he must bring his action where the defendant resides or carries on business, or where the cause of action in whole or part arose. The Statute does not take away his right to sue in the Supreme Court, but he takes proceedings in that Court at the risk of not recovering costs; under Section 34 of Chap. 31, Consolidated Statutes, 1888, and see *White* v. *Cohen*, 68 L.T. 305, which was decided on a section similar to that contained in our Act with this exception, that in our Act the Judge may certify on the record that there was sufficient reason for bringing the action in the Supreme Court. I see no reason for giving such certificate here, and give judgment for the plaintiff for $78.05, with County Court costs.

Judgment.

Judgment for plaintiff with County Court costs.

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THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. EWEN.

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. MUNN.

Tidal river—Right of Dominion of Canada to restrain pollution of—Injunction.

The Crown, in the right of the Dominion of Canada, has the right to take proceedings to restrain by injunction the pollution of tidal rivers, which co-exists with the right of the Provincial Attorney-General to restrain any public nuisance, caused by the improper conduct in question.

The fact that a Statute makes the conduct in question an offence, and imposes fines and imprisonment for its commission, does not derogate from the right of the Court at the motion of the party injured to restrain its commission by injunction.

An injunction may be granted although the defendant makes affidavits that he has taken precautions against the recurrence of the injury complained of.

Statement.

ACTIONS claiming injunctions restraining the defendants, their servants, agents or workmen from permitting offal or remnants of fish or other deleterious matter to pass into the Fraser River. The actions were tried together on the 26th day of March, 1895, before Mr. Justice DRAKE.

The facts and arguments fully appear from the judgment.

Charles Wilson, Q.C., for the plaintiff.

E. V. Bodwell and *Aulay Morrison* for the defendants.

Judgment.

DRAKE, J.: These actions came on together and the evidence in the first action was agreed to be used as evidence in the second action as far as appropriate. The action is brought for an injunction to restrain the defendant from depositing fish offal in the Fraser River to the detriment of navigation and the annoyance of the public. The plaintiff further alleges in the alternative that the river and the

salmon fishery therein is under the exclusive control of the Dominion and that the acts of the defendant were in violation of the Fishery Acts and in derogation of the Crown rights over the foreshore.

The defendant denies the escape of offal into the river and alleges that the fishery acts having provided penalties for any breach of the law, there can be no other penalties imposed. And further that the Attorney-General of the Dominion has no right of action.

The evidence on the plaintiff's part disclosed the fact that on certain days a large amount of offal escaped into the river from the defendant's cannery, and in fact no evidence was adduced by the defendant to show that any offal was disposed of otherwise than by depositing it in the river. The amount of offal which arises from the cannery operations was estimated at one-third of the total pack. This pack last year was 360,000 cases, which would make the amount placed in the river over 4,000 tons, and this deposit was made chiefly within the month when the sockeye run of fish was in the river. It was proved that large deposits of offal were left by the water on the river bank, creating a very offensive nuisance, the greater part sank to the bottom of the river and some of the fishermen gave it as their opinion that this output of filth checked the fish from coming into the river. As to this, it is a matter of opinion, and the data on which it is based requires more careful observation than has as yet been given to it. It cannot be disputed from the experience of other rivers and streams that pollution of the water is, if not destructive to fish life, one cause why fish desert the waters when this takes place. The defendant's counsel suggested that this offal was eaten by organisms which in turn were eaten by salmon, and therefore, it was beneficial to the fish, a theory without any satisfactory foundation. In addition to this evidence of nuisance, the fishermen complained that their nets were destroyed by the effects of the offal, and the water of the

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river polluted. Dr. Walker stated that a large number of typhoid cases existing in the camps, in his opinion, arose from drinking the river water. Dr. Bell-Irving, on the other hand, while admitting the existence of typhoid, considers it owing to the unsanitary arrangements of the fishermen's camps on the bank of the river, and the overcrowding and filth thereby engendered. Whatever may be the cause, the fact of its existence is undoubted. The defendant denies the right of the Attorney-General of the Dominion to prosecute this action on the ground that if the offal is a nuisance, the provincial Attorney-General is the only person who can take proceedings in the interest of the public. I do not agree with this contention, because the Dominion has the control of tidal rivers, harbours, fisheries, and navigation, and the action in some degree affects all these questions. With regard to the pollution of the stream by offal, the Dominion has under the Fisheries Act made regulations and imposed penalties, therefore, although the provincial Attorney-General might with regard to the nuisance take proceedings, yet as regards the fisheries and the conservation of the river, the authority is vested in the Dominion parliament.

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The defendant's first ground is that, as the Dominion Legislature has expressly legislated with respect to offal, and imposed fines and imprisonment for any infraction of the law to be recovered before Justices of the Peace, therefore this Court has not power to impose an additional penalty by way of injunction and he relies on the *Institute of Patent Agents* v. *Lockwood*, (1894) App. Cas. 347.

If this was an action to recover damages for allowing the offal to escape into the river, there would be great force in the contention, but what the plaintiff seeks to restrain is the nuisance which arises from the defendant's neglecting to comply with the law; the nuisance affects the public, and whether or not there was any law prohibiting the placing of the offal in the river, the defendant would be liable for a

nuisance, even if it arose from doing a lawful act, and JESSEL, M.R. in *Cooper* v. *Whittingham*, 15 C.D. 501, in dealing with this point says that where an act creates a new offence, and enacts a particular penalty, as a general rule the person proceeding under the Statute was confined to the recovery of the penalty in the mode prescribed; but the rule was subject to two exceptions, the ancillary remedy in equity by injunction to protect a right—that is a mode of preventing that being done, which if done would be an offence. Whenever the act is illegal and is threatened, the Court will interfere to prevent the act being done; and the second exception is under the Judicature Act, which enables the Court to grant an injunction in all cases in which it shall appear to the Court just and convenient and this authority he says is a general supplement to all acts of parliament.

In the present case, rights independent of the Statute are affected, the right of the public to pure air and water, the right of the fishermen to carry on their lawful business without the annoyance and nuisance of fish offal injuring their nets. In the patent case, the rights of the public were not affected, but only those of a statutory body; in addition a nuisance is an indictable offence at common law, and is also the subject of a civil action.

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The defendants first contended, that in fact what they did was of itself insufficient to cause a nuisance, but only became a nuisance (if at all) by the number of other canneries all doing the same thing. Every one who contributes to a nuisance is liable, if in the aggregate a nuisance is proved—*Thorp* v. *Brumfitt*, 8 L.R., Ch. 650; *Blair & Summers* v. *Deacon*, 57 L. T. 522.

The defendants first contended that there was no evidence that they either threatened or contemplated a renewal of the nuisance, and as the fishing was not being carried on now, it was necessary to show that the defendants intended at some future time to repeat the nuisance.

The plaintiff amended his claim alleging that the defend-

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ants intended to carry on their business this year, and if so the reasonable presumption is that there would be a renewal of the nuisance, and the defendants admitted the intention to carry on the cannery, but said they were making preparations to effectually prevent any escape of offal into the river. If they are successful in the preventive measures they propose an injunction will not affect them. The object of the plaintiff will be attained if in the future operations of the cannery the offal is prevented from polluting the river and the banks—it is not the object to interfere with a valuable industry and prevent its successful working, but only to control its methods so as not to prejudice the public or to injuriously affect the industry which the Government is anxious to protect.

In Munn's case the only additional evidence is, that he has established what he considers a sufficient protection for removing the offal. I am not all satisfied from the evidence that it is of the effect he wishes me to believe. The endless chain with cleats would doubtless be effective for removing liquids, but not solids, and the statement of the witness for the Crown, that it brought back nearly as much as it removed, confirms this view. His further statement that he employed boats and canoes to remove the stuff out to sea, can hardly be strictly accurate, as the amount required to be removed would require a daily fleet of boats, which would materially interfere with his fishing arrangements. I think in this case, as well as Ewen's, the injunction should go, and there will be sufficient time for the defendants to make satisfactory arrangements for carrying out their devices for removing this offal before the fishing begins.

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The parties must understand that they cannot be allowed to contravene the law.

With regard to the costs—Ewen since the close of the fishing season has commenced structural alterations, which he thinks will effect the object in view. Munn may have

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to improve his device so as to satisfy the fishery authorities. I think, therefore, that taking all the circumstances in consideration, there should be no costs.

The injunction will be to restrain the defendants, their agents, servants and workmen from creating or permitting a nuisance by polluting the water of the river with fish offal or by allowing the same to collect on the foreshore of the river.

Injunction granted.

NOTE—An appeal by defendant Ewen from this judgment to the Full Court (DAVIE, C.J., CREASE and MCCREIGHT, J.J.), was dismissed on the 29th April, 1895.

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Contract — Accord and satisfaction — Novation — Taking sole note of one partner for amount of joint account whether release of the other.

In an action against B. & S. as partners for goods sold and delivered, it appeared that the firm had dissolved, S. carrying on the business and assuming the liabilities. Plaintiffs having drawn on the firm for the amount, S. returned the draft, stating the dissolution and that he had no right to accept in the firm name, but sent his own note. This note not being paid at maturity, plaintiffs drew on S. who did not accept, but in lieu sent four notes made by himself, for the amount in the aggregate. These notes were held by plaintiffs and sent for collection at maturity, and on non-payment brought the action against B. & S.

Held, per DRAKE, J., at the trial, That though there was no express agreement to that effect, the acceptance of the four notes of S. and the retention of them, and forwarding of them for collection by plaintiffs was *prima facie* an acceptance of the sole liability of S. in the place of the joint liability of B. & S., and a discharge of B. there being no reservation of their rights against him.

On appeal to the Full Court per WALKEM, J.: (CREASE and MCCREIGHT, J.J.: concurring) That the proper question for the trial Judge was whether the plaintiffs had expressly agreed to take and did take, the notes of S. in satisfaction of the joint debt. That there was no evidence of such agreement, and the fact that the plaintiffs when taking the notes of S. did not expressly reserve their rights against B. was immaterial.

Statement.

ACTION by plaintiff to recover $1,081.52 for goods sold and delivered to defendants as partners. The defendant Stamford admitted his liability, and judgment was entered against him; the defendant Braden disputed his liability upon the ground that the plaintiff had accepted the promissory notes of Stamford in lieu of the indebtedness of the firm, and thereby discharged him from liability. The facts fully appear from the judgments and head note. The action was tried on the 29th November before the Honourable Mr. Justice DRAKE, who gave judgment as follows:—

Judgment.

DRAKE, J.: Action brought by the plaintiffs to recover

$1,081.52 for goods sold to the defendants between October, 1891, and December the same year. Stamford admits liability and judgment has been entered against him. Braden defends.

The defendants were plumbers carrying on business in partnership in Victoria. The ordinary course of business appears to have been for the plaintiffs to fill orders and draw for the amount. Up to the date of the supply of these goods all previous bills were met at maturity.

On the 26th March, 1892, the partnership between the defendants was dissolved. On the 6th April Stamford advises the plaintiffs that he was carrying on business alone and returns the draft drawn on the firm unaccepted, stating he was not authorized to accept in the firm's name. On the 20th April the plaintiffs sent their account addressed to Stamford alone and asked him to honour their sight draft for the amount. On the 29th of April, instead of honouring this draft Stamford sent his own note at three months for the account. This does not appear to have been done in pursuance of any request of the plaintiffs. This note would become due on the 1st August. The plaintiffs do not appear to have written in reply, but they appear to have drawn on Stamford on the 2nd August. Stamford writes complaining of dull times and endorses four notes dated August 1st, due 30, 60, 90 and 120 days making up the amount of the first note. None of these notes were paid at maturity.

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From the evidence I find that MacKenzie, the plaintiffs' agent here, more than once informed Braden that he would be held liable for this account, and he was so informed subsequent to the delivery of the notes of 1st August and there is no evidence of any contract or agreement substituting Stamford's individual liability for that of the firm, unless the note of $1,121.22, subsequently renewed by the four notes of August 1st can be so treated.

It has to be remarked that there is no evidence to show the note of $1,121.22 was accepted by the plaintiffs as a

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payment of the joint liabitity. The note appears to have been sent to the plaintiffs but whether it was returned or not cannot be traced, and Stamford has no recollection of its return, and the plaintiffs appear not to have relied on it as a payment, as they draw again for the amount as appears by their letter of the 10th August. I therefore think that up to the 1st August there was no express or implied agreement to look to Stamford alone. Stamford then sends four notes of 1st August in a letter dated 15th August. These notes I think must be treated as having been accepted by the plaintiffs, for they did not return them, and they sent them forward for collection as appears from the indorsements thereon. Mackenzie, the plaintiffs' agent, apparently had no knowledge of these notes having been sent. The dissolution of the defendants' partnership does not bind the creditors of the firm for no act of the partners *inter se* can alter their position as regards their creditors unless accepted in fact or by implication.

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There is no acceptance in fact of Stamford as sole debtor. It was contended in behalf of Braden that the delivery of the note to the plaintiffs followed by the renewal of the 1st August, was such a dealing with the debt as impliedly released Braden, and ought to be treated as an acceptance of Stamford as sole debtor. And the cases *Lyth* v. *Ault*, 7 Ex. 669; *Evans* v. *Drummond*, 4 Esp. 89; *Thompson* v. *Percival*, 5 B. & Ad. 925, were cited in support. In the case of *Lyth* v. *Ault* the defendants pleaded amongst other pleas an agreement between plaintiff and defendant that the sum of £12 should be paid to the plaintiff in discharging the sum of £12, and that the plaintiff should relinquish his claim against Ault for the residue of the debt and that the plaintiff should take Wood alone as solely liable for the residue of the said debt. On this plea the defendant had a verdict, and it was held a good consideration for an agreement to discharge the other debtor. This case therefore does not apply to the present circumstances. In *Evans* v.

Drummond, the goods sued for were supplied after Drummond had ceased to be a partner and the plaintiff accepted a bill from Contrunce one of the partners for the amount; he became bankrupt and he sued Drummond. Lord KENYON says that, "where partners have given acceptance and where one has made provision for the bill, is it to be endured that the holder shall take the bill of the other partner and yet hold both liable? It is a reliance on the sole security of Contrunce, and discharges the defendant." The facts of this case are very nearly identical with the case before me, viz., a joint debt and then a bill of one only. If the draft originally drawn by the plaintiffs had been accepted by the firm and they had subsequently taken Stamford's bill in payment, the case would have been exactly in point.

In *Thompson* v. *Percival*, DENMAN, C.J., in delivering judgment refers to *Evans* v. *Drummond*, and states that Lord ELLENBOROUGH acted upon that authority in *Reed* v. *White*, 5 Esp. N.P.C. 122, and said that it was contended that the acceptance of a Bill of Exchange by one of two debtors cannot be a satisfaction because the creditor gets nothing which he had not before, but he says the written security which was negotiable was something different from that which he had before, and it was easy to conceive that the sole liability of one might be more beneficial than the joint liability of the two; and he winds up his judgment by saying that if the plaintiffs did expressly agree to take and did take the separate Bill of Exchange of one in satisfaction of the joint debt, that would be a good discharge.

Judgment of DRAKE, J.

In the case before me there was up to the 1st August no acceptance express or implied but after that date I think as a jury, the receipt of the four notes of Stamford, and the retention of them and forwarding them for collection through their bankers was an acceptance of the sole liability of Stamford. There is no evidence that the plaintiffs in taking these notes expressly reserved their rights against

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Braden, or that Mackenzie was ever informed of the fact of the plaintiffs having accepted these notes. The case of *Swire* v. *Redman*, 1 Q.B.D. 536, was relied on by the plaintiffs. In that case, after the dissolution of the partnership, Holt commenced to manage the affairs of the late firm. He suggested to the plaintiffs that future drafts should be signed in his own name instead of that of the late firm, and this was done. The Court held that so long as the relation of joint debtors had not been changed to something else, the plaintiffs might give time to one without affecting their co-debtor. I think the position here of joint debtors was changed to something else and that something else by implication releases Braden.

This is not a case of novation, for there is no one else liable to the plaintiffs who was not originally liable.

Judgment of DRAKE, J.

The case is no doubt one of some difficulty and I come to the conclusion with reluctance that Braden is entitled to judgment.

Judgment will therefore be entered for Braden with costs.

From this judgment the plaintiffs appealed to the Full Court, and the appeal was heard before CREASE, MCCREIGHT and WALKEM, J.J.: on the 14th January, 1895.

Argument.

A. E. McPhillips for the appellants: In the absence of an express agreement to that effect a creditor taking the note of one partner for the debt of the partnership and suing thereon, but failing to recover the amount of the note, is not precluded from afterwards claiming the amount of the note against the partnership, *Lindley on Partnership*, 1890 Ed. 46, 239; *Lyth* v. *Ault*, 7 Ex. 669; *Bedford* v. *Deakin*, 2 B. & A. 210; *Jacomb* v. *Harwood*, 2 Ves. S. 265. It must be proved that a new security was taken and that the old debtor was discharged, *Winter* v. *Innes*, 2 Mylne & Craig, 101; *Harris* v. *Farwell*, 15 Beav. 31; *Evans* v. *Drummond*, 4 Esp. 89; *Reid* v. *White*, 5 Esp. N.P.C. 122; *Allison* v. *McDonald*, 23 Ont. 288; *Swire* v. *Redman*, 1

Q.B.D. 536. The case of *Birkett* v. *McGuire*, 7 O.A.R. 53, was over-ruled in the Supreme Court, *Cassell's Digest*, 1883, 332. The small number of cases in which relief has been refused compared with those in which it has been granted, shows that the leaning of the Court is strongly in favour of the creditor. A covenant not to sue is not a release. The mere taking of a bill from a new debtor (here he is one of the debtors) will not discharge the old debtor. *Muir* v. *Dickson*, 22 Dunlop 1070; *Anderson* v. *McDowall*, 3 MacPh. 727; *McIntosh* v. *Ainslie*, 10 MacPh. 304. To make a novation, there must be (1) the acceptance of a new debtor; (2) the discharge of the old. Nothing short of the creditors consent to discharge the old debtor expressly given or reasonably and fairly implied by the creditor's words or consent will suffice to establish novation.

Hon. C. E. Pooley, Q.C., for the respondents: Taking the note of a new firm for goods sold to the old firm operates as a release to the latter. *Watts* v. *Robinson*, 32 U.C.Q.B. 362. In England the law construes more easily a creditor's conduct and dealings as a consent to discharge by novation *Bilborough* v. *Holmes*, 5 Ch. D. 255. In *Rolfe & Bank of Australasia* v. *Flower*, 1 P.C. 27, the English Court held that when a new firm undertakes to discharge the liabilities of the old firm and announces that to the public, very little is required to assure an assent to the arrangement by the creditors. *Lindley on Partnership*, 1891 Ed. 248. The taking of the bill of the new firm or other new debtor after intimation that the new firm had taken over the estate and was to pay the debts of the old firm, and then waiting the currency of that bill and allowing the original debtor to enter into or carry out arrangements with the new firm on the faith of the debt having been paid, will discharge the old firm as by novation. The discharge of the old firm will be inferred from the creditor receiving the bill of the new firm and acting in a way that shews he accepts them as his debtors, and he has done so here, for the notes were accepted and

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forwarded for collection. The delivery of the notes to the plaintiffs followed by the renewal of the 1st August, was such a dealing with the debt as impliedly released Braden, and should be treated as an acceptance of Stamford as sole debtor, *Lyth* v. *Ault*, 7 Ex. 669; *Evans* v. *Drummond*, 4 Esp. 89; *Thompson* v. *Percival*, 5 B. & Ad. 925. The plaintiffs sent an account to Stamford made out in his name alone, and asking him to honour sight draft for the amount, and this also is evidence that the plaintiffs intended to look to him for payment.

WALKEM, J.: This is an appeal by the plaintiffs against a decision of Mr. Justice DRAKE, to the effect that they had released the defendant Braden from a debt of $1,081.52 due to them by the late firm of Braden & Stamford, in consequence of their having taken Stamford's individual notes for the amount after the dissolution of that firm. The legal principle applicable to such a transaction is thus stated by Lord Justice LINDLEY in the recent case of *Rouse* v. *Bradford Banking Co.* 7 R. 127: "The question as to whether a creditor of," say two "persons has released one of them and converted the other into his sole debtor, by what is called novation, is a question of intention; and an intention to look," for instance, to Stamford, is quite consistent to look to him as a mere matter of convenience without releasing his co-debtor Braden.

Judgment of WALKEM, J.

This principle, though not so broadly stated, was recognized and acted upon in *Thompson* v. *Percival*, 5 B. & Ad. 925, which closely resembles the present case. According to the report of that case, the defendants, James and Charles Percival, were in partnership. Charles retired from the firm and James continued the business in his own name. At the time of the dissolution, the firm was indebted to the plaintiffs; and sufficient effects were left in the hands of James to pay the partnership debts. The plaintiffs were not aware of the dissolution and continued

to supply goods, which James received. Afterwards the plaintiffs' collector applied to James for payment of what was due, and James told him that Charles knew nothing of the transactions and that the plaintiffs must look to him (James) alone. The plaintiffs subsequently drew a bill of exchange on James for "the mixed amount," which was accepted by him, and dishonoured. They also gave him time to pay, but they eventually sued both James and Charles. As James had become bankrupt, a verdict for the full amount was taken against Charles, with leave to move for a non-suit if the Court should be of opinion that the plaintiffs had discharged him from the debt. Lord DENMAN, in delivering the judgment of the Court, observed: "It is contended that the acceptance of a bill of exchange by one of two debtors cannot be a good satisfaction, because the creditor has nothing which he had not before. The written security, however, which was negotiable and transferable, is of itself something which he had not before; and many cases may be conceived in which the liability of one of two debtors may be more beneficial than the joint liability of the two, either in respect of the solvency of the parties or the convenience of the remedy. * * * If the plaintiff did expressly agree to take, and did take, the separate bill of exchange of James in satisfaction of the joint debt, we are of opinion that his so doing amounted to a discharge of Charles. No point was made at the trial as to the proof of such an agreement, nor was it required that this question should be put specifically to the jury. We think this ought to be done, and consequently the rule for a new trial must be made absolute."

Judgment of WALKEM, J.

The trial of the present action took place without a jury. The learned Judge, therefore, acting as a jury, had to decide whether the plaintiffs had "expressly agreed to take, and did take," Stamford's notes in satisfaction of the joint debt; but without so deciding, he held that "the receipt by the plaintiffs of the four notes of Stamford and the retention

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of them and forwarding them for collection through their bankers was an acceptance of the sole liability of Stamford." "There is no evidence," he observes, "that the plaintiffs, in taking these notes, expressly reserved their rights against Braden," but, with due deference, that is not the question. The question is, did they at the time, or, for that matter, at any time, expressly agree to relinquish those rights? And there is not, in our opinion, any evidence of their having done so, and that ought to be decisive in their favour. A question, however, with respect to any account rendered by the plaintiffs to Stamford was raised on behalf of Braden and may as well be disposed of. Shortly after the defendants had dissolved partnership, a draft on their firm for the amount due to the plaintiffs, who are Toronto merchants, arrived here. Stamford returned it unaccepted, on the ground that he was carrying on the business alone and had no authority to accept drafts in the firm's name. He also promised to pay them by his cheque. The plaintiffs then sent him an account in the following form, and advised him that they had drawn upon him at sight for it:

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"TORONTO, April 20th, 1892.

"*J. L. Stamford, Esq., Victoria:*

"In acct. with the E. C. Gurney Co., Ld.

"To acct. rendered, due April 10, '9	$1,091 52
Int. to April 30, at 7 per cent.	4 17
	$1,095 69

"DEAR SIR:—Unless you prefer to remit please honour our sight draft for above and oblige

"Yours, etc.,

"E. & C. GURNEY CO., LD.

"W."

It was contended on behalf of Braden that the fact of the account having been thus made out as against Stamford alone was evidence that the plaintiffs intended to look to him alone for payment. But this, at best, is but a matter

of inference. It may well be that the plaintiffs, in view of the non-acceptance of the first draft and of Stamford's promise to remit by cheque, decided to so frame the account as to make it correspond with the sight draft, and thus prevent Stamford from objecting to the draft on the ground that it was drawn upon him individually, while the account was made out against the firm. At all events the plaintiffs were entitled to demand payment from Braden or Stamford, either orally or by letter; and why not by an account in the above form. Besides, Braden, as well as Stamford, must have understood that the words "account rendered—due April 10, '92," meant the account of the old firm. Again, there was no evidence that the plaintiffs had transferred the firm's account in their books to Stamford, and, for that purpose, opened a new account in his name and debited him with the old account. Had the plaintiffs done so, Braden's position might have been different. As it is, the acceptance by the plaintiffs of Stamford's notes was manifestly of advantage to Braden, for if anything had been paid upon them, his liability would have been thereby reduced.

Judgment of WALKEM, J.

As I have already stated, there is no evidence that the plaintiffs "expressly agreed to take and did take" Stamford's notes in satisfaction of the joint debt. On the contrary, it appears that Braden was told by the plaintiffs' local agent, when the dissolution of partnership was first mooted and afterwards, during the currency of the notes that, in any event, he would be held liable for the partnership debts. Even if this were not so he could not escape liability in the absence of his creditors' consent to release him. It appears that when Stamford's notes were current he applied to the plaintiffs for $136 worth of goods and that the plaintiffs refused to let him have them, except for cash or a note with a good endorser. It is therefore most unlikely that with respect to the joint debt, which was eightfold greater in amount, the plaintiffs at any time

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contemplated releasing Braden and looking to Stamford alone—in other words looking to a man who from first to last refused to honour their drafts or to pay his notes.

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The appeal must be allowed with costs, and in lieu of the judgment given by the Court below in favour of Braden the judgment is to be entered for the plaintiffs as against him for $1,081.52 and costs. Judgment against Stamford has, I understand, been entered by default.

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CREASE and MCCREIGHT, J.J., concurred.

Appeal allowed with costs and judgment for plaintiffs with costs.

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March 1.

RE CHARLES PLUNKETT.

Criminal law—Practice—Certiorari—Six days' notice to Justices under 13 Geo. II., Cap. 8, Sec. 5—Substituting good warrant before return of rule.

Re PLUNKETT

The Statute 13, Geo. II, Cap. 8, Sec. 5, requiring six days' previous notice to convicting Justices of motion for *certiorari*, is in force in this Province.

The service upon the Justices of a rule *nisi* for a *certiorari* returnable more than six days after service will not be treated as a compliance with the Statute following *Regina* v. *Justices of Glamorgan*, 5 T.R. 279.

The convicting Justices after service on them of the rule *nisi*, substituted and brought in on its return a good warrant of commitment in place of that objected to, which was admittedly bad for not following the conviction.

Held, That they were entitled to do so.

Statement.

RULE *nisi* by defendant for a *certiorari* to bring up a conviction for larceny, and all causes of the prisoner's detention, and also for a writ of *habeas corpus* to bring up and discharge the prisoner from custody on the ground

that there was no sufficient warrant for his detention and that the prisoner be discharged without the writ actually issuing, and that the presence of the prisoner upon the return of the rule be dispensed with.

The rule *nisi* had been served upon the convicting Justices more than six days before the date of its return, but six days' notice of intention to apply for *certiorari* had not been served on them as required by 13 Geo. II. Cap. 8, Section 5.

The original warrant of commitment upon which the prisoner was held, at the time of the service of the rule *nisi* was admittedly bad for not following the conviction or disclosing any offence; but after the service of the rule, a good warrant was drawn up and duly signed by one of the convicting Justices and was substituted and brought in on the return of the rule *nisi*. Statement.

Robert Cassidy, for the convicting Justices, shewed cause against the rule *nisi*. The Statute 13 Geo. II. Cap. 8, Sec. 5, is in force in this Province. It has been held to be in force in Ontario, *Regina* v. *Peterman*, 23 U.C.Q.B. 516; *Regina* v. *Munro*, 24 U.C.Q.B. 44. The service of the rule to shew cause, though more than six days be given upon it, is not a sufficient compliance with the act. *Paley on Convictions*, 6th Ed. 438; *Regina* v. *Justices of Glamorgan*, 5 T.R. 279. Convicting Justices have a right to substitute and return a good in place of a bad warrant to a writ of *certiorari*. *Regina* v. *Richards*, 5 Q.B. 926; *Lindsay* v. *Leigh*, 11 Q.B. 455, *ex parte Cross*, 2 H. & N. 354; *Massey* v. *Johnson*, 12 East, 82. Argument.

J. P. Walls, contra.

DRAKE, J.: I must hold upon the authorities cited that the Statute 13 Geo. II., Cap. 8, Sec. 5 is in force in this Province, and that the service of the rule *nisi* upon the convicting Justices though more than six days before the date of its return was not a sufficient compliance with the Judgment.

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Statute. The motion for a *certiorari* will therefore be dismissed with costs. As far as this objection goes, a fresh application might be made by the prisoner. It appears however that the only substantial defect in the proceedings struck at by the motion is the insufficiency of the warrant of commitment. The Justices have since the service of the rule upon them, substituted and returned a good warrant which is supported by the conviction. "If a good warrant

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of commitment be returned, the Court will not enquire into the validity of a previous document under which in fact the prisoner was committed." *Paley on Convictions*, 6th Ed. 348. The motion for a writ of *habeas corpus* and discharge of the prisoner will therefore be dismissed, but without costs, as it was justified at the time it was launched.

Rule nisi discharged.

HUNG MAN v. ELLIS *ET AL.*

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HUNG MAN *v.* ELLIS

Company—Unregistered—Liability of promoters of.

Defendants, promoters of a public company, signed a memorandum of association for incorporation, under the Companies Act, 1862, (Imp.) and instructed the company to be incorporated, which was not done. At a meeting of the promoters subsequently held, at which some of the defendants were present, and others not, one B. was directed to incur certain expenses, the subject of the action.

Held, giving judgment against the defendants present at the meeting, and in favour of those not proved to have been present, that the defendants still occupied the position of promoters, and as such, not each others agents, or liable for each others acts.

Statement.

ACTION to recover the amount of an account for work done by the plaintiff, for the defendants, at their request.

A. L. Belyea and *H. E. A. Robertson*, for the plaintiff.

A. P. Luxton, for defendant Bowker, and *Gordon Hunter* for defendants Galletly, Monteith, Childs, Ellis and Taylor.

DRAKE, J.: All the defendants were represented except Bainbridge, Renouf and Nicholles.

It appears that Mr. Brady, a mining engineer, had some mining claims near the Thunder Hill Company's claim, and arranged with Bainbridge to try and form a company for their development, and the defendants by a memorandum of agreement undated agreed to subscribe for shares in a company to be thereafter formed to the value of $500 each. Apparently this agreement was entered into somewhere about February, 1892, for in that month a meeting was held at which the defendants Renouf, Taylor, Monteith and Bainbridge were present, and the names of the other defendants were given at that meeting as persons who had agreed to subscribe. The capital was to be $25,000.00, and those subscribing $500.00 were to receive $1,000.00 worth of shares.

Judgment.

Subsequently Bainbridge instructed Taylor to prepare a memorandum of association and register the company under the Companies Act, 1862, by the name of the Columbia Lakes Mining and Development Company, Limited.

Mr. Taylor prepared a memorandum of association accordingly and it was signed by all the defendants, each taking one share. The memorandum was left for registration with the registrar of joint stock companies, but it was not registered, as the necessary fees were not forthcoming.

It appears that it was not until 1894 that the subscribers, with possibly the exception of Taylor and Bainbridge, knew that the company was not registered in accordance with the Acts.

But Mr. Brady, on behalf of the intended company, located a number of claims in names of some of the persons who had consented to become subscribers, five claims at this time being the actual property of the promoters.

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Transfers of these various claims were made to the company as purchasers in March, 1892, and July, 1893.

These transfers were all delivered to Bainbridge and subsequently to Taylor, to be held in *escrow* to be delivered to the company when certain paid up shares were issued to Mr. and Mrs. Brady.

Mr. Brady from February until June, 1892, was at the mine.

In June, 1892, a meeting of the promoters was held in Victoria, at which Brady says Nicholles, he thinks, was chairman and Bainbridge secretary; he further says he thinks others were present, but cannot give their names. He says he was authorized to look after the work necessary to hold the ground, for which he was to receive no pay, and Bainbridge and Taylor to act as secretary and solicitor without pay as the company was not then organized.

No minutes are forthcoming of this meeting and no evidence of who were present beyond his statement.

Judgment.

Neither Nicholles nor Bainbridge deny that they were there—Ellis, Taylor and Galletly do.

Acting on the presumption that he was fully authorized to expend money for the proposed company, he employed the plaintiff, whose claim is now for $400.00 balance due for work done under Brady's instructions on the promoters' mine.

Bainbridge collected $2,425.00 from the persons who had agreed to subscribe; the greater part of this money was remitted to Brady between March, 1892, and May, 1893, except $332.00 which Bainbridge retained and has not accounted for.

The only subscribers who have paid up in full their promised subscriptions are the defendants Galletly, Ellis and Monteith.

It appears to me on these facts that this money was raised and expended by these parties as promoters in order to make the property available to sell to the intended

company.

Such being the case the defendants are not liable as partners *inter se*; they can only be made liable on their express or implied contracts.

With the exception of Nicholles and Bainbridge, who were present at the meeting when Brady was authorized to take charge and do what was necessary about the claims, I cannot see that there is any actual or implied contract which will bind the other defendants, as any evidence of their presence at the meeting in question is wanting.

The principle that promoters of companies are not each others agents or liable for each others acts is laid down in *Reynell* v. *Lewis*, 15 M. & W. 516, and other cases, and it is necessary before such promoters can be made liable to prove the existence of an authority from them to others, to bind them. Such an authority if not distinctly proved must be the natural inference from their acts, or subsequent ratification must be proved, none of which elements exist here. The payment of money to Bainbridge is not *per se* evidence of a contract by the person paying to pay for labour engaged by Brady.

Judgment.

Under these circumstances there will be judgment for the plaintiff against Nicholles, Bainbridge and Renouf with costs, and the action will be dismissed against the other defendants with costs.

Judgment for plaintiff with costs.

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Aug. 23.

THE CANADIAN PACIFIC NAVIGATION COMPANY
v.
THE VICTORIA PACKING COMPANY.

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1889.
Dec. 16.

C. P. N. Co. v. VICTORIA PACKING Co

Contract—Corporation—Seal—Mutuality—Restraint of trade—Consideration.

A contract by a corporation to ship all goods consigned to them at Victoria from a certain point, by plaintiff's steamers, is not void as being in restraint of trade.

Such contract is not void for want of mutuality by reason of not being under the corporate seal of the plaintiffs.

Semble, A contract by a trading corporation dealing with a snbject within the scope of the objects of its memorandum of association need not be under its corporate seal.

The advantages to the defendants provided for in the contract set out below constituted a sufficient consideration to support it.

Statement.

ACTION for damages for breach by defendants of a contract, the material clauses of which, together with the evidence and arguments of counsel, are set forth in the judgment.

M. W. T. Drake, Q.C., for the plaintiffs.

C. E. Pooley, Q.C., for the defendants.

Judgment.

BEGBIE, C.J.: This is an action brought for damages for breach of an agreement. The plaintiffs are an incorporated company established "for the purchase of vessels for the conveyance of goods and passengers in ships and boats, between such places as the company may from time to time determine, and to do all such other things as are incidental or conducive to the attainment of the above objects." The registered office is to be in British Columbia. The defendants are a salmon packing company having their cannery at River's Inlet on the north-west coast of British Columbia, some 600 or 700 miles from Victoria. On the 18th March, 1887, these parties entered into an agreement concerning the carriage of goods and passengers

between Victoria and River's Inlet by which (clause 1) the defendants are to "ship, or caused to be shipped by the steamers of the plaintiff company, all goods, &c., purchased by, and shipped by, or consigned to, the defendants for sale or use by them at the above-named places," (which I take to mean Victoria and River's Inlet only), "during the continuance of this agreement." Clause 2 confines the benefit of special rates to the defendants only. Clause 3. In case of any rise in freights, the defendants may be called on to pay the higher rate, but to have the surplus, above the special rates, refunded at the end of each month. Clause 4. The plaintiff company is to receive the goods at the proper place and time, and to forward, with reasonable dispatch and in suitable vessels, to their destination. Then follow the special rates for ordinary merchandise, bricks, lumber, salmon, beef, passengers' fares, &c. "In the event of opposition, whereby rates to canneries are reduced," defendants are to have the benefit of the reduction. Goods shipped and transported under this agreement are to be subject "to the conditions contained in the regular shipping receipts and bills of lading of" the plaintiff company; and the 5th and last clause provides that the agreement is to endure for two years. "And it is further distinctly understood and agreed that, if any freight covered by this agreement shall be forwarded by any other conveyance than that of the plaintiff company, the defendants shall pay to the company freight on such shipments, just as if such shipments had been made by the company's vessels."

Judgment.

In March, 1888, and subsequently, the defendants, notwithstanding notice, ceased to ship their goods by the Barbara Boscowitz, a steamer employed by the plaintiff company, and shipped them by a rival steamer, the Cariboo Fly, which is the breach complained of.

The defendants, in the first place, allege that the agreement of the 18th March, 1887, cannot be sued upon by the plaintiff company; for that they could not be sued them-

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selves upon it, not being under their seal, and so void for want of reciprocity—insisting that a corporation cannot enter into any agreement except under its seal. But this is a trading company, and the subject matter is obviously entirely within the most immediate scope of the objects in its memorandum of association. Modern decisions have, from the force of circumstances, entirely done away with the necessity of a seal in such a case. *South of Ireland Colliery Co.* v. *Waddle*, 3 L.R.C.P. 463, affirmed on appeal, 4 L.R.C.P. 617; *Australian Steam Navigation Co.'s case*, 5 E. & B. 409; *Albert Cheese Co.* v. *Leeming*, 31 U.C.C.P. 272. When the old rule was established, almost the only corporations in existence were municipal or quasi municipal corporations; and it certainly seems a refinement of technical absurdity to insist that the method by which alone a fifteenth century municipality could enter into a binding contract, shall also be that by which alone a trading joint stock company in the nineteenth century shall contract, merely because they both happen to be corporations.

Judgment.

The next point taken by the defendants was, that this was a nude act; it provided no advantage or consideration moving to them from the company, and, therefore, it could not be enforced against the defendants; and that in point of fact they had received no profit or advantage over any other shippers by reason of the agreement. But the defendants obtain by the contract this advantage, viz., a guarantee by the plaintiff company that their goods shall always be carried at reasonable times, and in steamers; whereas the agreement itself intimates that they had previously been compelled on occasion to have recourse even to canoes. The defendants gain also this advantage, that the rates of freight cannot be raised beyond those scheduled; and are to be lowered from time to time to the lowest rates actually levied on any customer. It is true, in the events which happened, and in the absence of competition, the rates were not in fact lowered; and it is admitted that the

plaintiff company carried at the schedule rates for all their customers, so that the defendants have in fact gained no pecuniary advantage over their competitors. But they were secured against loss in the case of rise in freights, and they might have made a gain, which form a valuable consideration moving from the plaintiffs to the defendants, sufficient to support the agreement.

Defendants allege that they understood that their goods were to be carried only on steamers entirely and absolutely owned by the plaintiff company. And, no doubt, that is a rational meaning which may be placed on the first words of the agreement, viz., where the defendants agree "that they shall ship, or caused to be shipped, by the steamers of the plaintiffs" all goods, &c. And so also in the final clause which provides that "in case any freight covered by this agreement shall be forwarded by any other conveyance than *that of the plaintiff company*", the defendants shall pay to the plaintiff company the stipulated freights, just as if the shipment had been "on the vessels of the plaintiff company." But these words would probably and fairly include any vessel chartered or hired by the plaintiff company to run on that line, equally with vessels of which they were the absolute owners. And when we come to the correlative undertaking by the plaintiffs, in the 4th clause, we find their agreement is "to receive defendants' goods and forward them, with reasonable dispatch and in suitable vessels," (not "in vessels of the company") "to their destination." And then at the end of this 4th clause there is the agreement that "goods shipped are to be subject to the conditions contained in the regular shipping receipts and bills of lading of the company." This introduces some very unambiguous stipulations, quite destructive of this part of defendants' contention. The shipping receipt in its printed form acknowledges the receipt of goods marked as below, "to be shipped on board the C.P.N. Co.'s steamer ———, whereof A.B. is master, or on board any other steamer of

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the company, *or on board any steamer the company may employ*," &c. And that acknowledgement of receipt is further subject to the endorsed conditions, one of which authorizes the company to tranship to any other steamer, or to deliver to any other steamers, companies, or persons, any goods destined for other parts than those at which the vessel, on which they are carried, calls. These documents, shipping receipts, &c., were in use in this form at and before the date of the contract. All these conditions therefore were and are imported into the contract now sued upon ; and I cannot say that the defendants were justified in forming the expectation, if they did expect, that the contract to carry was confined to vessels wholly belonging to plaintiffs. And, in point of fact, the plaintiff company had acquired the dominion over the steamer Barbara Boscowitz during two years from the 1st of January, 1887, by a charter under which she was to run on this line, and carry such goods as the plaintiff company might ship, though the evidence was not clear that she was to carry for them exclusively. As to the terms of that charter, by which the charter money is to be proportionate to the profits made, and the former captain is to continue in charge, there is nothing in that to make this last mentioned agreement more or less than a charter party. And a charterer is *pro tempore* an owner of the ship, as a lessee is of a house.

Judgment.

The defendants then contended that the whole agreement was aimed at procuring a monopoly of the coasting trade for the company by preventing competition ; and thus being for an illegal purpose, viz., in restraint of trade, it will not be enforced at law. It is probable that the preamble to the agreement is strictly true, and that each party to the contract had regard to his private interest and advantage, irrespective of the interest or advantage of anybody else. The public advantage was never in their minds. But the rule is, not that a contract shall be void unless it be for the public advantage, but only in case it be to the public injury.

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Restraint of trade however is one matter which may often be to the public injury, and the permitted limits of such restraint have been much discussed.

In the recent case of the *Mogul Steamship Co.* v. *M'Gregor*, before Lord COLERIDGE, 4 T.L.R. 783, and which afterwards went before the Court of Appeals, 5 T. L.R. 658—13th July, '89, the whole doctrine of restraint of trade by agreement for exclusive or limited dealing was much discussed and the earlier cases cited. In *Hilton* v. *Eckersley*, 6 Ellis & Bl. 47, Mr. Justice CROMPTON went so far as to say that "a combination tending directly to impede and interfere with the free course of trade and manufacture as illegal, and indictable at common law." But Mr. Baron ALDERSON, giving the judgment of the Exchequer Chamber, on appeal from that judgment, expressly declined to give any opinion upon the question of criminality, but held the bond in that case illegal in this sense, that it would not be enforced. Lord ESHER, however, in the *Mogul Co.* v. *M'Gregor*, cites Mr. Justice CROMPTON'S dictum almost with approval, certainly without disapproval. But the Court of Appeal, by a majority of two to one, (Lords J.J. BOWEN and FRY against Lord ESHER) maintained the decision of Lord COLERIDGE which was that the combination entered into between the defendants, and their adherence to the terms of that combination, though to the damage of the plaintiff, gave no cause of action against them to a competitor in trade ; *i.e.*, it was held *damnum absque injuria*. That is far from deciding that the stipulations of the combination would be enforceable at law between the defendants themselves, or that an action for damages could be maintained by any of the defendants against the others for a breach of the stipulations.

Judgment.

I apprehend the test to be the public injury. If the restraint be to the public general injury, the agreement will not be enforced. If no general loss be the result, actual or contemplated, the agreement will stand. It is clear there

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must be some prescribed limits of restraint, otherwise, scarcely any agreement between traders would stand. For every agreement involves an obligation, sometimes, many obligations; and every obligation involves a restraint between traders, generally, a restraint of trade. Contracts in restraint of marriage are as much disliked by the Courts as contracts in restraint of trade. But every marriage is, in a sense, a contract in restraint of marriage. The parties may intermarry with nobody else. Every contract of partnership, nay, every contract of sale, is a contract, in a sense, in restraint of trade. The parties are restrained from other partnerships, or from selling the goods specified to others. But every trader may enter into such a contract as he deems advantageous to himself, so as—that it involve nothing illegal, (*i.e.*, restraint by violence, intimidation, &c.,) and so also as that it involves no general injury to the public. Thus, on a sale of a business, restraint of trade within certain reasonable limits of place and time has always been permissible. It is not clear why, on such a sale, the vendor should not be permitted to covenant wholly to withdraw from it. In the present agreement, however, I find nothing affecting the public at large, but only a mutual agreement, by which the plaintiff company contracts always to be ready to carry at reasonable rates, times, and places, and the defendants, in order to secure the services of such a carrier, agrees to employ nobody else.

Judgment.

The defendants further object to the said agreement that it is too indefinite to be enforceable; that it does not stipulate that the company's vessels will ever call at River's Inlet, the site of defendants' business, nor indeed, that they will ever call at Victoria; that it is quite consistent with the memorandum of association that the company's operations should be confined between New Westminster and Alert Bay, or between Nanaimo and Fort Rupert, or between Victoria and ports on the Sound, not going near River's Inlet; moreover that the rates of freight are annexed only

to transportation from Victoria to the cannery, and not from the cannery to Victoria; and that it is too vague in this respect also. But even assuming that the company were entirely to abandon all the connection along the inner passages on the west coast of the mainland, it is to be observed that by the agreement, they have undertaken to receive defendants' goods at the proper place and time, and to forward the same to their destination with reasonable dispatch and in suitable vessels, and that the cannery and Victoria are expressly named as the termini. If the company have no steamers covering the whole distance between Victoria and the cannery, they are nevertheless bound to receive and carry, and to carry in steamers, (which is an additional argument that the possible use of strange steamers must have been originally contemplated). They are bound to receive, at the proper place and time, and carry with reasonable dispatch, and whether they complied with these stipulations would always be ascertainable by a jury.

As to goods carried between any other points than River's Inlet and Victoria, they would not be, in the language of the parties, "freight covered by this agreement." I think that the words, "rate on goods from Victoria to cannery," taken in connection with the whole agreement, and especially with the description of goods enumerated in the schedule, must in order to give effect to the whole contract, be read "goods carried between Victoria and the cannery," so as to mean and include the rate on goods from the cannery to Victoria. "Salmon in cans or barrels" are specially mentioned; which must certainly mean from the cannery. No difficulty appears to have arisen during the year 1887. In that year, the defendants shipped their goods, apparently in conformity with the agreement under the bills of lading of the plaintiff company, on board the steamer Barbara Boscowitz. The defendants say that they did so because the Barbara Boscowitz was, during that year, the only steamer on the line; that they had expected their

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goods to be carried on the Sardonyx. But they have not shown that they had any right to expect this ; or that they made any remonstrance with the plaintiff company, or gave them any notice that their shipments on the Barbara Boscowitz were not to be understood as shipments under their agreement; nor would any such remonstrance or notice have been of much avail to justify them in departing from their agreement with the plaintiff company, who, I think, have performed all they were bound to do.

Judgment.

The consequence of a breach of contract is damages. Here the parties have agreed what the measure of damages shall be ; and I think that the plaintiff company is entitled to apply that measure, and to have the amount ascertained by taking the accounts as prayed, and that the defendants must pay that amount to the plaintiffs accordingly, together with plaintiffs' costs up to this time.

Judgment accordingly.

NOTE—An appeal by defendants from this judgment was heard by the Full Court, CREASE, MCCREIGHT and WALKEM, J.J., and dismissed with costs on December 16th, 1889.

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Practice—Amendment—S. C. Act, C. S. B. C., Cap. 31, Sec. 58—Order—Omission of name of presiding Judge in caption—Rule 266—Judge "sitting for" Judge who made the order.

The omission of the name of the Judge by whom an order is made which, by the Supreme Court Act, C.S.B.C. Cap. 31, is directed to be inserted in the caption, is an "accidental slip or omission" within Rule 266, S.C. Rules 1890, which may be amended by the Court or any Judge thereof.

A Judge of the Supreme Court has power to sign an order for and on behalf of another Judge.

APPEAL by the defendant from an order made by Mr. Justice WALKEM on May 30, 1894, amending an order made by Mr. Justice DRAKE on May 26, 1894, committing the defendant for contempt for refusing to answer questions upon his examination as a judgment debtor, by inserting in the caption thereof the words "before Mr. Justice DRAKE." Statement.

John Campbell for appellants.

E. P. Davis for respondents.

The grounds of appeal, arguments and authorities cited fully appear from the judgments.

CREASE, J.: This was an appeal on behalf of the defendant Cotton from the order of Court dated the 30th May, 1894, whereby an order made herein by Mr. Justice DRAKE, on the 26th May, 1894, was amended by inserting the words "before Mr. Justice DRAKE" after the word "Court" in the first line of such order. Judgment of CREASE, J.

The appeal was made on two grounds, viz.:

1. That Mr. Justice WALKEM, who made the amendment, had no jurisdiction to sit for Mr. Justice DRAKE and make the said order.

2. That the amendment being a substantial one going to the validity of the whole order, and not merely a clerical

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error or omission, there was no jurisdiction to make the said order.

There were two orders.

The first of 26th of May, 1894, was made at Vancouver by Mr. Justice DRAKE. The effect of it was to declare the defendant guilty of a contempt of Court, and ordering him to stand committed to H.M.'s jail at New Westminster for the period of three months for his contempt.

The order was complete and good in substance and terms, the only objection being that the provisions of Section 58 of Cap. 31 Consol. Stat., 1888, for the insertion of the name of the Judge on the order, had accidentally not been carried out by the insertion of the usual words "before Mr. Justice DRAKE" in the caption of the order.

To cure this, upon motion made on behalf of the plaintiff to that effect, Mr. Justice WALKEM having as a matter of precaution, where the liberty of the subject was concerned, and *ex abundante cautela*, obtained by telegraph the sanction of Mr. Justice DRAKE, then in Victoria, to the amendment, upon motion duly made and opposed, made the order of the 30th of May, 1894, directing that the order made by Mr. Justice DRAKE on 26th May should be amended by adding the words "before Mr. Justice DRAKE" in the caption. And this is the order appealed against. In the caption of it the words were "before Mr. Justice WALKEM, sitting for Mr. Justice DRAKE," which also is appealed against.

Judgment of CREASE, J.

Mr. *Campbell* for the appellant argued that:

1. Mr. Justice WALKEM had no jurisdiction to sit for his brother Judge and make the latter order.

2. And that the amendment by the addition of the Judge's name was a substantial one, affecting the whole order, and therefore one which the learned Judge had no jurisdiction to make.

The learned counsel contended that our S.C. Rule 266 only gave the Judge an authority to rectify errors from an order as pronounced from the bench.

That the English Rule 319 from which our Rule 266 was copied (according to *Snow's Practice*, 1894, p. 586) restricted the privilege of amendment to rectifying clerical or other errors in the drawing up of the order, citing in support *Tucker* v. *N. Brunswick Co.*, 44 Ch. Div. 249, 250, where an interim injunction had been made against the company with the usual undertaking against damages incurred by the company. The company and one Matthews appeared at the hearing of the notice for injunction. When the discussion was at an end, counsel for Matthews asked for the usual undertaking as to damages ; this was promised both for the company and Matthews—but only the undertaking as to the company was embodied in the order. This was wrong, and the case was appealed. Lord Justice COTTON said:

"If Mr. Justice CHITTY who made the order had been appealed to, he might have set this matter right, for the order had been passed and entered ; he had jurisdiction to correct it as not rightly expressing the order he had made."

Judgment of CREASE, J.

From which defendant's counsel contended that Mr. Justice DRAKE might have made this amendment, but no other Judge.

He also argued on *Smith* v. *Baker*, 2 Hem. & M. 498, (an old case long previous to the Jurisdiction Act, before Vice-Chancellor WOOD) that while the Court would interfere in order to do justice, it would only do so where it was not interfering with statutory enactment.

A Judge here, Mr. CAMPBELL contended, had no power to interfere as it would be interfering with what he considered a statutory direction, namely, Section 58 of the Supreme Court Act, Consol. Stat. 1888, Cap. 31, which enacts that "every judgment or order made before a single Judge shall show on its face the name of the Judge making the same, *e.g.*, before Mr. Justice (naming the Judge)."

Citing Weekly Notes, 1867, in *re Hutchinson*, p. 49, where an amending order made after the stipulated time for

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making it had expired was allowed because it was not an order affected by the Act (the English Bankruptcy Act, Section 192).

The present order, he contended, should not be allowed, as it was an order which was affected by a statutory enactment. (Section 58.)

The order, too, had been already entered and executed by the imprisonment of the defendant, and could not now be amended. He contended that "Mr. Justice WALKEM, sitting for Mr. Justice DRAKE," was not a compliant with Section 58, and that he had no authority to do so, and considered the appeal should be granted.

Mr. *Davis*, for the plaintiff, argued: The cases cited do not apply to this one—as to the allegation that no case had been decided where a change had been made in an order after it had been entered. *Swire's Case*, 30 Chan. Div., 239 for instance, went much further—not only was the order entered, but there the error corrected was in a substantial matter.

Judgment of CREASE, J.

As to "this not being a clerical error, but a substantial one going to the whole order," the question for the Court is that under Rule 266—words, whatever they may be, omitted by accident or error, may be amended and set right.

Suppose an order headed "In the Supreme ——— of B. C."—Rule 266 covers that—and the missing word can be supplied.

If an order be—"that such and such a thing be done"—with the words "this Court doth order" omitted, Rule 266 could supply them.

The spirit of Section 58 has been observed in the present order—and the provision to show what Judge made it, complied with. The learned counsel to show that the practice of one Judge acting for another is a matter of courtesy contended that the same necessity which gave rise to the practice sustained by Chief Justice WALLBRIDGE in 2 Manitoba Rep. 53, where one Judge is allowed

even to rescind the order of another—obtains in Vancouver where Judges succeed one another at short intervals, and such a practice is one of great convenience. On all these grounds the appeal should not be allowed.

After giving full consideration to all the arguments and authorities adduced by the learned counsel on both sides, I am of opinion that the present appeal cannot be sustained.

Treating first of Mr. Justice DRAKE's order, I am inclined to think the requirement of Section 58 is substantially fulfilled by that order without any addition. It was in several respects much in the condition in which the Lord Chancellor in the *Risca Coal Co. case*, 31 L.J. Ch. 431, described as the most desirable. It was "completed on the spot and written out by the judicial officer and *in curia*," for it was drawn up by Mr. Justice DRAKE himself on the spot, at the time, in his own handwriting—which is perfectly well known—and signed on its face with his own initials, also in his own handwriting, and which could not possibly represent any other Judge's name.

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I think, therefore, that it may reasonably be contended that substantially the order "shows on its face the name of the Judge who made it," though not in the identical words "before Mr. Justice" so-and-so, which by-the-by are only given *e.g.*, that is *exempli gratia*.

But be that as it may—Mr. Justice WALKEM, as a Judge of the Supreme Court, by his own intrinsic authority under Judicature Rule 266 (marginal), had full power to make it as he has done.

That Rule says "clerical mistakes in judgments, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court (or a Judge), on motion or summons without an appeal."

Mr. Justice DRAKE's authority to act was not necessary to enable him to do this, prudent as it was to obtain it, to avoid even the appearance of collision, under the circumstances of this particular case.

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Like the instance alluded to by my learned brother during the argument—of a policeman having two warrants in his possession, one good, the other doubtful, and using the doubtful one—he has still the good one upon which he falls back, and that avails "*utile per inutile non vitiatur.*"

The Court was still in existence, and I think the act of making the amended order was the act of the Court by whichever S.C. Judge it has been made.

I think also that under marginal Rule 266, errors and omissions of any kind in a judgment which like this one are accidental, can at any time be corrected by the Court or any Judge thereof.

The identity of the Court is always sufficient to carry on the effect of the order.

If the Judge who made the order were drowned or died "the Court or a (that is any) Judge thereof" could correct such an error and deal with it to the same extent as the Judge who made it.

Judgment of CREASE, J.

There are often cases—for instance as in the Exchequer Chambers in England, which consists of several Judges—where one or more Judges go out of Court on some other duty and may or may not return, still the Court remains.

Without some such power of correction of such errors residing in the Court or a Judge, the course of justice would be most seriously impeded or thwarted. The *Risca Coal Co. case*, 31 L.J. Ch. 431, indicates this.

Although I have given the case so much attention, yet when we regard the authorities it seems scarcely a debatable point. On all considerations therefore I consider that the order of May 23 last and the amending order of May 30, 1894, were well within the scope of Rule 266, and must be sustained, and the appeal dismissed with costs.

Judgment of McCREIGHT, J.

McCREIGHT, J.: On the 26th day of May, 1894, Mr. Justice DRAKE sitting in Court in Vancouver made an order that the defendant Cotton be committed for contempt as in

the said order is mentioned. In the caption of the order, the words "before Mr. Justice DRAKE" were accidentally omitted although such expression is directed to be inserted on the face of the order or its caption by Section 58, S.C. Act, Cap. 31, p. 256 C.S.B.C., 1888. Accordingly Mr. Justice WALKEM being thereunto authorized by Mr. Justice DRAKE on the 30th May also sitting in Court, made an order directing the omitted expression to be inserted in the caption of Mr. Justice DRAKE's order, and in the amending order, it was stated in the caption to be made "before Mr. Justice WALKEM sitting for Mr. Justice DRAKE."

Mr. *Campbell* for Cotton contends:

(1.) That Mr. Justice WALKEM had no jurisdiction to sit for Mr. Justice DRAKE and make the said order;

(2.) That the amendment being a substantial one going to the validity of the whole order and not merely a clerical error or omission, there was no jurisdiction to make the said order.

As to the first point it seems plain that he had jurisdiction under the Supreme Court Rule, 266 which enables the Court or a Judge to exercise such jurisdiction "in cases of clerical mistakes in judgments or orders or errors arising therein, from any accidental slip or omission at any time." As Mr. Justice WALKEM had this authority by virtue of that Rule, whether sitting in Court or as a Judge, it seems unimportant whether Mr. Justice DRAKE purported also to give him such authority; of course he himself could give none greater than what the law warranted and I take it that the expression "sitting for Mr. Justice DRAKE" means little or no more than to negative any unusual interference by one Judge with the order of another.

The Rule of course recognizes the well known distinction between the Court and a Judge, in other words between one or more Judges sitting in Court and a single Judge sitting in Chambers, and the Rule does not by any means require

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a continuance of identity of the Judge in either case.

As to the second objection, I think this accidental slip or omission is precisely one of those which the Rule contemplates as likely to occur and proper to be corrected or amended. I think the appeal should be dismissed with costs. See *re Garre* 30 Ch. D. (C.A.) 239.

Appeal dismissed with costs.

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FRANK v. BERRYMAN.

Innkeeper—Loss of guest's goods—Liability—Contributory negligence—Volenti non fit injuria—Lien—Innkeepers Act, C.S.B.C., 1888, Cap. 59.

A person retaining goods under an Innkeeper's lien for board must take reasonable care of them.

Defendant, an innkeeper, detained plaintiff's trunk for the amount owed by him for board and lodging. Plaintiff assisted in carrying his trunk to the reading room, the ordinary baggage room being full.

The trunk was broken open and several articles lost.

Held, on appeal, per MCCREIGHT and WALKEM, J.J., sustaining the decision of DRAKE, J., at the trial; that the fact that plaintiff had assisted to place the trunk in the reading room, there being no evidence that he requested that it should be placed there, did not show contributory negligence on his part, or that he accepted the risk incurred thereby, nor did it discharge the liability of the landlord to take reasonable care.

Statement.

ACTION for the recovery of $194.70, the value of clothing belonging to the plaintiff, and retained by the defendant as an innkeeper to enforce his lien, for amount due him for board and lodging of the plaintiff, which articles of clothing the defendant failed to deliver to the plaintiff on his tendering the amount of his indebtedness. The statement of defence denied that the defendant retained the goods for

his lien, or that any tender of the amount due had been made by the plaintiff, and alleged that the defendant gratuitously allowed the trunk, at plaintiff's request and for his convenience, to remain during plaintiff's absence, where the plaintiff himself had placed it on defendant's premises, and that the loss and injury were caused by the negligence of the plaintiff. The defendant counter-claimed for $20.50, the amount owed by plaintiff to him and, without admitting any liability, brought into Court $29.50, saying that should the Court be of the opinion that he was liable for the alleged loss of clothing, this sum together with the amount of the counter-claim, was sufficient to satisfy any loss. The action came on for trial before Mr. Justice DRAKE, sitting as Judge of the County Court on Dec. 6, 1894. The plaintiff's evidence was that he stayed at the hotel of the defendant for the space of one month and a few days, that he was unable on leaving to pay his bill, and left his trunk there, that he did not leave his trunk voluntarily. He assisted to move the trunk to the reading room, the baggage room being full. When he returned he found that the lock of the trunk had been cut off, and that goods of the value of $200.00 were missing. He then asked defendant for the goods, offering to pay the amount of his indebtedness, but defendant said goods were stolen and he could not get them back. Statement.

F. B. Gregory, for the plaintiff.

E. E. Wootton, for the defendant, cited *Palin* v. *Reid*, 11 O.A.R. 63; *Lyman* v. *Mossop*, 36 U.C.Q.B. 230.

DRAKE, J.: I find from the evidence that the plaintiff's trunk was detained for the non-payment of his bill. It was not a voluntary deposit by the plaintiff for safe keeping. The fact of the trunk being broken is evidence of negligence. The trunk was placed in the room where it was opened by the defendant, the mere manual help of the plaintiff is not conclusive evidence that it was placed there by and at the Judgment.

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request of the plaintiff; the reason given by the defendant was that the baggage room was full. I pointed out at the close of the case that the Innkeeper's Act had not been pleaded and no evidence given that its provisions had not been complied with. The question of innkeeper and guest did not arise as the evidence disclosed that this relation between the parties had terminated, and the defendant held the trunk under his lien, and as such was liable to take reasonable care of the goods, in which duty he has failed. There must be judgment for the plaintiff for the whole amount of his claim, less the amount of the counter-claim, with costs.

Judgment for plaintiff.

From this judgment the defendant appealed to two Judges of the Supreme Court sitting as a Court of Appeal from the County Court, and the appeal was heard before McCREIGHT and WALKEM, J.J., on December 17, 1894.

Statement.

The grounds of appeal were, that there was no evidence of negligence on the part of the defendant, that he was a gratuitous bailee and as such only liable for gross negligence. That the plaintiff having assisted in placing trunk where it was opened thereby took the risk, and if there was any negligence, it was on the part of the plaintiff in so doing, that the property claimed for was not deposited expressly for safe keeping, and that under the Innkeeper's Act, C.S. B.C. 1888, c. 59, it was incumbent on the plaintiff in order to recover more than $50.00, to shew that the goods had been stolen, lost or injured through the wilful act, default or neglect of the defendant or his servants, which he had not done.

Argument.

A. E. McPhillips, for the appellants: The relationship of landlord and tenant did not exist when the goods were stolen and the defendant was a gratuitous bailee, *Moffat* v. *Bateman*, 3 P.C. 115. The defendant is liable for gross negligence only, and the necessary degree of negligence has

not been made out here, *Palin* v. *Reid*, 10 O.A.R. 63; *Lyman* v. *Mossop*, 36 U.C.Q.B. 230. The plaintiff was guilty of contributory negligence in placing the trunk in the reading room, thereby taking the risk, and he is now estopped from saying that it was not a safe place, *Oppenheim* v. *White Lion Hotel Company*, 12 Q.B.D. 27. If there was a detention under a lien, defendant was not bound to use greater care than he would of his own, *Angus* v. *McLaughlin*, 23 Ch. D. 330; *Cowell* v. *Simpson*, 16 Ves. 275.

F. B. Gregory, for the respondents: When goods deposited in a public inn are lost, *prima facie*, the loss is caused by the negligence of the innkeeper, although the owner directed them to be put in a particular room, and if the goods are lost or damaged, the liability of the innkeeper attaches, *Dawson* v. *Cholmeley*, 13 L.J.Q.B. 33; *Richmond* v. *Smith*, 8 B. & C. 9. *Angus* v. *McLaughlin* must be read along with *Dawson* v. *Cholmeley*.

The Court, McCREIGHT and WALKEM, J.J., held that the decision of the learned trial Judge was correct, and dismissed the appeal with costs.

Appeal dismissed with costs.

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DRAKE, J.
1894.
Dec. 6.

SUPREME COURT
McCREIGHT AND WALKEM, J.J.
1894.
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FRANK
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Judgment.

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1895.

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WILLIAMS v. RICHARDS.

Ca. Re.—Motion to discharge—Practice—Irregularity—Affidavit to hold to bail—Statement of cause of action.

WILLIAMS *v.* RICHARDS

An affidavit to hold to bail stated the facts constituting the plaintiffs' cause of action, setting out the amounts in respect of the different matters sued for, and, in a separate paragraph, stated "that the defendant is justly and truly indebted to the plaintiff in the sum of $2,447.81."

Held, Bad, and that it would not be inferred that such indebtedness was in respect of the causes of action previously set forth.

A statement of a cause of action in respect of premiums which the plaintiff was compelled to pay for the defendant upon a policy of insurance deposited by him with plaintiff as collateral security, held bad, for want of allegation that such payment was made by defendants request.

An objection that the affidavit to hold to bail did not show that the writ of summons had been issued over-ruled.

Statement.

APPLICATION by defendant to set aside a writ of *capias ad respondendum* and all proceedings thereunder and to discharge the defendants from arrest upon the grounds set forth in the judgment of DRAKE, J.

A. L. Belyea, for the defendant.

Thornton Fell, contra.

DRAKE, J.: The defendant was arrested under a writ of *ca. re.*, by order of Mr. Justice WALKEM on 21st January, 1895, and held to bail in the sum of $2,447.81.

The defendant now applies to be discharged on the following grounds:

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1. That the affidavit does not show a sufficient cause of action and is bad.

2. Affidavit insufficient as to defendant's intention to leave British Columbia and as to his intentions to defraud or delay creditors.

3. No evidence before Judge to show that the writ was issued or the writ entered.

4. The cause of action stated in affidavit varies from the writ and is wrongly stated.

On the 2nd and 3rd points the defendant has failed to satisfy me that the learned Judge had no knowledge of the commencement of this action when he made the order and I think he had sufficient grounds for considering that the defendant was about to quit British Columbia.

On the first ground I think the affidavit as to the moneys paid by the plaintiffs for the defendant in respect of the note signed by them for the accommodation of the defendant is sufficiently clear and distinct. In actions for money lent it is not necessary to aver a request, but in actions for money paid to the use of the defendant it should be stated that it was done at the defendant's request for without such request no cause of action arises.

This is applicable to the paragraph of the plaintiff's affidavit where payments of certain premiums is alleged without any request from the defendant.

The defendant however contends further that paragraph 10 of the affidavit does not necessarily refer to the previous transactions; it is a statement of a fact which would be satisfied by proving a liability arising from other causes entirely independent of the transactions set out in the previous paragraph of the affidavit.

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In this I think the defendant is right, the affidavit should be not only direct and positive as to the debt but must show a sufficient cause of action. If it had gone on to say after stating that the defendant was justly and truly indebted to the plaintiffs in the sum of $2,447.81, "in respect of the preceeding causes of action" or some other language connecting the facts set out in the prior paragraphs it would have been sufficient. In an affidavit to hold to bail nothing must be left to intendment, see *Mackenzie* v. *Mackenzie*, 1 T.R. 716, when after setting out certain facts the affidavit concluded by saying therefore the defendant is indebted; this was held insufficient. This affidavit does

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not go so far, it fails to connect the liability sworn to with the facts. If the affidavit is read as a whole it still is insufficient.

This being so it is not necessary to decide the other points raised.

The rule will be made absolute, costs will be costs in cause to defendant.

Order for capias set aside.

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Will—Instrument instructed by legatee—Validity—Onus of proof—Undue influence—Testamentary capacity—Costs.

Testator was a bachelor of 84. He had always been of careful habits and very determined mind, and had accumulated a small fortune by saving. He lived unattended in a small cottage which he owned. His only relatives were abroad. He had, commencing 13 years before his death, carried on a correspondence with the plaintiff, his nephew, who lived in England, and was in indigent circumstances, intimating an intention to provide for him by making a will in his favour. No testamentary disposition in favour of any other relative was indicated. Plaintiff obtained admission to a Sailors' Home in England in 1887, when testator wrote "I am glad you have got into that noble institution, it is all you will want for life." Testator in his subsequent correspondence made no allusion to any intention to leave plaintiff anything. Testator in 1891 was found in his cottage, in a state of physical collapse, from cold, weakness and neglect, and was taken to the house of the defendant who was a friend of long standing. He died there eight days afterwards. Seven days before his death he made the will in question, leaving all his property to the defendant, who at testator's request employed and instructed a solicitor who drew the will at his office. The solicitor attended the testator, read the will over to him twice, and asked him if he understood the will and wished to leave his property to the defendant, to which testator answered "Yes," and also asked if he had power to alter the will afterwards. The evidence of the solicitor and of the attending physician was that the testator was then of testamentary capacity.

Held, per CREASE, J., at the trial, that where a will is instructed or procured by the person propounding and taking a benefit under it, the *onus* of proof of its validity is shifted upon that person, who must remove any suspicion raised in the mind of the Court by the surrounding circumstances. That the facts in evidence (set out in the judgment) had raised such a suspicion in his mind, which had not been removed.

On appeal to the Full Court, (McCREIGHT, WALKEM and DRAKE, J.J.:

Held, That the evidence established the will as that of a free and capable testator and removed the case from the region of suspicion.

That the conduct of the defendant was not so suspicious as to warrant the litigation, and that costs should not be ordered to be paid out of the estate.

Statement.

ACTION to set aside the will of Samuel Adams, made on

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the 11th day of November, 1891, in favour of the defendant, and to rescind the probate thereof granted to the defendant on the 24th day of November, 1891. The statement of claim set out that the plaintiff was the nephew of the testator and his only relative in British Columbia, and that the only other next of kin was brother of the plaintiff residing in Liverpool, England, that the deceased had frequently, and particularly during the last seven years, expressed his intention of making a will in favour of the plaintiff, that on the 11th day of November, 1891, the deceased signed a will leaving all his real and personal property whatsoever and wheresoever, to Duncan McBeath, the defendant, and that probate of the said will was granted to the defendant on the 24th day of November, 1891, and further alleged that at the time the said deceased so made his said will he was so weak of mind, impaired by old age and enfeebled by illness as not to be capable of making the will, and that whilst in such state undue influence was brought to bear upon him to execute the same, and that he did not know the intent thereof. The statement of defence, after denying that the plaintiff was the nephew of the deceased or that the deceased left any next of kin to him surviving, alleged that "the said deceased at the time he made the said will was sound in mind and memory and in full possession of his faculties, and in every way capable of making the will" and that the deceased executed the will of his own volition and in the full exercise of his own free judgment, no undue influence, coercion, dominion, or pressure of any kind being brought to bear upon him in order to obtain the execution of the will, and further alleged that the defendant and the deceased, for many years previous to his death, had been upon terms of most intimate friendship, and that the deceased had frequently expressed his intention of leaving his property to defendant.

The action came on for trial before Mr. Justice CREASE. The facts, and authorities cited by counsel, sufficiently

appear from the head note and judgments.

Theodore Davie, *A.G*,. and *J. P. Walls*, for the plaintiff.

E. V. Bodwell and *Thornton Fell*, for the defendant.

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CREASE, J.: This was an action to set aside the will of Samuel Adams, of Victoria, deceased, made on the 11th November, 1891, in favour of Duncan McBeath, and to rescind the probate on the ground of undue influence, and the trial has occupied the whole of seven days.

Samuel Adams was a working printer, and a bachelor, a man of great intelligence and much and varied information. In the course of a long life he had accumulated some $2,000.00 or over, in the savings bank, and a valuable lot (No. 302) in the city, and had erected buildings on it, and might be considered well off for his station in life.

His will was made on the 11th November, 1891. He died on the 18th November, and probate was, without loss of time, obtained on the 24th November, 1891.

At the time of his death the testator had reached the patriarchal age of 84. He had no relatives in this country, but he had two nephews in England; the plaintiff, Thomas, and his brother William, in whom, as well as in their wives and families, he expressed for years previously a deep personal interest.

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To Thomas he had written frequently, indeed from 1878 down to the end of 1891, intimating distinctly in this correspondence his intention of leaving his property to him.

He had also mentioned to several persons, friends of his in Victoria, his intention of leaving his property to his nephew in England, as he was poor and in destitute circumstances.

These facts are patent on the face of the correspondence and are not disputed by the defendant.

The character of the deceased was a marked one. Both sides agree in representing him to have been always remarkable for directness of speech and truthfulness of character, as well as for the steadiness and tenacity of

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purpose with which he followed out any resolve he had once made, a pertinacity which one of the witnesses called "obstinacy."

He had for years been living alone in a cabin he had built for himself on lot 302, Victoria, doing all his own washing, cooking, baking, indeed everything for himself, but getting gradually weaker and deafer as the natural infirmities of so great an age imperceptibly gained the mastery over him, and as he describes it himself at last "very deaf."

It was in this position we find him, at the period when the events occurred, out of which the present action arose.

It opens with an incident almost dramatic in its effect. This occurred on Monday, 9th November, 1891. A Mrs. Rivers, living in a house immediately adjoining his own, summons an old friend and neighbour of the old man, whose will is now in dispute, named George Barrett, to see what had become of Mr. Adams. He had not shewn out of his cabin for three days and her fears were excited on his account, lest something should have happened to him. A ladder was found and raised to the window. On looking in a sad spectacle presented itself. The old man was seen grovelling and groaning on the floor in his shirt and drawers, and it was some time before they could make him hear, and it was with a considerable effort he himself crawled to the door and managed to open it sufficiently to let Barrett in. Then was beheld a pitiful sight. The old gentleman, apparently in a paroxysm of pain, clad in nothing but his shirt, had rolled out of bed, knocked the stove down, blackened and bruised his face by the blow and threw everything in the room into the utmost disorder.

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In that miserable state through the cold frosty night of Friday, all Saturday and Sunday, till 10 o'clock on Monday, he had remained, utterly helpless and unaided,—three wretched nights, grievously feeble and sick. He was at once put to bed by Barrett and well cared for.

On the Tuesday, contrary to his earnest desire to remain where he was, under the care of George Barrett as nurse, and after a futile suggestion that he should be taken to the Jubilee Hospital, he was removed to plaintiff's house at Victoria West.

McBeath proposed and then all present, including Dr. Milne, aided in inducing him to go to McBeath's.

What happened to him there the few days he survived, the care and attendance he received, the making of the will, his death and burial, the speedy obtaining of probate, the entry of defendant into possession, the claims of the plaintiff and his correspondence with the testator, all too long for insertion here, are sufficiently alluded to in the later portions of this judgment.

Upon the opening of the trial a question arose as to who should commence—upon whom did the *onus probandi* rest —as he was the person to begin. This was settled upon the authority of *Boyse* v. *Rossborough*, 6 H. of L. 1, and *Parfitt* v. *Lawless*, 2 P. & D. 462; *Thompson* v. *Torrance*, 9 Ont. App. 3, and *Hall* v. *Hall*, 1 P.& D. 481, in favour of Mr. *Bodwell*, on the ground that probate of the will now under contest having been granted in due form to McBeath the *onus probandi* was at first on the Attorney-General, the party attacking the will.

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But if, and when, in the course of the trial, the evidence should disclose facts which would raise a presumption against the validity of the will, the *onus* would be shifted ; and it would then be incumbent on the defendant to satisfy the Court that the will had been in all respects fairly obtained from a testator capable and able freely to make it.

This is what actually happened during the trial ; but only after the case was well advanced—when the evidence clearly proved that the will was made or procured to be made, by McBeath, in his own favour, to the exclusion of the testator's family.

The change of the *onus* of proof thus effected on to the defendant, though it vitally affected his position, could not

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make any apparent alteration, externally, in the lines on which the trial was proceeding.

The effect of the law, upon this shifting of the *onus*, could only be conclusively dealt with—after all the evidence was finished—in the judgment when it must form the leading principle of the decision.

The defendant, throughout, refused to acknowledge this. He chose to consider the case, solely, as if it necessarily lay with the plaintiff to prove that the will was bad ; and, not on himself to prove that the will was right in all respects and righteously obtained.

This failure to recognize, what I consider to be clear law on the point, compelled the learned counsel for the defendant to lay stress on those portions only of the authorities he quoted, which dealt with cases where the *onus* of proof had not been shifted. His position was maintained throughout with great skill and ability, from the narrow standpoint from which alone he chose to regard it. But the duty of a Judge goes much further. He cannot stop half-way. He has to declare all the law on the subject, as applicable to all the facts proved in evidence by sworn witnesses before him—and this is the course adopted here.

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The first thing to declare is the law which governs in cases of this kind. That is now sufficiently understood. From what I have already said it will have been seen that at first the *onus* was on the plaintiff to commence ; afterwards when it was proved that defendant was instrumental in making or procuring the will to be made in his own behalf, it was shifted to the defendant, on whom it then became incumbent to prove a good, valid will, and a capable testator.

Mr. *Bodwell*, confining himself to the narrow view I have mentioned, for the defendant, contended for the testamentary capacity of Samuel Adams and the right of a man to dispose of his own as he likes. In support of that he cited the well known case of *Broughton* v. *Knight*, 3 P. & D. 65,

not as a case in point (for that was one of insane delusion, that is, "the belief of facts which no sane person would have believed,") but as being valuable for the elaborate legal dicta of Sir JAMES HANNEN as to what constitutes a sound mind; (a perfectly balanced mind no one has). That learned Judge says: "A man in leaving his property may be influenced by mean, capricious, frivolous or even bad motives or eccentricity, or he may leave it to strangers." The learned Judge, however, winds up by confessing that soundness of mind is "a question of degree and it is impossible to lay down any abstract proposition that will guide one in determining it."

The learned counsel for the defendant only referred to such portions of the following cases as would support the theory for which he contended throughout, that McBeath having *prima facie* duly obtained probate of the will, the *onus* of proof of undue influence was all along on the plaintiff.

Whereas the law is, that where, as in the present case, a person is under such suspicion as the defendant, from being sole beneficiary of the testator to the exclusion of the blood, it is indispensable that the beneficiary should clear himself absolutely from this suspicion by showing himself free from exerting such influence, and that the testator was absolutely free from all controlling or constraining influences calculated to fetter the free exercise of his will. Also that he thoroughly understood, not only what he was doing, but the necessary effect of his action, so as to satisfy the conscience of the Court on these heads, and of the complete *bona fides* of the defendant throughout.

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In making reference therefore to the cases cited by the learned counsel for the defence, I have given not only the portions which appear for his contention,—which apply to cases where the beneficiary has not been instrumental in preparing the will—but those also which enunciate the law as it is applied in every case where the beneficiary is instru-

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mental in preparing or procuring to be made a will in his own favour, exclusive of all relations of the testator. The latter is the case here.

Hall v. *Hall*, 1 P. & D., 482, on a question of undue influence is an authority that "a testator must be a free agent. But all influences are not unlawful. Persuasion, or appeals to the affections, or ties to kindred, or to a sentiment of gratitude for past services, and the like, are legitimate, and may be pressed on a testator. On the other hand pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made."

The learned Judge goes on to say: "Importunity or threats such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind, or social discomfort; these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes is overborne, will constitute undue influence. In a word, a testator may be led, not driven, and his will must be the offspring of his own volition, not the record of that of someone else."

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And be it remembered that the case which gave rise to the above dictum was that of propounding a will where only relations were concerned, not (as here) of a gift to a stranger to the blood in a will prepared through that stranger, and so has here an *a fortiori* application.

From *Boyse* v. *Rossborough*, 6 H. of L., 49, the defendant's counsel drew the deduction that "once proved that a will has been executed with due solemnities by a person of competent understanding, and apparently by a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed."

And all those conditions defendant's counsel contended

had been proved in defendant's case.

The learned counsel further quoted *Boyse* v. *Rossborough* to lay down as a canon for the construction by the Court of the evidence in the case: "That if there was any explanation of circumstances consistent with defendant's innocence, that is to be adopted." Nay, more, that it must be shown that defendant's position and defence against the charge is absolutely inconsistent with what the plaintiff's witnesses have proved. That as undue influence cannot be presumed it must be proved by evidence, either direct or indirect, which is irresistible.

Here I note that, in this case under citation, it was admitted on all sides, that the testator there was of a sound disposing mind, and the direct charge was undue influence, and fraud, which is not pleaded here—but there had to be proved "irresistibly," consequently the above cited case is distinguishable; and is by no means on all fours with the case before me for decision, where the *onus probandi* has been shifted on to the defendant.

Under *Parfitt* v. *Lawless*, 2 L.R. P. & D. 462, defendant's counsel contended "that a relation may press his claims"—that only "coercion makes a will bad or importunity which cannot be resisted"—and that there was neither coercion nor importunity here. In this citation defendant's counsel still ignores the shifting of the *onus* on to himself, which is really the turning point of the case. The learned counsel for the defendant cited *Gardhouse* v. *Blackburn*, 1 P. & D. 109. That is a valuable case in several respects in probate cases; for it lays down the rules which, since the Statute, ought to govern the action of the Court in respect of a duly executed testamentary paper.

I will mention some of them:

1. That before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved the contents of the will.

2. That, except in certain cases, where suspicion attaches

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to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents.

3. That though the testator knew and approved of the contents, the paper may still be rejected on proof establishing beyond possibility of mistake, that he did not intend the paper to operate as a will.

Defendant's counsel cited this case of *Gardhouse* v. *Blackburn*, 1 L. R. P. & D. 109, to show that "except in certain cases where suspicions attach to the document" (the will, and he contended there were none here) "the fact of the testator's execution of the will was sufficient proof that he knew and understood the will." And here defendant's counsel contended, the circumstances connected with the testator's execution of the document shew that Adams knew and understood the will; whether he expressed that satisfaction or not. On this I need only remark here that the defendant being sole beneficiary, and procuring the making of the will, made the present a case well within the exception above referred to, and this shifted the *onus probandi* on to the defendant. With the facts attending the execution I shall deal later on. From the above it will be seen that though the learned counsel gave so limited an application to his own authorities a closer examination of them must have revealed to him that they have a wider scope, and have given him an inkling of the truth. Indeed he acknowledges this when he confesses, that "after all the question depended upon the pure freeness and understanding of the act which Adams performed," and the *onus* of proving this is on him. It is perhaps necessary to observe that the law and reasoning which prescribe the proofs necessary for the plaintiff in propounding a contested will, apply to the defendant under the peculiar circumstances of this case, in maintaining the correctness of the present will and Lord BROUGHAM'S remarks in *Panton* v. *Williams*, 2 T.C. Supplts. have an application here, when he says:

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"The course of the administration directed by the law is to prevail against him who cannot satisfy the Court that he has established a will. There is no duty cast upon the Court to strain after probate. The burden of proof eminently lies on him who sets up a will," and practically that is what, under the circumstances of this case, the law requires from this defendant.

Before going further, and launching into the determination of "the pure freeness and understanding of Adams" at the time of making the will, I think it is incumbent on me to acknowledge, as was indeed done by the learned Attorney-General, that, from the very authorities cited by Mr. *Bodwell*, the *onus* of proof is not thrown upon the party propounding a will, unless there is proof (as is undoubtedly the case here) that the beneficiary under it was instrumental in procuring it to be made. It is so in *Parfitt* v. *Lawless*, already cited. It is so in another case cited by the defendant, *Thompson* v. *Torrance*, 9 Ont. App. 3. There Chief Justice SPRAGGE (referring to *Baker* v. *Batt*, 2 Moore, P.C. 317, 319) says:

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"This statement of the Privy Council may, to some extent, assist in defining the position of a Judge in disposing of such cases as the present," and he then quotes from the case:

"And thus, in a Court of Probate, where the *onus probandi* most undoubtedly rests upon the party propounding the will, (and the defendant is now in that position) if the conscience of the Judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the paper in question does contain the last will and testament of the deceased, it is bound to pronounce its opinion that the instrument is not entitled to probate."

The next portion of that learned Chief Justice's opinion, now under citation, is a very complete answer to the somewhat extravagant view of the effect of the whole of the evidence, whence the learned counsel for the defendent

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drew the extraordinary conclusion, that "his case was either a mere fabrication, a wicked attempt at deception, the evidence of the principal persons a mass of perjury, (to an indictment for which he challenged his opponent) and the whole thing on the part of the McBeaths a conspiracy too vile for description, or else the validity of the will has been established." The law takes a much more temperate and reasonable view of the almost inevitable differences of opinion and construction of facts by different persons at different times, in will cases, without imputing crime and offense to any such discordant testimony or contradiction. It carefully avoids imputing motive, unless the same be necessary for the impartial discussion or determination of the legal points before the Court for decision. Thus says Chief Justice SPRAGGE on such a case:

"And it may frequently happen that this" (there was a declaration refusing probate) "may be the result of an inquiry in cases of doubtful competence in particular, without imputing perjury on either side; or, it may be the Judge is not satisfied on which side the perjury is committed, or whether it certainly exists."

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The shifting of the *onus* from the plaintiff on to the defendant, as soon as the fact is proved that he is the sole beneficiary under the will, to the exclusion of all blood relations, and that he procured it to be made, is a point which the learned counsel for the defendant persistently ignores. It is the one thing wanting in his brilliant and exhaustive summing up—the weak point in his armour. If his view of the law had been correct, and his facts such as he must have believed them to be, his eloquent peroration would have carried all before it. It is necessary, therefore, for the right understanding of the case, that the law should be distinctly laid down. That is shewn in *Brown* v. *Fisher*, 63 L.T. 465, December, 1890. (The latest law on the subject.) The President, Sir James HANNEN, says:

"I must recall the principles by which this Court, follow-

ing the decisions, not only of the Judges who have sat here (in probate) but in the Privy Council and the House of Lords, has laid down in cases where a will has been prepared by the person who takes a benefit under it, or where it has been prepared by his instructions without the intervention of anyone else."

That case is decisive, that the Court is to approach with suspicion the consideration of a will procured and propounded by a person taking a large benefit thereunder, (as is the case here) although it may have been prepared by a solicitor and though fraud is not pleaded by the person opposing the will, (fraud is not pleaded in this case), and where there was no testamentary incapacity on the part of the testator or the witnesses.

In that case it was also established that where a beneficiary, who had procured and subsequently propounded a will, failed under those circumstances to satisfy the Court by affirmative testimony, that the testator did, in fact, know and approve of the contents of the will which he had actually executed—the Court applying and acting upon the principles laid down by the House of Lords in *Fulton* v. *Andrew*, 32 L.T.N.S. 209, refused probate of such will with costs.

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In *Parker* v. *Duncan*, 62, L.T.N.S. 642, another case of undue influence, it was established that where a person propounded a will under which he benefitted largely, and was the person who alone took the instructions for it and procured its preparation, that fact alone "is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

These principles, to the extent I have stated, are well established; the former is undisputed.

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I must give one more citation of the law hereon. In *Parke* v. *Ollatt*, 2. Phil. 323 (approved of in subsequent cases) Sir JOHN NICHOL said, speaking of a will under which the writer of it was benefitted:—"The Court is extremely jealous of a circumstance of this nature. By the Roman law *qui se scripsit heredem* could take no benefit under it.

"By the law of England this is not the case, but the law of England requires, in all instances of the sort, that the proof should be clear and decisive; the balance must not be left in *equilibrio*. The proof must go not merely to the act of signing but to the knowledge of the contents of the paper. In ordinary cases this is not necessary, but where the person who prepares the instrument and conducts the execution of it, is himself an interested person, his conduct should be watched as that of an interested person. Propriety and delicacy would infer that he should not conduct the transaction."

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This canon of construction the learned counsel for the defendant with easy adroitness passes by. It is good to glide swiftly over thin ice.

Thus much for the law which must govern this decision. We must now consider the facts.

Before entering upon these, I cannot refrain from observing with regret, that the learned counsel for the defendant without one tittle of evidence, to support it, has damped the effect of the great effort of forensic eloquence, with which for five hours he riveted the attention of the Court, by throwing out imputations of malice and vindictiveness entirely unwarranted by the evidence against two of the witnesses, Kirsop and R. T. Williams. These men struck me, sitting also as a jury, as being throughout the whole case, men of honour and integrity, witnesses of the truth as far as their knowledge and information extended, free from any taint of interest or self-seeking in the matter, and inspired solely by the laudable desire, whether their views

of the law were correct or not, of seeing the old man's inheritance descend as he had from time to time, down to the latest period, declared to two of them it should do, to those of the blood, in accordance with the ordinary laws of descent. They do not appear even to have contemplated the possibility of the property being given to a man who was a stranger in blood, and whom they only knew as, at most, a friendly acquaintance of the deceased, and who had of late days, as far as they knew, dropped almost if not entirely out of sight. If Kirsop had even suspected such a thing he would never have told McBeath as they were arranging for the old man to go to his house, "that Mr. Adams had not got any will made yet, that he had been promising him for three or four years to make his will, and if they could get Adams to go down with him, and if he was capable of making a will, to get him to make his will." Nor would he have told him (which I have no doubt he did) "that there was $2,000 in the savings bank and that this property and everything he had, had to go to his nephews in Liverpool."

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The evidence of McBeath and Dr. Milne effectually negative any idea of malice or vindictiveness (what for?) against the defendant, for they testify, that after the first proposition of going to the Jubilee hospital was dropped, Kirsop was most active with Dr. Milne and McBeath in inducing Adams (who strove as hard as his weakness and illness permitted to remain in his house and be nursed by George Barrett) to go for care and good treatment to McBeath's; so handing him over to the very influences from which, according to the theory of vindictiveness, it is claimed Kirsop wanted to keep him free.

It was not from that quarter that malice or vindictiveness was to be looked for. He at least had no disappointed expectations to excite malevolence.

The application of the law to the present case upon the authorities cited, requires that the defendant must prove

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affirmatively by sufficient evidence to satisfy the conscience of the Judge, that the will is the valid will of a capable, intelligent and free testator; and that can only be effected by means of the evidence.

The present case must therefore be decided principally by fair conclusions to be drawn from an accurate comparison of the evidence on both sides, and analysis of admitted facts; the declarations of the deceased to trustworthy witnesses, his letters and correspondence; his hopes and wishes; his habits and character; and the evidence of independent witnesses on the one side as compared with the evidence of McBeath and his family and the testimony of independent witnesses on his side, and having regard to all the surrounding circumstances of the case.

The plaintiff's case as depicted in the correspondence to which I refer brought down to the most recent date, in the evidence as Barrett, Kirsop and R. T. Williams, is just as might have been expected, simple, natural and clear.

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It is first presented to the Court by the old man's nephew, Thomas Adams, who for the first time in his life gave evidence in a Court of law. This Thomas, the plaintiff, is a tall sailor-like man, now advanced in years, in manner simple and straighforward, and with a clear open eye, as becomes a witness of the truth.

After an industrious life in which he suffered much from exposure, he became an inmate of the aged and infirm Sailors' home, an almshouse at Egremont, near Liverpool; and was summoned hither to protect his interests and that of his family in the matter of his uncle's property, long promised to him, but claimed by the defendant.

A very important part is played in the case by letters from his deceased uncle to himself, which he received during a long succession of years. These letters and the evidence, prove incontestably that from the 25th October, 1878, down to the period of his death, he had time after time, year after year, most distinctly promised to leave all his property

(which he had on more than one occasion most carefully and minutely described) to his nephew Thomas, expressing deep personal interest also in his and his brother William's family and connections. To read these letters intelligently it is necessary to consider what all the witnesses on both sides agree was the character of the old man Adams who wrote them, on which I have already touched. All these concur in describing him as a man whose life extended long beyond the allotted span ; his age is placed to a day through one of his letters at 84 ; of close and regular habits, strict and just in his dealings, very independent in all his ways ; of an exceptional character for truthfulness, honesty and integrity ; of uncompromising steadiness and tenacity of purpose ; whose promises and resolutions once expressed it was useless to attempt to change ; but who, unfortunately, was particularly deaf (as far back as 1888, he says: "I am now close on 81," and also "very deaf, since I got the *rheumatic pains in the head*") and this increasing deafness was particularly shown when he was unaccustomed to the speaker's voice. The letters show that although it was thirty-six years since he had been living in the same town in England with his nephew, an interval during which he had been roaming all over the western world, following his vocation as a printer, and at last settled down on a competence in Victoria, he had not forgotten the nephew whom he had left as a boy ; but set to work with characteristic tenacity of purpose in 1878, to find him out. On discovering him, from that time forward he voluntarily entered into and maintained correspondence with him, steadily adhered throughout to the promise he had repeatedly made of leaving this nephew the whole of his property at his death, and should he outlive the nephew, then the property should go to this nephew's children and grandchildren. To this promise he adhered without a single break or expression of change of intention, up to within three months of his decease.

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Consistently with all this, he expressed (what in a man

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so sparing of enthusiasm as himself must be called) a strong family interest, continually requiring every particular as to Christian name, age, marriage, individual character, occupation and the like, their poor circumstances and all their needs, which time and again, unsolicited, he promised should not be forgotten in his will. With this professed object he was particular in obtaining their addresses and changes of address up to the present time. These were afterwards, during the trial, produced before the Court, carefully noted down in one of his books, for use, when the proper time should arrive. I have no doubt, from what these letters reveal, and the length of time (owing to the infirmity of age, difficulty of going to the post and rheumatism) during which he kept the nephew's letters, before replying, and from the internal evidence of the correspondence itself, that all the letters he received from the plaintiff containing the full particulars demanded, were preserved among his papers in the house when he died What became of them, there is no evidence to show, except they might have been burnt among those papers that were put in the fire at the time of cleaning up the house.

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The admitted account of old Adam's character leaves a fixed impression on my mind that he was the last man who would speak or act a lie ; or would, in the most heartless manner, act the part of deliberately encouraging false hopes, year after year, in anyone's breast, much less that of a poverty-stricken relation, to crush them at one blow on his death.

Such was the character of the old Samuel Adams and such the solemn promises made by him to his poor relations.

Let us now contrast these with the promises alleged to have been made, be it remembered, by the same man, to the defendant McBeath, during the same time that he was writing these letters.

There are several remarkable peculiarities which distinguish the McBeath promises from those made to the

plaintiff.

1. Like many international claims we have heard of, they grow by accretion; slight and shadowy at first, they gradually, in the evidence of McBeath and his family, but still confessedly indistinct and hypothetical, assume form and shape, not so much from greater certainty of expression, as from frequency of iteration, by members of the McBeath family, until at last on the death bed where certainty was absolutely necessary, they are made to assume the form of a definite acknowledged pledge of long standing on the occasion in which the dying man is said to have admitted a distinct promise, in the words, "as I always promised you, Mac," but of this more anon.

2. The alleged promises, indefinite and vague as I have described, were confined entirely to the evidence of McBeath and his family. It is not even alleged that a soul outside of that family, or any of the old man's acquaintances and neighbours, Kirsop, Barrett or Williams, ever heard the least surmise of them, although Kirsop and Williams were consulted by Adams about the disposition of his property.

3. The consideration set forth for them (for they are alleged to have been made long before his last illness) for some ten years, a few visits interchanged from time to time, latterly almost discontinued, (if the testator is to be believed, "I have no visitors now,") and a few "chores," or friendly services, which everyone in a new country does gratuitously for his neighbours, is utterly inadequate to supply a reason for the old gentleman's breach of faith towards his own family.

4. It is not by any means a proof of the intimacy claimed, that Adams did not once describe all his property to McBeath as he did several times to his nephew, and also to one of his neighbours when he thought of changing his investment; so much so that defendant declares it was only after his death, and the actual probate of the will that he

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knew he had $2,000.00 odd in the Savings Bank; although Kirsop swears that he particularly told him of it at the time of Adams' leaving, and pressed him to get the old man to make a will to his nephew.

5. McBeath carefully avoids dates, so he cannot be specifically contradicted, while the dates of the promises to the plaintiff are specific and exact.

6. Throughout, McBeath carefully eschews all knowledge of the old man's relations, and persists in his ignorance, even after being directly informed of their existence by his wife.

The correspondence I have referred to between uncle and nephew (which for convenience was termed "The Adams' Correspondence") shews that the old man knew well that his nephew, Thomas, was in destitute circumstances, and an inmate of an almshouse. He expressly refers with kindly sympathy to the fact that his nephew has a daughter, a widow with orphan children of his own blood, left destitute in the world, and that he has a married daughter, in whom he takes especial interest, with a family of young children. The old man not only makes these repeated promises in writing, to leave everything to his nephew, but tells Kirsop and Williams, his acquaintances and neighbours, of his intentions and shows them a pencil will he had drawn up to carry these intentions into effect.

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These, therefore, are circumstances clearly proved, under which, upon the authority of the cases already cited, the Court is bound to entertain suspicions affecting the validity of the will; and which throws the *onus* upon the beneficiary who propounded the will, and who has been instrumental in procuring it, to remove the suspicions attaching to it, and that by affirmative and irrefragable evidence.

McBeath is unable to deny these facts; but says Adams told him that he had destroyed a will prepared for him by Williams; but never told him what was in it, and though he cannot deny what was set forth in this long correspond-

ence, his counsel endeavoured to minimize and neutralise its effect, by inferring, that at last, contrary to what he admits to have been Adams' nature and character, and the express object of the latter part of his life, that the old man had changed his mind. The termination of the correspondence with its written assurances coming down to within three months of his death, and continued by the evidence of his neighbours and acquaintances, brings us down to the unhappy occasion of his last attack and sufferings which is already before us. Then, when stricken down by his final illness, utterly prostrate and helpless, as Dr. Milne, after carefully sounding him, expressed it, "the clock had nearly run down," he was persuaded by his friends, much against his will, to leave his own house and go for care and treatment to the house of the defendant, who to the neighbours was apparently only an acquaintance, but now alleges himself to have been an intimate friend. There was enacted the scene out of which the present action sprung; for to use the words of the learned Attorney-General, in his able and effective summary, "the very day after his removal he makes a will leaving everything absolutely to his acquaintance or friend, in whose house he was living, and giving the lie to every promise he had been making his nephew and children for the preceding eight years, and which will, if made in his sober, deliberate senses, would indicate, on the part of the testator, an utter abandonment of those principles of truth, justice and determination of purpose, for which, during a life of upwards of four score years, he had been so remarkable."

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I have already taken notice of the admitted fact that the old man is not even alleged to have intimated his intention so to leave his property to anyone, except the defendant, in whose favour the will was drawn, and his family. Then as to the mode of making the will. The evidence shews that it was procured and drawn through the direct instrumentality of the defendant, in whose favour it was made. He

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went to a lawyer, a young solicitor of good character and repute, and who acted in perfect good faith, but without any experience in a similar case, and a stranger to the testator. He twice stated that he believed the beneficiary told him on the way up to the defendant's house "that the deceased man had no relations in the world, that he was quite alone in the world," and this impression would account for his not having asked the old man if he had any relations, and in that case suggesting a provision for them. Through this gentleman he had the will drawn up in legal form in the shape (he swears) directed by the testator (an allegation which his wife and sister-in-law do not confirm) but one which exactly suited himself, and in that shape brought it to the old man's bedside. It is not denied, also, that he was present and supporting the old man up in the bed during the execution, and that his wife assisted to help him up, and that he was present the whole time that Mr. Hall, his lawyer, was with the testator, and Mr. Hall and a brother-in-law of the beneficiary under the will attested its execution. Neither is it denied that, although he knew Dr. Milne was coming to the house that afternoon; he avoided asking him any questions as to the testator, or to be present at the execution of the will. The only one who distinctly alleges that the old man actually gave instructions in favour of the defendant, is the defendant himself, *se ipsum scripsit heredem*.

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And how does McBeath attempt to remove the suspicions which the law and the facts compel the Court to entertain? And what is the value of his testimony in clearing himself? for on that very much depends; for round him as the centre figure of the piece, the evidence of all the other witnesses in the case is grouped.

It will therefore be necessary to regard it, first, of itself; second, as compared with that of the other witnesses—so as to note and weigh the points where they differ—to that end it will be necessary oscasionally, indeed more frequently

than one would otherwise desire, to use the words of the witnesses themselves.

I confess that in view of the facts discovered during the trial, I could not follow the learned counsel for the defence in his emphatic eulogy on the disinterested nature of the defendant's benevolence, or in the implicit reliance which he bespoke for his "unshaken" testimony in the box. If he and his family who repeated the alleged promises, of several years standing, almost in the very same words, like the "chorus" of the Greek play, are to be believed, the defendant must have been for years desirious of exercising his benevolence on his old friend by getting him into his house; though always put off with a polite promise: "*If* I go to live anywhere else, I will come to you." Making all allowance for the want of culture on which his counsel dwelt, the defendant's mode of delivering his evidence in the box, was to me as a jury, the reverse of satisfactory. His demeanor, the manner of delivery, a description of which could not possibly find its way into a reporter's notes, form a most important factor in weighing the value of his evidence. It was halting, circuitous and evasive; and uttered with averted eye, in so low a voice that with the most unremitting attention it could not be clearly heard. His own counsel within a few feet in front of him more than once experienced this difficulty, and impelled him to speak up.

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To the Court he presented the appearance of a witness who was studying not to say, rather than that of one who was ready to declare, all he knew; allowing counsel to repeat the questions with variations and adaptations, until he had apparently grasped some idea of the probable effect of his answers on his interests. I endeavoured to look at his evidence from the standpoint from which he wished it to be regarded, as that of a man who has quite unknowingly and innocently deprived some poor and destitute relations of the deceased of their inheritance; and who felt a certain

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natural degree of hesitation in advancing the proof necessary to support his claim. But as the examination went on, there was such patent "suppression" and "suggestion" that it gradually became impossible to regard him from that point of view. His whole case was that in 1879, when he came to Victoria and became acquainted with the deceased, they lived as bachelors in adjoining rooms, and had that intercourse which such proximity of two working men suggests, walking and chatting together as occasion served. That went on for two years, then Adams went to the cottage he had built on View street, and McBeath went into business on Fort street with one Cunningham, who managed the business while McBeath went to reside at Muirhead & Mann's factory, of which he became foreman; and, to his credit be it said, has remained so ever since. The acquaintance of the two was of course, not increased by the change, but they saw each other occasionally. It never went beyond the limits of a friendly acquaintance. In 1888 McBeath married and went to live in Victoria West, two miles away from Adams, there once in a while exchanging visits. McBeath stated he used to do several odd jobs ("chores") for Adams, such as cleaning the gutter of his little cottage of leaves, making a small deal table, putting up a shelf, splitting a little kindling, picking a few apples, and doing little trifling services of that kind which in a new country one neighbour readily does for another, without any idea of remuneration. Through these years, though they had considerable talk of travels and so forth, and occasionally about a sister in Australia and one in Ireland, who he told the defendant had died recently, "he never spoke about any other relations, outside of some friend or acquaintance that he said wished to come and live with him." (This presumably was the plaintiff, *vide* the correspondence). "He said they had done nothing for him and didn't know as he had any reason to be bothered with him. He spoke of him as a sort of friend."

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(Utterances as unlike those of the old man, as exhibited in his correspondence, as could well be).

McBeath added that when he had done these "chores" (or odd jobs) about the place, Adams would say: "That is first rate, Mac, I will pay you well for this some day." "He had just the same expression every time when I did work for him and he never offered to pay me any other way" (and this vague expression the defendant asks the Court to construe into a promise of his inheritance). "He never used to call me anything, only 'Mac.'" (George Barrett, an intimate acquaintance of Adams, when asked, more than once, if the old man did not call defendant "Mac," when Barrett was there, answered: "No, he never did so when I was present.") During the last year he said: "That in talk and conversation and habits, he didn't see very little change in Adams, but thought that he was getting older, of course." That Adams once talked to him of a will. He said R. T. Williams and some more of them around here had been all the time insisting upon him to make out a will and after the will was drawn up that he told McBeath that it did not suit him and he destroyed it. "That's the words he spoke to me," saith McBeath. Adams did not tell him nor did he ask what was in the will nor did he see it. Adam's attitude throughout does not support the defendant's claim to intimacy or confidence, nor does McBeath say anything of the will drawn by the old man in pencil in confirmation of his promise to his nephew, to which Williams swore, and which is uncontradicted, and I have no reason to doubt was the fact. If so it supports the correspondence and is against McBeath.

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The defendant gives an account of the illness of old Adams and the proceedings on View street on the occasion of his removal to McBeath's to the effect I have already given. "I remember the time the old man was taken sick. Well, it was on Monday evening, the 9th November. When I got there George Barrett was there. He was giving him

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drinks; giving him warm drinks and keeping up a fire in the stove. I went into the house and George Barrett told me the old man was pretty ill. I went into the room where he was and talked to him a while. I stayed till half-past nine. Barrett agreed to stay with him all night. I left and returned the next morning, when I went in I found Mr. Barrett there, he was lying alongside of the old man on the floor. (Barrett seems to have been a faithful guard and nurse). "He was asleep when I went in, at least he woke up after I went in and of course he got up then, and said he would go down and have some breakfast if I would remain with him, and I told him I would remain with him, and Mr. Barrett returned there about noon again." (This is the interval during which McBeath must have taken the opportunity for the private talk with Adams urging him to come to his house, of which he afterwards speaks). "The doctor was called in. He came with me. The doctor advised him to be taken to my place. Yes. I had spoken to Mr. Adams about it before, I told him on Monday, the night before, he had better come down to my place, where he would be taken care of by my wife and Mrs. Modeland, and he said if he was removed away from there at all he would go to my place." (It is beyond a doubt that he was particularly disinclined to go. Barrett, Kirsop and Williams put that beyond a peradventure.)

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"Well, the next day the doctor came. I think before he came, Mr. Kirsop and Mr. McDonald came in and they advised him to go to my place; that it was a very good thing for him to go there where he would be taken care of. The doctor advised him to go. So of course the old gentleman was willing enough to go." (Barrett and Kirsop say directly the contrary). "If he was removed from his house at all he would go to my place." (Always dependent on an "if.")

The apparent intention of the following examination was to bring out the benevolence which induced McBeath to

press his invitation.

Q. What object had you in asking him to be taken to your house? A. He always promised to live with us, he said "if" he had to leave his place in his last days he would go with us.

Q. Did you have any object in view? A. No, no object in view only his long promises before. I thought it was perfectly right for me to ask him to come, when he had always promised to come and live with us and in fact he promised several times when he was well and going around that he would come and live with us.

At last the witness gets his cue from the question.

Q. Did you want him for his own sake? A. Well, just for company's sake for the old gentleman, being all alone in the house by himself, just for him to come and live with us that he would not be so lonesome in his own home.

Q. Because you did not think he would be so lonesome and it would be better for him to live with somebody than himself? A. Yes, sir, because he was always complaining about being lonesome. When he was sick my wife went up to see him a week before and took up some fresh eggs for him. She went up on several occasions to see how the old gentleman was.

On the care of old Adams, he says:

Q. Did you take good care of the old gentleman? A. Yes, sir, sat up night and day with him; we took it in turn sitting up night and day with him.

Q. Was he getting worse? A. After he got down there after he got warmed up and something to eat and attended to, he seemed to change altogether from what he was when he was taken down.

(That is from the day before, when he was so utterly prostrated and half dead.)

Q. Did you say anything to him about a will? A. No.

Q. Mr. Kirsop said that before you took him down there he asked you to see that Mr. Adams should make a will in

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favour of his nephew if he was competent? A. Nothing was said to me about a will by Mr. Kirsop.

Q. Did you say anything to Mr. Adams about a will after he came down to your place? A. No, sir, not until after he sent for me.

Q. Tell us about that; what is the first thing that you knew? A. Mrs. Modeland came up to Mr. Muirhead's house and told Mr. Muirhead the old gentleman wanted to see me. In consequence of what Mr. Muirhead said I went home. When I went home I went into the room and asked the old gentleman what was the matter; what he was wanting me for?

Q. What he was wanting you for? A. Yes, and he says: "Mac, I have always promised you what little I have left, after I was through, you should have it, so that if I would get a lawyer to get a will drawn up." I asked him if he had any particular lawyer that he wanted to do his work. I did not know if he had any particular lawyer that he wished for his own work or not, he never mentioned it so he said: "No, get anyone you wish."

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Q. Now was that all the conversation at the time. A. Yes.

(He had omitted three particular words so his counsel made him go over it again.)

Q. You went into the room and you said what? A. I asked Mr. Adams what is the matter and what he wanted me for.

Q. Yes? A. And he said he always promised me what little was left after he was through with it, that I shonld have it, and for me to get a lawyer to make out a will *in my favour*. (These words witness omitted in his first account of it). And I asked him if he had any particular lawyer that wished to do it, and he said no, to get anyone I wished.

Q. Did he say anything more? A. No.

Continuing Mr. McBeath's evidence from the point where the instructions for the will are given, witness is

asked:

Q. Then what did you do; did you do anything more? A. No, I came up to town and just took the first lawyer I came to, that was Mr. Hall here. I did not know him at that time. I went into the first law office I came to. Mr. Hall was not in. Then I went up to tell the doctor (Dr. Milne) to go down, that he had better go down and see the old gentleman. Dr. Milne had been every day to see him at my house. He was attending him before. Then I went back to Mr. Hall and Mr. Hall was in. Then I told Mr. Hall what the old gentleman had told me and Mr. Hall went to work and drew up a will there, I believe.

Q. And then what? A. And after it was—what Mr. Hall could do in the office; he went down with me to the house. Mr. Hall stayed in the front room a little while and then we both went in together, and I told Mr. Adams this was Mr. Hall come in about the will, and he said "All right Mac," and he did not get up just then. In a few minutes he got up.

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Q. Did he get up alone? A. No, I helped him (his wife assisted him) "and he sat on the bedside" (supported by McBeath) "and Mr. Hall had a little conversation with him."

Q. Can you tell us what Mr. Hall said? A. Well, Mr. Hall read part of the will over to him, and it seemed that he was "a little" hard of hearing, and then he went on, I think, with two or three words of the first, and he asked him if he understood what he was saying and he said "yes," and Mr. Hall repeated the same over to him again, and a little louder; he knew that he was a little hard of hearing, and after it was all read over to him he asked him if he was willing that everything should be left to me and he said "yes, perfectly willing that it should be left to Mr. McBeath."

Q. What took place then? A. And Mr. Hall read over the whole will to him after he had it all fixed up, and then

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he and Mr. Modeland signed it. And after it was signed and all this he told me to get some money in the purse and pay the gentleman now, for his trouble.

Q. Do you remember anything that was said beside that. Go over it again? (Witness repeats in substance the aforegoing and adds:) "Mr. Hall asked him after it was over, if he was willing I should be heir to his property." "Yes, I remember the signing of the will; he done it himself, sat up" (in another place it is stated, supported by McBeath) "on the side of the bed and signed the will."

Mrs. McBeath's evidence does not agree with Mr. McBeath's on these important points—the alleged promise, and the direction to make it in McBeath's favour.

Mrs. McBeath says.

"Mr. Adams told Mr. McBeath he wanted him to get a lawyer to make out a will."

Q. You heard him? A. *Yes, quite distinctly.*

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Q. Tell us what you heard him say? A. Then he told Mr. McBeath he wanted to get up, and so he got up.

Q. I would like you to give us as nearly as you can remember the exact words Mr. Adams used when he gave instructions to Mr. McBeath to get the will made out? A. He was in the other room but I heard this distinctly; I was not just in the room with the old gentleman.

Q. And you did not hear all that was said? (Thus helped by the counsel, although she said 'I heard this distinctly' she replied:) Of course I was going about my work and did not pay him the attention, you know.

Q. Tell us what you did hear? A. I heard him wanting to get up and so Mr. McBeath called me in and 'we' helped him up.

Q. What conversation passed between Mr. Adams and McBeath that you heard? A. Well, when McBeath came in ——

Q. When McBeath came in what did you hear? A. I told you what I heard.

Q. Kindly repeat as nearly as you can remember? A. Well, Adams said, "Mac, I would like —— I wish you would get a lawyer to make out a will." That is as near as I ——

Q. Did he mention any lawyer's name? A. No, sir, he did not. Mr. McBeath asked if he had any particular one, and he said not.

Q. Did he say what particular disposition he wished to make of his property? A. No, not as I recollect.

Mrs. Modeland's evidence (which is praised to an extravagant extent by defendant's counsel), differs also materially from McBeath's as to the alleged promise and the instructions from Adams to McBeath.

She says: "When McBeath came in he asked me if Mr. Adams was worse, and I said I did not think so, but he wanted to see him, and Mr. McBeath went into the room and I heard"——

Q. Was the door closed? A. No, sir.

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Q. Where were you? A. In the kitchen (into which the little room Adams was in directly opens) and I heard Mr. McBeath speak to Mr. Adams and ask him what he wanted, and he said he wished for him to go for a lawyer; that he wanted to make a will.

Q. Said he wanted to make a will? A. Yes, sir.

Q. Were those the exact words he used? A. I could not say as they were the exact words, but it was to that effect.

When asked to repeat her evidence, she does so the second time as above, and when pressed to repeat her evidence a third time as to what occurred from the time McBeath entered into the room, she does so, in the following words:— "Well, when he came he asked me if Mr. Adams was any worse, and I told him no, I did not think he was, but he wished to see him; and he went into the room where Mr. Adams was, but I could not just say what he did say to Mr. Adams, and Mr. Adams said to him —— he called him

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'Mac'—that he wished to get a lawyer to make out a will, and Mr. McBeath asked him if he had any particular lawyer that he wished him to get and he said 'no,' he could get any one he wished."

Neither the wife nor the sister-in-law, who were both there at the time, and heard, make any mention, whatever, of the words: "Mac, I have always promised you what little I had left; after I was through you could have it," or of the alleged instructions to make the will in McBeath's favour.

I can see nothing, so far, to remove any of the grave suspicion which necessarily enshrouds this case.

While alluding to Mrs. McBeath's evidence, I notice she mentions that Adams "used to bring her little presents of different things" (presumably in acknowledgement of her and her husband's attentions).

She adds: "He always told me *if* he left his house he would come and live with us."

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Another matter is worth mentioning as it distinctly, though undesignedly, contradicts the witnesses Phillips and Isaac Modeland on the subject of the old man's deafness. Mrs. McBeath says: "I don't think Mrs. Mable entered into conversation with Mr. Adams, because *he was very hard of hearing.*" George Barrett, Kirsop and others, and the old man himself, aver the same, whereas Isaac Modeland says that "he spoke to Adams in his ordinary voice; Adams was a little deaf;" and he adds, "I did not talk louder to him than I am talking to you," and certainly the witness did not raise his voice in Court, and Modeland was a witness to the will.

Isaac Modeland was not a satisfactory or accurate witness for he considered there "was not very much the matter with Adams, only a little stiff and sore."

He says, too, after describing frequent visits to Adams, "he used to state McBeath was a very good friend of his and everything he had he would leave it to him."

This he afterwards qualified by adding, "as near as I could make out," the meaning of which phrase he could not explain nor could he say when he first heard Adams say so.

He says the old man always talked "of leaving everything he had in favour of McBeath."

Q. When? A. Off and on, whenever I used to be there.

Q. How many times? A. Very near every time we had any conversation with one another.

Q. Why did you not tell this yesterday? A. I don't think I was asked it yesterday, not that I know of.

Q. Did you inform Mr. Hall of this fact? A. I might for all I know.

Q. You can't tell whether you did or not? A. No.

One thing, however, he does state that Adams said: "Can I alter this (the will) at any time?" to which Mr. Hall replied, "Any time, right now, if you want it."

It is to be borne in mind that Modeland's visits and conversations with Adams in very nearly every one of which he said he was going to leave everything to McBeath, began in 1883, and he was in Victoria from 1883, with the intermission of three years he was away down East, to 1893, consequently he must have been under a misapprehension when he said they took place after Adams' sister was dead. He proves too much and too vaguely as to the alleged promises to be a trustworthy witness.

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We now come to the evidence of Mr. Hall, who was not acquainted with any of the parties until suddenly called in to make this will. Mr. Hall's evidence as to the preparation and making of the will, is important: "Mr. McBeath came to me at five o'clock one day and told me the kind of will Adams wanted me to make. I wrote it out in my office while he was waiting. Owing to detention at the power house (on the way to Mr. Adams, at McBeath's) it was 7 p.m. before it was signed by the testator. (The will gave, devised and bequeathed all the property of the testator

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real and personal, whatever and wheresoever, to "my friend," Duncan McBeath, absolutely and made him sole executor). When we went into the room Adams was lying in bed asleep. In the first place Mr. McBeath told Mr. Adams who I was and what I had come for. "Here is Mr. Hall, a lawyer, with the will which he has come for you to sign," or something to that effect, and then I don't think anything further was said until Mr. McBeath assisted him. The old man sat up on the side of the bed. He was in considerable pain as he was rising. I don't remember Mr. McBeath saying anything further to Mr. Adams than I have said.

"I expect I was the next to speak. As near as I can remember, I said 'I have a will here which, if you wish to sign, I will read it to you, or something to that effect, I am not sure of the exact words. As near as I can remember, he asked me to read it * * * This is eighteen months ago. * * * I read the will, I read the first sentence and then I stopped again, and asked 'do you hear me?' He said 'yes.' I then commenced again and read the will through.

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"I then asked him if that was in accordance with his wishes. He said 'yes, it is.'

"Then I wished to make sure that it was so, I just simply altered the form of the question a little and said 'do you wish to leave everything you have got, both real and personal property to Mr. McBeath?' He said 'I do.' Then the will was signed.

"After it was signed, he said * * * 'this should have been done long ago.' He also wished Mr. McBeath to pay me for what was done out of a purse there. I did not stop to get my pay * * * I simply stayed a few minutes.

"I did not know anything of either McBeath or the other man before. As to property, I understood from Mr. McBeath that he had a house and lot. I told him it was

necessary to get another witness.

"When we went into the house the family were at tea. I asked Mr. McBeath the name of the man I saw at the table. He said it was Mr. Modeland, and I said 'well, call him in, he will need to be in when the will is signed to witness it.'

"There was no one else in the house who could witness it.

"I did not at that time ask or know if he was a relative, have since learned he is a brother-in-law of McBeath's."

Q. Now, Mr. Hall, you have made many wills before, have you not? A. Some.

Q. And you, I suppose, have been sent for to make wills upon emergencies? A. Not very often. Oh, no, I did not look upon this as an emergency. Well, I suppose it was right to have it done at once, because the man was sick.

Q. Was he represented to you as being dangerously sick? A. No, I don't think so, the object of being in such a hurry was, the man was sick and we never know the length of life.

Yet, this was a very simple will.

Q. Now, don't you think it is preferable in drawing a will to take your instructions from the man himself, whose will you draw? A. I suppose it is if you ——

Q. Why did you not do so in this case? A. Well, for the very reason that I would simply have it ready when we got to the house, and then if it was in accordance with his wishes it would be sooner done.

Q. Is it not your plan in drawing wills to enter into conversation with the testator, discuss his affairs with him generally; why didn't you do that here? A. Well, I didn't know there was any particular occasion for it.

Q. Is it, or is it not, your practice to enter into a conversation with your client when you are drawing his will and ascertain the position of his property, and see, that is, that you and your client thoroughly understand each other? A.

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Yes, it is generally.

Q. Why did you depart from the usual practice this time? A. I had not had very much practice at that time.

Q. You have changed your practice since, I suppose? A. Yes, in that particular ——

Q. You did not see the doctor before you went to the sick man's bedside? A. No, I did not,——No, I did not carry on any correspondence with the relatives of the deceased. Nor advise anything of the kind to be done.

By Mr. *Bodwell:*

Q. There was nothing here to excite your suspicion when you were getting the will signed, was there? A. Nothing whatever.

By the Court:

When you went in there did you ask the old man if he had any relations? A. No, sir, I did not—I had—I have an indistinct recollection of Mr. McBeath telling me he (Adams) was alone in the world. I did not ask the old man himself if he had any relations.

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Q. Don't you always ask in the first thing in regard to relations when you go to make up a will? A. Well, your Lordship, I believe this is the only will I ever made to any but relations.

Q. Wouldn't that strike you all the more then? A. Well, I don't know, perhaps it would.

Q. Don't you know that sometimes in making a will is a time to heal up old breaches in a family, when a man is at the point of death and going before his Maker? A. As I said before, I have an indistinct recollection of Mr. McBeath telling me that the man had no relatives living.

Q. Whereabouts did Mr. McBeath tell you that? A. All the conversation that took place between Mr. McBeath and myself took place previous to the will being drawn, within my office, before we went down to the house, beside what little we may have said on the way down.

Q. This was in your office, or on the way down? A. Yes.

It will be in place here to give old Macdonald's evidence of the conversation between Kirsop, McBeath and Macdonald, on old Adams leaving his own house to go to McBeath's—(for McBeath to get a will made in favour of the nephew) as contrasted with that of the defendant on the same subject.

Mr. Kirsop asked McBeath how the old man was? McBeath said he was asleep. Kirsop then told him that if he was, to take him over to his house to try to get him to make a will if he was competent to. He told McBeath he was trying to get the old man to make a will for some years, and that old Adams intended what money he had in the bank, somewhere over $2,000.00, and all the property to go to his nephew in Liverpool. This, Macdonald said, was in the kitchen, but McBeath said it was in the little room 10x16 next to the bedroom where Adams lay. Macdonald's evidence was: "Kirsop, McBeath and myself were standing as far apart from each other as I am from you, *i.e.*, three to five feet." Adams being asleep did not require McBeath's services, so there was no chance of his not not having heard Kirsop.

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Q. What were they talking about? A. Just what I stated there. Kirsop asked me when the case came up first if I remembered the conversation.

Q. Yes, and he told you what it was, didn't he? A No he did not.

Q. Asked if you remembered what it was? A. He had no need to tell me.

Q. He had no need to tell you—how did you come to remember it so well? A. Because that was the only conversation that took place there.

Q. How long were you in the house? A. Well, not more than five or six minutes probably. I couldn't tell you. (McBeath says "quite a few minutes, about twenty minutes or so.") That was about all that was said that I remember. I don't remember anything else.

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Q. Why did Mr. Kirsop ask you to go there? A. I don't know; I never asked him anything about that.

Q. But he asked you to go? A. I met him on the street; he asked me if I would go up to see the old man, that he was sick.

This is McBeath's account of the conversation.

Well, when Mr. Kirsop and Mr. Macdonald came there I was in the room as he (Macdonald) stated there, and stood, it was not in the kitchen anywhere; they were only in the adjoining room to the bedroom where this conversation took place.

Q. Was anything said about a will there? A. No, not a word said about a will in my presence.

Q. What was the conversation about? A. The conversation was mostly about how would be the best way to do with the old man, to get him removed away from there. So, Mr. Kirsop stated it would be as well. I told him he was going to come to my place, and he thought it would be all right, it would be as well to take him where he would be cared for.

Q. And nothing was said about a will at all? A. *All the words said about a will was between George Barrett and I on the previous night, before he was removed.* I asked Mr. Barrett if he had his will made, and Mr. Barrett said he didn't know, he didn't know anything about his affairs. And he told me since, and I have asked him several times since. And he said he didn't know whether the old man had five dollars or five thousand.

Q. Now, did Mr. Kirsop speak to you about the old man making a will in favour of his nephew? A. No, he did not, he never mentioned a nephew to me; I did not know he had a nephew until this turned up in this matter now.

Q. I mean Mr. Kirsop, did he ever say anything about it? A. No.

The Court: You say you asked George Barrett if the old man had made a will? A. Yes, sir.

(This shows that the defendant had the idea of a will in his mind on his visit at Adams on Monday).

Q. Adams never told you where he was born? A. No.

(Then follows a long evasive shuffling in the cross-examination as to his age, with at last the same result that he did not know his age).

The following occurs in his evidence as to Adams' nationality:

Q. Did you always have the opinion that he was an Irishman? A. Just merely from his conversation and his speeches.

Q. Was it always your opinion he was an Irishman? A. I would not say it was always my opinion; I would have an opinion that he was an Englishman as well as an Irishman.

[So that he was not intimate enough to know Adams' nationality.]

As to his visits to Adams in 1891:

Q. How many times did you visit him in 1891? A. Oh ——

Q. Did you go to his house? A. Somewheres in the neighbourhood— — in fact I used to go up every two weeks and sometimes every week to see him when I quit work.

Q. And how many times did he come to see you at your house? A. At the house——he was there four different times (at intervals of about a month) and three different times at the shop where I worked (one of these times with George Barrett for lumber).

The order of events makes it necessary now to return to the evidence of McBeath.

As to the bank book and the $2,000.00 odd in the savings bank:

In his account of this also he was vague and evasive. It is thus described in the notes of trial.

Q. When you brought away Mr. Adams from his house what property did he carry away with him? A. That is

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from his own house to our place ?

Q. From his own place to your house ? A. He took a box he had there, a clothes trunk.

Q. Was his bank book among those things ? A. Not that I seen.

Q. Where was it you obtained this bank book? A. When was it?

Q. Where was it you obtained this bank book ? A. I got it in his box afterwards, (he does not say how soon after the removal he first saw it, in his trunk. It was a tin box that he had to keep his deeds and this bank book in.

Q. That was removed at the time ? A. That was removed at the time in his box.

Q. Removed to your house ? A. Yes, sir.

Q. When did you first hear that deceased had any money in the savings bank ? A. Well, I found out from his books after the old gentleman was dead.

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Q. Now, did you not hear that from Mr. Kirsop ? A. No, sir.

Q. He did not say that he had $2,000.00 in the bank ? A. *He* [Adams] *told me a few years ago that he had money in the bank*, but he did not tell me what quantity.

Q. You did not hear from Kirsop in the presence of Macdonald that he had this money in the savings bank ? A. No, sir.

Q. You did not know that he had money in the savings bank, except from what he told you before, except through the books ? A. No, not except through the books.

Two things are clear from the evidence : That he knew Adams had not made a will, and that he had money in the bank—when he took the old man to his house, not only from what Kirsop had told him at removal, but what the old man had himself mentioned to him before, viz., that Kirsop and Williams had been trying unsuccessfully to get him to make a will and that he had money in the bank, a deposit which his knowledge of the old man's close and

saving nature would assure him must now have reached a very substantial sum. So that in any case he must have had pretty good assurance, irrespective of Kirsop, Williams and Macdonald, that when he took Adams into his house Adams had not yet made his will, and was possessed of a decent property, as he once himself described it to his nephew " well worth looking up."

We now come to the extraordinary self-condemning letter which the defendant wrote to the plaintiff Thomas Adams. It is full of " suggestion " and " suppression," written with a good deal of cunning, but cunning is a crooked kind of wisdom after all, and manifestly devised with the idea of deterring the heirs from making any effort to contest the will, by conveying the impression that it was hopeless, as it was a will made by the lawyers some time ago, implying that everything had been long ago made sure by " the lawyers," and that but little was left worth contesting, after the portentous array of doctors' fees, " and funeral and nurses' expenses and lawyers expenses was paid," intimating that all was settled past recall or contest, " so all is settled now " (concluding significantly) " and I am in possession of what little was left " he might as well have added and possession is nine points of the law.

This letter of the 21st December, 1881, is as follows, commencing with a semi-confidential " Dear Sir :"

" DEAR SIR :—I drop you these few lines to let you know of Mr. Samuel Adams' death, which occurred at my home on the 18th day of November, 1891. I have been a particular good friend of his and always with him when I could. So he came to live with me. So I will tell you how he left what property he had. Well, about seven years ago he promised it all to me, what little was left after all the doctor's fees and funeral and nurse's expenses were paid and lawyer's expenses. So what little was left I am in possession of it, by will, which the lawyers made out in my favour some time ago. So all is settled now and I am in

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possession of what little was left.

"I am yours truly,

"D. McBEATH."

The close cross-examination of the defendant by the Attorney-General brought out in evidence, that, "what little was left" represented over $2,000.00 taken out of the bank by McBeath, $1,300.00 of which was expended in building another house on lot 302, View street, that defendant had entered into an engagement to sell the lot and buildings for $8,000.00, and that defendant had still $1,000.00 in hand of the old man's money, an estimated amount of about $9,000.00 in all.

It must be remembered also that this letter was written to a man whom he had never seen, and he swears repeatedly he had never heard of—in answer to direct questions from the Court.

He had to acknowledge that James Boyd had told him before he wrote this letter that R. T. Williams and friends of the deceased were stirring and writing in defence of the neglected relatives in Liverpool of their deceased friend, of whose promises and intentions in the nephew's favour he had repeatedly informed them.

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It also came out that no nurse's expenses were paid at all; and that the lawyer's fees, including caveat, amounted to the modest sum of $53.00, and the funeral expenses about $86.00, the doctor's about $35.00, in all about $174.00 against $2,275.00 in cash, besides the land and houses—"the little that was left."

It is scarcely strange that Thomas Adams, the nephew, should have declined to answer such a letter, for the reason delivered with a certain dignity of his own: "I considered the letter was an offence." And rightly so, for he had just learned from his correspondents in Victoria that the very day after Adams was placed, so weak and ill as to be scarcely conscious, in McBeath's charge, he had made a will in McBeath's favour absolutely, a will made or procured to be

made by himself, disinheriting all his blood relations, in whom he had from 1878 down to his last illness taken and expressed so deep an interest as the promised recipients of his dying bounty.

The whole letter was a practical example of a man *qui s'excuse*, and who in that and many other portions of his evidence evinces a remarkable economy of truth. There is nothing in this letter which speaks of frank good faith or helps to remove the suspicions which, on the authorities, the Court is bound in such a case to entertain.

The evidence in his cross-examination was most unsatisfactory throughout. In one part he states he did not write to the relative or anybody else about Adams' death, because he did not know he had any relatives, and did not know the addresses of any of the old man's friends, though he had them and afterwards used them from the old man's book.

In another part his wife swears she told him the information Mrs. Noble had given her, viz.: that the testator "had nephews in Liverpool and that she wished Mr. McBeath to write to them," and this long before the 21st December, 1891, when he did write to Thomas Adams.

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At another time we have him in reply to the Attorney-General's question respecting the defendant's letter to Thomas Adams, and the appearance of his name and address and that of two other relatives of old Adams, on a book left by the testator: Q. What was the necessity of writing this letter to Thomas Adams? A. I seen his name in that book there, and I thought probably he was some relation or acquaintance, or something else of his, and his name being Adams, I thought I would drop them *(sic)* a few lines to let them know of his death.

And immediately after, in answer to a question from the Court, when repeating an alleged promise of Adams to leave his property to him (McBeath), as far back as ten years ago, when, by-the-by, the testator was in San

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Francisco: "That he had nobody to leave his property to, and he would just as soon leave it to me as any one."

The Court: Did he say he had no one to leave his property to? A. Yes, sir; he said that he had no friend to leave it to, and he would as soon leave it to me as any one he knew of and he had no one else to leave it to.

What confidence can one place in the testimony of such a witness? And yet he is the witness of all others on whom the validity of the will hangs.

The evidence of Dr. Milne on the side of the defendant is not of the importance which one would expect from a medical man who has attended a dying man's bed where his will is the subject of contest.

This arises from the fact that his evidence is deficient in one most important particular—the doctor knew Adams was dying, but never once regarded him with a professional eye as to his capacity to make a free will, nor was his attention called to it, and consequently never once applied those particular tests which medical practice prescribes as essential in order to ascertain the exact testamentary capacity of the dying man. Now, what these medical tests are the learned doctor could have ascertained from a medical work of great repute, "Taylor's Medical Jurisprudence," which at page 768, speaks with no uncertain sound. He says as to the tests prescribed for "Wills in *Senile Dementia*:—Wills made in incipient dementia, arising from extreme age (senile imbecility) are often disputed, either on the ground of mental deficiency, or of the testator, owing to weakness of mind, having been subject to control and influence on the part of interested persons. If a medical man be present when a will is executed, he may satisfy himself of the state of mind of a testator by requiring him to repeat from memory the mode in which he has disposed of the bulk of his property. A medical man has sometimes placed himself in a serious position by becoming a witness to a will without first assuring himself of the actual mental

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condition of the person making it (case of the *Duchess of Manchester*, 1854). It would always be a ground of justification if, at the request of the witness, the testator is made to repeat substantially the leading provisions of his will from memory. If a dying or sick person cannot do this without prompting or suggestion, there is reason to believe that he has not a sane or disposing mind. It has been observed on some occasions, when the mind has been weakened by disease or infirmity from age, that it has suddenly cleared up before death, and the person has unexpectedly shown a disposing capacity. In *Durnell* v. *Corfield* 8 Jur. N. S. 915, a case in which an old man of weakened capacity had made a will in favour of his medical attendant, Dr. LUSHINGTON held that, to render it valid, there must be the clearest proof, not only of the factum of the instrument, but of the testator's knowledge of its contents, See Law Times, July 27, 1844. In *West* v. *Sylvester*, November, 1864, WILDE, J., in pronouncing judgment against a will propounded as that of the deceased, an aged lady, said: "At the time she executed the will, although for many purposes she might be said to be in her right senses, she was nevertheless suffering from that failure and decrepitude of memory which prevented her from having present to her mind the proper objects of her bounty, and selecting those whom she wished to partake of it."

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Ibid. p. 769—"Wills in *Extremis*.—Wills made by persons whose capacity during life has never been doubted, while lying at the point of death, or, as it is termed, in extremis, are justly regarded with suspicion ; and may be set aside according to the medical circumstances proved. Many diseases, especially those which affect the brain or nervous system, directly or indirectly, are likely to produce a dullness or confusion of intellect, under which a proper disposing power is lost. Delirium sometimes precedes death, in which case a will executed by a dying person thus affected would be pronounced invalid.

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"In examining the capacity of a person under these circumstances, we should avoid putting leading questions —namely, those which suggest the answers 'yes' or 'no.' Thus a dying man may hear a document read over and affirm, in answer to such a question, that it is in accordance with his wishes, but without understanding its purport. This is not satisfactory evidence of his having a disposing mind; we should see that he is able to dictate the provisions of the document, and to repeat them substantially from memory when required. If he can do this accurately, there can be no doubt of his possessing complete testamentary capacity. But it may be objected that many dying men cannot be supposed capable of such an exertion of memory; the answer then is very simple; it is better that the person should die without a will, and his property be distributed according to the law of intestacy, than that, through the failing of his mind, he should unknowingly cut off the rights of those who have the strongest claims upon him."

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On Dr. Milne's first tardy appearance on the scene, on the 8th November, to attend the old man in his miserable plight in View street, after three days and nights solitary agony, he did make the only close examination we have heard of, as to Adams' physical condition. He examined and sounded him thoroughly, and as the result of his investigation, announced aloud his decision in the expressive verdict: "The clock is nearly run down,"—as though he had said—Life may flicker awhile before extinction, but the machinery is worn out, the old man's days are numbered. It is a remarkable proof of either the extremely casual nature of the learned doctor's diagnosis of this case, or what is far more likely, a prior conviction, which his first and only examination had produced on his mind, that the patient was so far gone that no further medical aid, beyond warmth and nursing, was possible for one of such extreme old age and weakness,—that the doctor never once refers in his evidence to the chronic malady of rheumatism,

which the "Adams' correspondence" shows had been for years to the old man a constant source of the most acute pain and suffering, and to his experienced eye might have been expected to have left some indelible mark on the constitution. This is borne out by almost the only frank utterance in all Mr. McBeath's reluctant evidence.

Q. Did the doctor tell you he was on his death bed, and he did not think he would get up? A. He said he did not think he would get over it. He was pretty weak. He said it would be only a matter of time that he would be called away anyhow.

Q. Then you expected his death at any moment? A. Well, yes. In fact I did not expect he would get out of his bed.

And yet this same witness, just a minute before had testified:—

"Within a day or two of his death he was supposed to be all right." * * * And again:

Q. When did you make up your mind he was going to die? A. I never made up my mind he was going to die; of course the man was "poorly."

But to return to Dr. Milne: He testifies in answer to Mr. *Bodwell*:

"It was only a few months before his death I knew Adams by name. I was not his attending physician. He came into my office and I prescribed for him once in July, 1891. I did not see him professionally between July and his last sickness; I think I have seen him in the street. I was called in to see him on 9th November, 1891." * * *

Q. In what condition was he then? A. Well, he was in a very weak condition when I saw him, lying in one of the rooms, apparently without any one to look after him. His skin was cold, pulse very weak, indicating want of proper nourishment, warmth and food. I had conversation with him. He understood what we were saying to him quite distinctly though he was deaf, so you had to speak

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loud—in a loud voice.

I prescribed for him—to put a fire in the room, have his limbs and extremities clothed in warm flannel, and hot drinks to stimulate circulation. On Monday, the 10th, Mr. Kirsop came to my office and talked about the old gentleman. He advised that he should be either taken to the hospital or to Mr. McBeath's.

I don't know whether I went just then or not to see Mr. Adams. Mr. McBeath also came to my office. I went over and saw Adams. Mr. McBeath was there and I think another man (this was George Barrett) whom I do not recollect. Adams' physical condition was improved some. The question of his being removed to McBeath's was introduced. He had already made up his mind. He spoke about it and I concurred in being the best thing he could do. I could not give you his conversation, only it did not take any persuasion on my part, but merely to consent that it was the best thing he could do. I saw him next time on Wednesday the 11th, in the afternoon, in Mr. McBeath's house. His condition was somewhat improved from the Friday, and the second day I saw him he was more comfortable and resting easier. Yes, he seemed to be quite clear mentally. I spoke to him in a general way, and he was quite intelligent.

Q. *You talked to him about other matters except this illness?* A. No, *nothing in particular that I can remember.*

Mr. *Bodwell*: Q. Now, speaking as a professional man what do you say as to his testamentary capacity on that day? A. It was quite clear as far as that would be concerned. He was able to transact any business that day and some following days as well. I prescribed for him, gave general directions as to his nursing.

Q. What was the matter with the man? A. Well, really, when I first saw him it was lack of nutrition as I say, a hard floor and lack of proper nourishment. (Not a word about rheumatism).

Q. And on Wednesday? (this was the day of the will). A. He was still in that weak condition, very weak pulse, so much so that I refrained from allowing him to sit upright in bed. I saw him again in the afternoon of every day.

Q. On Thursday? A. He was much the same as on Wednesday.

Q. Mentally? A. Quite clear. Friday 13th, and Saturday 14th, the same, and on Sunday 15th, the same. On Monday 16th, on Sunday 15th, of course, and the day before, the 14th, he complained of considerable pain in the head; and on the 16th not quite so clear.

Within forty-eight hours of his death I may say he was so that he understood what I was saying to him, and the last day that I saw him alive was the day that I saw him unconscious. On the 16th and the day before he was in a stupid condition, and on the 17th. He died on the 18th.

Mr. *Bodwell:* Q. Now, speaking as a professional man with reference to testamentary capacity, up to what time would you say from your knowledge of him, was he capable of making a will? A. I should say 48 to 60 hours before his death he was quite capable of doing it, *because he understood everything I said to him.*

Q. What kind of a man was he as to brain capacity, from your knowledge of him? A. Well, he seemed to be rather an intelligent man. I never had the opportunity, only at the bedside, of talking with him. I had no opportunity of judging as to his character for strength of will, steadfastness of purpose, or anything of that kind. Well, I had just been treating him as a patient; he had a slight stricture, when I wished to press the cavity he kicked against that very much. Certainly, I thought he was a man that could not bear very much pain, that seemed to me the character of the man. However brave otherwise, I think he was a man who could not stand very much pain.

Q. Can you remember anything he said about his removal on the Monday, the 9th? A. No, he consented,

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acquiesced and spoke of going to McBeath's and he thought that was the best for him to do. He objected to going to the hospital; gave no reason.

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Dr. Milne's cross-examination elicited that the evidence he gave was entirely from memory and, of course, liable to its defects. He had not even made the usual medical notes of the case.

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The idea of a will had not suggested itself to him until he was going out of the gate after his last visit when he asked if Adams had made a will, and McBeath answered "yes, and that the lawyer Hall had made it," (he did not say for whom); neither McBeath nor Mr. Hall, although the doctor was at McBeath's on the Wednesday, (after the lawyer was sent for, and before Adams signed the will, and McBeath knew the doctor was coming there), had asked him to attend the execution, or to make sure of the old man's capacity to make a valid will by the necessary medical tests. He could not have given much thought to the case, or must have considered it beyond the reach of medicine, for he forgot, until reminded, that it was George Barrett who had fetched him on the 8th to visit Adams at View street after the accident. Forgot that he then made a close physical examination of the deceased; tried and sounded "heart, head, breast, etc." and forgot his expression "that the clock was nearly run down," he forgot the visit of Kirsop and Williams at his own office after Adams' death; forgot his query "who made the will" and his significant question to them "did he (Adams) know what the will contained when he signed it?" It also showed that in his visit to the sick man the conversation with him was chiefly confined to his bodily ailments and his answers to "yes" or "no." There might have been a few other remarks passed, but chiefly Adams' answers were "yes" or "no," so that nothing occurred in that respect to test the old man's capacity. The doctor did not see anything in his condition or connections to suggest the necessity of any enquiry into

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his mental condition, or to call for special examination; and without intending it, presumably because his attention was not drawn to his mental condition, he saw nothing to indicate he was not fit to make a will. Indeed, nothing occurred to him in his visits to Mr. Adams to give the idea that a will was in contemplation. And though he thought an examination into the man's condition when about to make a will, would have been a wise precaution, "it was not his practice to make any enquiry of that kind unless desired to do so, and then generally in consultation with one or two physicians." As to the man himself, he knew nothing of his brain capacity, strength of will or steadfastness of purpose. It was part of his character that he could not bear very much pain. He was from the first to last very feeble and very deaf, but that he (the doctor) could readily persuade him to do what he wanted. Indirectly he confirmed the evidence of Kirsop and Barrett of his reluctance to leave his house in View street, "when I went up there on the Tuesday the place of his removal had been settled as far as he was concerned. He consented, *acquiesced*, and spoke of his going to McBeath's."

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The evidence of Dr. Milne, and what must have been the intentional abstention of McBeath from taking advantage of his presence while the will was being signed, contributed nothing to remove the suspicions the Court was bound to entertain of the *bona fides* of the transaction, of the want of a clear understanding of the will, or the exercise of coercion, (which does not mean actual violence) in obtaining it.

The learned doctor's evidence in cross-examination has a slight smack of unconscious partisanship, not infrequent among professional men engaged on a side, and it takes an amusing turn when he affects to confound the "clock run down" of his own simile, with "the clock hanging up on the wall."

More serious however is his misapprehension of the law of medical jurisprudence applicable to the cases of wills of

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very old men, like the present, when made or procured to be made by the beneficiary, and he a stranger to the blood. When he ventures to give an opinion (though he confines it to his physical condition) that he thought he was fit to make a will at the time, he had not thought of the subject until after the patient was dead, and had not examined him with a view of testing his capacity while alive.

When cross-examined by the Attorney-General, Dr. Milne professed to have forgotten his close examination of old Adams and his expressive phrase as to the clock, but Mr. Attorney pressed him after he said: "I don't remember that; I don't remember that."

Q. Now, do you not remember remarking to Mr. Barrett (who went and fetched the doctor) "that the clock," referring to the old man, "that the clock had well nigh run down?" A. I may have done so, I really forget.

Q. Was that your opinion of him? A. Was what my opinion?

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Q. Was that your opinion, that the clock was pretty well exhausted and run down? A. You are referring to him? You are not referring to the clock on the wall?

Q. No, I am referring to the deceased man. A metaphorical expression, you know. A. Yes, I might have made that expression.

Q. And that was your opinion at the time? A. Yes, sir; that was my opinion.

Q. The old man was very feeble? A. Very feeble.

Q. Very feeble, indeed, I suppose; you say he was deaf, and you had to speak very loud to him? A. Very loud to him, yes.

Q. But by shouting at him you could make him hear? A. Oh, yes, sir; by speaking loud you could make him hear.

Q. *And your conversation, I understand, on all occasions was confined to his ailments?* A. *Ailments chiefly.*

Q. *There is nothing you can speak of outside his ailments?* A. *No, sir.*

Q. *And it was from talking to him of his ailments that you thought he was in his right senses?* A. *Yes, sir.*

Q. You had no talk with him about his wordly affairs, about his history and so on? A. No, I had none.

(Then as to the conversation with Kirsop and Williams in the doctor's office).

Dr. Milne: Kirsop was the first who came to me on the Tuesday.

Q. He came to your office and talked about the old gentleman, Adams? A. Yes, sir. He told me that he, Kirsop and his friends had been trying to persuade Adams to go down to McBeath's house.

Q. He did? A. Either to the hospital or to McBeath's house, and he asked me to come up and persuade him to the same effect. When I went there and spoke of the subject. But he had really consented at once to go, had made up his mind to go.

Q. So that directly you mentioned it he yielded and assented? A. Yes * * * I told him that I thought that it was the best thing for him to do, to go to McBeath's, and be cared for properly, because that was chiefly what was required.

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I did not keep notes of the condition of his health or his mental or bodily condition at the time of my visit.

The defendant's evidence as to the testamentary capacity of the testator, at the time of making the will I find the reverse of satisfactory.

The wife and sister-in-law of the defendant of course could only judge from external signs which came within their ken. That they made his latest hours less painful and his agonies less distressing than they would otherwise have been ("he rested easier") is clear. "E'en in our ashes glow their wonted fires." They talk at one time of his trying a chicken; at another feeling more smart, improved and so on, which means of course as compared with his utter prostration and battered condition on the fatal 8th

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But all the same he was dying all the time. "I expected he might die at any moment" in his one frank moment, confesses McBeath; "very feeble all the time" (says the doctor). George Barrett, who knew him as well as any and saw him at the McBeath's, "thought him as near dying as could be." On Wednesday, the day of the will, "he was still in that weak condition" (meaning as when he came) very weak pulse, "so much so that I refrained" (says the doctor) "from allowing him to sit upright in bed." He had to lie down because of his heart, could not stand, was as helpless as a baby. Now the state of the body must affect the mind, and it would be unreasonable to imagine that at that extreme age, after falling down in the street, followed by that frightful exposure to starvation and cold of three days and nights, in his night shirt, without fire, and in the month of November, which would have played havoc with a much younger man, that his mind should not have sympathized with his body and been seriously affected, and its fibre have been proportionately enfeebled. It could not have been in sound and fit condition to make an intelligent testamentary disposition of his property. What that is is aptly described by *Broughton* v. *Knight*, 3 P. & D. 65, and *(Sir J. Hannen) Burdett and others* v. *Thompson*, 3 P. & D. 73.

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"Speaking of the degree and kind of mental power required, from the character of the act, it requires the consideration of a larger variety of such circumstances than is required in other acts. Reflection upon the claims of the several persons who by nature or through other circumstances may be supposed to have claims on the testator's bounty, and the power of considering their several claims, and determining in what proportions the property shall be divided among the claimants."

"Whatever degree there may be of soundness of mind, the highest degree must be required for making the will."

I can add, (as did the learned Judge in that case) the

matter was ably argued and the learned counsel for the defendant addressed to me a powerful argument in favour of the will, which caused me to go over the evidence more than once, and to re-peruse the authorities with care and to note and weigh the points in which the witnesses differ, particularly in a case like this of "grave suspicion" which "calls for special vigilance on the part of the Judge in examining the evidence adduced in support of it." *Parker* v. *Duncan*, 62 L.T.N.S. 642.

The same view of the degree of intelligence required in making a will is laid down in *Coombes case*, Moore, 759. "It was agreed by the Judges that sane memory for the making of a will is not at all times when the party can answer anything with sense, but he ought to have judgment to discover, and be of perfect memory, otherwise the will is void."

And there could have been no perfect memory in this case.

That the principal witnesses for the defendant on the testator's supposed capacity, namely, McBeath and his family, judging from their limited point of view and the interest they took in the matter, should have considered him as in a fit state to make a will is not to be wondered at. The wish is often father to the thought, and without imputing motive, such may have been the case with them.

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With Dr. Milne's evidence in conclusion on this head I have already dealt.

The lawyer employed, with a little more experience, could have done something towards defining the exact mental condition of the patient, if in a private interview, he had sought to ascertain by suitable questions, the exact and uncontrolled real will and understanding of the man as to his relations, his property and its disposition; and had given him to understand through the medium of the doctor before the will was made, that he was a dying man, and not have left the poor sufferer believing, as the evidence shows he did, that he still had a chance to recover, to contemplate

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the altering of a will which every one there must have felt to be his last, although to the feeble, flickering intellect of the dying man, who still had hope of life, something must still have appeared wanting to bring peace and rest; or he never would have exerted himself in his feeble state to ask "Can I alter this." And what that missing something was, with his letters to the nephew before us, I do not think any reasonable, impartial person would have very much doubt. I confess, speaking as a jury, I have not.

Now, the circumstances attending the execution of the will, as the Court received it from the mouths and manner of the witnesses, instead of clearing, appear rather to accentuate "the grave suspicions" which cloud the whole transaction. None of this, happily, attaches to Mr. Hall. He, of course, is free from any such taint.

His shortcoming was the want of experience in the ordinary practice of testing the capacity of the testator, ensuring the exercise of his free intelligence, and bringing to his notice and memory any relations he might have intended to benefit in the disposition of his property. It is very probable that the recollection he twice mentioned, of the defendant's having told him when he came to his office or on the way to the house, that old Adams was alone in the world, that "he had no relations living," put all thoughts of possible relations out of his head.

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But then, after what Kirsop told McBeath of the nephews in the presence of Macdonald, all three within three to five feet of each other in a small room, 12x16, in the only conversation held there, then what shall we think of McBeath? Did he suppress all knowledge of relations then as he did in the case of the self condemning letter to Thomas Adams, even after his wife had told him of their existence; and James Boyd had given him similar information?

Now returning to the execution of the will. It was executed in the presence of the members of the McBeath household and the lawyer and no others—not even the

doctor. With the exception of the lawyer, none but the defendants' immediate relations were present, and they don't agree. Isaac Modeland differs from Hall in his account of it, tells us the old man was only "a little deaf." Others testify you had to "bawl" or "shout" to make him hear. Modeland declared that it was only necessary for one to speak in one's usual voice for the old man to hear. And one witness, the defendant's wife, who was in the room into which Adams' little chamber opened and with the door between open, could not hear what the lawyer read to the old man.

No time for any enquiry was given.

Mr. Hall tells us he was anxious in drawing the will itself beforehand to hurry over it all and save time, as the man was sick, and the length of life was uncertain. Under these circumstances, how can it be said that the old man heard and understood the will, and had what Lord COKE calls a "disposing memory" or "a safe and perfect memory." *Wilson* v. *Wilson*, 22, Grant 78.

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"By this we understand a memory that is capable of presenting to the testator all his property and all the persons who come reasonably within the range of his bounty."

The lawyer's evidence shows the want of some such test, and how little he must have appreciated the serious nature of the requirements to constitute a valid will under such circumstances.

It will be remembered that when he began to read, he was reading to a man who was in great pain and very deaf, and his own voice unfamiliar, and when he asked if Adams heard what he was saying the old man answered "yes."

He read the document through and then asked: "Are you willing to leave everything to McBeath?" Answer as before, simply "yes."

Then the question I have before referred to: "Can I alter this?" When told he could, added: "This ought to have been done before." Then the signature by testator

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and the defendant's brother-in-law, the offer of payment, and the whole affair was over. The lawyer only stayed "a few minutes" and disappeared; glad, we may readily believe, to escape as quickly as possible from such a painful scene, where all seems to have been gone through at full speed.

Now the only information extracted from the deceased was by putting leading questions to which the poor feeble sufferer could only answer "yes," a mode of interrogation which the authorities already cited declare to be utterly inadequate to remove suspicion either of want of a clear understanding of the document, or of that form of coercion to which the surrounding circumstances of this case so clearly point.

There was nothing throughout to prove that Adams, at the time of the will was capable of comprehending its effects, or all his property, and all the persons who could come within the range of his bounty.

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Wilson v. *Wilson*, 22 Grant, p. 81; a similar case says: It is not sufficient to make out that the testator was of capacity to answer a few common questions or make a few remarks, or even to conceive and express some wishes and ideas * * * It must satisfy the Court that he was equal and alive to and comprehend the full import of what he was doing at the time, seriously important, as what he actually did must be admitted to be."

Add what did the old man understand in his feeble way of it all? "Can I alter this will?" to my mind, in view of the circumstances, tells the tale. And "this should have been done long before" points the same way. What he wanted for years "long before" the letters to his nephew tell us, and the promises of which, very likely, he thought he was now carrying out through the medium of McBeath in favour of his nephew and relations.

The questions put by Mr. Hall were not inconsistent with this view, and McBeath the trustee to carry it out.

There is only one other alternative view, that, surrounded as he was in McBeath's house and his family and relations, in his weak and feeble state, in McBeath's arms and the other influences around him, when the question was put to him "Are you willing to leave everything to McBeath?" what other answer could he give than assent to what to him was far beyond the nature of a request.

Instead of removing the suspicion, the necessary inferences from all the circumstances and facts before the Court point rather to their increase than dissipation. The doubtful and contradictory evidence of McBeath, the prevarication of his wife of a vital fact to Mrs. Noble, the discrepancies in the evidence of the McBeaths and Modelands, the refusal of wife and sister-in-law thrice repeated to support McBeath in his statement of old Adams' instructions and promises in his favour in making the will.

The absurd pretention of intimacy for years with a man who would tell them nothing of his age, nationality, relations or of his property, and who limited his promises with an "if." The alleged promises to leave the property to McBeath, in violation of the solemn written promises of his life, to leave all to the nephews and their descendants—the failure in the old man's physical and mental condition—and the evidence delivered by the defendant's own witnesses, all of which I have perused with care, have, I find, only increased rather than cleared away those doubts and suspicions with which the law insists upon regarding a will made under such circumstances as the present.

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I find that it has not been affirmatively established, as the defendant was bound to establish it, that the deceased man, Samuel Adams, knew and approved of the contents of the will of the 11th November, 1891, which forms the subject of this trial.

I can find no case of a similar kind, though there may be such, where a will made under such or similar circumstances of grave suspicion has been maintained.

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I therefore adjudge and decree, that the will of the late Samuel Adams, dated the 11th November, A.D. 1891, in dispute herein, be set aside, and that the probate thereof granted unto the said defendant by this Court be rescinded;

And further, that it be referred to the Registrar of this Court to take an enquiry as to what personal property the said defendant has received under the said will, and that the said defendant do account for and forthwith pay into this Court the value of the same;

And further, that it be referred to the Registrar of this Court to take an enquiry as to what rents and profits of the real estate of the said Samuel Adams, deceased, the defendant has received under the said will, and that the said defendant account for and forthwith pay the amount of the same into this Court;

And further, that it be referred to the Registrar of this Court to take an enquiry as to the amount actually expended by the said defendant upon the said realty by way of improvements or otherwise, and as to the actual benefit derived by the said estate of the said Samuel Adams, deceased, therefrom;

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And further, that it be referred to the Registrar of the Court to take an enquiry as to the parties entitled to the estate of the said Samuel Adams, deceased, and that the said estate be distributed according to the Statutes in force for the distribution of the estate of deceased intestates;

And further, that an injunction issue out of this Court restraining the said defendant from dealing or in any way interfering with the real estate of the said Samuel Adams, deceased, known as lot No. 302, in the City of Victoria;

And further, that the defendant do pay to the plaintiff his costs of this action, other than the costs of the enquiry as to the parties entitled to the said estate and in connection with the distribution thereof;

And further, that judgment be entered accordingly for the plaintiff. *Judgment for plaintiff.*

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From this judgment the defendant appealed to the Full Court and the appeal was argued before McCreight, Walkem and Drake, J.J.

E. V. Bodwell, for the appeal.

Theodore Davie, A.-G., and *J. P. Walls, contra.*

McCreight, J.: This is an appeal from the judgment of Mr. Justice Crease who decided against the validity of a will made by one Samuel Adams in Victoria in November, 1891, in favour of McBeath. He seems to have considered that the will was not the will of a free and capable testator, and that as McBeath was concerned in the preparation of the will under which he took a benefit, the suspicion and jealousy with which the Court were bound to examine the evidence in support of the instrument was not removed by the witnesses at the trial.

That every such will is to be regarded with vigilance and suspicion is fully pointed out in the judgment of the Judicial Committee delivered by Baron Parke in *Barry* v. *Butlin*, 2 Moore, P.C.C., especially at p. 485, where that great Judge says that "all that can be truly said is that if a person, whether attorney or not, prepares a will with a legacy to himself (McBeath was only in part concerned in such preparation) that it is at most a suspicious circumstance of more or less weight according to the facts of each particular case, and in some of no weight at all," etc., etc., "but in no case amounting to more than a circumstance of suspicion demanding the vigilant care and circumspection of the Court in investigating the case and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased."

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The same Judge proceeds to say: "Nor can it be necessary that in all such cases even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for or reading over the instrument. They form no doubt the most satisfactory, but they are not the only satisfactory

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descriptions of proof by which the cognizance of the contents of the will may be brought home to the deceased," etc. I have quoted this last passage because the conduct of Mr. Hall, who prepared the will in pursuance of McBeath's directions, has been commented upon, and I feel bound to say that he acted in the reading over of the will to the deceased and the explanation of it to him and the execution of it as if he had the judgment of the Judicial Committee before him.

In endeavouring to ascertain the amount of vigilance and jealousy to be applied in examining the evidence in support of this instrument we fortunately have letters written by the deceased to his nephew, the plaintiff, which throw a great deal of light on the question as to what disposition he was likely to make of his property by will. These letters extend over a period from October, 1878, till July, 1891, and the deceased died in the November of that year (on the 18th), having made the will in question on the 11th of the same month, or a week previously. Of course for this purpose those letters are most valuable which were written nearest to the time of his decease, those written long previously being comparatively of little value. In the last letter written by the deceased which we have (*i.e.* dated July 21st, A.D. 1891) he says: "I am always well pleased to hear from you. I think I have no relations now living that ever bestowed a thought on me but you." This does not appear to have been a mere accidental expression, but see the evidence of R. T. Williams pp.181 and 182: "He spoke about those relatives and he said the only one he could recognize was Thomas, as far as I can remember." And see p. 155, the same witness says: "At one particular time, in September (*i.e.* 1891), I was in the house in the evening; he had been talking for some time and he pulled from underneath his chair an abstract of a will written in pencil in his own handwriting, leaving it to one Thomas Adams, of Liverpool." And again the same witness says in

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his evidence: Q. You say he showed you this pencilled document? A. I copied what he had in pencil in ink and got him to sign it and witnessed it for him that night. And line 1, p. 158: Q. You copied what he had in pencil? A. Yes, changing the ending of it so that it could be properly witnessed and altering the beginning of it. Q. But not altering the effect? A. No. Just the same as you copied it in ink. The above quotations satisfy me that there was little probability of the deceased leaving his property to any of his relatives with the exception of Thomas, the plaintiff. That he should leave nothing to the other, William, is probable from a letter written by him on the 7th of January, 1887. The only question, then, is, was it very probable he should make a will in favour of the nephew, Thomas, who, by the way, he had not seen for nearly fifty years? From the early letters written in the year 1878, and 1884, 1887, I think such was his intention, but when in August, 1887, he hears of Thomas getting into the Institution in Liverpool he seems to have considered that piece of good fortune secured every comfort to his nephew that he could reasonably require. See the letters of January, 1888, and October, 1888. In that of April, 1889, the deceased says: "You will never want for anything in this world so long as you remain where you are at present; you have enough to eat and drink, good comfortable clothes and a home to live in all for nothing, and I think that's all you want. You have every right to be thankful to God for what He had done for you." See, also letter of March, 1890, and of March, 1891, and the last of July, 1891. In brief, before Thomas was successful in getting into the Institution I think the deceased intended to leave his property to him, and made promises substantially to that effect; subsequently to that period, whilst his regard for his nephew did not cease, we find no more such intimations, and the will in pencil which R. T. Williams wrote out in ink for him, but which was never executed, leaves by no

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means an impression that he had concluded to make a will in his nephew's favour; but rather that he was pressed by the no doubt well-intentioned importunity of the witness Williams, as to which the evidence is clear. In truth there is an observable agreement between the evidence of R. T. Williams and that of the defendant McBeath, where the latter says: "He (*i.e.* the deceased) said that R. T. Williams and some more of them around here had been all the time insisting upon him to make out a will; and after the will was drawn up and shewn to him that it did not suit him and he destroyed it; that is the words he told me,"—and I think the sequel shows this statement to be true. I think the testator considered there was no use in leaving the property to Thomas, who would probably have to leave it to the Institution, or if not, that it might get into bad hands, *e.g.*, the other nephew, William. For the above reasons I see nothing improbable in the deceased leaving his property away from Thomas Adams, or his other relatives, or that the devise to McBeath constitutes a suspicious circumstance of any considerable weight.

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In cases of wills obtained by undue influence there will be generally suspicious circumstances attending the execution. See *Brown* v. *Fisher*, 63 L.T.N.S. 466, and *Parker* v. *Duncan*, 62 L.T.N.S. 642, and see *Baker* v. *Batt*, 2 Moo. P.C.C. at p. 323, but I see nothing suspicious in this case. McBeath is sent for and goes to see the deceased, and after communication with him goes for a lawyer and attempts to get the nearest, Hall, a stranger to himself. Hall happening to be out, he goes to the doctor (Dr. Milne), who had been the regular medical attendant of the deceased, and sends him to the house, and then goes back to Hall and finds him in. The drawing of the will in Hall's office I gather to have been Hall's act, probably for the purpose of using law books and stationery. The execution and the circumstances connected with it seem to me in the language of Baron PARKE, in *Barry* v. *Butlin*, 2 Moo. P.C.C. 490,

strong to prove the absence of clandestinity and fraud. Supposing the evidence of Hall and Dr. Milne not to have been obtainable, I should have felt some difficulty in arriving at a satisfactory conclusion in this case in opposition to that of the trial Judge who has had the great advantage of seeing the demeanour of the witnesses. But considering the evidence of Hall and Dr. Milne, which I thoroughly believe, as it appears in the stenographer's notes, I think the case becomes removed from the region of suspicion and that there is a moral certainty that the will was the will of a testator free and capable at the time he executed it and for several days afterwards, during which time he knew he could at any time alter it and yet omitted to do so; and I think the decision of the learned trial Judge must be reversed, as I cannot agree with his inferences from the statements of the witnesses.

Judgment of CREASE, J.

In regard to remarks in the judgment of the learned trial Judge, I think it is only right to say that the conduct of Dr. Milne and Mr. Hall seems to me to have been strictly professional and honourable, as well as upright and prudent. The respondent must pay the costs of this appeal, as well as those in the Court below.

WALKEM, J.: This action was brought by the plaintiff for a declaration by the Court that a will made by the plaintiff's uncle, one Samuel Adams, in the defendant's favour, was invalid on the alleged ground of his testamentary incapacity. The action was tried by Mr. Justice CREASE without a jury, and he found for the plaintiff. That finding is now appealed from, and we have, therefore, to consider whether it was warranted or not by the evidence. In doing so we must be guided by the well-understood principle that the law distinctly concedes the right to every capable testator to dispose of his property as he pleases, without regard to what may be termed sentimental claims arising from consanguinity or family ties. I make this observation

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because the learned Judge has dwelt upon the importance of such claims and has, in effect, held that in contests like the present they are, from their very nature, entitled to primary consideration, whereas the contrary is the case, and, indeed, so much so that if we should be of opinion that the learned Judge's finding ought to be sustained, then the respective rights of the heirs and next of kin of the deceased will virtually be settled and assured to them by the Statutes of Inheritance and Distribution.

Was the will in question the will of a free and capable testator—the will of a man who perfectly understood its effect and fully appreciated its consequences? This is the only question we have to decide, and its decision depends upon the evidence, not upon sentiment.

The facts connected with the execution of the will are few and simple; but, upon referring to them, a brief outline of the testator's character and mode of life would seem necessary. Adams was a printer by trade, very intelligent, self-reliant and independent in character. He was very decided in his views, and had a strong will which one of the witnesses described as "obstinacy." He was a bachelor, and led a somewhat solitary life, and was very reticent about his private affairs, even amongst the few whom he may have regarded as his friends. He spent the last thirteen years of his life in Victoria, and being of sober and thrifty habits he acquired a few thousand dollars' worth of property which he left by the will which is now impeached to the defendant, in whose house he died, after a short illness, at the age of about 84. The will having been made during his last illness, his mental condition at the time he executed it is the turning point of this as of all similar cases.

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On Monday, the 9th of November, 1891, Adams was found by some of his neighbours lying on the floor of his bedroom in a chilled and helpless state. Dr. Milne was shortly afterwards called in, and after examining the patient attributed his condition to a lack of food and warmth,

observing at the time to those present, doubtless in view of the patient's age, for he knew him, that "the clock" had "nearly run down." After prescribing restoratives Dr. Milne left the house. Next morning Mr. Kirsop, who had a friendly feeling for Adams and was, subsequently, one of the principal witnesses for the present plaintiff, called upon Dr. Milne and suggested that Adams should be removed to the hospital or to McBeath's house so that he might receive proper attention. The suggestion was approved of, and Mr. Kirsop apparently acted upon it, for when the doctor visited Adams next day "I found," as he states, "that he had made up his mind to go to McBeath's," and "required no persuasion from me to do so." Besides this, Adams had flatly refused to go to the hospital; and although, it is true, that he at first objected to be taken to McBeath's, he explained his reluctance on that score as being due to a fear on his part that he would give too much trouble to Mrs. McBeath, whom, as the evidence shows, he greatly respected. At any rate, when he got to McBeath's he said, "I have come here at last. It isn't a bad place to come to." Mr. Kirsop, moreover, stated in the witness box that he thought "it was a very good thing" for Adams to go to McBeath's "for (to quote his evidence)," I thought he was a particular friend of old Mr. Adams, and it was a pretty good thing to do, and I advised him (Adams) "to do it." From this evidence, the learned Judge, as appears by his judgment, came to the conclusion, in the first place, that Adams was removed against his will to McBeath's—which, in view of his weakness, is tantamount to saying that he was forced to go there; next, that Dr. Milne was one of those who personally induced him "contrary to his desire" to go there; and lastly that McBeath was a mere "acquaintance" of Adams' although Mr. Kirsop's statement that "he was a particular friend of Adams'" was corroborated by two other witnesses —Mr. Hastie and Mr. Phillips. This evidently was a misconception on the part of the learned Judge of the evidence

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referred to. Returning to the all important question of Adams' mental condition, Dr. Milne's evidence is, to the effect, that he visited Adams for the second time on Tuesday the 11th, and found that he was much improved ;—that, on Wednesday, the improvement continued, and the patient "was quite intelligent"—"quite clear, mentally," and that "his testamentary capacity was quite clear," and so much so that "he was able to transact any business that day and some following days as well ;" that he was "mentally quite clear" on Thursday, Friday and Saturday, but was not so clear on Sunday, the 15th ;—and that, on Monday he was "partly unconscious," and was more or less so until Wednesday afternoon, when he died. I have been thus minute in dealing with Dr. Milne's testimony, because it is, with the exception of that given by Mr. Hall, the solicitor who drew the will, the only disinterested evidence there is with respect to Adams' testamentary capacity. Moreover, Dr. Milne knew nothing of Adams' intentions as to his property, nor was he aware that a will had been made until after Adams' death. He therefore could have had no interest in supporting either of the present litigants. His evidence is on the face of it that of an unbiased and conscientious witness; and in this opinion my learned brothers coincide. It is also that of a skilled witness, whose professional opinion must far outweigh, and hence be preferred to the opinions of unscientific persons, especially upon such a difficult question as that of mental capacity. We find no difficulty, therefore, in coming to the conclusion that between Monday, the 9th, and Sunday, the 15th of November, Adams' mental condition was unimpaired and that he was thoroughly capable of making a will and appreciating its effects to the fullest extent. On one of these intervening days, namely, on Wednesday, the 11th, the will in question was made. It appears that on that day Adams, who was then in McBeath's house, sent word to McBeath, who was at work as foreman in Muirhead & Mann's sash

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and door factory, that he wished to see him. When McBeath went to the house Adams informed him in substance that, in accordance with previous promises, he intended to leave him his property and that he wanted him to get a lawyer, "any lawyer" he said, to draw up a will to that effect.

McBeath, accordingly went in search of one and, as he expresses it, entered "the first lawyer's office" he "came to," which happened to be Mr. Hall's. As Mr. Hall was out, McBeath left and called upon Dr. Milne and asked him to go and see Adams professionally, and then returned to Mr. Hall's. He thereupon gave instructions to that gentleman to draw the will in his favour, as directed by Adams. When this was done, Mr. Hall accompanied McBeath to his house and after waiting a short time in the front room went with McBeath into Adams' bedroom, where he was introduced to Adams as "the lawyer" who had "come about the will." Adams said "All right, Mac." A few minutes afterwards Adams, assisted by McBeath, sat up, not in bed but on the bedside, which tends to show that his physical strength had not deserted him. This incident is in itself trivial, but it becomes of consequence owing to the finding of the learned Judge that Adams was at the time *in extremis*, or in other words, in a state of impending dissolution—physically and mentally in Death's grasp; whereas, according to the evidence of Dr. Milne, Mr. Hall and McBeath, such was not the case, and as to his mental capacity, it was the reverse of the fact. When Adams was sitting on the bedside Mr. Hall proceeded to read the will to him in a loud tone of voice, as the old man was somewhat deaf, and after finishing the first sentence asked him if he had heard it. Adams said "Yes." The will was then read through. Mr. Hall thereupon asked Adams if it was his wish that all his property should go to McBeath, and Adams said "Yes." The will was then signed by Adams and attested by Mr. Hall and Isaac Modeland. This, I must observe, is McBeath's account of what occurred, and had it been unsupported by other evidence I

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might have had some hesitation in holding that the will was valid as the law stands, for it is a well-established rule that where a person takes a benefit under a will which he has been instrumental in preparing—and this is McBeath's case—the Court must be vigilant in examining all the evidence given in support of the will, and be judicially satisfied that it expresses the true intentions of the deceased. This is the rule laid down in *Parker* v. *Duncan*, 62 L.T.N.S. 642, and several other cases. But McBeath's statements have been corroborated in every particular by Mr. Hall, who, by the way, seems to have acted very prudently and honourably in the matter, for although retained by McBeath he read over the will deliberately to Adams, then asked him if it was right, and lastly, put the question formally—"Do you declare this to be your last will and testament?" Adams' answer being "I do." Mr. Hall could have done nothing more; and, as my brother MCCREIGHT observes, he must have had before him at the time the judgment of the Privy Council in the case of *Barry* v. *Butlin*, 2 Moo. P. C.C. 480. Mr. Hall also considered that Adams was quite rational during the whole of his interview with him, and I think he was right. After Adams, for instance, had signed the will he asked Mr. Hall if he could change it if he got better. This certainly was a rational question. In the next place, without any suggestion from those present, Adams requested McBeath to pay Mr. Hall, and, with that object, directed him to a drawer in a table near by, in which he said that he would find his purse. This was, at least, business-like. Now, from the moment Adams was informed that he could change his will, down to the time of his death, which happened seven days afterwards, he never expressed any dissatisfaction with it or any desire to alter it. During four, at least, of these seven days, viz.: on Wednesday, Thursday, Friday and Saturday, the 14th, his mental faculties were, according to Dr. Milne, unimpaired. There is also evidence that Dr. Milne was not a stranger to him, but

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that, on the contrary, he had attended him professionally on a former occasion. It is, therefore, fair to assume that if Adams ever entertained the idea of altering his will, he would have mentioned the subject to Dr. Milne, who visited him, at the time, daily. But he never spoke to Dr. Milne about the matter. Applying one's experience of life to these facts, it seems impossible to come to any other conclusion than that Adams finally and to his own satisfaction disposed of his property in manner indicated by the will. Again, the facts, in evidence that McBeath "took," as he expresses it, "the first lawyer he came to"—a stranger, too, at the time, to him—and that he immediately called upon and requested Dr. Milne to go and see Adams at once, are circumstances that strongly negative any semblance of fraud on McBeath's part. Indeed, had his object been a dishonest one, he could not have taken better measures to defeat it. I have purposely avoided discussing portions of the evidence which relate to conversations and correspondence which occurred between McBeath and others after Adams' death, for our inquiry has been, necessarily, limited to one question —Was Adams a capable and free testator? and being unanimously of opinion that he was, any such discussion would be profitless.

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With respect to Adams' alleged promises to McBeath to leave his property to him there is no direct evidence except McBeath's. Mr. Hastie proves that Adams took a most friendly interest in the welfare of both McBeath and his wife; Mr. Kirsop, an adverse witness, considered that Adams regarded McBeath as "a particular friend;" and, lastly, according to McBeath's evidence, he had, in view of Adams' old age and physical infirmities, helped occasionally in a small way in the shape of doing work about the house, for which Adams felt thankful. But discarding all this evidence, we come face to face with the rule of law which I have referred to, viz.: that a capable testator has a right, which no Court can deprive him of, to dispose of his

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property as he pleases. Adams having done so, we have no authority to interfere with his will and, in effect, say that we shall make a will for him, merely because he had expressed an intention, about ten years before his death, of leaving his property to the plaintiff.

The plaintiff's case is this: "I am a sailor; I saw my uncle in Pimlico in 1843, when I was an apprentice; about 36 years afterwards he wrote the first of a series of letters to me, and promised to leave his property to me." Now, this is true as regards some of the first letters; but when the testator learned that the plaintiff had been admitted into a seaman's home, or institute, in England, he seems to have changed or at least faltered in his purpose, for he congratulated him on being so fortunate as to be comfortably provided for for the rest of his life. At any rate, when one of the witnesses, Mr. Williams, pressed him to sign a will in the plaintiff's favour, which he, the witness, had copied from a pencil draft made by Adams, the latter refused to do so. This occurred about a month before Adams' death, and it certainly tends to show that at that time Adams had no intention of leaving his property to a nephew that, as a matter of fact, would not require it.

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Besides, the law attaches no importance to a testator's intentions except they assume the form of a properly executed will.

The judgment appealed from must, therefore, be reversed with costs in this Court and in the Court below.

DRAKE, J.: We have here to consider whether the conclusion arrived at by the learned Judge who tried this case and saw and heard the witnesses should be set aside. If it was a question which turned upon the balance of evidence between one side and the other on a point on which the evidence was conflicting, the decision of the trial Judge should not be lightly interfered with. If, on the other hand, there was evidence on the real question to be decided

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in this action, uncontradicted, then it is not a question of the balance of testimony but one which entitles the Court to examine into the conclusions arrived at by the learned trial Judge.

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The plaintiff, a nephew of the testator, claims to set aside his uncle's will, by which he devised his real and personal property to the defendant to the exclusion of his blood relations, none of whom he had seen for over forty years. The testator was a man of great age, 84 or 86. He lived alone in a small cottage and did his own household work. On the 10th of November, 1891, he was found suffering severely from cold and want of nutrition, and was persuaded by his friends to remove to the house of the defendant, an old friend of his own. A strong attempt was made to show that the testator was more or less coerced to take this step, but the doctor's evidence does not suggest any such idea; he says he found the testator did not require any pressing to make the move. He had in fact made up his mind to the change. Up to this time no serious endeavour was made to show that the testator was not perfectly sound in mind though enfeebled by illness. It was mentioned, though not pressed, that he was not of sound mind because at some previous time he was under the impression that an apparition of his sister had appeared to him on or about the period of her death.

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Who can say that such an opinion is an insane delusion? No other suggestion of delusion is made or attempted to be made and Mr. Williams, who has taken an active interest in this case, considered that he was properly competent to make a will in favour of his nephew but not in favour of the defendant. From the evidence of Dr. Milne I am satisfied that when the will was executed he was both mentally and physically capable of making a valid will. The doctor's evidence is most clear and emphatic on this head.

The next suggestion is that the will was obtained by

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undue influence. The law as collected from numerous cases on this head is that if, at the time of executing the will, there was any such dominant influence obtained over the testator as would prevent his exercising a free and unfettered discretion then the will thus obtained will be set aside. If the testator suffered from weakness of mind arising from the near approach of death, strong proof will be required that the testator knew and approved of the contents of the will. The Court always looks with suspicion on a will conferring benefits on the person by whom or through whose agency the will was prepared, but this suspicion goes no further than to necessitate a stricter proof of the testator's capacity and freedom from coercion. The rule throwing upon the party propounding a will prepared by a person who takes a benefit under it, the burden of showing that the will contains the true will of the deceased is not confined to cases where the will is prepared by the person benefitted, but whenever a will is prepared and executed under circumstances which give rise to the suspicion of the Court, it ought not to be pronounced for unless the party propounding adduces evidence which removes that suspicion and satisfies the Court that the testator knew and approved of the contents of the instrument. This is the result of *Barry* v. *Butlin*, 2 Moo. P.C.C. 480; *Fulton* v. *Andrew*, L.R. 7, H. L. 448; *Brown* v. *Fisher*, 63 L.T. 465; *Tyrell* v. *Painton*, 6 R. 1. What is the evidence on which the plaintiff relies as to undue influence? He first produces several letters from the testator to himself extending over thirteen years. In some of these letters there is a clear indication that at one period it was the intention of the testator to leave his property to the plaintiff and his children, but from the year 1887 down to the last letter this promise is not renewed, but indications appear that he was anxious to be kept fully informed of his nephew's address and also that of his nephew's children. The letters also disclose that the plaintiff had obtained a home for the rest of his life and was no

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longer in urgent or any need of assistance. This is the natural deduction from all the latter letters, and especially the letter of January, 1887, in which the testator says: "I hope the Lord will watch over you and keep you from coming to want any of the necessaries of life," and in the letter of August, 1887, he expresses his thankfulness that the plaintiff is so comfortably situated. "There will be no need," he says, "for you to trouble yourself any more about the things of this world." In addition to this it is proved that he had sketched out in pencil wishes in favour of the plaintiff or his children, but it is also shown that he could not be persuaded to convert these wishes into a formal will though frequently urged to do so. The testator was removed to defendant's house by his own consent; he was ill and weak and suffering from rheumatic pains, and the next day after his removal he sent for the defendant and asked him to get a lawyer as he wanted to make a will. The defendant says, "to make a will in his own favour." This latter expression is not spoken of by the other witnesses, who in the next room heard the greater part of the conversation, and it is put forward as a contradiction. I do not see it in that light.

What did the defendant do? He went to Mr. Hall, a lawyer unknown to himself and equally so to the testator. The defendant informed Mr. Hall that Mr. Adams wished to make a will leaving all his property to the defendant. Mr. Hall drew out a will accordingly, and, accompanied by the defendant, went to the house where the testator was and the will was read out loud and explained to the testator, and he was asked if he desired to leave everything to the defendant. What more Mr. Hall or any other more experienced solicitor could have done, I do not see. He satisfied himself that the will carried out the testator's wishes and it was accordingly duly executed, and the fact that the testator inquired if he could alter it is clear evidence that his mind was directed to the act he was performing. The testator was not at this time *in extremis*. He got

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up and sat on the side of the bed to sign it. He was not even in a state of bodily prostration, which would naturally weaken his mental powers. He lived for seven days afterwards, and according to Dr. Milne, he was both bodily and mentally capable until the Sunday following to make a will, the will being executed on the Wednesday previous. The validity of the will, therefore, in my opinion, does not depend at all on the evidence of the parties benefitted. This evidence of capacity is independent testimony, given by Dr. Milne and Mr. Hall, who had no interest direct or indirect in the result. Great weight should be given to it, not only from their professional reputation, which is unassailed, but also from the directness of their testimony.

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The law on this subject of undue influence is laid down in *Parfitt* v. *Lawless*, 2 L.R., P. & D. 462, and numerous other cases. The influence must be such as will coerce a testator to do that which he would not otherwise do if left to his own volition. In *Parfitt* v. *Lawless* it was held that in case of a gift *inter vivos* natural influence (such as a parent over a child; a husband over a wife; a lawyer over his client) would cause the Court to set aside a deed thus obtained, but the persuasion by a person to make a will in favour of a particular individual is not illegal. Undue influence is not persuasion only; it requires something more—some coercion mentally or bodily. There is no evidence of this in the slightest degree. The mere fact that the testator has benefitted a stranger to the exclusion of relatives (not very close of kin and personally unknown, except as to the plaintiff, and it was 49 years since they had met) is not sufficient ground for imputing undue influence. Neither Mr. Hall nor Dr. Milne saw anything approaching coercion. The testator was only twenty-four hours under the defendant's roof and there is not the slightest intimation that until the testator desired a lawyer to be sent for, the subject of his property was ever mentioned. What took place after the execution of the will is strongly argued as

evidence of improper conduct in executing the will. The refusal by Mrs. McBeath to satisfy a stranger making what might be considered impertinent inquiries, cannot be so considered. I think Mrs. McBeath was not called upon to disclose the testator's affairs to a person who was no relation or connection to the testator. The alleged denial by McBeath of the knowledge of the existence of nephews is not any evidence of improper influence. Whether he knew of it or not is of small importance. The letter he subsequently wrote is certainly no evidence of it, and I do not think calls for the animadversion it received. He gave more information than he was under any obligation to furnish, whether he knew or presumed the person he wrote to was a relative or not.

I think the whole of this unfortunate litigation has been caused by the interference of well-meaning but insufficiently informed friends of the deceased. A candid inquiry from the doctor or Mr. Hall ought to have been sufficient to satisfy these persons that the testator was in no way coerced into making this will, and that he executed it fully understanding its scope and import.

The principles which govern the Court in dealing with wills of this character are fully and amply laid down in the judgment of the learned Judge who tried the case, but I think he did not give to the uncontradicted testimony of Dr. Milne and Mr. Hall the weight it was entitled to. It was not in reality a case in which the testimony as to testamentary capacity or incapacity was balanced. There was no evidence of want of knowledge of the contents of the will or of testamentary capacity of the testator. And deductions have been drawn from *ex post facto* occurrences which do not touch the real point of the case.

In my opinion the will of the testator should be established, and the appeal allowed, and I think with costs both here and in the Court below. The litigation can hardly be said to have been caused by the negligence or

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want of care of the testator, and nothing that the defendant has done has misled the plaintiff.

Appeal allowed with costs.

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NOTE—The judgment of the Full Court has been appealed from to the Supreme Court of Canada.

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Mining Law—Mineral Act, 1891—Relocation—"Owner"—Staking—Excess of area—Abandonment—Public officer—Misuse of knowledge obtained in office.

The owners of a mineral claim, the title to which was considered defective, permitted a third person to re-locate it in his own name, whereupon he, without previous binding agreement to that effect, conveyed his title to them for a consideration.

Held, Not a re-location by the owners within Sec. 29, Cap. 25, Mineral Act, 1891, and that the written permission of the Gold Commissioner was not necessary.

The owner of shares in an incorporated mining company is not an owner of any part of a mining claim owned by it, within sec. 29, *supra*.

The location of a mineral claim is not void because, as staked, it exceeds the 1,500 feet in length provided by sec. 3 of the Mineral Act, (1891) Amendment Act, 1893, but may be corrected by virtue of sec. 14 of that Act, by the Provincial Suvreyor who makes the survey, by the removal for the correction of distance of any post except the initial post No. 1, if the alteration does not affect the previously acquired rights of adjacent owners.

Section 27 of the Act, providing that the owner may abandon a minera claim, inferentially permits him to abandon any portion of it upon his specifying and recording such abandonment.

The Court should deal with mining disputes upon the principles of a Court of Equity, and should discountenance a plaintiff, whose action is based upon defects in title, knowledge of which was acquired by him while a Government employee in a mining record office; it being contrary to his duty to the public, and those interested in the records, for him so to use such information.

Statement. MOTION for judgment. The action was brought to

declare the plaintiff entitled to a certain mineral claim located by him under the name of the "Safety," and to recover possession thereof, and damages from the defendants. The defendants claimed under a location of the same claim by their predecessor in title, under the name of the "Robert E. Burns" prior in date to that of the plaintiff. The plaintiff alleged that the "Robert E. Burns" location was void as insufficiently staked, in that it exceeded the 1,500 feet in length permitted by section 3 of the Mineral Act, (1891) Amendment Act, 1893; and also because it was, in effect, a re-location by the defendants, without the written permission of the Gold Commissioner as required by section 29 of the Mineral Act, 1891, of a mineral claim owned by them called the "Bobbie Burns," the title to which was defective.

Statement.

E. P. Davis, Q.C., for the plaintiff.

C. E. Pooley, Q.C., for the defendants.

The facts fully appear from the judgment.

CREASE, J.: This case, which was tried before me without a jury at Vancouver on the 26th and 27th of July last, just before the vacation, is one of considerable importance to the mining community. It discloses the attempt to wrest the possession of a claim from a set of men who have done a great deal of mining work, and expended large sums of money on it in labour and machinery, by one who has done no work and expended nothing upon it.

As the facts are numerous and somewhat involved a statement of the leading circumstances of the case and the practical effect of the pleadings becomes indispensable. The action is to determine the title to a mine, and for its possession and for damages. The plaintiff claims to have a right as an independent miner to the ownership of a claim called the "Safety." It runs over one which has been worked for several years by the defendants, or some of them, called the "Bobbie Burns;" and on which, it is not

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denied, the defendants have expended in labour, machinery and roads upwards of $20,000.00. On the "Safety" the plaintiff has expended practically nothing. The "Bobbie Burns" was recorded on the 12th May, 1891, by Archibald McMurdo, in (what is called from his discovery) the McMurdo basin, about 50 miles from Golden, on a branch of the Similkameen river. The "Bobbie Burns" was recorded under the Mineral Act of 1891. Other two claims —the "Robert E. Burns" and the "Safety"—were recorded under the Act of 1893. The last two claims are virtually the same claim; they run much on the same lines, and both cover the "Bobbie Burns." The documents and transactions affecting the "Bobbie Burns"—which I take first, as the first in order of record, are as follows:

On the 3rd August, 1891, Archibald McMurdo being then the discoverer and sole owner of the "Bobbie Burns;" conveyed to John English Askwith, three-fourths of his interest in that mine: retaining one-fourth in himself. On the 3rd November, 1891, Askwith conveyed to Fotheringham seven-eights of his three-fourths.

Judgment.

Later on Askwith conveyed the remaining one-eight of his said three-fourths, leaving McMurdo his one-fourth. In September, 1892, McMurdo made a written agreement (called a bond) with Fotheringham to convey to him that remaining one-fourth interest. On 4th July, 1893, Fotheringham gives Askwith, his brother-in-law, a power of attorney to deal with the "Bobbie Burns." On the 22nd July, 1893, Fotheringham conveys the "Bobbie Burns" to the defendants Ellis and Irving, (with certain provisions as to the defendant, McCabe). On the 31st July, 1893, McMurdo gives, in pursuance to the bond, a quit claim of all his interest in the "Bobbie Burns" to Fotheringham.

The instruments recorded affecting the "Robert E. Burns" are as follows:—

On 29th July, 1893, record of "Robert E. Burns" filed at Golden by George McCabe, one of the defendants. On 31st

July, 1893, a bill of sale given by George McCabe to Fotheringham, in consideration of $500.00 of all his interest in the "Robert E. Burns."

As to the "Safety" claim the instruments recorded were: On 30th September, 1893, record of the "Safety" claim by Allan Granger. On 30th September, 1893, a protest filed against the "Bobbie Burns" by the plaintiff, Allan Granger, under the Mineral Act, 1892, Cap. 32, B.C. All these documents were produced and proved at the trial. The statement of claim merely sets out the "Safety" claim. The defence is a general defence, and sets out the possession. The amended and equitable defence is, that McCabe had staked out and recorded the "Robert E. Burns" and had agreed to convey it to the defendants. Defendants therefore rely on the "Robert E. Burns." Plaintiff in reply objects: That the "Robert E. Burns" was defectively staked in certain particulars, viz: 1. That it covers a greater area than the Act allows. 2. That the distance between two stakes of the "Robert E. Burns" is over 1,500 feet. 3. That the location line is not distinctly marked, sub-section 6 of section 5 of reply; Stat. B.C. 1893, Cap. 29, Sec. 3, requiring that suchline "between posts 1 and 2 can be distinctly seen." 4. That No. 2 post of "Robert E. Burns" is undated. 5. That the "Robert E. Burns" is merely a re-staking of the "Bobbie Burns."

Judgment.

The issue was: 1. Was the "Robert E. Burns" sufficiently staked to comply with the Mineral Act? 2. Whether the location of the "Robert E. Burns" by McCabe was merely a re-staking of the "Bobbie Burns" on behalf of its owners. 3. Whether McCabe was not in equity so interested in the "Bobbie Burns" as to make him in equity a part owner, and therefore, under the latter part of section 29 of Stat. BC. 1891 Cap. 25 unable to re-stake without getting the written permission of the Gold Commissioner. The facts which were proved during the trial were:

That by various conveyances from McMurdo, the dis-

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coverer, the "Bobbie Burns" came into the possession of Robert Fotheringham as owner. During the years 1891 and 1892 there were duly obtained and recorded the proper certificates of assessment work done on the "Bobbie Burns," as required by Stat. B.C. 1891, Cap. 25, Sec. 24 work done each year on the claim itself to the value of at least $100.00. It was proved that Fotheringham expended in labour *bona fide* done, on the "Bobbie Burns," $1,500.00 of assessment work in the year 1893. He expended in erecting mill machinery adjoining, and for the purposes of that mine and making a road from the mill, $12,500.00, with about $2,500.00 worth of work done on the mine, making altogether $15,000.00. Askwith, who had a general power of attorney from Fotheringham, his brother-in-law, to transact all business for him in and relating to the "Bobbie Burns" claim, on leaving for the East, made specific arrangements with Harry Cummins, a duly qualified local surveyor, to survey the claim, make and record the proper affidavits and documents required by the Mineral Act to entitle him to a Crown grant—obtain the necessary certificates from the mining recorder, and insert the necessary notices: 1. In the Nelson papers. 2. Also in the British Columbia Gazette, and 3. To file the same with the mining recorder, and, with the necessary certificate of improvements, get the Crown grant.

Mr. Askwith returned in 1893 expecting to find a Crown grant, and all his orders complied with. Instead of that he found that his instructions had not been complied with—except that the notice had been inserted in the Nelson papers. This, though far short of his instructions, is so far confirmatory of the fact that the work was done, and the instructions on the part of the owner given, as defendants alleged.

The notice was not inserted in the British Columbia Gazette, nor was the certificate of the year's work, from 12th May, 1892, to 12th May, 1893, obtained and recorded.

Finding this, one George McCabe engaged to stake a new claim in a new name, including within its limits the "Bobbie Burns." This was done, and the new claim, now called the "Robert E. Burns," was staked out, located and recorded by McCabe in his own name. This was effected with the assistance of David Dickey and Manuel Dainard, who appeared as witnesses, and one Rury who was not called. The former two proved the correct staking.

As a jury, I am of opinion, from a consideration of all the evidence, that the claim "Robert E. Burns" was properly staked and recorded, and is a valid and subsisting claim, the 1894 work done thereon having been duly done, proved in detail, and recorded by McCabe, as by the certificate of the 20th July, 1894, more particularly appears; and all this I find accordingly.

It has been objected that the location of the "Robert E. Burns" by McCabe was, in effect, a re-location of the "Bobbie Burns" claim and that it was not *bona fide* done on his own behalf but collusively as agent of the owners of the "Bobbie Burns" and that by Stat. B.C. 1891, Cap. 25, Sec. 29, they should have obtained the written permission of the Gold Commissioner to make this new location, but I am of opinion that, having made the location in his own name, and no binding agreement to convey to the defendants or agency for them having been proved, the objection fails.

Judgment.

It has also been objected, that his claim, "Robert E. Burns," was wrongly staked, and was invalid, because, by Sec. 5, Cap. 32, of the Mineral Act, 1892, while he staked the right breadth of 1,500 feet, he exceeded the maximum length of 1,500 feet; and that therefore his staking is invalid.

But the words of the Act are as follows:

"Any free miner desiring to locate a mineral claim shall, subject to the provisions of this Act with respect to land which may be used for mining, enter upon the same and locate a plot of ground measuring, where possible, but not

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exceeding 1,500 feet in length by 1,500 feet in breadth, in as nearly as possible a rectangular form, that is to say," etc.

Now, a glance at a correct sketch of the locality would show that all the three claims are staked so much on the same lines on the north and west sides and these contain exactly the same right angle, each of the two sides forming which is exactly 1,500 feet long, that the construction of the 1,500 feet square specified in the Act follows as a matter of course.

So that all the excess in length, over 1,500 feet, of the "Robert E. Burns" can be cut off with exact precision by a line parallel to the south and north boundary lines of the "Robert E. Burns" without interfering with the direction of the location line of that claim, of which the evidence satisfies me as a jury; and the provincial land surveyor is by section 15—four lines above sub-section (a)—empowered to move No: 2 post, and inferentially any other post, except post No. 1, "for the correction of the distance," which is exactly what is wanted here. And I have already said generally, and the evidence satisfies me particularly, that the claim is properly staked, with proper and lawful posts, in compliance with the Act.

Judgment.

Indeed, it is but reasonable and common sense that when a claim is staked by others than actual surveyors, as by ordinary miners unskilled in actual measurements on the ground, such changes, not affecting the previous rights of adjacent owners, must very frequently take place under the eye and orders of the regular authority under the Act. By the portion of the ground complained of as overstaked in this instance, no other person's right was interfered with. That portion was entirely below the "Safety" claim; indeed, the "Safety" claim was not in existence till two months after the "Robert E. Burns" was staked. There is nothing substantial, therefore, in that objection. Moreover, I cannot find anything in the Act by which such excess of itself works a forfeiture. If it did, no claim could be

retained by a prospector unless it were laid out and staked with mathematical precision, in the first instance, by some duly qualified surveyor; and that, in practice, seldom if ever occurs; and is not called for by the necessities of the case nor in accord with the spirit and intention of the Act. I consider, therefore, that while liable hereafter to this rectification or, as the Act calls it, "correction of distance," the "Robert E. Burns" is substantially properly staked in compliance with and within the protection of the Act, and is a good valid and subsisting claim. And now, while upon this subject, I see no valid or good reason why the owner of a claim who, by the process laid down by section 29 of the Act of 1891, Cap. 25, can abandon a whole claim; since *omne majus continet in se minus* may not, by the same process, abandon any specific portion of a claim—provided he specify and record such abandonment.

Holding therefore, as I do, that the "Robert E. Burns" is a valid and subsisting claim, it follows as a matter of course that the "Safety" claim is not a legal claim; for irrespective of the defect in one post, which as a jury I consider proved—and which injuriously affects the record—it is made on ground which is neither waste land of the Crown, nor abandoned nor forfeited land, but in the legal occupation of other persons; to wit, the defendants in this case, by purchase from the recorder of it—McCabe.

Judgment.

And here I must digress for a moment to interpose a remark, that the $500.00 in the sale to Fotheringham does not represent all the consideration McCabe received. While that was the substantial part of it, for the value of the claim is still *in nubibus*, he also was to receive a certain value in the stock of a prospective company. But this he was quite entitled to do, and it did not therefore make him either a co-owner or agent of the other defendants. It did not even require him to hold a miner's certificate in order to keep his shares.

There is another reason for the above conclusion, which,

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despite the deprecation of the learned counsel for the plaintiff, I think militates against the plaintiff's right to stake out a claim over another, the effect of which would be to oust the title of the defendants—that is the mode in which the information which led to the attempt was acquired. He who comes for equity must do equity.

The plaintiff himself bore witness in the box, and the evidence was drawn from him, that while doing business as a miner and a mine dealer, he obtained employment from the Mining Recorder in copying out the Government mining records at Golden and at Donald; that it was in May, 1893, while copying out such records at Golden, that he discovered the slip made on the 12th May, 1893, through the *laches* of Harry Cummins, the surveyor employed on Fotheringham's behalf to complete the survey, notices, affidavits and certificates required by the Act, as preliminary to obtaining the Crown grant of the "Bobbie Burns."

He claims that he was allowed by the Mining Recorder, at the same time that he was so employed—living, too, for some time in his house, having constant access, in the course of his duty to the Government to the records—to practice his calling as a mining agent; in other words allowed to look out blots in mining titles—a permission which the Mining Recorder, who appeared as a volunteer witness at the trial, had no right whatever to grant, and plaintiff as an honourable man while in such employ had no right to accept.

Judgment.

The Recorder, if he had such a right, could have exercised it himself. Now, no person in Government employ is allowed to expose, or himself take advantage of, discoveries which he makes to the prejudice of others in the course of such employ. It is no answer to say that the public have free access to and can freely search all mining records—that is perfectly true and proper, *sub modo*—but a public officer, entrusted with the charge of public mining records, can only, except in exceptional cases, such as a record

coming in at night in a race to record some new discovery, where five minutes may make all the difference, allow anyone to come in and search such records, or make his own, except within reasonable hours in the day, and then only, for very obvious reasons, in the presence of the Recorder or someone duly authorized in his stead to protect the records, which are frequently the only title which the working miner has to sometimes a vast amount of property.

Any trifling with, or irregularity or favouritism in the keeping, or giving access to the records at unusual times, if known, will breed such a distrust among the mining population as will seriously affect their confidence in that department; a result which is earnestly to be deprecated, as it would be followed by all manner of evil consequences to the mining interests of that part of the country.

While honest working and expenditure of capital, which was undeniably the case here, in the opening and exploration of the mining ground, and in the employment of labour, should be, within lawful limits, encouraged; while mere colourable working, or neglect of working, should, under the stringent provisions of the Act, in that behalf, be followed by forfeiture of the privileges which the holders have been proved by experience unworthy to retain. It is of the utmost public importance in a mining country requiring the safe investment of capital for its development and the steady employment of labour, that the practice of jumping claims by persons—who, not working themselves, make a business of hunting for accidental or unintentional slips in records happening to men nore engaged in hard work underground, than accustomed to clerical employment (prospectors, who undergo infinite labour and hardships in bringing hidden wealth to light)—should be discouraged; as they always have been by this Court. They are the parasites who always hang about rich mining camps.

Judgment.

Long experience in mining camps, including British Columbia itself, from Cariboo downward, shows that there

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is no more fertile source of insecurity to investment, (and money is a sensitive plant), ill-blood, ill-feeling, not unfrequently culminating in violence and bloodshed—than the practice of what is known to miners by the term of jumping claims.

For the reasons already given, and after a most careful consideration as a Judge, of all the sections of the Gold Mining Acts, and, as a jury, of the evidence and arguments adduced on both sides, I find myself constrained to give judgment for the defendants, with the usual accompaniment of costs.

Judgment.

Judgment for defendants.

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IN *RE* THE VANCOUVER IMPROVEMENT COMPANY.

IN THE MATTER OF THE LAND REGISTRY ACT.

Land Registry Act—Certificate of indefeasible title—When grantable—C.S. B.C. Cap. 67, Section 63.

By the Land Registry Act, C.S.B.C. 1888, Cap. 67, Section 63 "The owner in fee of any land, the title to which shall have been registered for the space of seven years, may apply to the Registrar for a certificate of indefeasible title." The applicants applied to the Registrar at Vancouver for a certificate of indefeasible title to the lands in question upon an affidavit that they "are the owners in fee of the lands, the title of which lands has been registered for the space of seven years." The Registrar held that the applicant must prove a seven years' registered title in himself, following *in re Trimble* (per BEGBIE, C.J., 1 B.C. pt. 2 321) and refused the application.

Upon appeal to a Judge; MCCREIGHT, J., affirmed the Registrar and dismissed the appeal.

Upon appeal from MCCREIGHT, J., to the Full Court.

Held, Per BEGBIE, C.J., and DRAKE, J., that the construction of the Registrar and MCCREIGHT, J., was correct, and that the appeal should be dismissed.

Per CREASE and WALKEM, J.J., that all that was necessary under the language of the Act was that the applicant should be the owner of the lands, *the* title, not *his* title, to which had been a registered title for seven years, and that the appeal should be allowed.

APPEAL from an order of Mr. Justice MCCREIGHT made on September 6th, 1892, dismissing an appeal from the local Registrar at Vancouver dismissing a petition of the Company for a certificate of indefeasible title to certain lands, under Section 63 (*a*) of the Land Registry Act, C.S.

Statement.

NOTE (*a*.)—"63. The owner in fee of any land, the title to which shall have been registered for the space of seven years, may apply to the Registrar for a certificate of indefeasible title" &c.

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B.C. 1888, Cap. 67. Upon this the certificate of indefeasible title was refused by the local Registrar upon the following stated grounds: "That in view of the judgment in *Re Trimble*, 1 B.C. pt. 2, 321, requiring the applicant for a certificate of indefeasible title to be the registered owner for the period of seven years, I cannot entertain the application."

The applicants appealed from this decision to a Judge and the appeal was argued before Mr. Justice McCREIGHT who gave judgment dismissing the appeal and affirming the decision of the Registrar.

Statement.

The applicants appealed to the Full Court and the appeal was partly argued before BEGBIE, C.J., CREASE and WALKEM, J.J., on December 22nd, 1892, when it was adjourned to be re-argued before a Bench including DRAKE, J., and was re-argued accordingly on December 9, 1893.

Argument.

A. E. McPhillips for the appeal:

In *Re Ellard* (unreported) Mr. Justice McCREIGHT made an order for the issue of a certificate of indefeasible title, in a case similar to the present, on September 22nd, 1885. His present judgment appealed from was made in deference to *re Trimble*. The only requirements of the Section are: 1. That the applicant should be the owner in fee simple, and 2. That the title should have been for seven years, a registered title.

The Section does not require that the applicant should have been registered as the owner for seven years. This is a pre-requisite which should not be imported into the Section by implication or construction, but effect should be given to it as it stands. *Re Douglas*, Land Ord. Act, 1870, 1 B.C. Rep. pt. 1, p. 85; *Philpott* v. *St. George's Hospital*, 6 H. of L. cas. p. 338; *Fordyce* v. *Brydges*, 1 H. of L. cas. pp. 1 and 4; *Countess Rothes* v. *Kirkcaldy Water Works Co.* 7 App. Cas. 702. The granting of an indefeasible title to purchasers of a seven-years' old registered title, is not contrary to the policy or intention of the Act, as the title would still be defeasible on every ground necessary to be

guarded against, involving any fraud in any part of the chain of title. (*a*).

Sir MATTHEW B. BEGBIE, C.J., delivered a verbal judgment affirming his judgment *in re Trimble*, 1 B,C. pt. 2, 321.

DRAKE, J.: The question raised on this appeal is whether or not a person purchasing registered real estate is entitled to claim a certificate of indefeasible title, if his predecessors in title have been registered for the statutory period of seven years.

Under Section 13 of the Land Registry Act every person claiming to be a legal owner in fee simple of real estate may apply for and obtain a certificate of title.

The effect of this certificate is, that the person so registered shall be deemed to be *prima facie* the owner of the land described for such an estate of freehold as he legally possesses therein subject only to registered charges and the rights of the Crown.

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Section 63 then enacts that the owner in fee of any land the title to which shall have been registered for seven years may obtain an indefeasible title upon making an affidavit as to title deeds and he shall also state fully all encumbrances, estates rights and interests which in any manner affect his title. Are the estates and interests herein referred to limited to registered charges? If Sections 35 and 66 are examined it may be argued that a person seeking an indefeasible title is not bound to disclose any estates or interests affecting the land of which he has notice, express, implied or con-

NOTE (*a*.)—C.S.B.C. 1888, Cap. 67, Section 68. "And no such (indefeasible) certificate shall be impeached on account of any error, omission, or informality in the registration of title or any proceeding connected therewith, and notwithstanding the existence in any other person of any estate or interest in the land and except in case of fraud of the registered owner of any estate or interest therein, in respect of which a certificate of indefeasible title has been granted subject only to such encumbrances, &c., as appear on the register."

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structive, unless registered, because Section 63 says "subject to which he seeks to have a certificate of indefeasible title granted," and Section 66 limits the estates and interests to which an indefeasible title is subject to registered estates. If this is the correct view of the effect of these Sections, a person with distinct notice of an equitable charge is not bound unless such charge is registered. I next refer to Section 16 which enacts that trusts shall not appear on the register, but any *cestui que trust* may enter "no survivorship" against the title which acts as a caveat against dealing with the estate without notice, and Sections 19, 23 and 24 authorize the registration of equitable interests by way of charge.

These are the clauses in the Act chiefly affecting registration and the effect given thereto.

Judgment. of DRAKE, J.

A trustee is registered as the beneficial owner and he can part with the legal estate, and a purchaser from him without notice takes the property free from all liability not appearing on the register. How are *cestuis que trustent* under disability to be protected—cases must arise when there is no one in a position to register a charge to protect equitable rights. The main object of the Act is to facilitate the sale and transfer of real estate, but in giving effect to this object, the equitable rights which exist in such real estate ought to be protected.

The universal rule in equity is that all persons who take through or under a trustee (except purchasers for valuable consideration without notice) are liable to the trust. The Land Registry Act practically ignores this rule unless the notice appears on the register.

In the Imperial Act 38 and 39 Vic. C. 87, Section 7, registration vests the fee in the person registered subject when the person is a trustee only to any unregistered estates, rights, interests and equities to which, as between him and any persons claiming under him, such persons are entitled.

In the Victoria, Australia, Act the Commissioner (who

apparently is in the same position as the Registrar under our Act) can protect the rights of any persons beneficially interested under trust deeds in any way he deems advisable, and in the Manitoba Act, Section 89, the Master of Titles may appoint persons to act for minors, idiots, lunatics or persons unborn.

I think our Act is somewhat defective on these points and without in any way interfering with the main object of the registration laws that some such provisions as above should be inserted, so that in case of trusts they should appear as charges whenever a trust deed is registered.

I have referred to these various Sections as supporting the view I hold with regard to the construction to be placed on the language used in Section 63 ; it enacts that the owner in fee of any land the title to which shall have been registered for seven years may apply for a certificate of indefeasible title.

The term title means on the one hand the right of ownership and on the other the instruments or evidence of such right.

We are asked to adopt the second meaning and by so doing we should still further embarrass the owners of unregistered equitable interests, for a purchaser need only be on the register a single day (if the land has been registered for seven years in the names of his predecessors in title) to entitle him to this statutory title.

The period of seven years is almost an equivalent to a Statute of Limitations and should not be restricted in the manner contended for.

When more meanings than one can be given to the words of a Statute the rule is that the Court will adopt the meaning most consistent with practice and the obvious intention of the framers of the Act.

If we here apply to the term title the right of ownership then we afford a protection to a class whose rights under any other construction are insufficiently guarded, without

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at the same time prejudicing purchasers.

For these reasons I think that the appeal should be dismissed.

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CREASE and WALKEM, J.J., delivered verbal judgments following *re Shotbolt*, 1 B.C. Pt. II. 337, that the appeal should be allowed.

Appeal dismissed without costs.

DRAKE, J.
[In Chambers.]
1895.
April 29.

MACDONALD v. JESSOP *ET AL.*, TRUSTEES OF THE PANDORA AVENUE METHODIST CHURCH.

Practice—Moving to dismiss for want of prosecution—No proceedings for a year—Month's notice under Rule 749.

MACDONALD *v.* JESSOP ET AL

Supreme Court Rule 749, requiring a month's notice of intention to proceed when there has been no proceeding for one year from the last proceeding, applies to an application to dismiss an action for want of prosecution.

Statement.

SUMMONS by defendants to dismiss action for want of prosecution. The plaintiff had taken the last step in the action on the 16th day of April, 1894, by amending his statement of claim.

H. G. Hall for defendants.

Argument.

Arthur Davey (J. P. Walls) for the plaintiff, took the preliminary objection that a summons to dismiss for want of prosecution, is within Rule 749, and one month's notice of intention to apply should be given. The application was adjourned for argument and came on before DRAKE, J., on April 29th, 1895.

H. G. Hall, for the defendants: An application to dismiss is not proceeding in an action. The words "to pro-

ceed" in the Rule, mean to go forward with the action; we do not desire to proceed, but to stop the action, *Lumley* v. *Hempson*, 6 Dowl. 558. A month's notice is only required when a party wishes to take a step forward. The fact that if the action is dismissed an order will be made for the payment of costs, does not make the application a step forward, an order dismissing an action with costs is not a judgment for costs. Rule 340 does not restrict the defendant's right to move to dismiss. Under it he can either give notice of trial himself or apply to a Judge to dismiss the action for want of prosecution; if he gives notice of trial he proceeds with the action and one month's notice of his intention to do so should be given under Rule 749, but if he moves to dismiss the action, Rule 749 does not apply.

A. Davey (*J. P. Walls*) for plaintiff: A summons to dismiss for want of prosecution is within Rule 749, English Rule 973, which is taken from Hilary Term Rules of 1853, Rule 176. Under the Common Law Procedure Act, the practice to get rid of an action was to give the plaintiff twenty days notice to proceed, and if he did not do so, to sign judgment of *non pros*, and where no proceeding had been taken for a year, it was held under this Rule 173, necessary to give one month's notice. *Lord* v. *Hilliard*, 9 B. & C. 621; *Metcalf* v. *Hetherington*, 3 H. & N. 755; *Tipton* v. *Meeke*, 8 Moo. 579, and see also *Blake* v. *Summersby*, W.N. (89) 39. A summons is a proceeding in an action, *Chappell* v. *North*, (1891) 2 Q.B. 252. *Lumley* v. *Hempson* is distinguishable; it was a case where the plaintiff moved to set aside all his own proceedings in the cause, which was not a proceeding toward final order, as the present application is, but appears to have been taken by the plaintiff by way of discontinuing. This distinction is more apparent in the report of the case in 3 M. & W. 632.

Argument.

DRAKE, J.: The plaintiff took the last step in this action on the 16th day of April, 1894, by amending his statement

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of claim.

The defendant now moves to dismiss the action for want of prosecution. The plaintiff contends that a month's notice under Rule 749 should be given, which says the party who desires to proceed shall give a month's notice of his intention to proceed. The defendant's contention is that these words mean taking a step towards judgment and not taking a step to get rid of the action—dismissing an action is asking for judgment for costs.

The Rule itself is taken from the Hilary Term Rules of 1853, Rule 176; the practice then in existence to get rid of an action was either to compel the plaintiff to proceed to trial by giving him notice to try at the next sitting to be holden twenty days from service of notice—or by entering judgment of *non pros.* after four days notice to proceed.

Judgment.

There are other methods now for getting rid of a pending action, the defendant may set down the action himself or he can apply to dismiss for want of prosecution—he has taken the latter step and in my opinion it is a proceeding in the action and requires a month's notice, and the cases of *Lord* v. *Hilliard*, 9 B. & C. 621, and *Metcalf* v. *Hetherington*, 3 H. & N. 755 support this view.

I dismiss the summons with costs to plaintiff in cause.

Summons dismissed.

WARD v. CLARK.

DIVISIONAL COURT.

1895.

April 22.

WARD v. CLARK

Ca. Sa.—Maintenance money—Tendering to sheriff—Effect of—Rule 976.

On a motion to discharge defendant from arrest under a writ of *ca. sa.* for non-payment by the plaintiff of the weekly sum of $3.50 in advance to the sheriff for defendant's maintenance money under Rule 976, it appeared that the plaintiff had offered to pay the amount to the sheriff, who refused to accept it on the ground that he had money of plaintiff's in his hands sufficient to cover it.

Held, By the Divisional Court (DAVIE, C.J., and MCCREIGHT, J., affirming DRAKE, J.), a sufficient answer to the application.

APPEAL from an order of DRAKE, J., refusing an application, which the defendant made upon summons, to be discharged from custody under a writ of *ca. sa.*, upon the ground that the plaintiff did not comply with Rule 976 of the Supreme Court Rules, 1890, providing: "The party at whose instance the writ is issued shall pay to the sheriff the sum of 50c. per day for maintenance of the person arrested by weekly payments of $3.50 in advance."

On the 16th February, 1895, the plaintiff had obtained an order for the issue of a *ca. sa.*, upon his judgment herein, but, by mistake, a writ of *ca. re.* was issued upon the order, and the defendant was arrested thereon. Upon the same day he made an application by summons to set aside the writ of *ca. re.* for irregularity, and for his discharge. On the 19th February the summons was made absolute and the defendant discharged, but on the same day a writ of *ca. sa.* was issued under the order of the 16th, and the defendant was re-arrested and held thereon.

Statement.

At the time of the defendant's arrest, on the 16th, the plaintiff paid to the sheriff $3.50 as payment in advance for his maintenance for the week beginning on that date. On the 19th, upon the defendant's re-arrest upon the writ of *ca. sa.* the plaintiff paid to the sheriff a further sum of $3.50.

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The next payment made by the plaintiff to the sheriff was $3.50 on the 28th February.

It appeared from an affidavit filed by the plaintiff in answer to the motion that, on the 21st February, he had offered to pay a further sum of $3.50 for maintenance money to the sheriff, who declined to receive the same, stating that together with $2.00, the surplus remaining in his hands of the $3.50 paid in on the 16th February after deducting $1.50 for maintenance of the defendant during the three days upon which he was held upon the writ of *ca. re.*, he had money in his hands sufficient for the coming week's maintenance.

W. J. Taylor for the appeal: The whole question is, when did the first week and when did the second week of detention under the writ of *ca. sa.* in question commence? as the payments of $3.50 are required by the Rule to be made weekly in advance. The date of arrest upon the *ca. re.* which was set aside is wholly irrelevant. Rule 977 provides, "in case the said maintenance money shall not be paid *as aforesaid*, the defendant shall be entitled to be discharged from custody." Rule 976 also provides, "in case the person arrested shall be discharged during any week, the sheriff shall repay to the person paying the maintenance money the sum of 50c. a day for each day less than a week for which maintenance money has been paid." Assuming that the sheriff was entitled to appropriate the $2.00 remaining in his hands as money paid to him by the plaintiff as maintenance money under the writ of *ca. sa.*, which is not clear, the sheriff at the commencement of the second week, namely, on the morning of the 26th February, had, in his hands from the plaintiff, on account of maintenance for the ensuing week, only the sum of $2.00, and the payment of $3.50 on the 28th came too late. *Jensen* v. *Shepard*, B.C. Law Notes, p. 16, 3 B.C. p. 126; *Fisher* v. *Bull*, 5 T.R. 36.

Argument.

A. P. Luxton, contra: The weekly periods for payment

of maintenance money must be treated as commencing on the 16th February, the date of the defendant's first arrest. His custody was only interrupted by the fraction of a day on account of an irregularity in the form of the writ which was issued. The $3.50 paid on the 16th, and the $3.50 paid on the 19th, would together constitute weekly payments in advance for the two weeks ending on the 22nd and 29th February respectively. Even if the defendant's contention, that the weekly periods commenced on the 19th and 26th February, were correct, the plaintiff will have to be treated as having paid to the sheriff the $3.50 tendered to him on the 21st, for if he in, his official capacity, made the mistake of refusing to accept it, the plaintiff cannot be injured by that. This would leave out of the question the $2.00 remaining in the hands of the sheriff from the payment on the 16th.

Argument.

DAVIE, C.J.: I think this appeal must be dismissed. The plaintiff was arrested on the 16th February upon a writ issued under an order for a *ca. sa.*, but by mistake it was in the form of a writ of *ca. re.* That writ, having been set aside as irregular on the 19th and the defendant discharged, he was re-arrested upon the same day upon a writ of *ca. sa.* issued under the original order. On the 16th, the plaintiff paid $3.50 to the sheriff being a week's maintenance money in advance. Upon the 19th, the plaintiff paid a further sum of $3.50 to the sheriff, and on the 21st tendered him a further sum of $3.50, which he declined to accept upon the ground that, with the $2.00 remaining in his hands from the first payment, he had sufficient for the next week's maintenance. The plaintiff was entitled to recover this $2.00 back from the sheriff upon the discharge of the defendant on the 19th. He did not do so, but acquiesced in the position taken by the sheriff in treating it as maintenance money in his hands for the purpose of the *ca. sa.* I am inclined to think that the weekly periods should, under the circumstances, be treated as commencing on the 16th

Judgment of DAVIE, C.J.

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February. If I am wrong in that and if they did not, for the purposes of the application under consideration, commence on the 16th, but on the 19th February, then it is true that at the commencement of the second week, namely, on the morning of the 26th February, there was not a weekly payment of $3.50 in advance but only $2.00 actually in the hands of the sheriff, but, in that view, the plaintiff is entitled to be placed in the same position as if the money had been accepted. It was not his fault that the sheriff did not accept the money. Whether the sheriff made a miscalculation or not is, I think, immaterial. The object of the law, which was to relieve the country of the burthen of supporting debtors detained in custody, has been satisfied, and the defendant has nothing of which to complain.

Judgment of DAVIE, C.J.

McCREIGHT, J.: I am entirely of the same opinion. The policy of the Statute is to prevent persons imprisoned for debt becoming a charge upon the country. Although the writ of *ca. re.* was set aside as irregular, yet, as between the sheriff and the plaintiff the maintenance of the defendant commenced on the 16th February, and at the commencement of the second week he had the second $3.50 in his hands paid in on the 19th. Even if this view should be incorrect, the tender on the 21st was, in my opinion, sufficient to defeat the original motion and this appeal. I think, myself, that the sheriff was right in refusing the amount then offered, but at all events the execution creditor could do no more than he did in offering it. The appeal must be dismissed with costs.

Judgment of McCREIGHT, J.

Appeal dismissed with costs.

WILLIAMS v. WILSON AND MORROW.

CREASE, J.

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WILLIAMS v. WILSON AND MORROW

Contract—Rescission—Recovering back purchase money—Principal and agent.

An action does not lie against a person to recover back money received by him as agent for another, but lies only against the principal, and the Court will not in such an action, go into the question of whether the agent paid over the money to the principal or not.

In an action for the rescission of an agreement for the sale of lands, it was proved that the vendee tendered a conveyance for execution to the agent of the vendor, who was not proved to have been authorized under seal to execute deeds for the vendor.

Held, Insufficient to bind the vendor.

The vendee at the time of the agreement knew that the vendor had not then a title, but that he was the holder of an agreement from his vendors, upon payment of his purchase money, to give a deed when required.

Held, That the vendor was entitled to a reasonable time to make title, and that there was, on the facts, a waiver on the part of the vendee of his right to call forthwith for a conveyance.

ACTION for rescission of a contract for the sale of lands, on the ground of want of title in the vendor, and for recovery back from the vendor's agent of an instalment of purchase money paid to him by the vendee. Statement.

The facts fully appear from the judgment.

Aulay Morrison for the plaintiff.

L. G. McPhillips, Q.C., for the defendants.

CREASE, J.: This was an action for the rescission of a contract for the purchase of certain lots in Kootenay; the repayment of $150.00, an instalment of the purchase money paid on account, and interest, or, in the alternative, damages for the breach of such agreement after a tender of the balance of the purchase money by plaintiff according to the terms of such agreement, and refusal. The defence is the denial of the agreement in the specific terms set forth by the plaintiff in his pleadings; a denial of tender at the times pleaded or any other time; a plea of a tender of a Judgment

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conveyance of the premises with a good and sufficient title thereto before the action was brought, followed by plaintiff's refusal, and a demand, on a counterclaim, for the money to be paid back. On the hearing of the case on July 15, 1894, the evidence and the pleadings showed that Morrow acted in a representative capacity for the defendant Wilson, and that only.

In this view of his position, the $150.00 paid to Morrow must be treated as paid to Wilson; whether Morrow handed it over to Wilson or not, though there is evidence that he did pay it on his account. It is clear law that if money be paid to a known agent for the use of his principal, an action for money had and received cannot be sustained against the agent if it appears that the principal has the least colour of right to the money; for the Courts will not try the right of the principal to the money in an action against the agent. (*Greenway* v. *Hurd*, 4 T.L.R. 553, and cases there cited). The plaintiff admits an absolute right in Wilson, not merely a colour of right, but sues for the return of the money because of a subsequent alleged breach of Wilson's contract. The maxim *respondeat superior* therefore applies; and whether Morrow has paid over the money to Wilson, or whether he has not, he is answerable to him alone. *Hardmann* v. *Willcox*, 9 Bing. 382 (n); *Goodall* v. *Lowndes*, 6 Q.B. 464. There is no doubt, therefore, that as far as the action against Morrow is concerned, a non-suit must be entered. The next point which arises is that of Wilson's liability under the statement of claim and Williams' on the counter-claim. The former will depend very much on the legal effect of the tender of a conveyance by Williams to Morrow. Its efficacy depends on whether Morrow was authorized by Wilson under the power of attorney, or other deed, to execute a conveyance of the premises to Williams on tender of the balance of the purchase money and interest due at the time of such tender. The action really is for the rescission of the contract

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because of a refusal by the defendant Morrow to execute a conveyance of the property when a tender was made to him. Now Morrow had no such authority, at least none such was shown; constructive authority for one man to execute a deed for another is not enough. It must be express and by deed. But there was no express power to convey the lots of land in the so-called power of attorney, and it cannot be presumed. The wording of the power (not under seal) merely was: "I authorize T. D. Morrow to sign my name to agreements of sale of lands held in my name in Kaslo." No witnesses and nothing more. The learned counsel for the plaintiff argued that because the defendant Wilson had ratified all the acts of Morrow that he must be taken to have authorized them, and, therefore, must be considered his agent for all purposes, even to the execution of conveyances for Wilson. And he drew this conclusion from the plaintiff not sending the $150.00 to the defendant Wilson, who lived at Hamilton, Ont., also because Morrow drew on Wilson for $800.00 to pay for other properties Wilson had bought. But even if he were his general agent, that would not confer the authority to execute a conveyance of his principal's land. I can see nothing either in the supposed power of attorney, as presented to the Court, or in the evidence, to authorize Morrow to execute a conveyance of the land. He could receive moneys or lands, but I have not seen any power in him, as I have said, to convey away his principal's land. And if, as it appears to me, Morrow had no such power, then the tender to Morrow was useless, and, as far as affecting Wilson, was the same as if it had been *non avenu*. Then as to the flaw in the title as a reason for rescission. Williams acquiesced in the title as it was, shortly after the time of the purchase. Williams knew that the immediate title was an agreement from the original owners—with an engagement to give a deed when required—though it was a title it was not a good title, and the plaintiffs would have

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had a right to rescind the agreement if they had done so at once, after knowledge of the fact. Not doing so at once was a waiver. There was also a waiver after plaintiff had the advice of his present learned counsel *Morrison*, so plaintiff is concluded on that point. In the case of *Paisley* v. *Wills*, 18 O.A.R. 210, it was determined that an agreement cannot be rescinded, because the grantor has no title at the time of agreement, unless repudiation is made at once upon knowledge of the fact, and see also *McDonald* v. *Murray*, 2 O.R. 573 and 574. There is another point which I think is material to notice, that is that since Williams knew that Wilson had only an agreement to purchase, and still consented to take that title, he should have adapted his proceedings and notices to the condition of affairs in which he had acquiesced; and, instead of giving a reasonable time to Morrow, who could give nothing, should have given the defendant Wilson, who lived away in Hamilton, Ont., a reasonable time after tender to complete the title. Interest on the purchase money would then have ceased. But this was not done. The offer of time was given to the wrong man. The plaintiff, who challenged Morrow to accept payment and execute a deed at one and the same time, cannot now take advantage of that as a good tender. On the other hand, neither Wilson nor Morrow would have been justified when once a proper notice of readiness to pay up is given and a *bona fide* tender ready in considering that they can wait until the whole term—the whole stipulated time for repayment is gone past. That would be to vitiate an important portion of the agreement, which contained an option to the vendee by pre-payment to anticipate the time for the completion of the purchase. The fact is, as in many other cases, justice lies half-way. Williams did not repudiate the agreement for want of title, but because the conveyance tendered was not executed. It is a case, too, where, on application, I think a Court would have given time for the

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completion of the title. (*Fry on Specific Performance*, 2nd Ed. 576). Of course an ordinary person not learned in the law would not be expected to know that the covenants to pay and convey are separate: but ordinary sense, I should think, would have told plaintiff that Morrow had power to receive the money. He believes so still; and if he refused or could not himself give a deed, he should have sent to Hamilton for it, and have given a reasonable time to fetch it thence before applying for the drastic remedy of rescission. There was no damage meanwhile, no tempting sale at enhanced value to be lost by the delay, and the interest would have been saved. Morrow should have exerted himself more than he did. I speak now as a jury. He alone, knowing exactly the ground on which he stood as to his own powers, took advantage of that to let Williams get deeper into the mire. Wilson, knowing that the conveyance might be called for at any time during the period of the agreement, and certainly at its expiration, should have provided Morrow or some agent with it. There was a great deal of negligence and indifference in both of them, and it reacted very injuriously on Williams, and if there were any such chances in the interim between the tender of the deed, however ineffectual, and its return properly executed and delivery, Williams would certainly have lost them. Acting, therefore, rather under the general prayer for relief than the strict application of technical law which I have discussed, and after full regard to the authorities, evidence and arguments on both sides, I decide that there is no sufficient ground for rescission of the contract, and that there is no sufficient cause of action against Morrow. There is great negligence on the part of Wilson, but the amount of $315.00, is still due to him from Williams, and I order that the same be paid in two equal instalments of $157.50 each at three and six months' date respectively by the plaintiff to the defendant Wilson, without interest,

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and without costs to either party. Default of payment of either instalment to be followed by execution for the whole balance then due and costs consequent thereon.

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was put in the alternative as an action for negligence on the part of defendants as plaintiff's agents in not obtaining an accurate valuation. The jury, besides finding that S. had misrepresented to plaintiff the value of the security and character of H., found that S. led the plaintiff to rely upon the belief that the defendants were acting as agents for him, and that they were in fact his agents in the matter; that S. did not show the valuation to the plaintiff, who acted solely on his advice; that the defendants adopted the valuation without further enquiry, and in doing so were guilty of negligence. Upon these findings Walkem. J., ordered judgment to be entered for the plaintiff for the full amount of the loan and interest, as damages, upon plaintiff executing an assignment to defendants of the security. Upon appeal to the Full Court and motion to the Divisional Court for a new trial: *Held. per* Crease, McCreight, and Drake, J.J., that there was sufficient evidence and findings of agency and negligence. *Per* Crease, and Drake, J.J. affirming Walkem, J.: That the measure of damages was the whole loss on the loan; that the fact that the case was put to the jury as also involving actionable misrepresentation or deceit, and that findings were taken thereon; and that the learned Judge charged the jury that the representations, if made, amounted to a guarantee by the defendants of the loan, were insufficient grounds of mis-direction to call for a new trial. *Per* McCreight. J.; There was nothing amounting to a guarantee of the loan, and the damages should be reduced by the actual cash value of the security at the time of the loan, and a new trial had to ascertain such value. WOLLEY v. LOWENBERG, HARRIS & CO. [416

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plaintiff carried on baking and delivered the product in his own name. The debtor's name, however, was not removed from the door of the premises. The defendant seized under *fi. fa.* on the 5th January, 1894. *Held* (1) That the goods were not in the "apparent possession" of the debtor. (2) That the premises were not "occupied by" him, within the meaning of the act. BRACKMAN *et al* v. MCLAUGHLIN. - - - - 265

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CAPIAS AD RESPONDENDUM—*Affidavit to hold to bail—Statement of cause of Action.*] An affidavit to hold to bail stated the facts constituting the plaintiff's cause of action, setting out the amounts in respect of the different matters sued for, and, in a separate paragraph, stated "that the defendant is justly and truly indebted to the plaintiff in the sum of $2,447.81. *Held*, bad, and that it would not be inferred that such indebtedness was in respect of the causes of action previously set forth. A statement of a cause of action in respect of premiums which the plaintiff was compelled to pay for the defendants upon a policy of insurance deposited by him with the plaintiff as collateral security. *Held*, bad, for want of allegation that such payment was made by defendant's request. An objection that the affidavit to hold to bail did not show that the writ of summons had been issued. Over-ruled. WILLIAMS v. RICHARDS - - - - - 510

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o $375.000.00, and new shares of the face value of the latter amount falsely marked on their face "fully paid up," were issued and divided among the original shareholders in lieu and in sole consideration of their former shares. *Held, ultra vires* as the issue of shares at a discount, following Ooregum Gold Mining Co. v. Roper, 66 L. T., 427; and also void as an increase of capital not authorized by special resolution of the Company. The applicant accepted under the idea that they were valid, and sold a portion of the new shares issued to him. *Held*, not such an acquiescence as estopped the applicant from repudiating the remainder as against the Company. Remarks on the duties of the Registrar of public Companies. Order made rectifying the Register by removing the name of the applicant therefrom as a shareholder in regard to the new shares, and restoring it in regard to the original shares. TWIGG v. THUNDER HILL MINING CO. - - - - - - - - 101

CONDITIONAL APPEARANCE—*Ex parte* orders after. FLETCHER v. GILLIVRAY - - - 40
See PRACTICE.

CONSTITUTIONAL LAW—*B. N. A. Act, s. 92, s-s. 9—Taxation—Municipal license fees—Direct or indirect tax—Construction of Statute—Words ejusdem generis.*] The Municipal Act, 1885, Sec. 10, extended the powers of Municipalities so as to include "licensing and regulating wash-houses and laundries;" and Sec. 11 enacts that "Municipalities may hereafter levy and collect from every person who keeps or carries on a public wash-house or laundry, such sum as shall be fixed on by By-law, not exceeding $75 for every six months." On appeal from a conviction for carrying on a public laundry without a license. *Held*, (1) Taxation by means of license fees, and the tax in question, is indirect and not direct taxation. (2) All indirect taxation, except that authorized by Sec. 92, s-s. 9, B. N.A. Act, providing "in each Province the Legislature may make laws in relation to (9) shop, tavern, saloon, auctioneer, and other licenses, in o;der to the raising of a revenue for provincial, local, or municipal purposes," is *ultra vires* of the Provincial Legislature. (3) The words "and other licenses" only includes industries *ejusdem generis* with those specified, and do not include a washhouse. (4) If it appears that a tax is not ***bona fide*** within the purpose provided for,

CONSTITUTIONAL LAW—*Contract.*

but is imposed with the real purpose of discriminating against a class, it is not within the justification of the enabling Statute, and, on the facts, the tax in question was intended not for the purpose of raising a revenue, but as a restriction on the Chinese. REGINA v. MEE WAH. [403

CONTRACT—*Illusory promise—Agreements to pay such sum as W. H. shall consider right—Release.*] Plaintiff had performed services for a mining company for over three years, when the following resolution was passed: "*Resolved*, and carried unanimously, that Mr. H. E. C. be requested to accompany Messrs. H. and M. to England and assist them in negotiating the sale of the mines, and that he be paid for his expenses, $70, by each of the aforesaid thirteen interests, and such further sum as Mr. W. H. shall consider right upon the sale of the mines, in consideration of his services to the partnership." The plaintiff proceeded to England accordingly, and, in the result, a sale of the mines was effected. W. H. declined to allow plaintiff anything, and the defendants refused to pay him anything for his services, either before, or consequent on, the resolution. At the trial the jury found a verdict, and judgment was entered for the plaintiff for $1,350.00 for the former, and $4,350.00 for the latter services. On appeal to the Full Court, (McCreight, Walkem and Drake, J.J.) *Held*, (1) That the resolution affected subsequent services only, and that it contained no contract upon which the plaintiff could recover anything. (2) Its acceptance constituted an agreement by the plaintiff to abide by the decision of W. H. to the exclusion of any right of action for the subsequent services upon a *quantum meruit*, and that the judgment as to the $4,350.00 should be set aside. (3) A vested right of action can only be discharged by payment, release under seal, or accord and satisfaction, and, as plaintiff had at the date of the resolution such a right in respect of his prior services, the resolution could not be construed as affecting it and that the judgment for $1,300.00 should stand. CROASDAILE v. HALL. - - - - - - - - 384

2. ——*Covenant to indemnify—Whether demand upon plaintiff to pay under the contract indemnified against is a prerequisite to his cause of action on the covenant.*] BAKER v. DALBY - 289

CONTRACT—*Continued.*

3. ——*Corporation—Seal—Mutuality—Restraint of trade—Consideration.*] A contract by a corporation to ship all goods consigned to them at Victoria from a certain point by plaintiff's steamers, is not void as being in restraint of trade. Such a contract is not void for want of mutuality by reason of not being under the corporate seal of the plaintiffs. *Semble*, A contract by a trading corporation dealing with a subject within the scope of the objects of its memorandum of association need not be under its corporate seal. C. P. N. CO. v. VICTORIA PACKING CO. - - - - 490

4. —— *Hiring for term certain—Breach by master incapacitating himself from continuing the employment.*
See MASTER AND SERVANT.

5. ——*Novation—Accord and Satisfaction—Release.* - - - - -
See NOVATION.

6. ——*Rescission — Recovering back purchase money—Principal and agent.*] An action does not lie against a person to recover back money received by him as agent for another, but lies only against the principal, and the Court will not in such an action go into the question of whether the agent paid over the money to his principal or not. In an action for the rescission of an agreement for the sale of lands, it was proved that the vendee tendered a conveyance for execution to the agent of the vendor, who was not proved to have been authorized under seal to execute deeds for the vendor. *Held*, Insufficient to bind the vendor. The vendee at the time of the agreement knew that the vendor had not then a title, but that he was the holder of an agreement from his vendors to give a deed when required upon payment of his purchase money. *Held*, That the vendor was entitled to a reasonable time to make title, and that there was, on the facts, a waiver on the part of the vendee of his right to call forthwith for a conveyance. WILLIAMS v. WILSON AND MORROW. [613

7. ——*Towage — Concealment of circumstances affecting.*] DUNSMUIR v. THE-OWNERS OF THE SHIP "HAROLD." 128
See MARITIME LAW.

CONTRIBUTARY NEGLIGENCE — *Volenti non fit injuria.* - -
See INNKEEPER.

CORPORATE SEAL - - -
See CONTRACT, 4.

CORPORATION—*Torts committed by Servants of in course of its business—Respondeat Superior.* - - - -
See MASTER AND SERVANT.

2. ——*Ultra vires — Agency — Ratification.* - - - - - - -
See MASTER AND SERVANT.

COSTS—Order to refund costs recovered by a judgment reversed by appellate court. Jurisdiction to make. DAVIES v. MCMILLAN - 72

2. ——*Security for.*]—The court will order a plaintiff to give security for costs who has divested himself of his interest in the action, either before or after suit, and who appears to have no property or means. BEER v. COLLISTER - 79

3. ——*Security for—Non compliance with order for—Effect of.*]—The costs of motion to dismiss an action for non compliance with order for security for costs should be ordered to be paid as a condition precedent to being permitted to furnish the security and proceed with the action. COWAN v. PATTERSON - 353

4. ——*Of action to set aside probate of a will — Circumstances under which payment ordered out of estate though action dismissed.* - - -
See WILL.

5. ——*Of action brought in the wrong Court.* - - - - 465
See MCPHERSON v. JOHNSTON *et al.*

6. ——*Taxation—Witness fees—Travelling Expenses—Subsistence of non-resident plaintiff—Whether allowable.*] The plaintiff, resident in England, came to British Columbia to prosecute the action, remained until after the trial and obtained a verdict. *Held*, on taxation of costs, a party to an action coming from abroad to prosecute it, is not entitled to tax against the other side, either his travelling expenses or the cost of his subsistence while awaiting trial. ADAMS v. MCBEATH. 34

COUNTER-CLAIM—Striking out -
See PLEADING.

COUNTY COURT — *Practice — County Courts' Act, Secs. 95, 97—Summons in Chambers—Authority for.*] There is jurisdiction under the County Court Act and Rules, and it is the proper course, to entertain questions of practice arising in

COUNTY COURT—*Continued.*

that Court upon summons in Chambers in the same manner as in Superior Court actions. WILKERSON v. CITY OF VICTORIA. - - - - - - 366

2. ——*Jurisdiction — Venue.*] Where the plaintiff and defendant to a cause of action within the competence of the County Court reside in different County Court districts, the action should be brought in the County Court in the district where the defendant carries on business, or where the cause of action, wholly or in part arose (C. C. Amendment Act, 1894, Sec. 3), and is no reason for bringing the action in the Supreme Court. MCPHERSON v. JOHNSON *et al.* [465

3. ——*Practice — Statement in plaint of residence of parties—Order IV., Rules 2 and 3—Security for Costs—Married Women—Residence of.*] The statement in the plaint of the residence of the plaintiff (temporarily resident in California), as "the wife of Maynard Havelock Cowan, of Victoria." &c. *Held*, sufficient. Statement of the residence of defendants as "of Broad street, Victoria, auctioneers." *Held* sufficient. The residence of a wife not living apart from her husband is at the place of residence of her husband, and defendant held not entitled to security for costs from the plaintiff on the ground that she was living in California, her husband being resident in Victoria. COWAN v. CUTHBERT. - - - - - - - 373

COURT—Inferior—Restraining proceedings in to avoid inconvenience and multiplicity of actions—Discretion—How exercised. - - *See* INJUNCTION.

2. ——*Jurisdiction—Order effectuating judgment of Court of Appeal—Costs—Refund of on reversal of judgment.*] Plaintiff recovered a judgment, which, on appeal to the Full Court, was reversed with costs to the defendant. Plaintiff paid these costs. On appeal, the Supreme Court of Canada restored the original judgment with costs, but made no order to refund the costs paid by the plaintiff. Order made for defendant to refund the costs following. Rodger v. Comptoir D'Escompte de Paris, L. R. 3, P. C. 465. DAVIES v. MCMILLAN. - - - - - - 72

CRIMINAL LAW—*Practice—Certiorari—Six days' notice to Justices under 18 Geo. II., Cap. 8, (Imp.) Sec. 5—Substituting good warrant before return of rule.*] The Statute 13 Geo. 2, Cap. 8, Sec. 5, requiring six days' previous notice to convicting justices of motion for *certiorari* is in force is in this province. The service upon the justices of a rule *nisi* for a *certiorari* returnable more than six days after service thereof will not be treated as a compliance with the Statute—following Regina v. Justices of Glamorgan 5, T. R. 279. The convicting justices after service on them of the rule *nisi*, substituted and brought in on its return a good warrant of commitment in place of that objected to, which was admittedly bad for not following the conviction. *Held*, that they were entitled to do so. *Re* CHARLES PLUNKETT. - - 484

DAMAGES—Liquidated or unliquidated demand—Order XIV. - *See* PRACTICE.

2. ——*Measure of—Negligence in procuring valuation.*] In an action for damages against agents of a mortgagee for negligence in not procuring an accurate valuation of the lands or a good security for the loan, the property having been put up for sale under the mortgage and proving unsaleable, Walkem, J., giving judgment for plaintiff, upon a finding of the jury that the plaintiff had been unable to realize anything upon the security, ordered the defendants to pay the whole amount of principal and interest due upon the mortgage, upon the plaintiff executing a transfer to them of the the mortgage security. On appeal to the full court the judgment was affirmed by a majority of the court (Crease and Drake, J.J., McCreight, J., dissenting) *Per* McCreight, J. That there was nothing amounting to a guarantee of the loan, and the damages should be reduced by the actual cash value of the security at the time of the loan and a new trial had to ascertain such value. WOLLEY v. LOWENBERG, HARRIS & CO. - 416

NOTE.—On appeal to the Supreme Court of Canada the judgment of the majority of the court was reversed, and the judgment of McCreight, J., sustained.

DECEIT—Brokers for mortgagee—Misrepresentations by. - - *See* AGENCY.

2. ——*Negligent misrepresentation by agent—Necssity to prove mens rea.* - *See* AGENCY.

DIVISIONAL COURT.—Appeal—Time for extending.
See APPEAL.

2.—— *Extending time for appealing to after the lapse of eight days.*
See APPEAL.

3. ——*Jurisdiction—Order setting aside award and giving leave to apply for further directions—Final or interlocutory.*] *Held, per* Crease, McCreight and Walkem, J.J., over-ruling an objection to the jurisdiction of the Divisional Court to entertain an appeal from an order setting aside an award, which gave the parties liberty to apply for further directions, that same was not a final but an interlocutory order. WOOD v. GOLD - - - - - 281

4. ——*Right to make any order which may appear just.* FOOT v. MASON. 146

E. & N. RAILWAY ACT.—Taxes—Exemption—"Sold or alienated."
See SALE OF LANDS.

EMPLOYERS' LIABILITY — *Statute B. C. 1891, Cap. 10, Secs. 3-6—"Ways"—"Defect"—Contributory negligence—Volenti non fit injuria.*] Plaintiff in the course of his duties as defendant's employee in their mill, walked upon a roller way constructed for the purpose of carrying lumber from the saws out of the mill, consisting of a platform through which rollers moved by connecting uncovered cogwheels at each side, slightly projected. The jury found that there were other passage ways for the plaintiff, but none of them sufficient. That the non-covering of the cogs was a defect. That the plaintiff was cognizant of the danger of using the roller platform, but was not unduly negligent. and found damages. *Held, per* Drake, J.: Upon motion for judgment, dismissing the action, that if the defendants had covered the cogs the accident would not have happened, and that, upon the findings of the jury, the negligence of the defendants was primarily the cause of the accident, but that the plaintiff was guilty of contributory negligence in using the roller way as a passage way, and was *volens* in regard to the risk of injury. *Held*, by the Full Court (Begbie, C.J., Crease and Walkem, J.J.), allowing an appeal and entering judgment for the plaintiff. That, to support the defence of contributory negligence, it was necessary that there should be a direct and positive finding that the plaintiff voluntarily incurred the risk, and that there was no such finding. *Quaere*, whether that defence was not barred by section 6 of the Act. *Per* Walkem, J., that it was. SCOTT v. BRITISH COLUMBIA MILLING CO. - - - - - - - 221

EVIDENCE—Admissibility of statement of officer of warship making seizure under sub-Sec. 5 of Sec. 1 of the Seal Fishery (North Pacific) Act 1893. THE MINNIE - 161

2. ——*Commission to examine witnesses abroad—Affidavit for—Necessity to state names of proposed witnesses.*
See PRACTICE.

3. ——*Imperial Order-in-Council.*] The Court will take judicial cognizance, without further proof, of an Imperial Order-in-Council, upon production of a copy purporting to have been printed by the Queen's printer in London. THE MINNIE. - - - - - 161

4. ——*Observations on the doctrine of relevancy of evidence.* VARRELMANN v. THE PHŒNIX BREWERY COMPANY (LT'D. LIAB.) - - - - - - - 135

5. ——Statements of officer of company as evidence of dismissal from service. - - - - - - -
See COMPANY.

6. ——*Trial—Examination for discovery.*] A Judge in charging a jury may read to them parts of an examination for discovery additional to parts put in evidence by counsel. ADAMS v. THE NATIONAL ELECTRIC TRAMWAY & LIGHTING CO. [199

EXEMPTION FROM EXECUTION—*Homestead Amendment Act, 1890.*] A horse, the only exigible personalty of defendant, was taken in execution. It was appraised at $1,000.00. Defendant, under Sec. 2, Homestead Amendment Act, 1890, Cap. 20, providing: "2. It shall be the duty of every sheriff or other officer seizing the personal property of any debtor under a writ of *fieri facias*, or any process of execution, to allow the debtor to select goods and chattels to the value of $500.00 from the personal property so seized" claimed that he was entitled to select the horse to the extent of $500.00, and to be paid that amount by the sheriff out of the proceeds of its sale. *Held*, that the debtor was so entitled. VYE v. MCNEILL. - - - - 24

EXEMPTION—Of lands from Provincial taxation—E. & N. Railway Act—"Sold or alienated." - -
See SALE OF LAND.

EXECUTION - - - - - - - -
See EXEMPTION FROM EXECUTION.

2. ——*C. S. B. C., 1888, Cap. 42, Sec. 21—Receiver—Appointment of is not an execution—Order XLII., Rule 8.*] The appointment of a receiver of the estate of a judgment debtor at the instance of his judgment creditor by way of recovering upon the judgment is not an "execution" within the meaning of the Execution Act, Sec. 21, and clerks and servants of the execution debtor have no right to an order for payment of their wages out of the amount realized by the receiver in priority to the claim of the judgment creditor. ASPLAND V. HAMPSON & Co. - - - - - 299

EXECUTION ACT—*Claim of priority for wages.*] Plaintiff having obtained judgment and execution against defendant as administratrix of the estate of John Gilmour, deceased, John A. Gilmour claimed under C. S. B. C., Cap. 42, Sec. 21, to be paid the amount of wages due to him by the administratrix as manager of a farm, part of the estate of the intestate, ir priorty to the execution creditor. *Held*, that the Act only applies to claims for wages against the execution debtor, and the administratrix, and not the estate, was responsible for the wages, GILMOUR V. GILMOUR. - - 397

EXECUTORS AND ADMINISTRATORS—*Priority against assets of estate of judgment against Executors obtained before administration decree—C.S.B.C., Cap. 68, Sec. 4.*] The plaintiff obtained judgment against the defendant as an executor of the deceased, an insolvent. Afterwards an administration decree was made. The plaintiff applied for payment to him of the amount of his judgment out of funds in Court, being proceeds of the estate. *Held*, per Drake, J., making the order, that C.S.B.C. Cap. 68, Sec. 4, does not take away the priority of a creditor under a judgment obtained before the making of the administration decree. *Held*, on appeal, by the Divisional Court, Crease and McCreight, J.J.; it appearing that there might not be sufficient funds to satisfy an undecided right of retainer by the executor, and other judgments, that payment out of Court to plaintiff should

EXECUTORS AND ADMINISTRATORS—*Continued.*
be postponed till final distribution of the estate under the decree in the administration suit. WILSON V. MARVIN. - 327

EX JURIS WRIT OF SUMMONS—Practice—Rule 6—Refusing leave to issue when special endorsement discloses no cause of action.
See PRACTICE.

FRAUDS—Statute of—No defence to equitable mortgage. THE HUDSON'S BAY CO. V. KEARNS & ROWLING. - - - 330

2. ——*Health regulations — Victoria Health By-Law, 1893, Secs. 33, 35—"Infected locality"—Proof of—"Exposed to infection."*] Action of trespass against the Medical Health Officer of the City of Victoria for causing the plaintiff, one of a number of Chinamen, who landed at Victoria in a steamer last from Hong Kong in China, to be removed to the "Suspect Station" and there detained and subjected to cleansing process under colour of Sec. 35 of the Municipal Health By-Law, 1893, giving him, as Medical Health Officer, power "to stop, detain and examine every person or persons, freight, cargoes, railway and tramway cars coming from a place infected with a malignant or infectious disease," in order to prevent the introduction of such into Victoria. The plaintiff had been passed by the Dominion Government Quarantine Officer as entitled to land at Victoria. The white passengers from Hong Kong on the same steamer were not interfered with. The only evidence of Hong Kong being a place infected, etc., was that of a medical man resident in Victoria, who said "that in China small-pox was endemic, because there inoculation was the universal practice. That there was danger of infection from white passengers, but not the same danger as from Chinamen." There was no direct evidence of the existence of small-pox to a dangerous extent in Hong Kong at the time of the departure thence of the steamer, or that it was "a place infected," etc., or that the plaintiff had been "exposed to infection." *Held*, that the facts were insufficient to justify the action of the Health Officer under the By-law. Remarks on the duties of Health Officers. WONG HOY WOON V. DUNCAN. - - 319

INJUNCTION — *Disobedience of — Writ of Sequestration — Whether lies against*

INJUNCTION—*Continued.*

person not named in the injunction.] Persons not named in an injunction are not liable to be committed for breach of it, unless, with knowledge of the injunction, they interfere and commit the act enjoined, in which case they are liable for contempt of Court. DECOSMOS v. THE VICTORIA AND ESQUIMALT TELEPHONE CO. (L'TD.) - - - 347

2. ——*Maintaining status quo pendente lite.*] Upon motion to dissolve an injunction retaining property in dispute in *statu quo, pendente lite,* it is not necessary for the Court to enquire further into the rights of the parties, if it appears upon the affidavits, that the plaintiff has made. upon his own showing, a good case for the interference of the Court, and that there is, upon all the facts before the Court, a reasonable prospect of his succeeding at the trial. WARD & CO. v. CLARK & HENNIGER. - - - 356

3. ——*Municipal Act, 1892, Sec. 30, S. S. 10—Disqualification of Aldermen by reason of interest in contract—Practice—Injunction or quo warranto.*] An injunction is a competent and appropiate remedy for a complaint that an alderman is, on the facts alleged, disentitled by statute to sit and vote, where the prayer is to restrain him from so doing. *Semble,* If the action was to remove him from office and no other relief asked, *quo warranto* might be the only mode of procedure. COUGHLAN & MAYO v. THE CITY OF VICTORIA *et al.* - - - 57

4. ——*Restraining action in inferior Court.*] On appeal to the Divisional Court from a refusal to restrain a number of actions in the County Court to recover a rate under a municipal By-law upon the ground that the question could better be determined in the action in the Supreme Court to declare the By-law invalid. *Held, per* Crease and McCreight, J.J.: That the leaning of Superior Courts is against assuming to restrain a number of actions in an inferior Court, merely because the question upon which they depend may be finally decided once for all in one Superior Court action. BELROSE v. THE MUNICIPALITY OF CHILLIWACK. - - - - - 115

5. ——*Tidal River—Right of Dominion of Canada to restrain pollution of.*] The Crown in the right of the Dominion of Canada has the right to take proceedings to restrain by injunction the pollution of tidal rivers, which co-exists with the right of the Provincial Attorney-General to restrain any public nuisance caused by the conduct in question. The fact that a statute makes the conduct in question an offence, and imposes fines and imprisonment for its commission, does not derogate from the right of the Court, on the motion of the party injured, to restrain its commission by injunction. An injunction may be granted, although the defendant makes affidavits that he has taken precautions against the recurrence of the injury complained of. THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. EWEN. - - - 468

INNKEEPER—*Loss of guests' goods—Contributory negligence—Volenti non fit injuria—Lien—Innkeepers' Act C.S.B.C., 1888, Cap. 59.*] A person retaining goods under an innkeepers' lien for board must take reasonable care of them. Defendant, an innkeeper, detained plaintiff's trunk for the amount owed by him for board and lodging. Plaintiff assisted in carrying the trunk to the reading-room, the ordinary baggage-room being full. The trunk was broken open and several articles lost. *Held,* on appeal *per* McCreight and Walkem, J.J., sustaining the decision of Drake, J., at the trial; that the fact that plaintiff had assisted to place the trunk in the reading-room, there being no evidence that he requested it to be placed there, did not show contributory negligence on his part, or that he accepted the risk incurred thereby, nor did it discharge the liability of the landlord to take reasonable care. FRANK v. BERRYMAN. - - - - - - 506

INTEREST—*On judgment—Rate.*] The interest carried by a judgment in this province is governed by 1 and 2 Vic., Cap. 110, Sec. 17 (Imp.), and is therefore 4 per centum per annum. FOLEY v. WEBSTER, *et al.* - - - - 30

[ED. NOTE.—(a) by Stat. Can. 1894, Cap. 22, Sec. 2, the rate of interest upon judgments in British Columbia is fixed at 6 per centum per annum, to be calculated (Sec. 3) from the times of the rendering of the verdict or the judgment.]

2. ——*On promissory note at 6 per cent. after maturity—Bills of Exchange Act (Can.) 1890, Sec. 57—Liquidated demand.*

BRITISH COLUMBIA CORPORATION (LD.) V. COUGHLAN & MASON AND GEORGE STELLY. [273

3. ——"*Until paid' means until maturity—Practice—Order XIV.*] The plaintiffs' claim endorsed on a writ was upon a promissory note expressed to be payable "with interest at 9 per cent. per annum until paid." It claimed the amount of the note and interest at 7 per cent. from the date of the note to the date of the writ (in view of Sec. 80 of the Bank Act, 1890, Stat. Can. Cap. 31, limiting the interest recoverable by certain banks to 7 per cent.) *Held* upon summons for judgment under Order XIV: That the claim for interest at 7 per cent. after the maturity of the note was for unliquidated damages. BANK OF MONTREAL V. BAINBRIDGE & CO. - - - - 125

JUDGE—Jurisdiction of to vary order of another judge by adding conditions. - - - - -
See PRACTICE.

JUDGMENT—Against executors before administration decree — Priority of against assets of the estate—C.S.B.C. Cap. 68, Sec. 4. - -
See EXECUTORS AND ADMINISTRATORS.

2. ——*Under order XIV.—Contract—Construction of—Covenant to indemnify—Liquidated or unliquidated demand—Variation between endorsement and affidavit verifying.*] Plaintiff's writ was specially endorsed to recover "$1,000.00 for principal money due, under a covenant to pay the sum of $1,000.00 on 20th Feb., 1892." The covenant, as set out in the affidavit, was to assume, pay and discharge all moneys due and to become due from the said assignor (plaintiff) to one Parker, under a certain agreement between them, and "to indemnify and save harmless him the said assignor from the payment of the same," etc. It did not appear that Parker had demanded payment from the plaintiff. *Held, per* DRAKE, J., dismissing the motion: That the covenant was one of indemnity, and that it was a pre-requisite to the plaintiff's claim that he had paid, or been called upon to pay, the $1,000.00. That the cause of action proved was not that stated in the endorsement on the writ. Upon appeal to the Divisional Court, held *per* CREASE and WALKEM, J.J., dismissing the appeal: 1. The contract proved was one of indemnity. 2. A claim for breach of such a contract is not a liquidated but an unliquidated demand. 3. That the variance between the special endorsement and the affidavit was fatal. *Per* CREASE, J.: A demand upon the plaintiff, to pay the $1,000.00 was a pre-requisite to his cause of action. BAKER V. DALBY, BALLENTYNE & CLAXTON. - - - 289

JUDGMENT—*Continued.*

3. ——*Under order XIV. — Bills of Exchange Act (Can.), 1890, Sec. 57—Interest—Liquidated demand.* - -
See PRACTICE.

JURISDICTION—Of Court to award costs on dismissing a matter for want of jurisdiction to hear it. HENDRYX V. HENNESSEY. - 53

2. ——*Of Divisional Court,*] An order setting aside an award, and giving leave to apply for further directions, is not a final order and the Divisional Court has jurisdiction to entertertain an appeal from it. WOOD V. GOLD. - - 281

3. ——*Of Exchequer Court in Admiralty—Damages for breach of contract—Owner within jurisdiction — Entry of appearance no waiver of objection to jurisdiction.* - - - - -
See MARITIME LAW.

4. ——*Of judge to vary order of another judge by adding conditions.* - -
See PRACTICE.

5. ——*Of Supreme Court judge in County Court actions—C.C. Amendment Act, 1888.*] The jurisdiction of a Supreme Court judge to perform the duties of a County Court judge, in an action in the County Court, does not attach until the existence of the statutory pre-requisites to the exercise of the jurisdiction are made to appear as a matter of fact. A Court on dismissing a motion for want of jurisdiction has power to award costs. HENDRYX V. HENNESSEY. - - 53

7. ——*Power of judge to shorten notice required by Rules of Court.* - -
See RULES OF COURT.

JURY—Right to—Rule 333 - -
See PRACTICE.

LAND REGISTRY ACT—*Certificate of indefeasible title—When grantable—C.S.B.C. Cap. 67, Sec. 68.*] By the Land Registry Act., C.S.B.C. 1888, Cap. 67, Sec. 63, "The owner in fee of any land, the

title to which shall have been registered for the space of seven years, may apply to the Registrar for a certificate of indefeasible title." The applicants applied to the Registrar at Vancouver for a certificate of indefeasible title to the lands in question upon an affidavit that they "are the owners in fee of the lands, the title of which lands has been registered for the space of seven years." The Registrar held that the applicant must prove a seven-years' registered title in himself, following in *re* Trimble (*per* Begbie, C.J., 1 B.C. pt. 2, 321) and refused the application. Upon appeal to a Judge, McCreight, J., affirmed the Registrar and dismissed the appeal. Upon appeal from McCreight, J., to the Full Court, *Held*, *per* Begbie, C.J., and Drake, J., that the construction of the Registrar and McCreight, J., was correct, and that the appeal should be dismissed. *Per* Crease and Walkem, J.J., that all that was necessary under the language of the Act was that the applicant should be the owner of the lands, the title, not *his* title, to which had been a registered title for seven years, and that the appeal should be allowed. In *re* THE VANCOUVER IMPROVEMENT COMPANY.
[601

2. ——*Lis Pendens—Nature of the interest of plaintiff in the lands required to be shown in the action.*] Plaintiff claimed in the endorsement on his writ, on behalf of himself and the other creditors of the defendant Marie Schneider, a declaration that a conveyance made by her to her husband (co-defendant) of certain lands, was fraudulent and void as against them, and obtained and registered in the Land Registry Office a *lis pendens* against the lands in question. On motion to set aside the registration of the *lis pendens*, *Held*, *per* Drake, J., and affirmed on appeal by the Divisional Court (Crease and Walkem, J.J), that the statement of claim endorsed on the writ shewed an interest in the plaintiff, as a creditor, in the subject matter, sufficient to maintain the action and to support the registration of the *lis pendens* though only a declaratory order, and no consequent relief was prayed. In *re* THE LAND REGISTRY ACT BEVILOCKWAY V. SCHNEIDER. - 90

3. ——*Priorities between equitable mortgage and subsequent registered conveyance—Fraud—Constructive notice—Onus of proof—Pleading—Statute of Frauds.*] Action to foreclose an equitable mortgage

by deposit of title deeds, brought by the plaintiffs against the mortgagor K, and a person R, who appeared on the title as the grantee of the lands under a deed made to him by K, subsequent to, and, as the plaintiffs claim alleged, in fraud of the mortgage; which deed he had registered, not as a fee but as a charge, against the lands. K had suffered judgment by default. Neither notice of the mortgage, nor want of valuable consideration for the deed were charged against R in the statement of claim, or negatived by him in his defence, in which he claimed that, under Sec. 31 of the Land Registry Act, his registered charge was entitled to prevail over the plaintiffs' unregistered charges, and also set up the Statute of Frauds. At the trial R called no evidence, and maintained that the *onus probandi* to displace his *prima facie* statutory priority was on the plaintiffs, and that he was entitled to judgment. *Held*, *per* Walkem, J.. on motion for judgment, dismissing the action as against R, that his registered charge had a *prima facie* validity and priority, under Sec. 31, and that the *onus* of proof of want of consideration, fraud, or notice to him of the mortgage, was on plaintiffs. *Held*, by the Full Court on appeal. *Per* Crease, J.: That in the state of the pleadings and evidence, fraud on R's part could not be assumed by the Court, but that there should be a new trial to determine the question of the *bona fides* of the deed. *Per* McCreight, J.: That before the Statute the burden of proof would have been upon R to show that he made enquiries for the title deeds and gave valuable consideration for his deed from K, as being facts peculiarly within his knowledge and not of the plaintiffs, and that, not having done so, he was, by their absence, affected with constructive notice of the mortgage. That by Sec. 35 he was only relieved from the effect of such notice by proving himself a purchaser for value, and that the *onus* of so doing was therefore on him, and that as to the effect of notice, Sec. 31 must be read as subject to Sec. 35, which alone deals with that question. *Quære.* Whether the non-compliance with Secs. 13, 19, 54 and 55 of the Act as to production of title deeds vitiated the registration. *Per* Drake, J.: That, on the facts, the presumption was that R had actual, or that there was constructive notice to him of the equitable mortgage, and the *onus* was on him to allege and prove valuable consideration

for his deed. That the deed was improperly registered as a charge, and that the plaintiff should not be prejudiced by the mistake of the Registrar. THE HUDSON'S BAY CO. V. KEARNS & ROWLING. [330

LEGACY—Will—Construction of—Time of vesting of shares - -
See WILL.

LIQUIDATED DEMAND. - - - -
See PRACTICE.

LIQUOR LICENSE—*54 Vic., B. C. Cap. 21, Sec. 41—"Meal."*] By the Liquor License Regulation Act (*supra*) the sale of liquor in licensed premises is prohibited between the hours of eleven o'clock on Saturday night and one o'clock on Monday morning, and, by Sub-sec. 2 of Sec. 4, "the provisions of this section shall not apply to the furnishing of liquor to *bona fide* travellers, nor to the case of hotel or restaurant keepers supplying liquor to their guests with meals." The defendant was the holder of a saloon and restaurant license. A customer called for liquor during the prohibited hours, which was refused unless he ordered a "meal," whereupon he ordered crackers and cheese, for which no extra charge to that for the liquor was made. *Held*, sustaining a conviction of the defendant, that the word "meal" applied to food eaten to satisfy the requirements of hunger, and, on the facts, that the supply of food by defendant was a mere excuse to enable the defendant to supply liquor. REGINA V. SAUER. - - - 308

LIS PENDENS—Land Registry Act—Interest in lands sufficient to maintain *lis pendens*. - -
See LAND REGISTRY ACT.

MARITIME LAW—*Admiralty jurisdiction of Exchequer Court—Claims for damages for breach of contract by owner of ship—Owner within jurisdiction—24 Vic., Cap. 10 (Imp.), Sec. 6.*] The Admiralty Court has no jurisdiction over claims by owner or consignee of goods for damages done thereto by negligence or breach of duty by owner, master, or crew of the ship, if it is shewn that at the time of the institution of the cause any such owner, or part owner is within the province. *Held*, that the entry of an appearance is not a waiver of the objection to the jurisdiction. RITHET V. SHIP "BARBARA BOSCOWITZ" AND PORTER. - - 445

MARITIME LAW—*Continued.*

2. ——*Collision—One ship under way and other at anchor—Onus of proof—Mortgagee in possession—Right of to bring action for damages—Both parties in fault—Division of loss—Costs.*] It appeared from the preliminary acts that the defendant ship was under way and the plaintiffs' ship at anchor at the time of the collision. *Held*, upon proof of the interest and right to sue of the plaintiffs, that the *onus* was on the defendant ship to show that the collision was not caused by her negligence. (2.) That mortgagees of a ship, in possession, have a right of action for damage done to her. (3.) That where both parties are to blame for a collision, though in different degrees, the loss and costs will be equally divided between them. WARD *et al* V. THE SHIP "YOSEMITE." - - - - 311

3. ——*Salvage—Expense of conveying derelict to hands of Receiver of Wrecks—Whether recoverable.*] Plaintiff having salved the ship, incurred expenses in navigating her along a dangerous coast at a rough season of the year. *Held*, on the facts, that besides a salvage reward of one-half of the proceeds of the sale of the ship, the plaintiffs were entitled to expenses to be estimated at a lump sum. JACOBSON V. SHIP "ARCHER." - 374

4. ——*Towage contract—Towage or Salvage.*] The ship S. was found by the tug M. in a dangerous position in foul waters. The captain of the tug agreed to tow the ship into the open sea, the amount payable for such services to be left to the respective owners. The owners being unable to agree. *Held*, on the evidence, that the ship was in impending danger of loss from her situation, and the ignorance of her captain of the locality, and that the service of the tug was therefore a salvage, and not a towage, service. CANADIAN PACIFIC NAVIGATION COMPANY V. THE "C. F. SARGENT. - - 5

5. ——*Towage contract—Concealment of circumstances affecting—Extraordinary towage or salvage.*] The concealment by the owners of a ship, through the officer in charge, of the fact that the ship is in a leaky and dangerous condition, avoids a contract to tow her to port for a specified sum, made with him by the captain of a tug, in ignorance of her true condition. Where towage services cannot, on the facts, be said to have saved the ship from being lost, but were of extraordinary service, owing to her condi-

MARITIME LAW—*Continued.*

tion and involved more than ordinary trouble and risk, they should be allowed for, not as salvage but as extraordinary towage services. DUNSMUIR v. SHIP "HAROLD." - - - - 128

MARRIED WOMAN — Contract of — Necessity of proving possession of separate property. JACKSON v. MYLIUS. - - - 149

2. ——*Residence of is that of her husband—Security for costs.*
See COUNTY COURT.

MASTER AND SERVANT—*Respondeat superior—Corporation—Ultra Vires—Agency—Ratification.*] A corporation is liable for a trespass committed by its servant while conducting its business, although committed in the doing of an act *ultra vires* of the corporation itself. Where the servant of a corporation forms an erroneous judgmeut, and, in the supposed scope and discharge of the duty delegated to him, commits a trespass, the corporation is liable for it. ADAMS v. THE NATIONAL ELECTRIC TRAMWAY AND LIGHTING CO. - - - - 199

2. ——*Trespass—Respondeat superior Agency—New trial—Misdirection—Rule 446.*] A servant of the defendant corporation, employed to cut timber on its lands, knowingly trespassed and cut timber off plaintiff's lands, which adjoined, and the defendants' manager, general foreman and other servants, knowingly took and included it in defendants' boom and hauled it away. It was afterwards cut up and sold along with defendants' lumber. Evidence was given for plaintiff, and denied by defendants, that the trespass was committed by instructions of the manager. The jury found a verdict for the plaintiff, *Held, per* Drake, J., on motion for judgment: If a servant of a company commits a tort in the course of his employment, and for the benefit of his employer, whether by his direct orders or not, the employer is liable even if the act was unknown to or actually forbidden by him. On appeal and motion for a new trial: *Held, per* Crease, J., following Clark v. Molyneux, 3 Q.B.D. 237: The whole of the summing up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detached expressions. *Held, per* Walkem, J.: That it was misdirection by the trial judge to tell the jury that they had only to consider the question of damages, as the question of agency of the servant for the master by ratification or otherwise had to be left to them. That the defendants were liable for tortious acts of their manager and foreman on the ground that they had the entire control of their business. That under Rule 446, the Court on appeal, notwithstanding an apparent misdirection of the jury, can draw such inferences of fact as are not inconsistent with the verdict. HARRIS v. BRUNETTE SAW MILL CO. - - - - - - - 172

MASTER AND SERVANT—*Continued.*

3. ——*Wrongful dismissal—Contract of hiring—Construction of—Corporation—Evidence — Trial — Divisional Court jurisdiction.*] A contract by defendants to employ plaintiff as brewmaster in its lager beer brewery in Victoria for three years, and during that period pay him as such brewmaster a salary of $250.00 a month, at the end of each month, is broken by the company incapacitating itself from continuing the plaintiff in that employment, and is not satisfied by a readiness to pay the salary at the end of each month, VARRELMANN v. THE PHŒNIX BREWERY CO. - - 135

MECHANICS LIEN—*Stat. B.C., 1888, Cap. 74, Sec. 9—Statements i ı affidavits for lien—Residence of contractors—Particulars of work and materials "Owing."*] The filing of an affidavit fulfilling all the requirements of Stat. B.C. 1888, Cap. 74 Sec. 9 is a pre-requisite to the validity of a mechanics' lien. The following defects in such affidavit held fatal: (1) Omission to state the residence of the owner of the property. (2) Omission to sufficiently state the residence of the contractors. Statement of residence as "Victoria" held insufficient. (3) Omission to state in detail the particulars and items of the work done and materials furnished in respect of which the lien is sought. (4) Omission to state that the amount claimed was "due," and when it became due. Statement that it was "owing" held insufficient. SMITH v. MCINTOSH, CARNE, *et al.* - - - - - 26

MINING LAW—*Mineral Act, 1891—Relocation—"Owner"—Staking—Excess of area—Abandonment—Public officer—Misuse of knowledge obtained in office.*] The owners of a mineral claim, the

MINING LAW—*Continued.*

title to which was considered defective, permitted a third person to re-locate it in his own name, whereupon he, without previous binding agreement to that effect, conveyed his title to them for a consideration. *Held*, Not a re-location by the owners within Sec. 29, Cap. 25, Mineral Act, 1891, and that the written permission of the Gold Commissioner was not necessary. The owner of shares in an incorporated mining company is not an owner of any part of a mining claim owned by it within Sec. 29, *supra*. The location of a mineral claim is not void because, as staked, it exceeds 1,500 feet in length, as provided by Sec. 3 of the Mineral Act, 1891, Amendment Act, 1893, but may be corrected by virtue of Sec. 14 of that Act by the Provincial Surveyor who makes the survey, by the removal, for the correction of distance, of any post except the initial post No. 1, if the alteration does not affect the previous rights of adjacent owners. Section 27 of the Act, providing that the owner may abandon a mineral claim, inferentially permits him to abandon any portion of it upon his specifying and recording such abandonment. The Court should deal with mining disputes upon the principles of a Court of Equity, and should discountenance a plaintiff, whose action is based upon defects in title, knowledge of which was acquired by him while a Government employee in a mining record office, it being contrary to his duty to the public, and those interested in the records, for him so to use such information. GRANGER v. FOTHERINGHAM, *et al.* - - 590

MISDIRECTION—Motion for new trial for — Necessity of specifying grounds.
See NEW TRIAL.

2. ——*New trial.*] The trial Judge having left the case to the jury, as involving, in the alternative, either deceit or negligence in defendants as plaintiff's agents, a judgment for plaintiff was maintained by the Full Court upon the ground only of agency and negligence, and sitting at the same time as a Divisional Court, it refused to grant a new trial upon the ground of the introduction to the jury of the question of deceit. WOLLEY v. LOWENBERG, HARRIS & Co. - - 416

3. ——The whole of a summing up must be considered in order to determine whether it afforded a [fair

MISDIRECTION—*Continued.*

guide to the jury and too much weight must not be allowed to isolated and detached expressions. HARRIS v. BRUNETTE SAW MILL Co. - - - 172

MUNICIPAL LAW—*Alderman—Disqualification for interest in Municipal contract—Municipal Act, B. C., 1892, Sec. 30, s.s. 10.* An alderman who has contracted to supply, to a person who has a contract with his municipality, materials to carry it out, has "an interest in a contract with or for the municipality either directly or indirectly" within the meaning of the Municipal Act, 1892, B.C., Sec. 30, s.s. 10. COUGHLAN & MAYO v. THE CORPORATION OF THE CITY OF VICTORIA, ANTOINE HENDERSON, JAMES MUNRO MILLER AND JAMES BAKER. - - - - 57

2. ——*By-law — Municipal Act, 1892, Sec. 278—By-law not reconsidered and passed in the time limited—Validating Sec. 279—Effect of—Injunction—Whether actions in inferior Court restrained to avoid multiplicity.*] By section 278, Municipal Act, 1892, B. C., "before any By-law.....shall be valid or come into effect, the Council shall cause it to be published once in every week for four weeks in, etc.....after which the By-law may be reconsidered by the Council; and if reconsidered and finally adopted by the Council within thirty days from the termination of the four weeks of publication aforesaid, it shall come into effect after seven days from its final adoption by the Council, unless the date of its coming into effect is otherwise postponed by such By-law. By Sec. 279, unless quashed, "the By-law shall, notwithstanding any want of substance or form either in the By-law itself or in the time or manner of passing the same, be a valid By-law.' The By-law in question was not reconsidered and finally adopted by the Council within the thirty days above limited. No motion to quash the By-law within the time limited for that purpose had been made. The action was for a declaration that the By-law was invalid, and plaintiffs had obtained an *interim* injunction restraining actions against them in the County Court, to recover a rate assessed against them thereunder. *Held, per* Drake, J.: Dissolving the injunction, that the By-law was validated by Sec. 279, *semble*, that the objection was not fatal to the By-law. BELROSE v. THE MUNICIPALITY OF CHILLIWHACK 115

MUNICIPAL LAW—*Continued.*

3. ——*License—"Sale" of liquor—Club selling to its members whether.*] By the Municipal Act, B,C., 1889, Sec. 173, "Every Club in a municipality shall pay to the corporation of the municipality an annual tax of one hundred dollars on the 31st day of December in every year. * * A Club for the purposes of this Act shall mean and include an association of persons consisting of not less than forty in number, whose objects of association are mutual recreation or improvement, and the keeping for the members of a place of resort wherein intoxicating, spirituous or malt liquors are consumed by members either at a tariff fixed by the rules of the association or pursuant to any agreement or understanding between the members of the association." The defendants admitted that they were such an association. *Held*, that the Club was not liable to pay the license, because it did not sell liquor. THE CITY OF VICTORIA v. THE UNION CLUB. - - - - 363

4. ——*Negligence of corporation—Liability for non-repair of highway—Knowledge of defect—Municipal Act, 1892, Sec. 104, Sub-Sec. 90.*] Corporations undertaking to manage highways are not insurers against latent defects, they are only bound to take reasonable care. No action can be maintained at common law for an injury arising from the non-repair of a highway, but a duty may be cast by Statute upon a corporation to repair, and if that is clearly done it will be answerable in an action for negligence. The Municipal Act, 1892, B.C., Sec. 104, Sub-Sec. 90, gave the defendant corporation power to raise money by way of road tax, and to pass by-laws dealing with roads, streets and bridges. *Held*, that no duty to keep the streets in repair was thereby cast on defendants. LINDELL v. CITY OF VICTORIA. - - - - - 400

5. ——*Taxation—Direct or indirect.*] *See* CONSTITUTIONAL LAW.

6. ——*Taxation—License—"Wholesale Trader" definition of—Manufacturer selling in large quantities to merchants.*] By Stat. B.C., 55 Vic., Cap. 33, Sec. 204, ss. (10) "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 (10) from any person carrying on the business of a

MUNICIPAL LAW—*Continued.*

wholesale or of a wholesale and retail merchant or trader not exceeding $50 for every six months." *Held*, that a person who imported materials, and manufactured articles of clothing therefrom, and sold same in quantities to wholesale and retail dealers, was a person carrying on a wholesale business within the meaning of the Act. A trader, wholesale or retail, is one who sells to gain his living by such buying or selling, not to gain a profit on one isolated transaction. If a manufacturer sells the product of his labour and skill in wholesale quantities, he is a wholesale trader. REGINA v. PEARSON. [325

NEGLIGENCE—Municipal corporation—Liability for non-repair of highway—Municipal Act, 1892, Sec. 104, Sub. Sec. 90. - - *See* MUNICIPAL LAW.

2. ——*Volenti non fit injuria.* - *See* EMPLOYERS' LIABILITY.

NEW TRIAL—Motion for misdirection—Necessity of specifying grounds. CROASDAILE v. HALL. - 384

NON-SUIT—Observations by Begbie, C.J., on the propriety of obtaining a finding as to damages before entry of non-suit to avoid a new trial should the non-suit be reversed on appeal. VARRELMANN v. PHŒNIX BREWERY COMPANY (L'TD. LIAB.) - - - 135

NOVATION—*Accord and Satisfaction—Release—Taking sole note of one partner for amount of joint account whether release of the other.*] In an action against B. & S. as partners for goods sold and delivered it appeared that the firm had dissolved, S. carrying on the business and assuming the liabilities. Plaintiffs having drawn on the firm for the amount, S. returned the drafts, stating the dissolution and that he had no right to accept in the firm name, but sent his own note. This note not being paid at maturity plaintiffs drew on S.. who did not accept; but in lieu sent four notes made by himself for the amount taken in the aggregate. These notes were held by the plaintiffs and sent for collection at maturity, and on non-payment they brought the action against B. & S. *Held*, *per* Drake, J., at the trial, that, though there was no express agreement to that effect the acceptance of the four notes of S. and the retention of

NOVATION—*Continued.*

them, and forwarding them for collection, by plaintiffs, was *prima facie* an acceptance of the sole liability of S. in the place of the joint liability of B. & S. and a discharge of B., there being no reservation of their rights against him. On appeal to the Full Court, *per* Walkem, J., (Crease and McCreight, J.J., concurring): That the proper question for the trial judge was whether the plaintiffs had agreed to take, and did take, the notes of S. in satisfaction of the joint debt. That there was no evidence of such agreement, and the fact that the plaintiffs when taking the notes of S. did not expressly reserve their rights against B. was immaterial. GURNEY v. BRADEN. - 474

ONUS PROBANDI—Will instructed by legatee. - - - -
See WILL.

ORDER — Of judge — Jurisdiction of another judge to add conditions.
See PRACTICE.

PLEADING—*Admissions—Point of law not raised on pleadings.*] The objection that, upon the evidence, the act complained of was not done by the servant in the course or within the scope of his employment by defendants, and was unauthorized by them is not open to defendants upon motion for a non-suit, unless they pleaded it as a defence. ADAMS v. THE NATIONAL ELECTRIC TRAMWAY AND LIGHTING CO. 199

2. ——*Amendment — Adding counter claim after case set down for trial.* -
See PRACTICE.

3. ——*Amendment — Rules 703, 705, Right to examine upon.*] After an order for an amendment of a statement of claim, the amended claim must be delivered before an order for an examination of defendant can be made. COOLEY v. FITZSTUBBS. - - - - - 198

4. ——*Counter claim—Striking out—Rule 204.*] One of two defendants sued jointly may counter claim upon a cause of action which he individually has against the plaintiff. A counter claim should not be entirely independent of the original cause of action, but where the counter claim involved an issue raised as a defence it was held to be sufficiently connected with the claim. Upon appeal to the Divisional Court: *Held, per* Crease and Walkem, J.J.: The fact that a counter claim, if successful, involves the taking of a long account, which will delay the disposition of the action is not sufficient cause for excluding it, if otherwise unobjectionable. POWELL v. LOWENBURG, HARRIS & CO. - - - 81

5. ——*Rules 167, 173—Evasive denial—Admission—Contract of married woman—Separate estate.*] The action was tried and evidence given *pro* and *con* upon the question whether defendant Celia Mylius, a married woman, was liable to the plaintiff as being the partner of the defendant Jackson. The plaintiffs claim alleged: "2. The defendants entered into partnership as watchmakers and jewellers on etc. 3. That while the defendants were carrying on such business, the plaintiff advanced to them the following (claimed) sums." The statement of defence of Celia Mylius alleged: "1. The defendant denies that on, etc.. or at any other time she entered into partnership with the defendant Jackson, as alleged in paragraph 2 of the statement of claim. 2. Neither at the times therein alleged or at any other times did the plaintiff advance to defendants the sums alleged or any of them, and if.....advanced, they were advanced to defendant Jackson alone." Crease, J., who tried the action, entered judgment for the plaintiff, on the ground that the partnership was proved. There was no evidence that the defendant, Celia Mylius, had any separate property at the time of the alleged contract. On appeal to the Full Court: *Held, per* Begbie, C.J., and Drake, J., that the partnership was admitted on the pleadings, and that such objection was then open to the plaintiff. *Per* McCreight, J., dissenting: That the partnership was not admitted, but denied in the defence. That if otherwise, all proper amendments should be made to meet the case as presented at the trial. That in any case the objection that the defendant, Celia Mylius, had no separate property at the time the alleged liability arose, was fatal to the judgment. MARGARET JACKSON v. ALEXANDER JACKSON AND CELIA MYLIUS - - 149

[ED. NOTE.—The judgment of the majority of the Court was reversed, and that of McCreight, J., sustained, by the Supreme Court of Canada. (Mylius v. Jackson, 23 S.C.R. 485.)

PRACTICE—*Amendment — C. S. B. C. Cap. 31, Sec. 58—Order—Omission of*

PRACTICE—*Continued.*

name of presiding Judge in caption—Rule 266—Judge signing order made by another Judge.] The omission of the name of the Judge by whom an order is made, which by the Supreme Court Act, C.S.B.C., Cap. 31, is directed to be inserted in the caption, is "an accidental slip or omission" within Rule 266, S.C. Rules 1890, which may be amended by the Court or any Judge thereof. A Judge of the Supreme Court has power to sign an order for and on behalf of another Judge. GORDON v. COTTON. - 499

2. ——*Appeal to Divisional Court—Notice of appeal—Non-statement of Court appealed to or grounds of appeal—Irregularity—Waiver—Amendment.*] The non-statement in a notice of appeal of the Court intended to be appealed to is an irregularity. The attendance of respondent's counsel in the proper Court upon the notice is a waiver of such irregularity, though he takes preliminary objection to it. The omission to state the grounds of the appeal in a notice to the Divisional Court is fatal to the notice. Amendment, by inserting the grounds allowed on teams. BEVILOCKWAY v. SCHNEIDER. - - - - - 88

3. ——*C.S.B.C. Cap. 81, Secs. 61, 67—Rule 743—Extending time for appeal to Divisional Court after lape of the eight days.*] Rule 743, providing a Judge may extend the time for doing any act, although the application is not made until after the time appointed is not inconsistent with C.B.S.C., Cap. 31, Sec. 61, providing that every appeal to the Divisional Court shall be brought within eight days, unless the time shall be extended by a Judge, and the Court has power to extend the time for moving for a new trial after the lapse of eight days, as provided by the Statute. BRITISH COLUMBIA IRON WORKS CO. v. BUSE, *et al.* [170

4. ——*Chamber Summons—Filing Affidavit before issue of—Rules 421 and 572.*] Rule 572, requiring every summons in Chambers to give notice of the affidavits to be read in support of it, is imperative. LEISER v. CAVALSKY *et al.* - - 196

5. ——*Conditional appearance—Effect of entering where unnecessary.*] Notwithstanding Order XII., R. 19 (Rule 70), providing that a defendant may move to set aside service of a writ of summons without entering a conditional appearance, the fact that a defendant has entered a conditional appearance, is not a good preliminary objection to such a motion. FLETCHER v. MCGILLIVRAY. - 37

6. ——*Countermand notice of trial—Right to dismiss for want of prosecution after—Rule 340.*] The adjournment at the trial of a hearing, by consent of counsel, is equivalent to a countermand of the notice of trial, and if the plaintiff does not proceed in due course, the defendant may thereafter, either himself give notice of trial, or apply to dismiss for want of prosecution. HARVEY v. NEW WESTMINSTER. - - - - - - 398

7. ——*County Court — Procedure by Summons in Chambers.* - - -
See COUNTY COURT.

8. ——*Divisional Court — Extending time for appeal — Ex parte order — Irregularity.*] An order extending the time for appealing to the Divisional Court is irregular if made *ex parte*. The Divisional Court has jurisdiction, and, in a proper case, ought to cure irregularities or want of time in the bringing of an appeal by making an order at the hearing of the appeal extending the time for appealing and thereupon proceeding to hear same—following *re Manchester Economic Building Society, 24 Ch., D. 488.* VARRELMANN v. THE PHŒNIX BREWERY COMPANY, (L'TD. LIAB.) - - - - - - - 143

9. ——*Divisional Court — Remitting motion to Chambers for re-argument and to procure written judgment.*] On an appeal to the Divisional Court from an order of Walkem, J., in Chambers, refusing an application for discovery, counsel could not agree as to what had taken place in Chambers, or upon what were the reasons for the dismissal of the motion. The Court referred the motion back to Walkem, J., for report and re-argument before him if necessary. BEAVEN v. FELL. - - - - 362

10. ——*Entry of appearance—Whether waiver of objection to jurisdiction.*
See MARITIME LAW.

11. ——*Evidence—Commission to Examine witness abroad—Affidavit.*] An affidavit for an order for a commission to examine witnesses abroad must state the

PRACTICE—*Continued.*

names of the witnesses proposed to be examined. HERMANN v. LAWSON. 353

12. ——*Examination of parties—Rules 703 and 705—Order to amend pleadings—Effect of—Right to examine.*] After an order for amendment of a statement of claim, the amended claim must be delivered before an order for examination of defendant can be made. COOLEY v. FITZSTUBBS. - - - - - - 198

13. ——*Ex juris writ of summons—Rule 44—Order for substitutional service—Evasion of service—Necessity to shew—Affidavit—Supplemental refused.*] To support an order for substitutional service of a writ of summons allowed to be issued for service out of jurisdiction it must appear upon the affidavit upon which the order is obtained that the defendant is evading service of the writ. Supplemental affidavit that such was the fact not admitted in answer to a motion to set aside the order. MELLOR v. CARTER. - - - 131

14. —*Ex parte order extending time for appeal — Irregularity — Rule 674 — Divisional Court—Right of to make any order which may appear just.*] An *ex parte* order varying the terms of an order made upon summons is irregular but is not a nulity. By an order made upon summons, the action was dismissed for want of prosecution unless the plaintiffs gave security for costs within a week. On the last day of the week limited, an *ex parte* order was made extending the time for two days. Upon appeal to the Divisional Court from that order, it appeared that the plaintiffs had not up to then given the security ordered. *Held*, (1.) That the *ex parte* order was irregular. (2.) Objection that the action was out of Court over-ruled. (3.) The Divisional Court under Rule 674 had jurisdiction to make any order which might appear just. Order made that plaintiffs be at liberty to proceed with the action upon terms of giving the security within 48 hours and payment of costs. FOOT v. MASON. - - - - 146

15. ——*Judge — Jurisdiction of to vary order of another Judge by adding conditions.*] A Judge has no jurisdiction to add to an order made by another judge for redemption of a mortgage, on payment of the debt and costs to date of decree, a further term adding subsequent costs and requiring their payment as a further condition of redemption, and charge upon the lands, (*Per* Begbie, C.J., Crease, Drake and Walkem, J.J.) LEHMAN v. WILKINSON. - - - - - - 19

16. ——*Judgment under Order XIV—Bills of Exchange Act, (Can.), 1890, Sec. 57—Interest, unexpressed, after maturity of note—Liquidated or unliquidated demand.*] Plaintiff obtained an order for judgment under Order XIV., upon a specially endorsed writ against Coughlan & Mason as makers, and Stelly as endorser, for the amount of a promissory note and interest, as claimed, from the date of its maturity at 6 per cent., no interest being provided for in the note. The endorsement stated that the note had been duly presented for payment and been dishonoured, and that "notice of dishonour had been waived." Upon appeal to the Divisional Court: *Held, per* Crease and Drake, J.J., affirming Walkem, J., and dismissing the appeal: That interest was payable on the note after maturity at 6 per cent., and was a liquidated demand under the Bills of Exchange Act, (Can.), 1890, Sec. 57, and that the special endorsement was sufficient (McCreight, J., concurred on that point). *Per* McCreight, J., dissenting from the order of the Court, that the endorsement was insufficient. That the allegation of waiver of the notice of dishonour should have stated the name of the defendant, so waiving, and set out the facts relied on as a waiver, and that the note should have been stated to be still unpaid. BRITISH COLUMBIA CORPORATION (L'TD.) v. COUGHLAN AND MASON AND GEORGE STELLY. - - - - - - 273

17. ——*Judgment under Order XIV.—Variance between special endorsement and affidavit verifying—Held fatal to motion.*
See JUDGMENT UNDER ORDER XIV.

18. ——*Oaths' Act, 1892—Foreign Affidavit—Notary—Motion for judgment—Order XIV., Rule 2—Irregularity.*] An affidavit sworn out of the Province of British Columbia before a Notary Public and certified under his hand and official seal, is admissable under the B. C. Oaths' Act, 1892, Sec. 12. The copy of the affidavit to accompany a summons for judgment under Order XIV., Rule 2, must be a true copy. The affidavit was sworn before a Notary Public and the copy had no indication of the Notarial Seal upon the original. *Held*, fatal and motion dismissed. FIRST NATIONAL BANK v. RAYNES. - - - - - - 87

PRACTICE—*Continued.*

19. ——*Order XIV.—Special endorsement—Promissory note—Interest.*] The plaintiff's claim, endorsed on the writ, was upon a promissory note expressed to be payable "with interest at 9 per cent. per annum until paid." It claimed the amount of the note and interest at 7 per cent. from the date of the note to the date of writ (in view of Sec. 80 of the Bank Act, 1890, Stat. (Can.) Cap. 31, limiting the interest recoverable by certain banks to 7 per cent.) *Held*, upon summons for judgment under Order XIV.: That the claim for interest at 7 per cent. after the maturity of the note was for unliquidated damages. BANK OF MONTREAL v. BAINBRIDGE & Co. - 125

20. ——*Order III., R. 6—Damages fixed by contract—Liquidated or unliquidated demand—Order XIV.*] A claim for $1,000.00, "amount due upon an agreement whereby the defendant agreed to pay the plaintiffs the sum of $1,000.00 in the event of certain work in which the plaintiffs were engaged being wholly stopped by the defendant, and which has been wholly stopped by him," is a liquidated demand and proper subject of special endorsement. LANTZ *et al* v. BAKER. - 269

21. ——*Order of Court effectuating judgment of Court of Appeal—Costs—Refund of on reversal of judgment.*] Plaintiff recovered a judgment, which on appeal to the Full Court was reversed with costs to the defendant. Plaintiff paid these costs. On appeal, the Supreme Court of Canada restored the original judgment with costs, but made no order to refund the costs paid by the plaintiff. Order made for defendant to refund the costs following *Rodger v. Comptoir D'Escompte de Paris, L. R. 3, P.C. 465.* DAVIES v. MCMILLAN. 72

22. ——*Order taken out by neither party—Whether appealable.*] In order to maintain an appeal from an order, it must have been drawn up and issued. If the party upon whose summons the order is made refused to draw it up, the other party may obtain a similar order upon summons upon his own account. If the order made is not within the terms of the summons, then the party in whose favour it is made may draw it up. MCCOLL v. LEAMY *et al.* - - - - 360

23. ——*Pleading—Amendment — Counter claim—Adding after case in paper.*] Order made adding a counter claim after the case was in the paper for trial. BEER BROS. v. COLLISTER. - - - 145

24. —— *Pleading — Amendment after long delay—Propriety of.*] The proper mode for a defendant to take advantage of delays on the part of a plaintiff is to move to dismiss the action. Plaintiff after long delays, obtained an order to amend his statement of claim. *Held*, on appeal to the Divisional Court (Crease and Drake, J.J.,) that the intervening delay was no ground for setting it aside. CLARK v. EHOLT - - - 442

25. ——*Pleading — Amendment of—Postponing trial.*] After an order fixing the day for trial, amendments in the pleadings, making a new case, will only be allowed upon terms of postponing the trial, if the party against whom the amendments are made is not ready for trial on the new question introduced. WOLLEY v. LOWENBERG, HARRIS & Co. [197

26. ——*Pleading—Counter claim—Striking out—Rule 204.*] One of two defendants sued jointly may counter claim upon a cause of action which he individually has against the plaintiff. A counter claim should not be entirely independent of the original cause of action, but where the counter claim involved an issue raised as a defence it was held to be sufficiently connected with the claim. Upon appeal to the Divisional Court: *Held, per* Crease and Walkem, J.J.: The fact that a counter claim, if successful, involves the taking of long accounts which will delay the disposition of the action is not a sufficient cause for excluding it if otherwise unobjectionable. POWELL v. LOWENBERG, HARRIS & Co. - - - - 81

27. ——*Res judicata—Divisional Court—Judge in Chambers—Jurisdiction.*] An order once pronounced will be given effect to and followed by every Judge and Court of inferior or co-ordinate jurisdiction, and no order will be made inconsistent therewith. GABRIEL v. MESHER. 159

28. ——*Rules 976-977—Arrest—Ca. sa.—Discharge of prisoner for non-payment of maintenance money.* - - - -
See ARREST.

29. ——*Rule 70—Conditional appearance—Ex parte orders after—Waiver.*] The defendant who had entered an appearance

expressed to be conditional and for the purpose of moving to set aside the writ for irregularity; upon the dismissal of that motion moved to set aside two orders continuing an *interim* injunction upon the ground that they ought not to have been made *ex parte* after the appearance. *Held*, (1.) That the conditional appearance was not necessary to the motion to set aside the writ. (2.) That being limited to the purposes of that motion, it did not survive after the disposition of it. (3.) That the defendant's counsel having appeared on the motion was a sufficient submission to the jurisdiction to permit the motion to be heard. (4.) That the conditional appearance was a nullity, and the orders continuing the injunction were afterwards properly made *ex parte*. On appeal to the Divisional Court; *Held*, *per* Drake and Walkem, J. J.: (1.) An appearance under protest is a proceeding unknown to the law and irregular, (2.) That such irregularity was waived by the plaintiff by his notice of motion to continue the injunction, though itself not a sufficient notice. (3.) That the *ex parte* orders obtained thereafter were irregular. (4.) That as the first irregularity was committed by the defendant, he had no right to complain of irregularities into which his own error had led the plaintiff, and that the appeal should be dismissed without costs with leave to apply on the merits to dissolve the injunction. FLETCHER v. MCGILLIVRAY. - - - - - - 40-49

30. ——*Rules 6, 35, 44—Ex juris writ—Leave to issue—Affidavit for.*] A writ of summons for service outside the jurisdiction is irregular if issued without leave of a judge under Rule 6. An affidavit for an order for substitutional service of such writ must show that the defendant is evading the service of it. HULL BROS. v. SCHNEIDER. - - - - - 32

31. ——*Rule 147—Misjoinder.*] A claim endorsed on a writ of summons for a declaration that defendant is trustee of lands for plaintiffs and for a conveyance thereof to them, and for damages for breach of contract, and against one defendant for damages for misrepresentation in regard thereto, and for an injunction, is not a joinder of other causes of action with an action for the recovery of land within the meaning of Order XVIII., R. 2, (Rule 147). FLETCHER v. MCGILLIVRAY. - - - - - - - 37

32. ——*Rule 333—Right to jury—Waiver.* An action by an engineer for the price of making an examination and report upon a mineral claim, in which the defence denied the contract and set up that the report made was unsatisfactory and of no value, is within Rule 333 and either party is entitled to trial by a jury. The action had been brought down to trial without a jury and had been postponed, and the evidence of a witness subsequently taken *de bene esse*. *Held*, not to amount to a waiver of the right to a jury, or agreement to try without a jury. FERGUSON v. THAIN. - - - - - - 447

33. ——*Rules 128, 133—Third party notice—Parties—Substituting for defendants parties liable to indemnify them—Terms—Security for costs.*] Persons brought in on third party notice as liable to indemnify the defendants ought to be made co-defendants. At their own request, the third parties were substituted as defendants, upon giving security to the plaintiff for such amount as he might recover and costs. WILKERSON v. THE CITY OF VICTORIA. - - - - - - 367

34. ——*Rule 6—Writ of summons for service outside of jurisdiction—Endorsement not disclosing a reasonable cause of action.*] As the leave of the Court or a judge is (by Rule 6) expressly required to be obtained before the issue of a writ for service outside the jurisdiction, the Court must, before sanctioning it, be satisfied that the endorsement discloses a reasonable cause of action. The promissory note as set out in the special endorsement shewed the name of W., one of the defendants, sued as endorser, endorsed under that of the plaintiff, the payee of the note. *Held prima facie* evidence that W. was not liable on the note to the plaintiff, and that the plaintiff was not the holder of the note, and motion to issue the *ex juris* writ refused. TAI YUNE v. BLUM *et al.* - 21

35. ——*Security for costs.*] The Court will order a plaintiff to give security for costs who has divested himself of his interest in the action, either before or after suit, and who appears to have no property or means. BEER v. COLLISTER. - 79

36. ——*Staying execution pending appeal to Privy Council—Terms.*] Execution upon a judgment of the Supreme Court of Canada, made an order of this Court, will

PRACTICE—*Continued.*

be stayed pending an appeal to the Privy Council, upon terms. The terms imposed were to pay the costs of the appeal to the Supreme Court of Canada with an undertaking to refund, if the judgment be reversed; to give security for the amount of the judgment appealed from; money in Court to stand for such security *pro tanto*. DAVIES v. MCMILLAN. - 35

37. ——*Stay of proceedings—Summons for—When stay operates.*] A summons calling for a stay of proceedings only operates as a stay from and after its return, and judgment by default of appearance signed after service of summons, but before it was returned, is regular. LANTZ *et al* v. BAKER. - - - - - - 269

38. ——*Time—No jurisdiction in Court to shorten that required by rules of Court.* - *See* RULES OF COURT.

39. ——*Waiver.*] The fact that a defendant included in an application to set aside service of the writ of summons for irregularity, a motion to discharge an *interim* injunction granted before service of the writ, is not a waiver of the irregularity in the writ. FLETCHER v. MCGILLIVRAY. - - - - - - 37

40. ——*Waiver—Submission to the jurisdiction by appearance of counsel upon motion.* FLETCHER v. MCGILLIVRAY. - 49

41. ——*Moving to dismiss for want of prosecution—No proceedings for a year—Month's notice under Rule 749.*] Supreme Court Rule 749, requiring a month's notice of intention to proceed when there has been no proceeding for one year from the last proceeding, applies to an application to dismiss an action for want of prosecution. MACDONALD v. JESSOP *et al.* - 606

PRESSURE — *Bill of Sale — Fraudulent Preference Act, B. C.*] The plaintiff, the brother of the chattel mortgagor, had refused to make him necessary advances unless secured, whereupon the instrument in question was executed. *Held*, that there was pressure rebutting preference. MATHESON v. POLLOCK. - - 74

2. ——*Fraudulent preference—C. S. B. C., 1888, Cap. 51.* - - - - - - *See* BILL OF SALE.

PRINCIPAL AND AGENT. - - *See* CONTRACT.

PRIVY COUNCIL — Practice—Staying execution—Pending appeal to—Terms. - - - - - - *See* PRACTICE.

PROMISSORY NOTE—Order of endorsements—*Prima facie* no liability from subsequent to prior endorser. TAI YUNE v. BLUM *et al.* - - - - - - 21

PUBLIC COMPANY—*Unregistered—Liability of promoters—Agency.*] Defendants, promoters of a public company, signed a memorandum of association for incorporation under the Companies' Act, 1862, (Imp.), and instructed the company to be incorporated, which was not done. At a meeting of the promoters subsequently held, at which some of the defendants were present, and others not, one B. was directed to incur certain expenses, the subject of the action. *Held*, giving judgment against the defendants present at the meeting, and in favor of those not proved to have been present; that the defendants still occupied the position of promoters, and were, as such, not each other's agents or liable for each other's acts. HUNG MAN v. ELLIS *et al.* - 486

QUO WARRANTO—Whether, or injunction, the proper remedy to remove an alderman disentitled on the facts to sit and vote. - *See* INJUNCTION.

RATIFICATION - - - - - - - - *See* MASTER AND SERVANT.

RECEIVER—Appointment of by way of equitable execution is not an "execution" within C. S. B. C., 1888, Cap. 42, Sec. 21. - - *See* EXECUTION.

REGISTRAR—Public Companies—Remarks on the duties of. - - *See* COMPANY.

RES JUDICATA—An order once pronounced will be given effect to and followed by every Judge and Court of inferior and co-ordinate jurisdiction, and no order will be made inconsistent therewith. GABRIEL v. MESHER. - 159

RESPONDEAT SUPERIOR—Corporation—*Ultra vires*—Agency—Ratification. - - - - - - *See* MASTER AND SERVANT.

RESTRAINT OF TRADE - - -
See CONTRACT.

RULES OF COURT — *Jurisdiction of Court to relieve against provisions in.*] A judge has no power to shorten the four days' notice of a motion for judgment required by Order XIV., Rule 2. WHEATON V. ALLICE & AULT - 306

SALE—*Of lands—Taxes—Exemption—E. & N. Ry. Act—"Sold or alienated."*] By Stat. B. C., 47 Vic., Cap. 14, Sec. 22, (E. & N. Ry. Act) certain lands acquired by the company for the construction of the railway "shall not be subject to taxation unless and until the same are used by the company for other than railway purposes, or leased, occupied, sold, or alienated." In January, 1889, the E. & N. Ry. Co., by agreement, gave to the appellants the right to enter and select 50,000 acres of the said lands, the appellants agreeing to pay $5.00 per acre in certain instalments, with interest, etc., the lands to be conveyed to the appellants, as soon as the purchase money was fully paid, etc. The appellants had entered and surveyed the lands but never occupied the same, nor had they fully paid the purchase money. The Provincial Government assessed the lands for the purpose of taxation, and the Court of Revision confirmed the assessment. *Held*, by the Full Court on appeal: That the E. & N. Ry. Co., had not "leased, sold or alienated" the lands, within the meaning of the act, and that the same were not liable to taxation. VICTORIA LUMBER COMPANY V. THE QUEEN. - - 16

SALVAGE—Where towage services cannot, on the facts, be said to have saved the ship from being lost, but were of extraordinary service owing to her condition, and involved more than ordinary trouble and risk, they should be allowed for, not as salvage but as extraordinary towage services. DUNSMUIR V. THE OWNERS OF THE SHIP "HAROLD." 128

2. ——*Expenses of conveying derelict to hands of Receiver of Wrecks recovered in addition to.* - - - - -
See MARITIME LAW.

SEAL FISHERY (BEHRING SEA) ACT, 1891—*Ship found within prohibited waters with skins on board—Vis major—Lawful excuse.*] A sealing schooner equipped for sealing and with skins on board. was driven into the prohibited waters of the Behring Sea by stress of weather. A current, of which the master was ignorant, had falsified his reckoning so that he was unaware of his position. The schooner was seized by a Russian warship for infraction of the Act. Upon action by the Crown to condemn the schooner: *Held*, That the presence of the schooner at the point in question was sufficiently accounted for to rebut the Statutory presumption that she had infringed the Act. *Re* "AINOKA." - - - - 121

SEAL FISHERY (NORTH PACIFIC) ACT, 1893 — *Sections 2 and 5 — Onus of proof — Rebutting — Evidence — Statement of officer of warship — Admissibility.*] The Court will take judicial cognizance, without further proof, of an Imperial Order-in-Council, upon production of a copy purporting to have been printed by the Queen's printer in London. The statement of the captain or officer in command of a warship making seizure under sub-sec. 1 of the act, purporting to be signed by such officer, is admissible in evidence upon proceedings for condemnation without proof of signature. The Minnie was arrested 22 miles within the 30-mile limit of the prohibited zone, fully manned and equipped for taking seals and with one seal skin on board. *Held*, That the evidence for the defence set out in the judgment was insufficient to satisfy the *onus* cast on the ship by Sec. 1, sub-sec. 5 (a), to show that she was not used or employed in contravention of the act. THE "MINNIE." - 161

SECURITY FOR COSTS — *Nominal plaintiff—Costs of motion to dismiss for non-compliance with order.*] The Court will order a nominal insolvent plaintiff to give security for costs of the action. Where a party is ordered to give security for costs within a limited time, and makes default, he will be compelled to pay the costs of a motion to dismiss the action for the non-compliance, as a condition precedent to his right to furnish the security and proceed. COWAN V. PATTERSON - - - - 353

2. ——Plaintiff residing outside the jurisdiction voluntarily deposited $100.00 as security for costs. Upon motion by defendant after appearance, to increase the amount to $150.00. *Held*, (1.) The amount in which security is to be given is in the discretion of the Court. (2. An order increasing security for costs

SECURITY FOR COSTS—*Continued.*

will only be made after the amount furnished has been exhausted. MCLEAN v. THE INLAND CONSTRUCTION AND DEVELOPMENT CO., LTD. - - 307

3. ——*Practice—Discretion to refuse where not made bona fide.*] Security for costs, on the ground that the plaintiff is resident outside the jurisdiction, will not be granted to a defendant against whom the plaintiff holds an unsatisfied judgment for an amount sufficient to cover the costs of the action. HORSFALL v. PHILLIPS. [352

4. ——*Third party—Substituting for defendant upon giving security for claim and costs.* - - - - - - -
See PRACTICE.

SHARES—Issue of shares in company at a discount, illegal. - -
See PUBLIC COMPANY.

"SOLD"—Construction of word in statute, exempting lands from taxation "until sold." - -
See SALE OF LAND.

SPECIFIC PERFORMANCE—Whether right in vendee to call for a title before payment of purchase money where the agreement provides for conveyance "on payment of the purchase money." *Semble*, unnecessary for the vendor to be the holder of the title if he can obtain a grant in fee from the holder to the purchaser. - - - - - -
See TITLE OF LANDS.

STATUTE—*Construction of—Words ejusdem generis.*] The most reasonable rule to adopt to ascertain whether a certain matter or thing is within the meaning of a statute as being *ejusdem generis* with things specified therein "and others" is to look to the object or mischief aimed at by the Statute. All similar things that come within that object, though not in the abstract *ejuedem generis* are so for the purposes of the Statute. REGINA v. MEE WAH. - - - - - - - 403

SUMMARY CONVICTIONS—*Certiorari*—Substituting good for bad warrant on return of rule *nisi*. -
See CRIMINAL LAW.

TAXATION—Of lands for provincial revenue—Exemption—E. & N. Railway Act—"Sold or alienated."
See SALE OF LAND.

TENTERDEN'S ACT (Lord)—An agent in recommending a loan upon mortgage security upon lands represented to plaintiff that the borrower "was a hard working, industrious farmer, who would be sure to pay his interest money as it fell due," and also made certain representations concerning the value of the lands. The defendants pleaded Lord Tenterden's Act, and maintained that the representations were incapable of being separated, and that not being in writing, the action did not lie. A judgment for plaintiff having been maintained, not on the ground of misrepresentations but of negligence on the part of defendants in not taking due care to obtain a proper valuation and good security, the defence of the statute was not noticed except by Drake, J. *Per* Drake J. (p. 439), "That (Lord Tenterden's) Act applies to representations affecting the financial standing and credit of a person, and not to such statements as were made here that H. was a thrifty, hard-working man. Those statements may be absolutely true, without affecting his pecuniary position. The loan was not advanced on his thrift, but on the value of the security offered." WOLLEY v. LOWENBERG, HARRIS & CO. - - 416

TESTAMENTARY CAPACITY. - -
See WILL.

TITLE TO LANDS—*Vendor and Purchaser—Specific performance.*] An agreement for the sale of land provided for payment by instalments, and that, on payment of the purchase money by the vendees, the vendor would convey by a good and sufficient deed in fee simple, free from encumbrances, *Held*, that the vendors were not entitled to call for a title until after payment by them of the purchase money. *Semble*. It is not necessary in an action for specific performance of a contract for the sale of lands that the vendor should be the holder of the title if he can obtain a grant in fee from the holder to the purchaser. FOOT AND CARTER v. MASON AND NICHOLLES. 377

2. ——*Indefeasible.* - - -
See LAND REGISTRY ACT.

TOWAGE—*Extraordinary*—Where towage services cannot, on the facts, be said to have saved the ship from being lost, but were of extraordinary service owing to her condition, and involved more than ordinary trouble and risk, they should be allowed for not as salvage, but as extra-

TOWAGE—*Continued.*

ordinary towage services. DUNSMUIR v. THE OWNERS OF THE SHIP "HAROLD". [128

TOWAGE CONTRACT—Towage or salvage.
See MARITIME LAW.

TRIAL — Postponing where pleadings amended so as to make a new case after notice of trial. WOLLEY v. LOWENBURG, HARRIS & Co. - - - - - 197.

2. ——*Adjournment of by consent of Counsel equivalent to a countermand of notice of trial.*
See PRACTICE.

ULTRA VIRES—It is *ultra vires* of a company to issue shares at a discount, or to increase its capital except by special resolution under Sec. 51 of the Companies' Act, 1862 (Imp.), when the company is incorporated under that Act. TWIGG v. THUNDER HILL MINING COMPANY. - - - - - - - 101.
See COMPANY.

2. ——*Corporation—Agency—Ratification.*
See MASTER AND SERVANT.

VALUATOR—Duty of agent for mortgagee to obtain accurate valuation. - - - - - -
See AGENCY.

VENDOR AND PURCHASER — Sale of lands—Rescission. - -
See CONTRACT.

2. ——*Specific performance — Title of lands.*] An agreement for the sale of land provided for the payment of the purchase money by instalments, and that on payment of the purchase money by the *vendees* the vendor would convey by a good and sufficient deed in fee simple free from encumbrances. *Held*, that the vendees were not entitled to call for a title until after payment by them of the purchase money. *Semble*, it is not necessary in an action for specific performance of a contract for the sale of lands that the vendor should be the holder of the title if he can obtain a grant in fee from the holder to the purchaser. FOOT & CARTER v. MASON & NICHOLLES. [377

VENUE—In County Court actions. -
See COUNTY COURT.

VERDICT—The finding by a jury of damages must be considered as equivalent to a general verdict for plaintiff, supplementing the special findings and importing such as were necessary to a general verdict. SCOTT v. BRITISH COLUMBIA MILLING CO. - - - - 221

WAIVER—A shareholder in the company accepted, under the idea that they were valid, and sold, a portion of certain shares issued by the company at a discount, representing part of an increase of capital not authorized by special resolution as provided by Sec. 57 of the Companies' Act, 1862, (Imp.), under which the company was incorporated. *Held*, not such an acquiescence as estopped him from repudiating the remainder as against the company. TWIGG v. THUNDER HILL MINING COMPANY. - - - - 101
See COMPANY.

2. ——*Of irregularity in notice of appeal by appearance of counsel.* - - -
See PRACTICE.

3. ——*Of objection to jurisdiction by entry of appearance.* - - - -
See MARITIME LAW.

4. ——*Of right to a jury by conduct of action.* - - - - - -
See PRACTICE.

WILL—*Instrument instructed by legatee—Onus of proof—Undue influence—Testamentary capacity.*] Testator was a bachelor of 84. He had always been of careful habits and very determined mind, and had accumulated a small fortune by saving. He lived unattended in a small cottage which he owned. His only relatives were abroad. He had, commencing 13 years before his death, carried on a correspondence with the plaintiff, his nephew, who lived in England, and was in indigent circumstances, intimating an intention to provide for him by making a will in his favour. No testamentary disposition in favour of any other relative was indicated. Plaintiff obtained admission to a sailors' home in England in 1887, when testator wrote: "I am glad you have got into that noble institution; it is all you will want for life." Testator, in his subsequent correspondence, made no allusion to any intention to leave the plaintiff anything. Testator in 1891 was found in his cottage in a state of physical collapse from cold, weakness and neglect, and was taken to the house of the defendant, who was a friend of long standing. He died there eight days afterwards. Seven days

WILL—*Continued.*

before his death he made the will in question, leaving all his property to the defendant, who at testator's request employed and instructed a solicitor, who drew the will at his office. The solicitor attended the testator, read the will over to him twice, and asked him if he understood it and wished to leave his property to the defendant, to which testator answered "Yes," and also asked if he had power to alter the will afterwards. The evidence of the solicitor and of the attending physician was that the testator was then of testamentary capacity. *Held*, *per* Crease, J., at the trial, that, where a will is instructed or procured by the person propounding and taking a benefit under it, the *onus* of proof of its validity is shifted upon that person, who must remove any suspicion raised in the mind of the Court by the surrounding circumstances. That the facts in evidence (set out in the judgment) had raised such a suspicion in his mind which had not been removed. On appeal to the Full Court (McCreight, Walkem and Drake, J J.). *Held*, that the evidence established the will as that of a free and capable testator, and removed the case from the region of suspicion. That the conduct of the defendant was not so suspicious as to warrant the litigation, and that costs should not be ordered to be paid out of the estate. ADAMS v. MCBEATH. - - - 513.

2. ——*Legacy—Vested estate.*] *Held*, *per* Drake, J.: The following language in a will: "I give devise and bequeath to such of my wife's children as are alive at the time of my death all money or moneys deposited in my name in any bank or banks in the Province of British Columbia, said money to be divided between each of the said children share and share alike when they shall attain the age of 21 years. Until such time the said money and interest as aforesaid is to remain untouched except as hereinafter provided," created a vested interest in the children payable on their respectively attaining 21 years of age. *Re* GEORGE BAILLIE, DECEASED. - - - 350

WITNESS FEES—Travelling expenses — Subsistence of non-resident plaintiff—Whether allowable on taxation of costs — Taxation. ADAMS v. MCBEATH. - 34
See COSTS.

WORDS AND PHRASES—"Apparent possession." - - - -
See BILL OF SALE.

2. ——"*Defect.*" - - - -
See EMPLOYERS' LIABILITY.

3. ——"*Execution.*" - - -
See RECEIVER.

4. ——"*Infected locality*"—"*Exposed to infection.*" - - - - -
See HEALTH REGULATIONS.

5 ——"*Lawful excuse*"—*Seal Fishery (Behring Sea) Act, 1891—Ship found within prohibited waters with seal skins on board.*
See SEAL FISHERY (BEHRING SEA) ACT, 1891.

6. ——"*Meal.*" - - - -
See LIQUOR LICENSE.

7. ——"*Owing.*"] The Mechanic's Lien Act, Stat. B.C. 1888, Cap. 74, Sec. 9, requires an affidavit that the amount claimed is "due," and when it became due. A statement that the amount was "owing" held insufficient. SMITH v. MCINTOSH, CARNE *et al.* - - - - - 26

8. ——"*Owner.*" - - - -
See MINING LAW.

9. ——"*Premises occupied by.*" -
See BILL OF SALE.

10 ——"*Sale.*" - - - -
See MUNICIPAL LAW.

11. ——"*Sold or alienated.*" - -
See SALE OF LAND.

12 ——"*Until paid.*"] A promissory note payable at a certain date with interest at 9 per cent. per annum "until paid" means until the maturity of the note, and a claim in an endorsement for interest thereon after maturity at a higher than the statutory rate of 6 per cent. is not a liquidated demand and cannot be specially endorsed. BANK OF MONTREAL v. BAINBRIDGE. - - - - 125

13. ——"*Ways.*" - - - -
See EMPLOYERS' LIABILITY.

14. ——"*Wholesale trader.*" - -
See MUNICIPAL LAW.

WRIT OF SUMMONS—*Ex juris*—Affidavit for—Substitutional service —Necessity of showing that defendant absconded or is keeping away to evade service. -
See PRACTICE.